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Journal

JULY/AUGUST 2010
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by Martin H. Samson

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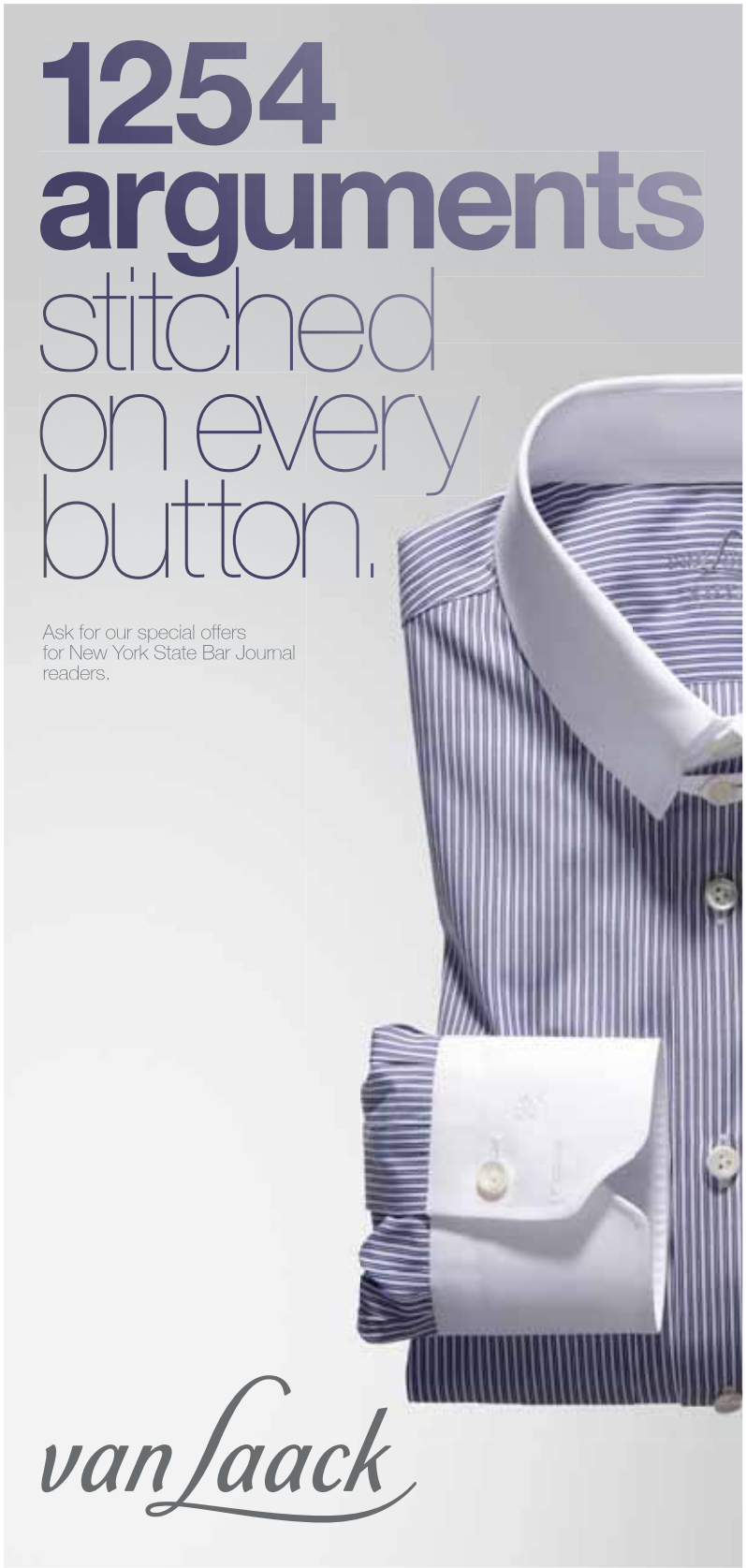

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STEPHEN P. YOUNGER

Shaping Our Profession: A Blueprint for the Future

We have all been affected in some way by the Great Recession. Whether you are a solo practitioner whose client base dried up; a small law firm having difficulty collecting bills; a large law firm forced to lay off associates and staff; a legal services provider stretched thin and forced to turn away an increased number of eligible clients for lack of funding; a recent graduate who cannot find a job; or an experienced attorney needing to retool in mid-career. No one was completely immune to the economic crisis. Its reach seemed to touch every aspect of our profession.

Over the past few months, I have traveled across New York and internationally – to Canada, India and Mexico – where I have spoken to bar leaders about the future of our profession.

I discussed the turmoil within our profession caused by the recent economic crisis. I emphasized the fact that we have before us a great opportunity to shape the future of our profession in a way that will safeguard against setbacks caused by future economic downturns, as well as mold our profession into one that those who came before us would be proud of and those who will come after us will be excited about.

This message resonated with each audience, no matter the demographic. Solo practitioners, large law-firm lawyers, rural lawyers, urban lawyers, international lawyers, young lawyers, senior lawyers, minority lawyers, women lawyers, law students – all recognize that a permanent and pervasive change in the way we practice law is long overdue. They also agree that bar associations should take the lead in shaping the future of our profession – bar associations have an obligation to serve as stewards of our profession.

As a result, and to fully engage the State Bar in shaping positive developments within our profession, I have formed a Task Force on the Future of the Legal Profession. Led by Linda Addison, Partner-in-Charge, Fulbright & Jaworski L.L.P., New York City, and Andrew Brown, managing partner at Brown and Hutchinson, the task force's four subcommittees will address the following key issues.

Training and Promoting New Lawyers

Each year thousands of law students graduate law school with hundreds of thousands of dollars in education-related debt, but they are not prepared for the practice of law. While law schools do a terrific job teaching students how to think like lawyers, they are not preparing them to draft a contract or take a deposition. This leaves law firms to train associates during their first and second years on the job; however, more and more clients are refusing to pay for the work of new associates.

We must fix this system, or new lawyers will not receive the training and experience they need.

Many associates at large law firms report that they are unhappy with their positions. They want better training, more experience and mentoring opportunities. More than 50% of associates leave their law firms before reaching their fifth year, depriving law firms of their talent just when they are becoming profitable. It is estimated that firms lose about $400,000 for every associate who leaves. These lawyers typically go to small- and mid-size firms, where, studies show, associates are more satisfied due to increased client interaction, training, and guidance from partners.

We need to consider how to create a satisfying work experience for our associates, while providing them with appropriate compensation and promotion opportunities. Some firms have abandoned the traditional lockstep system of associate pay in favor of a performance-based system that links compensation with competency and mastery of certain skills. Another model to consider is the British system, where recent graduates apprentice under a senior lawyer before beginning full-time practice.

A task force subcommittee, chaired by Prof. Mary Lynch of Albany Law School, will explore better ways to train new lawyers, so they are prepared to meet the demands of the modern client. The subcommittee also will consider methods to promote and compensate lawyers in a way that improves the lifestyle of associates while ensuring that clients feel confident that the lawyers working on their matters are fully trained.

Work/Life Balance

The practice of law has always been stressful. But this has been made worse by the 24/7 demands on law-

STEPHEN P. YOUNGER can be reached at syounger@nysba.org.

yers' time created by technologies like the BlackBerry and cell phones, which make lawyers accessible around the clock. Law was never a nine-to-five profession, but now it has become nearly impossible to turn off the office.

It is critically important to have workplace models that make it easier for lawyers, both men and women, to raise families and care for elderly parents or loved ones who are ill. An increasing number of female *and* male employees are demanding more balance for themselves and their families.

Most of us are familiar with flex-policies, which include flex-time and part-time options, as well as job sharing and telecommuting. But many employers do not offer these options, and some employers that do offer flex-time fail to provide the full support needed to make the arrangements work. Even worse, some attorneys who take advantage of the policies feel stigmatized for doing so.

Flexibility has been part of the conversation for some years now, but full flexibility in the workplace is yet to be realized. A task force subcommittee, chaired by Joey Silberfein of Ropes and Gray LLP, will examine how legal employers can promote healthy working environments, encourage work / life balance and use flexible work arrangements to enhance the profession.

Law Firm Structure/Alternative Billing Methods

Alternative billing arrangements are becoming more and more popular. A recent LexisNexis study found that 57% of in-house lawyers believed that the billable hour will be replaced by alternative fee structures.

This is no surprise because the billable hour system, which was created in the 1950s, is becoming increasingly problematic. Partners are pressured to keep associates busy billing long hours, while justifying their own rising billing rates to clients. Many clients feel that their lawyers care more about maintaining their law firm billing machines than truly serving clients' needs.

Alternative billing methods can be profitable for law firms, preferred by clients, and more satisfying to lawyers, who would rather be measured by the quality of their work than the quantity of hours they work. Yet, a reasonable amount of uncertainty comes with changing a billing method that has been used for nearly 60 years.

To eliminate some of the uncertainty, a subcommittee of the task force, chaired by Prof. Gary Munneke of Pace Law School, will examine best practices for law firms related to law firm structure, client development and alternative billing systems.

Technology

Technology seems to evolve by the minute. The BlackBerry has dramatically altered how we practice law. E-filing, e-discovery and e-marketing are radically changing the way we handle our case load and market our practices. Moreover, it is probable that these new techniques, such as e-filing, could become mandatory in the future. The Court of Appeals recently announced that it is considering mandating the filing of electronic copies of all briefs and record materials on appeal.

The lawyers who are able to harness the game-changing technology of the future will be the most successful in the legal marketplace. This is not an easy task, however, especially for solo and small-firm lawyers. We need to help our members understand and use the new technologies affecting the practice of law. A subcommittee of the task force, chaired by John Szekeres of Paul, Weiss, Rifkind, Wharton and Garrison LLP, will seek to identify these technologies and examine how lawyers can best use them.

Task Force on the Future

To advance these objectives, we have assembled a diverse and dedicated task force, representing academia, in-house counsel, law firms of all sizes, and both new and experienced lawyers. The task force will meet with representatives from relevant constituent groups, including managing partners, law school deans, and general counsel. I am confident that the thought leaders we have brought together will deliver a comprehensive and innovative blueprint that could help bring about permanent change in how we practice law – changes that make the practice of law less stressful, and more personally and professionally rewarding.

I am convinced there is a better way. We need only to figure out how to do it – for the good of our profession, the good of our clients, and – simply – because we owe it to each other and to lawyers of tomorrow to begin shaping the future of our profession today. ■

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September 23	Long Island
September 24	New York City
September 30	Buffalo
October 28	Albany

2010 Law School for Insurance Professionals

September 28	New York City; Syracuse
September 29	Albany
October 1	Buffalo; Long Island; Westchester

Practical Skills: Basic Matrimonial Practice

October 6	Albany; Buffalo; Long Island
October 7	New York City; Syracuse; Westchester

Bridging the Gap
(two-day program)

October 13–14	New York City

Practical Skills: Probate & Administration of Estates

October 19	Albany; New York City
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October 21	Westchester

Jim McElhaney's Day in Discovery

October 19	Long Island
October 21	New York City
November 10	Albany

Litigating Forensic Evidence

October 21	New York City

Emerging Issues in Environmental Insurance

October 29	New York City

Practical Skills: Purchases and Sales of Homes

November 2	Albany; Long Island; New York City; Rochester
November 3	Buffalo
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Practical Skills: Collections & Enforcement of Money Judgments

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Eighth Annual Sophisticated Trusts & Estate Institute
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Counseling Content Providers in the Digital Age was written and edited by experienced media law attorneys from California and New York. This book is invaluable to anyone entering the field of pre-publication review as well as anyone responsible for vetting the content of their client's or their firm's Web site.

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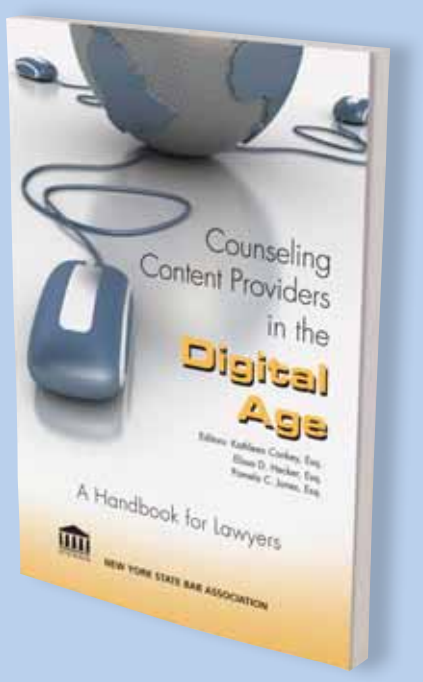

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What Attorneys Can and Cannot Say In and About Litigations

By Martin H. Samson

Lawyers are frequent targets of defamation suits for comments they make out of court about pending litigations. For example:

In May 2008, a New York state judge commenced a defamation action against a newspaper and a lawyer, seeking $10 million in damages as a result of two newspaper columns and related blog postings that the judge said falsely accused him of improperly presiding over a case. In the suit, the judge claimed that the defendant lawyer was the source of this misinformation because the lawyer had represented a client in the case at issue.

In December 2009, a company brought a defamation action against a lawyer, claiming that the comments the lawyer made in a press release about an action he had filed on behalf of his clients against the company were defamatory.

In September 2009, a trial commenced in a defamation action that a lawyer brought against a company and a former in-house counsel at the company. The complaint alleged that the then in-house counsel made comments in anonymous blog postings that the plaintiff "conspired" with a court clerk to "alter documents to try to manufacture subject matter jurisdiction where none existed," which comments were false and defamatory. The plaintiff allegedly undertook such misconduct in a suit commenced on behalf of his clients against the defendant company.

Lawyers have many reasons to talk about litigations outside of the courtroom, some of which include communications designed to do the following: (1) protect a client's reputation; (2) assist a client in obtaining a result; (3) pursue the litigation – communications with adversaries, clients, prospective witnesses, and stakeholders; (4) respond to damaging information released by an adversary or third party; and (5) obtain personal publicity. Indeed, there may be times when lawyers are obligated to make public statements on behalf of their clients as part of their ethical obligation to zealously represent their clients.

Speaking outside the courtroom, however, presents a host of risks lawyers do not face when speaking in court. In court, lawyers are largely protected from defamation claims by the litigation privilege. Yet, outside the courtroom, lawyers can face the threat of liability based on legal theories such as defamation, commercial disparagement, tortious interference with contract, and tortious interference with actual or prospective business relations, due to the subject or recipient of the out-of-court communications. The above anecdotes are examples of defamation actions that have arisen because of out-of-court communications.

This article will provide guidance on how to communicate about litigation outside the courtroom and address limitations imposed on such speech by applicable ethical rules, including Rule 3.6 of the New York Rules of Professional Conduct, which governs trial publicity. It will also discuss various protections available to attorneys when speaking about litigations, including the litigation privilege, the fair reporting privilege of N.Y. Civil Rights Law § 74, and various qualified and conditional privileges that protect communications made to those who share common interests with an attorney's client. Finally, the article will analyze a number of cases where these protections have successfully shielded an attorney from legal action and where they have not due to the nature of the communications in which the attorney engaged.

Martin H. Samson (mhs@dmlegal.com) is a litigation partner at Davidoff Malito & Hutcher LLP in New York City. He received his undergraduate degree from Duke University and his law degree from UCLA School of Law.

Ethical Limitations on Attorney Communications

Rule 3.6 of the New York Rules of Professional Conduct provides the key ethical restrictions on what an attorney may say outside the courtroom about a pending litigation. Titled "Trial Publicity," this rule governs a New York lawyer's ethical obligations when communicating publicly about a pending litigation.[1]

The overarching principle governing such communications by lawyers is to avoid prejudicing the pending proceeding and to preserve the parties' right to a fair trial. Rule 3.6(a) is clear, providing that "a lawyer who is participating in or has participated in a criminal or civil matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and *will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter*." Notably, the rule's application is restricted to a lawyer participating in the matter and, pursuant to Rule 3.6(e), to those in the lawyer's firm actually handling the litigation in question.

Next, Rule 3.6(b) provides examples of prejudicial statements that a lawyer should generally refrain from making outside of a court proceeding. These include statements that relate to (1) the character, credibility, reputation or criminal record of a party or witness; (2) the identity of a witness or the expected testimony of a party or witness; (3) the performance or results of any examination or test; (4) the identity or nature of physical evidence expected to be presented; and (5) inadmissible evidence.

Rule 3.6(c), on the other hand, gives examples of statements that ordinarily are permissible. In New York, however, there is no bright line rule providing for statements that are always allowed. Rather, permissible communications are still subject to the principle that a lawyer cannot make public statements that will have a "substantial likelihood of materially prejudicing an adjudicative proceeding." Provided that the statements will not have prejudicial effect, the lawyer can make statements "without elaboration" about the following:

> (1) the claim, offense or defense and, except where prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in [various specified matters concerning criminal cases].

An attorney should pay special attention to Rule 3.6(c)(2). Under this provision, the lawyer will usually be permitted to discuss any information contained in the public record. This encompasses a large percentage – but certainly not all – of the proceedings in a litigation that get filed in the court or occur in the courtroom.

It should be noted that, in this respect, the New York rule differs from ABA Model Rule 3.6 (the "Model Rule"). Unlike the New York rule, the Model Rule provides a list of statements that may be made irrespective of their impact on the outcome of a proceeding. The statements allowed under the Model Rule are, nevertheless, very similar to those found under New York Rule 3.6(c).

Rule 3.6(d) is an especially interesting provision; it allows a lawyer to comment to rebut information given to the public by an adversary or third party. Note that rebuttal communications are not subject to the strictures of Rule 3.6(a) or its restrictions on disclosure of matter that may be prejudicial. Before this provision applies, there must be publicity that is "not initiated by the lawyer or the lawyer's client." Rule 3.6(d) provides that "a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." However, this provision limits the communication "to such information as is necessary to mitigate the recent adverse publicity."

A limited number of cases have interpreted the restrictions imposed under Rule 3.6. *In re Sullivan*, the most pertinent New York decision, which applied Rule 3.6's predecessor DR 7-107 (the same rule for all intents and purposes), makes clear that the central purpose of the rule is to "insulate the trial process, and especially jurors, from efforts by attorneys to influence the outcome of the proceedings through extrajudicial means."[2] Accordingly, an attorney's speech that is in question will be judged through the prism of whether it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. *In re Sullivan* concerned the defense attorney in a highly publicized criminal trial, where the defendant was charged for her involvement in sensationalized murders. Given the particularly heinous nature of these crimes, the trial was a matter of intense public interest, and the court allowed live news coverage of the case from opening statements to summations. At its conclusion, the jury convicted the defendant on all counts charged.

In a television interview after the completion of the testimony but prior to the verdict, defense counsel made statements about the testimony that the defendant would have given had she been called to the stand. He also made statements about testimony a defense expert would have given had the expert not been excluded by the trial court, and about testimony another witness would have given had she been allowed to testify.

Notwithstanding the fact that one, if not more, of these statements appeared to constitute statements enumerated under Rule 3.6(b), statements that will normally be presumed prejudicial, the court held that under the unique

circumstances of the case, they were not prejudicial. In reaching this result, the court relied on the fact that there had been extensive media coverage of the case; repeated admonitions by the court to the jury to refrain from watching or reading media about the trial; assurances by the jurors that they would in fact do so; the fact that the gist of the defendant's testimony was already in front of the jury via a "confession" she gave to the police; and the fact that the expert's proposed – but inadmissible – testimony had been the subject of an extensive newspaper article two days prior.

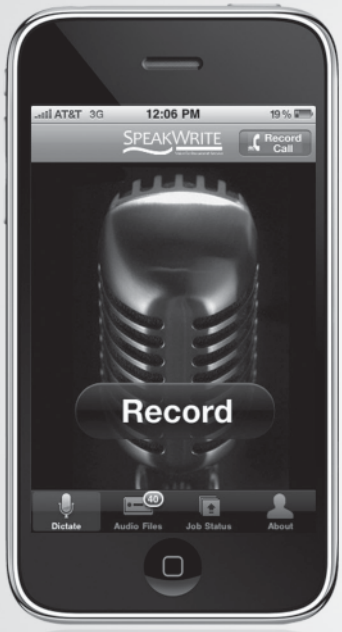
Because Rule 3.6 is similar to the ABA's Model Rule 3.6 and other states' ethics rules, cases that interpret the Model Rule can help interpret the contours and mechanics of New York Rule 3.6. The caselaw indicates that courts look at the following factors when determining whether counsel's extra-judicial statements have a substantial likelihood of materially prejudicing an adjudicative proceeding in a matter:

1. Nature of the proceeding. Will the case be tried before a judge or jury?[3] Is the case a criminal or civil action?[4] Obviously the nature of the proceeding will impact how sharply the court will scrutinize an attorney's public communications.
2. The timing of the disclosure. Disclosing evidence on the eve of trial is more likely to be prejudicial than disclosing the same information early in the proceeding.[5]
3. Previous dissemination of the information. If the information disclosed by counsel had previously been disclosed, counsel's subsequent disclosure is less likely to be deemed prejudicial.[6]
4. Reasonable reliance on other measures to prevent a jury from hearing prejudicial information, such as a judge's admonitions to a jury to avoid media accounts of a trial, which may reduce risks of prejudice.[7]
5. The lawyer's intent in making the statement – for example, is counsel rebutting prejudicial statements made by his adversary?

A number of cases concern lawyers who have been found to have made improper extra-judicial statements in violation of applicable ethical rules. The following two illustrate the point:

1. *United States v. Cutler*[8]

Defense lawyer Bruce Cutler was held in criminal contempt, subject to 90 days' house arrest and suspended from practicing law in the Eastern District of New York for 180 days for violating court directives that he stop making extra-judicial statements on behalf of John Gotti in accordance with Local Criminal Rule 7 of the Southern



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and Eastern Districts of New York. Cutler had conducted an extensive pre-trial media campaign – praising Gotti, accusing the government of engaging in misconduct, and deprecating the government's evidence and witnesses. He continued such conduct even after being directed to stop.

2. *United States v. Bingham*[9]

Defense lawyers were held to have violated Local Criminal Rule 1.07, which prohibited the making of extra-judicial statements that pose "a serious and imminent threat of interference with the fair administration of justice." These violations occurred during a televised interview the lawyers gave, in which they were highly critical of a judge's decision to empanel an anonymous jury in a trial of members of a Chicago street gang.

A number of ethical rules impose restrictions on what a lawyer can say outside the courtroom concerning a pending litigation. These are beyond the scope of this article, but include rules that prohibit the disclosure of client confidences to the disadvantage of the client or for the benefit of the lawyer (Rule 1.6), and the making of false or misleading statements (Rules 3.1 and 4.1).

