NEW YORK STATE BAR ASSOCIATION

Journal

JULY/AUGUST 2013
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The Boston Massacre Trials

By John F. Tobin

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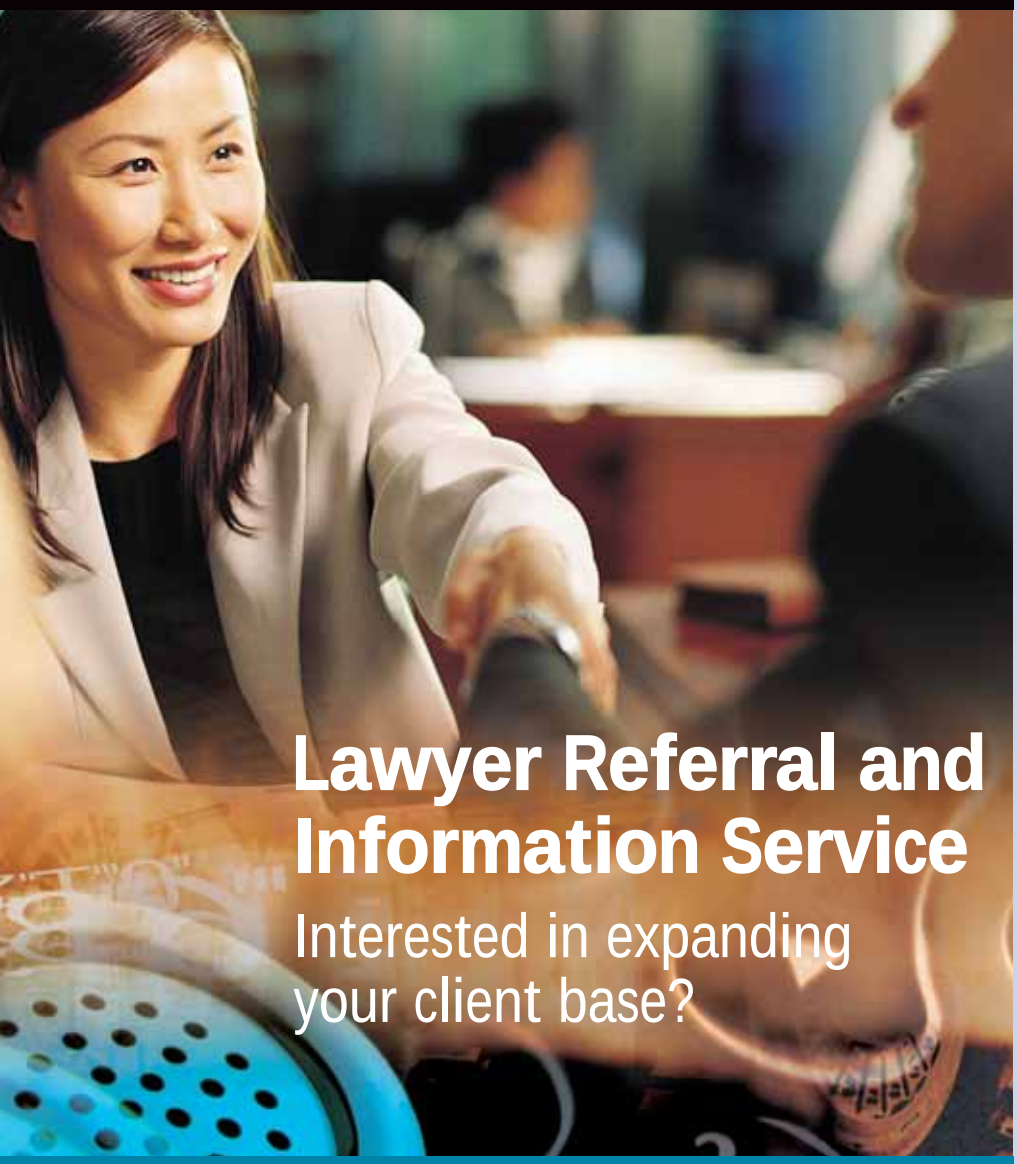

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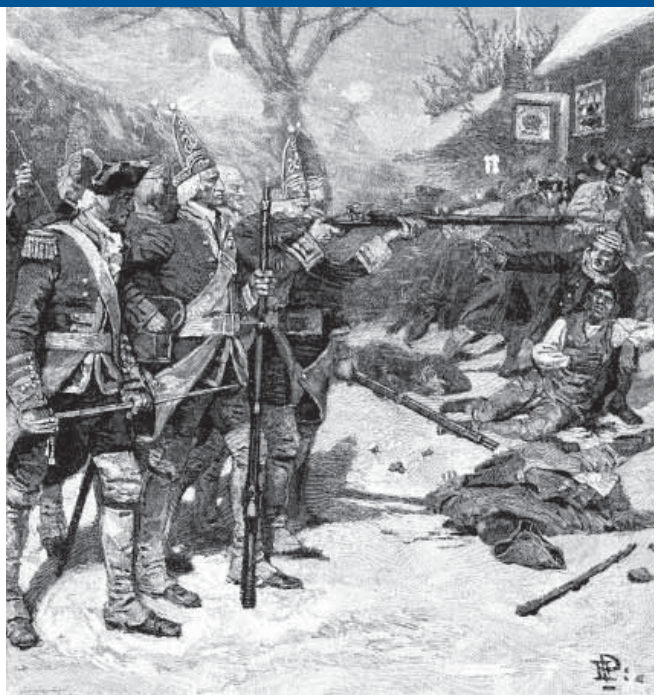

DEPARTMENTS

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DAVID M. SCHRAVER

Serving the Profession Through Technology

We all know that the legal profession is changing rapidly, and one of the forces driving that change is technology. As attorneys, sometimes we think of technology as a blessing; sometimes as a curse. But it is a fact of life – in both our personal and professional lives. Whatever our comfort level may be as consumers or users, we need to understand the changes, opportunities and challenges that technology presents.

One of the key priorities in our Association's strategic plan is to use technology to communicate more effectively with members and prospective members, and increase the overall value of membership in the Association. Since the strategic plan was adopted in 2011, we have hired a new Chief Technology Officer, Dave Adkins. Our Electronic Communications Committee, under co-chairs Mark Gorgos (Coughlin & Gerhart) and Gail Johnston (Cahill Gordon & Reindel), has been actively working with Dave and our Information Services Department to implement the plan. We have made significant investments in technology, and I would like to share these developments with you

New Website Design

This fall, we will unveil a new and completely redesigned NYSBA website. The Electronic Communications Committee was instrumental in guiding the new website design, which will offer a clean, intuitive interface and improved navigation – every part of the NYSBA website will be accessible from the home page. The new home page will feature a display area near the top of the page to promote events, alert users to crisis response initiatives (such as last year's response to Superstorm Sandy), and highlight NYSBA's products, programs and services. The site will feature a new "Members Only" area that will gather all members-only benefits and resources under one heading to make it easier to take full advantage of NYSBA membership. Another area on the home page, called "By Members, For Members," will link to a collection of substantive contributions of members such as reports, blog posts and articles from many publications. In addition, the new website will automatically recognize the device being used to access the site and provide an optimized view for that phone, tablet or web browser.

Content Management System

The new website will feature a new content management system (CMS) – the software that allows the creation, modification and publication of various types of content such as web pages and documents. The new CMS offers an entirely new shopping cart experience for those who purchase products or register for programs or events online, helping to connect users with other products and events that might be of interest. It will also include an online calendar that will provide filters to view CLE, Section or all NYSBA events, in addition to the standard grid or list view.

Private Online Professional Communities

A private online professional community is an interactive online space designed to encourage engagement and participation from a defined group of users (e.g., organized by practice area, geography, or other affinity group). These communities offer opportunities for discussion, connection and collaboration, and foster deeper relationships and a greater sense of belonging among members. They will enable the Association to move beyond listserves and create a long-term searchable knowledge database. Users will be able to sign up for email updates and customize the frequency with which they are received. The communities will be private, focused and secure; and there will be a mobile app for tablets and smartphones.

eLAP Update

In March, a new electronic Lawyer Assistance Program website – or eLAP – debuted. The site features self-help readings on a variety of topics ranging from substance abuse and depression to wellness and time management. No login is required to access the materials, and access to confidential and anonymous individual counseling is available through the use of a special email address on the site.

DAVID M. SCHRAVER can be reached at dschraver@nysba.org.

PRESIDENT'S MESSAGE

Electronic Publishing

Moving forward, we are investigating various electronic publishing solutions to provide e-book versions of legal reference and monograph titles, as well as e-versions of newsletters, journals and other publications. We are looking into such options as electronic delivery via a web browser on your desktop, mobile-friendly formats and delivery through an app that will collect publications on a virtual bookshelf for offline viewing.

Continuing Legal Education

The use of technology continues to be central to the Association's delivery of excellent continuing legal education (CLE) programming to attorneys throughout New York State and beyond. Through videoconferencing, live webcasts, and an extensive digital media library of recorded CLE products, our Committee on Continuing Legal Education and the CLE Department provide high-quality educational resources in multiple convenient and user-friendly formats. In June, we were pleased to learn that the CLE Department was the recipient of the Association for Continuing Legal Education's 2013 Award of Professional Excellence in the Public Interest, in recognition of the program "Providing Legal Assistance to Persons Affected by Superstorm Sandy." That program was coordinated by the CLE and Pro Bono Departments in the weeks following the storm and drew more than 2,000 participants, most of whom viewed the program as a live webcast from our website.

I hope you will find all of these developments exciting, interesting and valuable to your practice and your membership in the New York State Bar Association. Please feel free to share your thoughts and experiences with me. ■

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Tentative Schedule of Upcoming Programs *(Subject to Change)*

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Marriage Equality Update
(9:00 a.m. – 1:00 p.m.)
September 16 New York City

Henry Miller
September 17 Albany
October 10 Long Island
October 29 New York City (live and webcast)

Bridging the Gap
October 1–2 New York City (live program)
Albany; Buffalo
(videoconference from NYC)

The Brave New World of Open Government
Live and Webcast (9:00 a.m. – 1:00 p.m)
October 2 Albany

Gain the Edge
October 9 Albany
October 10 New York City

Practical Skills: Basic Matrimonial Practice
October 16 Buffalo; Long Island
October 17 Westchester
October 18 Syracuse
October 21 Albany; New York City

Women on the Move
October 17 Albany

Tax Aspects of Real Property Transactions
(9:00 a.m. – 1:00 p.m.)
October 22 Long Island
October 23 Albany
October 24 New York City
November 6 Albany
November 14 Westchester

Appellate Practice
October 25 Long Island
October 29 Rochester
November 21 New York City

Matrimonial Trial Institute IV
October 25 Buffalo
November 1 Long Island
November 15 Syracuse

Special Education
November 1 Buffalo
November 6 Long Island; Westchester
November 20 Syracuse
November 22 Albany
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November 14 New York City

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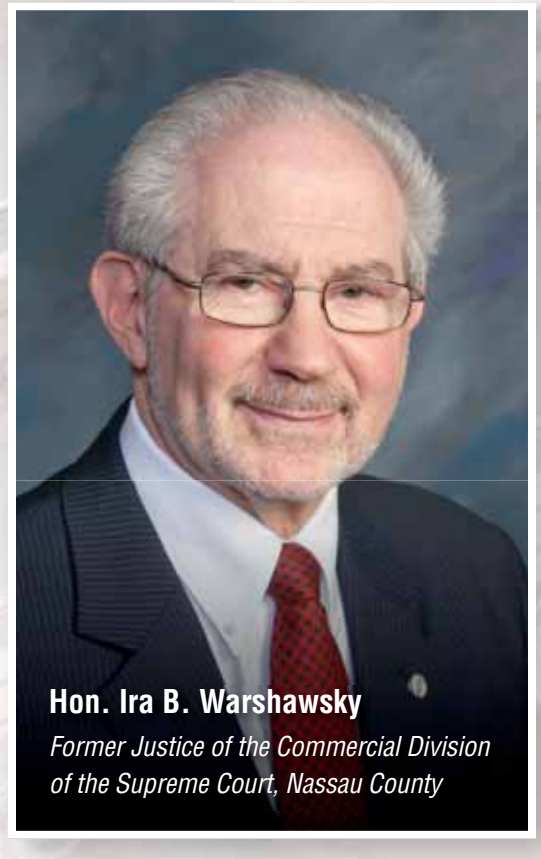

Hon. Ira B. Warshawsky
Former Justice of the Commercial Division of the Supreme Court, Nassau County

Judge Warshawsky has been a distinguished member of the New York judiciary for the past 25 years. He was a New York Supreme Court Justice in Nassau County's Commercial Division from 2002 until his retirement in 2011. He presided over all manners of business claims and disputes, including business valuation proceedings, corporate and partnership disputes, class actions and complex commercial cases. Immediately prior to this appointment, Judge Warshawsky handled general litigation, including products liability, from 1998 to 2002. Prior to that, he sat in the Nassau County District Court for ten years, from 1987 to 1997, presiding over a wide variety of matters.

According to the 2009/2010 New York Judge Reviews, Judge Warshawsky has been praised for keeping a "calm" demeanor, even during highly charged, high-profile cases. Lawyers interviewed described him as "one of the hardest working, intelligent, even-handed judges, who has a very good sense of justice." He has been described as a "top-notch judge" who is known for encouraging settlement negotiations without being overly aggressive. One attorney stated, "Judge Warshawsky is one of the best judges I have ever appeared before in the nation."

Judge Warshawsky is available to hear cases in any of NAM's offices throughout the New York Metropolitan area.

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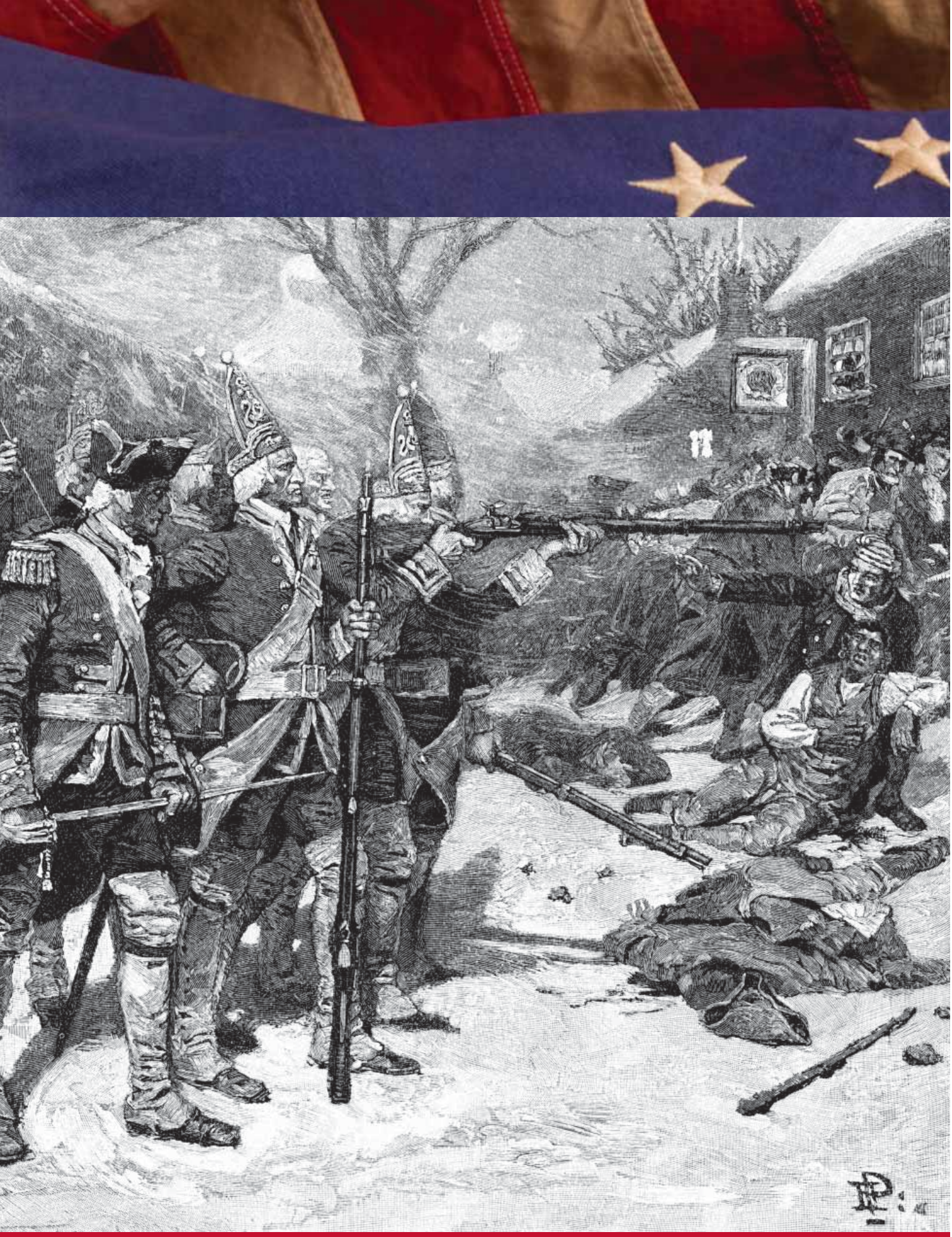
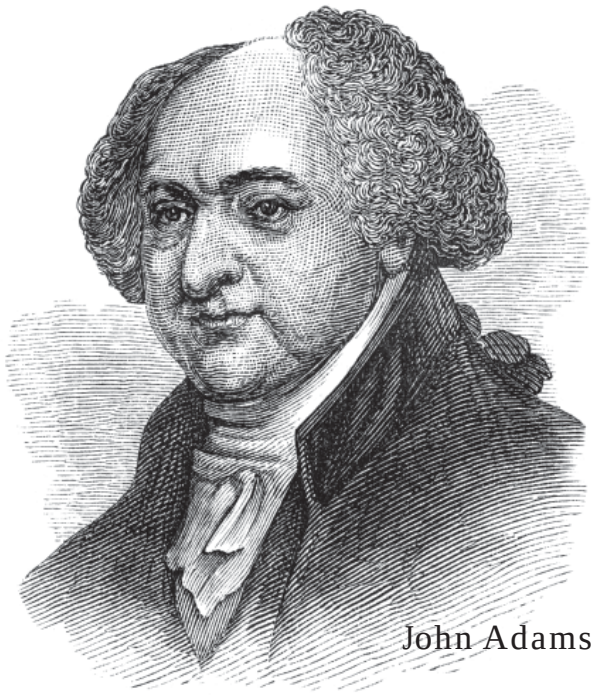


The Boston Massacre Trials

By John F. Tobin



John Adams

Within minutes after British soldiers fired into a crowd of civilians on King Street in Boston the night of March 5, 1770, the event was touted as a "massacre." The label has stuck to this day, almost two and a half centuries later, making it one of the most successful propaganda coups in American history.

