NEW YORK STATE BAR ASSOCIATION

Journal

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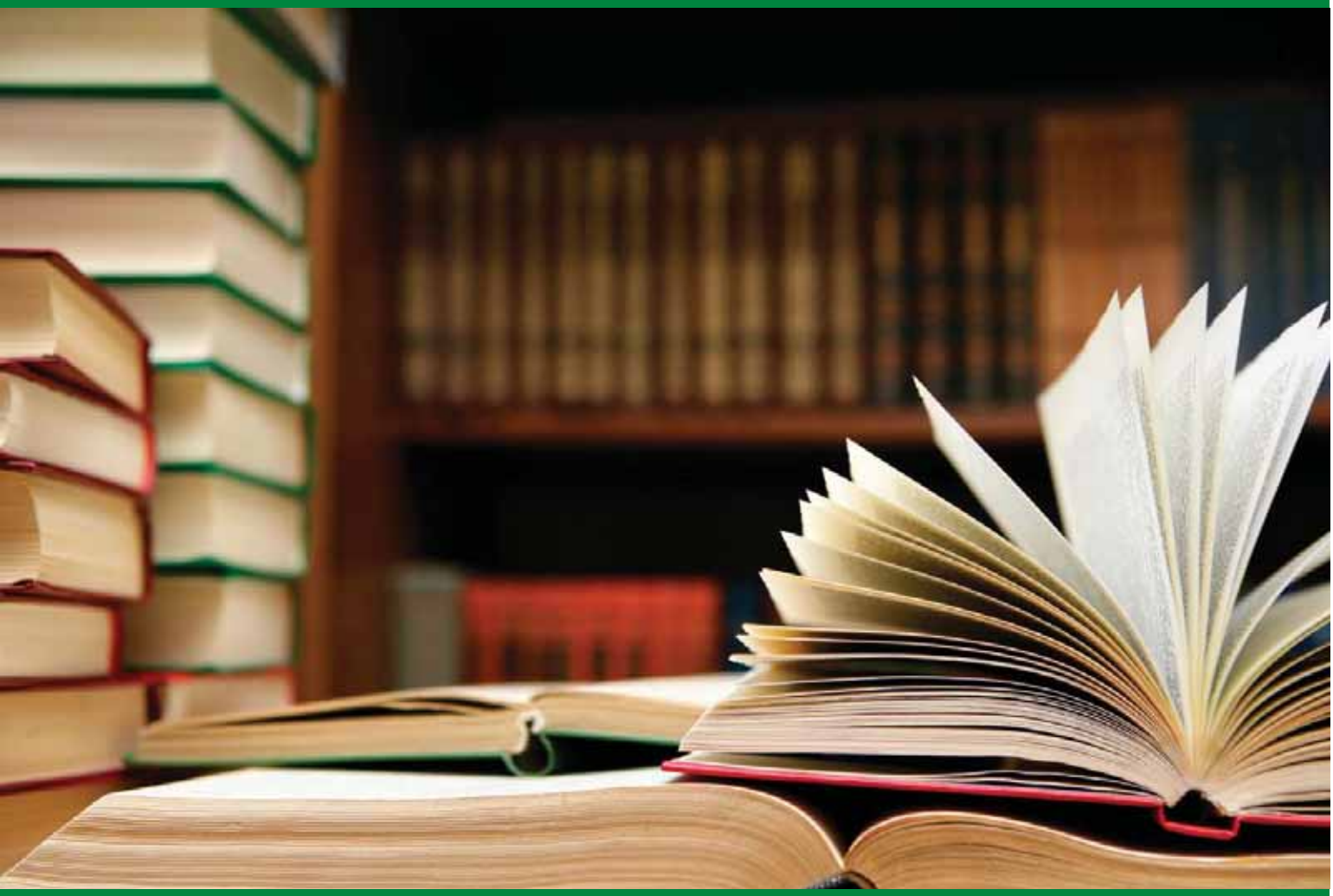

I Don't Need Your Authority

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by Eric Dinnocenzo

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NEW YORK STATE BAR ASSOCIATION
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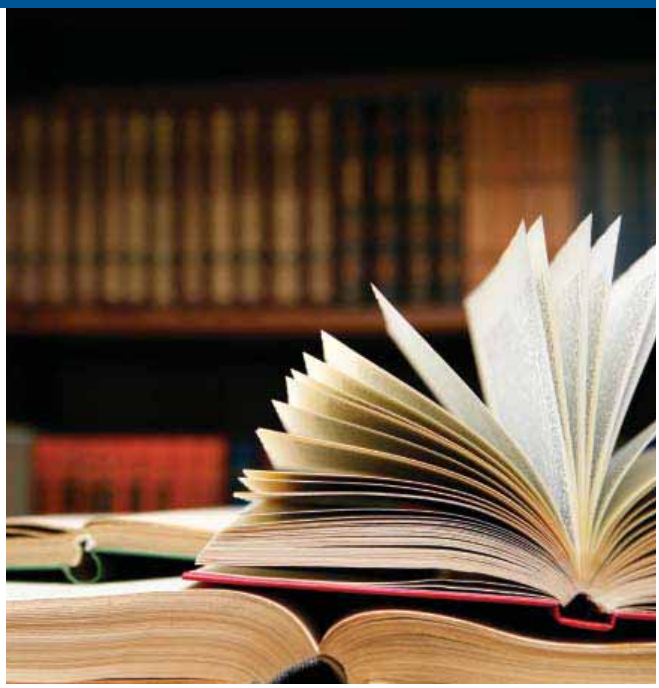

I DON'T NEED YOUR AUTHORITY

The Use of Learned Treatises in New York State Courts

BY ERIC DINNOCENZO

DEPARTMENTS

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STEPHEN P. YOUNGER

Shaping the Future of Our Profession

These are challenging times to lead a bar association. Over the last two years, our profession has been under extraordinary stress. While we are seeing signs of a turnaround, the effects of the "great recession" are still quite evident.

Since April 2008, the legal sector has lost more than 50,000 jobs. Law firms around the country have experienced declining revenues and problems in getting clients to pay their bills. Solo and small firm lawyers have struggled to manage their firms on their own, while experiencing difficulties maintaining their caseloads. At the same time that job opportunities for law school graduates diminished, tuition rates and student loan debt loads rose. It will clearly take time for us to get our profession back on its feet.

As we recover from the downturn, we have a choice. We can return to the status quo – i.e., the same practices that got us into this mess. Or, we can seize the opportunity presented by this crisis to change how we practice law. I am convinced that there is a better way. Our membership ranks are made up of thought leaders who can help guide our profession into the future – a future that will hopefully make the practice of law more satisfying for us and for the next generation of lawyers.

Law firm managers, corporate counsel and academics are all debating the evolution of our profession. In a recent poll of the legal profession, nearly 75% of those surveyed believed that our profession is undergoing a widespread evolution that will include permanent changes to billing structures, firm organization, and client expectations. Thus, we know that change is coming. The question is, who will make that change happen? In my view, we as the organized bar have a duty to lead in challenging times like this.

Toward this end, the theme for my term is "Shaping the Future of Our Profession." We will advance this goal in several ways. Most important, we are launching a Task Force on the Future of the Legal Profession to examine the structural causes of the difficulties our profession has experienced and propose best practices to help our members prepare for a challenging future. As a bar association, we are obliged to be stewards of the profession for the benefit of our next generation of lawyers.

Mentoring

A major initiative under this theme is promoting mentoring of new lawyers. The hustle of the daily practice of law is demanding for all of us. Technology has created a 24/7, virtual law office. Over time, it has become quite challenging for experienced lawyers to dedicate the time needed to coach new lawyers. However, we all need to remember that we would not be where we are today but for the mentors who have guided our careers.

Throughout my professional life, I have been blessed to have wonderful mentors. It began after college, when I was not even looking for a job. I had the wonderful fortune of working for then-Chief Administrative Judge Richard J. Bartlett. He took me under his wing and encouraged me to attend Albany Law School. Judge Bartlett then told me to clerk for Judge Hugh R. Jones – a former State Bar President who sat on the New York Court of Appeals. After my clerkship, Judge Bartlett directed me to Patterson Belknap in New York City, where I remain today – 30 years later.

Having benefited from positive mentoring, I believe that we each have an obligation to give back – an obligation to serve as mentors to the next generation of lawyers; to represent our profession well; and, most important, to be stewards of our profession and assure that it remains a profession of which our own mentors would be proud. This is especially important now, when graduating law students are having difficulty finding jobs, when associates who have been laid off are looking for work, and when many are questioning why they chose to be lawyers in the first place.

Over the next year, we will encourage our sections to provide opportunities to pair new lawyers with mentors. One such opportunity is already under way. We are matching law students with our sections, where they will be able to work on reports and, in the process, form relationships with leaders in the field.

Future of Our Profession

In tandem with mentoring initiatives, we also need to shape our profes-

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

sion so that it is satisfying for lawyers and attractive to our clients. Our new Task Force on the Future of the Legal Profession will try to project what the profession will look like in the next decade and propose steps that the State Bar can take to promote positive developments in the profession. There are four main components to this study: (1) exploring better ways to train new lawyers so they can meet the demands of the modern client; (2) helping lawyers find balance in the virtual, 24/7 workplace; (3) developing best practices for law firms in dealing with their clients, including the growing use of alternative billing systems; and (4) identifying the technologies of the future that will make our practices more efficient and effective.

This is an area where I am convinced that our Association can make a difference, not only in New York but nationally. New York is a very diverse state, and we are a diverse bar association. No organization is a clearer reflection of the overall profession than we are, representing large firms, small firms, big cities, suburbs, and rural areas. The best practices that our Task Force proposes can thus serve as a national model to improve the profession.

Government Ethics

Another recent phenomenon is the increasing loss of confidence that our citizens have in their government institutions. New Yorkers are losing their jobs and their homes at the same time that a succession of government officials are being investigated or indicted. On top of that, the gridlock at all levels of government appears to be worse than ever.

The State Bar has long supported transparency in our governmental institutions. In my view, effective ethics reform is needed to help restore confidence in our government. New York lacks a comprehensive anti-corruption statute. Given the U.S. Supreme Court's current review of the federal theft of honest services law, it is appropriate to consider whether New York should adopt meaningful anti-corruption legislation. Also, there is a patchwork of regulatory bodies in New York's government ethics arena. We need to consider what body is best equipped to monitor ethics in government and to ensure that necessary due process protections are secured.

Finally, we need ethics rules that will allow full participation of lawyers in government. Every day, New York lawyers lend their expertise on issues that affect the lives of New Yorkers, and many of them do so through public service in non-paying positions. As New York continues to work through the impacts of the recession, we cannot afford to lose the intellect and innovation that lawyers bring to the public sector.

Toward this end, our new Task Force will build on the work of our Special Committee on Government Ethics, which developed a set of "Guiding Principles on Government Ethics" that our Association adopted earlier this year. Hopefully, the Task Force's work will lead to meaningful reform that will help restore public confidence that our honest and hard-working public servants are advancing the interests of all New Yorkers.

Family Courts

There may be no place where shaping the future and restoring confidence in our government institutions come together as clearly as in our Family Court system. From foster care to child abuse and neglect, the Family Courts are dealing with the most vulnerable segment of our society – children – at the most vulnerable points in their lives. Unfortunately, the Family Courts are plagued by overcrowded dockets, too few judges, and long delays.

In 2007, a commission appointed by then-Chief Judge Judith S. Kaye recommended adding 39 new Family Court judges to handle the increased caseload. It has been 20 years since a new Family Court judgeship was created in New York City and, since that time, filings have increased by nearly 20%. Legislation is on the table to create more judgeships, but we have seen no progress. At the same time, the Family Courts need to consider what management techniques and technological tools can be used to better cope with their burgeoning caseloads.

Our new Task Force on the Family Courts will examine what resources our Family Courts need, as well as the case management and technological techniques that can help the Family Court system. Our goal is to ensure that we help effectively manage all cases affecting families, and that the Family Court is fully deployed.

Youth Courts

Chief Judge Emeritus Judith S. Kaye (who will be spearheading our Youth Court project) has reminded us that we have an obligation to nurture young people because their future depends on it – and so does ours. We cannot ensure our own future unless we do our part to help young people.

In more than 80 Youth Courts across New York, lawyers come together with law enforcement and educators to train young people to apply problem-solving methods for resolving minor youthful offenses. In Youth Courts, offenders are "tried" by their peers, who serve as lawyers, judge and jury. Youth Courts use positive peer pressure to ensure that young people in trouble pay back their communities and receive the help they need to avoid further brushes with the law. Studies show that youths sent through traditional courts are far more likely to return to the criminal justice system than those who go to a Youth Court.

Our new Special Committee on Youth Courts will examine the role the State Bar can play in promoting and financing Youth Courts and will review best practices for developing effective Youth Courts. The Special Committee also will explore legislation that can both maintain and expand the role of Youth Courts in our state.

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Real Problems, Real Answers: One Year's Experience With the New York Rules of Professional Conduct
(9:00 am – 12:35 pm)

June 7	Westchester
June 9	New York City
June 10	Long Island; Syracuse
June 17	Albany
June 18	Ithaca

Estate Planning After Divorce
(9:00 a.m. – 1:00 p.m.)

June 8	Westchester
June 9	New York City; Rochester

† Advanced Document Drafting for the Elder Law Practitioner

June 8	Long Island
June 10	Buffalo
June 11	Albany
June 21	New York City

Fraudulent Practices in Real Estate

June 8	Albany
June 16	New York City

Planning, Drafting and Administration of Conservation Easements

June 14	New York City

Practicing Matrimonial and Family Law in Chaotic Times – Part Two
(9:00 am – 1:00 pm)

June 18	Albany

Representing a Political Candidate
(9:00 a.m. – 1:00 p.m.)

June 18	Westchester
June 22	Albany
June 23	Buffalo; Long Island
June 24	New York City; Syracuse

2010 Insurance Coverage Update

June 18	Albany; Long Island; Syracuse
June 25	Buffalo; New York City

Bridging the Gap
(two-day program)

July 21–22	New York City (live session)

Albany (video conference from NYC)

Commercial Real Estate Leases

September 13	New York City
September 23	Rochester

Handling DWI in New York

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

Bridging the Gap
(two-day program)
October 13–14

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
November 4	Syracuse; Westchester

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November 18–19	New York City

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A Handbook for Lawyers

For as long as there have been printing presses, there have been accusations of libel, invasion of privacy, intellectual property infringements and a variety of other torts. Now that much of the content reaching the public is distributed over the Internet, television (including cable and satellite), radio and film as well as in print, the field of pre-publication review has become more complicated and more important. *Counseling Content Providers in the Digital Age* provides an overview of the issues content reviewers face repeatedly.

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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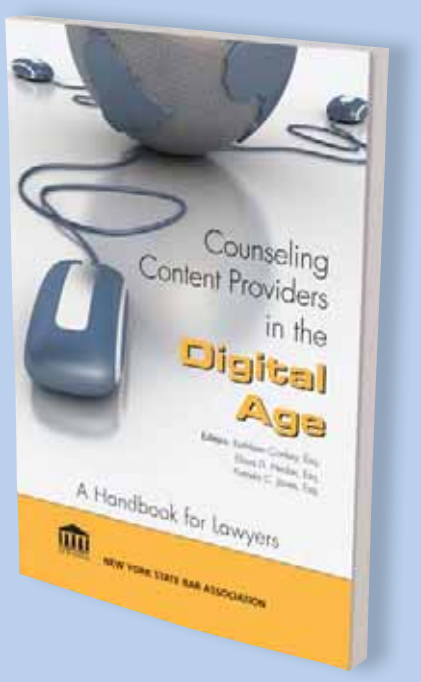

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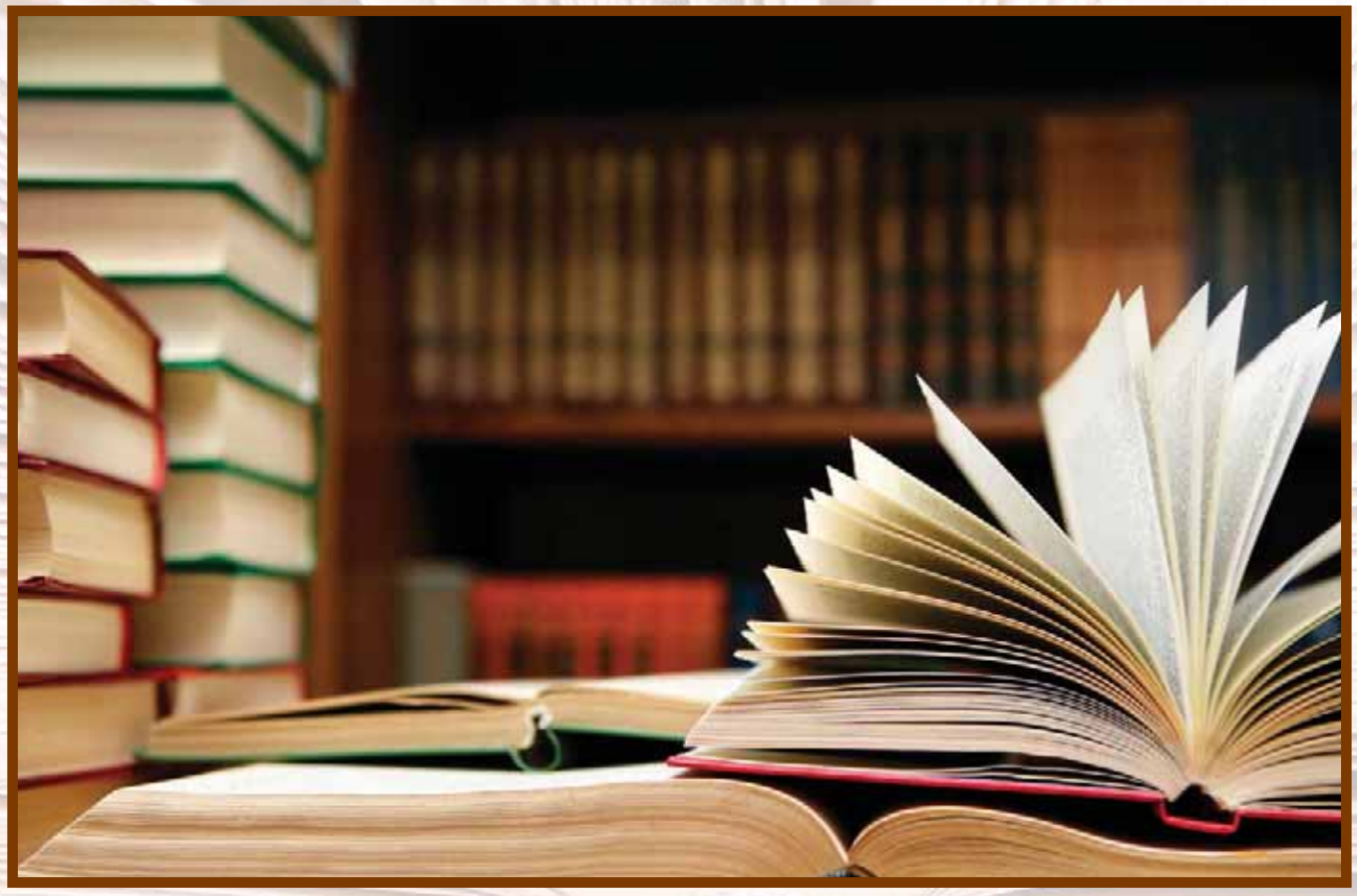
I Don't Need Your Authority

The Use of Learned Treatises in New York State Courts

By Eric Dinnocenzo



Eric Dinnocenzo (ericdinn@yahoo.com) is an attorney at Trief & Olk, a firm with offices in New York and New Jersey. He handles complex civil litigation with a focus on representing plaintiffs in bad-faith insurance denials, products liability, medical malpractice, and labor law. He is a *cum laude* graduate of Boston College Law School and received his undergraduate degree from Fairfield University.

You are about to go to trial and have just discovered a passage from a learned treatise that you believe can be used to discredit an opposing expert witness during cross-examination. You picture yourself reading aloud from the text and the expert suddenly at a loss for words on the witness stand, everyone in the courtroom realizing that the expert's opinion has been exposed as false.

For a trial lawyer such moments are priceless. But for those who happen to litigate in the New York state courts, they are exceedingly rare.

New York law only permits a learned treatise to be used during the cross-examination of an expert, and only – and this is key – if the expert concedes that it is authoritative.[1] As you may have already surmised, the seasoned expert witness will rarely, if ever, make that concession.

In fact, trial practice commentators have set forth methods to cope with the expert witness who is programmed to deny that any literature is authoritative. These include asking questions that establish that a text is used by professionals in the field, while avoiding the use of buzzwords like "authority" or "authoritative," and also pulling out the article or book, holding it aloft before the jury, and asking the expert if it is an authority on a particular issue, all the while anticipating that the expert will say no and the judge will not allow the attorney to read aloud from it.[2]

Seasoned experts routinely testify that while certain literature in the field may serve as a guide to formulating opinions, none is authoritative. For instance, some physicians claim that medicine is a constantly evolving science and that shortly after a text or article is published it becomes outdated. In a sense, who can blame them? Why should they open themselves up to cross-examination concerning unfavorable literature when other experts in the case will avoid it by refusing to agree that it is an authority? Especially considering that the law does not allow them during direct examination to refer to literature that actually supports their opinion.

In the federal courts or the state courts in the majority of other jurisdictions, the evidentiary rules regarding learned treatises are much different. Parties may read aloud from them, as well as show statements contained in them to the jury, during either direct or cross-examination of an expert witness. All that is required as a foundation is that the text must be shown to be a reliable authority, which can be accomplished by any testifying expert, not just the one who happens to be on the witness stand, as well as through judicial notice.[3]

New York Law

In recent years, New York law has slowly inched toward the federal rule, though its roots still remain firmly in the 19th century. In the 1896 case *Egan v. Dry Dock, E.B. & B.R. Co.*, the First Department held that a party may read aloud from a learned treatise to an opposing expert and ask if the expert agrees with certain statements. But the court was careful to qualify that, first, the witness must deem the writing to be an authority in the field.[4] Moreover, a learned treatise could be used in this manner only for the purpose of ascertaining the weight to be given to the testimony of the expert witness, not for the literature to be evidence for the jury to consider.[5]

New York state courts have consistently upheld this rule, as well as the principle that a party may not introduce learned treatises into evidence or read aloud from them during the direct examination of an expert on the grounds that they are inadmissible hearsay.[6] For example, the Second Department has held that a questioning attorney cannot read directly from his notepad to ask questions that were obviously taken from literature in the expert's field.[7] The Third Department has determined that an expert is not permitted to testify as to the results of his independent research of medical literature.[8]

The rationale for limiting the use of learned treatises during the cross-examination of experts is to prevent the expert from being ambushed by opposing counsel armed with books and articles of questionable legitimacy, and who, furthermore, could cause the trial to be overwhelmed by a scholarly debate about the relevant (or irrelevant) literature. As is evident, there is a certain trust in this equation that the expert will forthrightly admit or deny whether a text or article is an authority. The expert is the gatekeeper, and the law presumes that he or she is an honest one.