Protections Afforded for Out-of-Court Statements About Litigation

Lawyers often use strong language when accusing adversaries of engaging in misconduct whether in court pleadings or courtrooms. These contentions are advanced on behalf of, and in reliance on, information provided by clients. As noted, when communicating in the courtroom, the lawyer is largely immune from suit by the adversary for defamation arising out of such speech. What happens, however, when the lawyer seeks to discuss the same matter out of court? New York law provides a number of protections for lawyers speaking about a litigation outside the courtroom.

The Fair Reporting Privilege Under Civil Rights Law § 74

This statute provides immunity from a defamation claim for fair reports of a proceeding. As applied, the focus of the defamation inquiry shifts from the truth of the underlying statements in the litigation to the truth of the report of the proceedings in which they are advanced. Provided the latter is fair and accurate, the lawyer will not face a defamation suit arising from the untruthfulness of the statements or claims advanced in the underlying proceeding being reported on.

As the courts have explained, "for a report to be characterized as 'fair and true' within the meaning of the statute . . . it is enough that the substance of the article be substantially accurate."

In fact, it is unnecessary for the language used to "be dissected and analyzed with a lexicographer's precision."[10] The report is not required to use the same words as the pleadings to convey the substance of the judicial proceedings.[11]

While allegations of malice or bad faith do not overcome the "Section 74 privilege," the statute does not, however, protect all reports of judicial proceedings. Thus, § 74 does not protect statements in a report that imply misconduct beyond that alleged in the judicial proceeding on which the report is based.[12] In addition, a party cannot start a lawsuit for the purpose of gaining immunity to make a defamatory statement to the press. Thus, an attorney cannot commence an action by filing a complaint that would otherwise be defamatory – such as an accusation that a named adult raped a young boy – and then give the complaint and a report of the complaint to the press to publicize this act without intending to prosecute the lawsuit. This is known as the *Williams* exception. In *Williams v. Williams*,[13] the New York Court of Appeals carved out an exception to the Section 74 privilege for situations where a litigant "maliciously instituted a judicial proceeding alleging false and defamatory charges and then circulated a press release or other communication based thereon." The *Williams* exception is narrow "and does not apply in the absence of any allegation that the . . . action was brought maliciously and solely for the purpose of later defaming the plaintiff."

The Litigation Privilege

Conferred by common law, this privilege gives lawyers absolute immunity from defamation when their comments pertain to litigation. Notably, it covers both in-court and out-of-court statements. As explained by the court in *Lacher v. Engel*:[14]

> It is well established that a statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation. . . . [T]he rule rests on the policy that counsel should be able to speak with the free and open mind which the administration of justice demands without the constant fear of libel suits.

Not all statements made in a litigation are privileged, however. To be considered privileged, the statement must have some connection to the lawsuit. A wholly unrelated statement can give rise to a defamation claim, even if advanced in a litigation. The test for pertinence is extremely liberal. As explained in *Lacher*, "the privilege embraces anything that may possibly be pertinent or which has enough appearance of connection to the case."

The litigation privilege is "absolute."[15] As such, it "affords a speaker or writer immunity from liability for an otherwise defamatory statement to which the privilege applies, regardless of the motive with which the statement was made." As a result, the shield of an absolute privilege, as opposed to a qualified privilege, "is not conditioned upon the honest and reasonable belief that the defamatory matter is true or upon the absence of ill

will on the part of the actor." Instead, "an offending statement pertinent to the proceeding in which it was made is absolutely privileged, regardless of any malice, bad faith, recklessness, or lack of due care with which it was spoken or written, and regardless of its truth or falsity."

The litigation privilege is not limited to statements made in open court or in filed litigation documents. Rather, "the privilege is extended to all pertinent communications among the parties, counsel, witnesses and the court" regardless of "whether a statement was made in or out of court, was on or off the record, or was made orally or in writing."[16] For instance, courts have held that the litigation privilege extends to letters from witnesses to the judge; to out-of-court verbal exchanges between the parties' counsel; to off-the-record statements in the clerk's office; and even to correspondence from the board of directors of a homeowners association to the association's members reporting on the status of litigation to which the association was a party.

The litigation privilege is not limited to statements made in open court or in filed litigation documents.

In *Sexter & Warmflash P.C.*, the court held that the litigation privilege extended to a letter written by a party's husband, as her attorney-in-fact, and signed by her, which was sent to her former counsel. In the letter, the party set forth the reasons for discharging her counsel. This letter was also sent to another party to the litigation, as well as two other attorneys representing the party. As a result, the Appellate Division, First Department held that the statements were protected by an absolute privilege, dismissing the plaintiff's defamation claim arising out of the publication of the letter.

Courts have also held that the litigation privilege "extends to communications after a trial which are pertinent to the attorney-client discussions in explaining what has occurred and whether further action is possible."[17] In *Golden v. Muller*, the Illinois state appellate court held that two letters a lawyer sent to his client after a lawsuit, which addressed the client's frustrations with the suit, was protected by the litigation privilege. In those letters, the defendant lawyer made derogatory comments about his adversary. As a result, the court dismissed the defamation claims brought by the plaintiff based on the transmittal of the letter to the defendant's client. The court held that the litigation privilege did not, however, extend to the transmission of one of the letters to the wife of the defendant's client, who was not a client of the lawyer.

While the litigation privilege affords broad protections, it applies only to communications made to a limited audience, in particular, only to communications pertaining to litigation. While this covers communications to those involved in the litigation, it rarely extends to the public at large.

The Qualified Privilege

As the Second Circuit has explained, "good faith communications of a party having an interest in the subject, or a moral or societal duty to speak, are protected by a qualified privilege if made to a party having a corresponding interest or duty."[18] If these criteria are met, the speaker has a qualified immunity from a defamation claim. Therefore, the statements the attorney makes do not have to be true. To qualify for the privilege, the speaker must have an honest good-faith belief that the statements are true.[19] Moreover, if the attorney acts with actual or constitutional malice, the privilege will be lost.[20]

The qualified privilege has been held to protect speakers in a number of situations, including when making statements to protect the interests of the speaker; a third party to whom the speaker owes a legal, moral or societal duty to speak; and the recipient of the information. The privilege has been applied to cover communications between a speaker and a member of law enforcement seeking to protect the speaker's person or property; communications by or on behalf of a past employer to a prospective employer concerning a job applicant; communications as part of an internal investigation into employee misconduct; and communications by one member of an association, such as a homeowners association or a trade organization, to other members about a matter of common interest. Notably, this privilege does not permit unlimited broadcast of the statement at issue, but rather only protects publication to those who need to hear it for the purpose that the communication is permitted. Finally, the privilege protects lawyers when discussing litigation with third parties who have a common interest in the subject matter. Unlike the litigation privilege, however, it is not an absolute privilege precluding, in particular, the speaker from acting out of malice.[21]

There are other rules which govern how lawyers can conduct themselves in litigations, and what they can and cannot say therein. For example, N.Y. Judiciary Law § 487 prohibits lawyers from deceiving the court or parties, while Rule 130 of the Rules of the Chief Administrative Judge prohibits lawyers from engaging in frivolous conduct, which includes giving false testimony. These rules are beyond the scope of this article.

Instructive New York Court Decisions

New York state courts have addressed the various attorney communication protections in several cases, which provide helpful guidance for attorneys determining how to craft and whether to disseminate public communications.

New York courts have allowed lawyers to disseminate copies of the complaint to the media, holding that it is protected under Civil Rights Law § 74 as a fair and true report of the proceeding described in the complaint.

1. *Fishof v. Abady*[22]

The appellate court dismissed a defamation claim arising out of the attorney's dissemination of the pleadings to the media at a press conference under the protections of Civil Rights Law § 74.

2. *Branca v. Mayesh*[23]

The appellate court held that the distribution of the complaint and transcript excerpts at a bar association lecture attended by 150 people was protected communication against a defamation claim under Civil Rights Law § 74. The distributed complaint contained allegations accusing the plaintiff's attorney of fraud and unethical conduct. The court reached its holding notwithstanding the fact that the plaintiff's attorney prevailed after trial in the action that was commenced by the subject complaint and that the lecturing lawyer lost.

3. *Project Gamma Acquisition Corp. v. PPG Industries Inc.*[24]

The trial court dismissed a commercial disparagement claim arising out of the plaintiff's distribution of a complaint to the media under the Civil Rights Law § 74.

New York courts have also applied Civil Rights Law § 74 to protect lawyers and their clients from defamation claims arising from extra-judicial statements in a number of other settings.

1. *Hughes Training Inc. – Link Division v. Pegasus Real Time*[25]

The appellate court held that the dissemination of a memo on a company bulletin board to employees describing a litigation was protected against a defamation claim under Civil Rights Law § 74.

2. *Fuji Photo Film USA Inc. v. McNulty*[26]

The federal district court held that the employer's distribution of a memo to employees, accurately describing an action it had just commenced against an employee charging him with fraud, was privileged under Civil Rights Law § 74. The court further held that the distribution of the memo to company employees was also protected by the qualified privilege on the basis that the employer and its employees share a common interest in the subject matter. Since the employee did not allege that the employer acted with malice when making the statement, the employee's defamation claim could not be sustained.

3. *Ford v. Levinson*[27]

Reversing the lower court, the Appellate Division, First Department dismissed a libel claim arising out of statements purportedly made by the defendant attorney which appeared in a newspaper article describing the allegations of a prior lawsuit. Although the defendant lawyer denied making the statements, the court held that, even assuming he had, the claim was barred by Civil Rights Law § 74 because the statements constituted a fair and true report of the allegations made in the prior action.

Not all states grant lawyers protection from a subsequent defamation suit when they distribute a complaint to the press.

4. *Silver v. Kuehbeck*[28]

The circuit court held that the description of an affidavit in an underlying action, which was published in a newspaper article, was a fair and true report of the judicial proceeding.

5. *Lacher v. Engel*[29]

Reversing the lower court, the First Department dismissed the plaintiff's defamation claim arising out of statements the defendant attorney made in a complaint, during an arbitration, and to the press. As to the statements complained of that were advanced in the complaint, the court held those were protected by the litigation privilege, as they were pertinent to the claims advanced in the lawsuit. The defendant's statement to the *New York Law Journal* that the clients "were poorly served by a member of [the legal] profession to whom duty came well after other aims and interests" were protected by Civil Rights Law § 74.

Distribution of a Complaint Not Absolutely Protected in Other Jurisdictions

Not all states grant lawyers protection from a subsequent defamation suit when they distribute a complaint to the press. A number of states have, in fact, allowed defamation claims against attorneys arising out of their distribution of complaints to the press to proceed, holding that

the same are not protected by the absolute bar of the litigation privilege.[30]

There are a number of reasons to be concerned about the publication of initial pleadings. Certainly on occasion explosive and damaging charges – such as he raped me – have been highly publicized, only to be retracted or proven unfounded. Unfortunately, by the time the truth comes out, damage to reputation has already been done. There is no guaranty the readership of the first article – the accusation of rape – is the same as the second – exoneration of the falsely accused – or that a retraction, if there is one, is co-extensive with the original publication.

In such circumstances, New York attorneys must turn to the state's fair reporting privilege for protection. The privilege varies from state to state. In many jurisdictions, it affords more limited protection than it does in New York. Attorneys must prove not only that their report of the proceedings was fair and true, but that they were not acting with malice when they transmitted the complaint to the press. For example, in New Jersey, "a full, fair and accurate report of a judicial proceeding is qualifiedly privileged, although the report contains matters that would otherwise be defamatory and actionable" when there is no "proof of malice in making it."[31]

In some states, an attorney's act of transmitting the initial complaint before it has been brought before a judge for action is beyond the protection of the fair reporting privilege altogether. The privilege protects only the reporting of a judicial proceeding. The filing of an initial complaint is not a judicial proceeding, but rather only the statements of one side of the story and, therefore, neither differing in character nor deserving of more protection than statements made in non-protected public settings. In a recent New Jersey decision, the court allowed the plaintiff to pursue a defamation claim against the press for publishing an article based on the filing of an initial complaint, holding that it was not protected under New Jersey's fair reporting privilege.[32] The court held that "to rule otherwise would promote the filing of lawsuits that would be promptly discontinued once the goal of public defamation or even extortion was achieved."[33] This decision is currently on appeal to New Jersey's highest court.

The absence of a privilege does not mean the speaker will be held liable for defamation. Rather, it means that the speaker will have to defend against a defamation claim and address the truth or falsity of the allegations underlying the action and the statements made. This is significant for attorneys who want to comment on litigations on the Internet. In defamation law, a party may be dragged into court in a jurisdiction other than that in which he or she made the offending comments. The attorney may be subject to personal jurisdiction where the intended and unintended effects of the comments are felt. As a result, if a website posts a complaint online, it may also be subject to a defamation suit in a jurisdiction where the fair reporting privilege does not protect the dissemination of a complaint to the press and, thus, may not protect its appearance online on a website seeking to comment or report on it.

The Limited Protection of Civil Rights Law § 74

Civil Rights Law § 74 protects a lawyer's comments only when they are a fair and accurate report of the litigation he or she is describing. *Pisani v. Staten Island University Hospital*[34] illustrates what happens when those comments go too far and expose the speaker to a defamation claim without the protection of Civil Rights Law § 74. In *Pisani*, the New York federal district court held that the plaintiff could proceed with a defamation claim arising out of the defendant hospital's publication of a press release describing the settlement of a lawsuit. The settlement resolved a Medicaid fraud complaint that the New York Attorney General's Office commenced and which resulted in the hospital paying the state over $76.5 million. While the defendant hospital paid a substantial sum in the settlement, it neither admitted nor denied engaging in the alleged misconduct. According to the plaintiff, however, the press release sought to attribute blame for the misconduct (for which the hospital was charged) to

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the hospital's former executives. The press release stated, "we deeply regret and are embarrassed by the misconduct carried out by former executives of the Hospital that led to this settlement," and it contained a link to the complaint, which contained allegations of misconduct by the plaintiff and two other former hospital executives. Upon publication of the press release, the plaintiff was fired from his then-current employment. He brought the defamation action, claiming he had not engaged in the alleged misconduct and that the press release defamed him. The court held that because the press release could be read as an admission of the plaintiff's misconduct, it was not protected by the fair reporting privilege under Civil Rights Act § 74.

Lawyers' Speech on the Internet

How do these rules play out on the Internet? The following are several court decisions that address extra-judicial statements made on the Internet.

1. *Amway Corp. v. Procter & Gamble Co.*[35]

The Sixth Circuit held that the alleged publication by P & G of a complaint that it filed against Amway on a website, which a third party created, was protected under Michigan's fair reporting statute. The third party was a self-described "long time Amway opponent" and his website contained extensive negative documentation about the company. The Sixth Circuit affirmed the dismissal of the claims for tortious interference with contract and tortious interference with actual and prospective business relations brought against P & G, the website operator, and the law firm representing P & G. The complaint charged Amway with a number of wrongs, including "allegations that Amway is an illegal pyramid scheme and that Amway violated the RICO act," both of which Amway claimed were false. The appellate court held that the publication was protected by Michigan's fair reporting privilege because the alleged libel arose out of statements contained in the complaint as opposed to additional statements, added by P & G or the law firm to the website, that were outside of the court record. Significantly, the Sixth Circuit opined that the fair reporting privilege protects the publication online of any actual court filing.

2. *Mattel Inc. v. Luce Forward Hamilton & Scripps*[36]

A California state appellate court held that a lawyer's description of a lawsuit in a law firm newsletter published on the law firm's website was not privileged as fair reporting under California Civil Code § 47(c). As a result, the court allowed Mattel to proceed with both defamation and unfair competition claims against the lawyer and his law firm, arising out of the publication of the firm newsletter.

Specifically, under California Civil Code § 47(c), the fair reporting privilege applies only to publications by or to a public journal. The court held that the law firm's newsletter and website did not constitute a public journal because they were intended to advertise the firm's litigation prowess for the purpose of improving its image to solicit business. In fact, the court remarked that

> [w]hile the newsletter and website purport to give fair and true information about litigation the firm is handling . . . their obvious purpose was not to inform the public in a fair and true manner about its government, but to advertise the firm's litigation prowess for the purpose of improving its image to solicit business. To that end, the information is clearly slanted in a way to cast a better light on themselves and their client and a worse light on the opposition. Certainly this is not the kind of reporting one would expect from an unbiased reporter. . . . It would be a travesty of the news media privilege to extend its protections to the Luce Forward newsletter and website posting.

A lawyer's description of a lawsuit in a law firm newsletter published on the law firm's website was not privileged as fair reporting.

3. *American Dental Association v. Khorrami*[37]

The American Dental Association (ADA) brought a defamation action against Shawn Khorrami, a lawyer, due to statements he made on his website and in press releases concerning the ADA. The complaint alleged that Khorrami operated the website and issued the press releases to generate business for his law firm and to promote himself as an expert in lawsuits concerning dental amalgam.

According to the complaint, in his press releases and on his website, Khorrami claimed that his firm had been involved in litigation with the ADA and was very familiar with the ADA's efforts to "conceal the dangers associated with amalgam"; and that "the ADA has a vested economic interest in the continued use of mercury"; and that "amalgam fillings represent nothing more than a con on the U.S. population orchestrated by the ADA." The plaintiff further alleged that Khorrami accused the ADA of promoting unsafe dental practices by (1) "concealing the dangers associated with amalgam for the financial benefit of itself and those of organized dentistry"; (2) "exercising undue and unfair pressure on dentist because of its

purported vested economic interest in amalgam"; and (3) "perpetuating a 'con' on the American public concerning amalgam." The ADA claimed all these statements were false, adding that it had neither a financial or economic stake in dental amalgam or the use of mercury, nor had it published its own findings on the safety of amalgam or findings by other various independent scientific and consumer organizations.

Khorrami moved to dismiss the complaint on the grounds that he was protected against the plaintiff's defamation claim under California's fair reporting privilege and the litigation privilege. The court rejected these affirmative defenses and allowed the plaintiff to proceed with its claim. In doing so, the court held that the defendant's website was not a "public journal" within the meaning of the statute, and therefore, the privilege would not protect his statements on his website.

The court pointed out that, in fact, the statements did not even constitute a fair reporting of litigations Khorrami had brought against dentists, because "[i]n an effort to promote his litigation business, [Khorrami] present[ed] the statements to appear as statements of fact rather than as a report of judicial proceedings."

The court also held that the dismissal was not warranted under the litigation privilege. While acknowledging that the litigation privilege protects communications made outside the courtroom, however, it only protects statements "required . . . or permitted . . . by law in the course of the judicial proceeding to achieve the objects of the litigation." Pre-litigation statements are also subject to protection, but in order to obtain such protection, "the defendant must demonstrate that each statement was made with a good faith belief in a legally viable claim and in serious contemplation of litigation." It is only "when litigation is no longer a mere possibility, but has instead ripened into a proposed proceeding does the privilege arise." Since Khorrami's purpose was to solicit new business, the court did not grant him the privilege

Finally, the court noted that Khorrami's statements violated Rule 5-120 of California State Bar Rules of Professional Conduct, which, like New York's Rule 3.6, governs permissible "trial publicity" by a lawyer. Interestingly, California's fair reporting privilege differs in one significant respect from New York's. Under California Civil Code § 47(d), a privileged publication is one made

> [b]y a fair and true report in, or a communication to, a public journal of (a) a judicial (b) legislative or (c) other public official proceeding, or (d) of anything said in the course thereof or (e) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

This privilege, like New York's privilege, protects fair and true reports of litigations. Unlike New York, California only protects reports in "a public journal." New York, in contrast, protects such reports provided they are published; it does not place a requirement that a publication be in a public journal. A second distinction between California and New York is that California's fair reporting privilege does not protect communications to a public journal that violate Rule 5-120 of the California Code of Professional Responsibility.

Conclusion

Litigation often involves hotly contested issues on which the adversaries have diametrically opposed views on what has occurred and the legal consequences arising from them. Parties to a litigation usually have a lot at stake. They can be emotionally, professionally and financially invested in the eventual outcome. As a result, attorneys have developed numerous tactics to bring about a favorable result for their clients, one essential tactic being characterizing and creating a narrative about an opposing party whether in documents, the courtroom, or the public sphere. Such communications have persuasive and ultimately effective value in the resolution of an action. However, such conduct is closely regulated by the courts, as well as the profession, which prides itself in serving the clients and the public with the highest degree of integrity and professionalism. While attorneys are relatively protected from defamation claims for speech in the courtroom, once outside the courtroom, attorneys must be more cautious as their protections lessen considerably. Accordingly, attorneys should look to the several protections that exist, including the fair reporting privilege, the litigation privilege, and the qualified privilege, as guideposts when crafting and disseminating public statements.

1. Rule 3.6 is the successor to New York DR 7-107, which in its last iteration was similar to current rule 3.6(a), (b) and (c).

2. *In re Sullivan*, 185 A.D.2d 440, 444, 586 N.Y.S.2d 322 (3d Dep't 1992).

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3. As Chief Justice Rehnquist wrote in *Gentile v. Nevada State Bar*, 501 U.S. 1030, 1068, 1077 (1991), the "'substantial likelihood of material prejudice' test" of Rule 3.6 "will rarely be met where the judge is the trier of fact, since trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it."

4. The ABA comments to Model Rule 3.6 note that "criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected."

5. *See Harris v. Kellogg, Brown & Root Servs., Inc.*, No. CIV.A. 08-563, 2009 WL 700162 at *5 (W.D. Pa. Mar. 11, 2009).

6. *See, e.g., In re Sullivan*, 185 A.D.2d 440; *In re Grand Jury Investigation*, 23 Ohio App. 3d 159, 492 N.E.2d 459 (Ohio Ct. App. 1985); *Hirschkop v Snead*, 594 F.2d 356, 367 (4th Cir. 1979).

7. *In re Sullivan*, 185 A.D.2d at 445.

8. 58 F.3d 825 (2d Cir. 1995).

9. 769 F. Supp. 1039 (N.D. Ill. 1991).

10. *Ford v. Levinson*, 90 A.D.2d 464, 465, 454 N.Y.S.2d 846 (1st Dep't 1982) (quoting with approval *Holy Spirit Ass'n for Unification of World Christianity v. N.Y. Times Co.*, 49 N.Y.2d 63, 67, 424 N.Y.S.2d 165 (1979)).

11. *Fuji Photo Film U.S.A. Inc. v. McNulty*, No. 05 CIV.7869(SAS), 2009 WL 3754359 at *3 (S.D.N.Y. Nov. 4, 2009).

12. *Id.*

13. 23 N.Y.2d 592, 599, 298 N.Y.S.2d 473 (1969).

14. 33 A.D.3d 10, 13, 817 N.Y.S.2d 37 (1st Dep't 2006); *see also Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 171, 828 N.Y.S.2d 315 (1st Dep't 2007).

15. *Seltzer v. Fields*, 20 A.D.2d 60, 63, 244 N.Y.S.2d 792 (1st Dep't 1963).

16. *Sexter & Warmflash, P.C.*, 38 A.D.3d 163.