However, what actually happened that night was a far cry from a massacre, and could be more accurately described as a "riot." It would require two trials in a court of law to sort the facts and uncover the truth – at least to the extent that any trial can reveal the truth. But although most Americans have at least a vague notion of what transpired that night, few even know that trials took place, much less what occurred at them. If they did, they would surely view the shooting in a very different light.

The Shooting

Between October 1768 and March 1770, steadily increasing tension between the townspeople of Boston and the soldiers garrisoned there set the stage for what took place on March 5. But what happened during the days and hours immediately preceding the shooting were the sparks that set off the explosion.

On March 2 an employee of a rope-making business yelled out to a passing soldier, "Do you want work?" When the soldier said he did, the employee replied, "Well, then, go and clean my shit house." That did not sit well with the soldier, who returned later with other soldiers, and they brawled with the rope-makers.[1]

Then, early in the evening of March 5, a British officer, Captain John Goldfinch, was walking on King Street when he was accosted by a wig-maker's apprentice, Edward Garrick, who accused Goldfinch of not paying the wig-maker's master's bill for dressing his hair. Goldfinch ignored him and continued on, and Garrick loudly repeated the accusation to passersby. This was overheard by Private Hugh White, who was on sentry duty near the Custom House. When White confronted Garrick, telling him that Goldfinch was a gentleman and would pay his bill if he had not already, Garrick responded, "There are no gentlemen in that regiment." Angry words were exchanged, culminating in White's striking Garrick in the head with his musket, knocking him to the ground.[2]

This altercation soon attracted an angry, unruly crowd, consisting at first mostly of young boys, who began taunting White and throwing chunks of ice at him. Fearing for his safety, White left the sentry box, moved to the Custom House steps, loaded his musket, and called for the main guard to come to his aid.

John F. Tobin (jtob@co.ulster.ny.us) has been engaged in the practice of law for 30 years, handling both civil and criminal cases. He is currently the Chief Assistant District Attorney for the County of Ulster. He spends much of his spare time in the study of American history, particularly famous criminal cases.

The bell of the nearby Old Brick Church began to toll, the usual summons to fight a fire, which drew more and more people into King Street. The crowd, now consisting mostly of men, swelled to more than 300 strong, many of them brandishing sticks. They were spoiling for a fight.

At this point Captain Thomas Preston, the officer on duty, led seven soldiers, lined up in two columns, through the crowd to the beleaguered sentry. Their muskets were shouldered and unloaded, but their bayonets were fixed. Preston attempted to march his men back to the main guard, but the crowd hemmed them in, whereupon the soldiers loaded their muskets and formed up into a semi-circle facing the crowd.[3]

> "The law shall have its course. I will live and die by the law."

It was a little after 9:00 p.m. The air was chilly, the sky was cloudless, and the ground heavily mantled with snow. Though Boston did not then have street lamps, the area was somewhat illuminated by a first-quarter moon.[4]

As Preston, standing in front of the soldiers, called upon the crowd to disperse, many of them drew closer and pelted the soldiers with snowballs, chunks of ice, and sticks, taunting and daring them to fire their muskets.

Then one of the soldiers, Private Hugh Montgomery, was struck by a club thrown by a member of the crowd, causing him to fall to the ground and drop his musket.

What happened next can never be determined with any certainty and was the focus of the evidence presented at the trials, but what we do know for sure is that someone yelled "fire," most of the soldiers then discharged their muskets into the crowd, and 11 men were struck by the bullets. Three died at once, one died a few hours later, one died a few days later, and six survived their wounds.

Arrests and Incarceration

When Thomas Hutchinson, then Lieutenant Governor and Acting Governor of Massachusetts, learned of the shootings, he hurried to King Street where he was confronted by an angry crowd and various members of the Town Council, all demanding that he take swift action against the soldiers or face the prospect of an immediate uprising. After speaking with an unnerved Captain Preston and getting his account of what occurred, Hutchinson stepped out onto the balcony of the Town House, where the Council's chambers were located and which overlooked the scene of the shootings, and assured the gathered crowd that justice would be done, stating, "[t]he law shall have its course. I will live and die by the law."[5]

Two Justices of the Peace, summoned to the Council chamber shortly thereafter, interviewed a number of witnesses who swore that Captain Preston had ordered the soldiers to fire into the crowd and had even complained that they had not done so sooner. Concluding there was probable cause to believe that Preston and the soldiers had committed crimes, the Justices issued a warrant for Preston's arrest; he was taken into custody at about 2:00 a.m. on March 6. At about 3:00 a.m., after some interrogation by the Justices, Preston was remanded to jail. The next morning the soldiers surrendered to the authorities and were likewise remanded to jail.[6]

Indictments

On March 13, Jonathan Sewall, the Attorney General, presented the Crown's case to the grand jury, which handed up indictments charging Preston and the soldiers with murder. But it was not until September 7 that they were arraigned on the indictments; all of them pled not guilty.

Legal Representation

When the shootings occurred, Captain Preston, an Irishman, was 40 years old, had served in the army for 15 years, and was well liked in Boston, even by the radicals. Nonetheless, as he sat in jail the morning of March 6, he understood that he was in need of legal representation.

At the behest of Captain Preston, James Forrest, a loyalist merchant, appeared that day at the office of John Adams and tearfully implored him to represent Preston and the soldiers.[7] Although he realized he would be vilified by the town's inhabitants and the press, thus jeopardizing his thriving legal practice, Adams, then a 34-year-old lawyer, immediately agreed to do so, firm in his belief that all persons accused of a crime were entitled to an effective legal defense.

Some months later, contemplating the upcoming trials, Adams would quote in his diary the following passage from Beccaria, the renowned Italian penologist and opponent of capital punishment: "If, by supporting the rights of mankind and of invincible truth I shall contribute to save from the agonies of death one unfortunate victim of tyranny or of ignorance, equally fatal, his blessing and tears of transport will be a sufficient consolation to me for the contempt of all mankind."[8] He reiterated this quotation in the closing statements he delivered at the trials.

Word spread through Boston like wildfire. Within days of agreeing to defend Preston and the soldiers, rocks were thrown through the windows of Adams's home and he was jeered by passersby on the streets. Josiah Quincy Jr., a lawyer who had agreed to team up with Adams in the defense of Preston and the soldiers, and lawyer Robert Auchmuty, who had agreed to team up with Adams in the defense of Preston only, were likewise subjected to criticism and ridicule.[9]

Though no record has been found that it was of much concern to them, Adams and Quincy must have realized at the outset that they had a conflict of interest. Captain

Preston and the soldiers had been charged with murder, and at that time soldiers were just as entitled as civilians to assert what we today would call the defense of justification – that is, they were justified in using deadly physical force against the crowd because they had reason to believe the crowd was about to use deadly physical force against them. The only question the jury would have to decide was a factual one: Did Preston and / or the soldiers have *reason* to believe the crowd was about to use such force against them? If the jury concluded that they did, they were required by law to return a verdict of not guilty on the charge of murder.[10]

But here's the rub: Before any of the defendants would find it necessary to raise that defense at trial, the Crown would have to prove that he either killed one or more of the victims himself or, if he was Captain Preston, that he had ordered the shooting. Accordingly, it was apparent that Captain Preston would likely contend that the shootings were justified and / or that he had not ordered his men to fire, while it was equally apparent that the soldiers would likely contend that the shootings were justified and / or that Captain Preston ordered them to fire and they had merely followed his order to do so. After all, they could have been executed for not obeying such an order.[11]

Even if this conflict of interest was not of much concern to their lawyers, it certainly was to the soldiers. Learning that the court was contemplating conducting a trial of Preston alone to be followed by a separate trial of the soldiers, and recognizing the danger to them should the jury in Preston's trial conclude he had not ordered them to fire, the soldiers petitioned the court not to sever the cases. But their petition was to no avail – the cases were severed and Preston's trial was scheduled to precede theirs.[12]

Under today's ethical standards, at least in the United States, Adams and Quincy would be obligated to make a choice between representing Preston or the soldiers, and if they chose the soldiers over Preston, they would further be obligated to choose just one of the soldiers. But they were not as sensitive to such matters in those days, so Adams and Quincy proceeded nonetheless to represent both Preston and all the soldiers.

Propaganda and Spin Control

The first trial, that of Captain Preston, would not begin until October 24, 1770, more than seven months after he and the soldiers were arrested and incarcerated. While such a gap would be the norm in criminal cases today, it was highly unusual at that time, when criminal trials almost invariably took place less than a month after the defendant was arrested. So why the delay, and what was going on during those seven months?

Both the radicals, led primarily by Samuel Adams, and the loyalists, led primarily by Thomas Hutchinson, recognized that Preston and the soldiers stood

little chance of being acquitted while the town's passions remained inflamed. Consequently, the radicals did everything in their power to move the case immediately to trial. To that end, shortly after the shooting, Sam Adams convened a meeting of the town's inhabitants that continued throughout March and April, during which he relentlessly pressured Hutchinson and the judges to schedule the trial without delay. When on March 14 two of the judges, claiming illness, announced that the trial would be put off until the month of June, Sam Adams and his cohorts marched into the courtroom and scolded them about it. They did so again in May, this time threatening to withhold the judges' salaries if they did not comply with their demand.[13]

But Hutchinson was equally determined to put off the trial as long as possible and also besieged the judges in that regard, persuading them to adjourn the case repeatedly and ultimately until their next term, scheduled to begin in the fall.

The radicals and the loyalists maneuvered from the outset to accomplish their aims by propaganda and spin control, and it seems that no device was beneath them.

Within a few days after the shootings, the artist Henry Pelham prepared a drawing purporting to depict the event. It shows the soldiers standing in a straight line, not in a semi-circle as was actually the case; discharging their muskets like a firing squad, not at random as was actually the case; and Captain Preston standing behind them with his sword raised, not in front of them with his sword sheathed, as was actually the case. Paul Revere somehow got hold of the drawing; colored, engraved, and printed it; and distributed it far and wide, without Pelham's permission and without attributing it to him.[14] It instantly became a rallying point for the radicals and stands to this day as one of the most enduring and best-known works of pictorial propaganda.

Orchestrated by Sam Adams, depositions were taken from 96 people who claimed to be eyewitnesses to the shooting, almost all of them unfavorable to Captain Preston and the soldiers. The depositions were then published and distributed throughout the province under the title "A Short Narrative of the Horrid Massacre in Boston." Not to be outdone, John Adams and Josiah Quincy, assisted by Thomas Hutchinson and General Thomas Gage, commander-in-chief of all British troops in North America who was then in New York, obtained depositions from dozens of people who likewise claimed to be eyewitnesses, most of them favorable to Captain Preston and the soldiers and decidedly unfavorable to the mob the soldiers confronted that night. The contents of these depositions were leaked to the press and the public.[15]

Captain Preston's Trial

The trial of Captain Preston began on October 24 and ended on October 30, 1770, the first time in the history of Massachusetts that a criminal trial took longer than one day.[16] Indeed, on average, the Superior Court of Suffolk County disposed of as many as six jury trials in a day.[17] Preston's trial was conducted in a courtroom on the second floor of the courthouse on Queen Street, built in 1769; it is believed to have been attended each day by at least 60 spectators.[18]

The trial was presided over by Acting Chief Justice Benjamin Lynde, Jr., and Justices Edmund Trowbridge, John Cushing, and Peter Oliver. Thomas Hutchinson was actually the chief justice of the court, but for obvious reasons he declined to preside at the trial.

The Crown was represented by Robert Treat Paine, a longtime legal rival of John Adams and a radical, and Solicitor-General Samuel Quincy, the older brother of defense lawyer Josiah Quincy and a loyalist. The former was a special prosecutor of sorts, having been appointed to replace Jonathan Sewall, the attorney general who had obtained the indictments, who for unclear reasons had bowed out of the case and practically disappeared.[19]

The first order of business was the selection of the jury, then called the "venire." It appears that the Crown was not permitted to challenge any of the jurors who had been summoned. But the defense successfully challenged most of them, thus exhausting the panel.[20]

In accordance with the practice of that day, still followed in New York and in many other states, the sheriff simply conscripted the needed number of jurors, called then and now "talesmen," from among the bystanders in the courtroom and in the vicinity of the courthouse at the time. When additional defense challenges had been dealt with, the resulting jury consisted mostly of avowed loyalists, who for that reason alone, coupled with remarks they had made to others in advance of the trial, could be counted on to give Preston the benefit of any doubt. Indeed, it is not a stretch to say that the outcome of the trial was decided at that moment.[21]

The jury was confined and guarded overnight throughout the trial in the home of the jail keeper, not to prevent them from being prejudiced by exposure to news reports and other publicity about the case, but because the law then dictated that once a jury was sworn, it must be sequestered until a verdict was reached. They were provided with bedding and three meals a day, which included a variety of alcoholic beverages.[22]

Following an opening statement by Samuel Quincy, the Crown called 20 witnesses over the next two days to testify against Captain Preston. To a great extent their testimony was contradictory as to the conduct of the crowd just before the shooting, what Preston was wearing, where he was standing in relation to the soldiers, whether anyone shouted the word "fire," and, if so, whether it was Preston, one or more of the soldiers, and/or one or more members of the crowd who did so. The defense had a field day with them on cross-examination, eliciting testimony from some that ended up being more favorable to the defense than to the prosecution. After

quoting from various legal treatises to educate the jury on the applicable laws, Samuel Quincy announced that the Crown rested its case.[23]

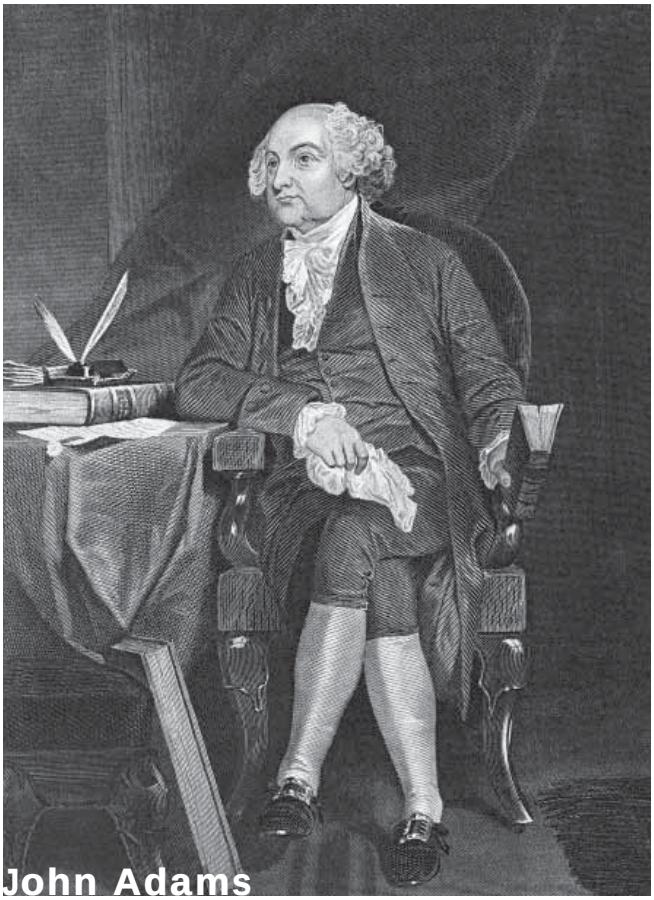
John Adams then delivered his opening statement. The defense called 25 witnesses over the next three days to testify on behalf of Captain Preston, including Thomas Hutchinson. Not surprisingly, their testimony supported Preston's contention that he and the soldiers had good reason to believe their lives were in imminent danger from the crowd and that, in any event, he did not order the men to fire. Unlike the testimony of the Crown's witnesses, their testimony was largely consistent and did not suffer much damage on cross-examination by the Crown's lawyers.[24]

Captain Preston did not testify at his trial, not because he invoked his right against self-incrimination, but because the rules of evidence in effect then prohibited the defendant in a criminal case from doing so, the theory being that, with so obvious a vested interest in the outcome, his credibility would be worthless. And although they were legally eligible to testify at Preston's trial, none of the soldiers were called by either the Crown or the defense. Of course, had they been called to testify, they could, certainly should, and probably would have refused to do so, invoking their right against self-incrimination.[25] Just imagine the ethical quandary John Adams and the other members of the defense team would have found themselves in if any of the soldiers were called by the Crown to testify at Preston's trial.

