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# NYLitigator

A Journal of the Commercial & Federal Litigation Section
of the New York State Bar Association

## Tenth Anniversary Celebration

### of the Commercial Division of the New York State Courts

**November 21, 2005 • Lincoln Center for the Performing Arts**

## Also in this Issue

# Commercial and Federal Litigation Section

## 2005-2006 OFFICERS



## The *NYLitigator*



## The *NYLitigator*





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# Table of Contents

**Spring 2006 • Vol. 11, No. 1**

**Page**

# Message from the Chair

By Stephen P. Younger

As a result of the current debate over Supreme Court nominations, I would like us all to focus on the importance of an independent judiciary to our work as lawyers. In *The Federalist Papers*, Alexander Hamilton wrote:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. . . . Without this, all the reservations of particular rights or privileges would amount to nothing.

**The Federalist No. 78: The Judiciary Department**

There is no more critical principle to a functioning democracy than the rule of law. And, the rule of law cannot operate effectively without an independent judiciary. This was brought into perspective this past year given the Terri Schiavo litigation. No matter what political or cultural orientation we each may have, we must all understand that everyone has the right to petition our legislative bodies to enact laws. However, once those laws are enacted it is the sworn obligation of our judiciary to determine whether those laws pass constitutional muster. Once our judges make those decisions, we as lawyers should support the judiciary's obligation to decide cases as they deem appropriate.

As lawyers, we should stand up for the judges who labor every day to uphold the rule of law in our country. Whether one agrees or disagrees with particular judicial decisions or not, it is the respect for our judiciary that has helped make our Republic so great. Without this respect, the nation cannot effectively operate under the rule of law. It is thus increasingly important for each of us as lawyers to speak out on behalf of the judiciary when attacks are made in the court of public opinion.

At our Spring 2005 Meeting, this point was emphasized by outgoing State Bar President Kenneth G. Standard. Commenting on the attacks made on the judiciary in the wake of the Schiavo litigation, Ken pointed out that our judges are hamstrung in their ability to defend themselves as their opinions must speak for themselves. He thus called on all lawyers to join him and "stand up for our judiciary, stand up for our government and stand up for America."

Our keynote speaker at the Spring Meeting, Senator Bob Kerrey, came back to this point in his remarks. He noted that it is unhealthy for our democracy if judges are driven to make decisions by public opinion—as opposed to the ideals of justice. As Senator Kerrey explained, when judges make unpopular decisions, as

their roles often require them to do, we should "explain to people that judges are not supposed to decide cases by taking a public opinion poll." He said that he "fear[s] for our Republic if we become so whipped around by public opinion that we are unable to have a functioning democracy."

In his first message to the Association, incoming State Bar President A. Vincent Buzard reiterated this theme saying that as lawyers it is our duty "to continually work to increase public comprehension of how vital the legal system is in society and daily life. . . ." He pointed out that "[w]hen the legal system and the profession are attacked"—such as with "charges of judicial activism"—then we as lawyers must be at the forefront "to educate and to debunk [such] myths. . . ."

At our Section's first Executive Committee meeting under my leadership, we voted to endorse a proposed resolution of the Association opposing proposed Congressional resolutions, H. Res. 97 and S. Res. 92, which would have continued the public criticisms of the judiciary this past year. These resolutions state their sponsors' views that judicial determinations about U.S. laws ought not to draw guidance from foreign law. Such resolutions would have had the potential to further chill the independence of our judiciary. This issue has also arisen in the Alito confirmation hearings, in which some senators have decried the citation of foreign law in the judicial opinions of U.S. courts.

At the State Bar's Presidential Summit held on January 25, 2006, the Section helped organize a program entitled, "The Supreme Court Appointment and Confirmation Process: An Examination of the Proper Role of Ideology, Judicial Ethics, Politics and the Media." A distinguished panel of attorneys debated the proper role of various groups in the appointment and confirmation of Supreme Court justices and asked whether the process has become overly politicized to the detriment of the legal profession as well as the Court.

As Section Chair, I am committed to advocating the importance of judicial independence across the state. I ask each of you to do what you can to clarify the important role played by judges in our system of democracy whenever you see the judiciary coming under public attack.

**Editor's Note: On November 21, 2005, the Commercial and Federal Litigation Section of the New York State Bar Association hosted a celebration at Lincoln Center for the Performing Arts in honor of the tenth anniversary of the Commercial Division of the New York State Courts. The following articles are adapted from the remarks and keynote addresses delivered at that event.**

# Chair's Introduction

By Stephen P. Younger

On behalf of the Commercial and Federal Litigation Section, I want to welcome you to this evening's anniversary celebration. Ten years ago, our Chief Judge established Commercial Divisions in New York and Monroe Counties. Since then, Commercial Divisions have spread to six other counties. This innovation has fundamentally changed how commercial litigation is practiced in our state's courts.

Tonight's event is about honoring our judges and court personnel who have made the Commercial Division such a resounding success.

The Commercial and Federal Litigation Section has always had a special bond with the Commercial Division. That bond was forged with a report issued by our Section in January 1995 which recommended the formation of the Commercial Division. The outstanding individuals who comprised the Section's Task Force on Commercial Courts deserve our appreciation. They are:

- Mark H. Alcott, Esq., Chair
- Vincent C. Alexander, Esq.
- Hon. P. Kevin Castel, Esq.
- William J. Dreyer, Esq.
- Lesley Friedman Rosenthal, Esq.
- Richard F. Griffin, Esq.
- Bernice K. Leber, Esq.
- Michael S. Oberman, Esq.
- Gerald G. Paul, Esq.
- S. Robert Schrager, Esq.
- Warren N. Stone, Esq.
- Mark C. Zauderer, Esq.

Following our Section's recommendation, Chief Judge Kaye formed a Task Force to study how to implement the Commercial Division. Those individuals who comprised Chief Judge Kaye's Task Force also deserve our recognition. They are:

- Hon. E. Leo Milonas, Co-Chair
- Robert L. Haig, Esq., Co-Chair
- Mark H. Alcott, Esq.
- Hon. Myriam J. Altman
- Thomas D. Barr, Esq.
- A. Vincent Buzard, Esq.
- William F. Kuntz, II, Esq.
- Elizabeth D. Moore, Esq.
- Michael S. Oberman, Esq.
- Anthony R. Palermo, Esq.
- Bettina B. Plevan, Esq.
- Roy L. Reardon, Esq.
- Jerome G. Shapiro, Esq.
- Justin L. Vigdor, Esq.
- Daniel B. Walsh, Esq.
- John F. Werner, Esq.
- Mark C. Zauderer, Esq.

Another person who was instrumental in forming the Commercial Division was our State's Chief Administrative Judge Jonathan Lippman.

**Stephen P. Younger, a litigation partner at Patterson Belknap Webb & Tyler LLP, is the Chair of the Commercial and Federal Litigation Section.**

# Welcome from the Judiciary

By Hon. Jonathan Lippman

On behalf of the New York State Unified Court System, I want to welcome you to the tenth anniversary celebration of the Commercial Division of the New York Supreme Court.

We are so gratified that this impressive assembly of speakers and attendees—representing the leadership of New York State's legal and business communities—value the Commercial Division enough to be present here this evening.

We are all here in this elegant setting tonight—for which I want to thank our hosts, Reynold Levy and Lesley Rosenthal—because in February 1995, our visionary Chief Judge, Judith Kaye, charged Leo Milonas and Bob Haig, as Chairs of the Commercial Courts Task Force, with developing the blueprint for a Commercial Division of the New York Supreme Court. Well, what they came up with was not a blueprint; it was a masterpiece!

Suffice it to say that the Commercial Division has met and exceeded everyone's expectations—the business sector, the Bar, and the judiciary. And judging by the constant flow of national and international pilgrims to the Commercial Division every year, there can be no question that New York State has become the international leader when it comes to business courts.

We owe this lofty status to the outstanding efforts of so many good people, beginning with our hard-working cadre of Commercial Division justices, who are engaged in the kind of detailed research and thinking that contributes to the coherent articulation and development of business law and to cutting-edge judicial expertise.

I want to take a moment now to recognize them. It used to be that we could identify each one individually, but I'm afraid that we have become victims of our own success. Because of our constant expansion over the years and tonight's time constraints, I am going to ask all of them—current and former—to stand up right now so that we can give them all a great big round of applause.

I also could not leave here tonight without acknowledging the excellent work of our dedicated non-judicial staff, so many of whom are here tonight. We could not have done it without them. Nor could we have done it without the incredible support we have received from the Bar, especially the New York State Bar Association and its Commercial and Federal Litigation Section.

*"There is a critical connection between the courts and the well-being of the public and the state economy."*

In conclusion, I am so pleased that you took time from your busy schedules to be with us tonight, because what we are celebrating is important not just for the judiciary, the corporations and the law firms represented here, but for all New Yorkers. There is a critical connection between the courts and the well-being of the public and the state economy. We all know that litigation is a major cost of doing business, and the business community—and all New Yorkers—can only benefit when the courts are capable of handling business disputes in an efficient, cost-effective and reliable manner.

Once again, welcome and thank you.

**Hon. Jonathan Lippman is the Chief Administrative Judge of the Unified Court System of the State of New York.**

# In-House Attorneys and Executives

By Lesley F. Rosenthal

It has been a pleasure working with Section Chair Stephen P. Younger, Section Secretary Michael Sant'Ambrogio, Antonio Galvao and Gretchen Walsh of Chief Administrative Judge Lippman's Chambers, former Section Chairs Mark Alcott, Robert Haig, and Lewis Smoley, Glenn Lefebvre and Barbara Mahan of the State Bar, and my Executive Assistant, Cecelia Gilchriest, to organize this event.

*"The Commercial Division is strongly supported by the business community, and that includes not-for-profit businesses in New York's cultural sector."*

In addition to the welcomes that Steve Younger and Chief Judge Lippman have extended to our Bar Association colleagues and distinguished members of the Bench, I would like to welcome to Lincoln Center, and to this distinguished Bar Association gathering, my fellow in-house attorneys and executives.

In-house counsel, perhaps more than anyone, control where commercial disputes are resolved, through forum selection clauses and choice of law provisions in the contracts that cross our desks on a daily basis. I personally cannot think of a better provision to incorporate into a contract than one entrusting any commercial disputes that may arise thereunder to the Commercial Division of the Supreme Court of this State, applying New York's well-developed commercial jurisprudence.

It was a privilege, as a youngish lawyer and a commercial litigator, to be included as Secretary of the Commercial and Federal Litigation Section's 1994–95 Task Force that proposed the creation of the Commercial Division.

Ten years later—now that I am a not-so-youngish lawyer and a recovering commercial litigator—it remains a privilege to join with the leadership of this Section in the celebration of the tenth anniversary of the Commercial Division, and in the further realization in years to come of the promise of New York's Commercial Division. As the mother of a fiercely independent nearly-ten-year-old myself, I look with considerable and ever-increasing admiration upon Chief Judge Kaye for her efforts to leave a lasting, positive imprint on the independent and largely self-directed entity that is New York's judiciary. Congratulations to Chief Judge Kaye, Chief Justice Lippman, and the members of the Commercial Division bench, past and present, for your outstanding accomplishments to date.

The Commercial Division is strongly supported by the business community, and that includes not-for-profit businesses in New York's cultural sector. The substantial economic activity generated by Lincoln Center alone—educational, cultural and performance operations—was estimated by the Economic Development Research Group in 2004 to contribute over $1.4 billion to the New York City metropolitan region economy.

Speaking of economic activity, the pleasure is mine to acknowledge once again the law firm sponsors of this festive event:

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Those of our guests here today who are in-house counsel no doubt have stories to tell about the colorful, brilliant, and demanding CEOs to whom you report. I can top that: my CEO, Reynold Levy, is in addition to all of those things, a lawyer. The combination of his educational achievements—in addition to his J.D. from Columbia Law School and a Doctorate in government and foreign affairs from the University of Virginia—and his many years of successful leadership at the highest levels of the private sector, as a former senior officer at AT&T, in the public sector both in New York City and the federal government, and in the not-for-profit sector as President of the International Rescue Committee—would fully entitle him to second-guess my legal advice and judgment at every turn. Despite the cautiousness that legal training can often imbue, Reynold Levy has catalyzed, and is spearheading, the single most important transformation of public performing arts space in the nation, the redevelopment of Lincoln Center. I am overjoyed to introduce to you the President of Lincoln Center for the Performing Arts, Reynold Levy.

**Lesley Friedman Rosenthal, Vice President, General Counsel & Secretary of Lincoln Center for the Performing Arts, Inc., is the Chair-Elect of the Commercial & Federal Litigation Section of the New York State Bar Association. Mrs. Friedman organized the celebration of the tenth anniversary celebration of the Commercial Division of the Supreme Court of the State of New York.**

* * *

# Host's Welcome

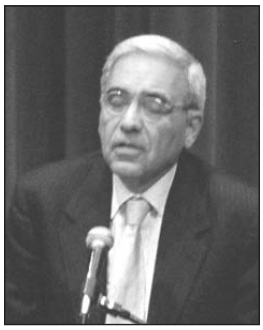
By Reynold Levy

Chief Judge Kaye, Chief Administrative Justice Lippman, Stephen Younger, Vince Buzard, Louise Parent, Mark Alcott, my colleague Lesley Rosenthal, distinguished guests and friends, welcome to Lincoln Center.

When Mahatma Ghandi was asked what he thought of Western civilization, he is reputed to have allowed as how he thought it would be a good idea.

*"From all sources (anonymous and otherwise) and by all accounts, the Commercial Division of the New York State Supreme Court* is *a good idea."*

From all sources (anonymous and otherwise) and by all accounts, the Commercial Division of the New York State Supreme Court *is* a good idea. On the occasion of its tenth anniversary, please add my voice to the chorus of congratulations reaching all those committed to the development of a body of commercial law in the state.



I know my colleague Lesley Rosenthal was instrumental in the recommendation to create this Commercial Division, yet another reason to be proud of her, and, no doubt, one reason you are assembled here at the largest and most consequential performing arts center in the world.

Other reasons occur to me. Some in this room have been known to tap dance from time to time, in and out of the courtroom. A few of you might teach Wynton Marsalis lessons in improvisation. And all of you seek a Commercial Division characterized by harmony, fluency and discipline—attributes prized by all twelve constituents of Lincoln Center.

Thank you for honoring us with your presence. And a special thank you to the sixteen New York law firms that are this evening's sponsors.

**Reynold Levy is President of Lincoln Center for the Performing Arts.**

# A Remarkable Coincidence

By A. Vincent Buzard

Being here tonight to be a part of the celebration of the tenth anniversary of the Commercial Division of the New York Supreme Court is an extraordinary privilege. The celebration reminds me of my very enjoyable participation in the effort to establish those courts.

About ten years ago Bob Haig called me and asked if I would serve on a special task force to formally establish commercial courts in this state and to expand commercial courts upstate—particularly to Rochester. Obviously, attempting to say no to Bob Haig is futile, and I did not want to say no in any event, so I accepted.

*"The courts not only do justice, they contribute to the economic well-being of the Empire State."*

My participation in those meetings was my first exposure to the leadership of Chief Judge Judith Kaye and to such people as justices Leo Milonas and Jonathan Lippman and the other eminent members of the committee. The committee was so eminent that I received a phone call from an opponent of commercial courts who said to me that "you are the only non-white-shoe lawyer on the committee." I did not think being called non-white-shoe was necessarily a compliment. I imagined my caller picturing me in a walk-up office over a liquor store on Main Street in Rochester because in those days while I did commercial litigation as I still do, I had my own small firm.

From the start, I was pleased to find that the task force was not just a study group, but an implementation committee and that something was going to happen. The meetings were held in Chief Judge Kaye's chambers on Park Avenue, so I would fly down in the afternoon and attend the 5:30 meetings. I think other people thought I just walked across the street or took a subway like they did. After the meetings, I would then go to the Cité restaurant for the wine dinner and then catch a cab and airplane back to Rochester late that night. I thought to myself, "What a great committee!"

My satisfaction came not simply from participating with terrific people and the dinner and wine which followed the meetings, but also the realization that we were accomplishing an important goal: the establishment of courts in this state dedicated to handling commercial disputes. Our work was not all smooth sailing, and there was some opposition in Rochester where the first upstate Commercial Division was to be located. However, when the announcement was made that Justice Tom Stander was to be the Commercial Division judge, the opposition essentially disappeared, and the court has been extremely successful in Rochester.

I do not know that any of us expected the effort to be as successful as it is with Commercial Divisions now in most of the major cities of the state and an accepted fact of life—efficiently, fairly, and knowledgeably resolving commercial disputes. The courts not only do justice, they contribute to the economic well-being of the Empire State.

My being here tonight is one of those remarkable coincidences that I could not have foreseen—that I would be President of the State Bar on this tenth anniversary celebration so that I could participate here tonight. Thank you so much for including me and congratulations to all those involved.

**A. Vincent Buzard is the President of the New York State Bar Association.**

# Keynote Address from the Chief Judge of the New York Court of Appeals

By Hon. Judith S. Kaye

In this official season—indeed this very week—of thanksgiving, I begin with thanks for so many things, including thanks to Lincoln Center for the Performing Arts (particularly to Lesley Rosenthal and Reynold Levy) and to the Commercial and Federal Litigation Section of the New York State Bar Association (particularly to Vince Buzard, Mark Alcott and Steve Younger) for hosting this elegant celebration. And thank you for putting me on stage at Lincoln Center. As a devoted fan of the opera, ballet, theater and movies—my husband, Stephen, and I are here very often—being onstage at Lincoln Center has been a lifetime dream of mine.

Then, too, there's a wonderful coincidence of timing in this evening's event: As you may (or may not) know, 2006 marks the centennial of the murder of Grace Brown, which was the basis of Theodore Dreiser's magnificent novel, *An American Tragedy*. That novel has inspired not only two films, but now also a brand new opera—called *An American Tragedy*—premiering right across the street at the Metropolitan Opera House in just ten days.

Here we are celebrating the tenth anniversary of what we can rightly proclaim *A New York Success*, or even more boldly *An American Success*: the Commercial Division of the Supreme Court of the State of New York. The link is plain as day, isn't it? Just think, in 90 years we might even be premiering at the Metropolitan Opera!

One cannot help wondering where world events and 21st century technology will have taken us by the year 2095. What, for example, will this beautiful state-of-the-art theater be in the year 2095? Simply unimaginable.

By the same token, I doubt that anyone here would venture a prediction about what the Commercial Division might look like in 90 years. But I will make a prediction about its short-term future, which is that we will continue to be guided by two foundational principles that have guided us throughout the entire decade and brought us to this wonderful tenth anniversary celebration: first, an outstanding, dedicated judiciary (which deserves your applause) and second, our collaboration with the Bar (which has mine).

In fact, I know of no initiative in the State court system that has more greatly benefited from a bench-bar collaboration than this one. It all began with a survey of lawyers who had actually litigated in four experimental Commercial Parts that had been established in Manhattan. Their rave reviews furnished the basis for a report by the Commercial and Federal Litigation Section of the State Bar proposing a permanent Commercial Division.

*". . . I know of no initiative in the State court system that has more greatly benefited from a bench-bar collaboration than this one."*

Then came a joint bench-bar Commercial Division Task Force, co-chaired by the incomparable Leo Milonas and Robert Haig, to implement the Section's recommendations. From day one, our mutual objective was a justice system equal to New York's status as a commercial and financial center, and a leader in the development of commercial law.

What better evidence of the success of the Commercial Division than its growth from the original six parts—five in Manhattan, one in Rochester—to additional parts in Nassau, Kings, Westchester, Albany, Suffolk and Erie Counties. Only this month, we opened a Commercial Division in Queens County, and expect to have a third part in Nassau by January 1. We are absolutely delighted to see the concept of the Commercial Division replicated in other states, even other countries.

And those are not the only significant statistics. The efficiencies have been truly staggering—whether in

reducing backlogs, or moving cases to resolution, or building a stable, comprehensive body of commercial law. In fact my favorite bedtime reading is *The Commercial Division Law Report*. Not exactly a *popular* publication at the newsstands—yet—but it does have a devoted readership, including the Chief Judge.

*"[T]he bench and bar together have changed commercial litigation practice in the New York State courts . . . provided an effective, attractive venue for business litigants . . . [and] improved the delivery of justice."*

Our Commercial Division collaboration has also helped stimulate innovation in technology and case processing throughout the State courts. Indeed, just this morning I attended the grand opening of our newest courthouse on Jay Street in Brooklyn—home to Supreme Court, Criminal Term, and the Family Court—where we have followed the model of the Courtroom for the New Millennium, developed by the Commercial Division. Today we are promoting the availability of decisions on the Internet, and e-filing. And maybe the very best evidence of all of our success together is the praise we hear from business leaders, especially those who in their agreements are designating the Commercial Division as their forum of choice.

I am so proud, as a representative of the courts, to share today's program with the two keynoters following me: Mark Alcott, representing the bar, and Louise Parent, representing the business community. This is indeed a fabulous collaboration in every sense.

While I cannot predict the next 90 years, I can promise that we will continue the bedrock principle of collaboration in fine-tuning practices and procedures in the Commercial Division to better serve the public. Our newest effort will be focus groups to bring together the bench, Bar and business community, to assure that we continue our strength and our success in serving the public.

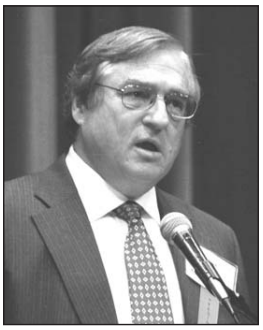
I hope you will forgive me for concluding with a thought that is corny, but does capture the spirit of tonight's celebration at Lincoln Center: The fact is we do make beautiful music together. As Steve Younger noted in opening this evening's program, the bench and bar together have changed commercial litigation practice in the New York State courts. We have provided an effective, attractive venue for business litigants. And we have improved the delivery of justice. Maybe not deserving of a full-length theatrical performance just yet, but definitely deserving of a great celebration.

My thanks to each and every one of you, most especially to our phenomenal judges and to our partners in the Bar for your role in the day-to-day performance of the Commercial Division of the New York State Supreme Court.

**Hon. Judith S. Kaye is the Chief Judge of the Court of Appeals of the State of New York, the State's highest court.**

# Keynote Address from the Bar— The Commercial Division Ten Years Later: How Did We Get Here and How Are We Doing?

By Mark H. Alcott



"New York is the center of world commerce, the headquarters of international finance, the home of America's leading businesses. As such, it strongly needs a modern, well-staffed, properly equipped forum for the swift, fair and expert resolution of significant commercial disputes."

Those words, written in 1995, introduced the Commercial and Federal Litigation Section's report proposing the creation of the Commercial Division, and served as the central rationale for that proposal.

The premise is as true today as it was ten years ago, if not more so. New York retains, and indeed has consolidated, its position at the epicenter of an increasingly globalized economy. New York financial institutions and capital markets are the source of industrial development, construction projects and jobs in every corner of the world. New York law continues to be the gold standard in cross-border transactions. And today we *have* our "modern, well-staffed, properly equipped forum for the resolution of significant disputes" arising out of these transactions: the Commercial Division of the New York Supreme Court.

In my brief remarks this evening commemorating the tenth anniversary of that forum, I would like to address two questions:

First: How did we get here?

Second: How are we doing, now that we are here?

The story of how we got here is of more than historical interest. It has important lessons for the future.

The Commercial Division was conceived at a time when the stars were in unique alignment: By happy coincidence, governmental, judicial and professional leaders were unusually receptive to new ideas—and, in particular, this idea. A relatively new incumbent Republican governor; a relatively new Chief Judge, appointed by a Democratic governor; and a relatively new section of the State Bar Association—all independently arrived at a common perspective: It would be good for the state, good for the economy, good for the legal system, and good for the profession if our state courts were able to handle commercial disputes wisely and efficiently, and were perceived as such by the business community.

As we said in our 1995 report: "[W]e think it is healthy for the state court system to have the business community as one of its many constituents. To put it another way, we think it is unhealthy for commercial litigants, in increasing numbers, to bypass the New York state courts, and therefore to have little interest in the strength and viability of those courts."

And so, encouraged by Chief Judge Kaye's remarks in her State of the Judiciary address, by the progress of the New York County Commercial Parts experiment, and by a receptive political climate, the Commercial and Federal Litigation Section initiated its study of "A Commercial Court for New York."

We faced two major political hurdles:

For one thing, there was the fear that a commercial court would be perceived as an elitist, Manhattan-centric entity that would divert needed resources from other parts of the judicial system.

But we built a thorough and powerful case for the proposition that a commercial court would benefit the state as a whole, not just a narrow segment.

Beyond that, there was the widely held view that such a court could not be established without legislation, or perhaps even a constitutional amendment, neither of which was politically feasible.

But we advanced the idea of a Commercial Division *within* the Supreme Court, which could be created, staffed and supervised by the Chief Administrator of the Courts, without the need for enabling legislations.

Our proposal was an interesting idea that looked good on paper, but where should we go from there? How could we advance this proposal? Well, we had a secret weapon—Bob Haig, the legendary founder of our Section, a man who knows how to get things done. Bob loved our idea and our report, and he guided us to Chief Judge Kaye and Chief Administrative Judge Milonas.

I remember vividly my first meeting on the subject with Chief Judge Kaye. She peppered me with questions and then said: "I'm going to appoint a special task force on this matter." "Terrific," I said, "a task force to study our proposal." "Not to study it," she said, "to implement it."

Few would have been bold enough to act so quickly and decisively, but Chief Judge Kaye was. The task force, chaired by Justice Milonas and Bob Haig, and including many of us in this room, went to work, and in less than a year, the Commercial Division was up and running.

As that background demonstrates, the Commercial Division is the epitome of bench-Bar cooperation, the quintessential example of what we can accomplish by working together. Sometimes we in the organized Bar spend too much time grumbling in the trenches, focusing on what troubles us and what separates us from our judicial colleagues. The creation of the Commercial Division reminds us to climb to higher ground, and see the possibilities that are out there when bench and Bar are united.