17. *Golden v. Muller*, 295 Ill. App. 3d 865, 871, 693 N.W.2d 385 (Ill. App. Ct. 1997) (citing with approval *Cummings v. Kirby*, 216 Neb. 314, 343 N.W.2d 747 (1984)).

18. *Boyd v. Nationwide Mut. Ins. Co.*, 208 F.3d 406, 409–10 (2d Cir. 2000)

19. *See, e.g., Curren v. Carbonic Sys. Inc.*, 58 A.D.3d 1104, 1106, 872 N.Y.S.2d 240 (3d Dep't 2009)("A qualified privilege arises when an individual makes a good faith statement upon a subject in which both the communicator and the receiver of the information have a corresponding interest.").

20. *Liberman v. Gelstein*, 80 N.Y.2d 429, 437–38, 590 N.Y.S.2d 857 (1992) ("The shield provided by a qualified privilege may be dissolved if plaintiff can demonstrate that defendant spoke with 'malice.' . . . [M]alice has now assumed a dual meaning, and we have recognized that the constitutional as well as the common law standard will suffice to defeat a conditional privilege.").

21. *Fuji Photo Film USA Inc. v McNulty*, No. 05 CIV.7869(SAS), 2009 WL 3754359 (S.D.N.Y. Nov. 4, 2009).

22. 280 A.D.2d 417, 720 N.Y.S.2d 505 (1st Dep't 2001).

23. 101 A.D.2d 872, 476 N.Y.S.2d 187 (2d Dep't), *aff'd*, 63 N.Y.2d 994, 483 N.Y.S.2d 1011 (1984).

24. 2009 WL 1764481 (N.Y. Sup. Ct. June 11, 2009).

25. 255 A.D.2d 729, 680 N.Y.S.2d 721 (3d Dep't 1998).

26. 2009 WL 3754359.

27. 90 A.D.2d 464, 454 N.Y.S.2d 846 (1st Dep't 1982).

28. 217 F. App'x 18 (2d Cir 2007).

29. 33 A.D.3d 10, 817 N.Y.S.2d 37 (1st Dep't 2006).

30. *See, e.g., Bochetto v. Gibson*, 580 Pa. 245, 860 A.2d 67, 69 (2004) ("At issue in this appeal is whether an attorney is absolutely immune from liability on the basis of the judicial privilege when he faxes to a reporter a complaint that he has previously filed. . . . [W]e hold that the judicial privilege does not protect an attorney from liability for such conduct."); *Williams v. Kenney*, 379 N.J. Super. 118, 877 A.2d 277, 287–88 (N.J. App. Div. 2005); Sack on Defamation, § 8.2.1, p. 8-14, n. 42.3 and cases cited there.

31. *Salzano v. N.J. Media Group, Inc., d/b/a The Record, et al.*, 403 N.J. Super 403 (N.J. App. Div. 2008) (quoting with approval *Costello v. Ocean County Observer*, 136 N.J. 594, 607, 643 A.2d 1012 (N.J. Sup. Ct., 1994)). *See also* Sack on Defamation, § 7.3.2 ("In some jurisdictions, the privilege is 'conditional' in the traditional sense of the word. It may be lost if the plaintiff demonstrates that the defendant is guilty of malice in the common-law sense of spite, ill will, or a purpose to harm. There are also jurisdictions where 'actual malice' in the constitutional sense of knowledge or reckless falsity defeats the privilege.").

32. *Salzano*, 403 N.J. Super at 418–19. ("The Court in *Costello* determined that the fair report privilege does not apply to 'the publication . . . of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken" (citing *Costello*, 136 N.J. at 611)).

33. *Costello*, 136 N.J. at 612; *see also* Sack on Defamation, § 7.3.2

34. 440 F. Supp. 2d 168 (E.D.N.Y. 2006).

35. 346 F.3d 180 (6th Cir. 2003).

36. 2001 WL 1589175 (Cal. Ct. of App., 2d Dist. Jan. 8, 2002).

37. 2004 WL 3486525 (C.D. Cal. 2004).

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BY DAVID PAUL HOROWITZ

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No Longer Special

New York state court practitioners with geographically diverse practices[1] face many challenges, not least of which is keeping track of differences in substantive and procedural rules between the state's four appellate divisions. So-called "splits" between the departments occur with surprising frequency.

While these splits have always existed, they presented less of a practical challenge when attorneys' practices were more localized. Today, many attorneys practice on a regular basis in the trial courts of two, or more, of the appellate divisions. An increasing number practice statewide. Because of this, in addition to the knowledge of the local variances that occur from one county to another, attorneys must make certain to know the controlling appellate division authority in any given trial court in which they appear.

In my own practice, there are days when I have a matter on in New York County in the morning, and another matter on in Kings County[2] in the afternoon. When I enter the subway at Chambers Street in Manhattan, I am in the First Department. When I emerge two subway stops later at Borough Hall in Brooklyn, I have been transported to the Second Department. Those two subway stops can make quite a difference.

There has been a long-standing split between the First and Second Departments concerning non-party disclosure. The dispute centered on whether a showing of "special circumstances" is necessary to compel non-party disclosure. The genesis of the split was a 1984 amendment to CPLR 3101(a)(4).

Citing the 1984 amendment, the First Department has long held that the pre-amendment requirement that a party demonstrate "special circumstances" to compel a non-party to furnish disclosure was eliminated by the plain language of the amendment.[3] At the same time, the Second Department has continued to require that special circumstances be demonstrated.[4]

Lest my upstate brethren feel ignored, the same split exists north and west of the Hudson Valley, with the Third Department in agreement with the Second,[5] and the Fourth Department in agreement with the First.[6]

Recently, in *Kooper v. Kooper*,[7] the defendant in a matrimonial action served five subpoenas *ducus tecum* upon financial institutions seeking the plaintiff's records. Each subpoena contained a statement that "[t]he circumstances or reasons said disclosure is sought or required are to identify and value certain marital property, which is material and necessary in the prosecution or defense of this action." The plaintiff demanded the subpoenas be withdrawn, *inter alia*, for failing to demonstrate special circumstances; the defendant refused, motion practice ensued, and the trial court granted the plaintiff's motion to quash.

The Second Department framed the issue and signaled a rejection of the special circumstances requirement:

> On this appeal we consider principles governing the discovery of documents from nonparties pursuant to CPLR 3101(a)(4), which provides that the party seeking disclosure must give notice stating "the circumstances or reasons such disclosure is sought or required" from the nonparty. Specifically, the question arises whether a party must establish the existence of "special circumstances" warranting discovery from a nonparty in order to successfully oppose a motion to quash a subpoena duces tecum served on that nonparty. Many of our cases continued to apply that standard after CPLR 3101(a)(4) was amended to remove the requirement that discovery from a nonparty be obtained only "where the court on motion determines that there are adequate special circumstances." We hereby disapprove the further application of the "special circumstances" standard in this context. We, nevertheless, look behind that language in our cases and find underlying considerations which are appropriate and relevant to the trial court's exercise of its discretion in determining whether a request for discovery from a nonparty should go forward or be quashed.[8]

The Second Department reviewed the 1984 amendment:

> In 1984, the Legislature amended CPLR 3101(a)(4) to eliminate the "on motion" and "special circumstances" language, substituting therefor the requirement that

such disclosure be obtained "upon notice stating the circumstances or reasons such disclosure is sought or required."

* * *

After the 1984 amendment, CPLR 3120, which specifically governs document production, continued to require a court order for discovery from a nonparty. Subdivision (b) of that Rule required the party seeking disclosure to obtain the order upon motion with notice to adverse parties and the nonparty from whom disclosure was sought. In 2002, the Legislature amended CPLR 3120, dispensing with the need to make a motion and requiring only service of a subpoena duces tecum for the production of documents in the custody and control of a nonparty witness. The 2002 amendment brought nonparty document production into line with the procedure for compelling a nonparty witness to produce documents during the nonparty's deposition, which requires service of a subpoena without a motion or court order.[9]

Acknowledging the existing split in the departments, the *Kooper* court traced the evolution of the special circumstances rule in the Second Department. Citing recent cases that "avoided the 'special circumstances' rubric," the Second Department reiterated that it "disapprove[d] further application of the 'special circumstances' standard."

Having eschewed the "special circumstances" requirement what, going forward, would be required to compel non-party disclosure?

> Whether or not our cases have applied the "special circumstances" standard, however, they contain underlying considerations which the courts may appropriately weigh in determining whether discovery from a nonparty is warranted. . . .
>
> Since *Dioguardi*, this Court has deemed a party's inability to obtain the requested disclosure from his or her adversary or from independent sources to be a significant factor in determining the propriety of discovery from a nonparty. A motion to quash is, thus, properly granted where the party issuing the subpoena has failed to show that the disclosure sought cannot be obtained from sources other than the nonparty, and properly denied when the party has shown that the evidence cannot be obtained from other sources. Our cases have not exclusively relied on this consideration, however, and have weighed other circumstances which may be relevant in the context of the particular case in determining whether discovery from a nonparty is warranted.
>
> We decline, here, to set forth a comprehensive list of circumstances or reasons which would be deemed sufficient to warrant discovery from a nonparty in every case. Circumstances necessarily vary from case to case. The supervision of discovery, the setting of reasonable terms and conditions for disclosure, and the determination of whether a particular discovery demand is appropriate, are all matters within the sound discretion of the trial court, which must balance competing interests. On appeal, this Court has the authority to review a discovery order to determine whether the trial court has abused its discretion as a matter of law, or in the absence of abuse, has exercised its discretion improvidently. The particular circumstances of each case must always weigh in the trial court's consideration of a discovery request and in our review of the trial court's exercise of its discretion.[10]

Finally, the *Kooper* court highlighted a continued split with the First Department:

> We emphasize, however, that our cases have consistently adhered to the principle that "[m]ore than mere relevance and material-

Citing recent cases that "avoided the special circumstances rubric," the Second Department reiterated that it "disapproved further application of the special circumstances standard."

> ity is necessary to warrant disclosure from a nonparty." The Third Department agrees with this principle. Although the First Department in *Velez* apparently deemed a showing of "need" and relevance sufficient to authorize discovery from a nonparty, our reading of CPLR 3101 includes the concepts of need and relevance within the threshold "material and necessary" standard which all discovery must preliminarily meet. The Legislature would not have included a separate subsection of the statute for nonparties if discovery from parties and nonparties were subject to identical considerations. Inclusion of the language "circumstances or reasons such disclosure is sought or required" from a nonparty (CPLR 3101[a][4]) indicates that something more than mere relevance is required if the discovery request is challenged. As a matter of policy, nonparties ordinarily should not be burdened with responding to subpoenas for lawsuits in which they have no

stake or interest unless the particular circumstances of the case require their involvement.[11]

The *Kooper* court affirmed the trial court's quashing of the subpoenas as "the defendant did not make a sufficient showing of the circumstances and reasons discovery from the nonparties was warranted."

Prior to *Kooper*, justices in numerous cases in the Second Department requiring "special circumstances" held the requirement to be satisfied where the matter sought was relevant and material and was unavailable from another source, and this criteria continues to provide a basis for disclosure. While declining to provide a "a comprehensive list of circumstances or reasons which would be deemed sufficient to warrant discovery from a nonparty in every case," the Second Department failed to offer any examples of other circumstances that would justify non-party disclosure. Thus, it is unclear what other circumstances will provide a basis in the Second Department for compelling non-party disclosure. ■

1. Many practitioners consider adjoining counties in New York City to be geographically diverse.

2. Brooklyn, in the vernacular.

3. *Schroder v. Consol. Edison Co.*, 249 A.D.2d 69, 670 N.Y.S.2d 856 (1st Dep't 1998).

4. *Koramblyum v. Medvedovsky*, 19 A.D.3d 651, 799 N.Y.S.2d 73 (2d Dep't 2005); *Tannenbaum v. Tenenbaum*, 8 A.D.3d 360, 777 N.Y.S.2d 769 (2d Dep't 2004).

5. *Ruthman, Mercadante & Hadjis v. Nardiello*, 288 A.D.2d 593, 732 N.Y.S.2d 455 (3d Dep't 2001).

6. *Catalano v. Moreland*, 299 A.D.2d 881, 750 N.Y.S.2d 209 (4th Dep't 2002).

7. 2010 NY Slip Op. 04147, 2010 WL 1912142 (2d Dep't May 11, 2010).

8. *Id.*

9. *Id.* (citations omitted).

10. *Id.* (citations omitted).

11. *Id.* (citations omitted).

In Memoriam: Steven C. Krane

With great sadness and regret, we mourn the passing of Steven C. Krane, the 104th President of the State Bar Association and the youngest attorney to hold the office. During his presidential term, 2001–2002, Krane coordinated the legal community's efforts to assist victims of the September 11th attacks and to provide legal advice to the families of those killed and injured. He created the Special Committee on Student Loan Assistance for the Public Interest (SLAPI) that provides grants to young lawyers working in the public sector, to help defray student loans. The New York Bar Foundation has re-named the fund in his honor.

"I have lost a treasured friend, and the State Bar has lost one of its greatest leaders and finest gentlemen," said State Bar President Stephen P. Younger. "Steve worked tirelessly to promote volunteerism among lawyers, and he frequently shared how etched in his mind were the faces of the numerous attorneys who stood on line to offer their pro bono help to 9/11 victims, and who gave so unselfishly during one of our nation's darkest hours. He loved to quote Winston Churchill's words: 'We make a living by what we get. We make a life by what we give.'"

Steve Krane was one of the nation's foremost and widely recognized leaders in the field of legal ethics and professional responsibility. From his early service on the NYSBA Special Committee on the Law Governing Firm Structure and Operation (MacCrate Committee) to his chairmanship of the Committee on Standards of Attorney Conduct (COSAC), he was instrumental to the development of the New York Rules of Professional Conduct, which were adopted in 2009. In June 2009, Krane was appointed by Governor David A. Paterson to the New York State Commission on Public Integrity. He is a former chair of the American Bar Association's Standing Committee on Ethics and Professional Responsibility. Throughout his career, he worked tirelessly to promote legal reform.

Early in his career, from 1984 to 1985, Krane left private practice to serve as one of the first law clerks to Hon. Judith S. Kaye, retired Chief Judge of the State of New York. He then rejoined Proskauer Rose LLP, where he became a partner, concentrating his practice in representing lawyers and law firms in legal ethics and professional liability matters. He co-chaired the firm's Law Firm Practice Group and served as general counsel for the firm.

Allen Fagin, chairman of Proskauer Rose, offered this tribute: "Apart from his extraordinary professional accomplishments, Steve was a remarkable human being: beloved by colleagues; a devoted mentor to numerous young lawyers; . . . passionate about the profession; a man of boundless energy, impeccable integrity and filled with abundant cheer. He will be sorely missed."

Steven Krane is survived by his wife, Faith, his daughter, Elizabeth, and his son, Cameron.

Donations in Steve's honor may be made to the newly renamed Steven C. Krane Fund for Student Loan Assistance for the Public Interest at the New York Bar Foundation, One Elk Street, Albany, NY 12207.

Jerry H. Goldfeder is Special Counsel at Stroock & Stroock & Lavan LLP. He is the author of *Goldfeder's Modern Election Law*, and he teaches Election Law at Fordham Law School and University of Pennsylvania Law School. He is Chair of the New York City Bar Association's Election Law Committee and has just been appointed Chair of the Election Law and Government Affairs Committee of the General Practice Section of the New York State Bar Association.

An earlier version of a few portions of this article appeared in the recent update of Mr. Goldfeder's book. These are reprinted with permission by the publisher.

Election Law Developments

By Jerry H. Goldfeder

As the 2010 New York elections are starting to heat up, this is an opportune time to review recent Election Law developments. I write this for the election law bar, whose practice requires familiarity with the procedural and substantive issues addressed in recent decisions and laws. But I also write with a wider audience in mind; after all, the rest of you may find some of this interesting.

Corporate and Union Dollars at Work

The United States Supreme Court's controversial decision in *Citizens United v. Federal Election Commission* has shaken the foundation of campaign finance jurisprudence.[1] Put simply, the Court held that corporations and unions, like natural persons, have a constitutional right to spend unlimited sums of money on behalf of, or in opposition to, a federal candidate, provided that these expenditures are "independent" of the candidate's campaign. *Citizens United* overruled previous Supreme Court decisions and upended the century-old view that corporations, in the context of political campaigns, were different than individuals and, given their resources, should be treated with a wary eye.

President Obama immediately lamented the holding; Senator Charles Schumer has introduced legislation in Congress to blunt its reach;[2] State Senator Daniel Squadron and Assemblymember Rory Lancman have proposed a law in New York to do the same.[3] It remains to be seen whether such legislation will be passed and, if it is, whether it would withstand judicial scrutiny. On the other hand, it appears that if a corporation is characterized as having the same constitutional rights as a natural person in a campaign, then it is a matter of logic, assuming the current voting pattern on the Supreme Court is maintained if Elena Kagan replaces Justice Stevens, that the ruling of *Citizens United* might very well be extended to invalidate the long-standing ban on direct corporate contributions to federal candidates as well.[4]

Two observations about the case: First, the law relating to what is an independent expenditure is murky. A federal statute attempts to set the parameters of campaign activity that is independent versus that which is "coordinated."[5] However, whether or not an expenditure is independent is fact-driven. As such, how corporations or unions spend their money in a campaign will undoubt-

edly be subject to complaints to, and scrutiny by, the Federal Election Commission.

Second, and closer to home, is the question of how *Citizens United* impacts New York law. At present, corporations are permitted to contribute an aggregate of $5,000 in a calendar year to all state and local candidates, while individuals may contribute up to $150,000 in a year; in New York City, corporate contributions to municipal candidates are banned altogether. If the ruling of *Citizens United* is extended to invalidate the ban on direct contributions to federal candidates, then the state restriction and the city ban, if challenged, might also fall. This, of course, would mean that corporate and union contributions could be made directly to state and local candidates at the same levels as natural persons.

It remains to be seen what next steps will be taken by supporters of the Supreme Court's holding in *Citizens United*.

You Think We Can't Do This? . . . Just Watch!

Two of the most newsworthy court decisions in New York this past year related to the highly unusual exercise of raw power, one by the Governor, the other by the State Senate.

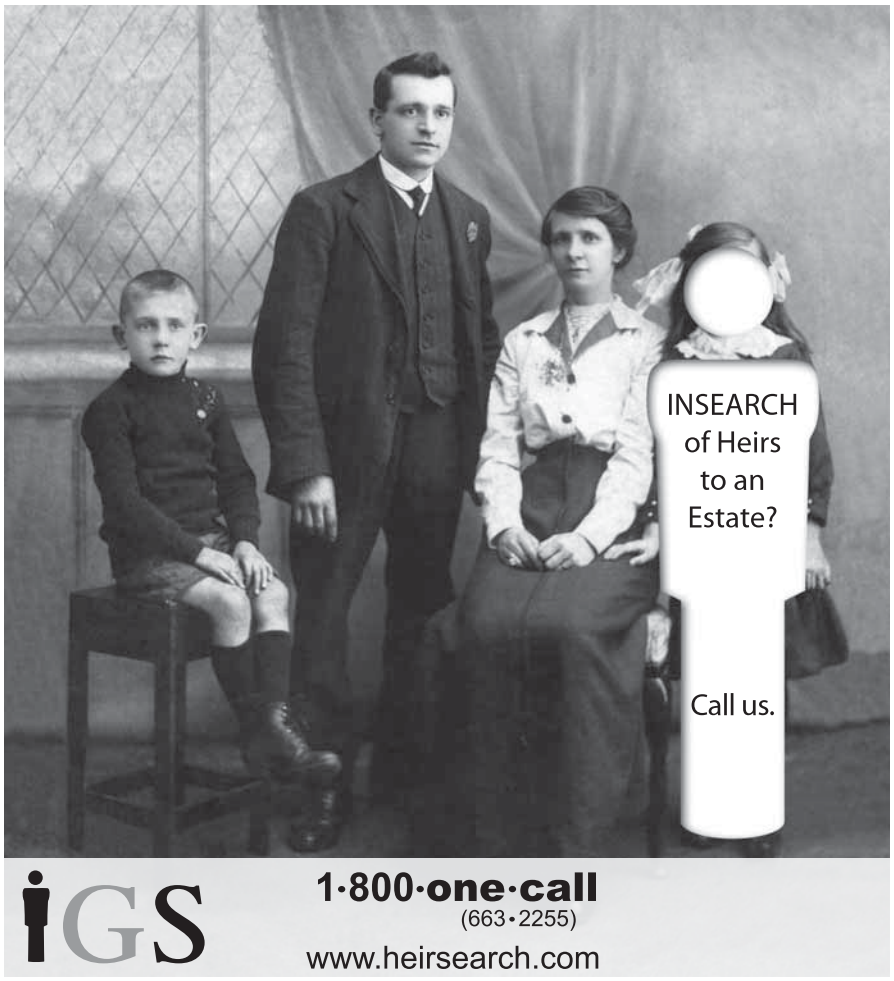
Although very few students of government thought he had the authority to do so,[6] Governor David A. Paterson, on July 8, 2009, appointed Richard Ravitch as Lieutenant Governor. The context, of course, was that Lieutenant Governor Paterson became Governor when Governor Eliot Spitzer resigned, and, for the ninth time in New York's history, there was a vacancy in the office of Lieutenant Governor. That was March 2008. Later in the year the Democrats took control of the State Senate for the first time in over 40 years, enabling Democrat Senator Malcolm Smith to become Temporary President of the Senate and, therefore, to assume the duties[7] (though not the office) of Lieutenant Governor.

In June 2009, however, several Democratic Senators switched allegiance and Republican Senator Dean Skelos was elected Temporary President. This unprecedented upheaval – and uncertainty as to who was the legitimate Temporary President and thus next in line to succeed Governor Paterson – prompted the Governor to name a new Lieutenant Governor.

Amid the great skepticism that the Governor had the power to fill the vacancy in this way, the matter was litigated, and, overturning years of conventional wisdom, the New York Court of Appeals, in a 4-3 decision, held that he did.[8]

This November, we elect a new Governor and Lieutenant Governor.[9] Should a vacancy in the office of Lieutenant Governor occur in the future, the Governor, relying on the Ravitch precedent, would meet no legal resistance to appointing a new comrade-in-arms. The better practice, however, would be to reform the law so that the decision is not solely a governor's. The federal model, embodied in the 25th Amendment to the United States Constitution, allows Congress to approve a President's choice to fill a vacancy in the vice presidency. New York should adopt this procedure.[10]

The New York State Senate also flexed its muscles this year by expelling one of its duly elected members, former Senator Hiram Monserrate. The media chronicled his tawdry conduct in great detail, leading up to his misdemeanor conviction of recklessly assaulting his female companion; so, too, did they broadcast all the details of his role in the Senate "coup" engineered by him and several allies. A Senate committee found him "unfit to serve" and the full Senate expelled him.