When the court reconvened on Saturday, October 27, the defense rested, and Adams and then Auchmuty delivered their closing statements. Adams dismantled the unfavorable testimony given by the Crown's witnesses, highlighted the favorable testimony given by the defense's witnesses and even some of the prosecution's witnesses, and lucidly explained the law of self-defense to the jury. Auchmuty's closing statement was much briefer, dealt almost exclusively with the law as opposed to the facts, and was generally thought to be much less eloquent. Josiah Quincy, though present throughout the trial, seems not to have participated in the questioning of the witnesses or the making of opening and closing statements.[26]

On Monday, October 29, it was Robert Treat Paine's turn, on behalf of the Crown, to deliver a closing statement. But Adams's closing was a tough act to follow, and Paine was simply not up to the task. His closing seems to have made little impression on the jury or, for that matter, anyone else in the courtroom.[27]

When Paine finished, the judges, each in turn, spent a total of four hours that afternoon charging the jury on the applicable law. They also gave their own analysis of the merits of the case, something that judges today are not permitted to do in New York or, to my knowledge, in any other state. Finishing at about 5:00 p.m., the judges directed the jury to retire to their deliberations.[28]


John Adams

Although the jury reached a verdict within three hours, they had to wait until the court reconvened at 8:00 a.m. the next day, October 30, before it could be announced. They found Captain Preston not guilty and he was immediately released from jail, from which he repaired to the relative safety of Castle William, the island fortress located in Boston harbor to which the 29th Regiment had been removed shortly after the shooting. There he set about the task of assisting the soldiers in their defense and preparing to defend himself against civil suits for damages reportedly being brought by the surviving victims of the shooting and the families of those who did not survive.[29]

No complete transcript of Captain Preston's trial, if one was made, has been found. Our knowledge of what occurred at the trial is based upon the various summaries of it prepared by the participants, but in recounting the testimony of the witnesses they did not distinguish between direct and cross-examination.[30]

The Soldiers' Trial

The soldiers' trial began on November 27 and ended on December 5, 1770. It was conducted in the same courtroom as Preston's trial and presided over by the same four judges, with Benjamin Lynde, Jr. again presiding. The Crown was still represented by Robert Treat Paine and Samuel Quincy.[31]

But the composition of the defense team had changed in the interim. Auchmuty had not been retained to represent the soldiers. His place was taken by Sampson Salter Bowers, whose task would be largely that of vetting the prospective jurors which, as will be seen, he performed rather well. John Adams became the senior member of the team, but this time Josiah Quincy would cross-examine the Crown's witnesses and conduct the direct examination of the defense's witnesses.[32]

Incredibly enough, the soldiers almost ended up with the same jury panel that had initially been assembled for Preston's trial, but the judges, thinking better of it, instead arranged for the drawing of a new panel. As in Preston's trial, the panel was exhausted during jury selection, making it necessary, once again, to pull in talesmen. But when the process was completed, not one of the jurors was from Boston, a coup for the defense. This jury, too, was sequestered and guarded throughout the trial.[33]

Captain Preston did not testify at his trial, because the rules of evidence prohibited him from doing so.

Following an opening statement by Samuel Quincy, the Crown called 16 witnesses over the next three days, the first being John Adams's own law clerk. Most of the witnesses testified about the various clashes between soldiers and civilians that took place in Boston during the days leading up to March 5 and the shooting. The most damning testimony was that of Samuel Hemmingway, who discussed a conversation he had with Private Matthew Kilroy one or two weeks before the shootings. Kilroy, already fingered by another prosecution witness as being the soldier who shot John Gray, had said that "he would never miss an opportunity, when he had one, to fire on the inhabitants, and that he had wanted to have an opportunity ever since he landed."[34]

The testimony of the prosecution witnesses having been concluded, Samuel Quincy presented his summary and analysis of the facts and applicable law and rested the Crown's case. His brother Josiah, on behalf of the defense, then delivered a lengthy opening statement in which he likewise discussed the applicable law and dissected the testimony given by the Crown's witnesses.[35]

Over the next three days the defense called some 30 witnesses to testify, including Josiah Quincy's own law clerk and Henry Knox, most of whom gave accounts supporting the contention that the soldiers fired in self-defense. The high point, though, was the testimony given by Dr. John Jeffries, the surgeon who treated Patrick Carr, one of the mortally wounded victims of the shooting:

> I asked him [meaning Carr] whether he thought the soldiers would fire. He told me he thought the soldiers would have fired long before. I then asked him whether he thought the soldiers were abused a great deal after they went down there. He said he thought they were. I asked him whether he thought the soldiers would have been hurt if they had not fired. He said he really thought they would, for he heard many voices cry out "kill them." I asked him then, meaning to close all, whether he thought they fired in self-defense or on purpose to destroy the people. He said he really thought they did fire to defend themselves; that he did not blame the man, whoever he was, that shot him.[36]

The defense rested, after which the Crown called two rebuttal witnesses. The proof was finally closed, and the case was adjourned for the weekend.[37]

When the trial resumed on Monday morning, Josiah Quincy delivered his closing statement for the defense. It was not as effective as his summation following the testimony of the Crown's witnesses, nor as eloquent and memorable as the closing statement made immediately after by John Adams.[38]

After a lengthy speech, during which he marshaled the evidence, expounded on the applicable law, and squarely addressed the politics of the case, Adams finished with the following remarks on self-defense, destined to become famous:

> Facts are stubborn things. And whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence. Nor is the law less stable than the fact. If an assault was made to endanger their lives, the law is clear – they had a right to kill in their own defense. If it was not so severe as to endanger their lives, yet if they were assaulted at all, struck and abused by blows of any sort, by snow balls, oyster shells, cinders, clubs, or sticks of any kind, this was a provocation, for which the law reduces the offense of killing down to manslaughter, in consideration of those passions in our nature which cannot be eradicated. To your candour and justice I submit the prisoners and their cause.[39]

In response to the closing statements of Quincy and Adams, Robert Treat Paine delivered a weak and rather lackluster one on behalf of the Crown. Then, over the next three-and-a-half hours, addressing the jury, the judges, each in turn, summed up and commented on the evidence and instructed them on the applicable law. Justice Trowbridge told them that "malice is the grand criterion that distinguishes murder from all other homicides." Justice Oliver, commenting on Patrick Carr's dying declaration to Dr. Jeffries, said, "Carr was not upon oath, it is true, but you will determine whether a man just stepping into eternity is not to be believed, especially in favor of a set of men by whom he had lost his life."[40]

On December 5 the jury was charged and in less than three hours came in with their verdict. They found six of the soldiers not guilty of any crime, but they found Hugh Montgomery and Matthew Kilroy guilty of manslaughter, likely because there was little doubt that they, at least, had fired into the crowd.[41]

At this point it is worth noting that Governor Hutchinson, before the trials began, had received instructions from the ministry in England to grant a reprieve to Preston and the soldiers if they were convicted until an actual pardon was eventually obtained from the King. News of this had reached Boston in advance of the trials and created quite a stir.[42]

The six soldiers who had been acquitted were immediately released from custody. Captain Preston sailed for England the next day, never to return. Montgomery and Kilroy, on the other hand, were remanded to jail to await their sentencing on December 14. They were facing the possibility of death, manslaughter being a capital offense. But when they appeared in court that day and were asked why they should not be sentenced to death, they invoked what was called the "benefit of clergy," which spared their lives. Benefit of clergy could be claimed only once in a person's lifetime. The price they had to pay for it was gruesome – as John Adams and others looked on, the sheriff branded each of the soldiers on the right thumb to ensure that they would never again invoke the benefit of clergy. They were then released from custody and soon rejoined their regiment, now in New Jersey.[43]

Private Hugh Montgomery, just before leaving Boston to rejoin his regiment, disclosed to John Adams that it was he, not Captain Preston, who urged the soldiers to fire.[44]

The soldiers' trial was transcribed by John Hodgson, who was not a trained or experienced court reporter but merely someone who could take shorthand. His transcription was published, but its accuracy and completeness are doubtful.[45]

Many who attended the trials, both those of radical and those of loyalist tendencies, agreed that the conduct of the proceedings and all persons in the courtroom was consistently orderly and decorous.[46]

John Adams's Reflections

There is little evidence that the reputation or livelihood of John Adams suffered as a result of his defense of Preston and the soldiers. Indeed, he was elected to the House of Representatives from Boston in June 1770, and his stellar career in government service thereafter is well known to all of us. He handled his last case in December 1777, immediately after which he replaced Silas Deane as a member of the American Commission in Paris.

Although he kept a diary throughout his life, John Adams recorded in it few of his thoughts concerning the two trials. But many years later, in his own retirement, Adams had this to say:

> The part I took in defense of Captain Preston and the soldiers procured me anxiety and obloquy enough. It was, however, one of the most gallant, generous, manly, and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country. Judgment of death against those soldiers would have been as foul a stain upon this country as the executions of the Quakers or witches anciently. As the evidence was, the verdict of the jury was exactly right.[47]

1. Hiller B. Zobel, The Boston Massacre 182 (N.Y.: Norton, 1971) (Zobel).
2. *Id.*, pp. 185–86.
3. *Id.*, pp. 194–95.
4. *Id.*, p. 184.
5. *Id.*, p. 203.
6. *Id.*, pp. 204–205.
7. Diary and Autobiography of John Adams, 4 Vols. 3:292–3:293 (L.H. Butterfield et al., eds. Cambridge, Mass.: Harvard Univ. Press, 1961).
8. Diary 1:350–1:351n.
9. Thomas J. Fleming, *Verdicts of History 1: The Boston Massacre*, Am. Heritage Mag. 18.1 (1966), p. 2 (Fleming).
10. Zobel, p. 197.
11. *Id.*, pp. 241–42.
12. *Id.*, pp. 242–43.
13. Fleming, *supra* note 9, p. 3.
14. Zobel, p. 211.
15. *Id.*, pp. 210–14.
16. *Id.*, p. 248.
17. Legal Papers of John Adams. 3 Vols. 1:xlviii–1:xlix (L. Kinvin Wroth et al., eds. Cambridge, Mass.: Belknap Press, 1965) (Legal Papers).
18. Zobel, pp. 247–48.
19. *Id.*, p. 219.
20. *Id.*, pp. 244–45.
21. Legal Papers 3:17–3:19; Zobel, pp. 244–46.
22. Legal Papers 3:21; Zobel p. 250; Hiller B. Zobel, *The Jury on Trial*, Am. Heritage Mag. 46.4 (1995), p. 6.
23. Legal Papers 3:50–3:62; Zobel, pp. 248–54.
24. Legal Papers 3:62–3:81; Zobel, pp. 254–60.
25. Zobel, pp. 254–55.
26. Legal Papers 3:81–3:89; Zobel, pp. 260–64.
27. Legal Papers 3:90–3:93; Zobel, p. 264.
28. Legal Papers 3:93–3:98; Zobel, pp. 264–65.
29. Legal Papers 3:22–3:24; Zobel, pp. 265–66.
30. Legal Papers 3:20–3:21; Zobel, pp. 248–49.
31. Legal Papers 3:24; Zobel, pp. 268–69.
32. Zobel, p. 268.
33. *Id.*, pp. 269–71.
34. Legal Papers 3:101–3:144; Zobel, pp. 271–76.
35. Legal Papers 3:144–3:169; Zobel, pp. 276–81.
36. Legal Papers 3:169–3:226; Zobel, pp. 281–87.
37. Zobel, p. 287.
38. Legal Papers 3:226–3:241; Zobel, pp. 287–89.
39. Legal Papers 3:242–3:270; Zobel, pp. 289–93.
40. Legal Papers 3:270–3:312; Zobel, pp. 293–94.
41. Legal Papers 3:312–3:314; Zobel, p. 294.
42. Legal Papers 3:13–3:14.
43. Legal Papers 3:29–3:31; Zobel, pp. 294–98.
44. Zobel, p. 300.
45. Zobel, p. 270.
46. Legal Papers 1:xxix.
47. Zobel, p. 302.

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Sweat the Small Stuff

Introduction

I like to think of myself as a "big picture" kind of guy, never lost in the trees, always able to see the forest. I also like to think of myself as highly evolved, aided in this evolution by heavy doses of self-help palaver. A personal favorite: "Don't sweat the small stuff."

While this combination of qualities helps make me a thoughtful, easygoing fellow (just ask my sons), the combination can have dangerous repercussions in my professional life. Danger lurks behind many of those trees, and the small stuff can be deadly. Reading the Court of Appeals decision in *Galetta v. Galetta*,[1] it is clear that the lawyer's touchstone should be: "Sweat the small stuff."

In *Galetta*, a prospective bride and groom executed a prenuptial agreement shortly before their wedding. Each signed the agreement, and each signature was notarized. In the litigation that ensued after the husband filed for divorce, the wife sought to set aside the prenuptial agreement. It was undisputed that both parties' signatures on the document were authentic, and that the agreement, prepared by the husband's attorney (the wife elected not to be represented by counsel), was not procured by fraud or duress.[2] What possible basis could there be for setting the agreement aside?

Oops!

While the signatures on the prenuptial agreement were on a single page, the parties had executed the agreement at different times, before different notaries, and neither was present when the other executed the document.[3] Up to this point, the execution was not subject to attack. The Court of Appeals zeroed in on the certificates of acknowledgement that accompanied each signature:

> The certificates appear to have been typed at the same time, with spaces left blank for dates and signatures that were to be filled in by hand. The certificate of acknowledgment relating to [the wife's] signature contains the boilerplate language typical of the time. However, in the acknowledgment relating to [the husband's] signature, a key phrase was omitted and, as a result, the certificate fails to indicate that the notary public confirmed the identity of the person executing the document or that the person was the individual described in the document. The record does not reveal how this error occurred and apparently no one noticed the omission until the issue was raised in this litigation.[4]

Domestic Relations Law § 236(B)(3)[5] (DRL) requires that prenuptial agreements be executed with the same formality as a recorded deed,[6] and the certificate of acknowledgment accompanying the husband's signature did not comply with the requirements of the Real Property Law (RPL).[7] It was upon this error that the wife sought a declaration that the agreement was unenforceable.

The husband argued that the agreement was enforceable because "the acknowledgment substantially complied with the Real Property Law":[8]

> [The husband] submitted an affidavit from the notary public who had witnessed his signature in 1997 and executed the certificate of acknowledgment. The notary, an employee of a local bank where the husband then did business, averred that it was his custom and practice, prior to acknowledging a signature, to confirm the identity of the signer and assure that the signer was the person named in the document. He stated in the affidavit that he presumed he had followed that practice before acknowledging the husband's signature.[9]

The trial court denied the wife's motion for summary judgment, finding that the "acknowledgment of the husband's signature substantially complied with the requirements of the Real Property Law."[10] On appeal, three justices of the Fourth Department affirmed, but upon a different rationale, holding "that the certificate of acknowledgment was defective but . . . that the deficiency could be cured after the fact and that the notary public affidavit raised a triable question of fact as to whether the prenuptial agreement had been properly acknowledged when it was signed in 1997."[11]

The two dissenters, believing first that the husband's argument was unpreserved, would have granted summary judgment to the wife, "declaring the prenuptial agreement to be invalid because the acknowledgment was fatally defective."[12]

No Cure From the Court of Appeals

A unanimous Court of Appeals[13] reversed, determining that the wife "was entitled to summary judgment declaring the prenuptial agreement to be unenforceable."[14] The Court first examined the language of DRL § 236(B)(3) and reviewed its 1997 decision in *Matisoff v. Dobi*,[15] where the Court held that an unacknowledged prenuptial agreement was invalid.

The Court next examined the acknowledgement procedure set forth in RPL § 291, the procedure DRL § 236(B)(3) requires for proper execution:

> Real Property Law § 291, governing the recording of deeds, states that "[a] conveyance of real property . . . on being duly acknowledged by the person executing the same, or proved as required by this chapter, . . . may be recorded in the office of the clerk of the county where such real property is situated." Thus, a deed may be recorded if it is either "duly acknowledged" or "proved" by use of a subscribing witness. Because this case involves an attempt to use the acknowledgment procedure, we focus on that methodology.

The Court explained that the acknowledgment procedure achieves two goals. First, to prove the identity of the person whose name and signature appears on the document and, second, "[to impose] on the signer a measure of deliberation in the act of executing the document."[16]

The Court turned to the specific issues at bar, to wit, "whether the certificate of acknowledgment accompanying defendant husband's signature was defective"[17] and, if the certificate was defective, "whether such a deficiency can be cured and, if so, whether the affidavit of the notary public prepared in the course of litigation was sufficient to raise a question of fact precluding summary judgment in the wife's favor."[18]

The Court noted that three provisions of the RPL "must be read together to discern the requisites of a proper acknowledgment,"[19] that is §§ 292, 303, and 306, and discussed the prevailing practice in 1997, when the document was executed, for certificates of acknowledgement:

> At the time the parties here signed the prenuptial agreement in 1997, proper certificates of acknowledgment typically contained boilerplate language substantially the same as that included in the certificate accompanying the wife's signature: "before me came (name of signer) to me known and known to me to be the person described in and who executed the foregoing instrument and duly acknowledged to me that s/he executed the same." The "to me known and known to me to be the person described in the document" phrase satisfied the requirement that the official indicate that he or she knew or had ascertained that the signer was the person described in the document. The clause beginning with the words "and duly acknowledged . . ." established that the signer had made the requisite oral declaration.[20]

This language was omitted in the certificate accompanying the husband's signature:

> In the certificate of acknowledgment relating to the husband's signature, the "to me known and known to me" phrase was inexplicably omitted, leaving only the following statement: "On the 8 [sic] day of July, 1997, before me came Gary Galetta described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same." Absent the omitted language, the certificate does not indicate either that the notary public knew the husband or had ascertained through some form of proof that he was the person described in the prenuptial agreement.[21]

Determining that the acknowledgement did not conform to the statutory requirements, the Court next considered whether the defect could be cured, and whether the notary public's affidavit submitted to the trial court created a question of fact precluding summary judgment.[22] The Court distinguished *Galetta* from *Matisoff*, the earlier case where there was no acknowledgement,[23] because in *Galetta* "there was an attempt to secure an acknowledged document but there was an omission in the requisite language of the certificate of acknowledgment."[24] The Court acknowledged that

> [a] compelling argument can be made that the door should be left open to curing a deficiency like the one that occurred here where the signatures on the prenuptial agreement are authentic, there are no claims of fraud or duress, and the parties believed their signatures were being duly acknowledged but, due to no fault of their own, the certificate of acknowledgment was defective or incomplete. Although neither party submitted evidence concerning how the error occurred, we can infer from the fact that the signatures and certificates of acknowledgment are contained on a single page of the document in the same typeface that the certificates were typed or printed by the same person at the same time. Since one acknowledgment included all the requisite language and the other did not, it seems likely that the omission resulted from a typographical error. Thus, the deficiency may not have arisen from the failure of the notary public to engage in the formalities required when witnessing and acknowledging a signature. To the contrary, it may well be that the prerequisites of an acknowledgment occurred but the certificate simply failed to reflect that fact. Thus, the husband makes a strong case for a rule permitting evidence to be submitted after the fact to cure a defect in a certificate of acknowledgment when that evidence consists of proof that the acknowledgment was properly made in the first instance – that at the time the document was signed the notary or other official did everything he or she was supposed to do, other than include the proper language in the certificate. By considering this type of evidence, courts would not be allowing a new acknowledgment to occur for a signature that was not properly acknowledged in the first instance; instead, parties who properly signed and acknowledged the document years before would merely be permitted to conform the certificate to reflect that fact.[25]

Unfortunately for the husband, the Court never arrived at considering whether a cure was possible.