The unfortunate consequence of the rule that exists in New York is that experts have grown adept at protecting themselves from questioning that concerns any scientific literature that challenges or contradicts their opinion. The expert can be questioned concerning his or her opin-

ion and the basis for it, but not about the literature that diverges from it. As a result, the truth-seeking function of a trial suffers.

Problems With Application

The New York rule can be vague and amorphous in its application because, as a practical reality, individual judges interpret it differently. Expert testimony during direct examination can range from discussing particular texts, to speaking generally about the body of literature, to not being permitted to discuss the literature at all. Similarly during cross-examination, although judges will not allow statements to be read from learned treatises unless deemed authoritative by the witness, some judges will allow attorneys to ask the expert if he or she agrees with the conclusions of specific texts or ask about general principles stated in the literature.

In certain types of cases, the limitations imposed by the New York rule can have a tremendous impact on how a case is tried. For instance, in medical malpractice cases involving infants who suffer shoulder dystocia with resulting Erb's palsy at birth, the medical literature is sharply divided about what causes a permanent paralysis of the infant's arm – one camp claims, in accordance with the long-held belief in the medical community, that it is solely due to physician negligence, while the other (using what a number of experts say is a flawed scientific method) concludes that a substantial number of injuries are caused naturally by maternal expulsive forces. A thorough analysis of the literature presented to the jury can have a different impact on its decision-making process in this type of case and others, as opposed to a trial in which the literature is suppressed or otherwise expounded on by experts, according to how they see fit, with no ability to impeach them with contradictory sources.

A Shift in the Law

In recent years, the First Department has departed slightly from the established rule. In its 2008 decision *Lenzini v. Kessler*, the First Department held that an expert who testifies to having consulted a text and agreeing with much of it may "not foreclose full cross-examination by the semantic trick of announcing that he did not find the work authoritative."[9] Thus, an expert does not have to say the magic word "authoritative" as a prelude to being questioned about certain texts or articles during cross-examination, at least in the First Department.

In reaching its holding, however, the Appellate Division found it significant that the expert brought the subject medical text to court and had made notes in it, and that a limiting instruction was given to the jury that the literature was only to be used in evaluating the credibility of the expert. Further, the court reiterated the principle that a learned treatise cannot be offered for its truth or to establish a standard of care.[10]

Arguably, this decision is not a stark development; it is a familiar rule that experts can be cross-examined about any materials they review in preparing for their trial testimony. Yet it does represent a shift away from the long-established rule that literature can be used during the cross-examination of an expert witness only if he or she concedes that it is authoritative.

The limitations imposed by the New York rule can have tremendous impact on how a case is tried.

Further muddying the waters, in 2006 the Court of Appeals held that it was permissible to show the jury, as a demonstrative aid, practice guidelines issued jointly by the American Heart Association and American College of Cardiology. The Court was careful to note that the guidelines were not introduced for the truth of their contents or to establish a per se standard of care, but instead to illustrate a defendant physician's decision-making process. Also significant was that the physician was a treating doctor and defendant in the case, rather than a retained expert, and when he referred to the guidelines during his testimony the plaintiff never requested a limiting instruction.[11]

Although the plaintiff argued that there was no meaningful distinction between offering the guidelines for their truth and using them to demonstrate a physician's decision-making process, the Court rejected this argument, adhering to the reasoning that the guidelines were not admitted to establish a standard of care, but rather to explain the physician's decision-making process.[12]

Thus, limited exceptions have grown out of the New York rule regarding how attorneys and expert witnesses may use learned treatises at trial. How to reconcile these exceptions with the rule poses a challenge to attorneys and judges in trials where scientific and other expert literature is poised to play a significant role.

The Federal Courts and Other States

The federal courts under Federal Rule of Evidence 803(18), along with a majority of states, allow the reading aloud from learned treatises at trial during both direct and cross-examination. To satisfy foundation requirements, any expert, whether called by the plaintiff or the defendant, must testify that it is a reliable authority in the field; or it can even be deemed such by judicial notice. Then it is open season to question any expert witness concerning statements contained in the treatise.

Still, certain rules apply. In federal court, the statements may be read into evidence, but may not be

received as exhibits.[13] In the context of a direct examination, experts may refer to literature to the extent that they relied upon it to arrive at their opinion.[14] To be clear, a learned treatise is not meant to be a substitute for expert testimony, but rather is to help the expert explain his or her opinion to the jury.

Historically, New Jersey law was nearly identical to New York law concerning the use of learned treatises at trial. But, finding the rule to have "pervasive problems," the New Jersey Supreme Court in 1992, in *Jacober v. St. Peter's Medical Center*,[15] adopted the more permissive scope allowed under Federal Rule of Evidence 803(18).

In *Jacober*, the court contrasted the merits of the federal approach with the drawbacks of its own rule and concluded that a more expanded use of authoritative treatises avoids the possibility for the expert to have "full veto power over the cross-examiner's efforts."[16] Preventing cross-examination upon the accepted literature in the field, the court reasoned, only serves to protect an ignorant or unscrupulous expert witness.[17] In short, a trial would be fairer if the expert witness was no longer the arbiter of the questions being posed and could be asked about divergent views expressed in the literature. As the court put it, "[a]doption of the federal rule will advance the goals of the adversarial system by enhancing the ability of juries to evaluate expert testimony."[18] The federal rule remedies the practical reality of admitting statements in learned treatises for the purpose of impeachment only, with an instruction to the jury that they are not to be considered for their truth.

Additional safeguards were erected by the New Jersey Supreme Court to ensure fairness at trial. The mere fact that a text has been published does not automatically render it admissible; rather, the text must be demonstrated by the expert to be one that qualifies as the type of material reasonably relied on by experts in the field. The trial judge has discretion to prevent the trial from being overwhelmed by the use of literature. Further, learned treatises may not be introduced into evidence as exhibits.[19]

Although it can reasonably be disputed, the court seemed confident that the rule it adopted would not likely be susceptible to abuse because attorneys have a strong incentive to direct the jury's attention to a few select, highly regarded texts or articles rather than overwhelming jurors with references to as many texts as possible.[20]

There is also a leveling effect that is created by the New Jersey and federal rule with respect to adversaries with unequal resources. A party who has less access to expert witnesses, or fewer financial resources, can bolster its expert testimony with the aid of literature, rather than simply being outmatched by a greater number of opposing expert witnesses, who perhaps are of greater stature.[21]

Frequently this is the case for plaintiffs in medical malpractice cases, who often have a smaller stable of experts to choose from, and who many times have to search for them out-of-state as physicians can be reluctant to testify against other physicians who practice in their state.

And, arguably, the federal rule keeps experts more honest. Since they are no longer the gatekeeper for the use of learned treatises at trial, the rule discourages them from straying too far from accepted principles in the field. Given that the purpose of a trial is to discover the truth of the matter being tried, this is a powerful policy reason for adopting the New Jersey and federal rule.

Conclusion

In federal and most state courts, the parties are allowed a much more liberal use of learned treatises at trial as opposed to the more than century-old rule that exists in New York. Nearly 20 ago, New Jersey transitioned from a rule similar to New York's and adopted Federal Rule of Evidence 803(18), which is applied in the majority of state courts. Given that over the past century society has become much more specialized in nature, with authoritative texts in professional fields growing exponentially in number and influence, it may be the case that New York will also at some point transition away from its restrictions on the use of literature at trial.

In 2008, the First Department took a step in this direction. Only time will tell if that momentum continues. ■

1. *Labate v. Plotkin*, 195 A.D.2d 444, 600 N.Y.S.2d 144 (2d Dep't 1993).
2. Ben Rubinowitz & Evan Torgan, *Authoritative Texts and Cross-Exam of Medical Experts*, NYLJ, June 7, 2007.
3. Fed. R. Evid. 803(18).
4. 12 A.D. 556, 571, 42 N.Y.S. 188 (1st Dep't 1896).
5. *Id.* at 571.
6. *See Kirker v. Nicolla*, 256 A.D.2d 865, 867, 681 N.Y.S.2d 689 (3d Dep't 1998); *Gunnarson v. State*, 95 A.D.2d 797, 463 N.Y.S.2d 853 (2d Dep't 1983).
7. *Labate*, 195 A.D.2d 444.
8. *Gushlaw v. Roll*, 290 A.D.2d 667, 670, 735 N.Y.S.2d 667 (3d Dep't 2002).
9. 48 A.D.3d 220, 220, 851 N.Y.S.2d 163 (1st Dep't 2008) (quoting *Spiegel v. Levy*, 201 A.D.2d 378, 379, 607 N.Y.S.2d 344 (1994)).
10. *Id.*
11. *Hinlicky v. Dreyfuss*, 6 N.Y.3d 636, 815 N.Y.S.2d 908 (2006).
12. *Id.*
13. Fed. R. Evid. 803(18).
14. *Jacober v. St. Peter's Med. Ctr.*, 128 N.J. 475, 489, 608 A.2d 304 (1992).
15. *Id.*
16. *Id.* at 490 (quoting *Whitley v. Stein*, 34 S.W.2d 998, 1001 (Mo. App. 1931)).
17. *Id.* (quoting *Darling v. Charleston Cmty. Mem'l Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965)).
18. *Id.* at 494.
19. *Id.* at 491–95.
20. *Id.* at 496
21. *See id.* at 495.

BURDEN OF PROOF

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"Know When to Hold 'Em"

Electronic disclosure and evidence continues to percolate through civil litigation in New York's state and federal courts, seemingly permeating certain practice areas. While common issues appear and apply in both court systems, federal courts have been in the forefront of creating a body of caselaw in the area and were early adopters of court rules intended to provide an organizational framework for, and formalize a means for addressing, electronic discovery issues. New York's state courts have demonstrated a willingness to follow where the federal courts have led.

Having dipped a toe back into the electronic pool with last issue's column discussing the *MBIA* case,[1] the path of least resistance was to keep swimming. This column focuses on the issue of litigation holds for ESI,[2] discussing two recent decisions, one state and one federal, that are particularly useful gadgets to have in the litigator's tool box.

More than one year ago[3] a new subsection was added to the Uniform Rules for the Supreme Court and the County Court, 22 N.Y.C.R.R. Part 202, directing that issues of electronic disclosure be discussed, where appropriate, at Preliminary Conferences.[4] Inserted as § 202.12(c)(3) (with the remaining subsections re-numbered), the rule provides:

> 3) Where the court deems appropriate, establishment of the method and scope of any electronic discovery, including but not limited to
> (a) retention of electronic data and implementation of a data preservation plan;
> (b) scope of electronic data review;
> (c) identification of relevant data;
> (d) identification and redaction of privileged electronic data;
> (e) the scope, extent and form of production;
> (f) anticipated cost of data recovery and proposed initial allocation of such cost;
> (g) disclosure of the programs and manner in which the data is maintained;
> (h) identification of computer system(s) utilized; and
> (i) identification of the individual(s) responsible for data preservation.[5]

The subjects and categories set forth in the rule will be immediately familiar to federal court practitioners as they closely follow those outlined in Federal Rules Civil Procedure 26. While there are still no reported decisions involving the state court rules *per se*, a number of recent trial-level decisions have addressed electronic disclosure issues that fall within the ambit of the rule.[6]

Litigation Holds in State Court

Justice Ramos in the Commercial Division, New York County, delved into "litigation holds," intended to prevent the destruction of potentially relevant electronic data, in connection with a motion for, *inter alia*, spoliation.[7] After reviewing the parties' submissions and conducting a hearing, Justice Ramos concluded: "As the finder of fact, this Court finds upon a preponderance of the evidence that [the producing party's] affidavits were materially incomplete, particularly with respect to the [] Defendants' email deletion policy."[8] Finding that the party's testimony "is starkly different from any kind of reasonable retention policy,"[9] the court held that "upon a preponderance of the evidence the [producing party] failed to implement any change in its policy upon the commencement of this litigation, upon being served with a discovery demand, or even upon Plaintiffs filing multiple orders to show cause to compel the [producing party] to produce emails responsive to the Document Demand."[10] The court also found that the e-mail production was "selective in nature,"[11] that the backup system upon which the producing party placed reliance in the absence of a litigation hold was such that, "a reasonable investigation would have revealed[,] failed to capture relevant emails,"[12] and that "counsel for the [producing party] made numerous statements to the Plaintiffs and this Court that were materially false."[13]

Determining that "[t]he CPLR and New York caselaw are silent on the obligations of parties and their counsel to effectuate a 'litigation hold,'"[14] Justice Ramos noted that "New York courts have turned to the Federal Rules of Civil Procedure and the caselaw interpreting them for guidance."[15] Following that guidance, the court determined that the demanding party was entitled to an adverse inference[16] and "that the utter failure to implement a litigation hold constitutes a separate discovery violation warranting sanctions,"[17] which the court determined was an award of attorney fees and costs associated with the forensic review of the producing party's hard

drives, together with counsel fees and costs on the motion.[18]

Litigation Holds in Federal Court

Judge Shira A. Scheindlin of the Southern District of New York penned a decision clearly intended to be the paradigm for ESI preservation and production in federal court. In *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*,[19] an action brought by investors of two liquidated hedge funds, Judge Scheindlin was confronted by motions for sanctions brought by the defendants against 13 of 96 plaintiffs based upon allegations that "each and every plaintiff failed to preserve and produce documents – including those stored electronically – and submitted false and misleading declarations regarding their document collection and preservation efforts."[20]

Titling her opinion "*Zubulake* Revisited: Six Years Later,"[21] Judge Scheindlin took care to organize the opinion in a manner that made following the complicated issues involving a multitude of parties, each of whose conduct needed to be evaluated individually, a fairly straightforward proposition.[22] To accomplish this, the opinion was organized under the following headings:

I. INTRODUCTION
II. AN ANALYTICAL FRAMEWORK AND APPLICABLE LAW
A. Defining Negligence, Gross Negligence, and Willfulness in the Discovery Context
B. The Duty to Preserve and Spoliation
C. Burdens of Proof
D. Remedies
III. PROCEDURAL HISTORY
IV. PLAINTIFFS' EFFORTS AT PRESERVATION AND PRODUCTION
V. DISCUSSION
A. Duty to Preserve and Document Destruction
B. Culpability
C. Relevance and Prejudice
D. Individual Plaintiffs
1. Plaintiffs that Acted in a Grossly Negligent Manner
2. Plaintiffs that Acted in a Negligent Manner
E. Sanctions
VI. CONCLUSION

The organization of the opinion is useful both for the framework it offers for understanding the issues surrounding electronic disclosure sanctions generally and in the case at bar, and for furnishing a model for future litigants to structure arguments for and against such sanctions.

The legal standards for the preservation and production of ESI, and the procedural framework, burdens of proof, and range of remedies set forth in the opinion, represent the synthesis and distillation of Judge Scheindlin's *Zubulake* decisions, and will be familiar to practitioners in the arena of electronic litigation.

One aspect of the opinion requires the careful construction of a chronology for past preservation and production efforts. *Montreal* was originally commenced in the Southern District of Florida in 2004 and was transferred to the Southern District of New York in October of 2005 following the defendants' successful motion to transfer venue.[23] Judge Scheindlin offered two alternative times when preservation obligations attached:

> Applying these terms in the discovery context is the next task. Proceeding chronologically, the first step in any discovery effort is the preservation of relevant information. A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful. For example, the intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached, is willful. Possibly after October, 2003, when *Zubulake IV* was issued, and definitely after July, 2004, when the final relevant *Zubulake* opinion was issued, the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.[24]

Judge Scheindlin fixed a moment in time when the failure to institute a proper litigation hold constituted gross negligence:

> After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.[25]

Judge Scheindlin addressed the transfer of the action from Florida to New York *vis a vis* the time when the preservation obligations at issue became fixed:

> The age of this case requires a dual analysis of culpability – plaintiffs' conduct before and after 2005. The Citco Defendants contend that plaintiffs acted willfully or with reckless disregard, such that the sanction of dismissal is warranted. Plaintiffs admit that they failed to institute written litigation holds until 2007 when they returned their attention to discovery after a four year hiatus. Plaintiffs should have done so no later than 2005, when the action was transferred to this District. This requirement was clearly established in this District by mid-2004, after the last relevant *Zubulake* opinion was issued. Thus, the failure to do so

as of that date was, at a minimum, grossly negligent. The severity of this misconduct would have justified severe sanctions had the Citco Defendants demonstrated that any documents were destroyed *after* 2005. They have not done so. It is likely that most of the evidence was lost before that date due to the failure to institute written litigation holds.[26]

In a footnote, Judge Scheindlin noted that while a duty to preserve existed in the Southern District of Florida when the case was filed, no Eleventh Circuit district court articulated a "litigation hold" requirement until 2007.[27]

Conclusion

Electronic disclosure will continue to devour litigation resources and require thoughtful and detailed analysis at the time when a party first contemplates bringing a claim or is alerted to the potential that it may be subject to a claim. The implementation of a well-thought-out and thorough litigation hold, while often costly, will bring great peace of mind during the prosecution of a case, enabling a party to go on the electronic disclosure offensive, without concern that its own misstep in this area renders it subject to penalty. ■

1. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 2010 NY Slip Op. 20043, 895 N.Y.S.2d 643 (Sup. Ct., N.Y. Co. 2010).
2. Electronically stored information. See Kelly D. Kubacki and Regina J. Jytyla's article "Navigating and Avoiding Sanctions for Failing to Preserve Electronic Information," on page 34 in this issue of the *Journal*.
3. Effective March 20, 2009.
4. 22 N.Y.C.R.R. § 202.12(c)(3), amended and renumbered.
5. *Id.*
6. *See. e.g.*, *In re Tamar*, 24 Misc. 3d 768, 877 N.Y.S.2d 874 (Sur. Ct., Westchester Co. 2009) (electing production in electronic format); *T.A. Ahern Contractors Corp. v. The Dormitory Auth. of State of N.Y.*, 24 Misc. 3d 416, 875 N.Y.S.2d 862 (Sup. Ct., N.Y. Co. 2009) (cost of production (traditional analysis)).
7. *Einstein v. 357 LLC*, 2009 NY Slip Op. 32784U, 2009 N.Y. Misc. LEXIS 3636 (Sup. Ct., N.Y. Co. 2009).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* (citations omitted).
16. *Id.*
17. *Id.*
18. *Id.*
19. 2010 WL 184312 (S.D.N.Y. 2010).
20. *Id.* at *1.
21. *Id.*
22. Judge Scheindlin noted in note 56:

I, together with two of my law clerks, have spent an inordinate amount of time on this motion. We estimate that collectively we have spent close to three hundred hours resolving this motion. I note, in passing, that our blended hourly rate is approximately thirty dollars per hour (!) well below that of the most inexperienced paralegal, let alone lawyer, appearing in this case. My point is only that sanctions motions, and the behavior that caused them to be made, divert court time from other important duties – namely deciding cases on the merits.

23. *Id.* at *8.
24. *Id.* at *3.
25. *Id.* at *7.
26. *Id.* at *10 (citations omitted).
27. *Id.* at n.90.

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New York's Family Health Care Decisions Act

The Legal and Political Background, Key Provisions and Emerging Issues

By Robert N. Swidler

Introduction

New York's Family Health Care Decisions Act (FHCDA)[1] establishes the authority of a patient's family member or close friend to make health care decisions for the patient in cases where the patient lacks decisional capacity and did not leave prior instructions or appoint a health care agent. This "surrogate" decision maker would also be empowered to direct the withdrawal or withholding of life-sustaining treatment when standards set forth in the statute are satisfied.

On March 16, 2010, Governor Paterson signed the FHCDA into law at a ceremony at Albany Memorial Hospital. The key provisions became effective on June 1, 2010.[2]

1. The Legal Background

End-of-Life Decision Making

Prior to the FHCDA, the law in New York on end-of-life decision making had been relatively stable for about 25 years – stable, but in the view of many observers, also harsh and unrealistic in its approach to decision making for dying and incapable patients. The long-standing law could be summarized in three broad principles:

Principle 1. Patients who have decisional capacity have a broad right to consent to or decline treatment – even life-sustaining treatment. This principle, which has its roots in Justice Cardoza's seminal decision in *Schloendorff v. New York Hospital*,[3] was first explicitly stated by the New York State Court of Appeals decisions in *In re Storar*,[4] and reaffirmed by the Court repeatedly since then, notably in *Fosmire v. Nicoleau*.[5] While New York courts based the right on common law, in 1990 the U.S. Supreme Court, in *Cruzan v. Director, Missouri Department of Health*, found that the right of competent adults to refuse unwanted medical treatment is a liberty interest protected by the Fourteenth Amendment Due Process Clause.[6] Accordingly, in general capable patients can decline life-sustaining treatment, including artificial

nutrition and hydration, without regard to their prognosis or the invasiveness of the treatment.

Principle 2. With respect to incapable patients, life-sustaining treatment can be withdrawn or withheld if there is clear and convincing evidence that the patient would want the treatment withdrawn or withheld. The Court of Appeals announced this standard in *In re Storar.*[7] In a later decision, *In re Westchester County Medical Center (O'Connor)*, the Court explained that "clear and convincing evidence" means proof that the patient made "a firm and settled commitment to the termination of life supports under the circumstances like those presented."[8] The *O'Connor* court also noted that the "ideal situation" is where the patient expressed his or her wishes in writing, such as in a living will.[9]

Principle 3. With respect to incapable patients, if there is not clear and convincing evidence that the patient would want treatment withdrawn or withheld, life-sustaining treatment is legally required to be continued or provided. This logical corollary to Principle 2 also arises from *In re Storar.* In that case, the Court refused to allow the mother of a mentally retarded man who was dying from bladder cancer to discontinue his regime of blood transfusions, because of the absence of proof of the patient's wishes.

In the years since *Storar* and *O'Connor*, the New York State Legislature approved three other principal circumstances in which life-sustaining treatment could be withdrawn or withheld:

DNR decisions. Decisions regarding the entry of a do-not-resuscitate (DNR) order can be made by a surrogate decision maker under circumstances defined in New York's DNR law.[10]

Health care agent. When a patient appoints a health care agent pursuant to New York's Health Care Proxy Law and later loses capacity, the agent can make any health care decision the patient could have made, including a decision to forgo treatment, based on a substituted judgment/best interests standard.[11]

Mentally retarded patients. Decisions to withdraw or withhold life-sustaining treatment from patients who have mental retardation or a developmental disability can be made by an Article 17-A guardian under a special state law enacted in 2002, known as the Health Care Decisions Act for Mentally Retarded Persons (HCDA).[12] Significantly, indeed remarkably, the Legislature amended the HCDA in 2007, with little controversy, to provide for the designation of a guardian without a court appointment for the purpose of making end-of-life decisions for a patient with mental retardation or a developmental disability who meets clinical criteria.

But in many end-of-life decisions involving incapable patients, the issue concerns a treatment other than resuscitation, there is no health care agent, and the patient is not mentally retarded. In such cases, the legal ability to withdraw or withhold treatment depends on whether there is "clear and convincing evidence" of the patient's wish to forgo such treatment.