Monserrate took the matter to federal district court, which cited the Legislature's plenary power to preserve the integrity of its body, and declined to enjoin the expulsion; it also suggested that Monserrate may pursue in state court the issue of whether Legislative Law § 3, which allowed for such expulsion, was constitutional under the New York State Constitution.[11] The Second Circuit affirmed, holding that the District Court did not abuse its discretion.[12]

In that Monserrate did not test the state constitutional issue, it remains unresolved whether a future expulsion, if challenged in state court, would succeed. Fifty years ago, an Assembly committee concluded that the state constitution barred it from expelling a member; last year a Senate committee concluded that it did have such power. The federal court, in finding that no federal constitutional right existed or was sufficiently abridged to warrant enjoining Monserrate's expulsion, neither supports nor prevents any future expulsion by the Legislature.

One additional question is raised. Assuming *arguendo* that the Legislature has the power to expel, there is, nevertheless, no bright line test for whether an elected official is "unfit to serve." The Monserrate case's heuristic value in this regard is ambiguous.

Campaign Finance Prosecutions

It is highly unusual for prosecutors to charge a candidate or campaign with campaign finance violations. Nevertheless, in 2008, New York County Surrogate-elect Nora Anderson was indicted for various campaign finance law violations. Eight of 10 counts were dismissed on the ground the court lacked geographical jurisdiction; the remaining two counts charged false filings in the first degree.[13]

Although it was actually the treasurer of the campaign committee who filed the campaign finance disclosure documents, the District Attorney prosecuted Anderson and a former employer who had gifted and loaned her approximately $250,000.[14] Anderson then contributed these sums to her campaign committee, and the treasurer identified Anderson as the contributor in the campaign filings. The prosecution essentially argued that the campaign committee should have listed Anderson's employer as the contributor instead, and, as such, her filings were false instruments. Anderson's defense was that the gift and loan became her money and the filings were, therefore, accurate. Surrogate Anderson and her co-defendant were acquitted, and she now serves on the bench.

A different result ensued in the case of Norman Hsu. Mr. Hsu, a prominent fundraiser for former Senator Hillary Clinton and many other nationally known candidates, was found to have concocted an elaborate Ponzi scheme in which he used approximately $50 million of other people's money for his contributions. He pled guilty to federal fraud charges and a jury found him guilty of violating federal campaign finance laws. He was sentenced to 24 years and four months for his crimes.[15]

Although such prosecutions have been extremely rare, candidates and practitioners are alerted to the apparently greater interest that federal and state authorities have recently exhibited. Indeed, in the aftermath of *Citizens United*, it would not be surprising if prosecutors scrutinize whether purportedly independent expenditures of corporations and unions are in fact improperly coordinated with a candidate's campaign.

It's My Party . . . and You're Not Invited

Political parties almost never oust their members. But that is exactly what the Conservative Party did last year, when it "disenrolled" approximately 1,500 new members on the ground that they joined *en masse* for the purpose of taking over its Suffolk County chapter. The disenrolled members challenged the Conservative Party's action in *Walsh v. Abramowitz*,[16] but Supreme Court, Suffolk County, upheld the disenrollment. The court articulated the case's "central issue" as

> whether an intentional and organized effort by an outside organization, in this case, the Suffolk County Police Benevolent Association, to cause massive enrollment changes of its members, their families and friends, into a political party, in this case, the Conservative Party, for an ulterior motive that has little if anything to do with the principles of the party, can be the subject of a removal [disenrollment] proceeding under the Election Law.[17]

The court surveyed various provisions of the Election Law that protect the prerogatives of political parties under New York's closed primary system and concluded that, as long as proper procedures were followed, parties had the right to bar those who sought a "take-over."

In the case before the court, the Suffolk County Conservative Party "believed itself to be the focus of . . . a conspiracy to perpetrate a scheme of large-scale fraudulent enrollment" for the purpose of electing a new sheriff who would be more supportive of the Suffolk County Police Department. The effort by the the Police Benevolent Association, seen as an organized, blatant attempt to use the party for its own purposes, was quintessential "party raiding" according to the court. Under the circumstances, therefore, the local Conservative Party had the right to challenge the bona fides of the 1,500 new members, and disenroll them.

This was an unusual decision. Voter registration and enrollment drives are to be *encouraged*. And, of course, a concerted effort by a group of people to re-direct a party's policies, or to nominate a particular candidate, is exactly what active political participants do. Witness, for example, the current "tea party" movement. Although some observers questioned the broader implications of

examining the motives of new enrollees, the court's ruling was not appealed. In fact, in an extraordinary step after the new enrollees were ousted, the Suffolk County Conservative Party commenced an action seeking damages for tortious conduct by those who tried to take over their party. The action continues, having survived a motion to dismiss.[18]

The Continuing War Over Absentee Ballots

Recent close elections have engendered a good deal of hand-to-hand combat over absentee ballots. In *Fingar v. Martin*,[19] the Appellate Division, Third Department restated its continuing view that absentee ballots cast by those voting from "second homes" are not presumptively suspect. On the contrary, the court treated the ballots as presumptively valid and appropriately placed the burden upon a challenger to prove that a voter's second residence was not a legitimate one. The court thus upheld the long-standing precedent that candidates and voters may have more than one home and may choose to vote from any one of them, so long as it is a bona fide residence. This year, in *Stewart v. Chautauqua County Board of Elections*,[20] the Court of Appeals reiterated the law that a New Yorker may vote from a "second" home, provided, of course, that there are "legitimate, significant and continuing attachments" to it.

Voters with a country or beach house, therefore, have a choice from which of their homes to cast a ballot.

"If You Can't Take the Heat, Get Out of the Kitchen!"

President Harry S Truman famously uttered this warning over 50 years ago to members of his administration, but in light of the New York Court of Appeals's decision in *Shulman v. Hunderfund*,[21] it should be taken to heart by would-be elected officials.

The facts of this action involved a school board candidate who, during his campaign for re-election, was the subject of an anonymous flier alleging that he "flagrantly broke the law." After the candidate lost the election, he discovered the perpetrators and sued them for libel. The Court of Appeals dismissed the complaint, and held that

> [i]t is understandable, of course, that [plaintiff] Shulman did not like [defendant] Hunderfund's provocatively phrased, and anonymous, charges against him. But so long as Hunderfund did not substantially depart from what he believed to be the truth, the only remedy for Shulman and other figures similarly situated is, as the Supreme Court said in its order setting aside the verdict in this case, *to develop a thicker skin*.[22]

It is, therefore, the law in New York that running for office is not for the meek or weak-hearted. If you are a candidate for office and opponents raise ballot access, campaign finance or residency issues, take it in stride. Develop a thicker skin! ■

1. 130 S. Ct. 876 (2010).
2. The Schumer-Van Hollen Bill is known as the "Democracy Is Strengthened by Casting Light On Spending in Elections [DISCLOSE] Act."
3. Bryan Fitzgerald, *New York Bill Asks Shareholder Permission Before Corporate Spending in Politics*, Albany Times Union (Apr. 15, 2010) *available at* http://www.timesunion.com/ASPStories/Story.asp?StoryID=921791&LinkFrom=RSS.
4. Currently, corporations and unions can assist a candidate by establishing a political action committee, which can, in turn, make direct contributions to federal candidates.
5. 2 U.S.C. § 431(17). *See* Robert F. Bauer, *The McCain-Feingold Coordination Rules: The Ongoing Program to Keep Politics Under Control*, 32 Fordham Urb. L.J. 507 (2005).
6. Jerry H. Goldfeder, *New York State of Mindlessness*, N.Y. Times, June 11, 2009.
7. N.Y. Const. art. IV, § 6.
8. *Skelos v. Paterson*, 13 N.Y.3d 141, 886 N.Y.S.2d 846 (2009).
9. Although candidates for the two offices seek their respective political party nominations in separate primary elections, the winners run together as a ticket, just as candidates do for President and Vice President of the United States. N.Y. Const. art. IV, § 1.
10. The Election Law Committee of the Association of the Bar of the City of New York issued a Report that recommended reforming state law to adopt the federal method. *See* Letter from Jerry Goldfeder, chair, N.Y. City Bar Comm. on Election Law, to Charles O'Byrne, Secretary to the Governor (July 1, 2008) (on file at www.nycbar.org/pdf/report/Governor_re_Succession.pdf).
11. Jerry H. Goldfeder, *Monserrate and the Question of Pink Slips for Elected Officials*, N.Y.L.J., Jan. 20, 2010, p. 4, col. 1.
12. *Monserrate v. N.Y. State Senate*, 599 F.3d 148 (2d Cir. 2010).
13. *People v. Anderson*, N.Y.L.J., Nov. 2, 2009, p. 17, col. 3 (Sup. Ct., N.Y. Co.).
14. I was retained as an expert by the defense.
15. *United States v. Hsu*, 643 F. Supp. 2d. 574 (S.D.N.Y. 2009).
16. N.Y.L.J., Sept. 23, 2009, p. 42, col. 1 (Sup. Ct., Suffolk Co.).
17. *Id.*
18. *Walsh v. Frayler*, 26 Misc. 3d 1237(A) (Sup. Ct., Suffolk Co. 2010).
19. 68 A.D.3d 1435, 892 N.Y.S. 2d 235 (3d Dep't 2009).
20. 14 N.Y.3d 139 (2010).
21. 12 N.Y.3d 143, 878 N.Y.S.2d 230 (2009).
22. *Id.* at 150 (emphasis supplied).

"I have a typical nine to five job. It's enough work for nine people and I'm treated like a five year old."

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These Are the Days: Lawyering Then and Now

By Judith S. Kaye

Two weeks of every five the Court of Appeals travels from Home Chambers – mine were in New York City – to Albany, the State's capital, for oral arguments, conferences and handing down opinions. But the Court is only physically in the City of Albany (at Court of Appeals Hall), because, in every other sense, everyone is immersed in the work of the Court, from early morning until late at night. Then back home, in the weeks in between Albany sessions, there are opinions to write, and new matters to study for the next session. And always there were all sorts of administrative issues I could, and did, involve myself in as Chief Judge of the State of New York.

The 25 years, three months, 19 days and 12 hours I was privileged to be part of the State's high court flew by; and now I find myself back in the law firm world, alongside so many of you. So much, of course, is different. In 1963, for example, Litigation Department meetings at Sullivan & Cromwell began with "Gentlemen and Judy" (that was me!), my comprehensive memorandum on Rule 10-b(5) of the Securities Exchange Act of 1934 was under 10 pages, and the Uniform Commercial Code and Civil Practice Laws and Rules were in their infancy in New York. Ah, those were the days!

What I prefer to reflect on, however, is not all that has changed but rather all that is enduring. No surprise considering that litigation is the lifeblood of our justice system; and it is the great American Bar who, throughout history, has kept our nation true to its fundamental values.

The Court Years

Just to give you a quick update on the quarter-century since my "departure" from law practice, I arrived at the Court of Appeals directly from trial practice on September 12, 1983, the first woman on that bench, with four of the seven colleagues about to reach age 70, the mandatory retirement age. Talk about halcyon days. I believe I took every conceivable advantage of the situation. I sure hope I did.

I learned a lot too. And one of my earliest lessons – on Day One – was among the most lasting. It arose in the context of a tort case, with the plaintiff-mother, a bystander to her child's injuries in an automobile accident, seeking emotional distress damages against the defendant-driver.[1] At the Court of Appeals, the reporting judge speaks and votes first at the conference table the day following oral argument; the junior judge next; then the remaining judges, in reverse order of seniority. My beloved colleague, Hugh R. Jones, the reporting judge in that tort case, spoke first, recommending that the Court of Appeals overturn the lower courts' dismissal of the case and allow the mother's claim for emotional distress damages to proceed. As the junior judge, I spoke right after him, explaining, with ample case authorities, why the lower courts were absolutely correct, that New York law simply did not allow a plaintiff to recover emotional distress damages in the absence of physical harm.

At the conclusion of my comprehensive report, Judge Jones responded "with due respect" (we all know what that means) that the law in this area has evolved a bit since the Court last addressed the issue, and he recommended that the Court take another look. WOW! And wouldn't you know, the Court of Appeals reversed and allowed the plaintiff's claim to proceed, carefully limiting the newly recognized cause of action to immediate family

members. The vote was 4-3, led by the four septuagenarians, the three junior judges in dissent, clinging to now-outdated precedents.

That sort of discussion recurred countless times over the next quarter-century I spent in the lawyer heaven of New York's high court. Sometimes it was a tort case, sometimes it was a constitutional issue, sometimes a criminal matter. But always the central dilemma was the same. One side would be pressing critical differences in the facts or expansive language in the law, or evolving jurisprudence, or new scientific research or changed circumstances and a need to keep up with the demands of modern society. The other side would be urging that if we did not strictly adhere to the prior cases, we would open the floodgates and the world would come to an end.

During those years that I perfected the art of the sleepless night. Affirm, reverse; affirm, reverse. Both sides persuasive, and the Court's decision enormously consequential for society and for the law. How I treasure the memory of those agonies! Ah, those were the days!

As I learned on Day One, the Court is there to settle and declare the law, to keep it stable, sensible and predictable to be sure, but also to see that it remains fully equal to the demands of a changing, maturing, progressing society. Not an easy task – utterly bedeviling on many occasions. After all, a case does not proceed through the trial and intermediate appellate courts when the answer is simple and clear. Invariably there are excellent arguments on both sides, and excellent advocates to press them.

Role of the Bar

And that brings me directly to the superb lawyers entrusted with responsibility for the due administration of justice, the pillar of our great American justice system.

Our judiciary has become, over time, a "vital engine . . . of civilizing change"[2] – a branch of government that can, and often does, play a key role in stimulating the process of reform in our democratic society. American jurisprudence is filled with examples of how our court system has served as an instrument of justice, as an agent for shaping and influencing society's evolving standard of decency and perception of the law – the state courts in particular serving as "laboratories of democracy." As a woman I have certainly been a beneficiary of pathbreaking court decisions.

But while a vital engine of civilizing change, the law and the courts are not self-directed or self-propelled engines. Despite all the talk about judicial activism, the fact is that courts don't go out and start lawsuits so they can resolve interesting questions. Necessarily somewhat removed and isolated from everyday affairs, necessarily somewhat passive and reactive to issues put before them by litigants, courts look to and depend upon the sensitivity, creativity and dedication of lawyers to enlighten them with new insights into old principles.

As the world changes and values evolve, courts look to the Bar to deepen their understanding of the context and ramifications of legal issues, to help keep the law attuned to the needs of contemporary society, and to lead in the progress of the law. All of which is to say that behind every judicial decision there are forceful advocates who, through preparation, persuasion and passion, alter the court's understanding of how the law should be applied to the particular case or controversy before it. Ah, these *are* the days, aren't they!

Promoting Change

Indeed, while judges are the ultimate decision makers – the final arbiters of how a case should be decided – it is the lawyers who have the power to test the boundaries of existing precedents, power to nudge the law in new and sometimes unexpected directions. This influence derives in part from the inherent nuances and complexities of the law itself. For, as we all know, the law often is shaded with ambiguity and uncertainty. And no one is better at excavating ambiguities and uncertainties than the zealous advocates known as the great American Bar.

In my years on the Court of Appeals, I came to appreciate that judicial decision making is much more than a mechanical exercise of locating citations and affixing them to facts. Even if the law were always to remain static, the problems confronted by the courts are people's problems, and the infinite ingenuity of the human mind seems never to concoct the identical factual situation twice. Immediately there is judicial hand-tailoring to be done, often requiring choices among sound alternatives, simply to fit existing precedents to the very next suit. Whether the issue is privity, or depraved indifference murder, or due process, equal protection, free speech or the right to a public education, invariably there are the subtle variations on age-old questions that take us down whole new paths. It's what Justice Souter recently described in his Harvard Commencement speech as "respecting all the words the Framers wrote, by facing facts, and by seeking to understand their meaning for living people."

Even if nothing more were required of courts than application of words of the Uniform Commercial Code or Workers' Compensation Law, the exercise is necessarily is more than mechanical. Inevitably, there are gaps to be filled and anomalies to be treated as statutes are tested in the crucible of live controversies that the most far-seeing legislators could never have contemplated. Even in applying laws declared by others, there is no question that judges frequently must choose among competing policies, thereby determining the range and direction of the law.

The Human Dimension

And of course, amid this uncertainty and imprecision, there is the human dimension. All human beings – yes,

judges too – have a view or outlook on life, some notion about what society needs, and all manner of personal feelings, beliefs and values. That outlook is influenced by a lifetime of experiences, including the experience of working collegially on a bench for many years.

Take for instance the remarkable career of United States Supreme Court Justice John Paul Stevens. Soon after his appointment to the Court in 1975, he joined opinions that helped reinstate the death penalty,[3] which had been effectively invalidated by the Court only four years earlier.[4] Yet two years ago, relying on his decades of experience in reviewing capital cases, Justice Stevens questioned whether the death penalty could be applied in a rational and non-discriminatory fashion.[5] Similarly, in *Regents of the University of California v. Bakke*,[6] the Court's famous 1978 affirmative action decision, Justice Stevens joined the majority in holding that the University had violated the rights of Allan Bakke, a white applicant to the medical school. Yet 25 years later, in 2003, Justice Stevens was part of the 5-4 majority in *Grutter v. Bollinger*,[7] upholding the affirmative action policy of the University of Michigan's Law School admissions program.

Yes, most definitely these *are* the days for our great American justice system and the lawyers and judges entrusted with its oversight. Indeed, it is vital to the future of America that lawyers and judges bring all their human powers to bear to assure that our system of justice remains fully equal to its name in this rapidly progressing world of ours.

But what about the millions who can't afford legal services? Here, too, our system of justice has the answer: pro bono service.

Promoting Justice

The very week I was admitted to the Bar of the State of New York, the United States Supreme Court issued a personal welcome: *Gideon v. Wainwright*.[8] Lawyers, Justice Black declared on behalf of a unanimous Court, are "necessities, not luxuries." As he went on to explain, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . [The noble idea of a fair trial] cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him."[9]

And over the decades we have seen the inarguable principle enlarged well beyond *Gideon*, recognizing that in the phrase "equal justice" the word "equal" is a redundancy. What, after all, is the meaning of justice if the courts are available only to those who can afford counsel? For lawyers, of course, pro bono service is not only a professional responsibility, it is also second nature. We never forget that there remains a deep and enduring need in our neighborhoods and communities for legal representation. Indeed, these are the days!

I recognize that not even lawyers have been spared during this difficult period. Without question, the turbulence in our financial markets and the economy has wrought significant damage, shaking our profession to its core. Examples abound: well-respected law firms closing their doors; others being forced to adopt layoffs and other draconian measures; bright and motivated young lawyers, fresh out of law school, the victims of a shifting marketplace.

During these times of personal upheaval, it would be natural to turn inward and lose sight of our broader civic duty as lawyers, to disregard our professional obligation to deliver legal services to the needy. But there are reasons – both practical and personal – for resisting this temptation.

Even in the best of times, the demand for quality legal representation far outstrips our ability to provide it. So it follows that in this darker, more challenging environment, the Bar's commitment to public service must be even more robust. Fortunately, as many of us can attest, the time and effort necessary to discharge this professional obligation is more than repaid in the form of personal enrichment.

In a sense, the act of performing pro bono service reaps its own reward. As studies have found, when people give to others, they feel better – better about themselves, better about the world. At a moment in history when society is under attack by a tempest of unsettling events – from rising unemployment to volatile stock markets to terrorism and beyond – science, if not logic alone, confirms that the road to personal happiness is in renewing our commitment to helping others. Yes, indeed, these are the days! I am proud to stand among you. ■

1. *See Bovsun v. Sanperi*, 61 N.Y.2d 219, 473 N.Y.S.2d 357 (1984).

2. William J. Brennan, Jr., *Space Law in the Next Century*, N.Y. St. B.J. (May/June 1991) 42, 44.

3. *See Gregg v. G.*, 428 U.S. 153 (1976); *Jurek v. Tex.*, 428 U.S. 262 (1976).

4. *See Furman v. G.*, 408 U.S. 238 (1972) (holding that imposition of death penalty under Georgia and Texas statutes, in cases before the Court, would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments).

5. *See Baze v. Rees*, 553 U.S. 35 (2008):

> In sum, just as Justice White ultimately based his conclusion in *Furman* on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment."

Id. at 86 (citing *Furman*, 408 U.S. at 312 (White, J., concurring)).

6. 438 U.S. 265 (1978).

7. 539 U.S. 306 (2003).

8. 372 U.S. 335 (1963).

9. *Id.* at 344.

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2009 Review of Uninsured, Underinsured and Supplementary Uninsured Motorist Insurance Law

By Jonathan A. Dachs

In 2009, significant developments took place in the constantly changing and highly complex areas of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law of which practitioners in those areas should be aware.

Insured Persons

The definition of an "insured" under the SUM endorsement (and many liability policies) includes the "named insured" or spouse, as well as the relatives of the "named insured" or spouse while residents of the same household.

The "Named Insured"

In *Siragusa v. Granite State Ins. Co.*,[1] the appellate court held that the claimant, a pedestrian struck by a car, was not an "insured" under a policy issued to the Guild for Exceptional Children, the sponsor of the apartment in which the claimant lived. The definition of "insured" in the SUM endorsement stated: "You, or the named insured and, while residents of the same household, your spouse and the relatives of either you or your spouse." Because the reference to "You" referred to the Guild, a corporation, which cannot have a spouse or relative, the claimant was not considered a "named insured."

Occupants

Also included within the category of "insureds" are individuals "occupying" the insured vehicle, or any other vehicle being operated by the named insured or spouse.

In *Continental Casualty Co. v. Lecei*,[2] the court upheld a Special Referee's determination that the claimant was "occupying" a truck within the meaning of the truck's policy, insofar as he was "alighting from the truck when

he was struck by a passing motorist," and, thus, was "still 'vehicle-oriented' at the time he was injured."

Insured Events

The UM/SUM endorsements provide for benefits to "insured persons" who sustain an injury caused by "accidents" "arising out of the ownership, maintenance or use" of an uninsured or underinsured motor vehicle.

"Use or Operation"

In *American Protection Ins. Co. v. DeFalco*,[3] an SUM claim was brought by a police officer, who alleged that the offending motorist put her vehicle in reverse and collided with the officer's patrol car after she had pulled over and stopped her vehicle upon being pursued by the officer. In addition to the issue of whether the officer's alleged injuries were the result of an "accident" or an intentional act, an issue was raised as to whether the injuries arose from the "use or operation" of an underinsured motor vehicle, rather than from a post-collision scuffle or altercation in the course of the officer's arrest of the motorist. In contrast to his affidavit submitted in opposition to the SUM carrier's petition to stay arbitration, in which he claimed that he was injured while exiting his vehicle as it was struck by the offending motorist, the claimant officer stated in an internal police department report that he was injured "while attempting to subdue and place a violent struggling suspect under arrest." These two explanations of how the officer was injured raised questions of fact and of credibility, which required a hearing to resolve.