> [S]imilar to what occurred in *Matisoff*, the proof submitted here was insufficient. In his affidavit, the notary public did not state that he actually recalled having acknowledged the husband's signature, nor did he indicate that he knew the husband prior to acknowledging his signature. The notary averred only that he recognized his own signature on the certificate and that he had been employed at a particular bank at that time (corroborating the husband's statement concerning the circumstances under which he executed the document). As for the procedures followed, the notary had no independent recollection but maintained that it was his custom and practice "to ask and confirm that the person signing the document was the same person named in the document" and he was "confident" he had done so when witnessing the husband's signature.[26]

The Court concluded:

> [E]ven assuming a defect in a certificate of acknowledgment could be cured under Domestic Relations Law § 236(B)(3), defendant's submission was insufficient to raise a triable question of fact as to the propriety of the original acknowledgment procedure. Plaintiff was therefore entitled to summary judgment declaring that the prenuptial agreement was unenforceable.[27]

> On the one hand, *Galetta* can be regarded as a paean to form over substance.

"Be Afraid, Be Very Afraid"

For the small subset of practitioners engaged in the practice of drafting prenuptial agreements and overseeing their execution, the implications of *Galetta* are clear.

Does *Galetta* have any lessons for the rest of us?

Certainly, affidavits are a part of every litigator's (and many a non-litigator's) professional life. They are, I suspect, the most common litigation document, and their ubiquity means they rarely rate a second thought.

Affidavits must be in admissible form, and that requires proper execution. An attorney who routinely spends hours agonizing over the text of a 10-line affidavit often will not even glance at what appears above or below the body of the affidavit.[28] If familiarity breeds contempt, contempt can breed mistakes, sometimes fatal.

Accordingly, practitioners should heed *Galetta*'s strict application of the rules governing execution of documents in all situations, not just those involving DRL § 236(B)(3). For example, CPLR 2309(c) requires that an affidavit that is executed outside New York State be accompanied by a Certificate of Conformity:

> § 2309. Oaths and affirmations
> (c) Oaths and affirmations taken without the state. An oath or affirmation taken without the state shall be treated as if taken within

> the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.

A number of courts have held that the absence of a certificate of conformity, absent effort to remedy the defect, is a fatal defect.[29] However, most courts that have considered the issue have held the absence of a certificate of conformity is not a fatal defect, but a "mere irregularity" subject to the generous standard of relief set forth in CPLR 2001.

In a recent decision (noting the agreement of the First and Third Departments), the Second Department, in *Fredette v. Town of Southampton*,[30] held that a trial court

> improvidently exercised its discretion in excluding from consideration the affidavits of Ken Glaser and Kris Kubly on the ground that the affidavits, while notarized, were not accompanied by a certificate of conformity required by CPLR 2309(c). This Court has previously held that the absence of a certificate of conformity for an out-of-state affidavit is not a fatal defect, a view shared by the Appellate Division, First and Third Departments as well.[31]

Whether the rule from this line of cases survives *Galetta* is a question, to paraphrase Professor David Siegel, better left to be determined in someone else's case.

Conclusion

On the one hand, *Galetta* can be regarded as a paean to form over substance. After all, the husband and wife both signed the prenuptial agreement, before notaries, and there was no fraud or duress. While the notary acknowledging the husband's signature may not have ascertained the husband's identity before witnessing his signature, it was, in fact, the husband's name and signature that were endorsed on the agreement. As for the goal of imposing "on the signer a measure of deliberation in the act of executing the document," that requisite language was present in the acknowledgment for the husband's signature, and there was no proof that any error on the part of the notary detracted from the husband's "deliberation" in executing the agreement.

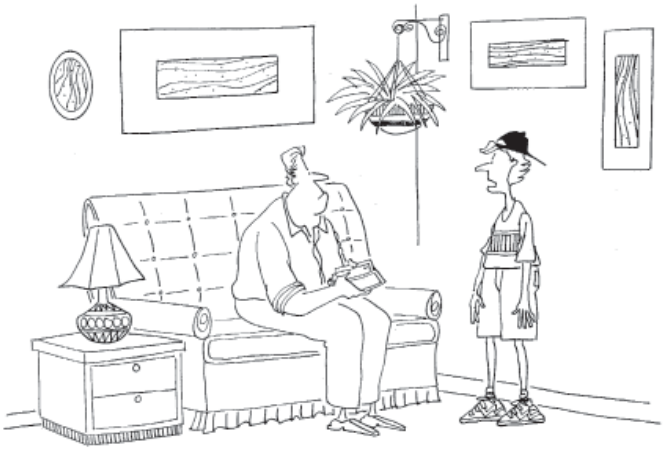
On the other hand, the procedures set forth in RPL § 291 have a purpose and reflect societal goals. Unlike *Galetta*, there are many cases where parties executing a document are not available, or able, to offer testimony concerning the circumstances surrounding the execution of a document when a dispute later arises. And, let's not forget that the Court left open the possibility that a defect in a certificate of acknowledgement could be cured upon a proper evidentiary showing.

Regardless of how you view the *Galetta* decision, the Court's message is clear: "Sweat the small stuff." ■

1. *Galetta v. Galetta*, 2013 N.Y. Slip Op. 03871 (2013).
2. No issue as to capacity of either party was raised.
3. *Galetta*, 2013 N.Y. Slip Op. 03871.
4. *Id.* at *2.
5. DRL § 236(B)(3) provides, in pertinent part:

   > Agreement of the parties. An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.

6. *Galetta*, 2013 N.Y. Slip Op. 03871.
7. *Id.*
8. *Id.*
9. *Id.* at *2.
10. *Id.*
11. *Id.* at *3
12. *Id.*
13. Judge Abdus-Salaam took no part in the case.
14. *Galetta*, 2013 N.Y. Slip Op. 2831.
15. 90 N.Y.2d 127 (1997).
16. *Galetta*, 2013 N.Y. Slip Op. 2831.
17. *Id.*
18. *Id.*
19. *Id.* at *4.
20. *Id.* at *4–5 (footnote omitted).
21. *Id.* at *5.
22. *Id.* The Court rejected the wife's argument that the issue was not preserved.
23. The Court explained: "When there is no acknowledgment at all, it is evident that one of the purposes of the acknowledgment requirement – to impose a measure of deliberation and impress upon the signer the significance of the document – has not been fulfilled. Thus, a rule precluding a party from attempting to cure the absence of an acknowledgment through subsequent submissions appears to be sound." *Id.* at *8.
24. *Id.*
25. *Id.* at *8.
26. *Id.* The Court discussed in detail the deficiencies in proof, and how those defects might have been overcome.
27. *Id.* at *9.
28. An earlier *Burden of Proof* column, *We All Do It*, N.Y. St. B.J. (Mar. / Apr. 2010), p. 20, addressed an item appearing above the body of the affidavit.
29. *PRA III v. Gonzalez*, 54 A.D.3d 917 (2d Dep't 2008) (Summary judgment for plaintiff was reversed where, inter alia, the affidavits in support of the motion did not have certificates of conformity: "We further note that the affidavits provided by the plaintiff were both signed and notarized outside of the State of New York, and were not accompanied by the required certificates of conformity, and the plaintiff made no attempt to rectify this defect" (citation omitted)).
30. 95 A.D.3d 940 (2d Dep't 2012).
31. *Id.* (citations omitted).



"A raise in my allowance is fine, dad. But what I'm really after is power of attorney."

The "Professional Reliability" Basis for Expert Opinion Testimony

By Hon. John M. Curran

The "professional reliability" exception for expert testimony has been recognized in New York since at least 1974.[1] It is frequently referred to by the courts as the professional reliability exception to the rule against hearsay.[2] It is respectfully submitted, however, that the "professional reliability" exception is not an exception to the hearsay rule but an exception to the traditional evidentiary foundation required for expert opinions.

Referring to the professional reliability exception as an exception to the hearsay rule creates conceptual confusion which has and will continue to cause the exception to be improperly used as a "conduit for hearsay."[3] When such hearsay is allowed, it deprives the opposing party of its rightful opportunity to cross-examine the truth of the matter asserted.[4] Until such time as the Court of Appeals resolves this "open question" of New York law,[5] or the Legislature enacts a statute on the subject, lawyers and the courts are urged to refrain from treating the professional reliability foundation exception as an exception to the hearsay rule.

Traditional common law rule prohibited an expert from expressing an opinion based on material not in evidence or not personally known to the expert.[6] This traditional approach required the expert to detail the facts upon which he or she relied before rendering an opinion and typically involved the use of hypothetical questions – which eventually fell out of favor.[7] Statutes ultimately eliminated the need for hypotheticals.[8] In New York, CPLR 4515 was enacted in 1963, allowing expert witnesses to express their opinions "without first specifying the data upon which it is based." Rule 703 of the Federal Rules of Evidence (FRE), proposed in 1969 and enacted in 1975, provides that an expert may base an opinion on

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matters not personally known to the expert and not in the record if the matter is "of a type reasonably relied upon by experts in a particular field." One treatise has suggested that this proposed change in federal evidentiary law influenced the New York Court of Appeals to liberalize its approach to the foundation requirements for expert opinion testimony.[9]

Stone

In *People v. Stone*,[10] the Court of Appeals affirmed admission of expert psychiatric opinion testimony that was based in part on extrajudicial statements the expert procured from individuals who did not testify at trial. The opinion regarding the defendant's sanity was allowed because the trial court had "reasonably assured itself of a legally competent basis for the psychiatrist's opinion."[11] The issue in *Stone* was whether the opinion would be allowed, not whether the hearsay extrajudicial statements were admissible.

Sugden

A few months later, in *People v. Sugden*,[12] the Court of Appeals recognized two exceptions to the common law rule that expert testimony be based on matters personally known to the expert or in the record: (1) an expert may rely on out-of-court material "if it is of a kind accepted in the profession as reliable in forming an opinion"; and (2) an expert may rely on out-of-court material which "comes from a witness subject to full cross-examination [at] the trial."[13]

Hambsch

The first time the Court of Appeals referred to the "'professional reliability' exception" was in *Hambsch v. New York City Transit Authority*,[14] where the Court held that the exception requires "evidence establishing the reliability of the out-of-court material."[15] In *Hambsch*, the plaintiff sought to introduce an expert opinion based in part on the expert's discussion with a radiologist. The Court found that the plaintiff failed to present evidence of the professional reliability of such a foundation and affirmed exclusion of the opinion.

Goldstein

The best explanation by the Court of Appeals of the professional reliability foundation exception is in *People v. Goldstein*.[16] There, the Court reversed the defendant's conviction and ordered a new trial because the prosecution's psychiatrist "recounted statements made to her by people who were not available for cross-examination."[17] While the Court's holding was ultimately based on a violation of the Sixth Amendment's "confrontation clause," the Court laid out a detailed analysis of the professional reliability foundation exception, holding that the psychiatrist's "opinion [under that exception] was admissible," even though it was based in part on out-of-court statements to the expert, because those statements met the "test of acceptance in the profession."[18] The parties assumed that the expert was therefore also allowed "to repeat to the jury all the hearsay information on which it was based."[19] The Court referred to this as a "questionable assumption."[20]

In *Goldstein*, the Court drew a clear distinction between the admissibility of an expert's *opinion* based in part on out-of-court materials and the admissibility of the hearsay information underlying that opinion. While the Court acknowledged that FRE Rule 703 had been amended in 2000 to allow such hearsay evidence under a strict analysis,[21] the Court declined to decide "whether the New York rule is the same as, or less or more restrictive than, this federal rule."[22]

Hinlicky

The most recent Court of Appeals decision to address "the professional reliability exception to the hearsay rule" is *Hinlicky v. Dreyfuss*.[23] There, the Court affirmed admission into evidence of an algorithm which was a portion of clinical guidelines published by the American Heart Association in association with the American College of Cardiology. The defendant physician testified that he followed the algorithm in his practice to evaluate patients, including the plaintiff. The trial court allowed admission

of the algorithm "under the professional [re]liability exception to the rule against hearsay."[24]

The algorithm was not hearsay, said the Court, because it was not offered to prove the truth of the matter asserted therein but to demonstrate the process the defendant physician followed.[25] Because defense counsel urged that "the algorithm was properly admitted under the professional reliability exception to the hearsay rule," the Court addressed the exception only to observe that it did not need to reach that issue. The Court added, "We note only that whether evidence may become admissible solely because of its use as a basis for expert testimony remains an open question in New York."[26] While the Court referenced FRE Rule 703, it also observed that, in *Goldstein*, it had "acknowledged the need for limits on admitting the basis of an expert's opinion to avoid a 'conduit for hearsay.'"[27]

Nothing in any of the decisions from the Court of Appeals on this subject creates a new exception to the rule against hearsay.

The Court's reference to the "professional reliability exception to the hearsay rule" is unfortunate because it did not make its decision on that basis. The Court's reference in that regard should be viewed as nothing more than quoting the defendant's argument on appeal which was in turn based on the ruling of the trial court.

The Future of the Hearsay Rule

Nothing in any of the decisions from the Court of Appeals on this subject creates a new exception to the rule against hearsay. The Legislature has not done so either. Accordingly, the courts are still governed by New York common law evidentiary principles. "In New York, the general rule is that all relevant evidence is admissible unless its admission violates some exclusionary rule . . . ."[28] "This general principle . . . gives rationality, coherence and justification to our system of evidence and we may neglect it only at the risk of turning that system into a trackless morass of arbitrary and artificial rules."[29]

The prohibition against hearsay is of course one such exclusionary rule. "The deprivation of the right of cross-examination constitutes the principal justification for the hearsay rule."[30] Further, "the rule is settled that if the evidence is hearsay, and a proper objection is made, the Trial Judge must exclude the evidence unless some recognized exception to the rule applies."[31] Unlike the FRE, New York does not have a "residual exception" to the rule against hearsay.[32] Because no such exception based on the professional reliability of hearsay underlying an expert's opinion has been recognized by the Court of Appeals, and the Court of Appeals has expressly declined to do so, the lower courts run the risk of creating a "trackless morass of arbitrary and artificial rules" if they appear to create such an exception.

A recent spate of Appellate Division cases appears to be running this risk.[33] Judge Colleen Duffy has soundly questioned these decisions in an article that provides an excellent discussion of the law on this subject.[34]

The decisions discussed by Judge Duffy involve civil commitment proceedings against alleged dangerous sex offenders brought under Article 10 of the Mental Hygiene Law (MHL). But the language of these decisions is not limited to such proceedings and may lead to their citation in other contexts. Caution is urged against a careless repetition of the phraseology from these decisions as it may be more appropriate to limit them to Article 10 civil commitment proceedings. One of the problems in trying to limit these decisions, however, is that the statutory language provides almost no basis for such a limitation. MHL § 10.07(c) states that Article 45 of the CPLR (Evidence) is applicable to trials conducted in civil commitment proceedings. While MHL § 10.08(b) provides the Attorney General's psychiatric examiner with broad access to the respondent's "relevant" records, and MHL § 10.08(g) allows admission of reports by such examiners pursuant to CPLR 4518 (Business Records Exception), the statute does not authorize receipt of hearsay evidence.

The most troubling aspect of these decisions' routine reference to a "professional reliability exception to the hearsay rule," an exception not yet created under law, is their allowance of hearsay evidence through experts. This is despite the clear distinction drawn in *Goldstein* between the allowance of an opinion based on hearsay and the receipt of the underlying hearsay evidence and is especially worrisome because a number of the decisions acknowledge *Goldstein* but then appear to ignore it.

The earliest of these decisions, *State of New York v. Wilkes*,[35] allowed an expert to testify to "limited amounts of hearsay information." This testimony consisted of advising the jury of uncharged past incidents of sex offenses as contained in parole documents that were not in evidence. While recognizing the statement in *Goldstein* – that it was a "questionable assumption" whether such evidence was proper – the Appellate Division nevertheless allowed the evidence, concluding that it was "well-settled" that such hearsay was admissible to inform the jury of the basis of the expert's opinion.[36] In support of this "well-settled" proposition, the court cited to three Appellate Division decisions which, on their facts, do not stand for this extraordinary proposition.[37] Moreover, the language in *Goldstein* and *Hinlicky* expressly leaves this question unresolved; therefore, the issue cannot be "well settled" under New York law.