Now let me turn to the second question I put at the outset—the one that Mayor Koch always used to ask: "How are we doing?" And I say *"we"* because I believe that all of us—judges, counsel and litigants—have a stake in the success of the Commercial Division. "How are we doing?"

By all accounts, very well indeed:

- The Commercial Division continues to attract a large, significant body of cases; so litigants are voting with their feet.
- The Commercial Division has spread beyond its initial confines to include additional judges, additional parts and additional counties.
- The Commercial Division is serving as a role model for other states that want to emulate our approach.

So we have every reason to be positive about what we have wrought. Moreover, among the key features of the Commercial Division are its practice of maintaining an ongoing dialogue with practitioners, through advisory committees and other forms of outreach; and its process of self-evaluation, through such innovative techniques as the focus groups that will be conducted over the next several weeks. In other words, the Commercial Division itself periodically asks: "How are we doing?" This very healthy approach should eliminate complacency and precipitate changes and improvements where needed.

In going through this process, one thing should be kept in mind: The goal in creating the Commercial Division, as set forth in the opening lines of the report that I quoted at the outset, was to establish a forum for the "swift, fair and expert resolution of significant commercial disputes."

"Swift. Fair. Expert." How do we examine those standards?

"Swift" is easy to measure. We have timetables, deadlines, calendars, standards and goals. The rate of dispositions can be calculated; so can the time from commencement to trial.

"Expert" is somewhat harder to judge, but it can be done: by reviewing the quality of the Commercial Division's opinions and case law, for example, or by calculating the ratio of affirmances to reversals.

But "fair" is the most elusive of these standards. Except in extreme cases, such as the denial of due process (which is not going to happen in the Commercial Division), fairness is often a matter of perception—something in the eye of the beholder. But when the beholder is a Commercial Division litigant, perception is crucial, because the forum was created for the very purpose of assuring business litigants that their disputes will be adjudicated wisely and rationally. So while it is important that Commercial Division litigants be able to give an affirmative answer to the question "Was your case adjudicated swiftly?" it is equally important that they give affirmative answers to these questions: "Was your claim or defense dispassionately considered? Were your arguments duly examined and weighed? Did you have a full opportunity to be heard?"

Sometimes, that may require a process that is a little less "swift."

Now I have not addressed what would normally be the final question—"Where do we go from here?" That is a question for another day.

But I have no doubt that the Commercial Division will continue to perform at a high level, continue to innovate and evolve, and continue to fulfill its mission; led by its very fine judges; inspired by those of its justices who have gone on to the Appellate Division, with our enthusiastic endorsement; and strongly supported by the business community and the New York State Bar Association.

**Mark H. Alcott, a senior litigation partner at Paul, Weiss, Rifkind, Wharton & Garrison, is the President-Elect of the New York State Bar Association. In 1994–95, as Chair of the Commercial and Federal Litigation Section, he created and chaired its Commercial Court Task Force that proposed the establishment of the Commercial Division, and was the principal author of the Task Force's report.**

# Keynote Address from the Business Sector: What I Like About the Commercial Division

By Louise Parent

Good Evening. I am so pleased to be here tonight in my capacity as General Counsel of American Express and to join in the celebration of the successes of the Commercial Division on the tenth anniversary of its creation.

When my colleague asked if I would be interested in speaking at the tenth anniversary celebration, I was somewhat hesitant at first—having had no personal experience litigating there myself. Thus, while American Express has been a party to a number of cases filed in the Commercial Division, the comments I have received concerning the benefits derived from litigating in the Commercial Division have been second-hand.

But when I heard that Chief Judge Kaye would be speaking, it really became an easy decision. I cannot tell you what a privilege it is for me to be standing here with Chief Judge Kaye. I have had the pleasure of working with the Chief Judge on a couple of occasions and I was awed by her graceful yet commanding style of leadership. She is someone who is able to influence people and build consensus in situations when there is not always a clear path.

And her leadership has done so much to revitalize New York's court system through the implementation of revolutionary ideas, such as the Commercial Division, that are now used as models in states across America as well as in countries around the globe. Indeed, a study conducted by Philadelphia litigator Mitchell Back, Chair of the Committee on Business Courts of the American Bar Association's section of Business Law, ranked New York among the best commercial courts for its efficiency and expertise.

So let me tell you briefly what I like about the Commercial Division.

First, it develops judicial expertise on complex commercial matters. Justices are selected who have a background in commercial litigation and, once selected, these justices hear only commercial cases.

Second, it is faster. The establishment of the Commercial Division has reduced the time to resolve these types of cases by over 40 percent in New York County and this reduces costs for everybody. And this is helpful to me personally because I work for a CEO who cares how much we spend on legal expenses. Some of the things that have made things faster are: (1) a solid Alternative Dispute Resolution program that settles at least 50 percent of the cases sent to mediation; and (2) procedural rules designed to speed up the litigation process by ensuring that discovery is managed appropriately.

Third, and finally, by creating the Commercial Division, Chief Judge Kaye and Chief Administrative Justice Lippman have told corporations that New York State wants your business. New York has always had a large body of commercial jurisprudence because it is a hub of commercial activity and the Commercial Division, which handles 5,000 new cases each year in New York County alone, ensures that this body of jurisprudence grows in a clear and coherent manner. As a result, I can say that New York is *not* one of those jurisdictions where I tremble at the thought of having to litigate.

I also understand that Chief Judge Kaye and Judge Lippman are looking to improve on the successes of the division. Public input has been requested on the proposed Model Rules/Guidelines for the Commercial Division drafted by Justice Austin, and Commercial Division focus groups will convene over the next several weeks. I commend them for their willingness to be held publicly accountable.

The Commercial Division has responded to the business community's needs and it continues to strive to improve its provision of services. As general counsel to a Fortune 500 company, I thank you for your efforts and I congratulate you on your tenth anniversary.

**Louise Parent is the General Counsel of American Express Company.**

# Scenes from the Tenth Anniversary Celebration










## Monday, November 21, 2005

# Commercial Division of the New York State Courts









# Lincoln Center for the Performing Arts

# Court of Appeals Sharply Diminishes the Substantive Due Process Rights of Property Owners in New York

By Philip M. Halpern

## I. Introduction

The Court of Appeals' 2004 decision in *Bower Associates v. Town of Pleasant Valley*[1] has effectively closed the courthouse door to property developers and owners seeking to protect specific constitutional rights. Examining the area of substantive due process in the land use context for the first time since *Town of Orangetown v. Magee*,[2] the Court of Appeals redefined and narrowed both elements of the substantive due process test. The greatest change occurs within the "entitlement test," which assesses whether a constitutionally protected property right exists in the prospective issuance of a license or permit. A property owner who seeks to challenge a state, county or municipal official for the improper denial of a permit or license must now demonstrate, for all practical purposes, that the official lacked any discretion to deny the application at the time of submission and that the denial was unconstitutionally egregious to a point beyond an arbitrary denial made solely for political reasons.[3] In redefining the entitlement test to "strike[] an appropriate balance between the role of local government[] . . . and the protection of constitutional rights,"[4] the Court of Appeals has come down in favor of the municipalities at the expense of the individual rights of the property owner.

The decision in *Bower Associates* closely follows a series of Court of Appeals' decisions which sharply enhance town and county officials' protection from liability. In *Pecoraro v. Board of Appeals*, which was decided on the same day as *Bower Associates*, the Court reaffirmed the discretionary authority of local Zoning Boards of Appeal (ZBA) when it held that the Town of Hempstead ZBA had not abused its discretion in denying an area variance application.[5] Earlier in the year, in *Pelaez v. Seide*, the Court found no question of fact existed which might create a "special relationship" between state officials and individuals in a lead paint case.[6] As with *Bower Associates*, the compelling nature of the underlying facts for the plaintiff in *Pelaez*, coupled with the Court of Appeals' grant of summary judgment in the municipality's favor, effectively precludes any potential finding of municipal liability based on a "special relationship." Collectively, these three cases substantially shore up municipal defenses and preclude liability absent egregious facts.[7]

## II. Underlying Facts in *Bower Associates*

The Court of Appeals examined two unrelated cases in *Bower Associates* which addressed similar property rights issues. In the two cases, both plaintiffs/appellants had sought to develop property but encountered a substantial degree of municipal opposition.[8] This opposition barred or delayed their respective projects and both sued the appropriate municipalities for a violation of their substantive due process rights.[9]

*"The Court of Appeals' 2004 decision in* Bower Associates . . . *has effectively closed the courthouse door to property developers and owners seeking to protect specific constitutional rights."*

Bower Associates owned 91 acres in Dutchess County which it sought to develop with townhouses and single-family homes.[10] Bower Associates' property crossed the border between the City of Poughkeepsie and Town of Pleasant Valley with eighty-eight acres in the former and just three acres in the latter.[11] Bower Associates applied for and gained the approval of Poughkeepsie for the construction of 134 homes and 51 townhouses (the "Stratford Farms" subdivision).[12] Poughkeepsie, however, conditioned its approval on Pleasant Valley's approval of a second access road into the project.[13]

Pleasant Valley proved to be far less accommodating. Although Bower Associates' application to Pleasant Valley sought permission for the subdivision and construction of three residential homes and the access road on the three-acre property, the Planning Board denied the application over its concerns with the environmental impact of the neighboring Stratford Farms project.[14] Bower Associates challenged this decision in court. In reviewing Bower Associates' Article 78 petition challenging the denial, the Supreme Court held that the Planning Board had acted in an arbitrary manner and that its "determination was driven largely by community pressure because the Stratford Farms subdivision . . . would provide no tax benefit to the Town of Pleasant

Valley."[15] The Appellate Division affirmed the grant of the Article 78 petition.[16]

*Home Depot*'s factual foundation reasonably tracks that of *Bower Associates*. Home Depot sought to build a store in Port Chester and received full site plan approval in February 1996.[17] The City of Rye borders Port Chester and was an "Interested Party" throughout the SEQRA review for the store.[18] Rye had taken a position adverse to the store and, during the environmental review, demanded, at a minimum, that Port Chester include four mitigation measures within the Findings Statement.[19] Port Chester fully reviewed Home Depot's proposed construction and approved it with only one of Rye's mitigation measures, the widening of a Westchester County road within Rye, Midland Avenue, to create a dedicated turning lane.[20] Rye challenged the SEQRA review and the Supreme Court upheld it, denying Rye's petition.[21]

Port Chester's site plan resolution required Home Depot to obtain a Westchester County permit for the widening of Midland Avenue as a necessary precondition before Port Chester would issue the village building permit.[22] The County tentatively approved the road-widening permit application, but advised Home Depot that its application form required the signature of the municipality, Rye, wherein the County road lay. Although Rye's standard procedure called for the City Engineer to review and sign off on County permit applications within 48 hours, the Rye City Council assumed control of Home Depot's permit application and refused to allow its execution.

After his own review, the Rye City Engineer advised the City Council that no substantive problem existed with the application. The Rye City Council proceeded to hold the construction process hostage. Although the Rye City Code did not invest the City Council with any express authority to review the permit application, the City Council informed Home Depot that it would not execute the application unless Home Depot agreed to perform all of the mitigation measures that Rye had demanded of Port Chester. Home Depot eventually agreed to pay $200,000 to Rye for the performance of these measures and to take other requested steps.[23] When the City Council announced the tentative settlement, however, the public hue and cry caused the City Council to retreat from the proposed settlement and to continue to withhold, without cause, its signature from the County permit application.[24] Rye's withholding of its signature precluded the issuance of the building permit and, in the end, resulted in the expiration of the site plan, a third SEQRA review and a more than two-year delay before Home Depot built its store (and widened Midland Avenue—which was no longer a precondition).[25]At these respective points, both Bower Associates and Home Depot asserted civil rights claims against, respectively, Pleasant Valley and Rye.[26] The Supreme Court denied defendants' motions to dismiss in each case and Home Depot's case proceeded through discovery.[27] The Supreme Court granted Home Depot's motion for summary judgment on liability on its substantive due process cause of action and rejected Rye's affirmative defenses of legislative and qualified immunity.[28] The Appellate Division, Second Department, reversed in each case, granting Pleasant Valley's motion to dismiss[29] and Rye's cross-motion for summary judgment.[30] Both Bower Associates and Home Depot moved for leave to appeal and the Court of Appeals granted each motion.

## III. Court of Appeals Decision

The Court of Appeals followed the standard rule in reviewing the substantive due process issue and patterned its decision after its earlier holding in *Town of Orangetown v. Magee*. The Court reiterated its two-part entitlement test for finding a protectable property right under the substantive due process doctrine:

> First, claimants must establish a cognizable property interest, meaning a vested property interest, or "more than a mere expectation or hope to retain the permit and continue their improvements; they must show that pursuant to State or local law, they had a legitimate claim of entitlement to continue construction." Second, claimants must show that the governmental action was wholly without legal justification.[31]

The Court of Appeals then emphasized that the key to the Magees' establishment of a cognizable property interest had been that they owned the land, had a permit and that their right to develop the property had vested.[32] The Court further repeated that the Magees had demonstrated that the Town's actions were "without legal justification and motivated entirely by political concerns."[33]

The Court reinforced its prior decision with holdings from the U.S. Court of Appeals for the Second Circuit. Looking at the entitlement test, the Court of Appeals noted that the federal court called for "considerable rigor" in its application.[34] Separately, the Court of Appeals also relied on the U.S. Supreme Court's recent substantive due process decision, which held that "'only the most egregious conduct can be said to be arbitrary in the constitutional sense.'"[35] After establishing these parameters, the Court observed that "[t]he two-part test strikes an appropriate balance between the role of local governments in regulatory matters affecting the health, welfare and safety of their citizens, and the protection of constitutional rights 'at the very outer margins of municipal behavior.'"[36]

The Court of Appeals rapidly applied both prongs of the test and rejected the constitutional claims of both appellants. Bower Associates, although it conceded that Pleasant Valley enjoyed broad, yet defined, discretion to review its proposed development, had argued that the Article 78 decision, holding that the Town had acted outside the scope of its discretion, adequately demonstrated the existence of a protected property right.[37] Focusing on the scope of Pleasant Valley's discretion, rather than reviewing the Town's action outside of that discretion, the Court of Appeals rejected Bower Associates' argument.[38] In addressing only Pleasant Valley's scope of discretion, rather than considering the prior judicial determination that Pleasant Valley had acted wholly outside of its authority, the Court of Appeals restricted the entitlement test to an examination of the theoretical degree of municipal discretion at the time it received a permit application.[39]

*"The Court of Appeals' decision in* Bower Associates *reflects a shift in analysis from the Supreme Court's foundation cases on substantive due process."*

In rejecting Home Depot's identification of a protected property right, the Court of Appeals held without analysis that Rye had discretion to act as it did.[40] The Court of Appeals further determined that neither the actions of Pleasant Valley nor Rye reached the level of unconstitutional arbitrariness.[41] The Court of Appeals concluded with an affirmation of both Appellate Division decisions.[42]

## IV. Decision Shifts and Redefines the Substantive Due Process Analysis

The Court of Appeals' decision in *Bower Associates* reflects a shift in analysis from the Supreme Court's foundational cases on substantive due process. Ignoring the subjective elements of the original test, *Bower Associates* marks New York's implicit adoption of an objective test of the presence of discretionary authority in a state or municipal actor. Individual real property rights will be diminished with the adoption of an objective test.

### 1. Origins and Conflicts in the Entitlement Test

The initial development of the entitlement test required a subjective review of the underlying facts of each case. The entitlement test for substantive due process applies to the first half of the burden of proof and examines whether an individual has a constitutionally protected interest in a prospective property right such as a permit or license. The language of the entitlement test is rooted in the 1972 decision of the U.S. Supreme Court in *Board of Regents v. Roth*.[43] In that decision, the Court held that "[c]ertain attributes of property interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[44] *Roth*, and its companion case *Perry v. Sindermann*,[45] established the subjective test for entitlement to due process protection, requiring not only a review of any discretion created by the state law source of the right but also a review of the facts and circumstances associated with the claim of entitlement.[46]

The Supreme Court detailed and developed the appropriate analysis for assessing "a legitimate claim of entitlement" in *Perry v. Sindermann*. In *Perry*, the Texas College and University System had employed the respondent as a professor for ten years within the system.[47] Although respondent had never been tenured within the system, he "offered to prove that a teacher with his long period of service at this particular State College had no less a 'property' interest in continued employment than a formally tenured teacher at other colleges,"[48] and provided, as evidence, an official faculty guide which stated, in part, "Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude towards his co-workers and his superiors, and as long as he is happy in his work."[49]

Applying *Roth*, the Supreme Court found that the respondent might hold a property interest protected by the requirements of procedural due process.[50] The Court noted that the absence of an explicit contractual tenure provision was not determinative because the law of contracts allowed for implied agreements and that "[e]xplicit contractual agreements may be supplemented by other agreements implied from the promisor's words and conduct in the light of the surrounding circumstances."[51] The Court concluded that the respondent "might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure."[52] The Supreme Court rejected the Court of Appeals' holding that "mere subjective expectancy" was sufficient for due process protection, but affirmed the reversal of the district court because "respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution.'"[53] Central to the language of *Roth* and its

application in *Perry* was the U.S. Supreme Court's recognition that the analysis of a legitimate claim of entitlement involved not only a review of the degree of discretion afforded to the municipality by the state law that created the property right at issue, but also a review of the facts and circumstances associated with the claim of entitlement. The Supreme Court's decisions established that courts should apply a subjective analysis to all substantive due process claims.

The U.S. Court of Appeals for the Second Circuit adopted the rulings of *Roth* and *Perry* a little more than a decade later in a substantive due process case. In *Yale Auto Parts, Inc. v. Johnson*, the Second Circuit used the same language as the Supreme Court, defining the test for a protected property right as a judicial measure of subjective discretion, i.e., a legitimate claim of entitlement exists if "absent the alleged denial of due process, there is a certainty or a very strong likelihood that the application would have been granted."[54] Five years later, the Second Circuit shifted the analysis from the estimated probability that the issuing authority would respond favorably to an application for an objective analysis of "the degree of discretion enjoyed by the issuing authority."[55] The Second Circuit then concluded that the court should measure the degree of discretion at the time the municipal actor made its final decision.[56] Accordingly, at the time of *Bower Associates*, the entitlement test adopted by the Second Circuit required the objective analysis of the degree of discretion available to the municipal actor to grant or deny a permit or license application at the time the state actor made its final decision.

### 2. *Bower Associates* Shifts the Analysis

The Court of Appeals in *Bower Associates* adopts a test significantly more restrictive than the Second Circuit precedent it relied upon. In *Town of Orangetown v. Magee*, the Court of Appeals implicitly rejected the Second Circuit's analysis in *RRI Realty Corp*.[57] and continued the subjective analysis developed in *Perry* and *Yale Auto Parts*. *Bower Associates* now reverses that focus, relying heavily on *RRI Realty Corp.* for the proposition that an objective determination that the local agency had the opportunity to deny the issuance is sufficient to bar the existence of a constitutionally protected property right and expressly rejecting the application of a subjective analysis.[58]

More important, and in contrast to the Second Circuit approach, the Court of Appeals' analysis indicates that a court should measure the existence and degree of discretion at the time an application is made, rather than when the municipal actor makes its final decision on the application.[59] The shift of the judicial test to an objective analysis at the time an application is submitted precludes, to all practical extent, the possibility that a New York court will ever find a municipal actor with the authority to review a permit or license application liable for the violation of a substantive due process right.

The Court of Appeals decision joins a broad array of decisions on the existence and application of the entitlement test. The U.S. Supreme Court's nearly three-year-old decision in *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, reflects these divergent views: In *Cuyahoga Falls* the majority tacitly approved the entitlement test for the first time in a substantive due process case, while Justice Scalia, writing for the concurrence, argued that no such right exists in a land use context and that the property owner's only recourse lies with the Takings Clause and the Equal Protection Clause.[60] The federal courts, otherwise, have not adopted a single test or uniform approach. The Third Circuit has concluded that the ownership of property, in and of itself, is a property interest that deserves the protections afforded by substantive due process,[61] while the First and Seventh Circuits have concluded that land use disputes are inherently political and rarely contain facts sufficient to state a cause of action.[62] The Second, Fourth, Sixth and Tenth Circuits have fashioned a restrictive entitlement test which requires the plaintiff to first prove a protected property interest by showing a legitimate claim of entitlement to a desired land use or approval.[63] The Fifth Circuit has, in certain cases, focused solely on the actions of the municipality,[64] while the Eighth Circuit and District of Columbia Circuit have been highly restrictive in their application of substantive due process to land use cases.[65] Closing out the variety, the Seventh (in certain circumstances), Ninth and Eleventh Circuits have suggested that the Takings Clause preempts any reliance on substantive due process to protect economic property rights.[66]

In short, *Bower Associates* adds a new voice to a diverse chorus of opinions.

### 3. Tougher Constitutional Standard

The Court of Appeals' additional rejection of both claims in *Bower Associates*, finding them insufficiently egregious, may provide a second indicator that the Court wishes to preclude substantive due process claims in New York land use cases. The U.S. Supreme Court has provided general guidelines for defining unconstitutional behavior. "The touchstone of due process is protection of the individual against arbitrary action of government."[67] In affirming the appropriateness of the entitlement test to substantive due process cases, the U.S. Supreme Court confirmed in *Cuyahoga Falls* that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense."[68] The Second Circuit, in applying the standard, has found that municipal actors who go beyond their identified

authority in order to obtain funds or property from an applicant or take arbitrary actions with the deliberate intent to prevent construction are guilty of actions that are constitutionally egregious.[69]

A comparison of the Home Depot facts against those specified in the Second Circuit's decision in *Walz* confirms that the Court of Appeals has now closed the state courthouse to federal substantive due process claims in the land use area. In *Walz*, the Second Circuit found as unconstitutional, arbitrary and capricious the municipal officer's requirement that the plaintiffs transfer the front fifteen feet of their property to Smithtown before the town would approve the issuance of an excavation permit.[70] Likewise, in *Home Depot*, Rye demanded the performance of $200,000 in additional road work and the performance of other conditions involving the scheduling and route of the trucks before it would execute the County road-widening permit application.[71] In looking at the Rye City Council's actions after full discovery, the Supreme Court concluded "that defendants' conduct was a gross abuse of governmental authority" as plaintiff demonstrated that defendants had no rational basis for refusing to approve the permit, that defendants acted for purely improper political reasons and such actions constituted a flagrant abuse of political power.[72] Looking at these facts, no practical difference existed between the two cases as, in each case, municipal officers resorted to extortion to establish additional conditions on the issuance of a permit.

The Court of Appeals rejected the Supreme Court's holding in Home Depot without analysis and merely stated that the lower court's decision lacked a finding of "egregious conduct that implicates federal constitutional law."[73] The absence of any analysis or explanation which distinguishes between the fifteen feet of property demanded in *Walz* from the $200,000-plus municipal extortion in *Home Depot* strongly suggests that the Court of Appeals will not find any municipal decision to deny a permit application sufficiently egregious in the future to reach the level of a constitutional violation regardless of motive. Indeed, this new holding conflicts with the Court's prior decision in *Town of Orangetown v. Magee*, where the Court found an inspector's action was constitutionally egregious when he denied the permit "without legal justification and motivated entirely by political concerns."[74] Under the *Town of Orangetown v. Magee* standard, Rye's actions fell squarely within this element. The Court of Appeals' apparent higher standard for constitutionally egregious behavior, coupled with the Court of Appeals' adoption of the objective analysis approach, appears consistent with the judicial system's general preference to avoid acting as a super Zoning Board of Appeals and becoming swamped with land use cases.

## V. Threat in Dicta

The *Bower Associates* decision contains a single-sentence distinction in dicta that potentially threatens most real estate construction and development. Noting a factual distinction between *Bower Associates* and *Home Depot*, the Court of Appeals wrote: "Moreover, unlike Bower (which owned the subject land), Home Depot at the time of Rye's refusal to consent to the road-widening permit was a contract vendee and, significantly, had only conditional site plan approval for the property it hoped to buy."[75] The second footnote of the opinion further developed this theory that Home Depot might not own the property.[76]

The Court of Appeals' attempt to distinguish between a property owner and the degree of ownership of a contract vendee hints at a possible termination of a century-old rule of law that places both on the same practical footing. Before this decision, New York courts viewed it as "well settled that the owner of the real estate from the time of the execution of a valid contract for its sale is to be treated as the owner of the purchase money and the purchaser of the land is to be treated as the equitable owner thereof."[77] Courts have not previously questioned whether or not a contract vendee possessed a property right: "The conclusion to be reached, of course, is that upon the execution of a contract an interest in real property comes into existence by operation of law. . . ."[78] New York courts have consistently placed the contract vendee in the same position as the property owner and have conducted a substantive due process analysis under various ownership grounds. In the past, an individual's status as a contract vendee[79] or even a lessee[80] has not adversely impacted his or her civil rights.

The Court of Appeals' suggestion that the equitable owner of the property, pending closing of the contract, might hold a smaller bundle of rights than the actual owner would have dramatic consequences on real estate development if the Court acts on its idea. Almost every contract for the sale of real estate contains some conditional language, whether it be the purchase of a home conditioned on obtaining mortgage approval or the purchase of property contingent on acquiring the necessary building permit. No rational basis exists to limit substantive due process or other civil rights to those individuals holding full and clear title to the property. Such a limitation would impair, limit or end many constitutional protections for tenants, contract vendees and other property holders.

## VI. A Missed Opportunity

Home Depot had proposed that the Court of Appeals re-examine the century-old test for a vested

property right.[81] New York's antiquated legal standard for a vested property right requires a showing that "the owner has undertaken substantial construction and made substantial expenditures prior to the effective date of the [zoning] amendment."[82] This standard predates the federal, state and county environmental laws and harkens back to an era when a developer only required a building permit to commence construction and he could readily obtain it at the town hall.