"Accidents"

In *American Manufacturers Mutual Ins. Co. v. Burke*,[4] the court addressed a situation where a police officer was injured when a vehicle he stopped in the course of an investigation accelerated while he was partially inside it. The driver of that vehicle pleaded guilty to assault in the second degree, admitting that she intentionally drove even though the officer was struggling with her. The court held that "given that the [officer's] injuries were not the result of an accident, he was not entitled to uninsured motorist benefits under the subject insurance policy."[5]

The Claimant and Insured's Duty to Provide Timely Notice of Claim

UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." A failure to satisfy the notice requirement vitiates the policy.[6]

In *Liberty Mutual Ins. Co. v. Gallagher*,[7] the court explained, "Where, as here, an insured is required to provide notice of a claim as soon as practicable, such notice must be given within a reasonable time under all of the circumstances." The court pointed out that "it is the claimant's burden to prove timeliness of notice, which is measured by the date the claimant knew or should have known that the tortfeasor was underinsured." However, the problem with measuring timeliness is that it "is an elastic concept, the resolution of which is highly dependent on the particular circumstances." The court highlighted several factors that would help in determining whether notice is timely, including "whether the claimant has offered a reasonable excuse for any delay, such as latency of his/her injuries, and evidence of the claimant's due diligence in attempting to establish the insurance status of the other vehicles involved in the accident."[8]

In *Bhatt v. Nationwide Mutual Ins. Co.*,[9] the court reinforced the rule that, in the context of an SUM claim (as opposed to a liability claim), the carrier must establish that it was prejudiced by a late notice of an SUM claim in which the insured had previously provided timely notice of the accident.[10]

There is also a requirement to give notice of a legal action, that is, to immediately forward to the UM/SUM insurer a copy of the summons and complaint or other type of process in a lawsuit commenced by the insured or the insured's legal representative against "any person or organization legally responsible for the use of a motor vehicle involved in the accident."

In *American Transit Ins. Co. v. Hashim*,[11] the court held that "[h]aving received timely notice of claim, plaintiff insurer was not entitled to disclaim coverage based on untimely notice of the claimant's commencement of litigation unless it was prejudiced by the late notice." The court further added that the insurer did not demonstrate prejudice in the case because it was notified of the legal action after the motion for a default judgment was made but before the order granting the motion and scheduling an inquest was rendered. The dissenting justice contended that "[i]nasmuch as counsel for Hashim did not advise the insurer of the pendency of the litigation until after he had moved for a default judgment, and then refused the common and professional courtesy of permitting it to file an answer, the prejudice is self-evident."

Effective January 17, 2009, the New York State Insurance Law was amended in connection with the timing required for giving notice of a claim under insurance contracts, effectively eliminating the "no-prejudice" rule. The new law added § 3420(a)(5), which requires that every policy or contract insuring against liability for injury to person, issued or delivered by the state, contain a provision in which the "failure to give any notice required to be given by such policy within the time period prescribed therein

shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide timely notice has prejudiced the insurer."

In addition, under § 3420(c)(2)(C), another new provision, "[t]he insurer's rights shall not be deemed prejudiced unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim." Section 3420(c)(2)(A) creates a shifting burden of proof on the issue of "prejudice," which works in the following way:

> In any action in which an insurer alleges that it was prejudiced as a result of a failure to provide timely notice, the burden of proof shall be on: (i) the insurer to prove that it has been prejudiced, if the notice was provided within two years of the time required under the policy; or (ii) the insured, injured person or other claimant to prove that the insurer has not been prejudiced, if the notice was provided more than two years after the time required under the policy.

Moreover, pursuant to § 3420(c)(2)(B), there will be an irrebuttable presumption of prejudice "if, prior to notice, the insured's liability has been determined by a court of competent jurisdiction or by binding arbitration; or if the insured has resolved the claim or suit by settlement or other compromise." This amendment to the "no-prejudice" rule may not be applied to cases involving policies issued before January 17, 2009. In such cases, the old common law rules apply.[12]

In *Malik v. Charter Oak Fire Ins. Co.*,[13] the court held that the injured party has an independent right to give notice, which is judged by a different, less stringent, standard than notice by the insured. As the court explained, "[t]he injured person's rights must be judged by the prospects for giving notice that were afforded him, not by those available to the insured." In other words, "[t]he passage of time does not of itself make delay unreasonable." Moreover, "[i]n determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insureds."[14]

The interpretation of the phrase "as soon as practicable" continued to receive significant attention in 2009.

In *Juvenex Ltd. v. Burlington Ins. Co.*,[15] the court held that the plaintiff's delay of two months in giving notice of claim was unreasonable as a matter of law, and that notice to the plaintiff's broker did not constitute notice to the insurer. Moreover, the court held that a failure to satisfy an insurance policy's notice requirement will not vitiate coverage when there is a valid excuse for late notice.

In *Progressive Northeastern Ins. Co. v. McBride*,[16] the court held that the claimant established a reasonable excuse for his nearly one-year delay in notifying the insurer of the claim, when his counsel sent several written requests to the tortfeasor's vehicle's insurers, but in the ensuing 12 months those letters were either ignored or the insurers provided erroneous information about the SUM limits of their policies.

In *American Transit Ins. Co. v. Brown*,[17] the court also held that the injured party was reasonably excused from his late notice of the lawsuit to the tortfeasor's insurer, which was sent to an old and incorrect address of the insurer because he was never advised of the insurer's change of address. The fact that the new address was contained on a check previously sent to the claimant's counsel during the settlement of a property damage claim did not suffice to put the injured party on notice of the new address to which the notice of claim or lawsuit should be sent. The dissenting justices, however, noted that there is no obligation on the part of a liability insurer to advise of a change of address, arguing that "to put forth the lack of such notice as a valid excuse for the failure to notify the insurer of pending litigation ignores the reality that (the insurer's) address could have been verified on the internet in approximately three-tenths of a second." On April 1, 2010, the New York Court of Appeals reversed the Appellate Division, First Department holding that the defendant had "failed to provide a valid excuse for his failure to use reasonable diligence in providing Plaintiff insurer with notice of the underlying personal injury action."[18]

Discovery

Effective January 17, 2009, with respect to liability policies that afford coverage for bodily injury or wrongful death claims where the policy is a personal lines policy other than an excess or umbrella policy, § 3420(d)(1) requires that within 60 days of receipt of a written request by an injured party or other claimant who has filed a claim, an insurer must confirm in writing whether the insured had a liability insurance policy in effect with that insurer on the date of the occurrence, and specify the limits of coverage provided under that policy. If the injured person or other claimant fails to provide sufficient identifying information to allow the insurer, in the exercise of reasonable diligence, to identify a liability policy that

may be relevant to the claim, the insurer has 45 days from the initial request to ask for more information, and then another 45 days after such information is provided to furnish the requested insurance information. Pursuant to an amendment to § 2601(a) of the Insurance Law ("Unfair Claim Settlement Practices"), the failure to comply with these disclosure requirements may result in departmental sanctions, including financial penalties.

Petitions to Stay Arbitration

Filing and Service

CPLR 7503(c) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded." The 20-day time limit is jurisdictional and, absent special circumstances, courts have no jurisdiction to consider an untimely application.[19] The 20-day rule does not apply when the basis for the petition is that the parties never agreed to arbitrate.[20]

In *MetLife Auto & Home v. Zampino*,[21] the court allowed the insurer to make a second application to stay arbitration long after the 20-day period from receipt of the demand for arbitration had expired.

> Under the particular circumstances of this matter . . . where Zampino failed to disclose the fact that she reached a settlement with [one of the tortfeasors] without MetLife's knowledge or consent allegedly in violation of the SUM endorsement, where MetLife did not discover these facts until after the expiration of the 20-day period set forth in CPLR 7503(c), and where MetLife filed its petition promptly upon learning these facts, we find that MetLife's failure to file its petition within that 20-day period does not bar this proceeding.[22]

Uninsured Motorist Issues

Self-Insurance

In *Richard Denise, M.D., P.C. v. New York City Transit Authority*,[23] the court observed that, as a self-insurer, the NYCTA is subject to the provisions of the no-fault law, as well as the uninsured motorist law to the same extent as an insurer.

An Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer

A vehicle is considered "uninsured" where it was, in fact, covered by an insurance policy at the time of the accident, but the insurer subsequently disclaimed or denied coverage.

In *Felice v. Chubb & Son, Inc.*,[24] the court noted that "an insurance carrier must give timely notice of a disclaimer 'as soon as is reasonably possible' after it first learns of the accident or grounds for disclaimer of liability." In fact, the insurance carrier has the burden of explaining the delay in notifying the insured or injured party of its disclaimer. The court also explained that "the issue of whether a disclaimer was unreasonably delayed is generally a question of fact, requiring an assessment of all relevant circumstances surrounding a particular disclaimer." In fact, "[c]ases in which the reasonableness of an insurer's delay may be decided as a matter of law are exceptional and present extreme circumstances."

A notice of disclaimer must be in writing, and not oral, such as over the telephone, held the court in *Stillwater Central School District v. Great American E & S Ins. Co.*[25].

The notice of disclaimer must be sent to all of the insureds and the claimants. In *Maughn v. RLI Ins. Co.*,[26] the court held that although the disclaimer letter was sent to an address at which three distinct insureds were located, because it was actually addressed to only one of them, it was ineffective as to the other two.[27]

> An insurance carrier must give timely notice of a disclaimer as soon as is reasonably possible after it first learns of the accident or ground for disclaimer of liability.

In *J. Lucarelli & Sons, Inc. v. Mountain Valley Indemnity Co.*,[28] the court noted that § 3420(d), by its terms, is limited to disclaimers "for death or bodily injury." Therefore, it is inapplicable in an action pertaining to a breach of contract and breach of warranty pertaining to the construction of a home.

In *JT Magen v. Hartford Fire Ins. Co.*,[29] the issue was whether the prompt disclaimer requirement of § 3420(d) is triggered when an insurance carrier receives the notice of claim from another insurance carrier on behalf of a mutual insured asking that the insured be provided a defense and indemnity. The court held that the tender letter sent by Travelers on behalf of JT Magen and others to Hartford fulfilled the policy's notice of claim requirements so as to trigger the insured's obligation to issue a timely disclaimer. The court distinguished its earlier holding in *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*,[30] in which it had previously held that § 3420(d) does not apply to inter-company notices.

The court, in *Estee Lauder Inc. v. OneBeacon Ins. Group, LLC*,[31] reiterated the general rule that notice of disclaimer "must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated." The court added that while, of course, "an insurer may reserve the right to disclaim

on such different or alternative grounds as it may later find to be applicable," the insurer must give written notice of disclaimer on such other grounds as soon as is reasonably possible, that is, the reservation of rights is not a disclaimer. The court further said that, "[a]s the duties to disclaim properly and specifically are imposed by law, an insurer cannot unilaterally absolve itself of these duties." Therefore, "an insurer cannot avoid a waiver of a defense of which it has actual or constructive knowledge (i.e., avoid its duties to disclaim promptly and with specificity on the basis of that defense), by a unilateral assertion in a disclaimer notice that it is reserving or not waiving a right to disclaim on other, unstated grounds."

New York City Housing Authority v. Underwriters at Lloyd's, London[35] concerned a late notice disclaimer issued more than three months after the plaintiff sent notice of claim to the insurer, and 73 days after the plaintiff turned over the file in the underlying case to the insurer, was held to be untimely as a matter of law. There was no need for an investigation to determine grounds that were apparent, and no proof that an investigation was conducted diligently.

In *GMAC Ins. Co. v. Jones*,[36] the tortfeasor's carrier received late notice of the accident from the claimant's attorney. Six days later, the carrier sent its insured a reservation of rights letter indicating that there

The court noted that the insurer did not conduct a prompt investigation and there was no justification for waiting over seven years from the execution of the non-waiver agreement until the denial.

In *Mayer's Cider Mill, Inc. v. Preferred Mutual Ins. Co.*,[32] the 12-year-old son of the insured's employee was injured in 1999 when he placed his hand inside machinery at the insured's plant. The minor did not bring a lawsuit until March 2009 (within the extended statute of limitations for minors). The insurer never disclaimed but, instead, had the insured's secretary/treasurer sign a "Non-Waiver Agreement" in 1999, pursuant to which the insurer indicated that it would investigate the claim and reserved its right to disclaim coverage on the issue of whether the injured plaintiff was an employee of the insured. By letter dated May 31, 2007, the insurer advised the plaintiff that its investigation into the matter "was continuing," noted that the policy did not apply to employees and continued to reserve its right to deny coverage. The court found that the insurer "failed to provide the requisite written notice of disclaimer to plaintiff as soon as [was] reasonably possible." The court further noted that the insurer did not conduct a prompt investigation and there was no justification for waiting over seven years from the execution of the non-waiver agreement until the denial. Thus, again, the courts have established that a reservation of rights letter is no substitute for a disclaimer.

In *Liriano v. Eveready Ins. Co.*,[33] the court held that the disclaimer letter was proper because it "adequately recited that the defendant was disclaiming coverage as to the plaintiff on the ground that he failed to provide the defendant with timely notice of the underlying litigation and with legal papers filed in connection therewith." Moreover, in *Guzman v. Nationwide Mutual Fire Ins. Co.*,[34] the court held that a 51-day delay in disclaiming for late notice of the underlying lawsuit was unreasonable.

was a "coverage question" based on his "failure to report an accident and cooperate in the investigation." Subsequently, the insurer attempted to locate its insured to allow him to explain his failure to notify it of the claim. These efforts included mail, personal visits, telephone calls to neighbors, and letters to relatives, all of which were unsuccessful. The insurer finally disclaimed 44 days after it had received notice. In holding that this disclaimer was not untimely, the court noted that "an insurer's delay in notifying the insured of a disclaimer may be excused when the insurer conducts an investigation into issues affecting [its] decision whether to disclaim coverage." When the insurer does conduct an investigation, "the burden is on the insurer to demonstrate that its delay was reasonably related to its completion of a thorough and diligent investigation." In *Jones*, the court concluded that the insurer's efforts constituted an "investigation into issues affecting [its] decision whether to disclaim coverage" and, therefore, the insurer established a reasonable excuse for the delay as a matter of law.

On the other hand, in *Crocodile Bar, Inc. v. Dryden Mutual Ins. Co.*,[37] in which the record established that the insurer's claims adjuster was aware when he received the claim that it was excluded from coverage, the same court held that the insurer failed to establish that its 62-day delay was reasonably related to the completion of a necessary, thorough and diligent investigation. Thus, the disclaimer was untimely.

In *Roules v. State Farm Ins. Cos.*,[38] the court held that a notice of disclaimer sent 13 days after the carrier first received notice of the accident was timely as a matter of law.[39] Moreover, in *Progressive Ins. Co. v. Dillon*,[40] the court noted that the insurer's failure to timely issue a

disclaimer or denial does not create coverage where none existed.

Non-cooperation

It is well-established that an insurance carrier that seeks to disclaim coverage on the ground of lack of cooperation must meet the "heavy burden" of demonstrating that it complied with the three-pronged test set forth by the New York Court of Appeals in *Thrasher v. United States Liability Ins. Co.*[41]

In *State Farm Indemnity Co. v. Moore*,[42] the court upheld the respondent insurer's disclaimer based upon the ground of non-cooperation by its insured, by demonstrating that (1) it acted diligently in seeking to bring about its insured's cooperation, (2) its efforts were reasonably calculated to obtain its insured's cooperation, and (3) the attitude of its insured, after the cooperation of its insured was sought, was one of "willful and avowed obstruction." As to the third prong, the court noted that, "[a]lthough it is not required of the insurer to show that the insured openly avowed an intent to obstruct the investigation of the claim, the facts must support an inference that the failure to cooperate was deliberate." In *Moore*, the respondent insurer demonstrated that it promptly commenced a detailed investigation and diligently followed up on it. In addition to numerous telephone calls made to the number the insured provided in the insurance policy, letters via certified or registered mail were sent to the address provided by the insured, of which the insured signed for one. Further, visits were made to the insured's address, and his mother maintained that she did not know his whereabouts. Under these facts and circumstances, the court concluded, these unsuccessful efforts were reasonably calculated to obtain the insured's cooperation, and the inference that the insured deliberately chose not to cooperate was compelling.[43]

Cancellation of Coverage

One category of an "uninsured" motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident. Generally speaking, in order to effectively cancel an owner's policy of liability insurance, an insurer must strictly comply with the detailed and complex statutes, rules, and regulations governing notices of cancellation and termination of insurance. These differ depending upon whether, for example, the vehicle at issue is a livery or private passenger vehicle and whether the policy was written under the "Assigned Risk Plan," and / or was paid for under a premium financing contract.

In *2-10 Jerusalem Avenue Realty v. Utica First Ins. Co.*,[44] the owner's tenant met with its insurer's agent on February 24, 2006, during the workday, and signed a writing requesting retroactive cancellation under a (non-auto) liability policy as of 12:01 a.m. on February 24, 2006. Unbeknownst to the tenant or the agent, an accident had occurred on February 24, 2006, some time after 12:01 a.m., but before the request for cancellation. The owner, apparently an additional insured under the policy, argued that since the policy permits cancellation only as of a "future date" specified in a written notice, and the written notice here did not specify a date in the future, the cancellation could not have been effective, under the "midnight rule" set forth in *Savino v. Merchants Mutual Ins. Co.*,[45] until at least the day after the accident. As the court stated, "[a]ny policy limitation on retroactive cancellation would be for the sole benefit of the insurer – protecting it against an insured who waits until the end of the policy period, sends a retroactive cancellation to avoid paying for the policy – and thus could be waived by the insurer." Thus, the court held that the policy was canceled effective February 24, 2006, at 12:01 a.m., as the tenant requested, and, therefore, was not in effect at the time of the accident.

Hit-and-Run

One of the requirements for a valid uninsured motorist claim based upon a hit-and-run is "physical contact" between an unidentified vehicle and the person or motor vehicle of the claimant. Generally, the "insured has the burden of establishing that the loss sustained was caused by an uninsured vehicle, namely that physical contact occurred, the identity of the owner and operator of the offending vehicle could not be ascertained, and the insured's efforts to ascertain such identity were reasonable."[46] Where an accident involves an identifiable driver, "the issue of whether there was actual physical contact is irrelevant."[47]

In *New York Central Mutual Fire Ins. Co. v. Vento*,[48] the court noted that "[w]hen there is an issue of fact as to whether physical contact occurred, a hearing on the issue must be conducted." Where the record supports the determination that there was physical contact between the vehicle of the insured and an unidentified vehicle, it will not be disturbed on appeal.[49]

In *Gurvich v. MVAIC*,[50] the court observed that "the courts have consistently afforded a very liberal interpretation to the [requirement of notice to the police within 24 hours of the occurrence], accepting police contacts that fall far short of the operator's obtaining a written report."

Stolen Vehicle

Automobile liability policies generally exclude coverage for damage caused by drivers of stolen vehicles, drivers operating without the permission or consent of the owner, or drivers operating a vehicle outside the scope of the permission given. In such situations, the vehicles at issue are considered "uninsured" and the injured claimant will be entitled to present an uninsured motorist claim.

In *Amex Assurance Co. v. Kulka*,[51] the court noted that "Vehicle and Traffic Law § 388 creates a strong presumption of permissive use which can only be rebutted with substantial evidence sufficient to show that the driver of the vehicle was not operating the vehicle with the owner's express or implied permission." However, the vehicle owner's uncontested testimony that the vehicle was operated without his or her permission will not, "by itself, overcome the presumption of permissive use."

A vehicle owner may be held liable, however, even where the vehicle is stolen if the owner violated Vehicle & Traffic Law § 1210(a) by permitting the vehicle to stand unattended without first stopping the engine, locking the ignition, removing the key, and setting the brake.[52]

In *Baldwin v. Garage Management Corp.*,[53] the defendant's garage attendant erroneously gave the car keys to an individual who falsely claimed to be the owner of the car parked in the garage. The individual then stole the car and 12 hours later was involved in a head-on collision with the plaintiffs. The court affirmed the grant of summary judgment in favor of the defendant garage owner on the ground that Vehicle & Traffic Law § 1210(a) did not apply because the vehicle was not stolen from a "parking lot" as defined by Vehicle & Traffic Law § 129-b. The basis for that determination was that the subject garage was not "provided *in connection with* premises having one or more stores or business establishments, and *used by the public as a means of access to and egress from* such stores and business establishments." In addition, the court held that the vehicle was not left to "stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle, and effectively setting the brake so as to constitute a violation of § 1210(a)." The court also dismissed the plaintiffs' common law negligence claim since "in the absence of an applicable statute, [a defendant cannot] be held liable for damages caused by [a thief] in the operation of [a plaintiff's] vehicle."

A vehicle owner may be held liable even where the vehicle is stolen if the owner violated Vehicle & Traffic Law § 1210(a).

Underinsured Motorist Issues

Triggering Coverage

In *Clarendon National Ins. Co. v. Nunez*,[54] the tortfeasor's insurer paid out the sums of $5,000 to one claimant and $15,000 each to three other claimants, which totaled the full $50,000 limits of coverage for the tortfeasor. The Appellate Division, Second Department rejected the underinsured motorist claims of each of the claimants under a 25/50 UM/SUM policy, noting that "[s]ince the tortfeasor's policy limits for bodily injury liability were identical to the petitioner's policy for bodily injury liability, the tortfeasor's vehicle was not underinsured." The Appellate Division added that "[c]ontrary to the respondent's contention, 11 NYCRR 60-2.3(f)(c)(3)(ii) does not render the tortfeasor's vehicle underinsured for purposes of triggering the SUM endorsement because of the payments the tortfeasor's insurer already made to them." The Appellate Division determined that the section of the Regulation 35-D SUM endorsement that defines an "uninsured motor vehicle" as one for which "there is a bodily injury liability insurance coverage or

bond applicable to such motor vehicle at the time of the accident, but . . . the amount of such insurance coverage or bond has been reduced by payments to other persons injured in the accident, to an amount less than the third-party bodily injury liability limit of this policy," requires such reduction for payments made "to other persons" and not payments made to the claimants.[55]

The Court of Appeals affirmed the Appellate Division's decision that the SUM was not triggered under the circumstances. The majority quoted the pertinent provision from the underinsured motorist statute, which it found provided that "SUM coverage is only triggered where the bodily injury liability insurance limits of the policy covering the tortfeasor's vehicle are less than the third-party liability limits of the policy under which a party is seeking SUM benefits." The Court also observed that the statute "calls for a facial comparison of the policy limits without reduction from the judgment of other claims arising from the accident." In fact, the Court noted that "section 3420(f)(2) was enacted to allow policyholders to acquire the same level of protection for themselves and their passengers as they purchased to protect themselves against liability to others."