The problem now is that this same concept is being repeated in the other departments. The most recent example also is of great concern because, unlike some of the

other similar decisions, the court gave very little consideration to this important evidentiary issue.[38] Instead, the court allowed testimony by the prosecution's psychiatrist regarding the "details of the appellant's sex offense history" since the purpose of that testimony was to explain the basis for the expert's opinion. The court made no mention of *Goldstein* and did not address the serious implications of allowing an expert to serve as a conduit for such hearsay evidence.[39]

It takes very little imagination to see how such a broad exception to the hearsay rule could be used and abused. Under the guise of exploring an expert's opinion, volumes of hearsay – untested by cross-examination – could be presented to a jury. If these recent decisions of the Appellate Division are blindly followed based on their easy and ready quotes, the "professional reliability" basis for expert opinion testimony will not just be a "conduit for hearsay," it will cause a flood. ■

1. *People v. Stone*, 35 N.Y.2d 69 (1974); *People v. Sugden*, 35 N.Y.2d 453 (1974). In *Sugden*, the Court of Appeals referred to *People v. DiPiazza*, 24 N.Y.2d 342 (1969), as the first case of the trend toward a "professional reliability" exception.
2. *State of N.Y. v. Hall*, 96 A.D.3d 1460 (4th Dep't 2012); *State v. Mark S.*, 87 A.D.3d 73 (3d Dep't), *lv. denied*, 17 N.Y.3d 714 (2011); *State of N.Y. v. Fox*, 79 A.D.3d 1782 (4th Dep't 2010); *State of N.Y. v. Motzer*, 79 A.D.3d 1687 (4th Dep't 2010); *A-Tech Concrete Co., Inc. v. Tilcon N.Y., Inc.*, 60 A.D.3d 603 (2d Dep't 2009); *State of N.Y. v. Suggs*, 31 Misc. 3d 1009 (Sup. Ct., N.Y. Co. 2011); *State of N.Y. v. J.A.*, 21 Misc. 3d 806 (Sup. Ct., Bronx Co. 2008); *Sunnyside Plus v. Allstate Ins. Co.*, 8 Misc. 3d 306 (Civ. Ct., Queens Co. 2005).
3. *People v. Goldstein*, 6 N.Y.3d 119, 126 (2005) (quoting *Hutchinson v. Groskin*, 927 F.2d 722, 725 (2d Cir. 1991)).
4. *Wagman v. Bradshaw*, 292 A.D.2d 84, 91 (2d Dep't 2002) ("The danger and unfairness of permitting an expert to testify as to the contents of inadmissible out-of-court material is that the testimony is immune to contradiction. It offends fair play to disregard evidentiary rules guaranteed by the force of common sense derived from human experience").
5. *Hinlicky v. Dreyfuss*, 6 N.Y.3d 636, 648 (2006); *see also Goldstein*, 6 N.Y.3d at 126–127.
6. *Sugden*, 35 N.Y.2d at 459; *see also Cassano v. Hagstrom*, 5 N.Y.2d 643, 646 (1959).
7. Michael M. Martin, Daniel J. Capra & Faust F. Rossi, New York Evidence Handbook § 7.5, p. 630 (2d ed. 2002).
8. *Id.*
9. *Id.* at § 7.3.2, p. 616.
10. 35 N.Y.2d 69 (1974).
11. *Id.* at 75.
12. 35 N.Y.2d 453.
13. *Id.* at 460–61.
14. 63 N.Y.2d 723 (1984).
15. *Id.* at 725 (citations omitted).
16. 6 N.Y.3d 119 (2005).
17. *Id.* at 122.
18. *Id.* at 126.
19. *Id.*
20. *Id.*
21. FRE Rule 703 ("Facts or data otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that the probative value in assisting the jury to evaluate the experts' opinion substantially outweighs their prejudicial effect.").
22. 6 N.Y.3d at 127.
23. 6 N.Y.3d 636, 648 (2006).
24. *Id.* at 643.
25. *Id.* at 645–46.
26. *Id.* at 648 (citing *Goldstein*, 6 N.Y.3d at 126–27 (concerning out-of-court *factual* statements)).
27. *Id.*
28. *People v. Scarola*, 71 N.Y.2d 769, 777 (1988).
29. *Ando v. Woodberry*, 8 N.Y.2d 165, 167 (1960).
30. Jerome Prince, *Richardson on Evidence* § 8-102 (Farrell 11th ed. 1995).
31. *Id.*
32. FRE Rule 807.
33. *State of N.Y. v. Robert F.*, 101 A.D.3d 1133 (2d Dep't 2012); *State of N.Y. v. Floyd Y.*, 102 A.D.3d 80 (1st Dep't 2012); *State of N.Y. v. Hall*, 96 A.D.3d 1460 (4th Dep't 2012); *State of N.Y. v. Mark S.*, 87 A.D.3d 73 (3d Dep't 2011); *State of N.Y. v. Anonymous*, 82 A.D.3d 1250 (2d Dep't 2011); *State of N.Y. v. Motzer*, 79 A.D.3d 1687 (4th Dep't 2010); *State of N.Y. v. Pierce*, 79 A.D.3d 1779 (4th Dep't 2010), *lv. denied*, 16 N.Y.3d 712 (2011); *State of N.Y. v. Fox*, 79 A.D.3d 1782 (4th Dep't 2010); *State of N.Y. v. Wilkes*, 77 A.D.3d 1451 (4th Dep't 2010).
34. Hon. Colleen D. Duffy, J.S.C., *The Admissibility of Expert Opinion and the Bases of Expert Opinion in Sex Offender Civil Management Trials in New York*, 75 Alb. L. Rev. 763 (2011 / 2012).
35. 77 A.D.3d at 1453.
36. *Id.*
37. *Id.* (citing *People v. Campbell*, 197 A.D.2d 930 (4th Dep't 1993) (defense psychiatric testimony offered to prove involuntariness of defendant's admission and not for the truth of defendant's statements to the psychiatrist)); *People v. Wlasiuk*, 32 A.D.3d 674 (3d Dep't 2006) (admission of report and videotape underlying expert's opinion deemed an improper conduit of hearsay); *Shahram v. Horwitz*, 5 A.D.3d 1034 (4th Dep't 2004) (harmless error to preclude plaintiff's expert from testifying about a medical record previously received in evidence which was available for the jury to review).
38. *Robert F.*, 101 A.D.3d 1133.
39. *Id.*

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Article 81 Guardianships and Autism Spectrum Disorder

By Anthony J. Enea

For years I have worked with the parents of children diagnosed with Autism Spectrum Disorder (ASD). I have learned that ASD refers to a range of neurodevelopment disorders that most frequently manifest themselves as both verbal and non-verbal communication difficulties, social impairments and repetitive, restricted and stereotyped patterns of behavior. Autism or "classical" ASD is the most severe form of ASD. Milder forms of ASD include Asperger's syndrome, childhood disintegrative disorder and pervasive development disorder–not otherwise specified (PDD-NOS).[1]

It has been estimated that one out of every 88 children age 8 will have an ASD, and that males are four times as likely to have an ASD as females.[2] ASD affects people of all races, ethnicities and socio-economic groups. Sadly, there is no known cure for ASD at this time; however, much progress has been made in diagnosing ASD, discovering potential genetic predispositions for ASD and treating ASD through the use of early behavioral and educational intervention programs.

Unfortunately, in addition to the many challenges the parents of an ASD child may face, they will also eventually be faced with the issue of whether they will need to seek legal guardianship for their ASD child who has reached the age of 18. At age 18, a child in New York is legally considered to be an adult,[3] and a parent is no longer the legal guardian of the child once he or she has reached that age. This regularly presents a predicament for the parent of an ASD child who requires some level of intervention and assistance with respect to decision making for health care and therapeutic issues, financial issues, and the day-to-day management of his or her affairs.

I was recently consulted by the parent of a 21-year-old ASD child. Since the child had reached adulthood, the mother had become extremely frustrated with the difficulties she was encountering in assisting her child with obtaining varied supportive and medical services the child needed. Her frustration reached the boiling point when she was unable to receive any information for two weeks as to where the child had been hospitalized due to the facility's need to comply with HIPAA – because her child was an adult.[4] While a legal guardianship may not be appropriate or necessary for every young adult with an ASD, there are numerous cases where it is both an appropriate and necessary form of intervention.

In deciding whether to seek legal guardianship and what form of guardianship (personal, property or both) is most suitable for the ASD child in question, there are a number of factors to be considered.

Issues

Obviously, one of the first issues that must be addressed is what level of assistance as to personal and property decision making the ASD child will need – both presently and in the future. Does the child have the requisite capacity to manage his or her personal, medical and financial affairs and to communicate his or her wishes with respect thereto? This assessment should involve a detailed review of the ASD child's medical history and any assessments made as to his or her limitations with respect thereto.

Section 81.02 of the N.Y. Mental Hygiene Law (MHL) requires that appointment of a guardian must be "necessary" to meet the alleged incapacitated person's (AIP) needs for property management, personal care or both. In deciding whether a guardian is necessary, § 81.02(a)(2) specifically provides that the court shall consider the sufficiency and reliability of available resources, as defined in § 81.03, to provide for personal needs or property management without the appointment of a guardian. Section 81.03(e) defines available resources to mean "resources such as, but not limited to, visiting nurses, homemakers, home health aides, adult day care and . . . residential care facilities." The definition of "resources" also includes powers of attorney, health care proxies, trusts, and representative and protective payees.[5]

Thus, if an adult ASD child (over the age of 18) has the capacity to execute a Durable Power of Attorney (POA) and Health Care Proxy Form (HCP), the need for the appointment of a guardian may be obviated, especially if these documents are drafted in a sufficiently broad manner to meet the present and possible future needs of the ASD child.

One difficulty in assessing the needs of an ASD child is that behavioral and social interactive issues can often be a major factor with respect to his or her needs. Thus, any pre-guardianship assessment should focus not only on the ASD child's ability to independently perform activities of daily living (feeding, dressing, cooking, bathing and toileting), but also on his or her ability to socially interact, such as to independently go food and clothing shopping, to speak clearly, to read and understand bills and bank statements, to use a credit card and to make change. For example, many ASD adults can reside independently in a home or apartment and make decisions as to their travel and food needs, but are unable to maintain and balance a checking account or handle their financial affairs. If it is determined that a guardian is needed, it is most important to fashion a guardianship that will allow the ASD child the greatest amount of freedom, independence and flexibility while also insuring that his or her personal and property management needs are adequately provided for.

Goals

One of the goals of Article 81 is that the guardianship should be the "least restrictive form of intervention."[6] The guardian should have only those powers necessary to assist the incapacitated person to compensate for limitations and to allow the person the greatest amount of independence and self-determination in light of the person's ability to appreciate and understand his or her functional limitations. In appointing a guardian, the court is guided by the concept of least restrictive form of intervention.

This provision of Article 81 – to customize and tailor the rights and duties of a guardian while still allowing the AIP the self-determination and independence suitable for his or her abilities – is what makes an Article 81 guardianship proceeding significantly more desirable than an Article 17-A proceeding under the Surrogate's Court Procedure Act (SCPA), for the vast majority of ASD cases. While the pros and cons of each proceeding have been the topic of many an article, these will not be the focus herein.[7]

While a guardianship for a "developmentally disabled person" would be appropriate under either Article 81 of the MHL or Article 17-A of the SCPA, unfortunately, Article 17-A does not permit tailoring and limiting the authority of the guardian to the specific needs of the AIP. This distinction was highlighted in *In re John J. H.*[8] Surrogate Kristen Booth Glen of New York County, in denying

the petition of the parents of an autistic child who, as part of their guardianship application, sought the authority to sell the child's artwork and donate the proceeds as a charitable contribution, held that the Surrogate's Court in an Article 17-A proceeding lacked the power to grant anything other than a plenary property guardianship, which did not include blanket gift-making authority. Surrogate Glen noted what was already well known in the guardianship community – that Article 17-A was "a blunt instrument" that did not permit any of the individualized tailoring that was available in Article 81. Thus, the petition was withdrawn by the child's parents and an Article 81 proceeding was commenced.

> In assessing the needs of an ASD child behavioral and social interactive issues can often be a major factor.

In the past there was some question whether an Article 81 proceeding could be utilized for a developmentally disabled minor child; however, in *In re Cruz*,[9] Justice Diane A. Lebedeff of the Supreme Court of New York County held that Article 81 provides no indication that it should not apply to minor children. Justice Lebedeff opined, "There is sufficient, albeit slight, affirmative language in the statute which supports its application to minors, and no language which preludes such application." She added that "[w]here it is clear that the child's functional limitations are permanent, there is good reason to pursue an Article 81 guardianship from the beginning rather than first utilizing S.C.P.A. 17 or 17-A during childhood then commencing a M.H.L. Article 81 guardianship at adulthood." The child in *Cruz* had suffered substantial brain injury during birth, and the medical malpractice claim had been settled for $3.5 million.

While the minor's parents are the legal guardians of the minor's person and can make decisions relevant to his or her person, it is generally when the minor child has inherited or recovered monies that he or she will require a guardianship for his or her property.[10]

Section 81.21 of the MHL delineates the powers that are necessary and sufficient to manage the property and financial affairs of the AIP and those depending upon the AIP. The guardian must afford the incapacitated person the greatest amount of independence and self-determination with respect to property management in light of that person's functional level, and maintain an understanding and appreciation of the AIP's functional limitations and personal wishes, preferences and desires with regard to managing the activities of daily living.

Section 81.21(a) permits precisely the requisite level of tailoring of the guardian's property management powers that is necessary and appropriate for an ASD child. The following illustrate some of the property management powers that may be granted under § 81.21(a):[11]

1. make gifts;
2. enter into contracts;
3. create revocable or irrevocable trusts or property (would include a Special Needs Trust) which may extend beyond the incapacity or life of the incapacitated person;
4. provide support for persons dependent upon the incapacitated person for support;
5. marshal assets;
6. pay such bills as are reasonably necessary to maintain the incapacitated person;
7. apply for government and private benefits;
8. lease and/or purchase a residence;
9. retain accountants and attorneys;
10. defend or maintain any judicial action.[12]

Section 81.22 delineates the personal needs powers granted to the guardian. Again, as in § 81.21 these powers are to be fashioned so as to afford the incapacitated person the greatest amount of independence and self-determination with respect to his or her personal needs. The following is illustrative of some of the personal needs powers granted under § 81.22:

1. determine who shall provide personal care and assistance;
2. make decisions regarding social environment and other social aspects of the life of the incapacitated person (IP);
3. determine whether the IP should travel;
4. determine whether the IP should possess a license to drive;
5. authorize access to a release of confidential records;
6. make decisions regarding education;
7. apply for government and private benefits;
8. consent to or refuse generally accepted routine or major medical or dental treatment;
9. close the place of abode.[13]

It should be noted that under § 81.22(b) no guardian may: (a) consent to the voluntary formal or informal admission of the IP to a mental hygiene facility under Article 9 or 15 of this chapter or to a chemical dependence facility under Article 22; and (b) revoke any appointment or delegation made by the incapacitated person such as a power of attorney, health care proxy or living will.[14]

In spite of the above-stated advantages of utilizing Article 81 for an ASD child, there is still a time and place for an Article 17-A proceeding. Most often, it is used for a person who will not be able to care for himself or herself due to a permanent and unchanging condition.

Decisions

Once the decision has been made to pursue an Article 81 guardianship for the ASD child, there are a number of important decisions and issues that will need to be addressed prior to the filing of the Petition. For example:

1. Who is going to be the guardian? Both parents, or just one parent (most commonly both)? Will a stand-by guardian be selected?
2. To what extent will the guardian need powers over the person and property of an ASD child?
3. Has the guardianship been discussed with the ASD child? Does he or she understand the nature of the proceeding and has he or she expressed an opinion of the powers being sought by the guardian?
4. Has there been a consultation with those professionals most familiar with the needs of the ASD child to assess what levels of independence are most appropriate for the child?
5. How to insure that the ASD child will be comfortable at the guardianship hearing? Explain to the child as best as possible some of the legal terms utilized at the hearing such as "incapacity," "powers over the property and person."
6. Will it be necessary, as part of the guardianship proceeding, to seek to have approved a Self-Settled Special Needs Trust for the ASD child? Generally, this is necessary if the ASD child has assets or will be receiving assets (inheritance, suit or settlement) that will impact his or her eligibility for such programs as Medicaid and/or Supplemental Social Security Income (SSI).
7. Is the ASD child presently enrolled in any federal or state programs such as Medicaid and/or SSI? Does Medicaid need to be given notice of the guardianship proceeding?
8. Is there a likelihood that the guardian or ASD child may be residing out of state? If so, it may be advisable to address this likelihood in the guardianship petition and obtain and necessary powers with respect thereto.

In conclusion, clearly the decision to seek an Article 81 guardianship for an ASD child is one that must be thoroughly evaluated prior to doing so. It is a decision that will have a far-reaching and profound impact on the life of an ASD child and his or her parents.

However, because of the nature of an Article 81 proceeding, and the inherent flexibility within Article 81, it is a decision that can be tailored and fashioned to the needs and concerns of both the parent and child while at the same time being a decision that can be modified or revoked at a later date if a change in circumstances has occurred. If properly fashioned, it can truly help insure the health and financial well-being of the ASD child for the balance of his or her lifetime. ■

1. *See Autism Fact Sheet*, National Institute of Neurological Disorders and Stroke, http://www.ninds.nih.gov.
2. *Prevalence of Autism Spectrum Disorders – Autism and Developmental Disabilities Monitoring Network, 14 Sites, United States, 2008*, Morbidity and Mortality Weekly Report, vol. 63, no. 3, Mar. 30, 2012, Centers for Disease Control and Prevention.
3. N.Y. General Obligations Law § 1-202.
4. Health Insurance Portability and Accountability Act of 2005 (HIPAA) 45 C.F.R. § 164.512(b).
5. MHL §§ 81.02(a)(2), 81.03, 81.03(a).
6. MHL § 81.03(d).
7. SCPA art. 17-A.
8. 27 Misc. 3d 705 (Sur. Ct., N.Y. Co. 2010).
9. 2001 NY Slip Op. 400 83U, 2001 WL 940206 (Sup. Ct., N.Y. Co. 2001).
10. *In re Mede*, 177 Misc. 2d 974 (1998); *see* SCPA 2220(1).
11. MHL § 81.21, (a).
12. MHL § 81.21(a).
13. MHL § 81.22.
14. MHL § 81.22(b).

BY HON. MARK D. FOX AND MICHAEL L. FOX

Civility in Litigation – A Path to Winning

It seems, does it not, that rudeness has become pervasive in our society. And, unfortunately, it seems to have infected the legal profession as well. While certainly not present in every case, and certainly not part of the conduct of every attorney, the problem has been recognized by commentators, rule-makers and judges.

Yes, judges. Courts can find themselves in the position of mediating problems stemming from the acrimonious nature of interactions between counsel of parties to a lawsuit.[1] In fact, some courts have resorted to treating attorneys like recalcitrant children when opposing parties can't agree on matters that should otherwise be routine. For example, one court required the sparring attorneys to engage in a game of "rock, paper, scissors" to determine the site for a party deposition![2] (*See* sidebar.)

The problem is being addressed through appeals to our better nature and encouraging civility for its own sake and for the betterment of our profession, and through actual (and threatened) rules and ethics changes that provide serious consequences for rude, uncivil and so-called scorched-earth tactics. But there is, we submit, another tactic for dealing with adversaries in litigated matters.