Familiar Scenarios

With these legal principles as the backdrop, variations of this scenario have occurred daily in hospitals and nursing homes across New York: An elderly patient is left permanently unconscious after a stroke and is able to breathe only while on a ventilator. After a period of waiting for improvement, the physician tells the family that there is no hope of recovery, and that it would be acceptable from a medical standpoint to discontinue ventilation. The close and loving family members believe their husband and father would not want his death prolonged this way, and favor discontinuing ventilation after making him comfortable.

Under New York law, the family had no control – life-sustaining treatment had to be continued indefinitely.

In most states, as a result of statute or caselaw, providers could honor the decision by this family. Under New York law they could not: in this instance there is no clear and convincing evidence and no health care proxy, the decision relates to ventilation, not CPR, and the patient is not mentally retarded. Accordingly, under New York law, the family had no control – life-sustaining treatment had to be continued indefinitely.

In another familiar scenario, an elderly woman who is a nursing home resident is in an advanced stage of Alzheimer's disease, and stops eating. As an interim measure, staff commences tube feeding by nasogastric (NG) tube, but recognizes that long-term tube feeding will require a surgical gastrostomy. The woman did not appoint a health care proxy or leave clear and convincing evidence of her wishes. The woman's daughters believe their mother would not want that operation, nor would she want continuous tube feeding for the short remainder of her life. They request that the NG tube be removed, and that she be given comfort care only. Again, in most states their decision could lawfully be honored. In New York, it would have been unlawful to honor their decision.

To be sure, even before the FHCDA, many hospitals and nursing homes in New York (or their medical staff) would have given effect to the decisions of these families, believing in each case that it was the humane, respectful and medically appropriate course. They might have tried to support their action by discerning "clear and

convincing evidence" from the family's recollections of the patient's statements and values. Or they might have contended that the treatment was "medically futile" or "medically inappropriate," even though in each case it would likely have been effective in keeping the patient alive a while longer. But it was hard to reconcile those approaches with the harsh letter of the caselaw, particularly as articulated in *O'Connor*. For that reason, other more cautious providers would have declined the family's decision under these circumstances; they would have kept the patient on the ventilator, or insisted upon the gastrostomy, even though in each case those approaches are inconsistent with the family's wishes and the patient's likely wishes.

Prior to the FHCDA, New York law was also deficient in providing family members with authority to consent to beneficial treatment for incapable patients.

Decisions to Consent to Treatment

Prior to the FHCDA, New York law was also deficient in providing family members with authority to consent to beneficial treatment for incapable patients. A patchwork of laws and regulations provides such authority under certain circumstances, such as where the patient previously appointed a health care agent, or where a court had appointed a guardian.[13] But there was no statute or regulation that generally empowered family members to consent to treatment when the patient could not and scant caselaw support for such authority. To be sure, providers generally turned to family members for consent anyway, and an exception in the New York informed consent statute provided some protection from liability for doing so.[14] But this lacuna in decision-making authority was still problematic in many ways. For example, the absence of clear legal authority on the part of family members to consent to treatment also impaired the ability to secure other decisions relating to treatment, such as authorization for the disclosure of protected health information.[15]

2. The Political Background

When Others Must Choose

In March 1992, the New York State Task Force on Life and the Law addressed this issue in its influential report, *When Others Must Choose: Deciding for Patients Without Capacity*.[16] The Task Force is a multidisciplinary panel that was formed by New York Governor Mario Cuomo in 1985 and charged with studying and making policy recommendations for public policies on issues relating to medical ethics and bioethics. Its earlier reports led to, among other public policies, a New York State regulation recognizing brain death (1986); New York's do-not-resuscitate law (1987); New York's Health Care Proxy Law (1990); and a law restricting surrogate mother contracts (1993).

In *When Others Must Choose*, the Task Force examined the absence of authority of family members or friends to make decisions for patients who lack capacity in New York. It reviewed the clinical, ethical and legal aspects of the problem. It recognized that most New Yorkers have not appointed health care agents, and it found there was a need to give family members and others close to the patient some default authority to make health care decisions for those patients who lack capacity, and who did not previously make a decision themselves or appoint a health care agent. The Task Force concluded that the absence of such authority resulted in both undertreatment and overtreatment of patients.

The Task Force went beyond just calling for reform. It advanced a specific legislative proposal to address the problem. The proposal (not called the Family Health Care Decisions Act until later) was similar in many respects to the Task Force's earlier proposal that led to New York's DNR law. Specifically, it proposed a statute that would set forth requirements for determining incapacity; allow the selection of a surrogate decision maker from a priority list, empower such surrogates to make health care decisions for patients who lack capacity and who could not make the decision themselves or appoint a health care agent; require the surrogate to adhere to the substituted judgment/best interests standard; and limit the circumstances in which a surrogate may authorize the withholding or withdrawal of life-sustaining treatment.

The Task Force sent its proposal to Governor Cuomo and to the state Legislature. In 1993 the proposal was introduced in the Assembly by Richard Gottfried (D-Manhattan), Chair of the Assembly Health Committee and formerly the lead sponsor of the Health Care Proxy Act.[17] Assemblyman Gottfried would prove to be a tenacious champion for the FHCDA. The bill was first introduced in the Senate by John A. DeFrancisco (R-Onondaga) in 1995,[18] but in most years thereafter it was sponsored by Senate Health Chair Kemp Hannon (R-Garden City).

At the start, the bill's prospects were strong. The Task Force had a remarkably successful track record of secur-

ing enactment of its previous proposals, such as the DNR and Health Care Proxy laws. Those policies were generally regarded as successful, and the Task Force made the compelling case that the FHCDA was a necessary and logical extension of the policies and principles it had previously advanced. Soon a large, impressive and diverse list of organizations announced their support for the FHCDA.[19] An umbrella group called the Family Health Care Decisions Coalition emerged to coordinate activities in support of the FHCDA.[20]

But at the same time, other factors impeded the progress of the bill. The New York State Catholic Conference, which was especially influential in the Republican-controlled state Senate, issued a memo opposing the bill. The Conference was concerned that aspects of the bill devalued life and facilitated euthanasia. It emphasized its opposition to a provision that would allow ethics committees to make end-of-life decisions for patients who did not have surrogates and to the termination of life-sustaining treatment for pregnant women patients. The Conference also sought to limit the circumstances in which artificial nutrition and hydration could be stopped, and to protect the conscience rights of health care providers. Other organizations such as Agudath Israel and New York State Right to Life expressed similar concerns.

Over time, the bill was amended to meet some of the Conference's concerns. For example, in 2002 both versions deleted the hospital-based process for making end-of-life decisions for patients without surrogates. But the Conference's opposition generally continued.

It was also significant that those New Yorkers who cared most about end-of-life decisions already had adequate means to protect their interests under law: they could create a health care proxy or living will. In a sense, the FHCDA sought to protect the interests of those who were not concerned enough about the matter to look out for themselves – akin to an intestacy law. Unsurprisingly, legislators did not often hear demands from grass-roots constituents for the bill.

As a result of forces promoting and forces impeding the FHCDA, for many years each spring a ritual was played out in Albany: supporters would meet with legislators and secure an editorial or op-ed piece. Numerous organizations would go on record as supporting the bill, but none would put substantial resources into a lobbying effort. At the same time, the organizations opposed to the bill would make their influential opposition known, especially to the Senate. By the end of each session, the bill had died in committee in one or both houses.

Beginning in 2002, a few developments offered new hope of securing enactment of the FHCDA. For one thing, that year the Legislature enacted the HCDA.[21] FHCDA advocates argued that since the Legislature was willing to allow surrogate end-of-life decisions for mentally retarded patients, who are less likely to have formed wishes and values, and who are more at risk of being "devalued," it should be willing to allow surrogate end-of-life decisions for other patients as well.

Also in 2003 the Family Decisions Coalition retained an Albany lobbying firm, Malkin & Ross, which advocated for the FHCDA year after year, mostly on a pro bono basis. Moreover, in 2007, Assemblyman Gottfried managed – rather surprisingly – to secure the support of Right to Life for the FHCDA, largely by adding language to emphasize the duty of providers to respect surrogate decisions that favored the provision of life-sustaining treatment.[22]

Perhaps most important, the attitudes of New Yorkers, including legislators, had gradually changed since 1993. A consensus seemed to emerge that it was often quite reasonable and not eccentric for a patient to want to opt for palliative rather than aggressive care toward the end of life. It also seemed to most New Yorkers that families *should* be able to make these decisions for their dying, incapable loved ones.

All these developments boded well for the prospects of enacting the FHCDA.

The Dispute Over "Fetus" and "Domestic Partner"

Despite such developments, the bill was gridlocked for several years by two issues that related more to the battles over abortion and gay/lesbian rights than to end-of-life decisions. First, in 2003 the Senate, at the request of the Catholic Conference, inserted in its version of the FHCDA a requirement that a surrogate, when making a decision about life-sustaining treatment for a pregnant patient, must consider "the impact of the treatment decision on the fetus and on the course and outcome of the pregnancy." Although it was doubtful that the clause would have any practical effect on surrogate decision making, pro-choice members of the Assembly regarded the insertion of the word "fetus" objectionable for symbolic and political reasons. As a result, for years the Assembly refused to support the FHCDA if it included the fetus clause, while the Senate refused to support the FHCDA without the clause.

Meanwhile, also in 2003, the Assembly introduced a version of the bill that revised the surrogate priority list to make the highest priority relative the "spouse *or domestic partner*." It did so both as a result of its growing support for gay/lesbian rights generally, but also because of the strong case for allowing a partner in a same-sex couple to make the health care decisions. However, the Senate indicated that it would not make that change in its version. As a result, for years the Senate refused to support the FHCDA if it included the domestic partner phrase, while the Assembly refused to support the FHCDA without such clause.

FHCDA advocates were frustrated by this impasse and wanted to return the focus of attention to the need to allow humane decisions for dying patients. They repeatedly proposed ideas for compromising or bypassing these disputes, but without success – until 2009.

Enactment of the FHCDA

As a result of the November 2008 election – the election that brought Barack Obama into the White House – Democrats gained control of the state Senate for the first time in over 40 years. In early 2009 Senator Thomas Duane (D-Manhattan) became Chair of the Senate Health Committee, and shortly thereafter he introduced a version of the FHCDA that tracked the Assembly version: it excluded the "fetus clause" and included the domestic partner clause.[23] The gridlock had ended.

In the spring of 2009, staff from the Governor's office, the Senate and the Assembly began to meet in the Capitol to scrutinize the language of the bill, and to identify and address technical and policy issues. Among the issues that received particular three-way attention were the need to clarify the settings where the FHCDA would apply and the need to address how the FHCDA would apply to persons who are already subject to the HCDA, or subject to OMH or OMRDD surrogate decision-making regulations.

That three-way review process was nearly complete when the dramatic "coup" in the Senate in June 2009 brought a halt to progress on all legislation, including the FHCDA.[24] Although staff ultimately finished that work and identical bills were introduced in the final days of the 2009 session, both houses adjourned before acting on them.

The bills were re-introduced in both houses in January 2010 with only one change: a long-standing provision stating that a surrogate's decision was not required if the patient had made a prior decision personally was amended to attach witnessing requirements to prior oral decisions to forgo life-sustaining treatment.[25]

The Assembly passed the FHCDA on January 20 with a nearly unanimous bipartisan vote, and the Senate passed it February 24, unanimously. On March 16, 2010, 17 years after the FHCDA was first introduced, Governor Paterson signed the FHCDA into law. The Governor stated, "After nearly two decades of negotiations, New Yorkers now have the right to make health care decisions on behalf of family members who cannot direct their own care."[26]

3. Key Provisions of the FHCDA

Key provisions of the FHCDA are summarized below. The new law is detailed, however, and this summary does not cover all its provisions.

Applicability

The FHCDA applies to decisions for incapable patients in general hospitals and residential health care facilities (nursing homes).[27] The statute uses the term "hospital" to apply to both those settings.[28] The FHCDA does not apply to decisions for incapable patients who have a health care agent;[29] who have a court-appointed guardian under SCPA 1750-b;[30] for whom decisions about life-sustaining treatment may be made by a family member or close friend under SCPA 1750-b;[31] or for whom treatment decisions may be made pursuant to OMH or OMRDD surrogate decision-making regulations.[32]

Determining Incapacity

The FHCDA sets forth a hospital-based process to determine that a patient lacks decisional capacity, but only for purposes of the FHCDA.[33] The process requires special credentials for professionals for determining that a patient lacks capacity as a result of mental retardation or mental illness.[34] It also requires that the patient and prospective surrogate be informed of the determination of incapacity[35] and additional notifications for patients from mental hygiene facilities.[36] Notably, if the patient objects to the determination of incapacity, or the choice of surrogate, or the surrogate's decision, the patient's objection prevails unless a court finds that the patient lacks capacity or another legal basis exists for overriding the patient's decision.[37]

Decisions for Adult Patients by Surrogates

The statute sets forth, in order of priority, the persons who may act as a surrogate decision maker for the incapable patient, i.e.:[38]

- an MHL Article 81 court-appointed guardian (if there is one);
- the spouse or domestic partner (as defined in the FHCDA);
- an adult child;
- a parent;
- a brother or sister; or
- a close friend (as defined in the FHCDA).

The surrogate has the authority to make all health care decisions for the patient that the adult patient could make for himself or herself, subject to certain standards and limitations.[39]

A surrogate's consent is not required if the patient already made a decision about the proposed health care, expressed orally or in writing, or with respect to a decision to withdraw or withhold life-sustaining treatment expressed either orally during hospitalization in the presence of two witnesses or in writing.[40] But since a surrogate must base his or her decision on the patient's wishes if they are reasonably known, even if a patient's prior oral decision cannot be honored directly, a surrogate will have to give that statement appropriate weight in making a decision.

The FHCDA requires the surrogate to base his or her decisions on the patient's wishes, including the patient's religious and moral beliefs. If the patient's wishes are not reasonably known and cannot with reasonable diligence be ascertained, the surrogate must base decisions on the patient's best interests, a term explained in the statute.[41]

Surrogate Decisions to Withdraw or Withhold Life-Sustaining Treatment

The FHCDA authorizes surrogate decisions to withhold or withdraw life-sustaining treatment only if one of two standards is met.

First, life-sustaining treatment can be withdrawn or withheld if:

- the surrogate determines[42] that treatment would be an extraordinary burden to the patient, and
- the attending physician and another physician determine that the patient:
  - is terminally ill (i.e., has an illness or injury that can be expected to cause death within six months, whether or not treatment is provided); or
  - is permanently unconscious.

Second, life-sustaining treatment can be withdrawn or withheld if:

- the surrogate determines[43] that treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or excessively burdensome under the circumstances; and
- the attending physician and another physician determine that the patient has an irreversible or incurable condition.[44]

Significantly, inasmuch as the definition of life-sustaining treatment includes decisions about resuscitation, one of the two standards must be met for surrogate consent to a DNR order as well.[45] As a practical matter, in most of the cases where a DNR order could have been entered under the DNR law, the order can be entered under the FHCDA.

FHCDA requires the surrogate to base his or her decision on the patient's wishes.

The two standards also apply to decisions regarding artificial nutrition and hydration (e.g., the provision of nutrition or hydration by a tube inserted through the nose, stomach, or vein). Decisions regarding the provision of food and drink are not considered health care decisions and are outside the scope of the statute.[46]

Decisions for Minor Patients

The statute authorizes the parent or guardian of a minor patient to decide about life-sustaining treatment under the same two end-of-life standards that apply to surrogate decisions for adults.[47] However, the parent or guardian must make the decision in accordance with the minor's best interests, taking into account the minor's wishes as appropriate under the circumstances.[48]

If the attending physician determines that the minor has the capacity to decide about life-sustaining treatment, the minor's consent is required to withhold or stop treatment.[49] If there is another parent who is unaware of the decision, the law requires an attempt to inform such parent of the decision.[50]

The statute allows a physician to accept a life-sustaining treatment decision by an emancipated minor without parental consent, although a decision by the minor to forgo such treatment requires ethics review committee approval.[51]

Decisions for Adult Patients Without Surrogates

One of the most significant features of the FHCDA is that it establishes a procedure to secure a decision (it is probably not accurate to call it "consent") to provide needed treatment for incapable patients who have no family members or close friends who could act as the surrogate.[52] Prior to the FHCDA, in such cases the pro-

vider might either go to court for the appointment of a guardian or approval of the treatment, or fashion some legally dubious "administrative consent," or wait for the patient's need for the treatment to become so urgent that treatment could be provided under the emergency exception to the informed consent requirement.

The FHCDA addresses the problem first by requiring hospitals, after a patient is admitted, to determine if the patient has a health care agent, guardian, or person who can serve as the patient's surrogate. If the patient has no such person, and lacks capacity, the hospital must identify, to the extent practical, the patient's wishes and preferences about pending health care decisions.[53]

Decisions to withdraw or withhold life-sustaining treatment from isolated incapable patients are strictly limited.

With respect to routine medical treatment, the statute simply authorizes the attending physician to decide about such treatment for patients without surrogates.[54] For decisions about major medical treatment, the attending physician must consult with other health care professionals directly involved with the patient's care, and a second physician selected by the hospital or nursing home must concur in the decision.[55] The treatment can then be provided.

In contrast, decisions to withdraw or withhold life-sustaining treatment from isolated incapable patients are strictly limited. Such decision can be made only (1) by a court, in accordance with the FHCDA surrogate decision-making standards; or (2) if the attending physician and a second physician determine that the treatment offers the patient no medical benefit because the patient will die imminently, even if the treatment is provided, and the provision of the treatment would violate accepted medical standards.[56]

Ethics Review Committees

The FHCDA requires hospitals and nursing homes to establish or participate in an ethics review committee (ERC) that has diverse membership, including community participation.[57] The ERC, which can operate through subcommittees, must be available to try to resolve disputes if less formal efforts fail. Its role is strictly advisory, however, except in two respects: ERC approval is required for certain decisions to withdraw or withhold life-sustaining treatment in nursing homes, and to affirm decisions to forgo treatment by emancipated minors.[58]

Other FHCDA Provisions

The FHCDA also

- sets forth the right of private hospitals and individual health care providers to refuse, on grounds of moral or religious conscience, to honor health care decisions made pursuant to the FHCDA, subject to limits and requirements (e.g., the facility must notify patients of its policy prior to admission and promptly transfer responsibility for the patient to another health care professional willing to honor the decision).[59]
- protects surrogates, health care providers and ethics committee members from civil and criminal liability for acts performed in good faith pursuant to the FHCDA.[60]
- provides that liability for the cost of health care provided to an adult patient under the FHCDA is the same as if the patient had consented to treatment.[61]
- establishes that the FHCDA does not:
  - expand or diminish any authority an individual may have to express health care decisions for himself or herself;[62]
  - affect existing law concerning implied consent to health care in an emergency;[63]
  - permit or promote suicide, assisted suicide, or euthanasia;[64]
  - diminish the duty of parents to consent to treatment for minors.[65]
- provides that a hospital or attending physician that refuses to honor a health care decision made by a surrogate in accord with the standards set forth in the FHCDA is not entitled to compensation for treatment provided without the surrogate's consent, except under specified circumstances.[66]

DNR-Related Provisions

The statute eliminates much of New York's DNR law as applied to hospitals and nursing homes, and provides for such decisions to be made in accordance with the standards and procedures in the FHCDA.[67] However, the statute then creates a new PHL Article 29-CCC as a place to retain (with some modifications) existing provisions on nonhospital DNR orders.[68] A helpful revision to the nonhospital provisions obligates home health care agency staff and hospice staff to honor nonhospital DNR orders (previously, nonhospital DNR orders were directed only to emergency medical services and hospital emergency personnel).[69]

The statute also renames the former DNR law, PHL Article 29-B, as "Orders Not to Resuscitate for Residents of Mental Hygiene Facilities," to preserve existing rules regarding DNR orders in those settings.[70]

Health Care Proxy Law Amendments
Chapter 8 amends the Health Care Proxy Law to require a provider, when an agent directs the provision of life-sustaining treatment, to provide the treatment, transfer the patient, or seek judicial review.[71] This mirrors a similar provision in the FHCDA. The statute also amends the proxy law to adopt the FHCDA provisions regarding institutional and health care provider conscience.[72]

Amendments to Guardianship Laws (MHL Article 81 and SCPA 1750-b)
The statute amends New York's guardianship law, MHL Article 81, to authorize a guardian of the person to act as a surrogate under the FHCDA for decisions in hospitals.[73] It also repeals provisions in MHL Article 81 that restricted the authority of a guardian to make life-sustaining treatment decisions.[74]

The statute amends the HCDA (SCPA 1750-b) to insert a definition of "life-sustaining treatment" (because previously it referred to a definition in MHL Article 81 that was repealed).[75]

Assignments for the Task Force on Life and Law
Chapter 8 directs the Task Force on Life and the Law to create a special committee to provide advice on standards and procedures for surrogate decision making for persons with mental retardation/developmental disability and persons in metal health facilities. The committee must include members appointed by OMRDD and OMH.[76]

Finally the new law also directs the Task Force to make recommendations on extending FHCDA decision-making standards and procedures to other settings, such as physician offices and home care.[77]

4. Emerging Issues

Enactment of the FHCDA will direct the attention of health lawyers, policy-makers, patient advocates and health care providers toward several issues. Here are a few:

The Challenge of Implementation
The FHCDA is not short and simple, and it will take time and considerable effort for health care providers, health lawyers and others to familiarize themselves with its requirements and to implement it in practice. Unexpectedly, the lead time between enactment (March 16, 2010) and the effective date (June 1, 2010) was extremely brief. As a result, providers need to scramble to conduct training and implementation efforts; clearly those efforts will need to extend well beyond the effective date.

On the positive side, several factors should aid in the prompt implementation of the FHCDA. First, the FHCDA is similar in structure to the DNR law that it supersedes, so providers and others will find its key concepts and procedures familiar. Moreover, statewide hospital and nursing home associations promptly and collectively made available to their members model policies and forms to implement the FHCDA. The developers of MOLST (Medical Orders for Life-Sustaining Treatment) also quickly revised their forms to reflect FHCDA principles. Other educational programs and materials (including this article) are rapidly emerging.

With patience and persistence on the part of providers, and with patience and forbearance on the part of regulators, the FHCDA can be implemented soon and implemented well in facilities across the state.

The Adequacy of Safeguards
The most significant change made by the FHCDA is that it empowers family members to direct the withdrawal of life-sustaining treatment in the absence of clear and convincing evidence of a patient's wish to forgo treatment. In lieu of the unrealistic and harsh clear and convincing evidence standard, the statute institutes safeguards, including these: it requires the attending physician and another physician to make specific clinical findings; it requires the surrogate to make certain non-clinical findings about the burdens of the treatment; it obligates the surrogate to base his or her decision on the patient's wishes if known, or else the patient's best interests; it allows persons connected with the case to challenge a decision.

There is ample reason to have confidence in the adequacy of these safeguards, and confidence that the

statute will in fact improve the quality of end-of-life decision making. But it is essential to empirically confirm that expectation. Policymakers, health care professionals, patient advocates, medical ethicists, academics and others need to study the experience under the FHCDA across the state and ensure that the safeguards and other provisions are working as intended.