While recognizing the power and authority of the New York State Superintendent of Insurance "to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation" and not "counter to the clear wording of a statutory provision," the majority interpreted the regulation in a manner that it believed was consistent with the statute. Thus, the majority concluded that "the 'payments to other persons' that may be deducted from the tortfeasor's coverage limits for purposes of rendering the tortfeasor 'uninsured' under a SUM endorsement do not encompass payments made to anyone who is an insured under the endorsement." As the majority further explained, "[a]s each claimant here falls within the endorsement's definition of an 'insured,' which encompasses all passengers in the covered vehicle, claimants are not 'other person[s].'" As a result, an insured is able to reduce the coverage limits of the tortfeasor's policy only when payments made under the tortfeasor's policy are to individuals, such as occupants of the tortfeasor's vehicle, injured pedestrians, or those operating a third vehicle, who are not covered under the SUM endorsement. The Court recognized that "[t]his guarantees that those who have purchased SUM coverage will receive the same recovery they have made available to third parties they injured – but no more." To allow the claimants in these cases to obtain additional coverage – up to an additional $50,000 in SUM benefits – after they received a total of $50,000 from the tortfeasor (for a total of $100,000) would be to provide an insured with more coverage than that provided to an injured third party under his or her policy ($50,000); a result that, in the majority's view, was not intended and should not be allowed.

Offset Provision

In *Clarendon National Ins. Co. v. Nunez*,[56] the Second Department held that the SUM carrier was entitled to offset the full $50,000 received by the respondents from the tortfeasor's insurer against the SUM limits of its policy, effectively allowing for an offset for payments made to the "insured<u>s</u>" (plural) despite the fact that the endorsement provision refers to the "insured" (singular), and precluding any recovery by any of the respondents under the $50,000 SUM policy. In affirming the decisions in both of those cases (based upon the "trigger" issue), the New York Court of Appeals did not address the offset issue at all.

Settlement Without Consent

In *In re Central Mutual Ins. Co. (Bemiss)*,[57] the respondent was injured in a multiple vehicle accident and negotiated a settlement with one of the tortfeasors for the full amount of that party's liability insurance policy. She then gave written notice to her SUM carrier of her intent to enter into this settlement, but the carrier did not respond to her request for permission to settle. Subsequently, she agreed to settle with a second tortfeasor for less than that party's liability limits without first giving any notice to, or obtaining the consent of, the SUM carrier. The respondent ultimately signed releases for both tortfeasors, which made no provision for protecting the SUM carrier's subrogation rights. When the respondent then made a claim for SUM benefits, the SUM carrier denied coverage based upon the failure to protect its subrogation rights. When the respondent demanded arbitration, the carrier moved for a permanent stay, which the trial court granted.

On appeal, the Appellate Division, Third Department agreed with the respondent that the settlement with the first tortfeasor was proper insofar as "the terms of the policy permitted her to settle with the first tortfeasor without preserving [the SUM carrier's] subrogation rights." Under Condition 10 of the SUM endorsement, since a request for consent to settle was made, and 30 days passed without a response, the insured was permitted to issue a release.

The Appellate Division reached a different conclusion, however, regarding the settlement with the second tortfeasor, concluding that such settlement, even for an amount less than the policy limits, destroyed the insurer's subrogation rights against that tortfeasor. Thus, the Appellate Division affirmed the grant of the petition on the basis of the respondent's failure to comply with the terms of her policy.

The Court of Appeals unanimously affirmed, rejecting the respondent's argument that once she settled with the

first tortfeasor for his full policy limits after notifying the SUM carrier of her intent to do so, she was not required to also notify the carrier in advance of her intent to settle with the second tortfeasor or to preserve the SUM carrier's subrogation rights as to him because she was not required to exhaust his liability limits prior to proceeding with her SUM claim.

Carefully examining the language and structure of Condition 10 ("Release or Advance"), the Court held that while the respondent contended that "any negligent party" referred only to the first tortfeasor whose policy was exhausted so as to make SUM benefits payable, "this is not readily apparent from the words used or the regulatory history." As the Court explained, "in short, Condition 10 delineates the *sole* situation in which an insured may settle with any tortfeasor in exchange for a general release, thus prejudicing the insurer's subrogation rights without the carrier's written consent."

In *Government Employees Ins. Co. v. Hengber*,[58] the court held that the insurer was not prejudiced by the respondent's failure to obtain its written consent to settle his personal injury action against the tortfeasor, who was insured by the same insurer as the claimant. "The settlement did not impair GEICO's subrogation rights against [the tortfeasor]," the court stated, "because an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered." ■

1. 65 A.D.3d 1216, 886 N.Y.S.2d 432 (2d Dep't 2009).

2. 65 A.D.3d 931, 885 N.Y.S.2d 285 (1st Dep't 2009). The court's decision setting the matter down for a framed issue hearing was reported on in last year's article. *See Continental Cas. Co. v. Lecei*, 47 A.D.3d 509, 850 N.Y.S.2d 76 (2d Dep't 2008).

3. 61 A.D.3d 970, 877 N.Y.S.2d 450 (2d Dep't 2009).

4. 63 A.D.3d 732, 880 N.Y.S.2d 164 (2d Dep't 2009).

5. *See also DeFalco*, 61 A.D.3d 970 (framed issue hearing required to determine whether collision was result of intentional act).

6. *See N.Y. Cent. Mut. Fire Ins. Co. v. Vento*, 63 A.D.3d 841, 882 N.Y.S.2d 126 (2d Dep't 2009); *Travelers Ins. Co. v. Cohen*, 61 A.D.3d 768, 877 N.Y.S.2d 189 (2d Dep't 2009).

7. 68 A.D.3d 772, 890 N.Y.S.2d 589 (2d Dep't 2009).

8. *See also Progressive Ne. Ins. Co. v. McBride*, 65 A.D.3d 632, 884 N.Y.S.2d 167 (2d Dep't 2009).

9. 61 A.D.3d 1406, 877 N.Y.S.2d 562 (4th Dep't 2009).

10. *See also Vento*, 63 A.D.3d 841; *In re Liberty Mut. Ins. Co. (Frenkel)*, 58 A.D.3d 1089, 872 N.Y.S.2d 590 (3d Dep't 2009); *cf.*, *Cohen*, 61 A.D.3d 768 (no requirement to demonstrate prejudice for untimely notice of an SUM claim where no prior notice of the accident received).

11. 68 A.D.3d 618, 892 N.Y.S.2d 78 (1st Dep't 2009).

12. *See Bd. of Managers of 1235 Park Condo. v. Clermont Specialty Managers, Ltd.*, 68 A.D.3d 496, 891 N.Y.S.2d 340 (1st Dep't 2009); *Sevenson Envt'l Servs., Inc. v. Sirius Am. Ins. Co.*, 64 A.D.3d 1234, 883 N.Y.S.2d 423 (4th Dep't 2009).

13. 60 A.D.3d 1013, 877 N.Y.S.2d 114 (2d Dep't 2009).

14. *See also Sputnik Rest. Corp. v. United Nat'l Ins. Co.*, 62 A.D.3d 689, 878 N.Y.S.2d 428 (2d Dep't 2009) (injured party "is not charged vicariously with an insured's delay").

15. 63 A.D.3d 554, 882 N.Y.S.2d 47 (1st Dep't 2009).

16. 65 A.D.3d 632, 884 N.Y.S.2d 167 (2d Dep't 2009).

17. 66 A.D.3d 447, 886 N.Y.S.2d 399 (1st Dep't 2009).

18. 14 N.Y.3d 809, 899 N.Y.S.2d 751 (2010).

19. *See State Farm Mut. Auto. Ins. Co. v. Waite*, 68 A.D.3d 1006, 889 N.Y.S.2d 866 (2d Dep't 2009); *Liberty Mut. Ins. Co. v. Zacharoudis*, 65 A.D.3d 1353, 885 N.Y.S.2d 610 (2d Dep't 2009) (notice of intention to arbitrate); *Liberty Mut. Ins. Co. v. Argueta*, 59 A.D.3d 446, 872 N.Y.S.2d 521 (2d Dep't 2009). *See also Hermitage Ins. Co. v. Escobar*, 61 A.D.3d 869, 877 N.Y.S.2d 413 (2d Dep't 2009).

20. *See In re Matarasso (Cont'l Cas. Co.)*, 56 N.Y.2d 264, 451 N.Y.S.2d 703 (1982); *Argueta*, 59 A.D.3d 446.

21. 18 Misc. 3d 1123(A), 856 N.Y.S.2d 499 (Sup. Ct., Nassau Co. 2008), *appeal dismissed*, 65 A.D.3d 1150, 885 N.Y.S.2d 227 (2d Dep't 2009).

22. *MetLife Auto & Home v. Zampino*, 65 A.D.3d 1151, 1152, 886 N.Y.S.2d 697 (2d Dep't 2009).

23. 25 Misc. 3d 13, 887 N.Y.S.2d 742 (App. Term, 1st Dep't 2009).

24. 67 A.D.3d 861, 888 N.Y.S.2d 437 (2d Dep't 2009).

25. 66 A.D.3d 1260, 887 N.Y.S.2d 719 (3d Dep't 2009).

26. 68 A.D.3d 1067, 892 N.Y.S.2d 172 (2d Dep't 2009).

27. *See also J.T. Magen v. Hartford Fire Ins. Co.*, 64 A.D.3d 266, 879 N.Y.S.2d 100 (1st Dep't 2009); *Guzman v. Nationwide Mut. Fire Ins. Co.*, 62 A.D.3d 946, 880 N.Y.S.2d 302 (2d Dep't 2009); *Mayer's Cider Mill, Inc. v. Preferred Mut. Ins. Co.*, 63 A.D.3d 1522, 879 N.Y.S.2d 858 (4th Dep't 2009).

28. 64 A.D.3d 856, 881 N.Y.S.2d 708 (3d Dep't 2009).

29. 64 A.D.3d 266, 879 N.Y.S.2d 100 (1st Dep't 2009).

30. 27 A.D.3d 84, 806 N.Y.S.2d 53 (1st Dep't 2005).

31. 62 A.D.3d 33, 873 N.Y.S.2d 592 (1st Dep't 2009).

32. 63 A.D.3d 1522, 879 N.Y.S.2d 858 (4th Dep't 2009).

33. 65 A.D.3d 524, 884 N.Y.S.2d 248 (2d Dep't 2009).

34. 62 A.D.3d 946, 880 N.Y.S.2d 302 (2d Dep't 2009).

35. 61 A.D.3d 726, 877 N.Y.S.2d 193 (2d Dep't 2009).

36. 61 A.D.3d 1358, 877 N.Y.S.2d 572 (4th Dep't 2009).

37. 61 A.D.3d 1361, 877 N.Y.S.2d 778 (4th Dep't 2009).

38. 59 A.D.3d 514, 873 N.Y.S.2d 183 (2d Dep't 2009).

39. *See also Key Bank U.S.A., N.A. v. Interboro Ins. Co.*, 65 A.D.3d 521, 884 N.Y.S.2d 246 (2d Dep't 2009) (13-day delay timely).

40. 68 A.D.3d 448, 889 N.Y.S.2d 583 (1st Dep't 2009).

41. 19 N.Y.2d 159, 278 N.Y.S.2d 793 (1967).

42. 58 A.D.3d 429, 872 N.Y.S.2d 82 (1st Dep't 2009).

43. *See also State-Wide Ins. Co. v. Luna*, 68 A.D.3d 882, 889 N.Y.S.2d 488 (2d Dep't 2009) (noncooperation disclaimer upheld).

44. 62 A.D.3d 481, 878 N.Y.S.2d 358 (1st Dep't 2009).

45. 44 N.Y.2d 625, 407 N.Y.S.2d 468 (1998).

46. *See N.Y. Cent. Mut. Fire Ins. Co. v. Vento*, 63 A.D.3d 841, 882 N.Y.S.2d 126 (2d Dep't 2009); *Travelers Indem. Co. v. Panther*, 61 A.D.3d 984, 878 N.Y.S.2d 174 (2d Dep't 2009).

47. *Panther*, 61 A.D.3d 984.

48. 63 A.D.3d 841.

49. *See Progressive Ne. Ins. Co. v. Harding*, 63 A.D.3d 947, 880 N.Y.S.2d 536 (2d Dep't 2009).

50. 66 A.D.3d 677, 885 N.Y.S.2d 770 (2d Dep't 2009).

51. 67 A.D.3d 614, 888 N.Y.S.2d 577 (2d Dep't 2009).

52. *See* Norman H. Dachs & Jonathan A. Dachs, *Stolen Vehicles and the Key in the Ignition Law*, N.Y.L.J., July 16, 1998, p. 3, col. 1.

53. 62 A.D.3d 818, 880 N.Y.S.2d 298 (2d Dep't 2009).

54. 48 A.D.3d 460, 850 N.Y.S.2d 639 (2d Dep't 2008), *aff'd sub nom. Allstate Ins. Co. v. Rivera*, 12 N.Y.3d 602, 883 N.Y.S.2d 755 (2009).

55. *See also, to same effect, Allstate Ins. Co. v. Rivera*, 50 A.D.3d 680, 855 N.Y.S.2d 217 (2d Dep't 2008), *aff'd*, 12 N.Y.3d 602, 883 N.Y.S.2d 755 (2009).

56. 48 A.D.3d 460; *Rivera*, 50 A.D.3d 680.

57. 54 A.D.3d 499, 862 N.Y.S.2d 654 (3d Dep't 2008), *aff'd*, 12 N.Y.3d 648, 884 N.Y.S.2d 222 (2009).

58. 66 A.D.3d 1020, 887 N.Y.S.2d 683 (2d Dep't 2009).

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Origin of the Sheriff-Friendly Clauses of CPLR 208 and 215

By Daniel Kelman

Modern-day readers of CPLR 215 and 208 might wonder why those sections grant such favorable terms to sheriffs; CPLR 215(2) sets a one-year statute of limitations on actions against sheriffs for escape and CPLR 208 exempts CPLR 215(2)'s one-year limitations period from tolling due to infancy or insanity. Confusion arises because modern-day readers of the CPLR are likely unfamiliar with the civil arrest provisions of repealed Article 61. New York common law[1] held sheriffs liable for prisoners kept in their custody, and actions against sheriffs for escape arose when a sheriff took custody of a judgment debtor who subsequently escaped or was released due to mistake or collusion. In 1848, when the language at issue in CPLR 208 and 215 was first codified, civil arrest was available as a tool to enforce judgments.[2] It is thus not surprising that victims of absconded debtors would often seek to collect from sheriffs by accusing them of incompetently monitoring their prisoners and / or taking bribes from imprisoned debtors.[3] It follows that these sheriff-friendly provisions in CPLR 215 and 208 were either the product of a vigorous public policy debate among the 1848 Code of Civil Procedure's (CCP) drafters or a lobbying effort on behalf of sheriffs; as will be discussed, evidence points to the latter.

Origin and Repeal of Civil Arrest

While actions against sheriffs for escape may still be brought under current N.Y. Correction Law § 514,[4] such actions have not been brought in decades. This is because CPLR Article 61, which permitted civil arrest, was repealed in 1978.[5] Therefore, because there are no longer imprisoned judgment debtors escaping, actions against sheriffs for such escapes do not occur.

Article 61's demise was the culmination of a gradual repeal of three common law writs widely used in medieval England and assimilated into New York's common law:[6] (1) *capias ad respondendum*, permitting imprisonment pre-judgment to ensure a debtor's presence at trial;[7] (2) *capias ad satisfaciendum*, permitting imprisonment post-judgment in lieu of payment;[8] and (3) *ne exeat rego*, permitting arrest for contempt of court in equitable actions to enforce mandatory injunctions.[9]

New York's first civil arrest legislation came in 1789, when the state enacted a complex procedure for release

of imprisoned debtors, which was later amended by the "Fourteen Days Act of 1813" – so called because it required 14 days' notice to creditors.[10] In 1831, New York took the bold step of becoming one of the first states to outlaw civil imprisonment of debtors.[11] Nevertheless, imprisonment of debtors accused of a fraudulent transfer, especially pre-judgment, remained permissible and was a contentious issue among New York jurists; notably, in 1905, Charles Evans Hughes published an influential article denouncing civil arrest as "a constant menace to the innocent" and a "means of private vengeance."[12] By 1920 – when the CCP was overhauled and replaced by the Civil Practice Act (CPA)[13] – codified versions of the three common law writs remained on the books,[14] though *ne exeat rego* was available only in limited form.[15]

Calls to repeal civil arrest continued. In 1946, the Judicial Council of the State of New York recommended abolition of civil arrest, but only two years later reversed its opinion and tabled the matter.[16] By 1959, the Legislature had appointed an Advisory Committee to recommend changes to the CPA, and the Committee on Law Reform of the Association of the Bar of the City of New York recommended repeal of the codified versions of the *capias* writs (permitting pre-judgment and post-judgment body executions). But the Committee's recommendations were not heeded, and the *capias* writs were encoded in Article 61 of the newly enacted CPLR of 1962.

In encoding the *capias* writs into CPLR Article 61, however, language was used that would lead to its eventual demise. Article 61's drafters sought to ease the burden of civil arrest on single parents and expressly exempted women from CPLR 6103's arrest provision. Ironically, as the women's rights movement expanded constitutional protections to *women* during the 1970s, CPLR 6103 was challenged and held unconstitutional under the Fourteenth Amendment's Equal Protection Clause because it discriminated against *men* on the basis of sex[17] – the Legislature could easily have drafted CPLR 6103 to exempt single parents without discussing sex. With the debate about the propriety of civil arrest reignited, the Legislature swiftly amended Article 61 to correct its constitutional defect.[18] Unfortunately for Article 61, due process had undergone a drastic change during the 1960s and 1970s, and as a result, pre-judgment seizures of property raised novel constitutional issues that were not part of American jurisprudence circa 1962. These concerns were not lost on the CPLR Revision Committee, which recommended repeal of Article 61; the Legislature did so in 1979.[19]

Interestingly, post-judgment body executions, codified at CPLR 5250, were not repealed. While the statute permits civil arrest to this day, it is undisputedly the least utilized tool to enforce money judgments in the CPLR.[20] This is because it permits civil arrest only under the narrow and difficult-to-prove circumstance where a solvent judgment-debtor is about to flee the state.[21] Moreover, although debtors today face imprisonment under Family Court Act § 454 and related Domestic Relations Law provisions for willfully failing to pay court-ordered child support or alimony, such actions technically impose imprisonment for the debtor's contempt of court – a remnant of the *ne exeat rego* writ.

The First Sheriff-Friendly Clauses

Today in 2010, only remnants of two of the three common law writs permitting civil arrest remain on the books. With *capias ad respondendum* repealed (the pre-judgment arrests from Article 61), only the *capias ad satisfaciendum* provisions of CPLR 5250 and the *ne exeat rego* provisions of the Family Court Act and Domestic Relations Law remain. What is more, these remedies are infrequently invoked and are no longer an important part of New York's jurisprudence.

But back when the CCP was adopted in 1848,[22] civil arrest was a popular remedy. CCP § 585[23] contained CPLR 208's precursor:

> If a person, entitled to bring an action mentioned in the last chapter [discussing statutes of limitation], *except for a penalty or forfeiture, or against a sheriff or other officer for an escape,* be at the time the cause of action accrued, either:
>
> 1. Within the age of twenty-one years; or
>
> 2. Insane; or
>
> 3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life; or
>
> 4. A married woman;
>
> The time of such disability is not a part of the time limited for the commencement of the action, except that the period, within which the action must be brought, cannot be extended more than five years, by any such disability, except infancy, nor can it be so extended in any case longer than one year after the disability ceases. (emphasis added)

Today, despite numerous recodifications and piecemeal amendments, CPLR 208 ends with the same language: "This section shall not apply to an action to recover *a penalty or forfeiture, or against a sheriff or other officer for an escape*" (emphasis added).

Likewise, the one-year statute of limitations for actions against sheriffs for escape in CPLR 215(2) was first codified in 1849 as CCP § 577(1),[24] which read:

> Within one year:
>
> An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

A comparison of the relevant portion of CPLR 215(2) reveals the similarities:

> The following shall be commenced within one year:
>
> An action against an officer for the escape of a prisoner arrested or imprisoned by virtue of civil mandate.

As to the reason why these provisions were included in the 1849 CCP, it appears they were either the product of a lobbying effort on behalf of sheriffs or an oversight by the CCP's drafter, David Dudley Field.[25] The lobbying effort hypothesis is supported both by statutory construction and Field's reputation as an expert draftsman. While CCP § 575(1)[26] provided for a three-year statute of limitations for "[an] action against a sheriff, coroner or constable incurred by the doing of an act in his official capacity . . . [but not] to an action for an escape," § 577 provided for a one-year statute of limitations against only a "sheriff or other officer, for the escape of a prisoner." Because the canon *expresio unius est exclusio alterius*[27] would require one to conclude that the Legislature intended two different results by excluding coroners and constables from § 577's one-year limitations period – especially because they are part of the same act – a court might have found that actions against constables for escape were still governed by the common law and did not fall under § 577's catchall of "other officer." Moreover, one would think that Field – the "Father of the Antebellum Codification Movement" who devoted his life to codification – would not have made such a glaring mistake.[28] Therefore, perhaps the sheriff's lobby was permitted to draft § 576, or perhaps Field made an oversight when drafting these sections; the truth, however, we may never know. ■

1. Actions could be brought by either statute or common law, see *Rawson v. Dole*, 2 Johns 454 (N.Y. Sup. 1807) ("The common law remedy to proceed against a sheriff for an escape, by action on the case, has been holden not to be taken away by the statute, enabling the party, in whose favor an execution issues against the body of his debtor, upon his escape to maintain an action for the debt and damages for which he was committed"), but actions at common law were preferable because they permitted interest. *Thomas v. Weed*, 14 Johns 255 (N.Y. Sup. 1817) ("If the plaintiff below had pursued his common law remedy, by a special action on the case, for negligence, or by an action, for money had and received, he would have been entitled to interest on the sum proved to have been received by the constable, or actually lost by his negligence. If the creditor, as in this case, chooses to avail himself of the statute remedy, so as to relieve himself from the necessity of proving actual loss, he must be satisfied with 'the amount of the execution'").

2. *See supra* note 1.

3. These forms of escape are referred to as "negligent" (incompetent monitoring) and "voluntary" (bribed) escape. Because plaintiffs bringing actions against sheriffs for escape were entitled to recover from the sheriff an amount equivalent to the damage caused by the escape, a question of fact was often raised as to whether the debtor was solvent at the time of arrest. While such was the rule regardless whether "voluntary" or "negligent" escape was alleged, plaintiffs alleging "voluntary" escape could conveniently explain why the debtor was insolvent (in exchange for release, the debtor paid the sheriff a lesser sum than was owed). Accordingly, the burden was on plaintiff to show the debtor was solvent at the time of arrest. *See Patterson v. Westervelt*, 17 Wend. 543 (N.Y. Sup. Ct. 1837) (citing *Tempest v. Liney*, Clay. 34 (1633) (Clayton is, I believe, the first systematic nisi prius reporter.)). By 1864, however, the rule had changed: "voluntary" escapes rendered a sheriff liable for the entire amount owed by the debtor, regardless of the debtor's solvency at the time of arrest. *Metcalf v. Stryker*, 4 Tiffany 255, 31 N.Y. 255 (1864).