Property development within New York occupies a substantial place in the state's economy. The New York Empire State Development Commission listed the value of construction contracts in 2002 at $24,180,795,000. During the same year, the New York State Builders Association listed residential construction costs at $5,306,658,802. These figures, however, do not reflect the substantial costs associated with SEQRA reviews for Type I actions, regardless of whether a positive declaration is reached. Builders and developers can and frequently do spend hundreds of thousands of dollars over the course of a year to meet their statutory and regulatory obligations in New York before the first shovel is placed in the ground.[83] Current New York law does not consider these expenses or time commitment in its assessment of a potential vested right.

A majority of the states in the nation have recognized the shift in development and vest a property interest before actual site work commences under a building permit. Georgia, Idaho, Maine, North Carolina, Pennsylvania, South Carolina, Tennessee, Utah, Vermont and Washington recognize a vested right at the time an applicant submits an application for a permit, so long as the application is consistent with the applicable building codes and ordinances.[84] Courts in Delaware, Florida, Hawaii, Illinois, Iowa, New Hampshire and Rhode Island have held that a vested right accrued where a landowner has experienced a substantial change of position, expenditure, or increase of obligation either pursuant to a building permit or in reliance upon the probability of its issuance.[85] A change in New York law would have recognized the realities of current property development and protected property owners who had invested tens or hundreds of thousands of dollars into the development of a site plan, only to discover that they lacked a protected property interest. New York law requires a change so that a property interest vests when the municipality completes its review and passes a resolution approving the submitted site plan. The Court of Appeals, however, declined to address this point.

## VII. *Pecoraro* and *Pelaez*

The Court of Appeals' decision in *Bower Associates* merely provides the primary example of the Court's reinforcement of judicial protection for municipal actions and discretion this past year. The Court of Appeals reiterated the great latitude that a municipal body possesses in exercising its discretion in *Pecoraro v. Board of Appeals of Town of Hempstead*.[86] In *Pecoraro*, the Court reversed the decision of both the Supreme Court and the Second Department to find that the ZBA for the Town of Hempstead had not abused its discretion in denying petitioner's application for an area variance.[87] In reaching its decision, the Court of Appeals reached beyond the factual determination of both lower courts in order to reinforce the original municipal decision. Likewise, in *Pelaez v. Seide*,[88] the Court of Appeals further shielded municipal actors from potential liability for its actions. The Court's decision in *Pelaez* narrows the application of the "special relationship" exception to such a narrow point that it appears unlikely that a municipality will be found liable in lead paint cases absent novel and unprecedented conditions.

*"A change in New York law would have recognized the realities of current property development and protected property owners who had invested tens or hundreds of thousands of dollars into the development of a site plan, only to discover that they lacked a protected property interest."*

The petitioner in *Pecoraro* brought his action after the Zoning Board denied the application because the requested variance was substantial and the surrounding property predominately conformed with the larger lot size requirement.[89] The Supreme Court annulled the Board's decision after it concluded that the Board had founded its decision on "generalized community opposition and had failed to provide a specific reason for its decision."[90] In affirming,[91] the Second Department determined that no one had presented any evidence at the hearing to substantiate a finding that the area variance would have an adverse impact on the neighborhood or offered any empirical data or expert testimony that refuted petitioner's evidence.[92] The Court of Appeals, however, reversed both lower courts. Looking past petitioner's demonstration that the immediately adjacent four lots were all of the same size and the Appellate Division's determination that no one introduced evidence contradicting the petitioner's various submissions, the Court of Appeals reinforced a court's obligation to defer to the local Zoning Board. Speaking for ZBAs around the state, the Court concluded: "As the board is entrusted with safeguarding the character of the neighborhood in accordance with the zoning laws, it was well within its discretion to deny a variance

that would have allowed an owner to take advantage of an illegally non-conforming parcel by erecting a dwelling upon it."[93]

The Court of Appeals' decision in *Pelaez* involves a step away from property and zoning issues and offers counties and municipalities an illustration of how far they may act, or fail to act, without incurring liability in a tort context. Here, the Court considered the criteria necessary for a party to show the existence of a "special relationship" and meet the standard required to hold a municipality liable in negligence.[94] The Court of Appeals, in affirming the Appellate Division's grant of summary judgment for Orange County, ignored a fact-rich environment in the case and drew up a standard for surviving summary judgment that is almost unachievable.[95]

The facts of the case are compelling. *Pelaez* focuses on twins who were tested for and found to have elevated lead counts, as well as a "host of medical problems," at the age of 14 months.[96] An Orange County official made several visits to their rented home and determined that every room in the rented home contained a lead risk.[97] The County then issued a Notice and Demand for Discontinuance, ordering the abatement of the lead within 24 days.[98] County officials made follow-up visits, checking the status of the abatement and providing Ms. Pelaez with a health regime that would help her children's condition.[99] County officials first noted in the follow-up visits that the owner had not started the abatement process and then, two weeks after the deadline, issued a Notice of Hearing for a date two months in the future.[100] The County official later canceled the hearing on the basis that the abatement was progressing, and waited another two months to revisit the location.[101] Six months after the initial direction to abate, the official found that the abatement, originally to be completed in 24 days, had "not proceeded well enough," and scheduled another hearing.[102] An Administrative Law Hearing Officer, a month later, directed the immediate relocation of the family.[103] Doctors tested the twin boys the following day and determined that their lead exposure had increased from 20 mcg/dl to 50 and 70 mcg/dl, requiring the immediate hospitalization of both 22-month-old children.[104]

The County, the following day, condemned the house as unfit for human habitation.[105] Pelaez commenced a personal injury action against the County; the Supreme Court denied the County's motion for summary judgment, but the Second Department reversed and dismissed the complaint.[106]

The Court of Appeals utilized the case to create a stringent benchmark for determining that a municipality and an individual have a "special relationship" sufficient to create municipal liability. The standard test recognizes the existence of that relationship:

> (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction or control in the face of a known, blatant and dangerous safety violation.[107]

In a decision seemingly at odds with the known facts of the case and the documented action of county employees, the Court of Appeals found that no issue of fact existed concerning whether the municipality assumed a duty on which the plaintiff could justifiably rely or whether the municipality assumed positive direction or control in the face of a known, blatant and dangerous safety violation.[108]

A judicial desire to further limit municipal liability provides the only apparent explanation for the Court's decision. County officials had told Ms. Pelaez that her two infants were suffering from lead paint poisoning and, initially, that the problem would be abated in 24 days.[109] County officials then continued to monitor, first scheduling and then canceling a hearing, while providing her with advice on how to mitigate the threat to her children.[110] Finally, the County scheduled a hearing, directed her removal from the building, conducted blood tests that resulted in the children's hospitalization and condemned the house.[111] Despite all of this and while conceding that the county officials "performed their duties imperfectly," the Court of Appeals concluded that no issue of fact existed as to whether the "municipality voluntarily assumed a duty on which plaintiff could justifiably rely."[112] Likewise, given that lead poisoning is a dangerous safety violation, the actions of the county official could have raised a question of fact as to whether or not they assumed positive control of the situation.[113] The Court's emphasis on the landlord enjoying immediate control of the abatement process, rather than the municipality, places the county official in a passive role that seemingly contradicts his ability to issue directives to abate the problem and to issue notices to compel a hearing.[114]

*Pelaez*'s net result is the creation of a near insurmountable barrier for those seeking to demonstrate a special relationship exists, as a matter of law, at the motion to dismiss stage.

## VIII. Conclusion

The Court of Appeals' decision in *Bower Associates* all but bars the courthouse door on substantive due process rights in the area of land use within the State of New York. With the Court's adoption of an objective test for discretion measured at the moment an application is submitted in *Bower Associates*, most county and municipal codes already will provide a sufficient degree of discretion for reviewing any permit or license applications. The Court has raised the bar so high at this time that it appears unlikely that a property developer or owner will be able to successfully demonstrate a substantive due process violation in the land use area. Land developers and property owners in New York now lack any constitutional recourse for damages when the whim and caprice of a public official blocks or delays the receipt of a necessary permit. While an Article 78 proceeding will provide a judicial avenue for obtaining the permit eventually, *Bower Associates* essentially precludes any recovery for the damages that the official's egregious behavior causes.

*"Land developers and property owners in New York now lack any constitutional recourse for damages when the whim and caprice of a public official blocks or delays the receipt of a necessary permit."*

This decision, however, should not provide the final say on the appropriate test. The wide variety of approaches taken by the different federal courts and some state courts, ranging from no substantive due process claim to a presumption of a property right with the judicial review focused only on the actions of the official, indicates that the United States Supreme Court will have to squarely address the entitlement test in the near future. Until then, property owners in New York will not enjoy substantive due process protections.

## Endnotes

1. 2 N.Y.3d 617, 781 N.Y.S.2d 240 (2004).
2. 88 N.Y.2d 41, 643 N.Y.S.2d 21 (1996).
3. *Bower Assocs.*, 2 N.Y.3d at 628–30, 781 N.Y.S.2d at 246–247.
4. *Id.* at 629, 781 N.Y.S.2d at 246.
5. 2 N.Y.3d 608, 781 N.Y.S.2d 234 (2004).
6. 2 N.Y.3d 186, 778 N.Y.S.2d 111 (2004).
7. Detailed familiarity with the case and the underlying case law justifies this article's focus on *Bower Associates*. *Pecoraro*, decided the same day, serves mainly to reinforce the discretionary authority of local ZBA and the limited judicial review permitted for such municipal determinations. *Pelaez*, particularly in light of the facts of the case, and the Court's determination that plaintiff could not show that a question of fact existed with respect to her reliance on the county officials has all but indemnified state, county and local officials from liability for almost any action that they take in handling a lead poisoning case.
8. *Bower Assocs.*, 2 N.Y.3d at 623–26, 781 N.Y.S.2d at 242–45.
9. *Id.*
10. *Id.* at 623, 781 N.Y.S.2d at 242.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 623, 781 N.Y.S.2d at 242–43.
15. *Id.* at 623–24, 781 N.Y.S.2d at 243.
16. *Id.* at 624, 781 N.Y.S.2d at 243.
17. *Id.*
18. *Id.* at 624–25, 781 N.Y.S.2d at 243.
19. *Id.*
20. *Id.* at 625, fn.3, 781 N.Y.S.2d at 243, fn.3.
21. *Id.*
22. *Id.* at 624–25, 781 N.Y.S.2d at 243.
23. *Id.* at 625, 781 N.Y.S.2d at 244.
24. *Id.*
25. *Id.* at 625–26, 781 N.Y.S.2d at 244.
26. *Id.* at 623–26, 781 N.Y.S.2d at 243–44.
27. *Id.*
28. *Id.* at 626, 781 N.Y.S.2d at 244–45.
29. *Id.* at 624, 781 N.Y.S.2d at 243.
30. *Id.* at 626, 781 N.Y.S.2d at 245.
31. *Id.* at 627, 781 N.Y.S.2d at 245 (quoting *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 52–53, 643 N.Y.S.2d 21, 27–28).
32. *Id.* at 627–28, 781 N.Y.S.2d at 245–46.
33. *Id.* at 628, 781 N.Y.S.2d at 246 (quoting *Magee*, 88 N.Y.2d at 53, 643 N.Y.S.2d at 28).
34. *Id.* at 628, 781 N.Y.S.2d at 246 (quoting *RRI Realty Corp. v. Incorporated Vill. of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989)). *RRI Realty Corp.* predates *Magee*, but was not mentioned in that decision.
35. *Id.* at 628, 781 N.Y.S.2d at 246 (quoting *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003)).
36. *Id.* at 629, 781 N.Y.S.2d at 246–47 (quoting *Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995)).
37. *Id.* at 629, 781 N.Y.S.2d at 247.
38. *Id.* (characterizing Bower Associates' argument as seeking to convert a victory in an Article 78 proceeding into a constitutionally protected property right, and then rejecting that argument).
39. *Id.* at 629–30, 781 N.Y.S.2d at 247.
40. *Id.* at 630, 781 N.Y.S.2d at 247. (The Court of Appeals apparently rested this finding on a footnote within the Supreme Court's Article 78 decision. That footnote had noted that Home Depot was entitled to relief under *mandamus* to review, but not *mandamus* to compel. The same Supreme Court Justice, three years later, and fully aware of the entitlement test's requirement for an absence of discretion or for that discretion to be "'so narrowly circumscribed that approval of a proper application is virtually assured'" (*see Bower Associates*, at 628, 781 N.Y.S.2d at 246 (quoting *Villager Pond Inc. v. Town of Darien*, 56 F.3d 375, 379 (2d Cir. 1995))), did not consider the footnote determinative and held that "there would have been either a certainty or a very strong

likelihood that the permit would have been approved." *Sup. Ct. Cite not available* (following the test laid out in *Yale Auto Parts* and *Town of Orangetown v. Magee*)).

41. *Id.* at 630, 781 N.Y.S.2d at 247. The Court of Appeals then examined Home Depot's Equal Protection cause of action and determined that it failed to meet the burden of proof. *Id.* at 630–32 781 N.Y.S.2d at 247–49.
42. *Id.* at 630, 781 N.Y.S.2d at 247.
43. 408 U.S. 564 (1972).
44. *Id.* at 577.
45. 408 U.S. 593 (1972).
46. *See id*. at 600–602.
47. *Id.* at 594.
48. *Id.* at 601.
49. *Id.* at 600.
50. *Id.* at 602–603.
51. *Id.* at 602.
52. *Id.*
53. *Id.* at 603.
54. *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 59 (2d Cir. 1985).
55. *RRI Realty Corp. v. Incorporated Vill. of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989).
56. *Villager Pond Inc. v. Town of Darien*, 56 F.3d 375, 379 (2d Cir. 1995).
57. The Court of Appeals decision in *Town of Orangetown v. Magee* came seven years after *RRI Realty Corp.*, but does not mention either that Second Circuit case or the shift to the objective measure of discretion found in that case. *See generally Town of Orangetown v. Magee*, 88 N.Y.2d at 52–53, 643 N.Y.S.2d at 27–28.
58. *Bower Assocs.*, 2 N.Y.2d at 628, 781 N.Y.S.2d at 246.
59. *Id.* at 629–30, 781 N.Y.S.2d at 247 (denying both Bower Associates' and Home Depot's assertion of protected property interest on the existence of discretion available, respectively, to Pleasant Valley and Rye).
60. 538 U.S. 188, 198–201 (2003).
61. *See DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 600–01 (3d Cir. 1995) (repeating that ownership is enough of a property interest to enjoy constitutional protection and that a substantive due process violation occurs when the governmental act is arbitrary and capricious); *but see United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 401–02 (3d Cir. 2003) (modifying the test concerning municipal conduct within the Third Circuit to apply a "shocks-the-conscience" standard to that conduct).
62. *See Macone v. Town of Wakefield*, 277 F.3d 1, 9 (1st Cir. 2002) (confirming the First Circuit's total bar when stating "[w]e have consistently rejected substantive due process claims arising out of disputes between developers and land planning authorities while leaving the door 'slightly ajar' for 'truly horrendous situations'" (quotation omitted)); *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45–47 (1st Cir. 1992) (stating that the "due process clause may not ordinarily be used to involve federal courts in the rights and wrongs of local planning disputes" and only leaving "the door slightly ajar for federal relief in truly horrendous situations"); *Centres, Inc. v. Town of Brookfield*, 148 F.3d 699, 704 (7th Cir. 1998) (requiring a showing that "some other substantive constitutional right has been violated," or that state law remedies are inadequate before a substantive due process claim can be stated); *Doherty v. City of Chicago*, 75 F.3d 318, 325 (7th Cir. 1996) (observing that the potential for a substantive due process claim exists but that the plaintiff must allege that the decision was arbitrary and irrational and allege either a separate constitutional violation or absence of an adequate state remedy).
63. *See Henry v. Jefferson County Planning Comm'n*, 34 Fed. Appx. 92, 97 (4th Cir. 2002) (noting that a plaintiff must demonstrate 1) a property interest, 2) which the state deprived him of and 3) that the state's actions fall "so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency" and that any significant discretion defeats the claim of a property interest); *Yalowizer v. Town of Ranchester*, 18 Fed. Appx. 745, (10th Cir. 2001) (noting that plaintiffs must "therefore show that defendants had limited discretion to deny or revoke their variance. Otherwise, [defendants'] decision making lacks sufficient substantive limitations to invoke due process guarantees"); *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000) (stating "[i]n municipal land use regulation cases . . . the entitlement analysis presents a question of law and focuses on 'whether there is discretion in the defendants to deny a zoning or other application filed by the plaintiffs'. . . . 'The entitlement analysis centers on the degree of discretion given the decision maker and not on the probability of the decision's favorable outcome'" (quotations omitted)); *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 130 (2d Cir. 1998) (person claiming property "right must have a 'legitimate claim of entitlement to it'" (quotation omitted)); *Triomphe Investors v. City of Norwood*, 49 F.3d 198, 202 (6th Cir. 1995) (no substantive due process claim lies when board has discretion to deny permit); *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 67 (4th Cir. 1992) (stating that "the routine land-use disputes that inevitably and constantly arise among developers, local residents and municipal officials is simply not the business of the federal courts").
64. *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 249 (5th Cir. 2000) (finding a protected property right and stating that "[s]ubstantive due process analysis is appropriate only in cases in which government arbitrarily abuses its power to deprive individuals of constitutionally protected rights"); *see also Jackson Court Condos., Inc. v. City of New Orleans*, 874 F.2d 1070, 1077 (5th Cir. 1989) (holding that "the outside limit upon a state's exercise of its police power and zoning decisions is that they must have a rational basis").
65. *George Washington Univ. v. District of Columbia*, 318 F.3d 203, 206–207 (D.C. Cir. 2003) (noting that substantial disagreement exists on the applicable test but concluding that, with respect to how "severely official discretion must be constrained," the inquiry must be to whether the "statute or regulation places substantial limits on the government's exercise of its licensing discretion"); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992) (implying that the right to own and make productive use of one's land free from arbitrary and irrational governmental interference is not sufficiently "fundamental" to warrant substantive due process protection); s*ee also Martin v. City of Brentwood*, 200 F.3d 1205, 1206 (8th Cir. 2000) (noting that the Eighth Circuit has "repeatedly taken a very restrictive view as to when state and local land use planing, zoning, and licensing decisions violate an aggrieved party's federal right to substantive due process").
66. *Daniels v. Area Planning Comm'n*, 306 F.3d 445, 459 fn.14 (7th Cir. 2002) (applying to instances where property taken for a private purpose); *Armendariz v. Penman*, 75 F.3d 1311, 1318–1320 (9th Cir. 1996) (substantive due process does not apply to property rights); *Village of Lake Jackson Ltd. v. Leon County*, 121 F.3d 610, 612 (11th Cir. 1997) (challenges to regulatory takings should be made under the takings clause, not under substantive due process).
67. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).
68. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003) (internal citations omitted).
69. *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir. 1995); *Sullivan v. Salem*, 805 F.2d 81 (2d Cir. 1986).

70. *Walz*, 46 F.3d at 169.

71. *Bower Assocs.*, 2 N.Y.3d at 624–25, 781 N.Y.S.2d at 243–44.

72. *Id.*, 2 N.Y.3d at 626, 781 N.Y.S.2d at 244.

73. *Id.* at 630, 781 N.Y.S.2d at 247. The Second Department tangentially addressed the impact of political motivation in assessing the egregious nature of a municipal act. That Court wrote that "[t]he fact that Town officials may have been motivated by parochial views of local interests is insufficient to implicate federal constitutional law, in the absence of irrational or invidious conduct in violation of a specific constitutional right." *Bower Assocs. v. Town of Pleasant Valley*, 304 A.D.2d 259, 264, 761 N.Y.S.2d 64, 69 (2d Dep't 2003).

74. 88 N.Y.2d 41, 53, 643 N.Y.S.2d 21, 28.

75. *Bower Associates*, 2 N.Y.3d at 630, 781 N.Y.S.2d at 247.

76. *Id.*, at 624, fn.2, 781 N.Y.S.2d at 243, fn.2 (stating that "Home Depot actually acquired a right to buy the site in 1992, but was not obligated to conclude the purchase unless the seller and purchaser obtained the necessary land-use approvals"). Factually, this statement is unsupported within the record.

77. *Bean v. Walker*, 95 A.D.2d 70, 72, 464 N.Y.S.2d 895, 896 (4th Dep't 1983) (quoting *New York Cent. & Hudson Riv. R.R. Co. v. Cottle*, 187 A.D. 131, 134, 175 N.Y.S. 178, 186 (4th Dep't 1919)).

78. *Id.*, at 72, 464 N.Y.S.2d at 897; *see also Sewell v. Underhill*, 197 N.Y. 168, 170–171 (1910); *Carnavalla v. Ferraro*, 281 A.D.2d 443, 443, 722 N.Y.S.2d 47, 48 (2d Dep't 2001) (affirming that "[t]he execution of a contract for the purchase of real estate and the making of a partial payment gives the contract vendee equitable title to the property"); *Dubbs v. Stribling & Assocs.*, 274 A.D.2d 32, 38, 712 N.Y.S.2d 19, 23–4 (1st Dep't 2000) (describing as a traditional principle of real property that the purchaser, after the execution of a valid contract, stands as the equitable owner of the land).

79. *See Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) (involving a contract vendee seeking substantive due process protection).

80. *See Lisa's Party City v. Town of Henrietta*, 185 F.3d 12, 17 (2d Cir. 1999) (involving a tenant bringing a substantive due process case).

81. The Court of Appeals' analysis of the entitlement test as applied to Home Depot would have proven unnecessary if the Court determined that Home Depot possessed a vested property right. The entitlement test under the substantive due process analysis merely examines whether or not a property interest exists in a prospective item. A vested property interest eliminates the need for the test and would focus judicial scrutiny on the actions of the municipal actor and whether they were constitutionally egregious.

82. *Ellington Const. v. Zoning Bd. of Appeals*, 77 N.Y.2d 114, 122, 564 N.Y.S.2d 1001, 1005 (1990).

83. *See* Todd G. Monahan, *Seeking the Spirit of SEQRA from Beneath the Paperwork*, 65 Albany L. Rev. 539, 569 (2001); Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience With SEQRA*, 13 Cardozo L. Rev. 2041, 2047–48 (1992).

84. *See* Arden S. Rathkopf, *The Law of Zoning and Planning*, 50.02[3][b][i][A], 50.04[1] (1997).

85. *Id.*

86. N.Y.3d 608, 781 N.Y.S.2d 234 (2004).

87. *Id.* at 614, 781 N.Y.S.2d at 237.

88. 2 N.Y.3d 186, 778 N.Y.S.2d 111 (2004).

89. *Pecoraro*, 2 N.Y.3d at 611, 781 N.Y.S.2d at 235–36. *Pecoraro* focused on the petitioner's attempt to gain a variance to build a single-family dwelling on a property that failed to conform to local zoning. The petitioner, in seeking a variance on both the lot area requirement and width requirement, introduced evidence that demonstrated that his proposed construction was consistent with the neighborhood's character, would not negatively impact community property values and that four parcels lay behind the property, each approximately 40' by 100'. *Id*. at 611, 781 N.Y.S.2d at 235. Petitioner offered evidence that the development would not disturb the physical or environmental characteristic of the area. *Id*. At least two community groups opposed the application on the basis that a variance would be contrary to the character of the area and inconsistent with a previous 1969 denial for a variance on the same property. *Id*.

90. *Id.* at 612, 781 N.Y.S.2d at 236.

91. The Appellate Division actually modified the decision of the lower court. The Supreme Court originally remanded the matter back to the Zoning Board for an additional hearing and determination. *Id*. The Second Department, however, found the remand unnecessary because the Board had already reviewed the petitioner's final plans. *Id*.

92. *Id.*

93. *Pecoraro*, 2 N.Y.3d at 615, 781 N.Y.S.2d at 239.

94. *Pelaez v. Seide*, 2 N.Y.3d 186, 193, 778 N.Y.S.2d 111, 113 (2004).

95. *Id.*

96. *Id.* The case was also consolidated with *Harris v. Llewellyn*, which concerned a lead poisoning incident in New York City and an action against the City. The facts specific to *Pelaez* are more compelling and provide the better example of the Court's restriction on suits against municipalities in lead poisoning cases.

97. *Id.* at 194, 778 N.Y.S.2d at 113.

98. *Id.*

99. *Id.* at 194, 778 N.Y.S.2d at 113–14.

100. *Id.* at 194, 778 N.Y.S.2d at 114.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 195, 778 N.Y.S.2d at 114.

105. *Id.*

106. *Id.*

107. *Id.* at 199–200, 778 N.Y.S.2d at 118. The Court assessment of an affirmative duty, in turn, is weighed against a four-part test. *Id.*, at 202, 778 N.Y.S.2d at 119 (citing *Cuffy v. City of New York*, 69 N.Y.2d 255, 513 N.Y.S.2d 372 (1987)).

108. *Pelaez*, 2 N.Y.3d at 202–204, 778 N.Y.S.2d at 119–121.

109. *Id.* at 193–94, 778 N.Y.S.2d at 113.

110. *Id.* at 194–95, *Id.* at 113–14.

111. *Id.*

112. *Id.* at 202, 778 N.Y.S.2d at 119.

113. *See Id.* at 203–05, 778 N.Y.S.2d at 120–21.

114. *Id.* at 204, 778 N.Y.S.2d at 121.

**Philip M. Halpern is the managing partner at Collier, Halpern, Newberg, Nolletti & Bock, LLP and concentrates in commercial litigation.**

# Report of the Commercial and Federal Litigation Section on the Lawsuit Abuse Reduction Act of 2005

## Summary

The New York State Bar Association Commercial and Federal Litigation Section strongly opposes the Lawsuit Abuse Reduction Act of 2005 ("LARA"), H.R. 420 for the following reasons:

- LARA would largely abrogate the long-standing American Rule that litigants bear their own attorneys' fees.
- LARA would seriously compromise principles of federalism by dictating in a wide panoply of state court actions that the American Rule be abrogated, venue in personal injury actions be limited, and spoliation sanctions be imposed.
- Through LARA Congress encroaches upon judicial rule-making authority by modifying a procedural rule to accomplish substantive ends in contravention of the well-established process for the judiciary's control of its procedural rules.
- LARA will hugely increase the cost of litigation by fostering in many, if not most, cases a collateral inquiry into the bases for assertions in the course of a lawsuit and an evaluation of the costs incurred in responding to them.
- LARA will stifle innovation in the law.