The Performance of Ethics Review Committees

For the first time, all hospitals and nursing homes in New York will be required to create or participate in ethics review committees.[78] The clear objective of ERCs is to provide a relatively impartial mechanism to resolve disputes and to provide oversight of the most sensitive decisions. But there is no assurance that ERCs will perform these functions well. Moreover, it is unclear how facilities can or will reconcile the role of ERCs with other facility-based ethics initiatives, such as ethics consultation services.[79] Mechanisms must be devised to measure and continually improve the quality of ERCs, and research should be conducted on the merits and demerits of this part of the statute.

Extending the FHCDA to Other Settings

The FHCDA applies only in hospital and nursing home settings. Yet the need for surrogate decision making can arise in any setting where health care is provided, including a diagnostic and treatment center, physician's office, dentist's office, assisted living residence, or home care situation. Of particular urgency is the need to allow surrogate decisions to elect hospice for an incapable patient, irrespective of where the surrogate makes the decision. But many of the safeguards in the FHCDA are designed for the hospital or nursing home setting, such as concurring opinion requirements and reliance upon ERCs. As a result, extending the FHCDA to other settings is not a simple matter. A key emerging issue for the Task Force on Life and the Law is to devise a way to accomplish this extension in a responsible and practical manner.

Decision Making for Developmentally Disabled Persons

As noted previously, surrogate decisions are already being made for developmentally disabled persons pursuant to the HCDA. Some advocates believe that the HCDA offers a better approach to surrogate decision making than the FHCA; other advocates favor extending the FHCDA to that population, perhaps with amendments or special provisions. The Task Force was directed to form a subcommittee to address this issue.

Surrogate Consent to Human Subject Research

The FHCDA has indirectly impacted other laws and regulations that refer to the authorized health care decision maker. Perhaps most significant, federal human subject research regulations allow a "Legally Authorized Representative" to give consent for incapable patients to be enrolled in research protocols.[80] A "Legally Authorized Representative" includes a person "authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research."[81] Thus the FHCDA would appear to give the surrogate such authority in many cases. This is a positive development in important respects: it expands access by incapable patients to promising clinical trials and facilitates medical advances in the treatment of conditions that cause mental incapacity. But it also poses new ethical concerns. An emerging issue is determining the extent to which the FHCDA has opened the door to surrogate consent for human subject research, and the extent to which the state should seek to regulate such research. This is yet another issue the Task Force on Life and the Law is examining.

Conclusion

The FHCDA authorizes a family member or close friend to make health care decisions, including end-of-life decisions, for a patient who lacks decisional capacity, subject to substantive and procedural safeguards. Ultimately, the FHCDA is best viewed as an effort to align New York law with sound clinical practice and broadly accepted principles of medical ethics. To be sure, it will be challenging to implement the FHCDA well, and it will be necessary to identify and correct its flaws and gaps, and respond to the issues it raises. But from the outset the FHCDA will provide relief from the harsh aspects of prior law, and over time the law can be expected to enhance the quality of decision making for incapable patients. ■

1. 2010 N.Y. Laws ch. 8, A.7729-D (Gottfried et al.) and S.3164-B. (Duane et al.). Section 2 of Chapter 8 amends N.Y. Public Health Law (PHL) to create "Article 29-CC Family Health Care Decisions Act."
2. 2010 N.Y. Laws ch. 8, § 29.
3. 211 N.Y. 125 (1914).
4. 52 N.Y.2d 363, 438 N.Y.S.2d 266 *cert. denied*, 454 U.S. 858 (1981).
5. 75 N.Y.2d 218, 551 N.Y.S.2d 876 (1990).
6. 497 U.S. 261 (1990).
7. 52 N.Y.2d 363.
8. 72 N.Y.2d 517, 531, 534 N.Y.S.2d 886 (1988).
9. *Id.*
10. PHL art. 29-B.
11. PHL art. 29-C.
12. Surrogate's Court Procedure Act 1750-b (SCPA).
13. PHL art. 29-C; N.Y. Mental Hygiene Law art. 81 (MHL).
14. PHL § 2805-d(4)(c) .
15. *See* 45 C.F.R. § 164.502(g)(2) (A HIPAA-covered entity must honor decisions about protected health information made by an adult's "personal representative," i.e., a person who has "authority to act on behalf of [the adult] in making decisions related to health care.").
16. NYS Task Force on Life and the Law, *When Others Must Choose: Deciding for Patients Without Capacity* (March 1992) *available at* http://www.health.state.ny.us/nysdoh/taskfrce/inforpts.htm.

17. A.7166 (1993). The bill was not named the "Family Health Care Decisions Act" until 1995.

18. S.4685 (1995).

19. Among the supporting organizations were: AARP; American College of Physicians; Association of the Bar of the City of New York; Friends of the Institutional Elderly; Gay Men's Health Crisis; Greater New York Hospital Association; Medical Society of New York State; Healthcare Association of New York State; Nurses Association of New York State; NYS Association of Homes and Services for the Aging; NYS Health Care Facilities Association; NYS Bar Association; NY Civil Liberties Union; NYS Hospice and Palliative Care Association; SEIU Local 1199; StateWide Senior Action Council.

20. *See* Family Decisions Coalition, http://www.familydecisions.org.

21. 2002 N.Y. Laws ch. 500.

22. Enacted at PHL §§ 2984(5), 2994-f(3).

23. S.3164-B (Duane).

24. *Republicans Seize Control of State Senate*, http://cityroom.blogs.nytimes.com/2009/06/08/revolt-could-imperil-democratic-control-of-senate (June 8, 2009, 15:50 EST).

25. Enacted at PHL § 2994-d(3)(ii).

26. Press Release, Office of Governor Paterson, *Governor Paterson Signs Family Health Care Decisions Act into Law* (Mar. 16, 2010), *available at* http://www.state.ny.us/governor/press/031610FHCDA.html.

27. PHL § 2994-b(1).

28. PHL § 2994-a(18).

29. PHL § 2994-b(2).

30. PHL § 2994-b(3)(a).

31. PHL § 2994-b(3)(b).

32. PHL § 2994-b(3)(c).

33. PHL § 2994-c.

34. PHL § 2994-c(3)(c).

35. PHL § 2994-c(4)(a), (b).

36. PHL § 2994-c(4)(c).

37. PHL § 2994-c(6).

38. PHL § 2994-d(1).

39. PHL § 2994-d(3)(i).

40. PHL § 2994-d(3)(ii).

41. PHL § 2994-d(4).

42. The statute does not explictly give this responsibility to the surrogate, but it is implict in the structure of the clause.

43. *See* PHL § 2994-c(6).

44. PHL § 2994-d(5)

45. PHL § 2994-a(19).

46. PHL § 2994-a(12).

47. PHL § 2994-e(1).

48. PHL § 2994-e(2)(a).

49. PHL § 2994-e(2)(b).

50. PHL § 2994-e(2)(c).

51. PHL § 2994-e(3).

52. PHL § 2994-g.

53. PHL § 2994-g(1).

54. PHL § 2994-g(3).

55. PHL § 2994-g(4).

56. PHL § 2994-g(5).

57. PHL § 2994-m.

58. PHL § 2994-m(2).

59. PHL § 2994-n.

60. PHL § 2994-o.

61. PHL § 2994-p.

62. PHL § 2994-q(1).

63. PHL § 2994-q(2).

64. PHL § 2994-q(3).

65. PHL § 2994-q(4)

66. PHL § 2994-s.

67. See 2010 N.Y. Laws ch. 8, § 4, which amends PHL art. 29-B – the DNR law – to make it applicable only to mental hygiene facilites. *See also* new PHL § 2994-a(19) (defining "life-sustaining treatment" to include cardiopulmonary resuscitation).

68. 2010 N.Y. Laws ch. 8, § 2, adding PHL art. 29-CCC Nonhospital Orders Not to Resuscitate.

69. PHL § 2994-ee.

70. PHL art. 29-B.

71. 2010 N.Y. Laws ch. 8, § 23. amending PHL § 2984(3).

72. 2010 N.Y. Laws ch. 8, § 23, adding PHL § 2984(5).

73. 2010 N.Y. Laws ch. 8, § 25, amending MHL § 81.22.8.

74. 2010 N.Y. Laws ch. 8, § 25, repealing MHL § 81.22.9(e).

75. 2010 N.Y. Laws ch. 8, § 27, amending SCPA 1750-b.

76. 2010 N.Y. Laws ch. 8, § 28(1).

77. 2010 N.Y. Laws ch. 8, § 28(2).

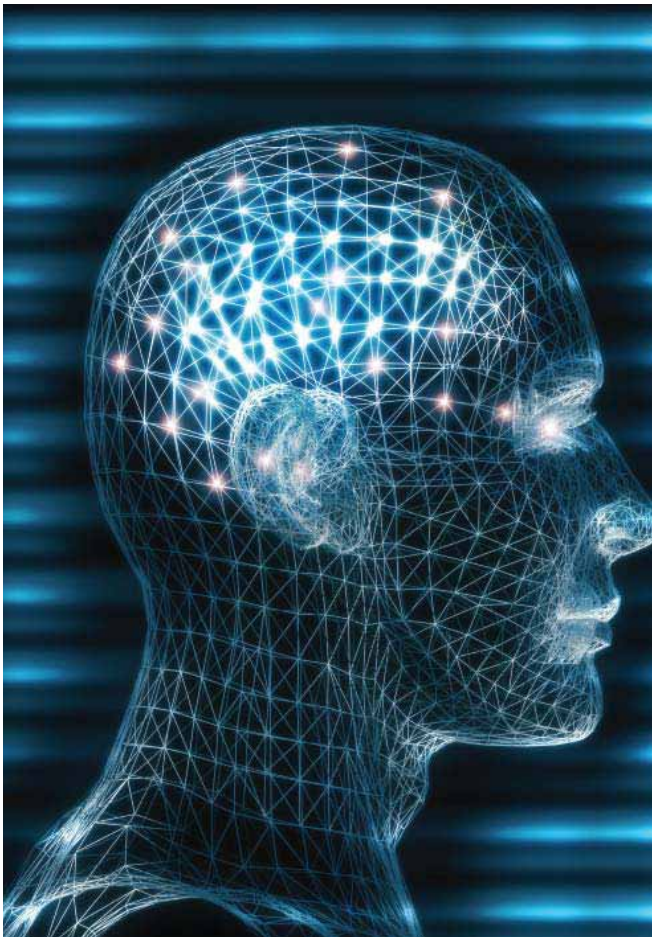
78. PHL § 2994-m. Since 1992, the Joint Commission on the Accreditation of Healthcare Organizations has required hospitals to have a mechanism to address ethical issue, but it has never specifically mandated ethics committees. Similarly, since 1997, New York's DNR law has required facilities to have a dispute mediation system, but does not require ethics committees for that purpose. PHL § 2972.

79. The statute helpfully notes that the ERC requirement does not "bar [providers] from first striving to resolve disputes through less formal means, including the informal solicitation of ethical advice from any source." PHL § 2994-m. Accordingly, a hospital's ethics consultation service or chaplain's office could still serve as a first line of guidance or attempted resolution of a dispute.

80. 45 C.F.R. § 46.116.

81. 45 C.F.R. § 46.102.

"I was going to settle ...
then I had a cup of coffee."



Assisted Outpatient Treatment: May the Sun Continue to Shine on Kendra's Law

By Martin Schoenfeld

As New York County's senior presiding judge over mental hygiene matters relating to the mentally ill, I conduct hearings at hospitals such as Bellevue and Kirby Forensic Psychiatric Center. The type of hearings, conducted primarily under Article 9 of the N.Y. Mental Hygiene Law (MHL), include those to release,[1] retain,[2] and medicate over objection.[3] Also included are assisted outpatient treatment hearings, which are governed exclusively by MHL § 9.60, known as "Kendra's Law."

Introduction

Under Kendra's Law, a judge may order assisted outpatient treatment (AOT) for those mentally ill individuals who are unlikely to survive in the community without certain services and who, based on their histories, would not seek those services voluntarily. These services may include medication, talk therapy, treatment for alcohol or substance abuse, and educational and vocational training, as well as housing.[4] There might also be money management services.[5] The judge's order will require monitoring and evaluating the recipient either by individual social workers or case management teams.[6]

Background

Although the public might not know the specifics of Kendra's Law, public interest in this statute increases with the appearance of sensational news stories when the mentally ill are involved in violent crimes. For example, according to media reports, in February 2008 David Tarloff, a person with a long history of mental illness and prior hospitalizations, allegedly slashed his former psychiatrist and fatally stabbed a psychologist who shared office space with the psychiatrist.[7] At the time of the incident, Mr. Tarloff had a strange plan to rob the psychiatrist and use the money to "rescue" his mother from a nursing home and take her to Hawaii.[8] In editorials about the incident, writers opined about whether the application of Kendra's Law could have prevented this violent episode.[9]

The law itself was named after Kendra Webdale, a young woman who, on January 3, 1999, was pushed off a subway platform and killed by an oncoming train. The man who pushed her was a paranoid schizophrenic who had neglected to take his prescribed medication.[10] However, despite repeated references to Kendra's Law as protection for society against violent acts by mentally ill individuals, the vast majority of those with mental illness

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are not violent. They are far more likely to be the victims rather than the perpetrators of violence.[11]

Kendra's Law was adopted to provide the resources and oversight necessary for a viable, less-restrictive alternative to hospitalization. Its purpose is to enable the mentally ill to lead more productive and dignified lives, while at the same time reduce the risk of danger posed by those mentally ill individuals who refuse to comply with necessary treatment.[12]

The idea of outpatient treatment commitment was first proposed in New York in 1989, but it faced opposition from civil liberties and consumer advocacy groups.[13] In later years, press coverage began to focus on the problem of having "revolving door" patients. These patients would appear stable in a hospital setting but, upon discharge, would deteriorate while in the community due to insufficient community resources and the patients' own inability or unwillingness to comply with treatment. These individuals frequently returned to costly inpatient admissions. This led to significant media attention and to increased efforts to pass legislation.[14]

In 1999, New York State adopted MHL § 9.60.[15] The statute provides a process to issue court orders requiring both compulsory outpatient treatment and immediate access to care. A judge not only directs that the recipient comply with outpatient treatment but further mandates that local health agencies provide the individual with essential services. To date, Kendra's Law has survived all constitutional challenges.[16]

Kendra's Law is a "sunset" statute; it will automatically expire on June 30, 2010, unless formally renewed. The law was originally enacted for a five-year period and was renewed for an additional five years in 2005.[17] At that time, the Legislature directed that the Commissioner of the Office of Mental Health (OMH) contract with an external research organization to evaluate the AOT program's implementation and effectiveness.[18] OMH contracted with the Department of Psychiatry and Behavioral Sciences at Duke Medical Center and subcontracted with Policy Research Associates, Inc., of Delmar, New York (collectively referred to as "Duke"). On June 20, 2009, Duke, having completed its evaluation, wrote a favorable report.[19]

This article will review the basic statutory procedure to obtain an AOT order, briefly discuss the Duke report, and explore the need to amend Kendra's Law to allow more judicial discretion.

Obtaining an AOT Order

The procedure governing the issuance of an AOT order includes eligibility requirements, categories of those persons who may petition the court to obtain an order, the content of the petition, the requirements of a proposed accompanying treatment plan, the mechanics of the court hearing, the resulting order, the consequence to a recipient for noncompliance, and the renewal of an order.[20]

The procedure begins with the filing of a petition in the supreme or county court in the county in which the person allegedly in need of AOT is present.[21] The court may order that an individual 18 or older receive AOT only if the judge finds that the individual

- suffers from a mental illness;
- is unlikely to survive safely in the community without supervision;
- historically has not complied with treatment for his or her mental illness;[22]
- is unlikely to participate voluntarily in outpatient treatment;
- needs AOT to prevent relapse or deterioration that would be likely to result in serious harm to self or others; and
- is likely to benefit from AOT.[23]

The class of persons who may petition for involuntary AOT of a mentally ill person is limited. Among those who may petition for AOT are

- an adult (18 years or older) who lives with the individual;
- his or her parents, spouse, adult siblings, or adult children;
- the hospital director where the individual is hospitalized;
- those who provide mental health services to the individual, including psychiatrists, psychologists, and social workers;[24] and
- a parole or probation officer assigned to the patient.[25]

A physician's affidavit or affirmation must accompany the petition.[26] That physician "shall not" be the same person as the petitioner.[27] In the affidavit or affirmation, the physician must state that he or she is able to testify at the hearing. In addition, the affidavit must include a statement that no more than 10 days before filing the petition

- the physician personally examined the patient and recommends AOT; or
- the physician unsuccessfully attempted to examine the patient,[28] is willing and able to examine the patient, and has reason to suspect that the patient meets the requirements for AOT.[29]

The court must set a hearing date within three business days from receipt of the petition.[30] At the hearing, the subject of the petition is entitled to have an attorney present. He or she has the right to be represented by either Mental Hygiene Legal Service or privately financed counsel. The right to counsel applies at all stages of the proceeding.[31] The subject of the petition must be afforded an opportunity to present evidence, call witnesses, and cross-examine adverse witnesses.[32]

An AOT order may not be issued unless a doctor gives the court a written treatment plan by the date of the

hearing.[33] Further, the physician who recommends AOT must not only have personally examined the patient, he or she must personally testify at the hearing.[34] The mere submission of a petition and doctor's affidavit or affirmation at the hearing cannot serve as sufficient evidence to authorize AOT.[35] If the subject of the petition refused to be evaluated, the judge, on reasonable cause, may direct that the subject be placed in custody and transferred to a hospital for up to 24 hours, to be examined.[36]

At the hearing, the physician is required to show not only that the subject of the petition meets the criteria for AOT but also that the recommended treatment is the least restrictive alternative.[37] Further, the doctor must describe in detail the type of outpatient treatment recommended, including any medication, and must give the rationale for using the recommended treatment.[38]

If, at the conclusion of the hearing, the judge does not find by clear and convincing evidence that the subject of the petition meets the criteria for AOT, the petition must be dismissed.[39] The subject is released from the hospital or, if not in a hospital, remains in the community without conditions.[40] If the petitioner has established by clear and convincing evidence that the subject meets the criteria, the judge may order the person to receive AOT for an initial period not to exceed six months.[41] In the order, the judge must make specific findings that the proposed treatment plan is the least restrictive treatment appropriate for the subject and shall include in the order all categories of treatment that the assisted outpatient is to receive.[42] At the appropriate times, the initial order may be renewed for successive periods of up to one year each, upon the filing of a renewal petition and a further hearing.[43]

Although AOT is provided under court order, failure to comply with that order is not a ground for contempt of court or for involuntary commitment.[44] Kendra's Law allows only one remedy. If, in the physician's judgment, an outpatient is noncompliant with the treatment plan, the physician may request that the individual be removed to a hospital for observation and immediate treatment. Once in the hospital, the patient may not be retained for more than 72 hours unless a new admission proceeding is commenced in accordance with other provisions of the MHL.[45]

The Duke Report

Consistent with its legislative mandate, the Duke report discusses the impact of AOT on New York's mental health system; reviews whether AOT programs motivate recipients to engage actively in treatment; evaluates the recipients' perception of AOT; assesses the success of AOT on rates of hospitalization, arrest, homelessness, violence, suicide, and substance abuse; and considers the regional and cultural differences in AOT implementation throughout New York State.[46] The Duke report is based on OMH surveys, AOT administrative statistics, hospital admission records, case management reports, Medicaid claims, and arrest records, as well as on personal interviews with key program stakeholders and service recipients.[47]

According to the Duke report, most of New York State's experience with AOT originates in New York City, where approximately 70% of all AOT cases are found. In some outside counties, AOT has either been rarely used or not used at all.[48] Ideally, AOT can be utilized as a preventive measure to avoid deterioration before hospitalization is needed. In nearly 75% of all cases, however, it is employed as part of a safe discharge plan for hospitalized patients. Thus, AOT is used mostly as a transition plan to ensure treatment following hospitalization, with the expectation of reducing hospital recidivism.[49]

AOT is used mostly as a transition plan to ensure treatment following hospitalization, with the expectation of reducing hospital recidivism.

A key goal of the AOT program is to motivate recipients to participate actively in community-based treatment and services. In this regard, the Duke report discusses the program's reliance on case managers. According to the report, Assertive Community Treatment teams, known as ACT teams, serve as a unified group in approximately 20% of the cases to provide all the recipients' needs.[50] ACT teams generally consist of a psychiatrist, a nurse, and other professionals such as vocational, family wellness, and substance abuse treatment specialists. ACT is designated for persons with severe mental illness who are difficult to serve in conventional outpatient mental health settings.[51]

The more common type of management assistance, according to the report, is called Intensive Case Management, or ICM.[52] Generally, with ICM, a social worker assists recipients to ensure that their medical, housing, employment, and other requirements are met. With ICM, however, separate providers supply the services and are not part of an all-purpose team. Thus, an ICM worker does not dispense services such as medication, as an ACT team would. Instead, the case worker is more like a personal assistant, helping recipients comply with AOT orders by coordinating their various services. In my experience, recipients who fail treatment plans with ICM are often thereafter given an ACT team.

The Duke report, in its summary, states that AOT orders exert a critical effect on service providers, stimulating their efforts to prioritize care for AOT recipients.[53] Among other findings, the report shows that perceptions of the AOT program – experiences of stigma or coercion, treatment satisfaction – appear largely unaffected by participation in the program and are more likely shaped by other experiences with mental illness and treatment.[54] Also, of great significance, the report finds that although there is an over-representation of minorities in AOT programs, this ratio is influenced more by social and systemic variables, such as multiple hospitalizations in public facilities and poverty levels that may correlate with race, and is not the result of racially biased implementation.[55] Finally, based on statistical evidence, the report concludes that those receiving successive periods of AOT have a lower incidence of arrest and hospitalization, are more compliant with treatment, and are better able to handle medication and personal finances.[56]

Judicial Discretion

Lack of Discretion

Under Kendra's Law, the judge's role is limited to determining whether a petitioner has demonstrated that the statutory requirements for AOT have been met. The appropriateness of releasing a patient from a hospital, or of allowing a mentally ill person who is already in the community to continue to reside there, is a function of the hospital's director and is not before the court at an AOT hearing. This lack of judicial discretion was clearly stated by the Appellate Division, First Department in its unanimous decision in *In re Manhattan Psychiatric Center*.[57]

In that case, the lower court judge, seeking to clarify the statute, held in abeyance an order regarding a hospital's AOT application for a patient whose history included such incidents as jumping from a five-story building and striking his father in the eye with a bottle. While recognizing that the judge "was obviously, and understandably, troubled that such a patient may be released at all,"[58] the Appellate Division nevertheless reversed and granted the order, stating that "the question for the court is not whether the patient should be released, but whether he should be released with or without an AOT order."[59] The opinion further stated that

> no measure of discretion would be sufficient to permit a court to bar the release of a hospitalized patient . . . as an alternative to ordering AOT, because Kendra's Law does not place that decision before the court. The statute provides that "[n]othing in this section shall be construed to affect the ability of the director of a hospital to receive, admit or retain patients who otherwise meet the provisions of this article regarding receipt, retention or admission. (§ 9.60[q])."[60]

Thereafter, in *In re Endress*,[61] the judge granted a hospital's AOT petition, despite his opinion that the patient's discharge was "totally inappropriate."[62] There, the patient had a lengthy history of prior hospitalizations and a long-standing record of criminal arrests for sexual misconduct and assaultive behavior. Although the patient was diagnosed with both schizophrenia and antisocial personality disorder, the hospital admittedly failed to treat the latter, notwithstanding its acknowledgment that during his current hospitalization the patient had "engaged in outrageous and facially illegal activity."[63]

The judge, "well aware" of the Appellate Division's opinion in *In re Manhattan Psychiatric Center* that the only issue before the court is whether to order AOT, remarked: "The court is powerless to prevent the occurrence of what is an obvious abuse of discretion by the [hospital] in deciding to discharge this man."[64] He then granted the petitioner's AOT application, stating that "[s]ociety and this patient are better served by this woefully inadequate outpatient treatment plan than by no treatment plan."[65]

On occasion, it also has been clear to me that, even with an AOT order, a patient might not be ready for discharge into the community. I recall one case in which a patient's family was against his being released from the hospital, and he refused to consent to outpatient treatment. His demeanor in the courtroom was extremely bizarre. During the AOT hearing, his behavior became more and more unpredictable. I expressed my concern that by discharging him, the hospital was not acting in this patient's best interest. The psychiatrist, however, testified that the patient was a malingerer who understood what was expected of him under AOT. As the only options were either granting or denying AOT, I signed the order. As the patient was leaving the courtroom, he totally decompensated, had to be physically restrained, and was re-admitted to the hospital on an emergency basis.