4. Actions against sheriffs for escape was first codified in 1849 as CCP § 453. *See* 1849 N.Y. Laws ch. 438.

5. 1978 N.Y. Laws ch. 534.

6. For an excellent discussion on the history of civil arrest in New York, see Eugene J. Morris & Hilton M. Weiner, *Civil Arrest: A Medieval Anachronism*, 43 Brook L. Rev. 383 (1976–77).

7. *Id.* at 383.

8. *Id.* at 383.

9. *Id.* at 387.

10. Howard C. Buschman & Arnold L. Mayersohn, *Civil Arrest and Execution Against the Person*, 12 Alb. L. Rev. 17 (1948).

11. The Stillwell Act, 1831 N.Y. Laws ch. 300; *see also Arrest and Imprisonment in Civil Actions in New York*, 26 N.Y.U. L. Rev. 172 (1951).

12. Charles Evans Hughes, *Arrest and Imprisonment on Civil Process*, 28 Rep. N.Y. State Bar Ass'n 151, 179 (2005); *see also* Morris & Weiner, *supra* note 6, p. 391, n.39 *et seq.*

13. 1920 N.Y. Laws ch. 925.

14. *See* CPA §§ 764, 826, 827.

15. CPA § 826 codified *ne exeat rego*. Unlike §§ 764 and 827, § 826's "availability depended upon external factors, rather than the nature of the cause of action." *See* Morris & Weiner, *supra* note 6, at p. 357.

16. Buschman & Mayersohn, *supra* note 10, at p. 17.

17. *Repeti v. Gil*, 83 Misc.2d 75, 372 N.Y.S.2d. 840 (Sup. Ct., Nassau Co. 1975).

18. After *Repeti*, Article 61 was amended twice, first in 1976 (1976 N.Y. Laws ch. 129), and next in 1978 (1978 N.Y. Laws ch. 534).

19. 1979 N.Y. Laws ch. 409.

20. "This provision has no rival as the least important of the enforcement devices." Siegel, McKinney's 1997 Practice Commentaries CPLR § 5250 (McKinney's 2010).

21. "The arrest it permits is allowed only on the narrow basis recited, it has little case law to speak of, and it gives promise of continuing to impose minimally on the attention of bench and bar." *Id.*

22. The CCP was actually adopted in two Acts during 1848 (1848 N.Y. Laws ch. 379) and 1849 (1849 N.Y. Laws ch. 438). A third act in 1849 (1849 N.Y. Laws ch. 439) adopted a table of contents to the CCP and provisions dealing with suits commenced prior to the CCP's enactment.

23. CCP § 585 was adopted in 1849 N.Y. Laws ch. 438.

24. 1849 N.Y. Laws ch. 438.

25. The 1848 Code of Procedure is commonly referred to as the "Field Code," as a tribute to its author.

26. *See* McKinney's Statutes § 240.

> Expression of one thing as excluding others
>
> The maxim ***expressio unius est exclusio alterius*** is applied in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.

27. Section 575(1) of the 1850 Field Code:

> An action against a sheriff, coroner or constable upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty; including the failure to pay money collected upon an execution; but this section does not apply to an action for an escape.

28. McKinney's Practice Commentaries for CPLR 215 merely states that the reason for this discrepancy is unknown.

BY ELLIOTT WILCOX

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Handling the Question & Answer Session

As the applause dies down, the emcee addresses you and says, "Thank you for speaking with us today – we really enjoyed it and received a lot of valuable information." Without warning, she turns to the audience and asks, "Does anyone have any questions for our speaker?" *Urp*. You didn't know they'd have a Q&A session after your presentation. What do you do?

If you're speaking to promote your firm or legal expertise, you will have to deal with question and answer sessions. Handle them well, and you'll appear to be the expert you say you are. Handle them poorly, and your expertise becomes suspect. Here are some tips for ensuring the success of a Q&A session.

Tell them in advance. If no one asks any questions, the Q&A session feels awkward for both the speaker and the audience. Usually, the audience didn't think of any questions because they didn't know they'd get the chance to ask them. You can fix this by telling them about the Q&A session at the beginning of your speech ("I'm sure some of you will have some questions about this subject. Please hold them until the Question and Answer session after my presentation, and I'll be happy to answer them then.") Alternative, ask your introducer to tell the audience about the Q&A session. ("After Shannon finishes speaking, she'll be happy to answer your questions.")

Prepare sample questions to prime the pump. Sometimes, even when you've notified them about the Q&A session, they're so stunned by your presentation that they forget to ask any questions. When that happens, kick start the Q&A session with some sample questions. ("When I've presented this information before, someone in the audience usually asks, 'But does that tax provision also apply to LLC's?' It does, and here's why . . .") No one wants to be the first to ask a question. Jump start the process, and they'll be more willing to ask questions.

Be prepared. Great! They're asking questions, just like you'd hoped. Now comes the hard part – you need to answer them. This will be the smallest portion of this article, but it's the most important. Just like the Boy Scouts, you must "Be Prepared." Know your subject matter and what questions to expect from your audience. If someone asks a question that you don't know the answer to, tell them you don't know. Promise to get back to them, and keep your word.

Repeat the question. If you speak to large groups, use a microphone, or record presentations for later broadcast, you should repeat the audience's questions. This helps everyone hear the question, and buys you a few additional seconds to compose your response.

Don't let one person dominate the Q&A. Remember the guy in law school who always dominated the classroom conversation? The class didn't like him then, and your audience doesn't like him now, either. How do you prevent one person from controlling the Q&A session? Offer to answer their questions after the presentation. Take only one or two questions from each person, to give everyone an opportunity to ask questions. Stop calling on that person.

You can even ask the emcee or meeting planner if anyone will give you problems during the Q&A. ("Oh yeah – Mr. Big always likes to heckle the speakers.") If so, ask for help – tell them to tap Mr. Big on the shoulder, pretend he's got a phone call, and walk him out of the room. They want your presentation to succeed, so they're usually willing to help. Just remember – you're onstage, so you're the one in control of the room. Don't cede your control to someone in the audience. Whatever you do, do it tactfully. Don't embarrass an audience member, unless they really, really deserve it. Chances are, they don't.

Don't offer advice that applies to only one specific instance. To head this off in advance, tell them you can't answer specific scenarios, since you won't be able to give a valuable answer without knowing all the facts. As always, remind them that they would best benefit from retaining private counsel to deal with specific legal issues. If someone is obviously trying to grill you about a legal problem they have, offer to meet with them privately after the presentation. ("This would take longer to answer than we have time for. Please meet with me after the meeting, and I'll be happy to speak with you then.") If it can't be answered

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BY HAROLD ADRION, JOHN FORRY & ROBERT HARRISON

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Why the U.S. Foreign Tax Credit's Interest Allocation Rules Are Important to U.S. Businesses

The recent federal HIRE Act included, as a revenue-raising measure, the further deferral – until tax years beginning after 2020 – of previously enacted rules permitting U.S. businesses to allocate their interest expenses on a worldwide basis. While the deferral is a revenue raiser for the government, it is also a tax burden on U.S. businesses with international investments.

Worldwide Income Rules

The United States taxes its citizens and residents on their worldwide income without regard to its source. Since foreign countries may tax income derived from sources within their borders, a U.S. citizen's foreign source income could be subject to international double taxation. In order to mitigate double taxation, a U.S. citizen is allowed to credit foreign income and similar taxes paid against its U.S. tax liability. However, the foreign tax credit is subject to limitations to ensure that foreign taxes are credited against the U.S. tax imposed on foreign source income and are *not* permitted to offset U.S. tax on U.S. source income.

The Foreign Tax Credit's Interest Allocation Rules

If a U.S. business has both U.S. and foreign income-producing investments, current law requires that at least part of its total interest expense be allocated to its foreign source income on the theory that debt is fungible, that is, regardless of where funds are borrowed from, they support the borrower's worldwide investments. On the other hand, multinational businesses have argued that, if part of domestic interest is to be allocated abroad, then part of foreign interest should be allocated to U.S. source income, reducing U.S. tax.

The Current Rules

The amount of the foreign tax credit is limited to the amount of U.S. tax on foreign source income (before the credit). This is computed by multiplying the taxpayer's pre-credit U.S. tax by the ratio of its foreign source taxable income to its worldwide taxable income.

In determining taxable income from foreign sources, deductions must be allocated and apportioned between U.S. source gross income and foreign source gross income. All allocations and apportionments of interest are made on the basis of the relative value of the U.S. and foreign assets. The determination of whether an asset is characterized as a U.S. or foreign asset is dependent on whether the asset produces U.S. or foreign source income. Either tax book values or fair market values can be used to value the assets.

The allocation of interest expense of the members of an "affiliated group" takes into account the assets of its domestic members. Because foreign corporations are not treated as part of the affiliated group under § 1504 of the Internal Revenue Code, the assets of a foreign affiliate are not directly taken into account. Nevertheless, the allocation takes indirect account of the foreign affiliate's assets because the stock of the foreign affiliate itself is a foreign asset of its U.S. parent. As a result, interest expense of the members of the domestic affiliated group is applied to reduce foreign source income of the group, thus reducing the foreign tax credit limitation of the group.

On the other hand, *none* of the foreign corporation's interest expense is allocated to the assets of the U.S. parent to reduce the parent's U.S. source income. This difference results in larger U.S. source income, while foreign source income has been reduced by the allocation mentioned above, and thus the foreign tax credit limitation is reduced. Creditable foreign taxes in

excess of this reduced limitation cannot be claimed as foreign tax credits in the current year.[1]

Example 1

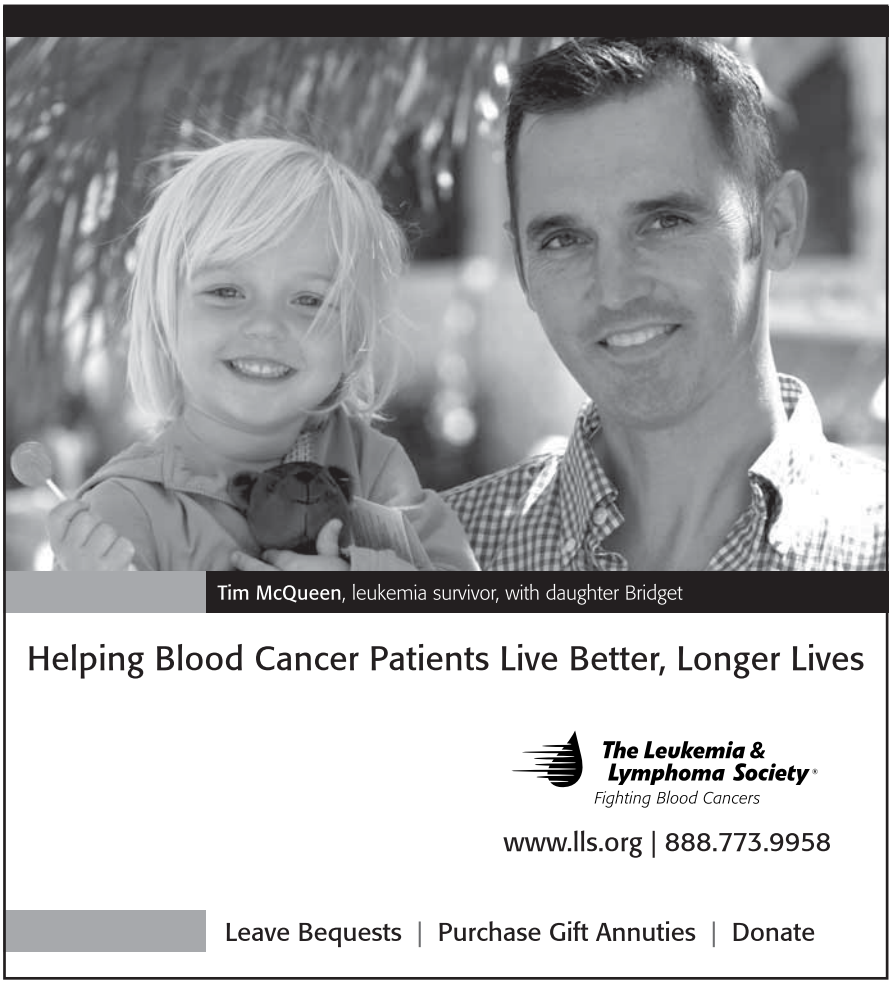
A U.S. parent has a wholly owned foreign subsidiary. The U.S. parent has $1,000 of U.S. assets that produce $150 of U.S. source income per year. The U.S. parent borrows $500 from an unrelated lender and pays $50 of interest each year. The foreign subsidiary also has $1,000 of foreign assets that produce $150 of foreign source income per year. The foreign subsidiary also borrows $500 from an unrelated lender and pays $50 of interest each year. The foreign subsidiary has net income of $100 ($150 income less $50 interest expense). The foreign corporation makes a $100 dividend distribution to the U.S. parent.

- The U.S. parent must apportion $50 of its interest expense between U.S. source and foreign source income based on the value of the corporation's assets that fall within each category. The value of the U.S. assets is $1,000 and the value of the stock of the foreign subsidiary is $500 (the foreign subsidiary has $1,000 of assets and $500 of liabilities). Therefore, $33.33 of the U.S. parent's interest expense ($50 interest expense multiplied by $1,000 of domestic source assets divided by $1,500 of total assets) is allocated to U.S. source income and $16.67 to the foreign source income. Thus, the U.S. parent has $116.67 of U.S. source income ($150 U.S. source income less $33.33 of allocated interest expense). The U.S. parent has $83.33 of foreign source income ($100 foreign source dividend income less $16.67 allocated interest expense). Assume that both the U.S. and the foreign country have 35% income tax rates. The pre-credit U.S. income tax on $200 of worldwide income ($116.67 U.S. source income and $83.33 foreign source income) is $70. The foreign subsidiary will likewise pay a $35 income tax to the foreign country ($100 foreign subsidiary net income multiplied by the 35% foreign tax rate).
- However, the U.S. parent is limited to a $29.17 foreign tax credit. The foreign tax credit limitation is computed by using the following formula: pre-credit U.S. tax ($70) multiplied by foreign source income ($83.33) divided by worldwide taxable income ($200), or $29.17. As a result, $5.29 of foreign income taxes is not allowed as a credit against current U.S. income taxes.

The result is double taxation without a full U.S. credit for foreign taxes, which is attributable to a reduction in the U.S. foreign tax limitation from an allocation of U.S. interest expense to foreign source income without a similar allocation of foreign interest expense to reduce U.S. source income. This double tax burden *increases* the cost for multinational corporate groups to borrow in the U.S. in order to make business investments.

The Delayed Rules

Legislation enacted in the American Jobs Creation Act of 2004 – but deferred several times – provides an election to allocate interest on a worldwide basis. The delayed provisions do not require U.S. companies to allocate domestic interest expense against foreign source income and incur double taxation, "unless their debt to asset ratio is higher in the U.S. than in foreign countries." In general, the domestic members of a "worldwide affiliated group" can elect to allocate and apportion their interest expense on a worldwide group basis



as if all the members of the worldwide group were a single corporation, with the following results:

- First, third-party interest expense of the domestic members of a worldwide affiliated group is allocated and apportioned to *foreign* source income in an amount equal to the excess of (1) the total interest expense of the worldwide affiliated group, multiplied by the ratio which the foreign assets of the worldwide group bear to the total assets of the group; over (2) the interest expense of all foreign corporations which are members of the worldwide group, to the extent such interest expense would have been allocated and apportioned to foreign source income if the provision's principles were applied separately to the foreign members of the group. (Here, for purposes of determining the assets of the worldwide group, the stock of corporations within the group is *not* taken into account, only their other assets.)
- Second, a "worldwide affiliated group" generally consists of the includible members of an affiliated group as that term is defined under present law for interest allocation purposes, as well as all controlled *foreign* corporations which in the aggregate, either directly or indirectly, would be members of such an affiliated group if the exclusion of foreign corporations from the group under § 1504(b)(3) did not apply. Thus the group's corporations are those – whether domestic or *foreign* – where at least 80% of the vote and value of the stock of such corporations is owned by one or more corporations in the group.

Example 2

Assume the same facts as in Example 1.

- Under the delayed rules, the $50 interest expense of the domestic corporation is allocated and apportioned to foreign source income in an amount equal to the excess of (1) $50 – that is, the $100 of total interest expense of the worldwide affiliated group, multiplied by the ratio which the $1,000 of foreign assets of the worldwide group bear to the $2,000 in total assets of the group; over (2) the $50 in interest expense incurred by the foreign corporation, to the extent such interest expense would be allocated to foreign sources if the provision's principles were applied separately to the foreign members of the group – which here is all the foreign corporation's interest, because all of its assets are foreign.
- As a result, none of the $50 interest expense of the domestic corporation is allocated and apportioned to foreign source income. The foreign tax credit limitation is $35, computed as follows: $70 (pre-credit U.S. tax) multiplied by $100 (foreign source income) divided by $200 (worldwide income). Because the creditable foreign taxes do not exceed the $35 foreign tax credit limitation, the entire amount of foreign taxes paid can be credited against the taxpayer's U.S. tax.

Conclusion

The impact of the delayed provisions is generally to increase the foreign tax credit limitation of multinational corporate groups, which decreases their U.S. tax liabilities. In the eyes of federal lawmakers, the delay of this impact is a revenue raiser; however, it also prolongs a double tax burden on U.S. multinational corporate groups. ■

1. This problem is further described and analyzed in an excellent paper by Jane G. Gravelle & Donald J. Marples, "The Foreign Tax Credit's Interest Allocation Rules," *Congressional Research Service* (2008).

PRESENTATION SKILLS FOR LAWYERS
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during the Q&A period, it's probably a situation they need to retain your services for, anyway.

"I'll take two more questions." Give them a clue that the Q&A will end soon by saying you'll take two (or three) more questions. To ensure that the final question is worthwhile, try this technique: "Okay, this is going to be the last question. Please remember that I will be happy to meet with you afterwards for as long as I can. Now, let's finish with whoever has the absolute best question that will help the greatest number of people." When you phrase it like that, most people will drop their hands, and the remaining questions will usually be worthwhile.

Have a second close. Most Q&A sessions end on a low note. Take some advice from the bad guy in *Highlander*: "It's better to burn out than to fade away." Don't let the impact of your presentation dwindle away. Have a second closing comment prepared to deliver after you've answered the final question. This statement can be anywhere from 30 seconds long to a minute or so. It should remind them of the main point of your speech, and also end the presentation on a high note.

Handling the Q&A session can be difficult and a bit uncomfortable at times, but if you will do your research, be prepared, and follow these tips, you'll handle it with poise and polish. *Any questions?* ■

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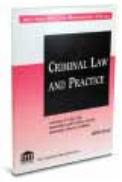

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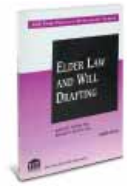

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because, like CRARC, it compels you to provide a rebuttal and refutation. Just like the Rebuttal and Refutation section in CRARC, the rebuttal section in IRARC will help you gain credibility with the reader, and it will help you focus your arguments.

Before we delve deeper into these models, here are some other IRAC variants that law professors recommend and practitioners use:

- **BaRAC**. Bold assertion, Rule, Application, and Conclusion.[7]
- **CIRAC**. Conclusion, Issue, Rule, Application, Conclusion.[8]
- **CRAC**. Conclusion, Rule, Application, Conclusion.[9]
- **CRAFADC**. Conclusion, Rule, Authority, Facts, Analogize / Distinguish, Conclusion.[10]
- **CREAC**. Conclusion, Rule, Explanation of the law, Application, Conclusion.[11]
- **CRuPAC**. Conclusion, Rule, Proof, Analysis, Conclusion.[12]
- **FIRAC**. Facts, Issue, Rule, Analysis, Conclusion.[13]
- **FORAC**. Facts, Outcome, Rule, Application, Conclusion.[14]
- **IDAR**. Issue, Doctrine, Application, and Result.[15]
- **IGPAC**. Issue, General rule, Precedent, Application, Conclusion.[16]
- **ILAC**. Issue, Law, Application, Conclusion.[17]
- **IRAAAPC**. Issue, Rule, Authority synthesis, Application, Alternative analysis, Policy, Conclusion.[18]
- **IREAC**. Issue, Rule, Explanation, Application, Conclusion.[19]
- **MIRAT**. Material facts, Issues, Rules, Application, Tentative Conclusion.[20]
- **RAFADC**. Rule, Authority, Facts, Analogize, Distinguish, Conclusion.[21]
- **TREACC**. Topic, Rule, Explanation, Analysis, Counter-arguments, Conclusion.[22]
- **TRRAC**. Thesis, Rule, Rule explanation, Application, Conclusion.[23]

Structuring the Brief

A valuable way to organize a legal argument is to give the reader a roadmap, which CRARC provides. A roadmap serves as a mini-thesis that tells the reader what you're about to discuss. Place your roadmap after your thesis and just before each individual CRARC. A roadmap constructed under the CRARC model instantly reveals the overall legal argument, the rule, how the rule applies to a particular set of facts, and the counter-argument, all before the reader begins to read the details of your argument.

Place your Rebuttal and Refutation in the right place in your brief so as not to undercut your argument. The places with the most emphasis in an argument are the beginning and the end, while the place with the least emphasis is the middle. With CRARC, an argument begins and ends with a persuasive conclusion. The best place for your Rebuttal and Refutation, then, is in the middle of the argument. This section addresses the flaws in your argument and should be the least memorable. If you follow CRARC, you'll place the Rebuttal and Refutation section in the middle of your argument, between your application and final conclusion. This way, you show the reader that you understand your opponent's position but you have good reasons to support your own position.