## LARA's Provisions

The text of H.R. 420 is attached as Exhibit 1. The changes it would make in Rule 11(c) of the Federal Rules of Civil Procedure are shown in Exhibit 2 (existing language proposed to be omitted is enclosed in bold brackets, new matter is printed in italics, and existing language in which no change is proposed is shown in roman type).

Section 2 of LARA will require federal courts on motion "or upon [their] own initiative" to impose sanctions, "including a reasonable attorney's fee," upon an attorney, law firm or party that files a pleading, motion or other paper that violates Rule 11(b).[1] The function of the sanction is expanded from its current deterrence to both deterrence *and* compensation of the party injured by the conduct. The specific mention of a nonmonetary sanction and payment into court in current Rule 11(c)(2) will be eliminated. For any attorney who violates Rule 11 three or more times during the attorney's career in a particular federal district court, for each violation starting with the third, under Section 6 of LARA, the court "shall suspend that attorney from the practice of law in that Federal district court for 1 year" and may suspend the attorney for an additional appropriate period. Section 5 states that the amendments in Section 2 "shall [not] be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law."

Section 3 of LARA provides that Rule 11 applies in any state court civil action in which the court determines upon a motion that the action "substantially affects interstate commerce" "based on an assessment of the costs to the interstate economy, including the loss of jobs, were the relief requested granted." The proposed statute requires that the state court make its determination "within 30 days after the filing of such motion," although it does not specify the consequences if the determination is made outside the time period. Section 5 states that Section 3 "shall [not] be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law."

Section 7 of LARA creates a rebuttal presumption of a violation of Rule 11 from an attempt to litigate in any forum an issue that has been lost on the merits on three consecutive prior occasions.

Section 4 of LARA concerns personal injury claims (except for class actions) filed in either federal or state courts and limits venue to the county or federal district where (1) the person bringing the claim resides at the time of filing or the time of the alleged injury; (2) the injury or the circumstances giving rise to the injury allegedly occurred; (3) if the defendant is a corporation, its principal place of business is; and, (4) if the defendant is an individual, the defendant resides. Section 4 does not provide for venue where a corporation is incorporated or does business and does not provide for venue based on a defendant's locale when a defendant is neither a corporation with a principal place of business in the United States nor an individual. Section 4(b) of LARA further provides that, if the injury or circumstances giving rise to the claim occurred in more than one county or federal district, the court "shall determine" the "most appropriate forum" for the claim, and, if it is elsewhere, dismiss the claim (not transfer it). Any applicable statute of limitations would be tolled only from the filing of the claim to the date of dismissal.

Section 8 of LARA concerns document destruction and applies to any court proceeding in a federal court or in a state court which substantially affects interstate commerce. It provides that whoever intentionally destroys documents "sought in, and highly relevant to," a pending court proceeding "shall" be punished with sanctions commensurate to those available under Rule 11, held in contempt of court, and, if an attorney, referred to appropriate state bar associations for disciplinary proceedings.

*"Although LARA is purportedly directed at 'frivolous' suits, it cuts a far broader swathe."*

The purpose of LARA, according to the Report of the House Judiciary Committee (H.R. Rep. No. 123, 109th Cong., 1st Sess. 3 (June 14, 2005)) is:

> The Lawsuit Abuse Reduction Act of 2005 . . . will restore the teeth to Federal Rule of Civil Procedure 11 it once had to deter frivolous Federal lawsuits. It would also extend Rule 11's protections to prevent frivolous lawsuits in state courts when state judges determine a case would have national economic consequences that affect interstate commerce. The bill would also prevent forum shopping, the nefarious practice by which personal injury attorneys bring lawsuits in courts that notoriously and consistently hand down astronomical awards even when the case has little or no connection to the court's jurisdiction.

## Problems With LARA

### Shifting Attorneys' Fees

Although LARA is purportedly directed at "frivolous" suits, it cuts a far broader swathe. Rule 11 applies to any filing during the course of a litigation, not just to initial pleadings. Rule 11(b) requires evidentiary support (or likely evidentiary support after a reasonable opportunity for further investigation) for factual contentions and a basis in existing law or a nonfrivolous argument for modification of existing law for legal contentions. It also requires that a filing not be presented to cause "unnecessary delay" or a "needless increase" in litigation costs. LARA makes mandatory the consideration of sanctions in every case, because it may be brought up on a motion by a party or by the court on its own. The effects of LARA will not be limited to frivolous suits. It will instead affect many, if not most, lawsuits, resulting in expensive collateral litigation over whether a party interposed a paper for a proper purpose and whether there was evidentiary or legal support for a position espoused during the course of the litigation.

The proponents of LARA claim that it seeks to restore the mandatory sanction regime that existed under Rule 11 from 1983 through 1993. That regime did not work. During hearings before the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee on the 1993 amendments to the Federal Rules of Civil Procedure, John B. Frank, a senior partner of the Phoenix, Arizona law firm Lewis and Roca, a former law school professor who taught civil procedure,[2] and an author of numerous books on court administration and procedure and constitutional and legal historical subjects, testified:

> Rule 11, as adopted in 1983 and enforced today, has been described by Professor Charles Alan Wright as the worst self-inflicted wound in the history of the rules-making process. It has been a blight. Seldom was an effort made with better intentions or higher purposes, but, as has been trenchantly observed by Professor Judith Resnik of the University of Southern California[,] most of the time rules reformers are mopping up after the mistakes of past rules reformers; and Rule 11 is a brilliant example. . . .
>
> In the less than ten years since the adoption of Rule 11, we have had thousands of cases invoking its application. Asking for sanctions because of challenge to the allegedly good faith inquiry into either facts or law has become a major industry. It has become routine that the attorneys now have a double duty, one to try the case and the other to try the opposing counsel.
>
> The rule has become more of a defendant's mechanism than a plaintiff's but the defendants have not liked it either. Approximately 75% of the sanction applications are against plaintiffs. Nonetheless, there are enough against defendants to create a mutual burden. Indeed, the Rule 11 operation is just as obnoxious to the leaders of the defense

bar as it is to the plaintiff's bar. The root goal is the desire to sanction frivolous cases. The underlying problem here is that the phrase "frivolous cases" has a happy ring to it as though it were saying something meaningful, when in truth this is false. One judge's frivolous case is another's serious question. In a Federal Judicial Center study, a group of judges who considered the same complaint divided fifty-fifty on whether it was frivolous. . . .

I do not pause with what I think are the substantive misfortunes under Rule 11 because the point that particularly concerns me is what I think the grossly unreasonable and unwholesome burden it has added to judicial administration. The American Judicature Society has done a major study. That study reported that in 7.6% of the cases studied there were Rule 11 sanctions and in 24.3% there was some kind of involvement without sanctions. That meant that there had been some kind of Rule 11 activity of a formal enough sort to be noticed in a third of the cases. This in turn means that a great number of time-consuming and dollar-consuming decision points have been put into the legal system.

When the attention goes from the frequency of Rule 11 in a batch of cases to the frequency of Rule 11 problems for lawyers in general, the American Judicature Society comes up with the astonishing figure that 82% of the bar studied has had some Rule 11 contact. . . .

The worst feature of the 1983 rule . . . is that the rule became a fee-shifting device so that the prevailing lawyer was required to get his fees out of the losing lawyer's side.

*Amendments to the Fed. Rules of Civil Procedure before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 103rd Cong., 1st Sess. 57–59 (1993) (statement of John P. Frank).

In *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975), the Court traced the history of and confirmed the American Rule that, "[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." 421 U.S. at 247. Based on the experience under Rule 11 from 1983 through 1993, LARA will significantly undermine and alter this rule, especially since its avowed purpose is to compensate the winner. Attempts to shift fees will become routine, and, because the standard for doing so is not merely that a contention was frivolous, it will be successful in many cases.

*"LARA seeks to reduce the number of frivolous suits by increasing the cost of bringing one. However, by indirectly pursuing those goals through Rule 11, which applies to more than just frivolous suits, LARA will also reduce the number of novel and creative factual and legal arguments that are made."*

For example, it is routine now for complaints to plead claims in the alternative. If one of those claims is dismissed or not proved at trial (and many are in this category), there may well be grounds for fee-shifting under a mandatory Rule 11. It is similarly routine now for answers to assert a defense of failure to state a claim. If a claim is successful, then there may well be grounds for fee-shifting under a mandatory Rule 11. In either event, the "winner" will likely seek its fees, and, even if it does not, the court must consider the possibility. Time-consuming and dollar-consuming hearings to determine the basis for a factual or legal contention and to evaluate the cost incurred by the party opposing the contention will be added to an already burdened federal judicial system.

LARA seeks to reduce the number of frivolous suits by increasing the cost of bringing one. However, by indirectly pursuing those goals through Rule 11, which applies to more than just frivolous suits, LARA will also reduce the number of novel and creative factual and legal arguments that are made. As found in the Federal Judicial Center study described by Mr. Frank, one judge's "frivolous" argument is another judge's "serious" argument.[3] But, because of the uncertainty, risk-averse attorneys in all cases, not just civil rights cases that may be arguably covered by proposed Section 5, will avoid making factual or legal contentions, particularly novel ones, which might be held to violate Rule 11. The law and society will be poorer for the restriction. As reported in the dissenting views in the House Report on LARA:

> A good example of the effect of this rule . . . was cited by the Honorable Robert L. Carter, United States District Court Judge for the Southern District of New York, when he stated: "I have no doubt that the Supreme Court's opportunity to pronounce separate schools inherently unequal [in *Brown* v. *Board of Education]* would have been delayed for a decade had my colleagues and I been required, upon pain of potential sanctions, to plead our legal theory explicitly from the start."

H.R. Rep. No. 123, 109th Cong., 1st Sess. 113 (2005) *(quoting* Symposium, The 50th Anniversary of the Federal Rules of Civil Procedure, 1938–1988, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights,* 137 U. Pa. L. Rev. 2179, 2193 (June 1989) (brackets in original)).

**Imposing on State Courts Rule 11 and Spoliation Sanctions and Venue Limitations for Personal Injury Actions**

In cases determined to substantially affect interstate commerce, LARA seeks to impose on litigants in state courts mandatory sanctions under Rule 11 and for intentional spoliation of documents. The condition precedent for a state case to be found to substantially affect interstate commerce is almost no limitation at all. *See, e.g., International Salt Co. v. United States,* 332 U.S. 392, 395, 396 (1947) (sales of $500,000 held not to be an insignificant or insubstantial amount of interstate commerce under the Sherman Act); *Detroit City Dairy, Inc. v. Kowalski Sausage Co.,* 393 F. Supp. 453, 472 (E.D. Mich. 1975) (sales of $86,376.72 held to be a not insubstantial amount of interstate commerce under the Sherman Act). Therefore, mandating that Rule 11 and spoliation sanctions be imposed by state courts in cases found to affect a substantial amount of interstate commerce are likely to encompass many, if not most, of the cases pending in the state courts.

In Section 4, LARA also limits the venues for personal injury actions in the state courts as well as in the federal courts. It exempts corporations from personal injury actions in states in which they are incorporated, if those states are not the corporations' principal places of business. The proposed statute ignores other types of organizations, such as limited liability corporations, which have become increasingly popular, especially for small businesses, in recent years. Further, the statute is more generous to foreign business entities than domestic corporations by limiting the choice of venue to where the claimant resides or the injury or circumstances giving rise to the injury allegedly occurred. It also appears that, if there are multiple corporate defendants with different principal places of business, venue will similarly be limited to where the claimant resides or the injury or circumstances giving rise to the injury allegedly occurred. In addition, the proposed statute provides for dismissal of claims if a plaintiff guesses wrong in attempting to determine the undefined "most appropriate forum" where the injury or circumstances giving rise to the claim occurred in more than one county or federal district. Moreover, Section 4 unfairly does not toll the statute of limitations beyond the date of dismissal to allow the plaintiff in a timely fashion to file a renewed complaint in what may be the "most appropriate forum."

Section 4 is far too restrictive. It limits allowable venues for personal injury actions far more than is necessary to accomplish its stated purpose of preventing the practice of bringing personal injury lawsuits in courts that purportedly hand down astronomical awards when the case has little connection to the court's jurisdiction. It is contrary to the notion that there are national markets for goods and services, which seems to animate the provisions of LARA dictating the application of Rule 11 in state cases involving substantial interstate commerce. Section 4 should be rejected in its current form.

The Supreme Court has commented on the principles of federalism that allow the states "to serve as laboratories for testing solutions to novel legal problems." *Smith v. Robbins,* 528 U.S. 259, 275–76 (2000) *(quoting Arizona v. Evans,* 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting)). Imposing uniform flawed mandatory Rule 11 and spoliation sanctions and limiting the venues for personal injury actions undermines this fundamental principle of federalism.

**LARA Avoids the Tested Procedures Under the Rules Enabling Act**

Since the passage of the Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. §§ 2071–2077), the Supreme Court has been granted the power to adopt procedural rules for the district courts combining law and equity.[4] In 1935, the Supreme Court appointed an Advisory Committee, 295 U.S. 774, which drafted proposed civil rules, published the drafts for comment, and revised the rules for discussion by the Judicial Conference of the Untied States before they were promulgated by the Supreme Court. 4 Wright & Miller, *Federal Practice & Procedure: Civil 3d* § 1004 at 25–28 (2002). They were then submitted to Congress, which did not block them. *Id* at 29–31. A similar procedure has been used for amendments to the Federal Rules of Civil Procedure ever since and is now codified in 28 U.S.C. § 2073.

Despite this time-tested procedure involving the bench, bar and legal scholars with public comment and a legislative opportunity for a veto, which resulted in 1993 in the modification of Rule 11 to remove its mandatory aspect, the House of Representatives proposes to sidestep this entire process through the passage of LARA. This will encroach upon the federal judiciary's control of its own procedures and could lead down the slippery slope of repeated jiggering of the Federal Rules of Civil Procedure to the detriment of the federal judicial system. It was just such interference by Congress that led to the Rules Enabling Act, according to Attorney General Homer Cummings, who pushed its passage:

*"The New York State Bar Association Commercial and Federal Litigation Section strongly opposes LARA and respectfully requests Congress to reject it."*

> Legislative bodies have neither the time to inquire objectively into the details of judicial procedure nor the opportunity to determine the necessity for amendment or change. Frequently such legislation has been enacted for the purpose of meeting particular problems or supposed difficulties, but the results have usually been confusing or otherwise unsatisfactory.

Cummings, "The New Criminal Rules—Another Triumph of the Democratic Process," 31 *A.B.A. J.* 236, 237 (1945). Congress should not now resume the bad habit of legislating procedural rules to accomplish apparently meritorious substantive ends, but which will have confusing and unsatisfactory consequences. As described above, LARA could work much unintended mischief in areas unconnected with its stated purpose and set a bad precedent for legislative tinkering with judicial procedural rules.

## Conclusion

The New York State Bar Association Commercial and Federal Litigation Section strongly opposes LARA and respectfully requests Congress to reject it.

## Endnotes

1. Rule 11(b), which is not amended by LARA, incorporates into each pleading, motion, or other paper presented to a court the representations that "(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."
2. There were no hearings on LARA in this session of Congress.
3. Proposed Section 7 also might chill legitimate attempts to reverse a decision by a trial court. Some states, such as California and New York, have three tiers of courts through which a litigant could appeal before seeking review of an adverse decision by the Supreme Court. If a litigant loses in a trial court and then on two appeals through the state court system, an attempt to seek Supreme Court review would be subject to the presumption that it was a violation of Rule 11, since the case would have been lost on the merits in three successive forums.
4. The Supreme Court was granted the power to make rules governing equity proceedings in the district courts through the Process Act of 1792, ch. 36, 1 Stat. 275, 276 (1792), and governing actions at law in the district courts through the Conformity Act of 1872, ch. 255, 17 Stat. 197 (1872).

**Editor's Note: This report was originally prepared by the Federal Procedure Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, and approved and adopted by the Section on October 20, 2005. The Section is particularly grateful for the efforts of Gregory K. Arenson, who presented the report to the Executive Committee of the Bar and the House of Delegates, which adopted the Report on November 5, 2005.**

# EXHIBIT 1

IB

## Union Calendar No. 69

109TH CONGRESS
1ST SESSION

# H. R. 420

**[Report No. 109–123]**

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

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IN THE HOUSE OF REPRESENTATIVES

JANUARY 26, 2005

Mr. SMITH of Texas (for himself, Mr. DELAY, Mr. CHABOT, Mr. PAUL, Mr. GREEN of Wisconsin, Mr. HERGER, Mr. KELLER, Mr. KING of Iowa, Mr. SHAYS, Mr. CANNON, Mr. BRADY of Texas, Mr. NORWOOD, Mr. NEUGEBAUER, Mr. CHOCOLA, Mr. MILLER of Florida, Mr. FEENEY, Mr. FORBES, Mr. GARY G. MILLER of California, Mr. CULBERSON, Mr. GARRETT of New Jersey, Mr. LEACH, Mr. KLINE, Mr. GALLEGLY, Mr. OTTER, Mr. JONES of North Carolina, Mr. KENNEDY of Minnesota, Mrs. MYRICK, Mr. MCCAUL of Texas, Mr. BOOZMAN, Mr. FRANKS of Arizona, Mr. SENSENBRENNER, Mr. GOODLATTE, Mr. FERGUSON, Mr. WILSON of South Carolina, Mr. BRADLEY of New Hampshire, Mr. CALVERT, Mr. FORTUÑO, Mr. KIRK, and Mrs. JO ANN DAVIS of Virginia) introduced the following bill; which was referred to the Committee on the Judiciary

JUNE 14, 2005

Additional sponsors: Mr. SOUDER, Mr. CONAWAY, Mr. ROHRABACHER, Mr. LEWIS of Kentucky, Mr. COX, Mr. SIMPSON, Mr. BARTLETT of Maryland, Mr. GUTKNECHT, Mr. NEY, Mr. MCHENRY, Mrs. CUBIN, Ms. GINNY BROWN-WAITE of Florida, Mr. ROGERS of Michigan, Mr. HENSARLING, Mr. AKIN, Mr. STEARNS, Mr. INGLIS of South Carolina, Mr. BACHUS, and Mr. PUTNAM

JUNE 14, 2005

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on January 26, 2005]

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# A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

***SECTION 1. SHORT TITLE.***

*This Act may be cited as the "Lawsuit Abuse Reduction Act of 2005".*

***SEC. 2. ATTORNEY ACCOUNTABILITY.***

*Rule 11(c) of the Federal Rules of Civil Procedure is amended—*

*(1) by amending the first sentence to read as follows: "If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the attorney, law firm, or parties that have violated this subdivision or are responsible for the violation, an appropriate sanction, which may include an order to pay the other party or parties for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper, that is the subject*

•HR 420 RH

*of the violation, including a reasonable attorney's fee.";*

*(2) in paragraph (1)(A)—*

*(A) by striking "Rule 5" and all that follows through "corrected." and inserting "Rule 5."; and*

*(B) by striking "the court may award" and inserting "the court shall award"; and*

*(3) in paragraph (2), by striking "shall be limited to what is sufficient" and all that follows through the end of the paragraph (including subparagraphs (A) and (B)) and inserting "shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee.".*

***SEC. 3. APPLICABILITY OF RULE 11 TO STATE CASES AFFECTING INTERSTATE COMMERCE.***

*In any civil action in State court, the court, upon motion, shall determine within 30 days after the filing of such motion whether the action substantially affects interstate*

*commerce. Such court shall make such determination based on an assessment of the costs to the interstate economy, including the loss of jobs, were the relief requested granted. If the court determines such action substantially affects interstate commerce, the provisions of Rule 11 of the Federal Rules of Civil Procedure shall apply to such action.*

***SEC. 4. PREVENTION OF FORUM-SHOPPING.***

*(a) IN GENERAL.—Subject to subsection (b), a personal injury claim filed in State or Federal court may be filed only in the State and, within that State, in the county (or Federal district) in which—*

*(1) the person bringing the claim, including an estate in the case of a decedent and a parent or guardian in the case of a minor or incompetent—*

*(A) resides at the time of filing; or*

*(B) resided at the time of the alleged injury;*

*(2) the alleged injury or circumstances giving rise to the personal injury claim allegedly occurred;*

*(3) the defendant's principal place of business is located, if the defendant is a corporation; or*

*(4) the defendant resides, if the defendant is an individual.*

*(b) DETERMINATION OF MOST APPROPRIATE FORUM.—If a person alleges that the injury or circumstances giving rise to the personal injury claim oc-*

*curred in more than one county (or Federal district), the trial court shall determine which State and county (or Federal district) is the most appropriate forum for the claim. If the court determines that another forum would be the most appropriate forum for a claim, the court shall dismiss the claim. Any otherwise applicable statute of limitations shall be tolled beginning on the date the claim was filed and ending on the date the claim is dismissed under this subsection.*

*(c) DEFINITIONS.—In this section:*

*(1) The term "personal injury claim"—*

*(A) means a civil action brought under State law by any person to recover for a person's personal injury, illness, disease, death, mental or emotional injury, risk of disease, or other injury, or the costs of medical monitoring or surveillance (to the extent such claims are recognized under State law), including any derivative action brought on behalf of any person on whose injury or risk of injury the action is based by any representative party, including a spouse, parent, child, or other relative of such person, a guardian, or an estate; and*

*(B) does not include a claim brought as a class action.*

•HR 420 RH

*(2) The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, but not any governmental entity.*

*(3) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, and any other territory or possession of the United States.*

*(d) APPLICABILITY.—This section applies to any personal injury claim filed in Federal or State court on or after the date of the enactment of this Act.*

***SEC. 5. RULE OF CONSTRUCTION.***

*Nothing in section 3 or in the amendments made by section 2 shall be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law.*

***SEC. 6. THREE-STRIKES RULE FOR SUSPENDING ATTORNEYS WHO COMMIT MULTIPLE RULE 11 VIOLATIONS.***

*(a) MANDATORY SUSPENSION.—Whenever a Federal district court determines that an attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall determine the number of times that the attorney has violated that rule in that Federal district court during that*

*attorney's career. If the court determines that the number is 3 or more, the Federal district court—*

*(1) shall suspend that attorney from the practice of law in that Federal district court for 1 year; and*

*(2) may suspend that attorney from the practice of law in that Federal district court for any additional period that the court considers appropriate.*

*(b) APPEAL; STAY.—An attorney has the right to appeal a suspension under subsection (a). While such an appeal is pending, the suspension shall be stayed.*

*(c) REINSTATEMENT.—To be reinstated to the practice of law in a Federal district court after completion of a suspension under subsection (a), the attorney must first petition the court for reinstatement under such procedures and conditions as the court may prescribe.*

***SEC. 7. PRESUMPTION OF RULE 11 VIOLATION FOR REPEATEDLY RELITIGATING SAME ISSUE.***

*Whenever a party attempts to litigate, in any forum, an issue that the party has already litigated and lost on the merits on 3 consecutive prior occasions, there shall be a rebuttable presumption that the attempt is in violation of Rule 11 of the Federal Rules of Civil Procedure.*

***SEC. 8. ENHANCED SANCTIONS FOR DOCUMENT DESTRUCTION.***

*(a) IN GENERAL.—Whoever influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, a pending court proceeding through the intentional destruction of documents sought in, and highly relevant to, that proceeding—*

*(1) shall be punished with mandatory civil sanctions of a degree commensurate with the civil sanctions available under Rule 11 of the Federal Rules of Civil Procedure, in addition to any other civil sanctions that otherwise apply; and*

*(2) shall be held in contempt of court and, if an attorney, referred to one or more appropriate State bar associations for disciplinary proceedings.*

*(b) APPLICABILITY.—This section applies to any court proceeding in any Federal or State court that substantially affects interstate commerce.*

•HR 420 RH

# EXHIBIT 2

## RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

**Rule 11. Signing of Pleadings, Motions, and Other Paper; Representations to Court; Sanctions**

(a) * * *

(c) SANCTIONS. [If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.] *If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the attorney, law firm, or parties that have violated this subdivision or are responsible for the violation, an appropriate sanction, which may include an order to pay the other party or parties for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper, that is the subject of the violation, including a reasonable attorney's fee.*

(1) HOW INITIATED.

(A) BY MOTION. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5[, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected]. If warranted, the court [may] *shall* award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) ON COURT'S INITIATIVE. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show

cause why it has not violated subdivision (b) with respect thereto.

(2) NATURE OF SANCTIONS; LIMITATIONS. A sanction imposed for violation of this rule [shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

[(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

[(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.] *shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee.*

# Report: Seeking to Require Party Witnesses Located Out-of-State and Outside 100 Miles to Appear at Trial Is Not a Compelling Request

Several recent cases have dealt with the issue of whether an individual party or an officer of a party (a "party witness") can be compelled to appear for trial testimony despite residing beyond the subpoena power of the court as defined in Federal Rule of Civil Procedure 45(b)(2). Decisional law under Rule 45 regarding the court's power to compel appearance of party witnesses who reside outside the 100-mile radius from the court and, for trial, outside the state in which the court is located, is split.

A closely related question is the extent to which Federal Rule of Evidence 611, governing the mode and order of interrogating witnesses, provides authority for a court to require a designated non-resident party witness to appear in the other party's case and thereby essentially expand the scope of a subpoena under Rule 45.

## Summary of Conclusions

Rule 45, as amended in 1991, does not explicitly extend the subpoena power of the court over party witnesses. Those courts that have concluded that the amended Rule does extend the subpoena power base their conclusion on negative implication from language added in 1991 to Rule 45(c)(3)(A)(ii) relating to standing to move to quash a subpoena. The courts that reach the opposite conclusion base their result on the limitations set forth in Rule 45(b)(2). Courts do not have inherent power to compel a party witness, residing outside the Rule 45 boundaries, to appear at trial as a witness for the opposing party. Similarly, while Rule 611 gives a court power to exclude witnesses, it does not extend the court's subpoena power.