Simply put, civility can help you win.

Client Expectations

No client wants a lawyer who seems soft and agreeable. In contested matters, the client often wants a "pit bull" who will aggressively go after the other side and give no quarter to the adverse party or the party's counsel. Such attitudes are not necessarily the fault of the client. They are the by-product of movie and television portrayals of trials, where outspoken incivility seems to be the order of the day.

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Counsel's task, then, is to change those expectations. At the beginning of the attorney-client relationship, take the time to make certain the client understands that being a zealous advocate does NOT mean being rude and uncompromising on issues of little importance or routine procedure. A proper strong tone can be used without being difficult or unpleasant. The client has not been conditioned to think that way. The client must understand that your every action is calculated to be of benefit to his or her cause and that "killing with kindness" can actually work. The bottom line must be that the client trusts your judgment as an attorney in tactical matters that come up during the litigation.

Why Civility?

Think about it: Who is the most important figure in the litigation? Who determines the schedule? Who determines what you get and what you have to give up in discovery, and when you can get it or have to turn it over? Who decides the motions *in limine* and evidentiary objections that determine what evidence the jury hears and what information is kept from them? And finally, who gives the jurors the instructions that will determine the particular issues they are to consider and the factors and standards they are to apply in making their decision? Of course we are referring to the court.

We are not suggesting that a lawyer's rudeness, lack of civility and lack of cooperation in pre-trial matters will absolutely result in unwarranted adverse rulings. Every judge we know consciously strives to base rulings on the merits of each issue. Judges are, however, human beings. We have all as litigators had the experience of appearing before an impatient judge who rules on issues without (in our opinion, at least) giving full consideration to our argued position. Perhaps that happens because the judge had grown tired of countless disputes over minor issues in a case. However, when we appear before judges who respect us as competent, professional and courteous advocates, we may be more likely to receive full consideration of our arguments before a ruling is made. And is that not what we as advocates wish for – to have the judge or jury be receptive to hearing our argument?

Attorneys who take a scorched-earth approach to discovery, fighting to the bitter end on each and every issue, accomplish three things, none of which is good.

First, they quickly make the court aware that they are wasting their own, their adversary's, and the court's time by fighting over issues that may be largely meaningless, or by taking positions that clearly lack merit. The danger is that when a real issue comes into dispute counsel may be seen as having "cried wolf" once too often.

Second, those attorneys are running up substantial hourly legal bills for their clients, with no commensurate benefit. In today's world, clients are becoming more sophisticated and far more conscious of burgeoning litigation costs.

Avista Management, Inc. v. Wausau Underwriters Insurance Co.

Hon. Gregory A. Presnell:

"This matter comes before the Court on Plaintiff's Motion to designate location of a Rule 30(b)(6) deposition (Doc. 105). Upon consideration of the Motion – the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts – it is

"ORDERED that said Motion is DENIED. Instead, the Court will fashion a new form of alternative dispute resolution, to wit: at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of "rock, paper, scissors." The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11–12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned in Courtroom 3, George C. Young United States Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801."

Third, those lawyers are building up resentment and frustration among their colleagues at the Bar; they destroy any potentially professional relationship with adversary counsel. This will not be helpful when the time to discuss settlement arrives, or when a simple stipulation or professional courtesy might be desired by the scorched-earth counsel.

The Jury

Jurors, as lay people, may be entertained by film and television portrayals of court proceedings where there is demeaning and rude behavior between litigants, but, as most people, jurors tend to be offended by real-life rude and offensive conduct. For example, the ABC television program *What Would You Do?* has actors performing scenarios in public places, such as restaurants or grocery stores, which often are offensive or cruel to a targeted individual, and then continues filming to get the reactions of nearby

observers. Some people are simply embarrassed by the conduct, while others actually intervene. All of the unknowing observers however, have one thing in common: they are all made extremely uncomfortable by the public rude behavior.

Jurors' reactions to such behavior in the courtroom are bound to be the same. Jurors like and feel positively toward people in authority (like attorneys) who are polite and considerate of others – including court personnel, other attorneys, and the jurors themselves. (Of course, how counsel treats a witness depends upon the witness and his or her place in the scheme of the case – a matter for discussion at another time.)

Keep in mind that while we as litigators are comfortable in the courthouse environment, it is a strange and stressful place for the jurors. They have been summoned to perform an important civic duty, which most of them take very seriously, but they have no real information about what is going to happen, what is expected of them – or even where the restrooms are located. We have all seen lawyers in courthouse hallways and elevators who strut and brag loudly about their exploits and intentions without being cognizant of those around them and of the impression they are making. It is obnoxious, very bad form, and can be damaging to the lawyer's case if anyone within earshot becomes a juror on the matter.

On the other hand, counsel who are polite and helpful to strangers who appear in need of direction, and courteous and friendly to courthouse personnel, receive certain benefits. If they have been observed by potential jurors in their case, these jurors will start with kind feelings toward counsel. When jurors like and feel comfortable with counsel, they are far more likely to see that attorney as a reliable source of information and thus be more apt to listen to and consider carefully the arguments the attorney presents. When counsel get to that place, their summation may in turn become very effective.

In Conclusion

While it is true, generally, that attorneys who refuse ordinary professional courtesies to adversaries (contrary to the behavior of most counsel) cannot be sanctioned for "frivolous conduct" absent a provision of statute or court rule[3] – that does not mean that a sanction of sorts is not available to the discourteous attorneys' colleagues. In *In re Will of Davey*,[4] counsel failed to provide what would be a standard professional courtesy in a probate proceeding – provision to executor's counsel of the original will by the attorney who prepared it. The court stated:

> There is a long-standing tradition among the members of the bar that the attorney who prepared the will will provide the original to the executor's counsel on request along with the affidavit of the attesting witnesses and otherwise be reasonably cooperative in providing other relevant information without charge. This practice is borne of a sense of collegiality and honor among practicing attorneys and it elevates the practice of law from what might otherwise be an atmosphere of money-grubbing bitterness and greed to a true level of professionalism. Good and honorable practitioners will extend such a courtesy to a colleague without hesitation. Occasionally, regrettable exceptions such as this [the situation in the *Davey* case] will arise.[5]

Should not this "sense of collegiality and honor among practicing attorneys" exist in every case? Should we not all strive to "elevate the practice of law" in our daily work – both for the benefit of the profession and for the public perception of the profession?

In the *Davey* case, in response to this sheer lack of professional courtesy, executor's counsel had no option but to call the preparing attorney into court, requiring that he take time from his practice to travel to court and testify. This prompted the Surrogate Court judge to note:

> However, [attorney A] may take some solace that attorney B has been caused to take time from his lucrative estate planning practice, travel some 90 minutes round-trip for his court appearance, spend nearly another hour testifying in court and receive only the pittance of his witness fee and mileage as his sole recompense. *For those members of the bar who choose to view professional courtesy as a foreign currency, that should be sanction enough.*[6]

Do not allow professional courtesy, civility, and respect to be foreign currencies in your practice – no one benefits from that.

We respectfully submit that civility in litigation really can be the path to effective advocacy – and potentially to a sought-after victory. ■

1. *See Pritchard v. Cnty. of Erie*, No. 04CV534C, 2006 WL 2927852 (W.D.N.Y. Oct. 12, 2006) (in an earlier motion decision in this case, the court stated:

> [it] "may resort to various devices under the Rules and within its inherent supervisory authority to control the conduct of the parties and counsel in this case, for example micro management of discovery or sanctions under Rules 11, 16(f), 37, and 28 U.S.C. § 1927 for unreasonable and vexatious conduct by counsel. This case needs to get to its merits and not dwell on arguments for the sake of vexatious litigation. Continuing down the current path of this action will inevitably lead to further delays, added expense, and ultimately justice denied."

2. *See Avista Mgmt., Inc. v. Wausau Underwriters Ins. Co.*, No. 05CV1430, 2006 WL 1562246 (M.D. Fla. June 6, 2006).
3. *See Premo v. Breslin*, 89 N.Y.2d 995, 997 (1997); *Frank M. v. Siobahn N.*, 268 A.D.2d 808 (3d Dep't 2000); 22 N.Y.C.R.R. § 130-1.1.
4. 27 Misc. 3d 182 (Sur. Ct., Madison Co. 2010).
5. *Id.* at 185.
6. *Id.* (emphasis added).

Constitutional Revision: Democracy-Building in Vietnam

By Pamela S. Katz

The National Academy of Politics and Public Administration II in District 9, HCMC Vietnam

Many people in the United States think of Vietnam just in terms of the Vietnam War (here known as the American War). In fact, souvenir shops in the tourist part of town sell T-shirts proclaiming "Vietnam: A Country, Not a War." But, as a Fulbright Scholar in Vietnam this year, I have come to see the country differently. Among other things, Vietnam is a dynamic and instructive place to watch as it, a communist nation, moves toward more democratic governance.

One of my interests and reasons for seeking the Fulbright in Vietnam was to better understand – and to feel – how economic openness in this communist/socialist nation is facilitating political openness and democracy.[1] Unwittingly, but fortunately, I landed here in the middle of a groundbreaking constitutional amendment process. An unusual invitation from the Communist Party political training academy for southern Vietnam (the National Academy of Politics and Public Administration II[2]) to talk about the United States Constitution put me in the position to meet some high-level Party officials. As a result of these contacts, I was able to sit with the Deputy Director of the Academy, Pham Minh Tuan, Ph.D. in Law, for a lengthy interview, which gave me a clear window into

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Banner about the constitution on Pasteur Street in HCMC, District 1

the literal "Party line" on this process.[3] Here is what I learned.

Vietnamese constitutional history tracks its tumultuous past. The first Vietnamese constitution was approved by its first National Assembly in 1946, shortly after Vietnam had gained independence in 1945. That constitution, however, was never adopted because war with the French broke out later that year. In the aftermath of the 1954 Geneva Accords, North Vietnam, then known as the Democratic Republic of Vietnam, approved what is now considered the nation's second constitution. Then, in 1975 after the collapse of the U.S.-supported regime in Saigon and unification of the country, work to revise the 1959 constitution began. In 1980, a new constitution applying to all of what is now the Socialist Republic of Vietnam was adopted. Then, in 1986, Vietnam undertook comprehensive economic reforms widely known here as *doi moi*. Soon thereafter, work on yet another constitution began, to reflect the new conceptualization of state power, independent economic sectors, a market economy and international integration. The result was the 1992 constitution, the nation's fourth and the one currently under revision today.[4]

Work on the current constitutional revision began in 2011 with passage of a resolution of the National Assembly, Vietnam's legislative body. The country and its relationship to the world in a global economy have changed considerably since 1992, including Vietnam's initiation into the Association of South East Asian Nations (ASEAN) in 1995 and the World Trade Organization (WTO) in 2007.

The National Assembly initiated the constitutional revision in order to facilitate the nation's international integration, ensure the stability required for economic and social development, and strengthen the rule of law. The Constitutional Drafting Committee (CDC) was established by the National Assembly to undertake the drafting of the revisions and the implementation of the amendment process.[5] The CDC identified specific objectives of the revision, including:

- "deepen [and] . . . ensure the people's ownership of state power and affirming the position and role of the Communist Party as a leading force of the state and society . . ."
- "affirm human rights protections . . ."
- "build . . . economic institutions, the socialist market-oriented economy, cultural and educational development, social equality and environmental protection . . ."
- "defend the sovereignty of Vietnam . . ."
- "[ensure] rule of law . . ."
- "be proactive in international integration."[6]

All of these matters are addressed, administratively and / or substantively, in the first draft of the revision.[7]

In December 2012, the CDC finished its first draft of the amendments and submitted it to the National Assembly. The National Assembly approved the draft and decided to submit it to the public for its opinion.[8] To facilitate this, the CDC established an editorial board for the constitutional amendment process, which comprised leading scientists and intellectuals in the areas of law, social science, history and technical science in Vietnam. This board's role is to gather, quantify, and summarize the opinions collected from the public to inform modifications of the original draft. Once the CDC approves these modifications, it will be up to the National Assembly to approve the final proposed constitutional revision by a two-thirds vote. No public referendum is required to ratify the decision of the National Assembly to approve

the amendments; however, the constitution contains a provision for the National Assembly to submit them to the public for referendum, if it so chooses.

The solicitation and collection of opinions from the public has been the most radical and progressive element of the process. It has taken many forms intended to accommodate the differences in education levels among the population and take advantage of the various ways in which the Vietnamese people participate in their communities. In larger cities where the population is generally literate, a copy of the 1992 constitution, along with the proposed revisions from the first draft, was delivered to every home. On the draft itself, residents indicate their approval for or make comments on the revisions and return it to the local authority.[9] In the rural areas, community (mostly quasi-Communist Party and governmental) groups, such as youth associations, women's groups and farmers' associations, held meetings at which the revisions were discussed. Minutes from those meetings were then submitted as comments for consideration. Vietnamese living overseas were also solicited for comment via mail and the Internet.[10]

Various governmental, Party, business and educational entities and organizations have been involved with opinion collection through meetings, conferences, websites and the media. One of the most prominent has been the Vietnam Fatherland Front, a government-created central clearinghouse for various political, social and community organizations throughout the country.[11] Through their network of political and community organizations from the central to the provincial and district levels, they have, as of March 2013, collected approximately eight million comments.[12] Major newspapers have published full text of the proposed amendments alongside the original text to show the changes being proposed.[13] The National Assembly has its own website for people to give comments as well as for them to review the planning documents for the constitutional amendment process.[14] Local authorities, too, have links on their websites for people to post comments. As indicated above, the editorial board of the CDC will consolidate and summarize these posts, reports and comments.

This outreach to the public is truly extraordinary, though it is clear that, as with most things, the process on paper is a lot more clear and impressive than its implementation in reality. But, to whatever extent it is real, it reflects an effort to inform and possibly empower the people. Deputy Director Tuan asserted that 10 to 15 years ago people in Vietnam knew little to nothing about their constitution. Awareness has grown with this effort and, he asserts, it is considered by the Communist Party to be the largest political activity undertaken to date to encourage people to understand the constitution and express their aspirations with regard thereto.[15]

I don't want to shill for the Vietnamese Communist Party; there is much cynicism and complaint about gover-

If you go to Ho Chi Minh City . . .

Aside from standard sightseeing, here are some recommendations from a fellow New Yorker who has lived here for almost a year.

Restaurants

Vietnamese: *Cuc Gach Quan* – an enormous menu with helpful staff to assist in making selections. Order the homemade tofu! 9/10 Dang Tat, ph. 08-3848-0144. District 1.

Com Nieu Sai Gon – featured in Anthony Bourdain's Vietnam episode, flying rice bowls and all. 6C Tu Xuong St., ph. 08-3932-6388. District 3.

Night market at Binh Tanh market – outdoor Vietnamese dining on plastic chairs, starts after 7:00 p.m. District 1.

French: *La Bouchon de Saigon* – casual French dining, red-checked tablecloths, welcome glass of Champagne, and charming wait staff. 40 Thai Van Lung, ph. 08-3829-9263. District 1.

Italian: *Stella* – reasonably-priced homemade pasta and sauce by an Italian chef. 121 Bui Vien, Pham Ngu Lao area, District 1.

Things to Do

Vietnamese massage Relaxing and affordable in this clean and lovely spa, with well-trained therapists and English speaking staff. Tell them Miss Pamela from America sent you! Indochine Spa – 69 Thu Khoa Huan St., ph. 08-3827-7188. District 1.

Tailor: Mr. Lam will make a suit for you in top-quality Italian fabric for a fraction of what it would cost and in record time. Lam Couture – 158C Dong Khoi St., ph. 08-3824-3830. District 1.

Back of the Bike Tours: Motorbike around HCMC to visit (safe) street food vendors , learn about Vietnamese cuisine, and eat your way through the city. www.backofthebiketours.com.

Co Giang Street: Lively market street in District 1, especially in the morning.

Cookunest Café: Live, acoustic music with the locals in a unique, quiet setting. 13 Tu Xuong St., ph. 08-2241-2043 Call to reserve a table on the first floor. District 3.

Bui Vien Street: Don't miss Pham Ngu Lao area, where you can start your evening in a plastic chair on the street with a 40-cent beer, go to Stella for dinner (see above), and enjoy the scene at Universal Bar (90 Bui Vien), where cover bands play American music loudly and with uncanny precision.

nance generally and the constitutional revision process in particular among Vietnamese, expressed online by brave bloggers or with eyes, groans, or smirks in conversation.[16] In fact, as I write today, a young woman, Nguyen Phuong Uyen, convicted of taking photographs at a political protest in Ho Chi Minh City, was sentenced to six years in jail after a secret trial.[17] And recently a journalist, Nguyen Dac Kien, was fired from his newspaper for his blog's implicit criticism of a Party official in relation to the revision process.[18] There are clearly still many challenges to face. But, at least one important aspect regarding the process undoubtedly deserves tribute.

> This outreach to the public is truly extraordinary, though it is clear that the process on paper is a lot more impressive than its implementation in reality.

The Communist Party and government took a risk when they decided to inform and involve the people as it did. While the reasons for this risk – which, I'd venture to say, was calculated – are obscure, there is no doubt that it offers the first step toward civic engagement: knowledge and understanding. The information campaign undertaken through conferences, websites, banners on the streets, newspapers and magazines got people knowing and talking. Even though some say that the Party's and government's purpose in doing so was just so much propaganda to *say* to themselves and the world that the People were engaged, when they undertook this effort they took the risk that people would *actually become* engaged. And they have. This is good news for the prospect of increased self-government and transparency in Vietnam. ■

1. For more on private ownership, and market oriented economic (including monetary) policies in today's Vietnam, see Vu Thanh Tu Anh, *Decentralization of Economic Management in Vietnam from the Institutional Perspectives*, Policy Paper for Fulbright Economics Teaching Program (FETP) Dec. 31, 2012, http://www.fetp.edu.vn/en/policy-papers/discussion-papers/decentralization-of-economic-management-in-vietnam-from-the-institutional-perspectives/ (last visited May 15, 2013).