Discretion as a Safeguard

Proportionally, the number of situations such as the three just discussed are small compared to the overall number of AOT cases heard. Considering, however, that in Manhattan alone more than 700 AOT hearings were conducted last year, the need for greater judicial discretion exists. Therefore, I propose that the statute be amended to enable judges, at the time of the hearing, to direct upon good cause shown that the subject of an AOT petition be retained for not more than 24 hours for observation. If, during that period, the hospital's director concludes that further retention is warranted, a new proceeding in accordance with the other provisions and constitutional safeguards set forth in the MHL shall be commenced. If the director still believes that release is appropriate, the AOT proceeding must then be continued until completion. The limited restriction on the individual's liberty is a small price for safeguarding the patient's welfare and the public's safety.

At the very least, judges should be provided with periodic status reports. This would help ensure that upon a recipient's leaving the hospital, or remaining in the community, those responsible for that person's well-being comply with the AOT order. These reports could also be used to assist judges in assessing an outpatient's progress (particularly useful because not all recipients appear at the AOT hearings),[66] and to alert the court about any significant events that might cause concern for decompensation. Currently, social workers regularly report to AOT program directors, who must submit written quarterly reports to the program coordinators.[67] The reports document changes in an outpatient's treatment plan such as a change in medication or in living arrangements and are also intended to help ensure that requisite services are being provided in a timely manner.[68] Similar types of reports would be very useful to judges.

> MHL § 9.60 should be amended to permit more judicial discretion.

Conclusion

Whether discussed in a research paper such as the Duke report or in tabloid editorials, the consensus is that AOT is a valuable program. The court hearing ensures that a patient's due process rights are protected, while the court's order is designed to reduce violent incidents by mandating outpatient treatment and other services. To further the goal of balancing the public's concern for safety with the AOT recipient's right to live a dignified life in the community, MHL § 9.60 should be amended to permit more judicial discretion. Whether or not amended to increase judicial supervision, however, the statute is worth saving. "Let the Sun Shine In."[69] ■

1. MHL § 9.31.
2. MHL § 9.33.
3. *Rivers v. Katz*, 67 N.Y.2d 485, 504 N.Y.S.2d 74 (1986).
4. MHL § 9.60(a)(1).
5. *In re William C.*, 64 A.D.3d 277, 284, 880 N.Y.S.2d 317 (2d Dep't 2009).
6. MHL § 9.60(i)(1).
7. Eric Konigsberg & Ann Farmer, *Father Tells of Slaying Suspect's Long Ordeal with Mental Illness*, N.Y. Times, Feb. 20, 2008, at B1.
8. *See* Al Baker, *Queens Man is Arrested in Killing of Therapist*, N.Y. Times, Feb. 17, 2008, at A1; John Eligon, *Suspect's Delusions Described to Judge*, N.Y. Times, May 21, 2008, at B6.
9. *See* Editorial, *Mike, Elliot: You Must Act*, Daily News, Feb. 21, 2008, at 28; E. Fuller Torrey, *Deadly Madmen – Mental-Health System Still Lets Them Roam*, N.Y. Post, Feb. 22, 2008, *available at* http://www.nypost.com/p/news/opinion/opedcolumnists/deadly_madmen_WgUp2zx9XTX6Wa4j0QzXFI.
10. *See People v. Goldstein*, 6 N.Y.3d 119, 122, 810 N.Y.S.2d 100 (2005); Anemona Hartocollis, *A Mother Relives Her Anguish; a Subway Killer is Sentenced*, N.Y. Times, Nov. 3, 2006, *available at* http://www.nytimes.com/2006/11/03/nyregion/03kendra.htm (last visited Apr. 17, 2010).
11. Michael F. Hogan et al., NYS/ NYC Mental Health-Criminal Justice Panel, *Report and Recommendations*, June 2008, at 9.
12. *In re K.L.*, 1 N.Y.3d 362, 366–67, 774 N.Y.S.2d 472 (2004).
13. Howard Telson, *Bellevue Pilots Outpatient Commitment Program*, 13 Am. Ass'n of Community Psychiatrists Newsletter 4 (1999), *available at* http://www.wpic.pitt.edu/aacp/Vol-13-4/regional13-4.html.
14. *Id.*
15. Kendra's Law, 1999 N.Y. Laws ch. 408.
16. *See, e.g.*, *K.L.*, 1 N.Y.3d at 367; *In re Urcuyo*, 185 Misc. 2d 836, 849, 714 N.Y.S.2d 862 (Sup. Ct., Kings Co. 2000).
17. *See* 2005 N.Y. Laws ch. 158 § 1.
18. 2005 N.Y. Laws ch. 158 § 6.
19. Marvin S. Swartz et al., *New York State Assisted Outpatient Treatment Program Evaluation* (2009) ("Duke Report").
20. The New York State Office of Mental Health provides sample legal forms that include an order to show cause, a verified petition, a physician's affirmation, and a final order/judgment. These forms are available on the Office of Mental Health's Web site at http://bi.omh.state.ny.us/aot/about?p=kl-forms.
21. MHL § 9.60(e)(1).
22. The statute sets forth specific criteria to determine whether the patients have a history of lack of compliance with treatment for their mental illness. A lack of compliance must have been either:
    - "a significant factor in necessitating hospitalization in a hospital, or receipt of services in a forensic or other mental health unit of a correctional facility" within the last thirty-six weeks before the petition the petition was filed; or
    - the result of "one or more acts of serious violent behavior toward self or others or threats of, or attempts at, serious physical harm to self or others" within 48 months before the petition was filed. MHL § 9.60(c)(4)(i)–(ii).
23. MHL § 9.60(c).
24. Mental health providers who are allowed to petition for AOT on behalf of the patient also include the director of a public or charitable organization, agency, or home that provides services or a residence to the patient and the director of community services or social work official of the city or county where the patient lives. MHL § 9.60(e)(1)(iv), (vii).
25. MHL § 9.60 (e)(1).
26. MHL § 9.60(e)(3).
27. *Id.*
28. Under the statute, an unsuccessful attempt to examine the patient occurs when the doctor "has not been successful in eliciting the cooperation of the subject of the petition to submit to an examination." MHL § 9.60(e)(3)(ii).
29. MHL § 9.60(e)(3).
30. MHL § 9.60(h)(1).
31. MHL § 9.60(g).
32. MHL § 9.60(h)(5).
33. MHL § 9.60(i)(1).
34. MHL § 9.60(h)(2).
35. *In re Gail R.*, 67 A.D.3d 808, 811, 891 N.Y.S.2d 411 (2d Dep't 2009).
36. MHL § 9.60(h)(3).
37. MHL § 9.60(h)(4).
38. *Id.*
39. MHL § 9.60(j)(1).
40. *In re Manhattan Psychiatric Ctr.*, 285 A.D.2d 189, 198, 728 N.Y.S.2d 37 (1st Dep't 2001).
41. MHL § 9.60(j)(2).

42. *Id.*
43. MHL § 9.60(k).
44. MHL § 9.60(n).
45. *Id.*
46. Duke Report, *supra* note 19, at 2.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 13.
51. *Id.* For more information about assertive community treatment, see "ACT Program Guidelines 2007," N.Y. State Office of Mental Health, http://www.omh.state.ny.us/omhweb/act/program_guidelines.html.
52. Duke Report, *supra* note 19, at 2.
53. *Id.* at 35.
54. *Id.* at 4.
55. *Id.* at 11–12.
56. *Id.* at 3–4, 28, 34, 36. This too has been my personal observation.
57. *In re Manhattan Psychiatric Ctr.*, 285 A.D.2d 189, 198, 728 N.Y.S.2d 37 (1st Dep't 2001).
58. *Id.* at 195–96.
59. *Id.* at 196.
60. *Id.* at 198.
61. 189 Misc. 2d 446, 732 N.Y.S.2d 549 (Sup. Ct., Oneida Co. 2001).
62. *Id.* at 448.
63. *Id.* at 452.
64. *Id.*
65. *Id.* at 454.
66. MHL § 9.60(h)(1).
67. MHL § 9.48.
68. *Id.*
69. From *Hair: The American Tribal Love-Rock Musical*. Words by James Rado and Gerome Ragni; music by Galt MacDermot (Broadway Opening 1968).

Navigating and Avoiding Sanctions for Failing to Preserve Electronic Information

By Kelly D. Kubacki & Regina J. Jytyla

On January 15, 2010, District Judge Shira Scheindlin of the Southern District of New York issued an opinion that has grabbed the attention of lawyers and clients that wrestle with the task of instituting and maintaining defensible legal hold policies. This case, *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*,[1] holds that sanctions may be imposed for spoliation of electronic data that is the result of negligent and grossly negligent conduct – not just bad faith. While this opinion sets parameters around culpability and conduct, many practitioners are still left wondering how corporate litigants can successfully navigate this challenging process. This article explores Judge

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Scheindlin's four-part analysis with regard to when spoliation warrants sanctions, including each standard of negligence and the sliding scale of corresponding sanctions that may arise when a party fails to fulfill discovery obligations. Practical guidance will also be offered to attorneys and corporate clients to help avoid the serious ramifications that may arise from a failure to preserve potentially relevant electronic information.

Case Background

This securities action was filed in February 2004 by a group of investors who sought recovery of $550 million in losses, resulting from the liquidation of two hedge funds. Ninety-six plaintiffs were in the original action, but only the actions of 13 were the subject of this discovery opinion.

During discovery, in October 2007, the Citco Defendants (consisting of Citco NV, Citco Group Limited and former directors) alleged the plaintiffs' production was severely lacking. As a result, the plaintiffs were ordered to provide the court with declarations regarding their efforts to preserve and produce documents. Based on the information received and by cross-referencing the productions and declarations of the plaintiffs, the defendants were able to identify at least 311 responsive documents that were not included in 12 of the 13 plaintiffs' productions and discovered that nearly all the declarations were false and misleading or executed by an individual without personal, relevant knowledge of its contents. Armed with this information following the close of discovery, the defendants moved for spoliation sanctions and dismissal of the plaintiffs' complaint.

Prior to discussion of the parties' specific shortcomings, Judge Scheindlin opens this opinion with a framework for determining when spoliation sanctions are appropriate. Four issues are essential to this analysis: the plaintiffs' level of culpability, the interplay between the duty to preserve and evidence spoliation, which party should bear the burden of proving evidence destruction and consequences, and the appropriate remedy for the harm caused.

Culpability

Turning to the party's culpability, Judge Scheindlin discusses the standards of negligence, gross negligence and willful misconduct in the discovery context. The judge describes negligence as behavior that falls below the standard of acceptable conduct. Acceptable conduct in the discovery context is determined by "what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding."[2] A party who fails to meet this acceptable conduct standard has acted negligently regardless of whether the actions resulted "from a pure heart and an empty head."[3] Behaviors constituting simple negligence include the failure to obtain records from all employees, the failure to take all appropriate measures to preserve ESI (electronically stored information), the failure to assess the accuracy and validity of selected search terms, or the failure to collect evidence.

Behaviors constituting simple negligence include the failure to obtain records from all employees.

Gross negligence is a standard greater than simple negligence – it is a failure to exercise the same level of care a careless person would employ. Accordingly, Judge Scheindlin defines the following failures as gross negligence:

- the failure to issue a written legal hold;
- the failure to identify the key players and ensure that their electronic and paper records are preserved;
- the failure to cease the deletion of e-mail or to preserve the records of former employees that are in a party's possession, custody or control; and
- the failure to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

Willful, wanton or reckless misconduct includes an intentional act, indifferent to the consequences, which "make[s] it highly probable that harm would follow."[4] Judge Scheindlin cites the intentional destruction of relevant ESI or paper documents as examples of willful misconduct, especially if the conduct occurred after the final relevant *Zubulake* opinion was issued in July 2004. The grossly negligent actions described above may be deemed willful if the party's actions are intentional. Judge Scheindlin notes that these behaviors are not meant to establish a definitive list, but are examples of discovery failures and culpability levels.

Duty to Preserve

After discussing the various levels of culpability in the context of discovery, Judge Scheindlin turns to the duty of preservation:

> By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence.[5]

Judge Scheindlin titled this case "*Zubulake* Revisited: Six Years Later" and used that series of seminal decisions to provide further framework for a party's obligations that stem from duty to preserve, determining "[i]t is well established that the duty to preserve evidence arises

when a party reasonably anticipates litigation."[6] In the instant case, the judge found the duty to preserve arose by April 2003 after the plaintiffs filed suit.

Burden-Shifting

Next Judge Scheindlin explores the burdens associated with the loss of documents, specifically analyzing who is responsible for demonstrating the favorability or prejudice of the lost evidence. Judge Scheindlin relates the burden of proof question to the severity of the sanctions at issue. For less severe sanctions, such as an award of costs and fees, the court's inquiry focuses on the spoliating party's conduct instead of the loss of evidence, and whether it was relevant or resulted in prejudice. Essentially, the innocent party must prove three elements: the spoliating party had control over the evidence and an obligation to preserve when the evidence was destroyed; the spoliating party acted with a culpable state of mind; and the missing evidence is relevant.

> The burden-shifting test seems to place a substantial burden on innocent parties.

When more severe sanctions are considered, such as dismissal or an adverse inference, the inquiry of the court focuses on behavior, in addition to the relevance of and prejudice caused by the unavailability of evidence. Moreover, if a spoliating party is found to have acted in a grossly negligent manner or in bad faith, relevance and prejudice may be presumed. However, this presumption is not required and is always rebuttable.

In her discussion of this issue, Judge Scheindlin sets forth a burden-shifting test as follows: if a spoliating party's conduct is egregious enough to justify the imposition of a presumption of relevance and prejudice or if the conduct warrants permitting the jury to make that presumption, the burden shifts to the spoliating party to rebut the presumption. If the spoliating party demonstrates no prejudice occurred, then no jury instructions would be warranted, although the possibility for lesser sanctions remains open.

Arguably, the burden-shifting test seems to place a substantial burden on innocent parties since it requires an innocent party to demonstrate the relevance of evidence that it may never review due to the opposing party's failure to preserve. As Judge Scheindlin notes, this seems unfair, but "the party seeking relief has some obligation to make a showing of relevance and prejudice, lest litigation become a 'gotcha' game rather than a full and fair opportunity to air the merits of a dispute."[7] An automatic presumption of relevance and prejudice would motivate parties to find errors and capitalize on mistakes, which the judge felt "would not be a good thing."[8]

Remedies

Turning to the final part of her four-point analysis, Judge Scheindlin notes sanctions serve to

> (1) deter the parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore "the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party."[9]

The least harsh yet most adequate sanction available should be imposed, ranging from cost-shifting and fines to preclusion and default judgment. The terminating or default judgment sanction should be imposed only in the most egregious cases, which Judge Scheindlin determined was not appropriate for the plaintiffs' actions.

After discussing the sanctions and analyzing the varying levels of an adverse inference instruction in particular, Judge Scheindlin concludes this discussion by noting the subjectivity of a decision to award sanctions. A judge relies on experience and his or her "gut reaction"[10] regarding the party's compliance with discovery obligations, which requires a case-by-case basis approach.

A party's best defense against sanctions is to fully comply with discovery obligations. Ignorance is no longer bliss and there seems to be decreasing protection for preservation mistakes, oversights or intentional destruction activities. By remaining vigilant in preserving information and addressing e-discovery issues, parties place themselves in the best position to avoid the court's wrath, administered through sanctions.

Legal Hold Implementation

Following the four-part analysis to determine if and when sanctions are appropriate, Judge Scheindlin discusses the plaintiffs' specific actions that led to the defendants' motion. This discussion centered on whether the plaintiffs issued a litigation (or legal) hold, an imperative step in preserving pertinent information and avoiding costly sanctions. Following the final *Zubulake* opinion in July 2004, the duty to issue written legal holds was clear and the plaintiffs should have instituted a written legal hold no later than 2005, which is when the action was transferred to the Southern District of New York.

Originally, the 13 plaintiffs discussed in *Pension Committee* failed to issue written legal holds when the duty to preserve initially arose in 2003. Seven of the plaintiffs eventually issued written holds, while six plaintiffs failed to issue a written hold at any time. The seven who issued written holds were found to have acted negligently, while the six who failed to issue any were found grossly negligent and subject to a permissive adverse inference sanction.

In addition to their failure to ever issue a written legal hold, these six plaintiffs conducted discovery in a grossly negligent manner. Their searches were "severely

deficient," and they failed to engage in any preservation or collection efforts prior to 2007 – four years after the duty to preserve technically arose. Not only did these plaintiffs fail to collect or preserve documents, they also actively continued to destroy electronic documents and backup data that may have contained responsive data. As such, it was fair to presume that the missing documents were relevant and the defendants were prejudiced. Regarding the backup tapes, Judge Scheindlin amended the original opinion to clarify that preserving all backup tapes is not required. Rather, the preservation obligation arises when the backup tape is the sole source of relevant information.[11]

For the seven plaintiffs who eventually did issue written legal holds, Judge Scheindlin notes that the duty to issue a hold was not well established in early 2004. Based on this fact, the rule of lenity applied and the belated issuance of the legal hold alone was insufficient to find that these plaintiffs engaged in grossly negligent conduct. Like the other six plaintiffs, these seven had additional discovery shortcomings that contributed to their conduct being deemed sanction-worthy. These shortcomings included deficient, unsupervised searches and relevant documents that were not produced.

Judge Scheindlin also found all 13 plaintiffs worthy of monetary sanctions because they "conducted discovery in an ignorant and indifferent fashion,"[12] and awarded the defendants reasonable attorney fees and costs associated with the motion. Finally, Judge Scheindlin ordered two of the plaintiffs to search backup tapes for relevant documents or demonstrate why this task could not be performed, but she declined to order further discovery with regard to the other 11 plaintiffs because the burden would far outweigh the benefit.

As demonstrated in *Pension Committee*, the failure to issue a legal hold will result in sanctions. Yet, as reported in a recent study by Kroll Ontrack, only 57% of U.S. corporations have an identified means to preserve potentially relevant data when litigation or a regulatory investigation is anticipated.[13] This statistic is alarming. Corporations are unable to comply with their duty to preserve potentially relevant information if they lack an appropriate means to suspend the expulsion of potentially responsive data. By failing to implement measures necessary to issue a legal hold, a company's ESI readiness policy cannot be effective and the company is at risk for costly motions and sanctions.

Furthering the precariousness of the legal hold process is the divide between corporate legal and IT departments, which share an increasing amount of responsibility for creating ESI strategy and enforcement. This relationship is moving in a more collaborative and cooperative direction, but it is far from perfect. Role confusion, vernacular barriers and budgetary ownership are all common subjects of contention. Thus, implementation and enforcement of the company's ESI strategy – which includes legal holds – should not be overlooked, and efforts should continue to strengthen the legal-IT relationship.

Pension Committee Distinguished

In February 2010, Judge Lee Rosenthal[14] from the Southern District of Texas authored an opinion that distinguishes and limits the *Pension Committee* ruling. The opinion, *Rimkus Consulting Group, Inc. v. Cammarata*,[15] addresses sanctions for the intentional destruction of electronic evidence. In this case, the defendants (who were the plaintiffs in the original action) contended that the deletion of evidence, including e-mails and attachments, was part of their routine business practice. Disagreeing with those arguments, Judge Rosenthal determined the defendants intentionally lost, altered and deleted e-mails the plaintiff requested in the discovery process. As a result, it was appropriate to send the case back to a jury with a permissive adverse inference instruction, and to award attorney fees and costs incurred during the plaintiff's investigation into the spoliation.

In exploring the preservation and spoliation issue, Judge Rosenthal discussed *Pension Committee*, paying particular attention to the U.S. Circuit Court differences with regard to culpability of parties and the burden of proof associated with relevance and prejudice of spoliated evidence. In regard to culpability levels, caselaw in the Second Circuit (as applied in *Pension Committee*) allows the imposition of sanctions for negligent evidence destruction, whereas in the Fifth Circuit, negligent destruction – as opposed to intentional, bad faith destruction – is insufficient for the imposition of an adverse inference instruction.[16] Judge Rosenthal concluded that these different culpability holdings "limit the applicability of the *Pension Committee* approach."[17]

In regard to burden of proof requirements, Judge Rosenthal made another distinction between the Second and Fifth Circuits, noting the Fifth Circuit has not addressed the presumptions of relevance and prejudice even in the context of bad faith. However, caselaw within the Fifth Circuit suggests that an adverse inference instruction is not considered appropriate unless there is a showing of relevance.

These differences highlight the continued confusion about the duty to preserve ESI. Organizations must make diligent efforts to understand the applicable legal standards and become better educated about the technology that can simplify and economize the discovery of ESI. Regardless of what legal standards apply, parties cannot ignore preservation obligations established by courts across the country. As Judge Rosenthal noted in *Rimkus Consulting Group*, the "spoliation of evidence – particularly of electronically stored information – has assumed a level of importance in litigation that raises grave concerns" and "distract[s] from the merits of a case, add[s]

costs to discovery, and delay[s] resolution."[18] Courts are recognizing the increasing impact presented by e-discovery related issues and are growing more intolerant of party missteps in this arena.

Best Practices

Commentators widely believe the *Pension Committee* and *Rimkus Consulting Group* decisions raise the bar of acceptable conduct for corporate litigants. Merely understanding the details discussed in these cases is not enough to meet this heightened bar. Instead, best practices, like the ones outlined below, must be instituted to successfully navigate all stages of data management and litigation response.