The uncertainty created by the present wording of the Rule is unacceptable. The rule makers should amend Rule 45 to either remove any possible implication that the subpoena power has been extended or to make explicit any proposed change in the subpoena power in civil actions.

## Discussion

### A. The Pertinent Rules

### 1. Rule 45

Rule 45(b)(2) permits service of a subpoena only (1) within the district of the court by which it is issued, (2) at any place without the district that is within 100 miles of the place of the trial, or (3) at any place within the state where a state statute or rule of court so permits.[1] Rule 45(b)(2) makes no distinction between service on a party witness and a non-party witness. The Rule also references the right to subpoena a U.S. national or resident who is in a foreign country, as provided for in 28 U.S.C. § 1783.[2]

*"Courts do not have inherent power to compel a party witness, residing outside the Rule 45 boundaries, to appear at trial as a witness for the opposing party."*

Trial subpoenas were originally limited to 100 miles, regardless of state boundaries. Judiciary Act of 1789, 1 Stat. 88 (1789). Concomitantly, the Judiciary Act of 1789 provided for the taking, and use at trial, of a deposition of a witness beyond the 100-mile trial subpoena bulge. *Id.* Rule 45(e)(1) of the Federal Rules of Civil Procedure adopted in 1938 carried over the 100-mile bulge limitation on trial subpoenas while permitting service of a trial subpoena anywhere in the district in which the district court sat. The 1991 amendments moved the geographic scope of a trial subpoena to Rule 45(b)(2) and expanded it to include any place within the state in which the district court sat as permitted by a state statute or rule. However, the 1991 amendments simultaneously adopted the protection in Rule 45(c)(3)(A)(ii) to permit a court to quash or modify a trial subpoena to a person, "who is not a party or an officer of party," located more than 100 miles from the court. Clause (c)(3)(A)(iv) additionally required the court to quash or modify a subpoena if it "subjects a person to undue burden."

The Advisory Committee Notes to the 1991 Amendments, which added clause (c)(3)(A)(ii) to Rule 45, do not suggest, much less state, that those amendments were meant to alter the jurisdictional limits of the court's subpoena power, except to the extent that such amendment, as stated above, adopts the state rule. There is no indication in the Advisory Committee Notes that nationwide service on party witnesses is permitted.

The Notes restate without further elaboration the provisions governing a subpoena of a non-party witness. The Advisory Committee Notes mention the provisions of clause (c)(3)(B)(iii) which authorizes a court

to condition enforcement of a subpoena compelling a non-party witness to attend trial upon provision for reasonable compensation for the time and effort involved. The Notes also refer to one situation where a court might quash a subpoena on a party witness:

> Clause (c)(3)(A)(iv) requires the court to protect all persons from undue burden imposed by the use of the subpoena power. Illustratively, it might be unduly burdensome to compel an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute, especially so if the adversary would be required to incur substantial travel burdens.

The Rule and the Advisory Committee Notes by distinguishing in two places between party and non-party witnesses can thus be read as assuming that courts have the power to require corporate parties to bring officers to testify at trial. However, this possible assumption and how it is related to the subpoena power as set forth in Rule 45(b)(2) are not discussed. Nor are any limitations on the power articulated, except to the extent that the Notes state that it might be unduly burdensome to compel an adversary who has no knowledge of the matter to incur substantial travel expenses.

### 2. Rule 32(a)

Related rules are Federal Rules of Civil Procedure 32(a)(2) and 32(a)(3). Rule 32(a)(2) provides that the deposition (1) of anyone who at the time of taking the deposition was "an officer, director, or managing agent" of a party or (2) of a person designated as a witness under Rules 30(b)(6) or 31(a) "may be used by an adverse party for any purpose."

Rule 32(a)(2) thus provides that an adverse party may introduce such deposition testimony regardless of the person's availability.[3] With the increased use of video-taped testimony, the prejudice suffered by not having a live witness because he or she cannot be subpoenaed has been substantially minimized.

In addition, under Rule 32(a)(3), a deposition of a witness—including employees of a corporate party as well as officers, directors, and managing agents—may be used "by any party" under various circumstances, including if "the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of a witness *was procured* by the party offering the deposition" (emphasis added). In such a case, the party offering the deposition has the burden of proving that the witness lives more than 100 miles from the place of trial or hearing. 7 Moore's Federal Practice at § 32.24[1][a] (3d ed. 2005). But the party offering the deposition—including the employer of the witness—need not do more to satisfy the Rule. "The party offering the deposition is forbidden to procure the deponent's absence (or distance); this is a far cry from requiring the litigant to procure the deponent's presence." *Ueland v. United States*, 291 F.3d 993, 996 (7th Cir. 2002).[4] Under Rule 32(a), video-taped depositions can often be used to overcome any limitation of the subpoena power.

### 3. Rule 611

Federal Rule of Evidence 611 confers discretion upon courts to control courtroom proceedings. The Rule provides, in pertinent part: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

Judicial authority under Rule 611 is broad. Specifically, the Advisory Committee Notes to Rule 611(a) explain that "[t]he ultimate responsibility for the effective working of the adversary system rests with the judge . . . . [to decide] the order of calling witnesses and presenting evidence." In addition, federal courts have consistently held that trial judges enjoy wide discretion in courtroom management, and decisions in this area are rarely disturbed on appeal. *See*, *e.g.*, *Loinaz v. EG&G, Inc.*, 910 F.2d 1, 6 (1st Cir. 1990) ("[d]ecisions regarding the management of the trial calendar and the courtroom proceedings are particularly within the province of the trial judge, and her determinations will not be disturbed by [a court of appeals] absent a finding that she abused her discretion"); *see also Elgabri v. Lekas*, 964 F.2d 1255, 1260 (1st Cir. 1992) ("[w]e do not disturb decisions regarding courtroom management unless these decisions amount to an abuse of discretion that prejudices appellant's case"). However, there is no indication in the language of Rule 611 that it was intended in any way to affect subpoena power.

## B. Policy Issues

In 1964, the Supreme Court commented that the original restriction on the scope of a trial subpoena was "designed not only to protect witnesses from the harassment of long, tiresome trips but also, in line with our national policy, to minimize the costs of litigation." *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 234 (1964). More broadly, these policy issues may be stated as the convenience of the party subpoenaed and the public interest in a fair trial.

Today, these policy considerations are more complex. It is still inconvenient for a trial witness to travel to the courthouse, but it is probably easier to travel by

airplane coast to coast today than it was to travel by horse 90 miles in 1789. Nor are state boundaries an appropriate determinant of the difficulty a witness faces in attending a trial in response to a subpoena. It is probably easier for a witness located in Philadelphia, Pennsylvania to attend court in New York City than for a witness located in Albany, New York. Yet, the latter can be compelled under current Rule 45(b)(2) to attend a trial in the Southern District of New York, while the former cannot. Moreover, with large, multi-national corporations engaged in litigation in the federal courts, there may also be a sense that it is not a great economic imposition for them to pay for their officers to attend a trial in which they are involved.

On the other hand, it has always seemed fairest to allow each side to put on its own case in the manner it sees as best to influence the trier of fact. Thus, if a party did not have control over a witness and the witness was not within the subpoena power, as recognized by the First Congress, the party could read portions of the witness's deposition. However, courts have a strong preference for live testimony to enable the trier of fact to see the witness's demeanor. *See Napier v. Bossard,* 102 F.2d 467, 469 (2d Cir. 1939) (L. Hand, J.) ("[t]he deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand"); *United States v. Int'l Bus. Machs. Corp.*, 90 F.R.D. 377, 381 (S.D.N.Y. 1981). Depositions may have been taken at a point in the case before the questioner had available all information and testimony about which he or she would like to examine—or with which the questioner would like to confront—the witness at the later time when discovery is complete and trial is under way. Moreover, reading a deposition at trial might not be as effective as having the witness appear live, especially if the witness appeared in the other party's case. In addition, if the witness appeared twice, once by deposition read by someone who was not the witness and once live, it could confuse a jury and lead to some duplication of testimony.

Yet, the alternative of requiring a witness to appear live once and permitting the party sponsoring the witness to conduct its examination in the middle of the other party's case can lead to even more confusion and prevent both parties from presenting a logical, persuasive case to the trier of fact. Nonetheless, a video-taped deposition may eliminate many of the concerns with reading a deposition, since the witness's demeanor will be apparent, and the trier of fact is less likely to confuse a deposition reader and the witness who testifies in the other party's case.[5] As video-taped depositions become more common, the public interest in a fair trial may now be shifting in favor of not requiring witnesses to attend trial who are beyond the current geographic scope of a trial subpoena, even if they are an officer of an adverse party.

### C. Authority Regarding Power of Federal Courts Over Party-Witness

There are three arguments that the subpoena power should be extended beyond the limits set forth in Rule 45(b)(2). These are based on: (1) the provisions of Rule 45; (2) the inherent power of the federal courts; and (3) Rule 611. None provide persuasive reasons for extending the subpoena power.

#### 1. Case Law Interpreting Rule 45

There is a split in the post-1991 case law on whether Rule 45 confers greater power to subpoena party witnesses than to subpoena non-party witnesses for trial.

The majority view, that amended Rule 45 confers greater authority to subpoena parties relative to non-parties, does not treat Rule 45(b)(2), by itself, as establishing the boundaries of the subpoena power. Rather, a majority of courts read Rule 45(c)(3)(A)(ii) as implicitly conferring additional power to subpoena parties and their officers. For example, in *In re Ames Dep't Stores, Inc.*, No. 01-42217 (REG), 2004 WL 1661983, at *1 (S.D.N.Y. Bankr. June 25, 2004), the court denied a motion to quash a subpoena compelling the defendant's president to appear at trial in New York even though he lived and worked in Florida. In ruling for the plaintiff, the court observed that "[s]ince that provision [Rule 45(c)(3)(A)(ii)] easily could have been drafted, if it had been the rulemaking [sic] intent, to . . . make its provisions applicable to 'a person' generally, the compelling interpretation is that its application is limited to those persons who are particularly described—i.e., to non-parties or their officers." *Id.* In other words, because Rule 45(c)(3)(A)(ii) sets out a court's power to quash subpoenas, the fact that such clause addresses only non-parties is interpreted to mean that a court is not empowered to quash or modify subpoenas served on parties more than one hundred miles from the place described in the subpoena. Otherwise, as the court in *Ames* states, the rule makers could have used language applicable to all parties when describing the court's power to quash or modify a subpoena. (As noted above, clause (c)(3)(A)(iv) does seem to apply to parties, but the *Ames* court does not mention that clause.)

This view of Rule 45 has been accepted by several district courts. *See*, *e.g.*, *Hayes v. Segue Software, Inc.*, No. Civ. A. 301CV1490D, 2001 WL 1464708, at *5 (N.D. Tex. Nov. 14, 2001) (noting that "Segue's officers would be compelled to testify because the court's subpoena power is limited only over persons who are neither parties nor officers"); *see also In re Bennett Funding Group, Inc.*, 259 B.R. 243, 250–51 (N.D.N.Y. 2001) (concluding, in deciding a motion to dismiss for forum *non conveniens*, that "the Court will be able to compel all the party witnesses from California to appear before it" in New York because the court is only required to quash

or modify a subpoena compelling the appearance of non-parties); *Ferrell v. IBP, Inc.*, No. C98-4047-MJM, 2000 WL 34032907, at *1 (N.D. Iowa Apr. 28, 2000) (highlighting that *Johnson v. Land O'Lakes, Inc.*, 181 F.R.D. 388 (N.D. Iowa 1998), a case previously decided by the Northern District of Iowa, "does not follow the majority of courts" and denying defendant's motion to quash a subpoena for two of its "high-ranking officers"); *Venzor v. Chavez Gonzalez*, 968 F. Supp. 1258, 1267 (N.D. Ill. 1997) (concluding that the "limitation on a trial subpoena [under Rule 45(c)(3)(A)(ii)] applies only to 'a person who is not a party'"); *Stone v. Morton Int'l, Inc.*, 170 F.R.D. 498, 500 (D. Utah 1997) (concluding that "Rule 45 F.R.C.P. allows a corporate officer of a party to be subpoenaed to appear beyond the 100 mile limitation"); *National Property Investors VIII v. Shell Oil Co.*, 917 F. Supp. 324, 329 (D.N.J. 1995) (noting, in deciding a motion to dismiss for forum *non conveniens*, that "unlike party witnesses . . . non-party witnesses cannot be compelled to testify before this Court"); *M.F. Bank Restoration Co. v. Elliott, Bray & Riley*, Civ. No. 92-0049, 1994 WL 719731, at *8 (E.D. Pa. Dec. 22, 1994) (granting a motion to quash a subpoena in part because "none of these six employees is represented to be an officer of TRC").

Those courts that hold that Rule 45(c)(3)(A)(ii) does not allow the subpoenaing of parties, nor party witnesses, who are outside of the district (and outside the state) and beyond 100 miles of the court treat Rule 45(b)(2) as establishing the boundaries of the subpoena power. For example, in *Johnson v. Land O' Lakes*, the court denied plaintiff's motion *in limine* seeking to compel the trial appearance of one of defendant's vice presidents, relying on the fact the witness lived and worked in excess of 100 miles from the court where the trial was to take place. 181 F.R.D. at 396. In denying the motion, the court emphasized:

> Rule 45(c)(3)(A)(ii) simply does not extend the range of this court's subpoena power, although it does provide that the court may quash a subpoena, otherwise within its power, for a *non-party* witness, under certain circumstances. There simply is no 'negative implication'. . . that Rule 45(c)(3)(A)(ii) subjects to subpoena officers of parties who are more than 100 miles from the place of trial whether or not they are within the range of the subpoena power defined in Rule 45(b)(2).

*Id.* at 397 (italics in original). Simply put, the minority view holds that an officer who lives and works more than one hundred miles from the court and outside the state where the trial is to occur is beyond the subpoena power of that court as described in Rule 45(b)(2).

Several other federal courts—but a minority—have applied Rule 45 in the same fashion. *See*, *e.g.*, *Smith v. Chason*, No. CIV. A. 96-10788-PBS, 1997 WL 298254, at *9 n.4 (D. Mass. Apr. 10, 1997) (noting, in deciding a motion to dismiss for forum *non conveniens*, that "[t]he 100-mile limitation on service of a subpoena applies to parties as well as non-parties"); *Lindloff v. Schenectady Int'l*, 950 F. Supp. 183, 185 (E.D. Tex. 1996) (noting, in deciding a motion to dismiss for forum *non conveniens*, that "any of Defendant's officers or employees who are outside the Eastern District and who might be unwilling to appear at trial would have to be within a 100 mile radius" of the courthouse if the court were to compel their appearance).

In *Jamsports & Entertainment, LLC v. Paradama Prods., Inc.*, No. 02 C 2298, 2005 WL 14917, at *1 (N.D. Ill. Jan. 3, 2005), the court rejected the argument that the long-standing geographic limitations on the reach of a subpoena had been expanded with respect to a person who is a party witness. The court read Rule 45(c)(3)(A)(ii) as providing that, even if service is proper under Rule 45(b)(2)—that is, it is *served* within the geographic limits—it is to be quashed as to persons who are not officers of a party if it requires them to travel more than 100 miles. *Id.* at *2.

It appears that the minority view is better reasoned than the majority view. The subpoena power is clearly set forth in Rule 45(b)(2). Nothing in that section suggests that party witnesses are subject to nationwide service in civil cases. Moreover, the language of Rule 45 sharply contrasts with the provisions of Federal Rule of Criminal Procedure 17, which clearly provides for nationwide service of subpoenas on all witnesses. It does not seem appropriate for the rule makers to have modified Rule 45(b)(2) indirectly by inserting a provision in Rule 45(c)(3)(A) limiting the standing to move to quash a subpoena. Nor is it likely that such a modification occurred or was intended when the Advisory Committee Notes are silent about such a change.

### 2. Authority Regarding Inherent Power of the Court Over Party Witnesses

Another possible argument for a right to nationwide service of subpoenas would be reference to the inherent power of federal courts. However, this argument is not persuasive as it is well established that the inherent power of the courts does not permit courts to override specific provisions of the Federal Rules.

The inherent powers of the federal courts, according to the Supreme Court, are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962). However, this power is limited to situations that the Federal Rules do

not address. *See Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995). The First Circuit has held that "inherent powers cannot be exercised in a manner that contradicts an applicable statute or rule." *In re Atlantic Pipe Corp.*, 304 F.3d 135, 143 (1st Cir. 2002).

Several cases decided prior to 1991 rejected an "inherent powers" theory to override the restrictions of Rule 45. Thus, the Fifth Circuit in *GFI Computer Indus., Inc. v. Fry*, 476 F.2d 1, 5 (5th Cir. 1973), held "the [district] court had no power to force a civil defendant outside its subpoena jurisdiction to appear personally at the trial and there submit to examination." *See In re Air Crash Disaster Detroit Metro. Airport*, 130 F.R.D. 647, 650 (E.D. Mich. 1989); *Standard Metals Corp. v. Tomlin*, No. 80 Civ. 2983, 1982 WL 1300, at *1 (S.D.N.Y. Apr. 14, 1982) (motion denied, where, "[d]espite the clear language of the rule above [Rule 45], plaintiff seeks to have the court use its power to provide for a fair trial to compel witnesses far beyond the 100 mile limit to attend trial in the instant case"); *Jaynes v. Jaynes*, 496 F.2d 9 (2d Cir. 1974) (court has no power to subpoena defendants who lived in Texas to trial in Northern District of New York, citing Rule 45). The 1991 amendments did not purport to change the results of these cases.

The Manual for Complex Litigation (Fourth) § 12.23 similarly does not support the inherent power theory. It concludes that, while a court "probably" lacks authority to compel a non-resident party witness to appear in its opponent's case, the court only can "encourage cooperation by precluding the uncooperative party from later calling such a witness." Thus, whatever the limitation of the subpoena power in Rule 45, it is not extended through the courts' inherent power.

### 3. The Effect of Federal Rule of Evidence 611

In light of the broad discretion Rule 611 offers to courts, some have proposed that Rule 611 can be used to compel the appearance of witnesses in situations where Rule 45 is silent or restricts a court's subpoena power. Analysis of the relationship between Rule 611 and Rule 45 reveals that courts have used Rule 611 to prevent gamesmanship in the order and mode of witness production and presentation. But, courts have rejected the notion that Rule 611 expands a court's subpoena power under Rule 45.

#### a. The Use of Rule 611 to Prevent Gamesmanship

Courts have used their discretion under Rule 611 to prevent gamesmanship tactics in witness appearance and presentation at trial. Specifically, under Rule 611, courts have acted "to preclude parties who refuse to honor a reasonable request for production of a key witness subject to their control, and thereby force an opponent to use a deposition, from calling the witness to testify personally during their presentation of evidence." Manual for Complex Litigation 2d § 22.23 at 127 (1986 ed.).

Two decisions from the Southern District of New York reflect this practice. In *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 776 F. Supp. 838 (S.D.N.Y. 1991), the court held that a party witness could not willfully absent himself during the plaintiff's presentation of evidence and later testify in the defendant's case. Citing Rule 611's conferral of judicial discretion to control the mode and order of witness interrogation, the court concluded that, "[i]f [the party witness] elects to absent himself during plaintiffs' case, he will not testify at all, and plaintiffs will be free to comment upon his absence." *Id.* at 839.

Similarly, in deciding whether to compel defendants to produce two witnesses in the plaintiff's case, the Southern District of New York embraced a fairness approach and assessed the importance of the particular witnesses and their testimony, rather than adhering to the party/non-party and 100 mile distinctions of Rule 45. *See Maran Coal Corp. v. Societe Generale de Surveillance S.A.*, No. 92 Civ. 8728 (DLC), 1996 WL 11230 (S.D.N.Y. Jan. 10, 1996). The court concluded that the live testimony of the witnesses was critical to the jury's understanding of the issues. *Id.* at *1. Relying on Rule 611(a), the court ordered the defendants to produce the witnesses in the plaintiff's case or be precluded from calling those witnesses in their own case. *Id.* at *3.

#### b. Rule 611 Does Not Expand the Court's Subpoena Power Under Rule 45

Although courts have used Rule 611 to preclude defendants from calling witnesses who were willfully withheld from the plaintiff's case, courts have rejected the argument that Rule 611 expands the subpoena power set forth in Rule 45. For example, in *In re Air Crash Disaster*, 130 F.R.D. at 648,[6] the Eastern District of Michigan rejected the contention that Rule 611 provides sufficient authority to compel the appearance of a non-party witness beyond the 100-mile radius of the court's subpoena power. According to the court, Rule 45 explicitly lists the geographic limitations on the authority of federal courts to compel the attendance of non-party witnesses at trial.

The court's decision limiting the power of Rule 611 in the subpoena context appears sound for two reasons. First, if Rule 611 could be used to compel the appearance of witnesses beyond the subpoena power, trial judges would enjoy unfettered discretion, and the limitations of Rule 45 would be rendered meaningless. In addition, the Federal Rules of Civil Procedure contemplate a situation in which a party seeks testimony from a witness outside the court's subpoena power. In such a case, Rule 32(a)(2), dealing with the use of depositions

at trial, not Rule 611, dictates the proper course of action.

In sum, Rule 611 confers broad discretion on courts to control the order and mode of witness appearance and presentation at trial. Courts have used Rule 611 to prevent gamesmanship and preclude defendants from calling witnesses who are being willfully withheld from the plaintiff's case. However, Rule 611 does not expand the court's subpoena power under Rule 45. As a result, the court's conclusion concerning its power to control witness attendance at trial is governed by the court's interpretation of Rule 45, not Rule 611.

*"The Section concludes that current Rule 45 should not be read to provide nationwide service of process over officers of corporate defendants."*

## Conclusion

The Section concludes that current Rule 45 should not be read to provide nationwide service of process over officers of corporate defendants. It is desirable for the Advisory Committee on Civil Rules to make the Rule explicit as to whether or not there should be such nationwide service under Rule 45.

## Endnotes

1. Rule 45(b)(2) provides in part: "Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena."

2. To the degree there is uncertainty as to a court's authority to subpoena party witnesses located within the United States, but more than one hundred miles away, there is little uncertainty regarding a court's authority to subpoena witnesses located in a foreign country. That authority depends upon whether the person is a national or resident of the United States.

   Rule 45(b)(2) provides a "subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28 U.S.C. § 1783." Section 1783, in relevant part, states:

   > A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country . . . if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

   28 U.S.C. § 1783(a).

   Thus, a court's subpoena power over foreign witnesses is described by statute, not Rule 45.

3. However, the authors of Moore's Federal Practice point out: "A party may introduce the deposition of an adversary's agent regardless of the agent's or the adversary's availability at trial. Though arguably inconsistent with the language of Rule 32(a)(2), many trial judges require that a deposed witness testify live, if available, and precluding a party from reading the deposition testimony of an available adverse party witness is at worst harmless error, and not grounds for reversal." 7 Moore's Federal Practice, § 32.21[2][d] (3d ed. 2005).

4. Compare, however, Federal Rule of Evidence 804(a)(5) which defines "unavailability" for the purpose of a hearsay exception as "absent from the hearing and the proponent of a statement *has been unable to procure* the declarant's attendance . . . by process or other reasonable means." (Emphasis added.) It would seem that using this standard, an employer would almost always be able to procure the testimony of its employees, and thus the employer's attempted use of an employee's deposition would be subject to the hearsay objection.

5. In 1996, Federal Rule of Civil Procedure 43(a) was amended to allow a court, "for good cause shown in compelling circumstances and upon appropriate safeguards, [to] permit presentation of testimony in open court by contemporaneous transmission from a different location." The Advisory Committee Notes caution that this procedure is not to be used if it is merely inconvenient for a witness to attend trial. "Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena."

6. Although this case was decided prior to the 1991 Amendment to Rule 45, the court's rationale is applicable to amended Rule 45 as well.

**Editor's Note: This report was originally prepared by the Federal Procedure Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, and approved and adopted by the Section on September 15, 2005. The Section is particularly grateful for the efforts of Gregory K. Arenson, Thomas McGanney, and Allan M. Pepper, the principal authors of this report. The report states only the position of the Commercial and Federal Litigation Section of the New York State Bar Association and does not necessarily represent the view of the New York State Bar Association until such time as it is adopted by the Executive Committee or House of Delegates of the New York State Bar Association.**

# Report: Is Personal Service of a Subpoena Required Under Rule 45?


## Summary

Although the language in Rule 45 of the Federal Rules of Civil Procedure governing how subpoenas are to be served has remained unchanged since it was first adopted in 1937, it is unclear whether a subpoena must be personally served on the person to whom it is addressed in order to be valid and enforceable. Rule 45(b)(1) provides that service of a subpoena shall be made "by delivering a copy thereof" to the person named in the subpoena. The Rule is silent as to whether "delivery" requires personal in-hand service or permits some form of substitute service. There is a split in authority (including a split within the federal courts in New York State) as to whether personal in-hand service is required. The supposed "majority rule" is that personal in-hand service is required. However, a significant number of decisions have held that personal in-hand service is not required.

The Section believes that personal in-hand service of a subpoena is not required by the language of Rule 45(b)(1); that, as a matter of policy, personal service should not be the only method of service permitted, particularly since service of a summons and complaint other than by personal in-hand service is permitted in the federal courts; and that non-personal service is and should be permitted, provided that the method of service employed satisfies the due process requirement of providing reasonable assurance that the subpoena has been received. The Section further believes that any method of service permitted under Rule 4 of Federal Rules of Civil Procedure for the service of a summons and complaint should be permitted under Rule 45(b)(1) for the service of a subpoena and that Rule 45(b)(1) should be amended to explicitly provide that.