The structure of a lawyer's argument section of a brief might look something like this:

I. Point Heading

Thesis section

A. Sub-point heading

Sub-thesis

1. Sub-sub point heading

Sub-sub thesis

2. Sub-sub point heading

Sub-sub thesis

B. Sub-point heading

Sub-thesis

1. Sub-sub point heading

Sub-sub thesis

2. Sub-sub point heading

Sub-sub thesis

Point Heading

Use CRARC for the thesis, sub-thesis, and sub-sub thesis sections. The point heading is the conclusion you want the reader to agree with, and it summarizes the basis for your conclusion. It should be general enough to encompass all sub-arguments. For more information, see the Legal Writer's column on writing effective point headings.[24] The thesis section shouldn't be longer than two pages. Organize your argument into as many sub-sections as you need, depending on the number of issues. If you have a two-part test, for example, use point heading I for the first part of the test and point heading II for the second part of the test, if both parts of the test are at issue. The sub-point headings will deal with the specific prongs of the rule or elements of the test. If you use sub-points, or sub-sub-points, then each one should also be CRARCed. Having a thesis section after each sub-point and sub-sub point heading in a CRARC format might seem repetitive, but it will help readers understand your argument. Keep the sections concise. CRARC permeates every aspect of the brief. Its success will depend on how you organize the arguments into points, sub-points, and sub-sub points. The entire argument section of the brief should be one large CRARC and, for the most part, each sub-point, sub-sub-point, and so on should be CRARCed.

CRARCing the CRARC

Use the CRARC model for each issue, and have the courage to limit the number of CRARCs to those issues that have a reasonable likelihood of success. Issues — and, thus, separate CRARCs — consist of individual grounds on which the court might grant the relief you seek if it agrees with you on that issue but disagrees with you on everything else.

Your strongest CRARC, or at least the one that will give you the greatest relief, should be listed first, although

threshold arguments like those involving the statute of limitations or jurisdiction always go first. Because you'll focus on proving your conclusion, using CRARC will help you avoid addressing tangential issues.[25]

Beyond the Acronyms: The Meaning of CRARC

"C": Conclusion.

- The Conclusion section is a succinct summary of your main argument on an issue and why you should win.
- This first "C" is a conclusion about how the court should deal with your legal issue.
- The initial conclusion is your initial and most valuable opportunity to persuade the reader why you should win. This is what distinguishes CRARC from IRAC or IRARC. With the latter two, unlike with CRARC, you begin with a neutral restatement of an issue.
- The Conclusion section shouldn't be a blanket restatement of your point, sub-point, or sub-sub-point heading. Restatements waste an opportunity to persuade. The Conclusion should succinctly summarize the argument you'll make in the CRARC ahead. It could be more detailed than a heading, but it needn't be.
- In an appellate brief, the first Conclusion answers the question on appeal in your favor. In a trial memorandum, the first Conclusion will state why the court should rule in your favor on the issue in your case.

"R": Rule.

- The Rule section should consist of a statement or series of statements of the constitutional, statutory, or common-law authority you deem binding or persuasive in determining the legal issue. Raise all relevant rules for the first time in the Rule section, not in the Rebuttal and Refutation section.
- Whenever possible, limit yourself to three or four rules.
- Paraphrase the law or quote directly from the law.
- State your rules in order from those most favorable to your case to those least favorable to your case under the law. Then cite your strongest authorities first.
- Cite relevant statutes or case law after each rule, but do not string-cite to show off your research.
- The Rule section can be more than one paragraph; it should be as long as it needs to be to encompass the rule.
- Don't give more rules than the court needs to decide your case. Be brief and concise.
- Raise binding authority before you raise persuasive authority.
- Consider using parenthetical explanations to explain case law.

"A": Application.

- Argue your facts here.
- Apply to the facts of the case the rule you identified as relevant. If your rule has a set of elements or factors, then apply them to your facts accordingly.
- Even if the rule you've enunciated comes from a case that contains dissimilar facts, show how the rationale behind the rule applies in your case.
- Don't simply recite facts in the Application section. The Application section is where law and fact meld. Attach legal significance to the facts of your case. Merely stating, without applying, the facts of precedential cases won't persuade the reader. Don't expect the reader to compare the cases with your facts and reach the conclusions you urge.
- Your Application contains your factual and legal arguments and should support your conclusion.
- Case comparisons are ineffective, except when one case contains facts similar to your case.
- In a thesis paragraph, provide only a brief application. You'll apply the law to the facts in detail in later points and sub-points of the brief.

"R": Rebuttal and Refutation.

- Rebut your adversary's strongest arguments one at a time and refute them, before moving on to the next rebuttal, with your strongest counter-arguments.
- Bolster your credibility by showing the court that you recognize counter-arguments (those that criticize or distinguish the law or facts of a case you cited in the Rule section). Explain why your position is correct despite potential or apparent weaknesses.
- Explain why your adversary's arguments are unpersuasive. Your first sentence in this section should begin with a statement showing how (1) the opponent's case is unpersuasive for a specific reason, (2) your opponent's use of a case is misplaced for a specific reason, or (3) the opposing argument isn't compelling for a specific reason. After the first sentence in this section, state the law that shows the truth of the sentence. Then apply the law to the case. Then conclude. To rebut a second or third argument, follow the same framework.
- State your opponent's position neutrally and honestly and then refute that position with facts or law favoring your position.
- Don't repeat rules you already gave in your Rule section.

"C": Conclusion.

- Your final conclusion should conform to the first "C" section and

With CRARC, an argument begins and ends with a persuasive conclusion.

the point heading. But instead of arguing your issues, use the final conclusion to state the relief you seek.

- This is the narrow conclusion: Tie the legal issue and your arguments to the relief you seek.
- The conclusion summarizes the applicable sub-point or sub-sub-point.

Be specific about how the court should decide your case. In appellate briefs, also state whether the trial court or the intermediate appellate court made a correct or an incorrect decision — whether the appellate court should reverse or affirm the decision. This shows your reader that every line in between the first and last conclusion of a CRARC proves your first conclusion.

Have the courage to limit the number of CRARCs to those issues that have a reasonable likelihood of success.

Applying the CRARC Model: An Example of IRAC and CRARC

Here's one example of the CRARC model for an argument section of a persuasive brief and one example of the IRAC model and a discussion section for an objective memorandum using the same issue and law. Notice the difference in the persuasive power between these two models.

CRARC Example

Conclusion: Gregory is not liable to Lisa for battery. He intended only to scare Lisa when his umbrella scratched her leg.

Rule: Battery is an intentional harmful or offensive contact. [Add cite.] Lisa must prove that Gregory developed the specific intent to harm or offend her before or contemporaneously with his contact with her. [Add cite.] Only Gregory's indirect contact or contact with an instrumentality that makes contact with Lisa's person is sufficient to constitute a battery. [Add cite.]

Application: Gregory scratched Lisa's leg with his umbrella. The intent element is absent from this case. When Gregory scratched Lisa with his umbrella, he did not intend to touch Lisa harmfully or offensively. Gregory intended only to scare her.

Rebuttal and Refutation: Although he did not touch Lisa directly with a part of his body, the indirect contact of his umbrella with Lisa's leg satisfies the harmful contact element of battery. But although Gregory intended to scare Lisa, merely intending to scare a person is not sufficient for battery, a specific-intent crime. To satisfy specific intent, Lisa had the burden to establish that Gregory intended to harm or offend Lisa when he scratched her with his umbrella. Because Lisa did not prove that Gregory intended to harm or offend her when he scratched her leg, the requisite element of intent for battery is absent here.

Conclusion: Gregory did not intend to harm or offend Lisa with his umbrella. Thus, this Court should affirm the trial court's decision and find that Gregory is not liable for battery.

IRAC Example

Issue: The issue is whether Gregory is liable for battery for scratching Lisa's leg with his umbrella even though he intended only to scare her.

Rule: Battery is an intentional harmful or offensive contact. [Add cite.] Battery requires a plaintiff to prove that the defendant developed the specific intent to harm or offend the plaintiff before or contemporaneously with the defendant's contact with the plaintiff. [Add cite.] Indirect contact by a defendant, or contact with an instrumentality that makes contact with the plaintiff's person, is sufficient to constitute a battery. [Add cite.]

Application: Gregory scratched Lisa's leg with his umbrella. Although he did not touch Lisa directly with a part of his body, direct contact is unnecessary to establish battery. The indirect contact of his umbrella with Lisa's leg satisfies the harmful contact element of battery. The intent element, however, is absent from this case. When Gregory scratched Lisa with his umbrella he did not intend to touch Lisa harmfully or offensively. He intended only to scare her. Therefore, the requisite element of intent is not met here.

Conclusion: Because Gregory intended only to scare Lisa when his umbrella scratched her leg, the court will probably find that Lisa has failed to prove that Gregory had specific intent to harm her. Therefore, the court will likely affirm the trial court's decision and find that Gregory is not liable for battery.

Compare

In the IRAC example, it was not apparent until you got through the application what side the writer was advocating. Opening with an issue statement in the form of a question gives the reader the opportunity to follow the analysis from a neutral point of view. This is why many recommend IRAC for neutral legal memorandums. But the better option remains IRARC for objective writing because, like the CRARC model, you'll include a rebuttal and refutation section in which you'll take into account the weaknesses in the case and any counter-arguments.

The CRARC model, in contrast, is more persuasive than IRAC because it begins with a sharp conclusion statement as opposed to the neutral issue restatement in IRAC. From the beginning, the reader knows that you advocate Gregory's position. The reader will view the rest of your argument through Gregory's lens.

The CRARC example is also more persuasive than its IRAC counterpart.

CRARC provides a more credible analysis of the law. In the battery example, CRARC provides a rebuttal and refutation of the intent issue that the IRAC model neglects. The rebuttal and refutation is an excellent tool because it allows you to concede points that you must concede to win on an issue, without undercutting your argument. It shows the reader that you understand your opponent's position but that you still have a persuasive reason for the court to favor your position under the law and the given set of facts.

Like any other organizational method, CRARC is only one way to write a persuasive, logical, and consistent brief. Although critics argue that strict adherence to any organizational method hinders good writing,[26] following CRARC helps you focus and develop strong and persuasive legal arguments. With CRARC, each argument and each paragraph within the argument will support your conclusion. CRARC provides a structure in which you can logically express your legal analysis. The heavy lifting of legal analysis still remains your duty, but CRARCing will consistently help you write persuasive briefs.

Benefits to Using CRARC Over IRAC or IRARC

Of the many variations of the IRAC model, CRARC — through its use of both an opening conclusion statement and a rebuttal and refutation section — stands as an effective model for persuasive written advocacy. In form and substance, CRARC is a crucial tool for lawyers seeking to argue their clients' cases in the appellate or trial context. It avoids a neutral opening issue statement and forces the lawyer to acknowledge but also to counter an adversary's argument (substance). CRARC also reflects an important strategy in its structure. It places the conclusion statement up-front and puts the rebuttal and refutation section in the middle of the argument (form). This does not reflect an arbitrary or pointlessly rigid methodology. Rather, it is a tool built from research and experience, and one that provides the level of organization courts and judges need. ■

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1. *See, e.g.*, Jessica E. Slavin, *Did You Learn About IRAC in Law School? How did IRAC Become Such an Important Part of Legal Writing Teaching? And Should it Be?*, Sept. 2008, http://law.marquette.edu/facultyblog/2008/09/11/did-you-learn-about-irac-in-law-school-how-did-irac-become-such-an-important-part-of-legal-writing-teaching-and-should-it-be/ (last visited June 7, 2010).

2. Jane Kent Gionfriddo, *Dangerous! Our Focus Should Be Analysis, Not Formulas Like IRAC*, Second Draft, Nov. 1995, at 2, available at http://www.lwionline.org/publications/seconddraft/nov95.pdf (last visited June 7, 2010) ("Complex legal problems simply don't break down easily into a statement of a 'rule' and a statement of 'legal reasoning' or 'policy.'").

3. James M. Boland, *Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club*, 18 St. Thomas L. Rev. 711, 731 (2006) (stressing that professors should teach organizational models like IRAC).

4. *Id.* at 730; *see* Anita Schnee, *Logical Reasoning "Obviously,"* 3 J. Legal Writing Inst. 105, 120–21 (1997) (discussing the deductive process of IRAC and similar models).

5. *See generally* Terrill Pollman & Judith M. Stinson, *IRLAFARC! Surveying the Language of Legal Writing*, 56 Me. L. Rev. 239 (2004) (surveying legal-writing professors' use and understanding of terminology).

6. *See, e.g.*, Research, Writing & Advocacy 2006–07, The Paradigm for Predictive Legal Writing: Using "IRAC," *available at* http://www.law.msu.edu/rwa/IRAC.pdf (last visited June 7, 2010).

7. Pollman & Stinson, *supra* note 5, at 255.

8. Lisa Eichhorn, *Writing the Legal Academy: A Dangerous Supplement*, 40 Ariz. L. Rev. 105, 135–36 (1998).

9. *Id.* at 135.

10. Sam M.H. Jacobson, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, 2 J. Ass'n Legal Writing Directors 67–70 (2004).

11. Christine M. Venter, *Analyze This: Using Taxonomies To "Scaffold" Students' Legal Thinking and Writing Skills*, 57 Mercer L. Rev. 621, 624–26 (2006).

12. Pollman & Stinson, *supra* note 5, at 259.

13. Sally Ann Perring, *In Defense of [F]IRAC*, Second Draft, Nov. 1995, at 12, *available at* http://www.lwionline.org/publications/seconddraft/nov95.pdf (last visited June 7, 2010).

14. Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 Marq. L. Rev. 887, 898 n.51 (2002).

15. http://en.wikipedia.org/wiki/IRAC (last visited June 7, 2010).

16. Barbara Blumenfeld, *Why IRAC Should Be IGPAC*, Second Draft, Nov. 1995, at 3, *available at* http://www.lwionline.org/publications/seconddraft/nov95.pdf (last visited June 7, 2010).

17. http://en.wikipedia.org/wiki/IRAC (last visited June 7, 2010).

18. Ellen Lewis Rice et al., *IRAC, The Law Students' Friend or Foe: An Informed Perspective*, Second Draft, Nov. 1995, at 13, *available at* http://www.lwionline.org/publications/seconddraft/ nov95.pdf (last visited June 7, 2010).

19. Pollman & Stinson, *supra* note 5, at 261–62.

20. *See* John H. Wade, *Meet MIRAT: Legal Reasoning Fragmented into Learnable Chunks*, 2 Legal Educ. Rev. 283(1990).

21. Jacobson, *supra* note 10, at 66–67.

22. http://en.wikipedia.org/wiki/IRAC (last visited June 7, 2010).

23. Kim Cauthorn, *Keep on TRRACing*, Second Draft, Nov. 1995, at 4, *available at* http://www.lwionline.org/publications/seconddraft/nov95.pdf (last visited June 7, 2010).

24. *See* Gerald Lebovits, The Legal Writer, *Getting to the Point: Pointers About Point Headings*, 82 N.Y. St. B.J. 64 (Jan. 2010).

25. *See* Andrew H. Baida, *Writing a Better Brief: The Civil Appeals Style Manual of the Office of the Maryland Attorney General*, 3 J. App. Prac. & Process 685, 719 (2001) (citing Stephen V. Armstrong & Timothy P. Terrell, Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing 2-1(1992) (arguing that organizational structure helps legal writers develop legal arguments logically and persuasively, eliminating tangents)).

26. *See, e.g.*, Jane Kent Gionfriddo, *supra* note 2, at 2.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: I have just read a biography by a well-known author who used the word "and" in places where I believe "to" would have been correct; for example, "I will try and answer your question." Shouldn't that be "try to answer your question"?

Answer: Yes. However, if two separate actions were involved, the word *and* would be correct. For example, in "I will read *and* answer your questions," two actions are described. The substitution of *and* for *to* is common, but the ambiguity it can cause may be damaging in court cases, as in the following statement:

> In *Henningson*, the court held for the plaintiff and eliminated the privity requirement between the manufacturer and the consumer.

Were there two holdings that eliminated the privity requirement or only one? The word *and* makes two actions seem likely, but when the statement is properly re-drafted in either of the following ways, it becomes clear that only one is involved:

> In holding for the plaintiff, the *Henningson* court eliminated the privity requirement between manufacturer and consumer.
>
> The *Henningson* court eliminated the privity requirement between manufacturer and consumer when it held for the plaintiff.

The following sentence, from the same source, is also ambiguous:

> If the landlord was guilty and violated the rule, his conduct constitutes constructive eviction.

Two acts or one? A re-draft clarifies:

> If the landlord was guilty in violating the rule, his conduct constitutes constructive eviction.

Even the highest court sometimes violates the "and" rule, creating ambiguity, as the following language indicates:

> The plaintiff's mother and the only surviving party to the agreement testified.

The sentence structure seems to indicate that two persons testified, but only one did – the mother, who was the only surviving party. Changing the construction in either of the following ways clarifies the situation:

> The only surviving party, the plaintiff's mother, testified.
>
> The plaintiff's mother, who was the only surviving party, testified.

A congressional committee debated the "and" rule in September 2002, just before the invasion of Iraq. Senator Trent Lott and a half-dozen of his colleagues considered whether to give President Bush authority to "use force against Iraq *and* restore peace and security in the region" (my emphasis).

Some senators, fearing that the word *and* would give Mr. Bush carte blanche to go to war, wanted to change the word *and* to *to* or omit *and* altogether. But the language remained intact – to the later regret of many Americans.

Question: Some time ago, reader Frank E. Stepnowski wrote that strangers regularly insert an extra vowel sound (*uh*) between the *p* and the *n* of his last name, an error that I called *epenthesis*. He asked, "Did you mean *elision*?"

Answer: No. The word *elision* refers to the omission of vowel sounds in words, a usage that linguists call *syncope*. The omission occurs in the pronunciation of *terrorism* as *terrism* or the pronunciation of *library* as *liberry* or the pronunciation of *veterinarian* as *vetinarian*. *Epenthesis* is the insertion of a sound or syllable between consonants.

Why do we add an unnecessary sound to a perfectly good word? Because we all have "lazy tongues." To pronounce Mr. Stepnowski's name correctly, your tongue must move from a bilabial position in *p* (with your lips together) to a position in the center and at the roof of your mouth to make the sound of *n*. But if you add an *uh* sound between the *p* and the *n* (and say Stepuhnowski) your tongue easily slides from the front of your mouth to the high-middle to pronounce the *n*. Say it both ways to notice the difference.

Epenthesis affects a lot of words. Realtors call themselves *relitors* (adding an "i" where none belongs); athletes have become *athaletes*; arthritis is *arthuritis*, which is just as painful to your joints, but easier on your tongue. Many of us call elm trees *elum trees*. And poison ivy has become, in the speech of some American dialects, *poison ivory*.

When some people use the word *nuclear* they call it *nucular*. That's because to pronounce *nuclear* correctly, you must move your tongue from *nu*, a low position in the back of your mouth, to the initial *k*-sound in *cle*, a high position just behind the front teeth. But inserting the sound of *q* lets the tongue move easily forward to the *k* sound.

When words are widely mispronounced for a long time, their spelling may change to conform to the mispronunciation. That happened with the word *glimpse*, which originally had no *p*. *Glimpse* derived from the Middle English verb *glimsen* ("to glance"). The *p* sound was added to allow the tongue an easy transition from the *m* to the *s* in the middle of the word. The word *empty* also came into English without its *p*, but we added one for ease. *Messenger* started out as *messager* but adding an *n* made it easier for our tongue. So perhaps someday *nuclear* will be spelled "nucular." ■

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Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

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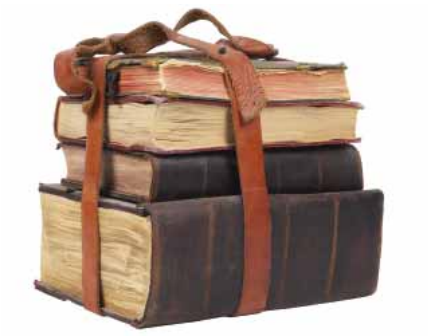

Cracking the Code to Writing Legal Arguments: From IRAC to CRARC to Combinations in Between

Many legal-writing professors teach their first-year law students the IRAC model as an organizational method to write legal arguments. IRAC stands for Issue, Rule, Application, and Conclusion. Law students use it to pass exams, to outline, and to write the discussion sections of their legal memorandums and the argument sections of their briefs. Many students find that IRAC gives their writing organization. Others find that IRAC prevents them from making creative arguments — that it stifles them and impedes their learning. They use it — when they use it — only because they are told to use it, even though some professors — notably legal-writing professors — opt for a more flexible model.[1]

After law school, some lawyers abandon their IRAC roots. Some of these lawyers become lazy: They write just to submit a document, without devoting much effort to structuring their legal analysis. Others find IRAC too rigid: They find that it prevents them from developing legal arguments according to their own style of writing.[2] These lawyers have forgotten that law school taught them important and lasting skills. Their decision to draft briefs without using an organizational model is unwise. The audience for their persuasively written briefs — judges — need writing drafted according to an organizational method that conveys arguments efficiently.

Lawyers who refuse to use IRAC should replace it with something else. Smart lawyers use IRAC variations to formulate their written arguments. Lawyers who use IRAC or any of its variations will avoid missing important, logical steps in an argument or will fail to address the argument's weaknesses. All legal writers will improve their writing skills and their submitted product by using IRAC or one of its many variations.[3]

The IRAC model has become so pervasive in the legal community that it has given rise to a seemingly endless array of other acronyms.[4] Law professors have created rich and varied terminology to describe legal writing and the legal-writing process.[5] This article is designed to introduce lawyers to other organizational methods that go beyond IRAC. One method is CRARC, the Legal Writer's patent-pending model.

Of the many organizational models deviated from IRAC, one that fully captures all elements of persuasive legal writing is CRARC. CRARC stands for Conclusion, Rule, Application, Rebuttal and Refutation, and Conclusion. You, the lawyer, should use CRARC as a roadmap to structure an argument section when drafting a persuasive trial or appellate brief. CRARC guides you to begin an argument with a persuasive conclusion statement instead of a neutral issue statement. It also directs you to craft a rebuttal that acknowledges the potential weaknesses of a client's case and preemptively refutes the other side's contentions. Anticipating a rebuttal will give you credibility without undercutting an argument. Although some IRAC models recognize the value of drafting an introductory topic sentence in the form of a conclusion or the need to address counter-arguments at the application stage,[6] the traditional IRAC model overlooks these elements.

Lawyers may also use IRARC — another Legal Writer patent-pending format and a CRARC variant — when drafting an objective memorandum. IRARC stands for Issue, Rule, Application, Rebuttal and Refutation, Conclusion. The difference between CRARC and IRARC is that the former begins with a persuasive conclusion statement and the latter begins with a neutral issue statement. Because the Legal Writer recommends CRARC for persuasive legal writing, this article will focus on CRARC.

CRARC holds many advantages over both IRAC and IRARC for persuasive briefs. Both IRAC and IRARC begin with a neutral restatement of the issue in the case. When you restate an issue up-front, you miss an opportunity to persuade the reader. CRARC guides you to begin your argument with a conclusion, which allows you immediately to tell the reader why you should win. It also helps you analyze important facts and prevents you from missing crucial facts. A properly CRARCed argument section addresses the strongest arguments first, followed by weaker arguments and public-policy arguments. This is the best method for persuasive writing. It draws the court's attention right away to the arguments with which it might agree.

IRAC and IRARC should not be ruled out completely; either tool can help you draft neutral office memorandums. IRARC is better than IRAC

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