> The exact moment the duty to preserve arises remains a tricky issue and is often considered the most challenging step of the e-discovery process.

Implement an Archiving System

As legal requirements become more stringent, it is increasingly important that organizations arm themselves with the proper tools to defend against the risks presented by the mountains of data created and maintained in the course of business. One solution is implementing an effective archiving system. Archiving enables efficient records management that not only facilitates business and storage efficiency, but can also ensure compliance with legal and regulatory requirements. E-mail and filing archiving will allow legal, IT and compliance teams to appropriately preserve, manage, locate and produce relevant ESI, in addition to allowing for quick enforcement of the company's document retention policy.

An archiving solution streamlines the ability to administer legal holds. It facilitates efficient identification of potentially relevant ESI through enterprise-wide searching and enables legal holds to be immediately put into place, preventing liability for preservation issues. Data that is not relevant to the investigation, regulatory matter or litigation can be released easily, decreasing data stores that may eventually progress to the next phases of the e-discovery process.

Create an Application Inventory and Data Map

Another way to proactively approach data management is to create an application inventory and data map. An application and inventory map provides organization to IT environments and allows for a quick identification of pertinent data and custodians that are key to the fulfillment of preservation obligations. It also prevents the need to search for information throughout the organization's electronic information. Possessing this tool will help strengthen defensibility arguments if the opposing party moves for spoliation sanctions in the event some data does not get preserved.

Once the application inventory and data map is in place, it must be routinely updated as an organization's technology environment is constantly changing. The periodic updates should intertwine with technology asset management processes, storage planning, information security assessments and other peripheral processes. When applications or systems are retired, information should be included as to where the final set of data is kept and what process will be required to restore if necessary. Maintaining this information and checking with the pertinent parties prior to requiring a restoration, will save time, cost and effort down the road.

Know When the Duty to Preserve Arises

The exact moment the duty to preserve arises remains a tricky issue and is often considered to be the most challenging step of the e-discovery process. The Federal Rules of Civil Procedure provide little guidance as to a party's preservation obligation and when the duty to preserve arises. Thus, litigants must rely on caselaw to determine the proper course of action.

In a separate case from the Southern District of New York, United States Magistrate Judge James C. Franics IV found the duty to preserve arose no later than the lawsuit's filing.[19] In the District of Maryland, the court found the duty to preserve arose when a plaintiff sent a letter informing the defendant that he had consulted attorneys regarding the matter.[20] The Western District of Kentucky has held the notice of litigation was established after a phone call from the plaintiff and the filing of a complaint.[21]

As demonstrated by the sampling of cases above (which by no means present an exhaustive list of possibilities), it is no wonder parties are confused as to when the duty to preserve arises. It is better for parties to be safe than sorry by implementing a written legal hold sooner rather than later if litigation appears to be on the horizon. To increase defensibility, parties should maintain detailed notes of the preservation protocol followed, which include when the hold was issued, what details were included in the hold, to whom the hold was issued and the efforts taken to continually monitor compliance.

Issue Written Legal Holds

As highlighted by *Pension Committee*, issuing legal holds is an essential step of the process. Upon reasonable anticipation of litigation, counsel must issue written legal holds and communicate them appropriately to employees of the organization. This ensures all department heads, IT personnel and pertinent employees are made aware of

the hold. The written hold should include the purpose for the hold, a description of the lawsuit or investigation, and the guidelines for determining what data should be preserved and by whom. Counsel should then work jointly with IT to notify legal opponents and any relevant third parties of their duty to preserve potentially responsive information. Internal automatic destruction must also be suspended, which includes halting defragmentation software and other forms of automatic or routine drive "cleanup" activities.

The failure to properly issue a legal hold and prevent the disposal of information spells disaster for parties and their counsel. In addition to *Pension Committee*, federal caselaw from across the country is peppered with incidents involving spoliation and sanctions requests. Indeed, according to Kroll Ontrack's *2009 Year in Review* report, 66.7% of federal cases in 2009 that addressed sanctions involved preservation and spoliation issues. To provide an example, consider an Eastern District of New York case from March 2009 that addressed legal holds. In *Acorn v. County of Nassau*,[22] the defendants claimed they issued a "verbal" legal hold and instructed key individuals to search for responsive documents, despite lacking the technical resources to locate and access electronic documents. Finding the defendants possessed a duty to preserve and were grossly negligent in failing to issue a proper legal hold, the court awarded the motion costs and attorney fees to the plaintiffs.

Monitor Legal Hold Compliance

Once a legal hold notice is issued, counsel should actively monitor internal suspension measures and ensure compliance. This includes sending update notices to keep key players and new employees informed, reminding them of their preservation obligations. Detailed and accurate records should also be kept of what data have been preserved and how, should the opposing party bring preservation methods into question. Counsel should ensure the legal hold is in effect until final judgment, a settlement has been reached and a formal release has been signed by all parties, or the case is dismissed and no related claims remain outstanding. To lift the legal hold, counsel should circulate an explicit notice that serves to officially resume scheduled disposal. Care must be taken to ensure the hold is not lifted prematurely on particular data that may be concurrently under hold for another matter.

A recent case from the Middle District of Florida highlights this ongoing obligation of counsel. In *Swofford v. Eslinger*,[23] the court cited *Zubulake IV* and found that it is insufficient for in-house counsel to simply notify employees of preservation notices. Rather, counsel "must take affirmative steps to monitor compliance"[24] to ensure preservation. *Swofford* is a novel case as it marks one of the first instances where in-house counsel was sanctioned for discovery failures. The court issued an adverse inference sanction for the evidence destruction and awarded attorney fees and costs to the plaintiffs, holding the defendants and in-house counsel jointly and severally liable.

Conclusion

Judge Scheindlin reiterates in *Pension Committee* that perfection is not required, but parties must take the necessary steps to properly preserve relevant records for collection, review and production. Although the specific definitions of unacceptable conduct and relational levels of culpability provided in *Pension Committee* are not meant to establish a definitive list of behavior in the discovery process that will result in sanctions, the message is abundantly clear. Courts will impose sanctions for a failure to properly fulfill discovery obligations. Counsel can help avoid spoliation by properly planning for electronic discovery prior to litigation. Investing resources in proper preservation and legal hold management from the outset will return dividends by ensuring that discovery practices withstand judicial scrutiny in the unfortunate event opposing counsel files a motion seeking spoliation sanctions. ■

1. 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).
2. *Id*. at *3.
3. *Id*. at *3.
4. *Id*. at *3.
5. *Id*. at *1.
6. *Id*. at *4 (citing *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 433, 436 (2d Cir. 2001)).
7. *Pension Committee* 2010 WL 184312 at *5.
8. *Id*. at *5.
9. *Id*. at *6 (citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)) (quoting *Kronisch v. U.S.*, 150 F.3d 112, 126 (2d Cir. 1998)).
10. *Id*. at *7.
11. *Id*. at *12 n.99.
12. *Id*. at *23.
13. Kroll Ontrack, *Third Annual ESI Trends Report* (2009).
14. Judge Rosenthal currently serves as chair of the Federal Judicial Conference Advisory Committee for the Federal Rules of Civil Procedure, and led the committee when the Federal Rules of Civil Procedure were amended in 2006 to address electronically stored information.
15. 2010 WL 645253 (S.D. Tex. Feb. 19, 2010).
16. Judge Rosenthal also notes that bad faith is required for an adverse inference instruction in the Eleventh Circuit, and that the Seventh, Eighth, Tenth and D.C. Circuits appear to require bad faith. *Id.* at n.11.
17. *Id*. at *7.
18. *Id*. at *1.
19. *Green v. McClendon*, 262 F.R.D. 284, 2009 WL 2496275 (S.D.N.Y. Aug. 13, 2009).
20. *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494 (D. Md. 2009).
21. *KCH Servs., Inc. v. Vanaire, Inc.*, 2009 WL 2216601 (W.D. Ky. July 22, 2009).
22. 2009 WL 605859 (E.D.N.Y. Mar. 9, 2009).
23. 671 F. Supp. 2d 1274 (M.D. Fla. 2009).
24. *Id.* at 1281 (citing *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. July 20, 2004)).

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The views expressed in the article are those of Mr. Tembeckjian and do not reflect the views of the New York State Bar Association.

Point of View: Judicial Reform and the Test of Time

By Robert H. Tembeckjian

In 1975, New York became the 38th state to create a disciplinary commission for the purpose of handling complaints of misconduct against judges.[1] Today, all 50 states and the District of Columbia operate such systems, culminating a national movement to take the discipline of judges out of the exclusive control of the courts, which had not been especially active in the field.[2] While there are variations from state to state, the basic model is the same: an office of ethics enforcement professionals investigates and litigates complaints under the supervision of a board or commission which, where appropriate, either imposes or recommends sanctions against those judges found to have engaged in misconduct, subject to review by the state's highest court.

I believe the record of the past 35 years demonstrates the strength and fairness of this disciplinary system in New York State. While the New York State Commission on Judicial Conduct ("Commission" or COJC) understands that the "watchdog" nature of its work is unlikely to earn it the affection of all judges, or the acclaim of grievants whose complaints have been examined and dismissed, a judicial watchdog regarded as too active by the former and too passive by the latter probably has it just right.

That is not to say that there is no room for improvement. The Commission itself has been advocating important structural changes to make the process more open and less mysterious, to give it more flexibility in imposing sanctions commensurate with the misconduct, and to make its decisions more accountable to the state's highest court. While such changes would require action by the Legislature, the Commission has been receptive to constructive suggestions that could be implemented on its own, in the form of amendments to its operating procedures and policies.

The Commission's Mandate, Checks and Balances

The Commission is an independent agency established by the New York State Constitution to review complaints of misconduct against judges and justices of the Unified Court System and, where appropriate, render public determinations of admonition, censure or removal from office, or retirement for disability.[3] There are approximately 3,500 judges and justices in the system, and the Commission receives and processes over 1,800 complaints per year.[4]

While judges must be free to act independently, on the merits and in good faith, they also must be accountable should they commit misconduct. The Commission's objective is to enforce high standards of conduct as articulated in the Rules Governing Judicial Conduct ("Rules"). By absorbing, addressing and often defusing the intense criticism leveled at the judiciary by disappointed litigants and other complainants, and disciplining those relatively

few judges whose behavior demands it, the Commission protects the independence of the judicial branch to preside over cases and render decisions free from untoward influences. In so doing, it serves the public interest in a dynamic three-branch system of government in which the judiciary operates both independently and ethically.

The Commission was created in 1975 because judicial discipline, which to that point was the sole province of the courts, was dormant.[5] The now-defunct Court on the Judiciary, for example, had been convened only five times in the preceding 25 years.[6] In contrast, in its 35 years of operation, the Commission has received and processed over 41,000 complaints, conducted over 7,500 investigations, publicly disciplined over 700 judges and confidentially cautioned over 1,400 others.[7] These numbers demonstrate not only that the Commission fulfills its mandate vigorously but also that it protects the judiciary from frivolous grievances. The vast majority of complaints are dismissed at the outset as without merit, and investigations are much more likely to exonerate than inculpate the judge.

The constitutional provisions that created the Commission recognize the important role the judiciary must continue to play in the discipline of its own. First and foremost, the ethics Rules are promulgated by the Chief Administrative Judge on approval of the Court of Appeals.[8] Four of the 11 Commission members must be judges.[9] The Chief Judge makes appointments to the Commission, as do the Governor and the leaders of the Legislature.[10] Yet to ensure the Commission's own independence and prevent domination by any one branch, its own members elect a Chair and hire an Administrator to run the day-to-day operations, and its budget is negotiated and submitted to the Legislature by the Governor, not controlled by the judiciary.[11]

The Commission itself, not its staff, must authorize all investigations, and strict quorum requirements make it impossible for any disciplinary action to be taken without the participation of at least eight and the concurrence of six out of the 11 members.[12]

Formal disciplinary hearings are presided over by referees, many of whom are retired judges, designated by the Commission, not its staff.[13]

Finally, the Court of Appeals has authority to review any Commission disciplinary determination at the request of the disciplined judge.[14] The Court has heard 91 such reviews since 1978, accepting 75 Commission determinations, modifying 14, rejecting one and remitting one for further proceedings.[15] While on 12 occasions it reduced and on two occasions it increased the discipline imposed, the only case in which the Court rejected a Commission sanction – *In re Greenfield*,[16] which severely constrained the Commission's authority to act in matters involving unreasonable delay in rendering decisions – was effectively reversed by the Court's recent ruling in *In re Gilpatric*.[17] The Court declared that, based on 19 years of experience, the *Greenfield* doctrine was "not workable," and it affirmed the Commission's jurisdiction to act where decisional delays were lengthy and without valid excuse.

While its affirmance rate is noteworthy, the Commission recognizes a significant constraint in the present system. In most states, the highest court has authority to review all judicial disciplinary decisions. In New York, however, the Court of Appeals may review only those cases that the disciplined judge chooses to appeal. The Commission has called for expanding the Court's authority, as discussed in the Recommendations section below.

Standing the Tests of Time and Litigation

While there have been calls from judges and others over the years to amend New York's judicial disciplinary system, the Commission believes that the test for change should not be what would please or solely benefit the judiciary or complainants but what would be consistent with the public interest in a fair but rigorous system of ethics enforcement. Indeed, the Commission's procedures have stood both the tests of time and litigation, having been subjected to and withstood more than 100 procedural challenges over the years, mostly in the form of CPLR Article 78 proceedings initiated by judges or complainants, or in disciplinary reviews heard by the Court of Appeals.[18] For example, in *Nicholson v. Commission*[19] and *In re Doe*,[20] the Court affirmed the Commission's authority to pursue matters bearing a "reasonable relation to the subject matter under investigation."

In *In re Seiffert*,[21] the Commission's standard of proof – preponderance of the evidence – was unequivocally affirmed.

In *In re Petrie*,[22] the Commission's procedure for summary determination was upheld.

The fundamental structure of the Commission itself – reposing in one body both investigative and adjudicative functions – is a standard administrative agency model that has been emulated in 42 states and has been upheld in constitutional challenges throughout the country.[23] Indeed, the Commission's Operating Procedures and Rules are modeled after the State Administrative Procedures Act. However, to ensure that its procedures are fair and convey the appearance of fairness, the Commission bifurcated its staff so as to separate those who investigate and litigate cases from the Clerk of the Commission, who neither investigates nor litigates but assists the Commission in its adjudicatory role in the manner of an appellate law clerk.[24]

Having withstood these and other tests, the Commission's procedures should not be amended merely to assuage some critics' unhappiness with some of the agency's disciplinary decisions. Just like judges, the Commission must call them as it sees them, without

outside influence. Where a proposed change is fair and reasonable, however, the Commission will likely embrace it. For example, upon considering the concurring and dissenting opinions in *In re Shaw*,[25] the Commission clarified the standard necessary to prevail on a motion to reconsider a disciplinary determination.[26] More recently, upon considering a report of the New York County Lawyers' Association, the Commission undertook to implement certain clarifications to its Policy Manual.[27]

and for years on its Web site, refutes the suggestion of some critics that the Commission is either concentrating disproportionately on part-time magistrates or somehow besmirching full-time judges by lumping them in with part-timers. All judges – part-time or full-time, law-trained or lay-jurist, upstate or downstate, state-paid or locality-paid – wield enormous power and are subject to the same ethical Rules, which the Commission endeavors to apply equally, without fear or favor.

Discipline is based solely on whether there were violations of the Rules, without regard to whether the judge was part time or full time, elected or appointed.

Avoiding Judicial Politics

Judges, of course, are required to avoid political activity, except under the limited circumstances of their own campaigns for elective judicial office.[28] To avoid even the appearance that its decisions might be influenced by partisan judicial politics, the Commission adopted a rule prohibiting its members from directly or indirectly participating in judicial elections, except their own campaigns for judicial office, and even from participating in bar association ratings of candidates for appointive judicial office.[29] While there is occasionally some debate over the impact of a Commission discipline on the re-election or re-appointment of a censured or admonished judge,[30] the Commission's role is limited to disclosing certain information to a judicial rating or appointing authority that presents a signed waiver of confidentiality from the judicial candidate.[31]

The Commission has also avoided taking any position on two recurring issues: whether judges should be elected or appointed, and whether the system of part-time town and village court justices should be replaced or amended – e.g., to require that all such magistrates be lawyers.[32] The Commission has sought to avoid any suggestion that its decisions in individual cases were affected by a political view of the method by which an individual ascended the bench or the efficacy of the part-time magistrate system. Discipline is based solely on whether there were violations of the Rules, without regard to whether the judge was part time or full time, elected or appointed. Indeed, the Court of Appeals has unequivocally held that the Rules Governing Judicial Conduct set forth a statewide standard that must be applied with equal force to all judges.[33] It is significant to note, however, that after 35 years and over 700 decisions, approximately 69% of the judges disciplined by the Commission have been town and village magistrates, who happen to comprise approximately 67% of the state's judiciary.[34] This statistical track record, openly reported for decades in its annual reports

Recommendations

While it may be rare for a government agency to encourage greater review of its decisions by a higher authority and greater public access to its work, the Commission has made such recommendations over the years to promote the public policy of checks and balances.

Court of Appeals Review of All Commission Disciplines

There is no greater advocate for judicial independence and accountability than the Court of Appeals. The Court's authority over the Commission is a great safeguard to both. Yet review is limited to those cases in which the disciplined judge appeals.[35] The Commission has recommended legislation to enable the Court to review any Commission disciplinary decision.[36] Chief Judge Jonathan Lippman has endorsed the proposal,[37] which would bring New York in line with the vast majority of states in which the highest court, appropriately, is the ultimate authority on all matters of judicial discipline.

Making Formal Disciplinary Proceedings Public

All Commission investigations and formal disciplinary proceedings are confidential by law.[38] For 35 years, the Commission has advocated that post-investigation formal proceedings should be made public, as they were in New York until 1978, and as they are in 35 other states.[39] Opening the process in this way would educate both the judiciary and the public and demystify an important aspect of the Commission's work. It is ironic that many who claim the Commission's secrecy leads to unaccountability do not join the Commission in seeking to open the process. In this regard it is important to note that the State Senate Judiciary Committee held two public hearings in 2009 on the Commission's operations and procedures, and thereafter State Senator John L. Sampson introduced a bill (S.6264) that would make the Commission's formal disciplinary proceedings public.

Authorizing Suspension from Office

On occasion the Commission has concluded that a particular judge engaged in conduct warranting discipline more serious than censure but less severe than removal.[40] Yet in New York, unlike most states, there is no authority for the Commission to suspend a judge. Even the authority of the Court of Appeals to suspend a judge is limited to interim situations, such as when a judge is charged with a felony.[41] For years, the Commission has advocated expanding the range of available sanctions to include suspension without pay.[42]

Conclusion

Public confidence in the independence, integrity, impartiality and high standards of the judiciary, and in an independent disciplinary system that helps keep judges accountable for their conduct, is essential to the rule of law. The members and staff of the Commission are confident that their work contributes to those ideals, to a heightened awareness of the appropriate standards of ethics incumbent upon all judges, and to the fair and proper administration of justice.

A system that has handled so many cases, produced fair results and withstood 35 years of legal and procedural challenges, and that has internal as well as external checks and balances, should not be disturbed without significant cause. While the Commission itself advocates some change, it would also borrow from the vernacular: *If it ain't broke, don't fix it.* ■

1. The Legislature authorized a Temporary Commission on Judicial Conduct in 1974, which began operations in January 1975. An amendment to the State Constitution, and subsequent enabling legislation, made the New York State Commission on Judicial Conduct (COJC) permanent as of April 1, 1978, and effectuated the structure under which it continues to operate today. N.Y. Const. art. 6, § 22; N.Y. Judiciary Law art. 2-A ("Jud. Law").

2. Gerald Stern, *Is Judicial Discipline in New York State a Threat to Judicial Independence?*, 7 Pace L. Rev. 291 (1987); David Cleveland & Jason Masimore, *The Ermine and Woolsack: Disciplinary Proceedings Involving Judges, Attorney-Magistrates and Other Judicial Figures*, Geo J. Legal Ethics 1037 (2001).

3. N.Y. Const. art. 6, § 22; Jud. Law art. 2-A.

4. COJC, 2010 Annual Report, *available at* www.scjc.state.ny.us.

5. Stern, *supra* note 2.

6. *Id.*

7. COJC, 2010 Annual Report, pp. 41–42, 249.

8. N.Y. Const. art. 6, § 20; 22 N.Y.C.R.R. §§ 100 *et seq.*

9. N.Y. Const. art. 6, § 22(a); Jud. Law § 41(1).

10. *Id.*

11. Jud. Law § 41(2), (7).

12. Jud. Law § 41(6).

13. Policy 3.2, COJC, Policy Manual, *available at* www.scjc.state.ny.us.

14. Jud. Law § 44(7).

15. A list of the 91 cases, with citations and results, is available on the Commission's Web site: www.scjc.state.ny.us.

16. 76 N.Y.2d 293, 558 N.Y.S.2d 881 (1990).

17. 13 N.Y.3d 586, 896 N.Y.S.2d 280 (2009).

18. COJC, 1995 Annual Report, pp. 66–69.

19. 50 N.Y.2d 597, 431 N.Y.S.2d 340 (1980).

20. 61 N.Y.2d 56, 61, 471 N.Y.S.2d 557 (1984) (citing *Carlisle v. Bennett*, 268 N.Y. 212, 217 (1935)).

21. 65 N.Y.2d 278, 491 N.Y.S.2d 145 (1985).

22. 54 N.Y.2d 807, 443 N.Y.S.2d 648 (1981).

23. *In re Hanson*, 532 P.2d 303 (Ala. 1975); *In re Flournoy*, 195 Ariz. 441, 990 P.2d 642 (Ariz. 1999); *Adams v. Comm'n on Judicial Performance*, 10 Cal. 4th 866, 42 Cal. Rptr. 2d 606 (Cal. 1995); *In re Zoarski*, 227 Conn. 784, 632 A.2d 1114 (Conn. 1993); *In re Kelly*, 238 So. 2d 565 (Fla. 1970); *In re Vaughn*, 265 Ga. 843, 462 S.E.2d 728 (Ga. 1995); *In re Holien*, 612 N.W.2d 789 (Iowa 2000); *In re Rome*, 218 Kan. 198, 542 P.2d 676 (Kan. 1975); *In re Bowers*, 721 So. 2d 875, (La. 1998); *In re Diener*, 268 Md. 659, 304 A.2d 587 (Md. 1973); *In re Chrzanowski*, 465 Mich. 468, 636 N.W.2d 758 (Mich. 2001); *Comm'n on Judicial Performance v. Russell*, 691 So. 2d 929 (Miss. 1997); *In re Elliston*, 789 S.W.2d 469 (Mo. 1990); *Mosley v. Comm'n on Judicial Discipline*, 117 Nev. 371, 22 P.3d 655 (Nev. 2001); *Friedman v. State of N.Y.*, 24 N.Y.2d 528, 301 N.Y.S.2d 484 (1969); *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (N.C. 1977); *In re Schenck*, 318 Or. 402, 870 P.2d 185 (Or. 1993); *In re Pirraglia*, 916 A.2d 746 (R.I. 2007); *In re Brown*, 512 S.W.2d 317 (Tex. 1974); *In re O'Dea*, 159 Vt. 590, 622 A.2d 507 (Vt. 1993); *In re Deming*, 108 Wash. 2d 82, 736 P.2d 639, *as amended by* 744 P.2d 340 (Wash. 1987).