### A. Applicable Provisions of Rule 45 and Their History

Rule 45(b)(1) provides in pertinent part: "Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person. . . ." Rule 45(b)(3) provides in pertinent part: "Proof of service when necessary shall be made by filing . . . a statement of the date and manner of service. . . ."

Rule 45(b)(1) does not specify whether a copy of the subpoena must be delivered personally to the witness named in the subpoena or whether some other means of delivery will suffice. The relevant language of Rule 45(b)(1) has remained unchanged since it was first adopted in 1937 as part of then Rule 45(c) of the original Federal Rules of Civil Procedure.[1] The language was moved from Rule 45(c) to Rule 45(b)(1) as part of the 1991 Amendments to the Federal Rules. *See* Advisory Committee Notes, 1991 Amendment, Subdivision (b) ("Paragraph (b)(1) retains the text of the former subdivision (c) with minor changes."). Similarly, the language of Rule 45(b)(3) has remained unchanged, except for being moved from Rule 45(d)(1) to Rule 45(b)(3) as part of the 1991 Amendments. *See* Advisory Committee Notes, 1991 Amendment, Subdivision (b) ("Paragraph (b)(3) retains language formerly set forth in Paragraph (d)(1).").


*"The Section believes that personal in-hand service of a subpoena is not required by the language of Rule 45(b)(1) . . ."*


The Advisory Committee Notes to the 1937 adoption of then Rule 45(c) state that subdivision (c) "provides for the simple and convenient method of service permitted under many state codes; e.g., N.Y.C.P.A. (1937) §§ 220, 404 . . .; Wash Rev. Stat. Ann. (Remington, (1932)) § 1218." The Advisory Committee Notes give no indication as to whether personal service of a subpoena was intended to be required by then Rule 45(c).

Although then Rule 45(c) (now Rule 45(b)(1)) did not specify whether the term "delivering" required personal delivery or whether some form of non-personal delivery would be permitted, the 1951 edition of *Moore's Federal Practice* stated, without explanation, that "service must be made by delivering a copy to the person named personally." 5 *Moore's Fed. Practice* ¶ 45.06[1] (2d ed. 1951).

The state laws to which the 1937 Advisory Committee Notes refer do not clearly indicate whether it was intended that a subpoena had to be personally served. The reference to the New York Civil Practice Act supports the position that only personal service was intended to be permitted. Section 404 of the C.P.A. provided, in pertinent part:

> **§ 404. Service of Subpoena Issued out of a Court.** A subpoena issued out of the court, to compel the attendance of a

> witness, and, where the subpoena so requires, to compel him to bring with him a book or paper, must be served as follows:
>
> 1. The original subpoena must be exhibited to the witness.
>
> 2. A copy of the subpoena, or a ticket containing its substance, must be delivered to him.

C.P.A. § 404, *Clevenger's Practice Manual of New York* (1936 & 1939 eds.).

The requirement that the original of the subpoena must be exhibited to the witness indicates that personal service was required.[2] And in *Broderick v. Shapiro*, 172 Misc. 28, 14 N.Y.S.2d 542, 543 (Sup. Ct. N.Y. Co. 1939), the court held that "a subpoena must be served on a witness personally." *See also In re Depue*, 185 N.Y. 60, 69–70, 77 N.E. 798, 801 (1906).

Section 220 of the C.P.A., also referenced in the 1937 Advisory Committee Notes, provided that a summons could be served by any person over the age of 18 who was not a party and that "the provisions of this article relating to personal service, or a substitute for personal service, of an original summons apply to a supplemental summons." C.P.A. § 220, *Clevenger's Practice Manual of New York* (1936 & 1939 eds.). The provisions of the C.P.A. governing service of a summons provided for only personal service unless a court order for substituted service was obtained and such an order could only be obtained upon a showing that "the plaintiff has been or will be unable, with due diligence, to make personal service of the summons within the state." C.P.A. § 230, *Clevenger's Practice Manual of New York* (1936 & 1939 eds.). Section 230 provided for an order for substituted service upon a defendant that was a domestic corporation (with certain limited exceptions) or a natural person residing within the state. *See also* C.P.A. § 225 (personal service upon a natural person), § 228 (personal service upon a domestic corporation), § 229 (personal service upon a foreign corporation, § 231 (manner of making substituted service), and § 232 (order for service of summons by publication).

On the other hand, the Washington statute referenced in the 1937 Advisory Committee Notes suggests that at least some form of substituted service would be permissible. Section 1218 of Wash. Rev. Stat. Ann. (Remington) (1932) provided that a subpoena:

> may be served . . . by exhibiting and reading it to the witness, or by giving him a copy thereof, *or by leaving such copy at the place of his abode*.

(Emphasis added.)

### B. Applicable Legal Authority

Many decisions have found that personal service of a subpoena is required by Rule 45.[3] This is the supposed "majority rule." *See Hall v. Sullivan*, 229 F.R.D. 501, 502 (D. Md. 2005) ("a majority of courts have held that personal service is required, while a growing minority of others have not"; court followed minority position in holding that personal service is not required in case of subpoena *duces tecum*); *Agran v. City of New York*, 1997 WL 107452, at * 1 (S.D.N.Y. Mar. 11, 1997) ("the weight of authority is that a subpoena *duces tecum* must be served personally"); *In re Shur*, 184 B.R. 640, 642 (E.D. Bankr. Ct. 1995) ("a majority of courts hold that Rule 45 requires personal service"; court followed other authorities in holding that personal service is not required); 9 *Moore's Fed. Practice* § 45.03 [4][b][i], at 45–26 (3d ed.) ("[a] majority of courts have held that Rule 45 requires personal service").

However, there are a significant number of cases that have concluded that personal service is not required.[4] There is also a split of authority among the decisions of federal courts in New York. *Compare Agran*, 1997 WL 107452 (S.D.N.Y.); *In re Smith*, 126 F.R.D. at 462 (E.D.N.Y.); *Khachikian*, 1994 WL 86702, at * 1 (N.D.N.Y.); and *Lehman*, 206 F.R.D. at 346–47 (E.D.N.Y.), which conclude that personal service is required, *with Catskill Development, L.L.C.*, 206 F.R.D. at 84 n. 5 (S.D.N.Y.); *Cohen*, 2001 WL 257828, at * 3 (E.D.N.Y.); *Cordius Trust*, 2000 WL 10268 (S.D.N.Y.); *First City, Texas-Houston, N.A.*, 197 F.R.D. at 254–55 (S.D.N.Y.); *First Nationwide Bank*, 184 B.R. 640 (E.D.N.Y. Bankr. Ct.); *Hinds*, 1988 WL 33123 (E.D.N.Y.); *King*, 170 F.R.D. 355 (E.D.N.Y.); and *Ultradent Prods., Inc.*, 2002 WL 31119425 (S.D.N.Y.), which find that personal service of a subpoena is not required.

At one time, *Moore's Federal Practice*, without explanation, took the position that Rule 45 (then Rule 45(c)) required personal service of a subpoena. *See* 5A *Moore's Fed. Practice* ¶ 46.06[1] (1994) and 5 *Moore's Fed. Practice* ¶ 45.06[1] (2d ed. 1951). The current version of *Moore's* no longer adheres to that position. After stating that a majority of courts require personal service, it notes that several courts have declined to follow the majority rule and "have presented several effective arguments in opposition to requiring personal service." 9 *Moore's Federal Practice* § 45.03[4][b][i], at 45–26 (3d ed.). Those arguments are discussed below. *Wright & Miller*, however, takes the position that personal service is required. 9A C. Wright & A. Miller, *Federal Practice & Procedure Civil 2d* § 2454, at 24–25 (1995) ("*Wright & Miller*"). It offers no explanation or analysis except to cite cases that found that personal service is required. As noted above, none of those cases provides any explanation for that conclusion. Although *Wright & Miller* also cites cases finding that personal service is not required, it

does not address this split in authority or explain why requiring "personal service" is the better or correct conclusion. *Wright & Miller* § 2454, at 24–25 (1995).

Analyzing the 1991 changes to Rule 45, Professor David Siegel stated with respect to Rule 45(b)(1):

> No change is made in method, alas. The method is still by "delivering" the subpoena to the person to be served. Subdivision (b)(1). The substituted methods available for summons service under Rule 4 are not available for a subpoena, such as by delivery to a person of suitable age and discretion at the witness's dwelling house under Rule 4(d)(1). The word "delivering" has been rigidly construed. [citing *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-A-Mousson*.]

D. Siegel, "Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure," 139 F.R.D. 197, 207 (1992).

Rule 17(d) of the Federal Rules of Criminal Procedure contains the same language as Rule 45(b)(1), providing that "[s]ervice of a subpoena shall be made by delivering a copy thereof to the person named."[5] Rule 17(d) does not contain any language regarding proof of service. Thus, there is nothing comparable to the language in Rule 45(b)(3) regarding proof of "manner of service." The language in Rule 17(d) regarding service being made by "delivering" a copy of the subpoena has remained unchanged since the Rule first took effect in 1946. The Advisory Committee Notes to original Rule 17(d) specifically note that Rule 17(d) "is substantially the same as" then Rule 45(c) of the Federal Rules of Civil Procedure.

There is limited legal authority addressing whether Fed. R. Crim. P. 17(d) permits only personal service of a subpoena. All but one of the cases that could be found and two legal treatises say that personal service is required by Fed. R. Crim. P. 17(d). However, no analysis or explanation is provided for that conclusion. *See United States v. Grooms*, 6 Fed. Appx. 377, 381 (7th Cir. 2001) (in rejecting defendant's claim that a defense witness's failure to appear at trial denied defendant his Sixth Amendment right to compulsory process, the court stated "defendants bear the responsibility of using proper methods to secure their witnesses' presence in court, such as effecting personal service of subpoenas as required by Rule 17(d)"); *Arnsberg v. United States*, 757 F.2d 971, 974–75, 976 (9th Cir. 1985) ("the date of Arnsberg's scheduled appearance passed without the personal service required by Rule 17(d)"; "because Arnsberg had not been personally served, he had no obligation to appear before the grand jury and therefore could not lawfully be arrested for failing to do so"); 25 *Moore's Fed. Practice* § 617.05[2] (3d ed.) ("personal service is required"); L. Levenson, *Federal Criminal Rules Handbook*, Rule 17(d) ("[S]ervice must be personal. Service by fax is not authorized and a subpoena may not simply be left at the witness's dwelling place.").

In *United States v. Venecia*, 172 F.R.D. 438 (D. Or. 1997), the court held, without any explanation, that service by fax is not authorized by Criminal Rule 17(d). In *United States v. Crosland*, 821 F. Supp. 1123, 1128 n. 5 (E.D. Va. 1993), the court stated: "[A]lso somewhat questionable is the use of facsimile transmission to effect service. It is unclear whether facsimile transmission is contemplated by Rule 17(d)'s reference to 'delivering' the subpoena. In the civil context, several courts have found that facsimile transmissions do not constitute valid service under Rule 5(b) of the Federal Rules of Civil Procedure. *See, e.g., Mushroom Assocs. v. Monterey Mushrooms, Inc.*, 1992 WL 442898, *3 (N.D. Cal. 1992); *Salley v. Board of Governors, University of North Carolina*, 136 F.R.D. 417 (M.D. N.C. 1991)."[6] *See also Ferrari v. United States*, 244 F.2d 132, 141 (9th Cir. 1957) (service of a subpoena on a former employer who plainly says he has no intention of finding the named witness does not meet the requirements of Rule 17(d)).

However, in *United States v. Williams*, 557 F. Supp. 616 (E.D. Tenn. 1982), the court upheld service of a subpoena under Fed. R. Crim. P. 17(d) where the subpoena was personally delivered to the secretary of the witness after the witness was notified of the subpoena by his secretary, acknowledged the subpoena, and the secretary accepted it in his behalf. The court stated: "as to such federal process, '* * * in-hand service is not required * * * '", citing *Hanna v. Plumer*, 380 U.S. 460, 466 (1965). *Id*. at 622 n. 2.

### C. Reasons For and Against Construing Rule 45(b)(1) to Permit Non-Personal Service

#### 1. Reasons to Find Personal Service is not Required

The decisions finding that Rule 45 does not require personal service offer five reasons for that conclusion. First, the language of Rule 45 does not explicitly require personal service and does not explicitly preclude non-personal service. Rather, it only requires that a copy of the subpoena be "delivered" to the person named. *See, e.g., Cordius*, 2000 WL 10268, at * 2; *King*, 170 F.R.D. at 356; *Doe*, 155 F.R.D. at 630; *Green*, 2005 WL 283361, at * 1 n. 1. A number of courts have relied upon a dictionary definition of the word "deliver" and their belief that nothing in the everyday meaning of the term suggests a requirement of by-hand delivery to the recipient. Delivery by regular, registered or certified mail, for example, does not require the personal presence of the addressee. *See Doe*, 155 F.R.D. at 360 ("'Delivery' connotes simply

'the act by which the *res* or the substance thereof is placed within the actual . . . possession or control of another,'" quoting *Black's Law Dictionary*); *In re Shur*, 184 B.R. at 642 ("Deliver" is defined as "to bring or transport to the proper place or recipient;" "Transport" is defined as "[t]o carry from one place to another; convey;" "Convey" is defined as "to communicate or make known; impart," quoting *American Heritage Dictionary of the English Language*; also relying on *Black's Law Dictionary*.). However, as discussed below, the term deliver, as used in Rule 45(b)(1), as well as in other Federal Rules, has been construed, albeit without analysis, to require personal service.

The second reason courts have found for not requiring personal service is that the drafters of the Federal Rules of Civil Procedure knew how to indicate that personal service was required when that requirement was intended. *See* Fed. R. Civ. P. 4(e)(2) and 4(f)(2)(C)(i). Rule 4(e)(2), which covers service of a summons and complaint upon an individual within the United States, provides, in pertinent part, for "delivering a copy of the summons and of the complaint to the individual *personally. . . .*" (emphasis added). Similarly, Rule 4(f)(2)(C)(i), which covers service of a summons and complaint upon an individual in a foreign country, provides, in pertinent part, for "(i) delivery to the individual *personally* of a copy of the summons and complaint. . . ." (emphasis added.) If "delivering" in Rule 45(b)(1) requires personal, in-hand service, then the word "personally" in Rules 4(e)(1) and 4(f)(2)(C)(i) would be mere surplusage. *See*, *e.g.*, *Cordius*, 2000 WL 10268, at * 2; *Doe*, 155 F.R.D. at 630–31; *In re Shur*, 184 B.R. at 642–43.

The language in Rule 4(e)(2) that is quoted above appeared in the predecessor of that Rule—Rule 4(d)(1)—when it was adopted as part of the Federal Rules in 1937. Rule 45(c), adopted at the same time and which covered service of a subpoena, only required, as Rule 45(b)(1) now does, that a subpoena be delivered; there was no express requirement that a subpoena be delivered personally to the witness. The fact that the drafters specified personal delivery in Rule 4(d)(1), but did not specify personal delivery in Rule 45(c), suggests that when Rule 45(c) was adopted in 1937, it was not intended that a subpoena had to be personally delivered.

The predecessor of Rule 4(f)(2)(C)(i) was adopted in 1963 as then Rule 4(i)(1)(C) and contained the same language as Rule 4(f)(2)(C)(i) now does—"delivery to the individual personally." It could be argued that if the word deliver, standing alone, was understood to require personal delivery, then the word "personally" would not have been included as part of the new provision. On the other hand, it is at least equally plausible, if not more so, that the drafters were simply using the same language that was contained in then Rule 4(d)(1), which covered service on individuals in the United States, when they added a provision expressly addressing service on individuals in a foreign country.

Third, none of the cases that conclude that personal service of a subpoena is required provide any analysis in support of that position or even attempt to explain the basis for that conclusion. *See Doe*, 155 F.R.D. at 631; *First Nationwide Bank*, 184 B.R. at 642–43; *see* other cases cited in note 1, above.

Fourth, there is no persuasive policy reason for a requirement that a subpoena must be personally served. There is no meaningful policy distinction that would justify a requirement of personal service of a subpoena under Rule 45 when personal service of a summons and complaint is not required under Rule 4 in the case of certain categories of defendants.[7] The policy underlying both Rules is that the method of service must comply with the due process requirement that it be reasonably calculated to give actual notice. *See*, *e.g.*, *Green*, 2005 WL 283361, at * 1 n. 1; *First Nationwide Bank*, 184 B.R. at 643. *See also* discussion at pp. 16-17, below.

Fifth, Rule 45(b)(3) requires proof of service of the subpoena that indicates the "manner of service." If the only manner of service permitted were by in-hand, personal service, no statement as to the manner of service would be necessary. *See*, *e.g.*, *Cordius*, 2000 WL 10268, at * 2; *Green*, 2005 WL 283361, at * 1 n. 1; *Western Resources, Inc.*, 2002 WL 1822432, at * 2.

Courts have also relied upon Fed. R. Civ. P. 1, which provides that the Rules should "be construed and administered to secure the just, speedy and inexpensive determination of every action." *Hall*, 229 F.R.D. at 504; *Cordius*, 2000 WL 10268, at * 2; *Doe*, 155 F.R.D. at 630; *Western Resources, Inc.*, 2002 WL 1822463, at *2.

### 2. Reasons to Find Personal Service is Required

As indicated above, the decisions finding that personal service of a subpoena is required by Rule 45 provide no explanation for or analysis of that conclusion, except to say that Rule 45 does not authorize any other method of service, apparently construing (without explanation) the term "delivering" to mean personal, in-hand delivery. *See*, *e.g.*, *In re Smith*, 26 F.R.D. at 462; *Agran*, 1997 WL 107452, at * 1; *Application of Johnson & Johnson*, 59 F.R.D. at 177. The closest thing to an explanation is the Court's statement in *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980), as follows:

> Federal Rule of Civil Procedure 4, which governs service of process, is primarily concerned with effectuating notice. To that end, the Rule provides for a wide range of alternative methods of service, including registered mail,

> each designed to ensure the receipt of actual notice of the pendency of the action by the defendant. By contrast, Federal Rule 45(c), governing subpoena service, does not permit any form of mail service, nor does it allow service of the subpoena merely by delivery to a witness's dwelling place. Thus, under the Federal Rules, compulsory process may be served upon an unwilling witness only in person. Even within the United States, and even upon a United States citizen, service by registered U.S. mail is never a valid means of delivering compulsory process, although it may be a valid means of serving a summons and a complaint.

636 F.2d at 1312–13. The court evidently concluded that absent an affirmative provision expressly authorizing a method of service other than personal service, personal service was the only method permitted.

There are five reasons that can be advanced for requiring only personal in-hand service of a subpoena. First, Rule 45(b)(1) does not expressly authorize any other method of service. When the drafters of the Federal Rules of Civil Procedure have wanted to authorize service of a summons and complaint by a method other than personal service, they have explicitly said so. *See* Fed. R. Civ. P. 4(e)(2) & 4(f)(1)-(3); *see also* Fed. R. Civ. P. 4(e)(1) (service pursuant to state law). The countervailing argument is that when the drafters wanted to require personal service, they explicitly said that. *See* Fed. R. Civ. P. 4(e)(2) & 4(f)(2)(C)(i).

Second, courts have construed the word "delivering" as used in Federal Rules governing the service of subpoenas in criminal cases and the service of the summons and complaint in the case of certain categories of defendants in civil cases as requiring personal service.

"Delivering" as used in Fed. R. Crim. P. 17(d), which governs service of subpoenas in criminal cases, has been construed to require personal service. *See* pp. 7-9, above.

Similarly, the word "delivering" in Fed. R. Civ. P. 4(h)(1), which governs service of a summons and complaint on a corporation in the United States, and provides that service may be made by "delivering" copies on certain specified individuals, has been construed to require personal service. *See Taylor v. Stanley Works*, 2002 WL 32058966, at ** 4–5 (E.D. Tenn. Jul. 16, 2002); *Amnay v. Del Labs*, 117 F. Supp. 2d 283, 286–87 (E.D.N.Y. 2000); *Mettle v. First Union Nat'l Bank*, 279 F. Supp. 2d 598, 602 (D.N.J. 2003); *Petrolito v. 1st Nat'l Credit Servs. Corp.*, 2005 WL 331741, at * 1 n. 2 (D. Conn. Feb. 2, 2005); *Osorio v. Emily Morgan Enters., L.L.C.*, 2005 WL 589620, at * 2 (W.D. Tex. Mar. 14, 2005); *Cataldo v. United States Dep't of Justice*, 2000 WL 760960, at * 7 (D. Me. May 15, 2000); 1 *Moore's Fed. Practice 3d*, § 4.53 [2]; *see also BPA Int'l, Inc. v. Kingdom of Sweden*, 281 F. Supp. 2d 73, 84 (D.D.C. 2003) (mailing summons and complaint to employee of corporate subsidiary of corporation being sued "does not fulfill any part of [the] requirement" of Rule 4(h)(1)).[8]

Former Fed. R. Civ. P. 4(d)(4), now part of Fed. R. Civ. P. 4(i)(1)(A), which governed service of a summons and complaint on the United States, provided that service was to be made "by delivering a copy of the summons and of the complaint to the United States Attorney for the district in which the action is brought * * *." The term "delivering" in former Rule 4(d)(4) has been held to require personal service. *See Gabriel v. United States*, 30 F.3d 75, 77 (7th Cir. 1994); *Peters v. United States*, 9 F.3d 344, 345 (5th Cir. 1993); *McDonald v. United States*, 898 F.2d 466, 467–68 (5th Cir. 1990); *Dowdy v. Sullivan*, 138 F.R.D. 99, 100 (W.D. Tenn. 1991) (service by certified mail on U.S. Attorney was improper service; personal service required); *accord* 1 *Moore's Fed. Practice* § 4.55 [1], at 4-72 (3d ed.) (if service on the U.S. attorney is effected under Rule 4(i)(1)(A) by delivery, "the summons and complaint must be personally delivered").

Fed. R. Civ. P. 4(j)(2) provides that service of a summons and complaint upon a state municipal corporation, or other governmental organization shall be effected by, among other things, "delivering" copies of the summons and complaint to its chief executive officer. The term "delivering" has been construed to require personal service. *See* 4B C. Wright & A. Miller, *Federal Practice & Procedure: Civil 3d* § 1109, p. 47 (2002); *Gilliam v. County of Tarrant*, 94 Fed. Appx. 230 (5th Cir. 2004) (use of certified mail does not satisfy Rule 4(j)(2)); *Husner v. City of Buffalo*, 172 F.3d 37 (Table), 1999 WL 48776, at ** 1 (2d Cir. Feb. 1, 1999); *Cambridge Mut. Fire Ins. Co. v. City of Claxton, Ga.*, 720 F.2d 1230, 1232 (11th Cir. 1983) (applying predecessor of Rule 4(j)(2), then Rule 4(d)(6)); *Gil v. Vogilano*, 131 F. Supp. 2d 486, 494 (S.D.N.Y. 2001) (service by mail not proper); *Barrett v. City of Allentown*, 152 F.R.D. 46, 48–49 E.D. Pa. 1993) (applying former Rule 4(d)(6)); *Miles v. WTMX Radio Network*, 2002 WL 1359398, at * 2 (N.D. Ill. Jun. 20, 2002), *report and recommendation approved in part*, 2002 WL 1613762 (N.D. Ill. Jul. 17, 2002); *Oltremari by McDaniel v. Kansas Social & Rehabilitative Serv.*, 871 F. Supp. 1331, 1353 (D. Kan. 1994).

However, none of the authorities construing Fed. R. Crim. P. 17(d), Fed. R. Civ. P. 4(h)(1) and 4(j)(2), and former Rules 4(d)(4) and 4(d)(6) contains any explanation, discussion or analysis as to why the term "delivering" requires personal service. They simply state that personal service is required. And as indicated earlier, courts have split in deciding whether the term "deliver-

ing," as used in Rule 45(b)(1), requires only personal service. *See* cases cited in notes 2 and 3, above.

Because the term "delivering" does not intrinsically mandate only personal service, a conclusion that only personal service is authorized, based on the use of that word, is not warranted. Such a conclusion also ignores the fact that Rule 45(b)(1) does not use the term "personally", as contrasted with Rules 4(e)(1) and 4(f)(2)(C)(i), which are explicit in requiring personal service, and that Rule 45(b)(3) requires proof of the "manner of service" employed, which suggests that more than one method is permissible.

A third reason that could be advanced for requiring only personal service of a subpoena is the severity of the sanction that can be imposed for ignoring a subpoena—contempt of court. *See* Fed. R. Civ. P. 45(e). It could be argued that personal service ensures that before such a severe sanction is imposed, there is no dispute about whether the party received the subpoena.[9] On the other hand, the failure to respond to a summons and complaint can also result in a severe sanction—a default judgment against the defaulting party. *See* Fed. R. Civ. P. 55(a) & (b). In the case of a default judgment, the defaulting party can seek to have it vacated for good cause. *See* Fed. R. Civ. P. 55(c) & 60(b). In the case of a subpoena that has allegedly been ignored, before the sanction of contempt can be imposed, the defaulting party will have an opportunity to argue that the subpoena was never properly served. Due process requires that the allegedly defaulting party be given adequate notice and an opportunity to be heard on a motion for contempt. *See Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1342 (8th Cir. 1975); 9A *Wright & Miller* § 2465, at 82 (1995). In addition, in order to hold the witness in contempt, the subpoena must be valid and the witness must not have an adequate excuse for the noncompliance. *Id*. at 85–86. Thus, there does not seem to be any policy reason based on the potential severity of the sanction for requiring personal service of a subpoena when personal service of a summons and complaint is not always required.

A fourth reason is that when Fed. R. Civ. P. 45(c) was amended in 1991 to move the language concerning the method of service of a subpoena into Rule 45(b)(1), all the decisions addressing whether personal service was required by Rule 45(c) had found that it was, except for the decision in *Hinds*, 1988 WL 33123. *See* case cited in footnotes 2 and 3, above; *see also* Note, "Rule 45(b): Ambiguity in Federal Subpoena Service," 20 *Cardozo L. Rev.* 1065, 1071 (1999). If the Advisory Committee had thought that the courts had improperly construed Rule 45(c) to require personal service, presumably there would have been a proposed or actual amendment of the Rule to change that requirement, or the Advisory Committee would have commented on those decisions, which it did not. This would suggest that the decisions requiring personal service were correct.