2. The National Academy is also known as the Institute of Politics and Administration or Political-Administrative Academy Region II.

3. The interview was videotaped, translated, and edited for NYSBA's Law, Youth and Citizenship program's State Court Watch/Interviews for Understanding project, http://www.statecourtwatch.org/scw-interviews.html.

4. In 1995, the U.S. Embassy in Hanoi was opened and Vietnam opened its embassy in Washington, D.C. the same year. In 2001, minor amendments to the 1992 constitution affirmed the rule of law as a characteristic and requirement of the Socialist Republic of Vietnam.

5. The CDC's president and vice president are the Chairman and Vice-Chairman, respectively, of the National Assembly. Other members include the Prime Minister, the Deputy Prime Minister, and the ministers of Internal Affairs, Defense, Public Security and Planning and Investment. In addition, heads of important socio-political organizations, such as trade unions, youth unions, women's associations, farmers associations and the two largest scientific research centers: the Institute of Social Sciences and Vietnam Technical Science Institute, are members.

6. Interview with Pham Minh Tuan, Deputy Director of the Institute of Politics and Public Administration II, in HCMC, Vietnam (Apr. 16, 2013), as translated by Khang Nguyen.

7. Draft posted online in Vietnamese at http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_NGHIQUYET/View_Detail.aspx?ItemID=32&TabIndex=1 (last visited May 19, 2013).

8. The draft revision establishes a constitution with 11 articles and 124 chapters, reducing the 1992 constitution by one article and 23 chapters, and modifying 99 chapters.

9. There was no box on the form to reject the revision. And, anecdotally, it appears as though some people were concerned about writing negative comments or refusing to submit the completed form for fear of retribution.

10. *See, e.g.*, P. Thao, *Overseas Vietnameses (sic) Comment on Constitutional Revision*, Baomoi.com (Jan. 18, 2013) http://en.baomoi.com/Home/society/www.dtinews.vn/Overseas-Vietnameses-comment-on-constitutional-revision/331633.epi (last visited May 19, 2013).

11. For more about the Fatherland Front, see the website at http://www.mattran.org.vn/home/gioithieumt/luatmt/lmttqvn1.htm.

12. Initially, the collection of public opinion was to take three months, from January 1, through March 31, but the National Assembly and the CDC decided to extend the time because of the considerable participation. Now, the comment period will end on October 31, 2013.

13. The news media (print and online) are largely controlled by the government.

14. The official website of the National Assembly and the constitutional revision is at http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_NGHIQUYET/View_Detail.aspx?ItemID=32&TabIndex=1&LanID=33 (last visited May 18, 2013). Links from here take you to the proposed revisions and various areas for posting. People may post their comments on the website anonymously if they so choose. The website is only translated into English on its home page.

15. In my own experience talking with large groups of law students in Ho Chi Minh City and Hanoi, 100% of them knew about the constitutional revision process and most had some knowledge of the changes being proposed.

16. See *Petition 72 and the Struggle for Constitutional Reforms in Vietnam*, blog of the International Journal of Constitutional Law and Constitutionmaking.org, a joint project of the Comparative Constitutions Project and the United States Institute of Peace. http://www.iconnectblog.com/2013/03/petition-72-the-struggle-for-constitutional-reforms-in-vietnam/ (last visited May 19, 2013). This blog discusses Petition 72, introduced by Vietnamese scholars, including former Communist Party officials, and signed by approximately 6,000 supporters (though some sources indicate over 10,000 signatures to date). The Petition criticizes some of the revisions' provisions, including those regarding protection for human rights, and suggests additional revisions. *See also Vietnam Crony Communists Resist Constitution Backlash*, Bloomberg News, Apr. 8, 2013, http://www.bloomberg.com/news/2013-04-07/vietnam-crony-communists-resist-constitution-backlash.html (last visited May 19, 2013); Anh Ba Sam blog anonymous post, *Notice of Drafting Group Recommendations and Up 72 on Constitutional Amendments*, Apr. 16, 2013, http://translate.google.com/translate?hl=en&sl=vi&u=http://anhbasam.wordpress.com/&prev=/search%3Fq%3Danh%2Bba%2Bsam%2Bblog%26client%3Dfirefox-a%26hs%3DCZE%26rls%3Dorg.mozilla:en-US:official (last visited May 19, 2013); and blog posts at http://www.boxitvn.net/. Some of these blogs are largely unavailable via straight Google searches from within Vietnam and/or are occasionally hacked, most suspect, by the government.

17. See press release of the U.S. Consulate in HCMC http://hochiminh.usconsulate.gov/pr-05172013.html (last visited May 24, 2013).

18. Chris Brummitt, *Critics Pile on Vietnam in Rare Constitutional Debate*, Nw. Asian Weekly, Mar. 10, 2013 at http://www.nwasianweekly.com/2013/03/critics-pile-on-vietnam-in-rare-constitutional-debate/ (last visited May 19, 2013).

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2012 Review of UM, UIM and SUM Law

By Jonathan A. Dachs

Once again, and for the 20th year in a row, we present this annual survey of developments in the area of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law from the previous year. As always, 2012 was a busy and important year in this ever-changing and highly complex area of the law.

PART I. GENERAL ISSUES

Insured Persons

The definition of an "insured" under the SUM endorsement (and most liability policies) includes a relative of the named insured and, while residents of the same household, the spouse and relatives of either the named insured or spouse.

"Named Insured"

In *American Alternative Ins. Corp. v. Pelszynski*,[1] the court held that a volunteer firefighter injured in an accident while on route to a fire emergency in his own vehicle (equipped with a blue light and a two-way radio provided by the volunteer fire department) was not an insured under the volunteer fire department's SUM Endorsement and, therefore, not entitled to make an SUM claim thereunder. The court explained, "'You' in the definition refers to the Fire Company, which cannot have a spouse or relative."[2]

Note, however, that by legislation that was proposed in 2012, and which became effective in April 2013,[3] and is applicable to any policies issued or renewed on or after that date, Insurance Law § 3420(f) (Ins. Law) was amended by adding a new subdivision (5). Section 3420(f)(5) requires that all policies under which a fire department, fire company (as defined in General Municipal Law § 100), ambulance service, or "voluntary ambulance service" (as defined in Public Health Law § 3001) is a named insured shall provide Supplementary Uninsured/Underinsured Motorist coverage to an individual employed by, or who is a member of, such entities and who is injured by an uninsured or underinsured motor vehicle while acting in the scope of his or her duties for the named insured entity, except with respect to the use or operation by such individual of a motor vehicle not covered under the policy.[4]

In *Morette v. Kemper, Unitrin Auto & Home Ins. Co., Inc.*,[5] the named insured under a commercial auto insurance policy was a limited liability company (LLC), of which the injured party/decedent was the sole member. The injured party's estate sought to make a claim for SUM benefits under the SUM endorsement of the LLC's policy. The endorsement in question defined

> "[t]he unqualified term 'insured' . . . to mean [y]ou, as the named insured and, while residents of the same household, your spouse and the relative of either you or your spouse." Similarly, "survivor rights" coverage was afforded to "you or your spouse, if a resident of the same household," should either one die, in which event "this SUM coverage shall cover . . . [t]he survivor as named insured [and] . . . [t]he decedent's legal representative as named insured, but only while acting within the scope of such representative's duties as such." At the time the policy was issued, "spousal liability" was excluded, but the insurer issued a notice to the LLC that "upon written request of an insured, and upon payment of the premium" it would provide "Supplemental Spousal Liability Insurance coverage

> . . . cover[ing] the liability of an insured spouse because of the death of or injury to his or her spouse, even where the injured spouse must prove the culpable conduct of the insured spouse." Also, the policy excluded as an "insured" a member of a limited liability company only "while moving property to or from a covered auto" or "for a covered auto owned by him or her or a member of his or her household." No other language was contained in the policy excluding members of a limited liability company from coverage.[6]

One fairly common ground for disclaiming liability or denying coverage is the ground of non-cooperation by the insured.

Analyzing this policy in accordance with general rules governing interpretation of insurance policies, the court observed that "[o]nly by employing a construction which allows for a member of the limited liability company who is a 'natural person' (Limited Liability Law § 102(w)) to be an 'insured' under the policy can these policy provisions be given any effect; otherwise they are illusory." Accordingly, the court held that the decedent, as the sole member of the named insured LLC, was an "insured" for whom SUM benefits were provided. Finally, the court went on to distinguish the case law cited and relied upon by the insurer, which held that a business auto policy issued to a corporation does not provide uninsured motorist coverage to a family member of the sole shareholder of the corporation, from cases involving limited liability companies, to the extent that their members are "natural persons." The court noted,

> "The LLC was designed as a hybrid of the corporate and limited partnership forms, offering the tax benefits and operating flexibility of a limited partnership with the limited liability of a corporation."
>
> Significantly, a limited liability company is "an *unincorporated* organization of one or more persons having limited liability for the contractual obligation and other liabilities of the business" (Limited Liability Company Law § 102(m) emphasis added). A limited liability company is more akin to a partnership (see Partnership Law §§ 2, 10) since both entities are "combination[s] of individuals, who can suffer injuries and do have spouses, households and relatives."[7]

Finally, the court pointed to the case of *Aetna Casualty & Surety Co. v. Mantovani*,[8] wherein an arbitration award in favor of a partner for underinsured motorist benefits under a business auto policy issued to a partnership was upheld.

Residents

In *Neary v. Tower Ins.*,[9] the court noted that "[t]he standard for determining residency for purposes of insurance coverage requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain. Mere intention to reside at certain premises is not sufficient."[10]

Insured Events

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

Use or Operation

In *Allstate Ins. Co. v. Reyes*, where the respondent was bitten on her breast by a dog that reached out through an open window in a parked car (in a no-parking zone), the supreme court held that the term "use" in the definition of an "uninsured motor vehicle" (i.e., "ownership, maintenance or use") encompassed the facts of that case. As explained by the court in denying the petition to stay arbitration, "[c]ertainly, the use of a vehicle to transport a household pet is now commonplace and the dog would not have been close enough to bite the respondent's right breast without the use of Mr. Kazimer's vehicle to haul the dog and Mr. Kazimer's act of permitting the rear window to remain open. It is not necessary that the use of the vehicle be *the* proximate cause of the respondent's injuries. Rather, this court finds that the use of the vehicle was a proximate cause of the respondent's injuries."[11]

Claimant/Insured's Duty to Provide Timely Notice of Claim

UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." Liability policies contain similar notice provisions.

Numerous recent cases have again held that where an insurance policy requires that notice of an occurrence be given "as soon as practicable," notice must be given within a reasonable period of time under all the circumstances. An insured's failure to satisfy the notice requirement constitutes a failure to comply with a condition precedent, which, as a matter of law, vitiates the contract.[12] "Where no excuse or mitigating factor is offered, the reasonableness of the delay is determined as a matter of law."[13]

In *Gilliard v. Progressive*, the court observed,

> "In the context of supplementary uninsured/underinsured motorist (hereinafter SUM) claims, it is the claimant's burden to prove timeliness of notice, which is measured by the date the claimant knew or should have known that the tortfeasor was underinsured. Timeliness of notice is an elastic concept, the resolution of which is highly dependent on the particular circumstances.

> In determining whether notice was timely, factors to consider include, inter alia, whether the claimant has offered a reasonable excuse for any delay, such as latency of his/her injuries, and evidence of the claimant's due diligence in attempting to establish the insurance status of the other vehicles involved in the accident."[14]

Here, the plaintiff met his prima facie burden with respect to the issue of "due diligence" by submitting the correspondence he sent within two weeks of the accident to the alleged tortfeasor, vehicle owner and insurer, seeking its policy limits, as well as a subsequent discovery demand for the policy limits served in the course of litigating the underlying personal injury action.

In *Rosier v. Stoeckeler*, the court observed that "notice of a claim or a potential claim provided by an insured only to the insured's broker, and not to the carrier or its agent, generally is not considered sufficient notice to the carrier."[15]

The court, in *Konig v. Hermitage Ins. Co.*, observed that

> Insurance Law § 3420(a)(3) gives the injured party an independent right to give notice of the accident to the insurer and to satisfy the notice requirement of the policy. "[W]hile an insured's failure to provide notice may justify a disclaimer vis-a-vis the insurer and the insured, it does not serve to cut off the right of an injured claimant to make a claim as against the insurer." As such, the injured person "is not to be charged vicariously with the insured's delay." "However, where an injured party fails to exercise the independent right to notify the insurer of the occurrence, a disclaimer issued to an insured for failure to satisfy the notice requirement of the policy will be effective as against the injured party as well."[16]

In *GEICO v. Torres*,[17] the court held that the claimants were not diligent in ascertaining the identity of the proposed additional respondent's insurer or in notifying the insurer of the claim, where the police accident report prepared the night of the accident contained the insurer's policy number, but respondents waited eight months to inform the insurer of the accident.

In *Kalthoff v. Arrowood Indemnity Co.*,[18] where notice to the insurer was provided by the injured party and not by the insured, the court held that the disclaimer, which referred to late notice by both the injured party and the insured, was effective against the injured party because it was sent to the insured with a copy to the injured party.

In *Castro v. Prana Associates Twenty One, LP*,[19] Prana wrote a letter to Northfield, dated September 29, 2009, notifying it of the underlying action and requesting defense and indemnification as an additional insured under the Northfield policy. However, the court held that the letter did not trigger Northfield's duty to disclaim coverage as to Four Star, its named insured. Both insureds were required to provide notice of a claim; accordingly, notice provided by Prana could not be imputed to Four Star. Prana and Four Star were not united in interest; in fact, they were adverse to one another.

In several recent cases, the courts have noted that the legislation that requires an insurer to show prejudice does not apply to cases in which the pertinent policy was issued *before* the effective date of the statute.[20]

Yet, it should be remembered that "even prior to the statutory amendment, when an insurer received notice of an accident in a timely fashion, the insurer could not properly disclaim a late SUM claim absent a showing of prejudice."[21]

In *Donald Braasch Construction, Inc. v. State Ins. Fund*,[22] the court stated,

> "Notice provisions in insurance policies afford the insurer an opportunity to protect itself . . . , and the giving of the required notice is a condition to the insurer's liability. . . . Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy. The burden of justifying the delay by establishing a reasonable excuse is upon the insured," and such excuses include the lack of knowledge of an accident; a good-faith and reasonable basis for a belief in nonliability; and a good-faith and reasonable basis for a belief in noncoverage.[23]

In numerous cases decided in 2012,[24] the courts analyzed the reasonableness of the excuses for late notice in several contexts with fairly consistent results – rejecting the proffered explanation or excuse. Cases in this area are very fact specific, and, thus, should be analyzed carefully.

Discovery

The UM and SUM endorsements contain provisions requiring, upon request, a statement under oath, examination under oath, physical examinations, authorizations, and medical reports and records. The provision of each type of discovery, if requested, is a condition precedent to recovery.

In *Progressive Northern Ins. Co. v. Foss*,[25] the court held that the SUM insurer had ample time to seek the discovery it sought via its petition to stay arbitration *before* commencing the proceeding but "unjustifiably failed to do so." Accordingly, the court granted the claimants' motion to dismiss the petition.

In *Goel v. Tower Ins. Co. of New York*,[26] the court held that the defendant insurer did not establish that the plaintiff's failure to comply with the coverage conditions by not sitting for an examination under oath (EUO) and by not producing all of the documents sought by the insurer constituted willful non-compliance with the terms of the subject policy and, therefore, affirmed the denial of the insurer's motion for summary judgment and directed the plaintiff to appear for an EUO within 90 days. The court further noted that the court below "properly considered the totality of the circumstances in concluding that plaintiff's conduct was not so willful as to require excusing defendants from liability. . . . Moreover, the record shows that defendants did not act diligently to obtain plaintiff's

cooperation in a manner that was reasonably calculated to bring it about."[27]

In *Jones v. American Commerce Ins. Co.*,[28] an action to recover uninsured motorist benefits, the claimant/insured moved for summary judgment on the issue of liability prior to the exchange of any discovery. In reversing the trial court's grant of that motion, the Second Department held that "[s]ince the defendant [insurer] had no personal knowledge of the relevant facts, it should be afforded the opportunity to conduct discovery, including depositions of the plaintiff, the operator of the uninsured vehicle, and an eyewitness identified in the police accident report."[29]

Petitions to Stay Arbitration

Filing and Service

CPLR 7503(c) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded." The 20-day time limit is jurisdictional and, absent special circumstances, courts have no jurisdiction to consider an untimely application.

In *Allstate Ins. Co. v. LeGrand*, the court noted that "[t]he failure to move to stay arbitration within the 20-day period specified in CPLR 7503(c) generally constitutes a bar to judicial intrusion into the arbitration proceedings [but that] a motion to stay arbitration may be entertained outside the 20-day period when 'its basis is that the parties never agreed to arbitrate, as distinct from situations in which there is an arbitration agreement which is nevertheless claimed to be invalid or unenforceable because its conditions have not been complied with.'"[30] In this case, the accident took place while the insured was driving a rental car in Mexico. The policy provided benefits for accidents that occurred within the state of New York, "the United States, its territories or possessions or Canada." Since the policy did not provide for coverage in the geographic area where the accident occurred, the court held that "it cannot be said that the parties ever agreed to arbitrate this claim."[31] Thus, the petition to stay arbitration, filed more than 20 days after receipt of the demand for arbitration, was not untimely.

The court, in *GEICO v. Albino*,[32] held that it was proper to allow the petitioner leave to amend its petition to include, *inter alia*, a claim that no hit-and-run accident had occurred. The court stated, "While CPLR 7503(c) provides that a party served with a demand for arbitration must seek a stay within 20 days thereafter or be precluded from doing so, it does not prohibit the amendment of a timely petition."[33]

Arbitration Awards: Scope of Review

In *In re Bobak (AIG Claims Services, Inc.)*, an SUM case, the court observed, "In a case such as this, '[w]here arbitration is compulsory, our decisional law imposes closer judicial scrutiny of the arbitrator's determination under CPLR 7511(b). . . . To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious.'"[34]

In *Allstate Ins. Co. v. GEICO*,[35] the court stated that "[a]n arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached.'"[36]

In *Modafferi v. Manhattan and Bronx Surface Transit Operating Authority*, the court stated that "'[a]n arbitration award can be vacated by a court pursuant to CPLR 7511(b)(1)(iii) on only three narrow grounds: if it is clearly violative of a strong public policy, if it is totally or completely irrational, or if it manifestly exceeds a specific, enumerated limitation on the arbitrator's power.'"[37] There, the defendant failed to demonstrate the existence of any of the statutory grounds for vacating the arbitrator's award, and, thus, its motion to vacate the award was denied (and the award was confirmed).