24. 22 N.Y.C.R.R. § 7000.13.

25. 96 N.Y.2d 7, 724 N.Y.S.2d 672 (2001).

26. 22 N.Y.C.R.R. § 7000.6(f)(6).

27. *Judicial Conduct Commission Rejects NYCLA's Report as "One-Sided,"* N.Y.L.J., Feb 26, 2010, p. 1.

28. 22 N.Y.C.R.R. §§ 100.0(Q), 100.5.

29. 22 N.Y.C.R.R. § 7000.14.

30. New York City Mayor Michael Bloomberg and New York Governor David Paterson did not reappoint judges whom the Commission had censured. *No Reappointment for Judge Who Accosted Lawyer*, N.Y.L.J., Nov 29, 2007, p. 1, col. 1; *Decision Not to Reappoint Sends "Chilling" Message, Judge Claims*, N.Y.L.J., May 1, 2009, p. 1 col. 3. A town justice recently ascribed his re-election defeat in part to a Commission censure. *Republicans Win Both Saranac Lake Justice Seats*, Adirondack Daily Enter., Mar 17, 2010. On the other hand, two judges were recently re-elected despite having been censured or admonished. *Top Court Rules Commission Can Admonish Kingston Judge*, Poughkeepsie J., Dec. 15, 2009; *Commission Admonishes State Supreme Court Justice McGrath*, Albany Times Union, Feb. 17, 2010.

31. Jud. Law § 45; Robert H. Tembeckjian, *A Role for Disciplinary Agencies in the Judicial Selection Process*, 34 Fordham Urban L.J. 501 (2007).

32. The state constitution does not require a town or village justice to have a law degree. N.Y. Const. art. 6 § 20.

33. *In re Fabrizio*, 65 N.Y.2d 275, 277, 491 N.Y.S.2d 144 (1985); *In re Vonderheide*, 72 N.Y.2d 658, 660, 536 N.Y.S.2d 24 (1988).

34. Statistical analysis of Commission cases, www.scjc.state.ny.us/Determinations/all_decisions.htm.

35. Jud. Law § 44(7).

36. COJC, 2010 Annual Report, p. 20.

37. *Agency Seeks Wider Court of Appeals' Review of Judge Discipline Cases*, N.Y.L.J., Apr. 21, 2010.

38. Jud. Law §§ 44(4), 45.

39. COJC, 2010 Annual Report p. 17, *available at* www.scjc.state.ny.us.

40. *In re Doyle*, 2007 WL 2505975, www.scjc.state.ny.us/Determinations/D/doyle.htm; *In re Carter*, 2006 WL 4742824, www.scjc.state.ny.us/Determinations/C/carter.htm; *In re Raab*, 2003 WL 599401, www.scjc.state.ny.us/Determinations/R/raab.htm; *In re Barr*, 1980 WL 129351, www.scjc.state.ny.us/Determinations/B/barr.htm; *In re Hopeck*, 1980 WL 129350, www.scjc.state.ny.us/Determinations/H/hopeck.htm; *In re Sena*, 1980 WL 129346, www.scjc.state.ny.us/Determinations/S/sena.htm.

41. N.Y. Const. art. 6 § 22 (e)–(g).

42. COJC, 2010 Annual Report, p. 17, *available at* www.scjc.state.ny.us.

Corporate Governance: An Expert Can Make a Difference in Litigation

By Sheryl L. Hopkins, H. Stephen Grace, Jr., and John E. Haupert

The current economic crisis has once again focused the spotlight on corporate governance issues. Past board and management actions are being scrutinized in the numerous securities fraud, breach of fiduciary duty, and ERISA actions that have been filed in the aftermath of the stock market decline in 2008 and 2009. Whether considering the propriety of board and management actions in consummating recent mergers and acquisitions, such as Bank of America's acquisition of Merrill Lynch, or considering the actions of the board in carrying out its responsibilities in the Countrywide securities fraud litigation, corporate governance issues are at the center of this litigation. This article will address how the testimony of corporate governance and management practices experts can be utilized in this and other litigation, and who is qualified to testify as a corporate governance expert.

Corporate Governance Practices Are at Issue in a Variety of Causes of Action

Roles, responsibilities, practices, and processes of both the board and management are at issue in a variety of causes of action. For example, breach of fiduciary duty actions against directors asserting that directors have failed to properly exercise their oversight or decision-making functions or have acted in bad faith or in their own self interest obviously require an understanding of how boards and management function and the standard business practices and processes of corporate governance that may be applicable. Similarly, securities violations claims may require an understanding of the roles and responsibilities of directors and individual corporate officers to determine whether fraudulent intent is present or whether a due diligence defense is available. And even common law fraud claims involving complex business decisions may

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implicate corporate governance issues in explaining how and why decisions were made and what structures were in place to ensure good decision making to address issues of fraudulent intent and misrepresentation.

Corporate Governance Testimony Is Specialized Knowledge Which Can Be Helpful to Courts and Juries Under Fed. R. Evid. 702

In the context of these actions, courts and juries are increasingly asked to assess and evaluate complicated business decision-making and oversight decisions. Good business decisions sometimes have bad outcomes. To avoid having these types of cases tried by hindsight, it is important that the trier of fact understand the context in which business decisions are made as well as good corporate governance and management practices and processes for making decisions. Business mores and governance practices evolve over time. What steps should be taken, procedures followed, and information considered in making these and similar decisions? What are the roles and responsibilities of the individual officer and director in this process? These are complicated questions whose answers are important to the fact finder.

But executive compensation issues, provisions in mergers and acquisition agreements, financial decision-making issues, director oversight responsibilities, and disclosures in financial statements or SEC filings, to name a few, are not exactly everyday stuff within the common experience of most courts and jurors. Testimony explaining both the context in which the board or management acted and customary business practices, standards of conduct and procedures for boards or management can, therefore, be helpful to the court or the jury in deciding the case.

Federal Rule of Evidence 702 recognizes that expert testimony is admissible where "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Courts have for some time recognized that complex corporate management process and practice issues are beyond common experience and may require expert clarification.[1]

The following three real-life examples, based on the experiences of the firm with which the authors are associated, demonstrate how attorneys can use corporate governance and management practices experts in breach of fiduciary duty, securities violations, fraud, bad faith claims and other cases.

Breach of Fiduciary Duty Claim Against Independent Directors

In breach of fiduciary duty actions against directors and officers, the court or the jury must determine whether directors and officers acted in an informed manner with the best interests of the corporation in mind and in good faith. To help make these determinations, expert testimony is useful to explain both the context in which the directors or officers acted and customary business practices, standards of conduct and processes considering the specific circumstances. The following breach of fiduciary duty action against the independent directors of a bankrupt corporation illustrates how corporate governance and management practice testimony can be used in these types of cases.

In this case, the liquidating trustee of a creditor trust established in connection with a Chapter 11 plan of reorganization sued the independent directors of a twice–bankrupt energy company asserting: (1) the independent directors elected after the corporation first emerged from Chapter 11 had breached their fiduciary duties by pursuing business strategies that were excessively risky and not in the corporation's best interests; and (2) the directors knew these risky strategies represented a material conflict of interest between the CEO and the corporation, since these strategies offered the CEO the only opportunity to regain control of the corporation. Specifically, the plaintiff alleged that the independent directors had abdicated their corporate governance responsibilities, approved the expenditure of large sums of money in high-risk oil and gas exploration ventures, and engaged in self-dealing.

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The corporate governance expert reviewed the allegations and addressed each allegation to determine if customary business practices and processes were followed. The expert found that the independent directors had acted appropriately for the following reasons:

- The oil and gas industry is inherently a risky business and risk sharing is a business judgment.
- The directors were independent and were not excessively compensated; there was no self-dealing.
- The independent directors were well informed and appropriately interacted with and relied on management and exercised experienced and reasonable judgment in addressing their responsibilities in an effort to make the reorganized entity a success.
- Certain senior creditors in the first bankruptcy proceeding, operating as a bondholder committee, negotiated the CEO's employment agreement and incentives and were directly involved in the selection of the independent directors. The company's strategy was developed and put in place by the bondholder committee as part of the Plan of

Reorganization, which was approved by the court. The strategy was based on the bondholder committee members' experience with the CEO and on their belief that he was a talented natural resources finder.

- The CEO would never have regained control of the corporation under the employment agreement negotiated by the bondholder committee, even if the plan had been successful. These senior creditors, regardless of the success of the reorganized firm, would have retained control. In fact, the employment contract anticipated the bondholder committee members would replace the CEO if the plan was successful.
- The damages claimed by the plaintiff in the form of loss of value were speculative and not based on any evidence; the actions of the independent director did not cause any damages.

This analysis helped explain the context in which the independent directors had acted, to show that they had acted in an informed manner with the best interests of the corporation in mind and in good faith. The case was ultimately dismissed on the defendant's motion for summary judgment.

Good Faith and Bad Faith Claims

Corporate governance and management practices experts may also offer helpful testimony in other types of complex commercial litigation. The following embezzlement case, in which the plaintiff claimed direct and consequential damages of almost $19 million against the defendant bank, again shows how testimony on corporate governance and management practices can be used effectively.

Two of the plaintiff's employees embezzled almost $1 million over several years from their employer by setting up a fictitious bank account at the defendant bank. The embezzlement resulted in the plaintiff company's insolvency. The company sued the bank asserting that the bank was negligent, acted in bad faith, and failed to follow reasonable commercial standards of fair dealing by opening the account and accepting checks and wire transfers into the fictitious account without proper endorsement. After reviewing the evidence in the case, the corporate governance expert, testifying on both liability and damage issues, refuted the plaintiff's claims, as follows:

- The two employees had commenced their embezzlement scheme several years before the fictitious account at the defendant bank was opened, a fact unknown to the plaintiff at the time it filed the initial petition. In fact, the employees had employed fictitious accounts at three other banks prior to opening the account at the defendant bank and had embezzled a total of almost $2 million through the fictitious accounts at multiple banks.
- The embezzlement resulted from both a lack of and failure of internal controls at the plaintiff's company and from a highly unusual and inappropriate delegation of responsibilities by the company's owner.
- Significant problems with the timely and accurate production of financial statements by the plaintiff also contributed to the lax environment, which allowed the two employees to undertake and continue the embezzlement scheme for several years.
- The plaintiff company's damage claims were not supported by the evidence.

After an extensive trial, the jury found that the plaintiff had direct damages of only $120,000. The jury further found that the plaintiff itself was responsible for 95% of this $120,000 in damages and that the defendant bank was responsible for only 5% of the damages or $6,000. The jury also found there were no consequential damages.

Securities Violations Claims

Claims for violations of the 1933 Securities Act and the 1934 Securities Exchange Act against companies, directors and officers frequently require an understanding of the roles and responsibilities of directors and individual corporate officers to determine whether fraudulent intent is present or whether a due diligence defense is available. The following Rule 10b-5 claim by the SEC against a CEO demonstrates the types of issues where corporate governance testimony may assist the fact finder.

The SEC sued the defendant CEO of a software company claiming that the CEO had intentionally orchestrated the misstatement of the company's financial statements through an accounting fraud, which ultimately resulted in a restatement. The SEC further asserted that the CEO's certification of the restated financial statements was an admission of wrongdoing. While at first glance, this case might appear to have called exclusively for accounting expert testimony, the real issue in the case was not whether the accounting was right or wrong, but whether the non-accountant CEO had exercised appropriate judgment in addressing the accounting issues and in relying on accounting professionals.

The defendant's corporate governance expert evaluated the allegations and explained how companies are organized and what the CEO's role and duties were in this situation as follows:

- All companies must rely on a division of labor to operate.
- By necessity the CEO must rely on the expertise of others within the company to fulfill the duties and obligations in his or her role in the overall management of the company.
- The proper accounting for transactions under generally accepted accounting principles (GAAP) is not always a black-and-white issue and requires accounting expertise.

- The CEO was not an expert in accounting and had the right, in this instance which involved complicated accounting issues not fully resolved by the accounting rules, to rely on the accounting judgment of both internal and external accounting professionals as to the proper way to account for the transactions in question.
- The CEO had not ignored his duties, but rather had diligently performed those duties by seeking the advice of experts in an effort to fulfill his obligations.

This analysis was helpful in establishing that the CEO had acted appropriately without fraudulent intent. The case was settled for a nominal five-figure sum after the judge stated at a pre-trial hearing that he did not believe a fraud charge could be supported at trial.

Who Is Qualified to Testify as a Corporate Governance Expert?

Once it is determined that the testimony of a corporate governance expert would be helpful to the trier of fact to understand the evidence, the next question is, Who is qualified to testify as a corporate governance expert? Courts, in the exercise of their gatekeeper role under Federal Rule of Evidence 702, must decide at the outset who is qualified to testify as a corporate governance expert. Under Federal Rule of Evidence 702, a witness can be qualified as an expert "by knowledge, skill, experience, training, or education." Courts reviewing academic credentials have qualified practicing attorneys, law school professors, MBAs, microeconomists, and CPAs as corporate governance experts. But not every attorney, MBA, accountant or economist is qualified to testify as a corporate governance expert. Thus, the need to clarify what other qualifications should be expected of those who represent themselves as qualified corporate governance experts.

The Advisory Committee notes to Federal Rule of Evidence 702 (2000 amendments) recognize that in some fields experience may be the "predominant, if not sole basis, for a great deal of reliable expert testimony." Courts must look beyond a proposed expert's academic or technical training credentials when determining whether that expert is qualified to render an opinion in a given area. They must also examine the full range of the expert's practical experience.[2] Experience may trump academics in many situations. For example, a Ph.D. in food science qualified by education may be able to explain what pathogens contaminate food, but if the question at issue is customary safety practices and processes used in a kitchen to avoid food contamination, a chef with years of experience in preparing food is more qualified than the food scientist to answer this question. Similarly, a mechanical engineer may be able to explain the forces at play on a racehorse's legs in running a race, but if the issue is what to do to avoid injury in running a race, a jockey qualified by years of practical experience in riding horses in races can more credibly answer the question than the mechanical engineer.

Similarly, those with practical experience in corporate governance are generally better able to explain good corporate governance practices than those simply qualified by academics. Courts, for example, have focused on experience in both corporate law and securities law in qualifying attorneys as corporate governance experts. Lawyers testifying on corporate governance issues, however, may have their testimony excluded, or at least limited, based on the well-recognized principle that experts cannot testify about legal issues. In court, there is only one legal expert – the judge.[3]

In the management area those with actual, real-world upper-level management or board experience are qualified to testify on corporate governance practice issues. Those who have sat on or advised boards and been involved in making key decisions understand the process and the structures necessary to govern an organization effectively and fairly. General knowledge of the primary activity areas within companies, i.e. production, marketing, finance and accounting, legal, research and development, human resources, external relations, and IT is required, as well as an understanding of both formal and informal organizational structure.

Those with practical experience in corporate governance are generally better able to explain good corporate governance practices than those simply qualified by academics.

Experience with external financial reporting processes and other corporate communications, including annual filings, interim filings, proxy statements, other SEC filings and SOX requirements, is frequently important. Knowledge of how oversight and control systems and checks and balances, both formal and informal, actually work within an organization is key. Such systems go well beyond review of the income statement and balance sheet and must focus on operating cash flows, capital expenditures and other key value drivers. Familiarity with the functioning and structure of board committees such as the audit committee, the compensation committee, the

nominating/governance committee, and the evolving risk management committee can also be useful.[4] The ability to explain the uncertainties involved in making business decisions and the processes, practices, and information necessary to make good decisions may best reside in those who have made these decisions.

Conclusion

The testimony of a corporate governance expert can be helpful to the jury in a variety of causes of action, especially where complex business decision-making practices and processes are at issue. Breach of fiduciary duty cases, securities violations claims and, frequently, fraud and bad-faith claims all include issues that implicate the management decision-making process and actions. Understanding the roles and responsibilities of officers, directors and others with decision-making authority and the processes and structures in place in a business entity to ensure good decision making is important in these cases to help the trier of fact place the decision in the proper context of what was known at the time the decision was made. Practicing attorneys, law school professors, microeconomists, MBAs and CPAs have all been qualified as corporate governance experts by the courts, but education in law, economics, or management is not alone sufficient to qualify one as an expert in corporate governance. A corporate governance expert should also have practical experience in dealing with corporate governance issues – both to qualify as an expert and to enhance his or her credibility with the trier of fact. ■

1. *See, e.g., Bauman v. Centex Corp.*, 611 F.2d 1115, 1120–21 (5th Cir. 1980) (corporate management issues may be complex and require expert testimony; the court admitted expert testimony of management consultant on corporate finance issues)
2. *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005).
3. *See, e.g., Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997).
4. *See* H. Stephen Grace, Jr. & John E. Haupert, *Corporate Governance Consultants: The Issue of Qualifications*, NACD – Directors' Monthly (May 2007).

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MEET YOUR NEW OFFICERS

President
Stephen P. Younger

Stephen P. Younger of New York City, a partner at Patterson Belknap Webb & Tyler, LLP, took office on June 1 as the 113th president of the 77,000-member New York State Bar Association. The House of Delegates, the Association's decision- and policy-making body, elected Younger at the organization's 133rd annual meeting, held this past January in Manhattan.

Younger graduated *cum laude* from Harvard University in 1977 and earned his law degree *magna cum laude* from Albany Law School in 1982 where he was editor-in-chief of the *Albany Law Review*.

He is a leading commercial litigator known for his work in the arbitration field and he regularly represents financial institutions, mutual funds, hedge funds, pension funds and venture capital firms in securities disputes. A seasoned trial lawyer, he has tried many cases in federal and state court and before arbitration panels, and frequently argues appeals, particularly in the appellate courts of New York. Based on his significant ADR experience, he is often called on to serve as an arbitrator or mediator in high-stake matters.

Prior to joining Patterson Belknap, Younger served as law clerk to the Hon. Hugh R. Jones, associate judge for the New York Court of Appeals.

Active in the State Bar since 1983, Younger most recently served as president-elect and chaired the House of Delegates and the President's Committee on Access to Justice. He is a past chair of the Commercial and Federal Litigation Section, and past chair of the section's Securities Litigation Committee and its Pro Bono and Public Interest Committee. He is a fellow of The New York Bar Foundation.

In addition to his State Bar activities, he served as transition director for New York State Attorney General, Andrew M. Cuomo and is currently a member of the Transition Committee for New York County District Attorney, Cyrus Vance, Jr. He is the chair of the Executive Committee of the CPR Institute for Dispute Resolution.

Younger also is counsel to the New York State Commission on Judicial Nominations, which nominates New York's Court of Appeals Judges, and is a member of the First Department Judicial Screening Committee. He currently serves on the Advisory Committee to the Commercial Division of the New York State Supreme Court. He also served as a member of the Chief Judge's ADR Task Force. A long–time trustee of Albany Law School, Younger is past president of its National Alumni Council.

President-elect
Vincent E. Doyle III

Vincent E. Doyle III, a partner of the Buffalo law firm Connors & Vilardo LLP, took office on June 1 as president-elect of the 77,000-member New York State Bar Association. The House of Delegates, the Association's decision- and policy-making body, elected Doyle at the organization's 133rd annual meeting, held this past January in Manhattan. As the current president-elect, Doyle chairs the House of Delegates and the President's Committee on Access to Justice (formed to help ensure civil legal representation is available to the poor). In accordance with NYSBA bylaws, Doyle becomes president of the Association on June 1, 2011.

Doyle is a trial and appellate attorney whose practice includes civil and white collar criminal litigation, and representation of professionals in disciplinary proceedings, as well as advising on legal ethics matters. He received his undergraduate degree from Canisius College and earned his law degree from the University at Buffalo Law School, *magna cum laude*.

Active in the State Bar for 20 years, Doyle served for four years as a member-at-large of the State Bar's Executive Committee and on the House of Delegates. He previously chaired the Criminal Justice Section, the Special Committee to Ensure Quality of Mandated Representation, and the Task Force to Review Terrorism Legislation. He also is a member of the Trial Lawyers Section, Committee on Legislative Policy, Membership Committee, Committee to Review Judicial Nominations, Committee on the Tort System, and the Task Force on Wrongful Convictions. He is a Fellow of the New York Bar Foundation.

Doyle sits on the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge of the State of the Courts of New York, and was appointed by retired Chief Judge Judith S. Kaye to the Commission on the Jury, a blue-ribbon panel charged with formulating ways to improve the jury system in New York. He previously served on the Grand Jury Project, also by appointment by Judge Kaye. He also is a member of the New York State Judicial Screening Panel for the Fourth Judicial Department.

An active member of the Bar Association of Erie County, Doyle served on its Board of Directors from 2003–2006; currently, he is president of that association's Aid to Indigent Prisoners Society. He also serves on the Board of Trustees of Villa Maria College in Buffalo.

Secretary
David P. Miranda

David P. Miranda, a partner of the Albany law firm Heslin Rothenberg Farley & Mesiti P.C., is the new secretary of the 77,000-member Bar Association. Miranda took office on June 1, 2010.

Miranda received his undergraduate degree from the State University of New York at Buffalo and earned his law degree from Albany Law School.

An experienced trial attorney whose intellectual property law practice includes trademark, copyright, trade secret, false advertising, and patent infringement, as well as licensing, and Internet-related issues, Miranda has served as a member-at-large of the State Bar's Executive Committee since 2006. He chaired the Young Lawyers Section from 2002–2003 and was that section's delegate to the American Bar Association from 1998 to 2000. A past chair of the Electronic Communications Committee, he is a member of the Commercial and Federal Litigation Section, the Committee on Continuing Legal Education and the Committee on the Annual Award. He also served on the Task Force on E-Filing and the Special Committee on Cyberspace Law.

Miranda is the immediate past president of the Albany County Bar Association. In 2009, he served on the Independent Judicial Election Qualification Commission for the Third Judicial District of the State of New York. In 2002, then-Chief Judge Judith Kaye appointed him to the New York State Commission on Public Access to Court Records.

He received the Capital District Business Review's 40 Under Forty Award for community involvement and professional achievement in 2001. He was editor-in-chief and contributing author of *The Internet Guide for New York Lawyers* in 1999 and 2005, and is the author of "Defamation in Cyberspace: *Stratton Oakmont, Inc. v. Prodigy Services Co.*," published in the *Albany Law Journal of Science & Technology*. He is an arbitrator of intellectual property disputes for the National Arbitration Forum.

Treasurer
Seymour W. James, Jr.

Seymour W. James, Jr., of New York City, has been re-elected to a third term as treasurer of the New York State Bar Association.

James received his undergraduate degree from Brown University and earned his law degree from Boston University School of Law.

James is the Attorney-in-Charge of the Criminal Practice of The Legal Aid Society in New York City. In that capacity, he is responsible for the Society's trial, parole revocation and appellate criminal practice.