A fifth reason that could be advanced for construing the word "deliver" in Rule 45(c) to require personal delivery would be based on Rule 5, which covers service on a party represented by an attorney. Rule 5(b)(2)(A) provides a definition of "deliver" for that limited purpose and does not limit the term to personal delivery:

> (A) Delivering a copy to the person served by:
>
> (i) handing it to the person;
>
> (ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or
>
> (iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

Virtually the same language was contained in Rule 5(b) when it was adopted in 1937.[10]

It could be argued that the need to spell out in then Rule 5(b) that "deliver" did not require only personal delivery, shows that the word "deliver" was understood in 1937 to require personal delivery unless otherwise provided. However, that would be inconsistent with the perceived need to expressly require in then Rule 4(d)(1) that delivery of a summons and complaint on an individual in the United States had to be delivered to the individual "personally." Thus, the argument would appear, at most, to support the idea that the word "deliver," standing alone, is inherently ambiguous as to whether delivery must be personal delivery. Then Rule 5(b), as Rule 5(b)(2)(B) does now, also permitted, as an alternative to delivery, service by mail. This might lend support to the argument that even if delivery does not mean personal delivery, it would not encompass service by mail.

It could also be argued that it is somewhat unfair to involve a person with no stake in a lawsuit without providing that person with the best notice possible, that is, personal service. But we fail to see how the need of the parties to involve others in their dispute should require the *best* notice possible, rather than notice sufficient to satisfy the requirements of due process. The countervailing policies of seeking to provide justice and have the truth come to light override the concern of third parties not to be involved in a dispute about which they have necessary information.

### D. Due Process Requirements

Due process requires a method of service of a summons or a subpoena that is reasonably calculated, under the circumstances, to provide actual notice and an opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988); *Baker v. Latham Sparrowbush Assocs.*, 72 F.3d 246, 254 (2d Cir. 1995); *S.E.C. v. Tome*, 833 F.2d 1086, 1093 (2d. Cir. 1987); *Cordius Trust*, 2000 WL 10268, at * 2 (service of subpoena by certified mail satisfies due process); *First Nationwide Bank*, 184 B.R. at 644 (after 6 failed attempts at personal service, mailing a subpoena to witness at his home address and then delivering it to his counsel in another case held to satisfy due process); *King*, 170 F.R.D. at 356 (delivery of subpoena by hand to someone at witness' residence and mailing copy to the same address satisfied due process); *Doe*, 155 F.R.D. at 630 (delivery by certified mail upheld, but leaving the document at the served individual's dwelling "would not assure delivery *to the person*").

As the foregoing cases indicate, due process does not require in-hand personal service. While it is beyond the scope of this report to address which methods of service, other than personal service, would satisfy due process, it appears that any method authorized under Rule 4 would satisfy such requirements.

## Conclusion

After considering the applicable authority and the reasons in favor and against construing Rule 45(b)(1) to require personal in-hand service of a subpoena, the Section has concluded that personal in-hand service of a subpoena is not required by the language of Rule 45(b)(1), that there is no policy reason why only personal in-hand service should be required, particularly since personal in-hand service of a summons and complaint is not required in many situations in federal court. The Section further believes that any method of service permitted under Rule 4 of the Federal Rules of Civil Procedure for the service of a summons and complaint should be permitted under Rule 45(b)(1) for the service of a subpoena and that Rule 45(b)(1) should be amended to explicitly provide for that.

## Endnotes

1. The proposed style revision to Rule 45(b)(1) by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States does not alter the language or clarify what the term "deliver" means. *See* Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure (Feb. 2005).

2. At some point prior to 1958, the requirement that the original subpoena be exhibited to the witness was eliminated and C.P.A. § 404 required only that a copy of the subpoena be delivered to the witness. *See Application of Barbara*, 14 Misc.2d 223, 226, 180 N.Y.S.2d 924, 927 (Sup. Ct., Tioga Co. 1958), *aff'd*, 7 A.D.2d 340, 183 N.Y.S.2d 147 (3d Dep't 1959). That version of C.P.A. § 404 was construed by both the lower court and the Appellate Division in *Application of Barbara* to permit service of the subpoena by means other than personally handing the subpoena to the witness, at least where the witness sought to avoid service of the subpoena. In *Application of Barbara*, the process server went to the witness's home and told his wife that he had a subpoena and explained its contents, but she refused to summon the witness or accept the subpoena on his behalf. The process server observed the witness through a window and told him that he had a subpoena, exhibited the subpoena and stated its substance. Thereafter, he fastened the subpoena to the front door and, using a portable electronic amplifier, read the contents of the subpoena through the amplifier at least twelve more times from various positions around the house. In holding that the requirement of delivery was complied with, the Appellate Division stated that "the requirement that a subpoena 'be delivered to the witness' (Civil Practice Act, § 404) is somewhat less stringent than the provision that a summons be delivered 'to the defendant in person' (Civil Practice Act § 225)." 7 A.D.2d at 343, 183 N.Y.S.2d at 149.

3. *See Agran v. City of New York*, 1997 WL 107452 (S.D.N.Y. Mar. 11, 1997) (service by mail improper); *Alexander v. Jesuits of Missouri Province*, 175 F.R.D. 556, 560 (D. Kan. 1997) (leaving subpoena at home of witness with her husband improper); *Application of Johnson & Johnson*, 59 F.R.D. 174, 177 (D. Del. 1973) (personal service of a subpoena is required when an individual is subpoenaed; service on registered agent for corporation not proper when subpoena directed to individuals); *Barnhill v. United States*, 1992 WL 453880, at * 4 (N.D. Ind. Apr. 8, 1992), *rev'd on other grounds*, 11 F.3d 1360 (7th Cir. 1993) (service by certified mail improper); *Benford v. American Broadcasting Cos., Inc.*, 98 F.R.D. 40, 41 n. 5 (D. Md. 1983) (*dicta*); *Chima v. United States Dep't of Defense*, 2001 WL 1480640, at * 2 (9th Cir. Dec. 14, 2001) (unpublished decision) (service by mail improper); *In re Smith (Conanicut Inv. Co. v. Coopers & Lybrand)*, 126 F.R.D. 461, 462 (E.D.N.Y. 1989) (court refused to order alternative means of service, holding that Rule 45 requires personal delivery of the subpoena to the party named); *Federal Trade Commission v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1307, 1312–13 (D.D.C. 1980) (service by registered mail invalid); *Ghandi v. Police Dep't of City of Detroit*, 74 F.R.D. 115, 120–21 (E.D. Mich. 1977); *Gillam v. A. Shyman, Inc.*, 22 F.R.D. 475, 479 (D. Alaska 1958) (subpoena served on wife of witness not valid); *Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968) (service of subpoena *duces tecum* on plaintiff's counsel not valid); *In re Nathurst*, 183 B.R. 953, 955 (M.D. Fla. Bankr. Ct. 1995) (service by certified mail improper); *In re Pappas*, 214 B.R. 84, 85 (D. Conn. Bankr. Ct. 1997); *In re Smith*, 126 F.R.D. 461, 462 (E.D.N.Y. 1989) (court refused to order alternative means of service, holding that Rule 45 requires personal delivery of subpoena to party named); *James v. McKenna*, 2003 WL 348921, at * 2 (E.D. La. Feb. 6, 2003) (service by certified mail invalid); *Khachikian v. BASF Corp.*, 1994 WL 86702, at * 1 (N.D.N.Y. Mar. 4, 1994) (service of subpoena *duces tecum* directed to defendant invalid when served on defendant's attorney by regular mail); *Klockner Namasco Holdings Corp. v. Daily Access.com, Inc.*, 211 F.R.D. 685, 687 (N.D. Ga. 2002) (service of subpoena made on wife of witness improper); *Lehman v. Kornblau*, 206 F.R.D. 345, 346–47 (E.D.N.Y. 2001) (service of subpoena by certified mail on counsel for non-parties was improper); *Northeast Women's Center, Inc. v. McMonagle*, 1987 WL 6665, at * 5 (E.D. Pa. Feb. 10, 1987) (subpoena served by mail improper); *Rotter v. Cambex Corp.*, 1995 WL 374275, at * 1 (N.D. Ill. Jun. 21, 1995) (service by mail improper); *Scarpa v. Saggese*, 1994 WL 38620 (1st Cir. Feb. 10, 1994) (unpublished opinion) ("a subpoena cannot be left at someone's home; it must be served upon the person"); *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683, 685–86 (D. Kan. 1995) (service by certified mail improper); *Terre*

*Haute Warehousing Serv. Inc. v. Grinnell Fire Protection Sys. Co.*, 193 F.R.D. 561, 562–63 (S.D. Ind. 1999) (service by certified, return receipt held improper); *Tidwell-Williams v. Northwest Georgia Health Sys., Inc.*, 1998 WL 1674745, at * 7 (N.D. Ga. Nov. 19, 1998) (subpoenas not properly served; plaintiff failed to show the subpoenas were personally served rather than faxed or mailed); *United States v. Philip Morris Inc.*, 312 F. Supp.2d 27, 37–38 (D.D.C. 2004) (deposition subpoenas left at mailroom of Justice Department or with support staff, but not personally served on witnesses, invalid); *Whitmer v. Lavida Charter, Inc.*, 1991 WL 256885 (E.D. Pa. Nov. 26, 1991) (not sufficient to leave subpoena at dwelling place of witness).

4. *See Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 84 n. 5 (S.D.N.Y. 2002) (substituted service of subpoenas on tribal officials upheld; subpoenas served at the tribe's offices followed by mailing to the same address); *Codrington v. Anheuser-Busch, Inc.*, 1999 WL 1043861, at * 1 (N.D. Fla. Oct. 15, 1999) (service by mail upheld); *Cohen v. Doyaga*, 2001 WL 257828, at * 3 (E.D.N.Y. Mar. 9, 2001) (service by mail upheld); *Cordius Trust v. Kummerfeld*, 2000 WL 10268 (S.D.N.Y. Jan. 3, 2000) (court ordered service of subpoena by mail); *Doe v. Hersemann*, 155 F.R.D. 630 (N.D. Ind. 1994) (service by certified mail upheld); *Firefighters' Inst. for Racial Equality ex rel. Anderson v. City of St. Louis*, 220 F.3d 898, 903 (8th Cir. 2000) (service by fax and mail held invalid because court could not be assured that delivery occurred; court indicated that substituted service that will ensure receipt of the subpoena may be proper); *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 254–55 (S.D.N.Y. 2000) (service by attaching subpoena to door and mailing a copy to counsel for witness, which was a party, upheld after unsuccessful attempt to personally serve the agent the witness had appointed for service of process), *aff'd*, 281 F.3d 48, 55 (2d Cir. 2002) ("[a]lthough compliance with the service requirements may not have been exact, they were substantial and sufficient"); *In re Shur*, 184 B.R. 640 (E.D.N.Y. Bankr. Ct. 1995) (court upheld service of subpoena mailed to witness's home with copy delivered to his counsel in another case); *Green v. Baca*, 2005 WL 283361, at * 1 (C.D. Cal. Jan. 31, 2005) (court upheld service where subpoenas left at various witnesses' offices); *Hall v. Sullivan*, 229 F.R.D. 501, 505–06 (D. Md. 2005) (holding personal service not required in case of subpoena *duces tecum*); *Hinds v. Bodie*, 1988 WL 33123 (E.D.N.Y. Mar. 22, 1988) (court ordered service of subpoena by alternate means and held witness in contempt for failure to comply); *King v. Crown Plastering Corp.*, 170 F.R.D. 355 (E.D.N.Y. 1997) (delivery of subpoena to witness's residence and mailing to residence upheld); *Ultradent Prods., Inc. v. Hayman*, 2002 WL 31119425, at ** 1, 2 (S.D.N.Y. Sept. 24, 2002) (service of subpoena *duces tecum* on corporation by service on Secretary of State upheld on ground that the method of service was authorized by New York state law); *Western Resources, Inc. v. Union Pacific R.R. Co.*, 2002 WL 1822432, at * 2 (D. Kan. Jul. 23, 2002) (court upheld service upon non-party's attorney and by Federal Express).

5. A number of states' provisions governing service of subpoenas also use the same language as Fed. R. Civ. P. 45(b)(1). *See* Ariz. R. Civ. P. 45(b)(1); Colo. R. Civ. P. 45(c); Del. Super. Ct. Civ. R. 45(b)(1); D.C. Super. Ct. R. Civ. P. 45(b)(1); Haw. R. Civ. P. 45(c); Idaho R. Civ. P. 45(c)(2); Me. R. Civ. P. 45(b)(1); Mo. Sup. Ct. R. Civ. P. 57.09(d); Nev. R. Civ. P. 45(b); N.J. R. Gen. Application 1:9-3; N.M. R. Civ. P. 1-045(B)(2); Wyo. R. Civ. P. 45(b)(1). Whether those state provisions have been construed to require personal service is beyond the scope of this report.

6. *Mushroom Associates* and *Salley* involved the issue of whether service of discovery requests on a party by fax is proper under Fed. R. Civ. P. 5(b), which covers service of papers on a party in an action represented by an attorney. Both courts held that it was not.

7. Rule 4 contains a number of provisions allowing non-personal service of a summons and complaint. In the case of service upon an individual in the United States, Rule 4(e)(1) permits service in accordance with the law of the state in which the district court is located or in which service is effected and Rule 4(e)(2) permits leaving copies of the summons and complaint at the individual's dwelling or usual place of abode with a person of suitable age and discretion or by delivering copies to an agent authorized to receive service of process. In the case of service upon individuals in a foreign country, Rule 4(f)(2)(C) provides that, unless prohibited by the law of the foreign country, a summons and complaint may be served by any form of mail requiring a signed receipt. In the case of service upon a corporation in the United States, Rule 4(h)(1) provides that service may be made in the manner prescribed for individuals in Rule 4(e)(1), which, in turn, provides for non-personal service.

8. Unlike Rule 4(h)(1), Rule 45 does not address, in the case of a corporation, to whom the subpoena must be delivered. Courts have looked to Rule 4(h)(1) for guidance. In *In re Pappas*, 214 B.R. 84, 85 (D. Conn. Bankr. Ct. 1997), the court held that service of a subpoena on a corporation's receptionist constituted valid service under Rule 45(b)(1) after first concluding that Rule 45(b)(1) requires personal service of a subpoena. The court reached its conclusion as to the propriety of the service in question by finding that because Rule 45 does not specify what constitutes personal service upon a corporation, courts look to Rule 4(h)(1) for guidance, and that under applicable state law, service upon a corporation's receptionist constituted personal service. *See Khachikian v. BASF Corp.*, 1994 WL 86702, at * 1 (N.D.N.Y. 1994) (look to Rule 4(d)(3) (now Rule 4(h)) to determine who can be served with subpoena addressed to corporation); *In re Grand Jury Subpoenas*, 775 F.2d 43, 46 (2d Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986) (same).

9. There will always be the possibility of dispute over receipt, even in the case of personal service, if the recipient attempts to lie about receiving it or in the case of sewer service.

10. Then Rule 5(b) provided in pertinent part: "Service upon the attorney or upon a party shall be made by delivering a copy to him * * *. Delivery of a copy within this rule means: handing it to the attorney or the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."

**Editor's Note: This report was originally prepared by the Federal Procedure Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, and approved and adopted by the Section on November 16, 2005. The Section is particularly grateful for the efforts of James F. Parver, the principal author of this report. The report states only the position of the Commercial and Federal Litigation Section of the New York State Bar Association and does not necessarily represent the view of the New York State Bar Association until such time as it is adopted by the Executive Committee or House of Delegates of the New York State Bar Association.**

# Essay: An Exception to the Finality Requirement

By Andrew J. Schatkin

In federal appellate practice the general and set rule is that an appeal may only be made or taken from a final order which ends the litigation on the merits and leaves nothing for the court to do but execute judgment.[1] For example, a District Court's denial of a 12(b)(6) motion to dismiss, which leaves controversy pending, is not a "final decision or order" and so is not appealable.[2] Stated differently, within limited parameters and exceptions to be discussed in this essay, interlocutory appeals are effectively barred.[3] However, federal courts have carved out one exception to this set rule of finality. As set forth in *Cohen v. Beneficial Indus. Loan Corp.*,[4] interlocutory appeals may be taken from "collateral orders."

In *Cohen*, stockholders sued the defendant corporation and certain of its managers and directors, alleging that they engaged in a continuous and successful conspiracy to enrich themselves at the expenses of the corporation from the year 1929 and on. The suit alleged mismanagement and fraud. The corporate defendant moved pursuant to New Jersey law to post security for the defendant's costs including attorney's fees and appealed from the denial of that motion.

The United States Supreme Court held that the order denying the motion was appealable, finding that the decision fell within that small class of decisions which finally determines a claim of rights separable from and collateral to rights asserted in the action, rights which are too important to be denied review and too independent of the case itself to require that appellate consideration be deferred until the case gets adjudicated.

The Supreme Court concluded that the order appealed from was in some sense a final disposition of a claimed right, not as part of the original cause of action and not requiring consideration with it.[5]

More specifically, the definition of the Collateral Order Doctrine has been said to be a narrow exception to the Final Judgment Rule limited to those trial court orders affecting rights that would be irretrievably lost in the absence of an immediate appeal. For a collateral order to be subject to interlocutory appeal, three requirements must be met. The order must: (1) conclusively determine the disputed question or questions; (2) resolve an important issue completely separate from the merits of the action and; (3) be effectively unreviewable on appeal from the final judgment.[6] Thus, it has been held that an order decertifying a class action cannot be the subject of an interlocutory appeal or an order disqualifying counsel.[7] This essay considers a separate discrete issue: Is the denial of a claim, in a case of qualified or absolute immunity, appealable when dismissal of the pending claim has been denied?

In general, the rule is that an interlocutory appeal is permitted from an order denying immunity, either absolute or qualified. The reasoning is that the immunity is permanently lost if the case is permitted to go to trial, as subsequent review would be ineffective. This rule is succinctly and well stated in *Mitchell v. Forsyth*.[8] In *Mitchell*, the petitioner, the Attorney General, authorized a warrantless wiretap for the purpose of gathering intelligence regarding the activities of a radical group that had made tentative plans to take actions threatening the nation's security. Relying on *United States v. United States District Court*,[9] the United States Supreme Court held that the Fourth Amendment did not permit warrantless wiretaps in cases involving domestic threats to national security. The respondent then filed a damages action in the federal District Court against the Attorney General alleging that the surveillance, to which he had been subject, violated the Fourth Amendment of the U.S. Constitution and Title III of the Omnibus Crime Control and Safe Streets Act. The District Court granted the respondent's motion for summary judgment on the issue of liability and held that the petitioner was not entitled to either absolute or qualified immunity. The Court of Appeals agreed with the denial of absolute immunity, but held with respect to the denial of qualified immunity, that the District Court order was not appealable under the Collateral Order Doctrine.

The United States Supreme Court reversed, stating the District Court's denial of qualified immunity was the denial of an entitlement not to stand trial under certain circumstances and such entitlement constituted immunity from suit rather than a mere defense to liability, and like absolute immunity, is effectively lost if the case is erroneously permitted to go to trial. Thus, the United States Supreme Court held the claim of qualified immunity is appealable under the "Collateral Order Doctrine" since it conclusively determines the disputed question and makes a claim for rights separable from and collateral to rights asserted in the main action.

Similarly, in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*,[10] an engineering firm, which had entered into a contract with a Puerto Rican Agency to provide services regarding the subject matter of an environmental consent decree, brought an action seeking a declaration of rights with respect to the agreement alleging damages for alleged breach of contract. The Agency moved to dismiss based on the Eleventh Amendment immunity and the Agency appealed. The Court of Appeals dismissed the appeal. The United States Supreme Court held that the same reasoning that allowed and permitted an order denying individuals' and officials' claims of absolute and qualified immunity to be appealed applied here and that this case fell within the Collateral Order Doctrine of *Cohen.* Once the State and its entities are held to be immune from suit under the Eleventh Amendment, the elements of the Collateral Order Doctrine are satisfied.

Moreover, the Court reasoned that a motion to dismiss on Eleventh Amendment grounds involves a claim to fundamental Constitutional protection, whose resolution will have no bearing on the merits of the underlying action. Finally, the Court held that the value to the states of their Eleventh Amendment immunity gets lost as the litigation proceeds. Thus, the U.S. Supreme Court held that the Order here fulfilled the *Cohen* criteria: (1) conclusively determining the disputed question; (2) resolving an important issue separate from the merits of the main case; and (3) effectively being unreviewable from the final judgment.

## Conclusion

This examination of final and interlocutory appeals, in addition to examining the appealability of the denial of absolute and qualified immunity claims, reveals the existence of a collateral order exception comprised of three parts: (1) conclusive determination of a disputed question; (2) resolution of an important issue separate from the merits of the action; and (3) unreviewability from an appeal of the final judgment.

As to the denial of absolute or qualified immunity, this much is clear: Should the case proceed to trial, immunity is irretrievably and absolutely lost. Unless an interlocutory appeal is permitted, there can be no review that can undo the damage, change the result, or alter the facts. Thus, when immunity is denied and the case proceeds to trial, immunity is effectively lost. Despite the ability to appeal at the conclusion of the case, the damage is done and the loss of immunity, though reviewed in and through the final judgment, is effectively gone. The reason for the rule is obvious: Appeal would be ineffectual at the end of the trial. Instead, parties should be allowed to make interlocutory appeals of such orders.

## Endnotes

1. *See Catlin v. United States*, 324 U.S. 229 (1945); *see also Lauro Lines SRL v. Chasser*, 490 U.S. 495 (1978).
2. *EEOC v. Am. Exp. Co.*, 588 F.2d 102 (2d Cir. 1977); *CES Publ'g Corp. v. St. Regis Publ'n, Inc.*, 531 F.2d 11 (2d Cir. 1975).
3. 28 U.S.C. § 1291 (1994). *See Firestone Tire and Rubber Co. v. Risgord*, 449 U.S. 368 (1981) (explaining that the finality requirement preserves rule and independence of the district court judge, eliminates successive appeals, and promotes effective judicial administration); *see also Di Bella v. United States*, 369 U.S. 121 (1962); *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360 (3rd Cir. 1975).
4. 337 U.S. 541 (1949).
5. *See also United States v. Alcon Labs*, 636 F.2d 876 (1st Cir. 1981).
6. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985); *Flanagen v. United States*, 465 U.S. 259 (1984); *Coopers and Lybrand v. Livesay*, 437 U.S. 463 (1978) (orders decertifying class action not subject to Collateral Order Doctrine and therefore not appealable).
7. *See Coopers and Lybrand*, 437 U.S. 463 (1978).
8. 422 U.S. 511 (1981).
9. 407 U.S. 297 (1972).
10. 506 U.S. 139 (1993). *See generally Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996); *Taylor v. Bowers*, 966 F.2d 417 (8th Cir. 1992) (to the extent the district court's denial of claim of qualified immunity turns on issues of law, denial is appealable final decision, despite absence of final judgment); *Robinson v. Volkswagenwerk AG*, 940 F.2d 1369 (10th Cir. 1991); *Crymes v. DeKalb County*, 923 F.2d 1482 (11th Cir. 1991) (absolute immunity: county commissioners); *Auriemma v. Montgomery*, 860 F.2d 273 (7th Cir. 1988) (governmental officers); *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988) (holding that absolute immunity did not adhere where defendants announced to the media the discontinuation of the prosecution; no immunity adhered to a press release); *Agromayor v. Colberg*, 738 F.2d 55 (1st Cir. 1984) (holding that the press officer position question was sufficiently essential to the legislative process to confer immunity).

**Andrew J. Schatkin practices law in Jericho, N.Y. He is the author of 140 legal articles, has contributed to five books, and is listed in *Who's Who in America, Who's Who in American Law,* and *Who's Who in the World*. In addition to his J.D. he has a Certificate in International Law from the Hague in the Netherlands and a Dip. in Human Rights from Strasbourg, France.**

**BOOK REVIEW**

# *New York Trial Notebook*

Edward L. Birnbaum, Carl T. Grasso & Hon. Ariel E. Belen,
James Publishing, 2005, 850 pages with CD of full text and 76 forms

Reviewed by Michael S. Oberman

With a large number of brochures for new books hitting our desks and with many firms operating with a tighter budget for library book purchases, a pragmatic question for evaluating a new book is whether it is worth what it costs. *New York Trial Notebook ("NYTN")*, the latest offering from James Publishing, is an extremely good value. *NYTN*—even if evaluated without regard to its costs—is also a very useful book. But *NYTN* is not the most comprehensive and insightful resource available for litigators primarily handling complex commercial cases.

*NYTN* takes the reader step-by-step through the trial process, including an overview of New York's trial courts, pre-trial procedures (e.g., note of issue, jury demand, expert disclosures and pre-trial motions), the trial itself, and trial motions. The authors write with authority. Edward L. Birnbaum and Carl T. Grasso are members of Herzfeld & Rubin, P.C. and experienced trial lawyers. Justice Ariel E. Belen was elected to the New York State Supreme Court in 1994, served in the Commercial Division in Kings County between 2002 and March 2005, and now sits as an Associate Justice of the Appellate Term for the 2nd and 11th Judicial Districts.

*NYTN* is designed as a notebook rather than a treatise: the text is divided into hundreds of short sections concisely addressing specific subjects. Within these short sections, practice pointers are sometimes set off with the sub-heading "In Practice." The detailed table of contents runs about fifty pages and—standing alone—serves as an outline of topics to be considered in preparing for trial. This outline makes it very easy to find a point of interest, while the comprehensive index and searchable CD virtually guarantees that the reader will quickly find where *NYTN* discusses a particular topic.

By way of example, while I was reading the book I was asked whether my firm could serve as counsel to a client if one of our partners might have to testify. Paging through the table of contents, I immediately saw "Chapter 12 Disqualification of Counsel," and within that chapter the following sub-headings:

**III. Counsel as Witness**

§12:70 Advocate-Witness Disciplinary Rules

§12:71 Lawyer to be Called on Client's Behalf

§12:72 Lawyer to Be Called Other Than on Client's Behalf

§12:73 When Witness "Ought" to Testify

§12:74 Lawyer as Witness in Another Capacity

§12:75 Pro se Representation

I located the same sections by looking in the index for "Lawyers" and—after not finding that word—looking for "Counsel," which referred me to "Attorneys," which in turn referred me to the "Advocate Witness' Rules," where I found the list of sub-sections included in the table of contents. Searching for the word "disqualification" on the CD got me to the same place. Each of these sections crisply describes its subject, giving the basic rule, exceptions to the rule and citations to the relevant disciplinary rules and leading cases.

As another example, I needed to confirm my recollection on the reach of a New York subpoena to call as a witness an employee of a corporation that was subject to personal jurisdiction in New York but located outside of New York. Chapter 17 covers subpoenas, with a section on "Service of Subpoenas" and within that section a heading for "Territorial Reach." (The index worked as well: Under "Subpoena" comes "Service of; and under that, "territorial reach.") Here are excerpts from a section that takes up a full page of two columns (case citations omitted) (at 17-7 – 17-8):

> A subpoena in an action in the supreme, county, surrogate, or family court has statewide reach. [NY Const, Art. VI, § 1(c).] . . . Subpoenas may note served out of state. . . . This is based upon the language of Judiciary Law 2-b(1) limiting the judicial power to issu-

> ing subpoenas requiring attendance to testify to persons "found in the state." However, there is authority that persons that are out of state but employed by a party may be compelled to appear at trial by a subpoena served on the party employer, who is under the jurisdiction of the court.
>
> While a subpoena may not be used to compel an out-of-state person unconnected with a party to appear at the trial, such a person's testimony for trial may be taken pursuant to CPLR 3108, which permits a deposition by written questions, or by a commission or letters rogatory issued by the jurisdiction where the person is located. . . .

Perhaps of greatest utility to a lawyer with limited trial experience in New York State courts is "Chapter 20, "Jury Selection." This chapter lays out the rules and procedures for *voir dire*; provides practical advise for questioning panel members (with specific advice separately for plaintiff's counsel and defendant's counsel); and describes the grounds for challenges for cause and peremptory challenges. The "nuts and bolts" are supplemented with practical guidance. For example, the section on questioning prospective jurors includes subsection "§ 20:93 Minimize Repetition" and within that subsection three "In Practice" paragraphs which advise (with illustrative anecdotes): "*Do Your Best Not to Look Bored*"; "*Avoid Repeating Yourself or Even Appearing to Repeat Yourself*"; and "*Listen Carefully, and Avoid Needlessly Repeating Questions*."

While the chapter does give a complete treatment of jury selection, a few additions could make the chapter even more helpful. For example, either the text or the CD could include a script for or simulated transcript of all or a large part of the questioning of a panel. And the chapter would benefit from a table or chart providing a summary timeline of each of the separate steps in jury selection, which the practitioner might use in court as a guide to what will occur and when.

*NYTN* includes an immense amount of learning on the presentation of testimonial evidence from lay and expert witnesses, nontestimonial evidence, and demonstrative evidence. These chapters cover the core of the trial, and there is a good mix of the basic rules with "how to" practical guidance. For example, in § 17:04 on when to subpoena witnesses, the authors write (at 17-4):

> **IN PRACTICE:**
> Counsel may wish to call as part of its case a representative of an adverse corporate party, but there is no guarantee that that particular representative will be present in the courtroom. Unless 'surprise' in calling the corporate representative as an adverse witness is uppermost, either ask the court to order that he or she be present in court on the day you want, or serve the person with a trial subpoena. If you will be deposing the corporate representative, ask for the representative's home address; or if refused, ask counsel to agree that they will accept a trial subpoena on behalf of the representative.

This "In Practice" tells the reader how to secure the testimony of an adverse party's representative, but does not go to the next level of discussing when and whether it is good strategy to call the other side's officers as part of your client's case.

Even though *NYTN* is a notebook, there are not separate checklist pages for the practitioner to remove and take to court in a personal trial notebook. It would be helpful to add as a new feature removable checklists of the steps for introducing a document in evidence; objections to documents; and objections to the testimony of lay and expert witnesses. The teaching is already in the book; I am merely suggesting a summary of the learning in a more portable format. (*NYTN* is too big and heavy to carry back and forth to court except for the CD.) A further suggestion: while *NYTN* does include discussion of modern technology (§ 16:101), that discussion could be expanded to give practitioners who are not at the cutting edge of technology a much more concrete section on how to take advantage of the high tech courtrooms now available and on how to bring new technology into courtrooms not yet modernized.

My one over-arching reservation about *NYTN* is its heavy focus on personal injury cases. Time and again, the examples used are taken from this category of litigation. For example, Chapter 5 is titled "Expert Witness and Medical Report Disclosure" and focuses largely on medical experts; it does not give equal attention to commercial cases. A word search with the CD for "commercial" in this chapter found one mention in a parenthetical case discussion on the need to request expert disclosure in order to receive it (§ 5:20). Chapter 27, "Cross-Examination of Expert Witnesses," has the word "commercial" only in a case name (§ 27:11, citing a case brought by Commercial Union Insurance Co.). I found in the entire *NYTN* only three passing mentions of the Commercial Division. There is no discussion of the special challenges of complex commercial cases with the mind-numbing amount of exhibits and the complexity of subject matter, other than a few suggestions for themes in commercial litigation and limited tips for

opening and closing statements in commercial cases found in Chapters 14, 21 and 30.

*NYTN* can help a commercial litigator prepare for trial, and it will provide quick answers to the everyday issues of trial practice. But for a more thorough and treatise-like treatment of strategy, practice techniques and rules applying to a large commercial case (especially a case to be tried in the Commercial Division), *NYTN* does not match up to the chapters on a trial (mostly written by Stephen Rackow Kaye) appearing in Bob Haig's indispensable treatise, *Commercial Litigation in New York State Courts*—now in its Second Edition. (*See* page 60 for a review of this book by Lauren Wachtler.) But the authors of *NYTN* could come closer by markedly increasing their discussion of commercial cases.

There is much to like about *NYTN*, especially the amazing amount of well-presented accessible information offered for a bargain price. And, if *NYTN* matches the example of James Publishing's last offering to New York lawyers—*New York Civil Practice Before Trial* (reviewed in *NYLitigator*, Winter 2001 at 124–25)—we can expect updating and enhancements that will make a good book even better. Bottom Line: Buy the book.

**Michael S. Oberman is a partner in the Litigation and Intellectual Property Departments of Kramer Levin Naftalis & Frankel LLP. He has litigated a wide variety of complex civil and copyright cases at the trial and appellate levels and in arbitration and has also served as an arbitrator and a mediator. Mr. Oberman has been a member of the Executive Committee of the Commercial and Federal Litigation Section of the New York State Bar Association since the Section's formation and was the Section's Delegate to the House of Delegates from 1989–91. Mr. Oberman has written on court procedures and administration and is active in efforts for court reform. He has served as a member of Chief Judge Kaye's Commercial Courts Task Force, which created the Commercial Division of the New York Supreme Court, and has also served as a member of the Second Circuit's Committee on Rules and Operating Procedures.**

**BOOK REVIEW**

# *Commercial Litigation in New York State Courts, Second Edition*

Robert L. Haig, Esq., Editor-in-Chief
West Publishing, 2005, 6,444 pages

Reviewed by Lauren J. Wachtler

Seldom have I, or perhaps anyone else for that matter, actually relished the idea of reading 6,444 pages contained in five volumes. However, the pleasure of reading the five volumes of *Commercial Litigation in New York State Courts*, edited by Robert L. Haig, was only surpassed by the thoroughly delightful educational experience provided by a review of this remarkable work. *Commercial Litigation in New York State Courts* is the most comprehensive, readable and overall outstanding treatise which any practitioner in this state could find. It is not only an invaluable work for the commercial litigator in New York, but I would go so far as to say indispensable to anyone practicing law in this state.

The contributing authors to Mr. Haig's volumes read like a list of "Who's Who" among the most highly regarded commercial litigators and jurists in this state, who have shared with readers of these volumes the vast enormity of their experience, expertise, and practical advice. Commencing in the first volumes with comprehensive discussions of jurisdiction and venue within the state courts, the various contributing authors take the reader on a procedural and substantive journey through the state court system providing an excellent guide to procedure, substantive law, tactical advice and a checklist for every conceivable area of commercial litigation in New York, from the initial filing of a complaint, through discovery, motion practice, trial, post-trial motions and appeals. Included are samples of pleadings, which will certainly appeal to the less-experienced practitioner, and some strategic discussions of trial tactics and techniques which the more experienced litigator will find of interest.

Perhaps the most refreshing part of these volumes is that they are not only comprehensive, but readable, well annotated and provide information to the most experienced litigator as well as to those with less trial or litigation experience. In reviewing some of the chapters, I found myself actually recalling difficult matters in which I had been involved, or questions which had arisen in the course of litigations where these volumes would have been an invaluable resource, not only from a substantive point of view, but from the practical advice relating to so many and varied topics.

Of particular significance is that fact that Mr. Haig has been able to discuss so many different topics in these volumes without sacrificing the comprehensive coverage of each topic. For every chapter not only contains a wealth of information, but also included are citations to other sources; West Key Numbers; secondary sources, including other treatises, articles and periodicals; and detailed lists of practice aids which the authors have also provided as additional source material.

Most practice treatises in New York generally end there—not so with *Commercial Litigation in New York State Courts*. After dealing with comprehensive analyses of all phases of a litigation in text and an abundance of footnotes in the first three volumes (which in and of themselves could stand alone as a resource and reference guide), Mr. Haig has included two volumes on areas of the law which have become more prevalent in recent years as matters litigated in the Commercial Divisions of the State Courts. These two volumes include comprehensive chapters on such topics as Mergers and Acquisitions, Banking Litigation, Antitrust Litigation, Partnerships, Shareholder Derivative Actions and Professional Liability Litigation, just to name a few.

That Mr. Haig has been able to amass all of this information, and provide an interesting, topical, and thorough response to the growing and different types of cases which are being litigated in the Commercial Divisions in New York, is a truly remarkable accomplishment and these volumes surely merit a place on every practicing attorney's bookshelf.

**Lauren J. Wachtler is a partner at Montclare & Wachtler in New York City. She is a former Chair of the Commercial and Federal Litigation Section of the New York State Bar Association (NYSBA). She is a member of the State and New York County Commercial Division Advisory Committees, the e-Filing Task Force of the NYSBA, and the NYSBA Executive Committee. She is also the Commercial and Federal Litigation Section's Representative to the NYSBA House of Delegates.**

**BOOK REVIEW**

# *Winning with Expert Witnesses in Commercial Litigation*

Robert L. Dunn,
Lawpress Corporation, 2003, 541 pages

Reviewed by Michael S. Oberman

A book titled *Winning with Expert Witnesses in Commercial Litigation* (*WWEWICL*) surely calls out for a review in this journal. Has someone finally filled the void by providing commercial litigators with an all-in-one comprehensive synopsis of the law on expert witnesses, a how-to-guide for experienced and novice litigators alike, and a strategy manual which takes on the recurring and challenging issues of the day? The answer, alas, is not yet.

*WWEWICL* is a successor to a prior work by the same author, *Expert Witnesses—Law and Practice*. The old title is a better fit for what the author provides. I would describe *WWEWICL* as a case digest with commentary about the law plus a very small amount of how-to-guidance. Robert L. Dunn, now Corporate Counsel for Real Restaurants, a former partner at Cooper, White & Cooper in San Francisco and a magna cum laude graduate of the Harvard Law School, has 35 years of experience in major commercial litigation, much of it using expert witnesses. There is no reason to doubt that Dunn knows his subject thoroughly, making that much greater the disappointment in the narrow focus of the book.

*WWEWICL* has 8 chapters: "Legal Principles"; "Qualifications of Expert Witnesses"; "Foundation for Expert Testimony"; "The Expert Opinion"; "Direct Examination of Expert Witnesses"; "Cross-Examination of Expert Witnesses"; "Conflicts of Interest, Expert Misconduct, and Ethical Issues"; and "Working with Experts." For most of the book, Dunn provides a brief statement of the weight of authority on a point of law, and then provides citations with parentheticals supporting the statement. For example, § 3.3, "Facts Made Known to the Expert," within the chapter on "Foundation for Expert Testimony," states (at p. 70):

> An expert may testify based on facts made known to the expert. This is the second of the three general categories of foundation for an expert opinion described in Rule 703. *See* § 3.1 [which quotes Rule 703]. The fact may be known to the witness through trial testimony, depositions, or even through information supplied by counsel.

The section then provides illustrative federal cases and cases from Illinois, Maine, Massachusetts, Michigan, North Carolina, Oregon and Wisconsin. It ends with the following comments (at p. 71):

> The objection is occasionally made that an expert witness testifies based upon assumptions of fact supplied by counsel. The relevant question is not the source of the assumptions if the witness makes assumptions of fact; the issue is whether those assumptions find support in the evidence. A witness testifying based upon assumptions of fact supplied by counsel is doing nothing different from rendering an opinion based upon a hypothetical question, a time-honored though now less-used technique for examination of expert witnesses. *See* §§ 5.10-5.15.

An organized presentation of the law on expert witnesses, compiling leading cases from around the country drawn from commercial disputes, is of obvious value as a starting point for researching a point of law or for obtaining a quick, top-line answer to a question about the use of experts. Dunn is proud of his contribution: His preface reports that *WWEWICL* compiles almost 1,500 cases, and then adds: (at ix):

> All cases are set out separately by state. The book contains both an alphabetical table of cases and a table of cases by jurisdiction. The reader may locate quickly all expert witness cases decided in his or her jurisdiction that are cited in the book. Almost every case cited is accompanied by a capsule distillation of its holding so that the reader will know what the case actually decided and not just see an unexplained citation. Where the case deserves discussion, more is said and quotations are included as appropriate when the court has decided to explain the law.

This very neatly describes the bulk of the book.

*WWEWICL* is most valuable in elucidating the subjects on which expert testimony is allowed in commercial litigation and the types of opinions that are admissible. Here, Dunn adds more detailed commentary about key cases in addition to his case squibs. Best of all, the book compiles in § 5.19 cases describing expert testimony that was credited by the courts (and in § 5.20, the converse). The reader will take away a good sense of the types of opinions to elicit from an expert.

How complete is the coverage of legal issues? I tried to find Dunn's discussion on whether a party may use at trial the report and/or deposition testimony of an expert identified by the adversary pre-trial but then not called to testify at trial by that adversary. This is an issue that has arisen in

my practice and has been briefed for trial. The most widely cited cases are C*ollins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980) (holding that an expert's report and deposition were admissions of the party retaining the expert) and *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147 (3d Cir. 1995) (holding that experts, due to their supposed impartiality, are not agents of the parties who retain them). Neither case is cited in the book (Dunn taking the view that "most case law more than 15 years old is of little use" (at p. ix)). The issue is, however, described in § 7.8, "Calling Another Party's Expert," curiously within the chapter on "Conflicts of Interest, Expert Misconduct, and Ethical Issues." Dunn writes (at p. 347):

> A number of cases refuse to permit one party in commercial litigation to use another party's expert as an expert. Most cases also hold that while the expert remains a consultant, he or she may not also be called by another party.

He then provides as the first squib (at p. 348):

> **Federal:** *Glendale Federal Bank, FSB v. United States,* 39 Fed. Cl. 422 (1997) (plaintiff may not introduce deposition testimony of experts retained by defendant but withdrawn before trial as admissions under Rule 801; experts are not agents of a party and if withdrawn before trial are not persons authorized to speak for a party); *Ferguson v. Michael Foods, Inc.*, 189 F.R.D. 408 (D. Minn. 1999) (plaintiff will not be permitted to call defendant's expert as an adverse witness during plaintiff's case).

*Glendale* is a more recent case than *Collins* or *Kirk* and it does discuss these two earlier cases. The book, in this way, does get the reader to the right cases on this issue, but it does not flag the *Collins* line of authority.

On the other hand, I was troubled by how Dunn treats the question of whether to retain an expert on a contingency basis as a strategy issue (*see* §§ 6.11 and 8.10). He writes (at pp. 305–06) "that there is little case law discussing what might happen if the circumstance were to occur." I could find no mention of our State's Code of Professional Responsibility, which makes contingency fee payments for experts improper (DR 7- 109C), or of the similar provision in the Model Rules of Professional Conduct (Rule 3.4(b) comment).

My major complaint about *WWEWICL* is its short treatment of practice points and strategy, especially about the issues we confront in everyday practice. Dunn does provide chapters on the direct and cross-examination of experts, but he offers only some dozen pages on when to start working with an expert, how to find an expert, what information to provide to the expert, and pre-trial expert discovery. Dunn writes that a novice expert would be "shocked" to learn that drafts are discoverable (at p. 363), without offering any guidance to the attorney on how to oversee (or more extensively participate in) the preparation of expert reports or on how to avoid producing drafts (e.g., a stipulation between counsel that expert drafts are not discoverable). The word "spoliation" does not appear in his index, and his passing mentions of drafts pales next to the must-read article by Jerome S. Solovy and Robert L. Byman, "Do You Feel a Draft?", which appeared in the June 9, 2003 *National Law Journal*. Also inexplicably absent is a citation to either *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 284 (E.D. Va. 2001) or *W.R. Grace & Co.–Conn. v. Zotos Int'l, Inc.*, 2000 WL 1843258 (W.D.N.Y. Nov. 2, 2000), recent cases discussing spoliation in the context of drafts of expert reports. You are unlikely to win with experts in commercial litigation if you mishandle the issue of experts' drafts.

As another example of the under-treatment of strategy, Dunn says that a lawyer "should ask at the expert's deposition every question that may be asked on cross-examination at trial" (at p. 365). Some lawyers might agree with this advice, but a complete strategy manual would also discuss the belief of many other lawyers that it is best to save for trial the decisive impeachment of an adversary's witness. A full cross-examination in deposition might make it possible for the expert to alter his presentation for trial, or might lead a party to hold back an expert who could be destroyed at trial. As two last examples, Dunn does not provide forms of retainer agreements with experts for situations that might warrant them, or discuss the pros and cons of whether counsel for the party retaining the expert should act as counsel for the expert during his or her deposition. Many attorneys as a matter of practice (and often without analysis) will represent the expert at deposition. Other attorneys are trending to the view that an expert's duty of objectivity can put the expert at odds with the retaining counsel and that the creation of an attorney-client relationship between the expert and the retaining counsel can suggest bias on the part of the expert.

*WWEWICL* suggests by its title more than it is. The "bible" on the use of expert witnesses in commercial litigation remains to be written.

**Michael S. Oberman is a partner in the Litigation and Intellectual Property Departments of Kramer Levin Naftalis & Frankel LLP. He has litigated a wide variety of complex civil and copyright cases at the trial and appellate levels and in arbitration and has also served as an arbitrator and a mediator. Mr. Oberman has been a member of the Executive Committee of the Commercial and Federal Litigation Section of the New York State Bar Association since the Section's formation and was the Section's Delegate to the House of Delegates from 1989–91. Mr. Oberman has written on court procedures and administration and is active in efforts for court reform. He has served as a member of Chief Judge Kaye's Commercial Courts Task Force, which created the Commercial Division of the New York Supreme Court, and has also served as a member of the Second Circuit's Committee on Rules and Operating Procedures.**

# Section Committees and Chairs

**Antitrust**
Jay L. Himes
NYS Attorney General's Office
(212) 416-8282
E-mail: jay.himes@oag.state.ny.us

**Appellate Practice**
Preeta D. Bansal
Skadden Arps Slate Meagher & Flom LLP
(212) 735-2198
E-mail: pbansal@skadden.com

Daivd H. Tennant
Nixon Peabody LLP
1300 Clinton Squre
Rochester, NY 14604
(585) 263-1000
E-mail:dtennant@nixonpeabody.com

**Arbitration and Alternative Dispute Resolution**
Deborah Masucci
AIG Domestic Brokerage Group
(212) 770-1288
E-mail: deborah.masucci@aig.com

Carroll E. Neesemann
Morrison & Foerster, LLP
(212) 468-8138
E-mail: cneesemann@mofo.com

**Bankruptcy Litigation**
Douglas T. Tabachnik
Law Offices of Douglas T. Tabachnik
(732) 792-2760
E-mail: dttlaw@aol.com

**Civil Practice Law and Rules**
James Michael Bergin
Morrison & Foerster, LLP
(212) 468-8033
E-mail: jbergin@mofo.com

Susan M. Davies
Law Offices of Gregory P. Joseph, LLC
(212) 407-1208
E-mail: sdavies@josephnyc.com

**Civil Prosecutions**
Neil V. Getnick
Getnick & Getnick
(212) 376-5666
E-mail: ngetnick@getnicklaw.com

Jonathan D. Lupkin
Fleming Zulack Williamson Zauderer LLP
One Liberty Plaza, 35th Floor
New York, NY 10006
(212) 412-9579
E-mail: jlupkin@fzw.com

**Class Action**
Ira A. Schochet
Labaton Sucharow & Rudoff LLP
(212) 907-0864
E-mail: ischochet@glrslaw.com

**Commercial Division**
Vincent J. Syracuse
Tannenbaum Helpern Syracuse & Hirschtritt LLP
(212) 508-6722
E-mail: syracuse@tanhelp.com

**Complex Civil Litigation**
Edward A. White
Hartman & Craven LLP
(212) 753-7500
E-mail: ewhite@hartmancraven.com

**Construction Litigation**
J. Scott Greer
Lewis & Greer, P.C.
(845) 454-1200
E-mail: jsgreer@lewisgreer.com

John F. Grubin
Wasserman Grubin & Rogers, LLP
(212) 581-3320
E-mail: jgrubin@wgrlaw.com

**Creditors' Rights and Banking Litigation**
Peter J. Craig
Peter Craig & Associates PC
(585) 586-1060
E-mail: pjcraig@aol.com

Michael Luskin
Luskin Stern & Eisler, LLP
(212) 293-2700
E-mail: mluskin@lse-law.com

S. Robert Schrager
Hodgson Russ, LLP
(212) 661-3535
E-mail: rschrager@hodgsonruss.com

**Electronic Discovery**
Constance M. Boland
Nixon Peabody LLP
(212) 940-3000
E-mail:cboland@nixonpeabody.com

Adam I. Cohen
FTI Consulting, Inc.
(212) 841-9393
E-mail: adam.cohen@fticonsulting.com

**Employment and Labor Relations**
Gerald T. Hathaway
Littler Mendelson, P.C.
(212) 583-2684
E-mail: ghathaway@littler.com

**Evidence**
Lauren J. Wachtler
Montclare & Wachtler
(212) 509-3900
E-mail: ljwachtler@montclarewachtler.com

**Ethics and Professionalism**
Anthony J. Harwood
Labaton Sucharow & Rudoff LLP
(212) 907-0700
E-mail: aharwood@labaton.com

James M. Wicks
Farrell Fritz P.C.
(516) 227-0617
E-mail: jwicks@farrellfritz.com

**Federal Judiciary**
Carol E. Heckman
Harter, Secrest & Emery, LLP
(716) 853-1616
E-mail: checkman@hselaw.com

Jay G. Safer
LeBoeuf, Lamb, Greene & MacRae, LLP
(212) 424-8287
E-mail: jsafer@llgm.com

**Federal Procedure**
Gregory K. Arenson
Kaplan Fox & Kilsheimer LLP
(212) 687-1980
E-mail: garenson@kaplanfox.com

**Intellectual Property**
Peter Brown
Brown Raysman Millstein et al.
(212) 895-2480
E-mail: pbrown@brownraysman.com

**International Litigation**
Stephen H. Orel
Wolf Haldenstein Adler Freeman & Herz LLP
(212) 599-0916
E-mail: shorel@yahoo.com

Ted G. Semaya
Eaton & Van Winkle LLP
(212) 561-3615
E-mail: tsemaya@evw.com

**Internet and Litigation**
Peter J. Pizzi
Connell Foley LLP
(973) 533-4221
E-mail: ppizzi@connellfoley.com

**Membership**
Edwin M. Baum
Proskauer Rose LLP
(212) 969-3175
E-mail: ebaum@proskauer.com

**Pro Bono and Public Interest**
Michael W. Martin
Fordham Univ. School of Law
(212) 636-7781
E-mail: mwmartin@mail.lawnet.fordham.edu

Bernard W. McCarthy
Chadbourne & Parke, LLP
(212) 408-5397
E-mail: bernard.w.mccarthy@chadbourne.com

**Publications**
Carrie H. Cohen
Office of Attorney General Eliot Spitzer
(212) 416-8242
E-mail: carrie.cohen@oag.state.ny.us

**Real Estate Litigation**
David Rosenberg
Marcus Rosenberg & Diamond, LLP
(212) 755-7500
E-mail: dr@realtylaw.org

**Securities Litigation**
Douglas Clinton Conroy
(203) 961-7400
E-mail: douglasconroy@paulhastings.com

James D. Yellen
Morgan Stanley
(914) 225-5565
E-mail: james.yellen@morganstanley.com

**State Court Counsel**
Kathy M. Kass
NYS Supreme Court
(646) 386-3655
E-mail: kkass@courts.state.ny.us

Benjamin Tzvi Orlofsky
(646) 386-3359
E-mail: borlosfsk@courts.state.ny.us

**Technology**
Daniel P. Levitt
(212) 687-3455
E-mail: levittdan@aol.com

# At-Large Members of the Executive Committee

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Keane & Beane P.C.
(914) 946-4777

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Flemming Zulack Williamson Zauderer LLP
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(212) 557-7200

Lauren J. Wachtler
Montclare and Wachtler
(212) 509-3900

NYLitigator
Commercial & Federal Litigation Section
New York State Bar Association
One Elk Street
Albany, New York 12207-1002

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