Active in the State Bar since 1981, James is a member of its House of Delegates, Finance Committee, Membership Committee, and Committee on Diversity and Leadership Development. Within the Criminal Justice Section, James serves as a member-at-large of its Executive Committee. He served as the Vice President for the 11th Judicial District from 2004–2008 and on numerous committees, including the Nominating Committee, the Special Committee on Association Governance, the Committee on Legal Aid, the Committee on Attorneys in Public Service and the Task Force on Increasing Diversity in the Judiciary. He is a Fellow of the New York Bar Foundation.

James is a past president of the Queens County Bar Association and has served on a number of that association's entities, including its Judiciary Committee. He also is a member of the Macon B. Allen Black Bar Association and a former member of the Board of Directors of the Metropolitan Black Bar Association.

In addition to his bar association activities, James is a member of the Departmental Disciplinary Committee for the First Judicial Department, the Committee on Character and Fitness for the Second Judicial Department and the Independent Judicial Election Qualification Commission for the Second Judicial Department. He also serves as the secretary of the Correctional Association.

James has served as an Adjunct Professor of Law at CUNY Law School and on the faculty of the Benjamin N. Cardozo School of Law Intensive Trial Advocacy Program.

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: It troubles me that *The Washington Post* seems to split infinitives as a matter of policy, and *The New York Times* also permits the practice. Split infinitives too often weaken the verb without adding the emphasis the author intended. Please comment.

Answer: Attorney Nicholas Cobbs, who sent these comments, is not the first correspondent to voice his dislike of split infinitives. Most of the readers who agree with him believe there is a grammatical rule against splitting infinitives that even those who ought to know better (like the journalists mentioned above) are breaching.

In fact, the rule against splitting infinitives originated with 18th century grammarians, who thought that there ought to be such a rule, so they created one. It was clear to these well-educated gentlemen that the English language needed help because it was, as their leader Bishop Robert Lowth, an Oxford University professor, said "extremely imperfect" and "Many of even the best writers" constantly make egregious errors in English. So it was imperative that they, the "authorities" – wise persons knowledgeable about the language – take charge.

The problems of English occurred, these grammarians believed, because speakers of English were polluting the language. The English language had been polluted by straying from Latin, the perfect language, but Lowth's book, *Proposal for Correcting, Improving and Ascertaining the English Tongue*, would cure its ills by enforcing Latin rules on English grammar, even retaining their Latin names (nominative, genitive, dative, accusative, and ablative).

There were at least two problems with that plan. First was the grammarians' assumption that English had descended from Latin. It is true that both languages descend from the Indo-European progenitor, but there are many Indo-European groups, and English descends from the Germanic group, while Latin descends from the Italic group.

The second mistaken assumption of the 18th-century grammarians was that language could be set by fiat and prevented from changing. They were unaware that majority usage determines both the meaning and the grammar of a language. The English grammarians were also unaware that Latin had undergone many changes since the classical rules were written, so that Latin, too, had been corrupted. But, undeterred by their limited knowledge, the 18th-century scholars pursued their agenda.

One of the characteristics they deplored was that the English infinitive had been divided into two words. In Latin, the infinitive form itself had contained the preposition *to*. As we all learned in Latin 101, *amare* means "to love." Obviously, that infinitive ought not have been "split." (The grammarians could merely have re-joined the two words, creating the infinitive form *to love*, but they ignored that possibility.)

So the rule against splitting infinitives was born. Thus they announced that phrases like: "to safely refuse," "to carefully consider," "to politely acknowledge," and "to unduly postpone" were ungrammatical. (All these phrases were taken from modern legal casebooks.) Replace these with: "safely to refuse," "carefully to consider," "politely to acknowledge," and "unduly to postpone." (Also correct would be, "to refuse safely," "to consider carefully," "to acknowledge politely," and "to postpone unduly.")

The trouble with their "rule" was that almost nobody observed it. English royalty and aristocrats ignored it, and the English lower classes were blissfully unaware of it. Schoolmarms obediently taught it to their pupils, but forgot to observe it. The pupils remembered to cite it, but forgot to follow it.

In America, however, with its huge middle class of "rules-followers," a surprising number of people felt that to split an infinitive was almost sinful. It became a shibboleth, distinguishing the educated from the uneducated.

There is, of course, nothing wrong with observing the invalid infinitive-rule. But if there were such a rule, it would be stylistic, not grammatical. If splitting an infinitive would result in clarity and emphasis, split it. The following sentences containing split infinitives seem to me to pass that test, but you may differ:

> It is necessary to really understand the matters at hand.
>
> The result was to considerably lessen the benefit.
>
> The aim is to better equip candidates for office.

Some readers also believe that an expanded infinitive rule proscribes the insertion of an adverb into a verb phrase. Timothy Levin, of Harrisburg, Pennsylvania, sent two illustrations of supposedly incorrect usage.

> Average weighted maturity *will ordinarily exceed* five years.
>
> The portfolios *may also invest* in other fixed income securities.

He also provided correct versions of the same statements:

> Average weighted maturity *ordinarily will exceed* five years.
>
> The portfolios *also may invest* in other fixed income securities.

But there is no rule against inserting adverbs into verb phrases. All four of the above statements are grammatical. The only distinction in preference is that of clarity. The second two sentences may be ambiguous because the adverbs might be understood to modify the preceding word rather than the following word. For example, does the phrase "ordinarily will exceed" modify *maturity* or does it modify (as intended) *five years*? This problem is called the "Janus effect," so-called for the mythical Roman god of doors, who could look both forward and back. ■

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

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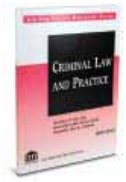

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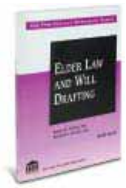

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Lawyers might not have enough time to argue their position as adequately as they'd like. A reply brief allows the lawyer to present the oral argument in depth, use the allotted time to respond to as many of the judges' questions as possible, and, for complicated points and citations, to tell the judges, "It's in my reply brief."

> Replies shouldn't strike back at the opposition's Rambo-like mudslinging.

Sometimes it's advantageous not to file a reply brief, even when a lawyer can present a strong one. This involves making a judgment call. If the opposing side has failed to respond to the lawyer's strongest argument or, worse, if the opposing brief includes a gross misstatement of law, it might be smart "to save this for oral argument so you do not tip your hand."[16] Good lawyers prepare for oral argument by reading the other side's reply brief.[17] By not replying, the lawyer who wrote the opening brief can maintain an element of surprise. This tactical decision might backfire, though. A judge might not like a purposeful delay in presenting a strong rebuttal or "may forget or fail to listen to your oral argument, or may give the motion papers to a law clerk not present at oral argument."[18]

Lawyers' Common Mistakes

Judges who bemoan reply briefs are annoyed "that too many attorneys commit the sins of either simply regurgitating what they said in an opening brief or attempt to raise new issues for the first time."[19] Because a reply brief is a final submission to a court, "the proper purpose of a reply brief is to reply."[20]

Repetition

Reply briefs should not repeat statements of fact, reargue the case, or raise arguments not made in the opening brief.[21] Most rules governing reply briefs dictate non-repetition,[22] and repeating arguments from the opening brief serves no purpose. Rehashed reply briefs have an effect opposite from the one their authors intended. Lawyers submit rehashed replies thinking that judges are influenced by what they read last. Not so. Rereading the same thing annoys judges, makes them believe that the lawyer doesn't have a strong case against the other side's arguments, and sways them the other way.[23]

Unfair Tactics

Reply briefs shouldn't include arguments and facts not discussed by either side until that point. Judges look down on this practice, and with good reason. Because reply briefs are rarely rebutted, the fairness with which they're written impacts their persuasiveness.[24] As one court wrote in a decision striking a plaintiff's reply brief, "'[I]t is established beyond peradventure that it is improper to sandbag one's opponent by raising new matter in reply.'"[25]

Improper reply briefs are often the subject of litigation. The opposing party can object to an improper reply brief with a motion to strike.[26] A court will not review documents attached to a reply brief that are not part of the record or new issues "to which the adversary side has no opportunity to respond."[27] It's unfair to cite "cases or other authorities that were in existence when the appellant's main brief was filed, but were not cited in either the appellant's main brief or the respondent's answering brief."[28] Even meritorious arguments improperly raised in a reply brief are deemed waived, and judges won't consider them.[29] Judges believe that to consider these arguments would reward unfair behavior, and they sometimes strike them with harsh words.[30] Dismissing a meritorious argument, one judge wrote, "Having made their bed, defendants will not now be heard to complain of having to lie in it."[31] Another judge once remarked that "this tactic on the part of defendants' counsel smacks of sharp practice and I do not appreciate it."[32]

Some exceptions exist to the rule against raising new issues on reply. Litigating motions to strike often involves deciding "what constitutes a truly 'new' substantive [issue or] argument."[33] Nonwaivable issues like lack of subject-matter jurisdiction may be raised on reply.[34] Citations to non-controlling, or persuasive, authorities are not new arguments and may be presented at any time.[35] A controlling case may be brought to the court's attention in a reply if it was decided after the opening brief was filed.[36] Courts will also take judicial notice of new matters, such as matters of public record, injected into a reply brief.[37] A court will sometimes permit in the interest of justice an issue to be raised on reply, although courts exercise this discretion rarely and only in unusual circumstances.

Another remedy is available for improper reply briefs: a sur-reply. Sur-replies are rarely permitted as a matter of right, however, and filing one requires leave of court on good cause.[38]

The Structure of an Effective Reply

One judge has characterized the role of the reply brief as follows: "'Reply briefs should be used as a stiletto to skewer misstatements of fact, misquotations, miscitations, matters not in the record, or grossly erroneous propositions of law.'"[39]

Brevity and Theme

A court might permit over-length briefs if asked, although lawyers should still make their replies short. Asking for more space "seldom serve[s] their movant's purpose"[40] and can be counter-pro-

ductive. Lawyers ask for more space when they want to write a complex and detailed reply.[41] That's the opposite of what a reply brief should be.

Reply briefs are most effective when they are concise, direct, punchy, and selective. They should have a theme that follows the opening briefs and which gives the court a final, new perspective on the central issues. If several themes are possible, the lawyer should choose the most compelling one — the one without which the judge is most likely to rule the wrong way.[42] Equities should be woven into the reply.[43] Judges decide cases according to their best interpretation of the law. Their interpretation of the law will be influenced by an unemotional appeal to justice that explains the policy reasons why the lawyer should win.

Format

New York requires replies to follow the same format as opening briefs.[44] In most other states and in most federal courts, replies must typically conform only to the rules for the tables of contents and authorities, and a tight page limitation.[45] The introduction should draw the judge to the theme right away. Lawyers should "avoid a point-counterpoint approach."[46] They should quote parts of the opposition brief that are the "most susceptible to attack," but only if they can make these attacks in a persuasive way without repeating the opening argument.[47]

Lawyers should limit what they reply to. They must focus on the gravamen of the opponent's argument, avoid peripheral matters,[48] and concentrate on key issues that will rebut the opposition's argument while re-emphasizing their own position. The reply need not, and should not, correct each inaccuracy, explain every point of disagreement, or distinguish every case the opponent cited. Lawyers shouldn't worry about formal conclusions. They're unnecessary. Lawyers should say what they need and stop.[49]

Professional Tone

Replies shouldn't strike back at the opposition's Rambo-like mudslinging. Judges decide cases on the real issues rather than on ad hominem persecution, which is uncivil and distracts from the real issues. Unless it's necessary to correct "mischaracterizations, distortions, or baseless criticisms," lawyers should disregard gratuitous rhetoric and personal attacks.[50] Falling into the temptation to attack tit-for-tat will portray both sides as having an equally unprofessional "tone or tactics [that] have no place in written advocacy."[51] When a response to a personal attack is needed, sometimes a simple footnote will do.[52] If a longer response is necessary, it might be "worthwhile to include a short, separate section . . . to address the topic."[53]

The reply is most effective when it ignores mudslinging by "focus[ing] on the merits"[54] "on a global rather than individual basis."[55] It should do this as directly as possible, using tables, charts, bullet points, and visuals to make the disagreement with the other side easy to understand. The idea is to "leave the [judges] feeling that both the law and the equities are on your side — that the law will make more sense if you prevail."[56]

Conclusion

As one authority says, "Having the last word in an argument can make a difference."[57] Lawyers should use every tool available "to exploit the limited opportunity afforded by reply briefs" to advance or refine their argument.[58] Lawyers should resist the urge to get the last word just for the sake of having the last word. But "[i]f properly presented, a reply brief enhances both a lawyer's credibility and the persuasive force of a client's arguments."[59] ■

1. Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument § 13.5 (rev. 1st ed. 1996).

2. Mike McKee, *Are Reply Briefs Really Necessary?*, The Recorder, Aug. 1, 2008, *available at* http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202423420048 (last visited Apr. 10, 2010).

3. *Id.*

4. Michael A. Pollard, Writers' Corner, *To Enhance Credibility and Persuasion: The Art of the Reply Brief*, 51 DRI For the Defense 74, 74 (May 2009).

5. Interview by Bryan Garner with Lord Denning, LawProse, Inc., http://lawprose.org/interviews/judges_lawyers_writers_on_writing.php (follow "Lord Denning (late), Master of the Rolls (London, England): On Grasping the Nettle" hyperlink) (last visited Apr. 10, 2010).

6. Aldisert, *supra* note 1, at § 13.5.

7. McKee, *supra* note 2.

8. Paul J. Killion, *Having the Last Word: The Appellate Reply Brief*, Certworthy 8, 8 (Fall 1998), *available at* http://raymondpward.typepad.com/files/killion.pdf (last visited Apr. 10, 2010).

9. McKee, *supra* note 2 (quoting California Justice William Bedsworth).

10. McKee, *supra* note 2.

11. *Id.*

12. *See* Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 73–74 (2008). Among the retro-readers is New York Appellate Division Justice Saxe. *See* David B. Saxe, Essay, *How We Operate: An Inside Look at the Appellate Division, First Department*, N.Y.L.J., May 13, 2009, at 6, col. 4 ("An idiosyncrasy I have, but one which I do not necessarily recommend, is after I read the bench memo and the decision of the lower court, I first read the appellant's reply brief. I find that this procedure of working backwards helps me isolate the most central issues.").

13. McKee, *supra* note 2.

14. Steffen N. Johnson, Writer's Corner, *The Anatomy of an Effective Reply Brief*, Certworthy 29, 29 (Summer 2006), *available at* http://raymondpward.typepad.com/newlegalwriter/files/2006Summer.pdf (last visited Apr. 10, 2010).

15. McKee, *supra* note 2.

16. Nina E. Kallen, *Winning Your First (or Next) Summary Judgment*, http://www.kallenlawyer.com/articles/winning.htm (last visited Apr. 10, 2010).

17. Pollard, *supra* note 4, at 74.

18. Kallen, *supra* note 16.

19. McKee, *supra* note 2.

20. Thomas R. Newman & Steven J. Ahmuty Jr., Appellate Practice, *Reply Briefs: Not Simply the "Last Word" in a Case*, N.Y.L.J., May 3, 2006, at 3, col. 1.

21. Thomas J. Carey, Jr., *A Few Tips on Effective Appellate Briefs*, 5 Am. Bankr. Inst. 197, 212 (2008).

22. *See, e.g.*, CPLR 5528(c) (New York).

23. McKee, *supra* note 2.

24. Pollard, *supra* note 4, at 74.

25. *Wolters Kluwer Fin. Svcs. Inc. v. Scivantage*, N.Y.L.J., Apr. 18, 2007, at 23, col. 3 (S.D.N.Y. 2007) (quoting *Murphy v. Village of Hoffman Estates*, No. 95 C 5192, 1999 WL 160305, at *2, 1999 U.S. Dist. LEXIS 3320, at *5 (N.D. Ill. 1999)) (alteration in *Wolters*).

26. Newman & Ahmuty, *supra* note 20, at 3, col. 1.

27. Russel J. Davis et al., *Appellate Review*, 4 N.Y. Jur. 2d § 371.

28. Newman & Ahmuty, *supra* note 20, at 3, col. 1.

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"Relax, gentlemen. There are more chairs in the next room."

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29. *Id.*

30. Michael C. Silberberg, *Refusal to Hear Argument First Raised in Reply Brief*, N.Y.L.J. May 1, 1997, at 3, col. 1.

31. *Id.* (quoting S.D.N.Y. Judge Kaplan).

32. *Id.* (quoting *Polycast Technology Corp. v. Uniroyal, Inc.*, 792 F. Supp. 244, 269 (S.D.N.Y. 1992)).

33. Newman & Ahmuty, *supra* note 20, at 3, col. 1.

34. *Cf.* Mark Davies, *Perfecting an Appeal to the Appellate Division*, 8 N.Y. Prac., Civil Appellate Practice § 12:51 (2008) (noting that "nonwaivable jurisdictional defect[s] may be raised for the first time on appeal").

35. Newman & Ahmuty, *supra* note 20, at 3, col. 1.

36. *Id.*

37. *Id.*

38. Newman & Ahmuty, *supra* note 20, at 3, col. 1. The New York Court of Appeals doesn't permit sur-replies. *See* 22 N.Y.C.R.R. § 500.12(g). But other New York appellate courts may grant leave to file a sur-reply on good cause.

39. Carey, *supra* note 21, at 212 (quoting Justice Kass).

40. Pollard, *supra* note 4, at 74.

41. *Id.*

42. Johnson, *supra* note 14, at 29.

43. *Id.* at 30.

44. CPLR 5528(c).

45. Killion, *supra* note 8, at 9.

46. 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, 722 (2001).

47. Pollard, *supra* note 4, at 74, 80.

48. *Id.* at 80.

49. Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief*, http://www.appellate.net/articles/gdaplbrf799.asp (last visited Apr. 10, 2010).

50. Frank E. Noyes II, Writers' Corner, *Your Opponent's Offending Material: Dealing with Mudslinging*, 1 For the Defense — Judicial Edition 78, 78 (Feb. 2010).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Newman & Ahmuty, *supra* note 20, at 3, col. 1.

56. Johnson, *supra* note 14, at 29.

57. Thomas D. Hird, Writer's Corner, *No Reply?*, Certworthy 40, 40 (Summer 2005), *available at* http://home.earthlink.net/~raymondpward/sitebuilder-content/sitebuilderfiles/Certworthy2005summer.pdf (last visited Apr. 10, 2010).

58. Pollard, *supra* note 4, at 80.

59. *Id.*

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at Columbia Law School and St. John's University School of Law. He thanks New York Law School student Yevgeny Samokhleb for his research help. Judge Lebovits's e-mail address is GLebovits@aol.com.

PRESIDENT'S MESSAGE
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Looking Ahead

Under the leadership of my predecessor, Mike Getnick, the State Bar ramped up its resources to help our membership weather the economic downturn. As a result of these efforts, the State Bar – now over 77,000 members strong – grew both in number and strength. As Mike passes the baton, the State Bar is in a very strong position. This is a testament to his leadership and the tremendous value of State Bar membership. We are grateful to all of you for your continued support of the Association.

We have experienced difficult times, but we can see a turnaround on the horizon. As we look ahead and prepare for the next decade, we must recognize the great recession for what it is: a wake-up call for our profession. As a result, we must take a hard look at ourselves. And we must be prepared to make changes in how we practice law to keep it the satisfying profession we all sought in becoming lawyers.

There is a better way to practice law. We only need to figure it out – for the good of our profession, for our clients and for the next generation of lawyers. ■

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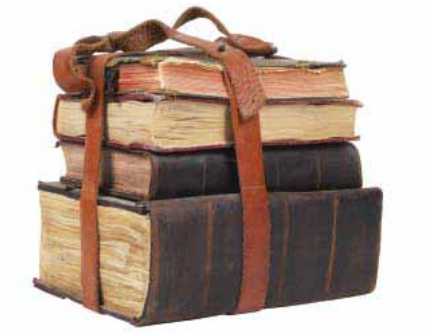

Or Forever Hold Your Peace: Reply Briefs

Few lawyers can resist having the last word. Nor should they. Reply briefs are optional, but lawyers should always reply unless they've nothing important to add, they're certain of victory, they don't want to tip their hand for oral argument, or they can't do so because of timing or financial constraints. True: "Reply briefs are not the favorite children of appellate judges."[1] But that's mostly because they're often done so poorly that they're a waste of time, money, and paper.[2] If done right, reply briefs are "very useful" and "an integral and indispensable part of the courts' record."[3] The problem is that many replies "fail to promote their proper, limited objective."[4] If they're done well, replies can determine a motion on an appeal.

The Usefulness of Replying

Lawyers should address weaknesses preemptively — and grasp the nettle[5] — by rebutting their opponent's arguments in their opening papers. Grasping the nettle assures that judges who might not read a reply will nonetheless consider the counterarguments. Counterarguments in the opening brief will also define in advance how the judges will frame the issues and compel the opponent to respond or concede. Counterarguments in the opening brief will make the lawyer writing the opening brief anticipate contrary arguments and thus improve the opening arguments. And the opposing side might consider a more favorable settlement if the cards are on the table. As one authority explained, "An appellant should never deliberately save for the reply its response to an argument."[6]

Show Confidence

Lawyers who've grasped the nettle should still reply. It's poor advocacy to leave the opposing side's analysis of an argument as the last word. Not replying implies that the lawyer's case is weak.[7] It shows a lack of confidence, not an abundance of confidence. Even if the lawyer believes that the opposing brief is weak, the judges might disagree. Judges might see a lack of a reply brief as a concession to the opposition's argument.[8] As one judge put it, "'Why in the world . . . would you ever want to give your opponent the last word before oral argument?'"[9]

Narrow the Issues

Replies help lawyers and judges narrow issues and refine arguments. Issues might be conceded and arguments changed as the parties write their briefs. Reply briefs "confront the true strength" of the opponent's argument and are where a party often "attempt[s] to answer, for the first time, the most difficult arguments against her position."[10]

There's no reason for judges to devote "time struggling with something in [an] appellant's brief, only to find [that the] respondent concedes it or attacks it on a completely different basis than the one anticipated by the appellant."[11] That's why some judges review cases by reading the reply brief first and working backward — a practice called retro-reading.[12] By reading in reverse, retro-reading judges immediately assess the heart of the controversy and avoid considering irrelevant, academic, conceded, or unopposed issues. To retro-readers, the reply brief is the instrument that forms the first perception of the case, a perception against which they weigh everything they read and hear afterward. It's no surprise, then, that some call reply briefs "the mother's milk of appellate advocacy."[13]

A reply brief is equally important when it's read last, as it most often is. An opposition brief might "have muddied the waters with extraneous material" and diverted the judges' attention from the strongest parts of the opening brief's argument.[14] The reply brief becomes the lawyer's opportunity to refocus the judges on the lawyer's theory of the case.

> Lawyers should address weaknesses preemptively — and grasp the nettle.

Strategy

A good reply is especially important when no oral argument is heard. Given the ever-increasing caseloads of both lawyers and judges, fewer oral arguments are heard today than in the past. Replying is "the appellant's last attempt to show why — notwithstanding what the respondent says — the appellant should win."[15] Even when oral argument on a motion or an appeal takes place, it's limited in time.

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