PART II. UNINSURED MOTORIST ISSUES

Self-Insurance

In *Incorporated Village of Rockville Centre v. Ziegler*,[38] the claimant, a police officer injured while on duty when his police vehicle was struck by an underinsured motor vehicle, sought SUM benefits from the Incorporated Village – his employer and the owner of the vehicle he was occupying at the time – and from an insurer that issued an excess policy to the Village, which provided SUM coverage with a limit of $500,000 subject to a $500,000 self-insured retention. The Village and the insurer contended that no coverage was available to the claimant because the Village was self-insured and its self-insured retention did not provide SUM coverage. Based upon evidence "tending to show that the Village did not provide underlying underinsured motorist coverage," and the fact that "there was no agreement to arbitrate," the court reversed the denial of the petition and granted a permanent stay of arbitration.

The Second Department, in *Metropolitan Property & Casualty Ins. Co. v. Singh*,[39] observed that the New York City Transit Authority, the owner of a bus, was a self-insurer. The claimant's failure to rebut that showing led to the granting of the claimant's insurer's petition to stay arbitration of his uninsured motorist claim.

Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer (Ins. Law § 3420(d))

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

In *City of New York v. Greenwich Ins. Co.*, the court observed,

> Under Insurance Law § 3420(d)(2), an insurer wishing to deny coverage for death or bodily injury must "give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage." "When

> an insurer fails to do so, it is precluded from disclaiming coverage based upon late notice, even where the insured has in the first instance failed to provide the insurer with timely notice of the accident." Although the timeliness of such a disclaimer generally presents a question of fact, where the basis for the disclaimer was, or should have been, readily apparent before the onset of the delay, any explanation by the insurer for its delay will be insufficient as a matter of law.[40]

"[T]he timeliness of an insurer's disclaimer [or denial] is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage."[41]

In *How Shim Yu v. General Security Ins. Co.*, the court observed that "[a]n insurer's failure to provide notice [or disclaimer] as soon as is reasonably possible precludes effective disclaimer, even where the policyholder's own notice of the incident to its insurer is untimely."[42]

The Fourth Department, in *RLI Ins. Co. v. Smiedala*,[43] noted that an insurer's opposition to a motion for summary judgment in a declaratory judgment action could be deemed a written disclaimer / denial of coverage, subject, of course, to the timeliness requirement of Ins. Law § 3420(d)(2).

In *George Campbell Painting v. National Union Fire Ins. Co. of Pittsburgh, PA*,[44] the First Department declined to follow, and expressly overruled, its prior longstanding rule, set forth in *DiGuglielmo v. Travelers Property Casualty*,[45] wherein it had held that, notwithstanding the statutory language in Ins. Law § 3420(d) requiring a liability insurer to give written notice of disclaimer "as soon as is reasonably possible," an insurer "is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer."[46] Based upon its reassessment of the statutory language and the decisions of the Court of Appeals interpreting it, and "dictated by fidelity to the plain language chosen by the Legislature, the teachings of our State's highest court, and the policy considerations embodied in the law," the court held – in agreement with prior decisions / law in the Second Department[47] – that "§ 3420(d) precludes an insurer from delaying issuance of a disclaimer on a ground that the insurer knows to be valid – here, late notice of the claim – while investigating other possible grounds for disclaiming."[48] Thus, because the insurer in this case had sufficient information to disclaim coverage on the ground of late notice, but did not issue a disclaimer on that ground until nearly four months later, that disclaimer was ineffective as a matter of law. The court further noted that once the insurer possessed all the information it needed to determine that the plaintiffs, which sought coverage as additional insureds, had failed to give timely notice of the claim, as required by the policy, it "had no right to delay disclaiming on the late-notice ground while it continued to investigate whether plaintiffs were, in fact, additional insureds."[49] As the court further explained, the plain language of Ins. Law § 3420(d)

> cannot be reconciled with allowing the insurer to delay disclaiming on a ground fully known to it until it has completed its investigation (however diligently conducted) into different, independent grounds for rejecting the claim. If the insurer knows of one ground for disclaiming liability, the issuance of a disclaimer on that ground without further delay is not placed beyond the scope of "reasonably possible" by the insurer's ongoing investigation of the possibility that the insured may have breached other policy provisions, that the claim may fall within a policy exclusion, or (as here) that the person making the claim is not covered at all. Stated otherwise, the statute mandates that the disclaimer be issued, not "as soon as is reasonable," but "as soon as is reasonably *possible*."[50]

The First Department, in *AIU Ins. Co. v. Veras*, held that a letter of disclaimer sent 15 days after the insurer completed its two-week internal investigation, which led to the decision to disclaim, was untimely as a matter of law. The court further rejected the insurer's argument that the delay was due to its investigation of other possible grounds for disclaiming. Citing *George Campbell Painting*, the court stated: "'[J]ust as we would not permit the insured to delay giving the insurer notice of claim while investigating other possible sources of coverage, we should not permit the insurer to delay issuing a disclaimer on a known ground while investigating other possible grounds for avoiding liability.'"[51]

In *Brother Jimmy's BBQ, Inc. v. American International Group, Inc.*,[52] the court held that a delay of 38 days in disclaiming excess coverage was unreasonable as a matter of law, because the ground alleged as support for the disclaimer was clear from the face of the notice of claim and other documents submitted to the excess carrier.[53]

In *City of New York v. Greenwich Ins. Co.*,[54] the notice of claim received by the insurer contained only the date of loss and did not indicate when the insured first learned of the subject accident. The insurer's investigation did not begin until more than 31 days after it received the notice letter and continued for approximately five and a half months. Noting that "insurers have a duty to 'expedite' the disclaimer process," and that the insurer did not explain "why anything beyond a cursory investigation" was necessary to determine whether the insured timely notified it of the claim, the court held that the five-and-a-half month delay in disclaiming was unreasonable as a matter of law.

The court in *Country-Wide Ins. Co. v. Preferred Trucking Services Corp.*[55] held that the disclaimer was untimely because it came approximately four months after the insurer learned of the ground for the disclaimer. The court rejected the insurer's contention that the disclaimer was timely because it had no basis for disclaiming coverage until it became apparent that the operator of the subject truck would not cooperate with the defense of the underlying personal injury action. The court explained, "Plaintiff's diligent conduct prior to the disclaimer, in

attempting to secure the cooperation of both Preferred's owner and the operator of the truck, shows that plaintiff believed that both had knowledge or information pertaining to the accident and the underlying litigation, and belies plaintiff's representation that its sole concern was with the testimony of the operator of the truck."[56]

In *City of New York v. General Star Indemnity Co.*,[57] the court held that issues of fact remained as to whether information the insurer received, which failed to identify the named insured or the number of the master policy, provided a sufficient basis for a disclaimer, and whether the disclaimer subsequently issued by the insurer was timely. The insurer claimed that it did not receive sufficient documentation until 11 days after it received first notice of the claim, and it disclaimed 30 days later.

In *How Shim Yu v. General Security Ins. Co.*,[58] the insurer learned by August 27, 2004, that the plaintiff had served the summons and complaint in the underlying action on the Secretary of State on December 31, 2001, that the Secretary of State had sent the documents to the address on file for the insured, and that those documents had been returned unclaimed. Thus, the insurer was aware by that date of the grounds for disclaimer but did not disclaim until July 18, 2007 – almost three years later. This delay was held to be unreasonable as a matter of law; the court rejected the insurer's contention that it had to wait until the motion court in the underlying action confirmed the Special Referee's finding that the insured had deliberately left its mail unclaimed.

The Second Department, in *Tower Ins. Co. v. Khan*,[59] held that a disclaimer issued 17 days after the insurer obtained all of the facts necessary to support the disclaimer was timely.

In *Castro v. Prana Associates Twenty One, LP*,[60] where the insurer did not receive notice until it received notice of the summons and complaint from the claimant on May 25, 2010, and from the insured's broker on June 2, 2010, the court held that using either notice date, the insurer's disclaimer letter, dated June 14, 2010 (either 20 or 12 days later), was timely as a matter of law.

In *City of New York v. General Star Indemnity Co.*,[61] the court held that issues of fact existed as to the timeliness of the disclaimer issued either 64 or 30 days after receipt of notice, and whether the insurer conducted a "diligent" investigation.

Several recent cases reiterated the proposition that a disclaimer pursuant to Ins. Law § 3420(d)(2) is unnecessary when a claim does not fall within the coverage terms of the insurance policy. Stated another way, "[a]n insurer is not required to deny coverage where none exists."[62]

One fairly common ground for disclaiming liability or denying coverage is the ground of non-cooperation by the insured. In order to support a disclaimer on that ground, the insurer must demonstrate that (1) it acted diligently in seeking to bring about the insured's cooperation; (2) the efforts it employed were reasonably calculated to obtain the insured's cooperation; and (3) the attitude of the insured, after his or her cooperation was sought, was one of "willful and avowed obstruction."[63]

In *American Transit Ins. Co. v. Hossain*,[64] the court held that although the insurer sent letters and investigators to three different addresses for the insured, the record did not establish that the insured received the letters or had actual notice of the attempts to contact him. Further, the insurer never attempted to contact the insured at various other addresses in its file or at a possible work location. Thus, the evidence was insufficient to establish lack of cooperation.

Cancellation of Coverage

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

In *GEICO v. Phillip*,[65] the court noted that the initial burden of demonstrating a valid cancellation is on the insurance company that disclaimed coverage on that ground. In addition, the court observed that Vehicle & Traffic Law § 313 (V&TL) governs the procedures which an insurance carrier must follow in order to properly cancel an automobile insurance policy. Pursuant to § 313(2)(a), an insurance carrier is required to file with the Commissioner of Motor Vehicles a notice of cancellation within 30 days after the cancellation in order for the cancellation to be valid and effective against third parties.

In *GEICO v. Allen*,[66] the claimant was injured while a passenger in a vehicle that was operated by Clifton Jordan and insured by Infinity Auto Ins. Co., under a policy issued to Sarah Pemberton. In opposing the petition to stay the uninsured motorist arbitration sought by the claimant against his own insurer, Infinity contended that its policy to Pemberton had been validly "rescinded ab initio" based upon Pemberton's death seven years earlier. The court rejected that contention, however, because "'Vehicle and Traffic Law § 313(1)(a) supplants an [insurer's] common-law right to cancel a contract of insurance retroactively on the grounds of fraud or misrepresentation, and mandates that the cancellation of a contract pursuant to its provisions may only be effected prospectively. This provision places the burden on the insurer to discover any fraud before issuing the policy, or as soon as possible thereafter, and protects innocent third parties who may be injured due to the insured's negligence.'"[67]

Stolen Vehicle/Non-Permissive Use

Also in *GEICO v. Allen*, where the respondent was injured on August 7, 2010, in a letter dated September 1, 2010, Infinity also disclaimed coverage on the ground that

owner Pemberton had died in 2003, and, thus, Jordan was operating the vehicle without the permission of its owner. The respondent then made an uninsured motorist claim against GEICO, and GEICO sought to stay arbitration on the ground that Infinity insured the vehicle. In response to that proceeding, Infinity contended that not only had the policy issued to Pemberton been validly "rescinded ab initio" based on her death in 2003 but, further, that it had validly disclaimed coverage based on nonpermissive use, submitting in support a transcript of a recorded statement from Jordan "that could be interpreted as indicating that he 'had no business' driving the subject car, which had belonged to his ex-wife's deceased mother and was sitting outside the home of his ex-wife, who never used it."[68] The supreme court granted the petition and permanently stayed the arbitration, without a hearing. On appeal, the Second Department reversed.

Although the court agreed that Infinity did not validly disclaim on the ground that it rescinded the policy upon learning of the insured's death in 2003, noting that the right to cancel a contract of insurance retroactively on the grounds of fraud or misrepresentation has been overridden by V&TL § 313(1)(a), which mandates only *prospective* cancellations, it held that the issue of permissive use could be validly litigated and a hearing was necessary to determine that issue. The fact that Pemberton had died seven years prior to the accident did not conclusively resolve the issue in favor of Infinity. After her death, the vehicle could have come under the ownership of another individual who gave Jordan express or implied permission to operate it. Thus, the matter was remitted for a hearing on permissive use.

In *Fiduciary Ins. Co. of America v. Jackson*,[69] the court held that the presumption of permissive use was rebutted by evidence that the vehicle owner left the keys on a table in his mother's home with instructions that his mother or his cousin would pick it up for repairs. As explained by the court,

> a finding of constructive consent requires a consensual link between the negligent operator and one whose possession of the car was authorized. Here, there was no evidence showing a consensual link between the owner and his mother on the one hand, and the driver on the other. There is no basis to disturb the court's finding that the owner's testimony that he did not give the driver permission to use the car was credible.[70]

Hit-and-Run

UM/SUM coverage is available to victims of accidents involving a "hit-and-run," i.e., where an unidentified vehicle involved in an accident leaves the scene of that accident.

In *Allstate Ins. Co. v. Stricklin*,[71] at a framed issue hearing concerning the possible identity of the hit-and-run vehicle, the respondent testified that within "about five minutes" after the accident, an unidentified individual handed him a piece of paper containing the license plate number of the car that fled the scene. The respondent further stated that this individual told him that he "went down the road and retrieved the plate number." While the respondent was "headed into the ambulance," he gave the piece of paper to a police officer at the scene. The plate number and identifying information of the offending vehicle were included in the subsequently prepared police accident report. The individual identified as the owner of the vehicle denied involvement in an accident. The hearing court admitted the uncertified police report into evidence even though no police officer testified and concluded, based thereon, that "there is another tortfeasor for which there is coverage."[72] Thus, the hearing court granted the petition to permanently stay the uninsured motorist claim.

The Second Department reversed, on the basis that the police accident report was inadmissible under the present sense exception to the hearsay rule, since the statement contained therein was not made "substantially contemporaneously" with the witness's observations, and the declarant's description of the relevant events was not "sufficiently corroborated by other evidence." Since there was no other evidence that the alleged identified vehicle was involved in the subject accident, the court denied the petition to stay arbitration.

In *GEICO v. Baik*,[73] the court upheld the granting of the insurer's petition to stay arbitration on the ground that the petitioner established that neither the respondent nor the policyholder reported the alleged hit-and-run accident to the police, a peace or judicial officer, or to the Commissioner of Motor Vehicles within 24 hours of the accident, or as soon as possible thereafter, as required for a valid hit-and-run claim.

In *GEICO v. Albino*,[74] the court observed that where a case is determined after a hearing, the appellate division's power to review the evidence is "as broad as that of the hearing court, taking into account in a close case the fact that the hearing judge had the advantage of seeing the witnesses."[75] Thus, the court upheld the determination, made after a framed issue hearing, that there was no physical contact between the claimant's vehicle and an alleged hit-and-run vehicle.[76]

Actions Against the Motor Vehicle Accident Indemnification Corp. (MVAIC)

In *Johnson v. MVAIC*,[77] the court held that the petition to commence an action against MVAIC was time-barred.

> One category of an "uninsured" motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident.

The petitioner's accident occurred on January 20, 2003, when he was 14 years old. The applicable three-year statute of limitations for a personal injury action was tolled until the petitioner turned 18, and expired on April 27, 2009, when he turned 21. The petition for leave to sue MVAIC was not filed until June 14, 2010, after the expiration of the statute of limitations.

PART III. UNDERINSURED MOTORIST ISSUES

Purpose

In *Weiss v. Tri-State Ins. Co.*, the court observed that "SUM coverage in New York is a converse application of the golden rule; its purpose is 'to provide the insured with the same level of protection he or she would provide to others were the insured a tortfeasor in a bodily injury accident.'"[78]

Trigger of Coverage

In *Bobak v. AIG Claims Services, Inc.*,[79] although the evidence established that Reliance, the tortfeasor's primary insurer, was insolvent, and that no benefits would be afforded to the claimant by the guaranty association that assumed the liabilities of the insolvent insurer, the evidence also established that the tortfeasor had a $1,000,000 excess liability policy with Travelers, and that Travelers had not disclaimed coverage thereunder. The court, therefore, counted the Travelers $1,000,000 coverage in the trigger comparison and found, based thereon, that the claimant's $1,000,000 SUM policy was not triggered because the tortfeasor's $1,000,000 bodily injury limits were not less than the claimant's $1,000,000 bodily injury limits.

Justice Carni, the lone dissenter, would have held that the SUM coverage was triggered simply by the insolvency of the primary insurer, and that "where, as here, a vehicle is insured by a motor vehicle liability policy issued by an insolvent insurance company and is thus an 'uninsured motor vehicle,' the existence of an excess insurance policy does not change its status as such." He explained, "In other words, an excess or umbrella policy does not constitute a 'bodily injury liability insurance policy' for purposes of determining whether a motor vehicle is 'an uninsured motor vehicle' triggering SUM coverage." He further concluded that "the amount of a tortfeasor's coverage under a motor vehicle liability policy may not be combined with the amount of his or her coverage under a commercial general liability excess policy in determining whether SUM coverage is implicated."[80]

Consent to Settle

The Third Department, in *State Farm Mutual Automobile Ins. Co. v. Perez*,[81] observed that

> [w]here an insurance policy "expressly requires the insurer's prior consent to any settlement by the insured with a tortfeasor, failure of the insured to obtain such prior consent from the insurer constitutes a breach of a condition of the insurance contract and disqualifies the insured from availing himself of the pertinent benefits of the policy . . . unless the insured can demonstrate that the insurer, either by its conduct, silence, or unreasonable delay, waived the requirement of consent or acquiesced in the settlement."[82]

In that case, the respondent sent two letters to the petitioner. The first notified it of the respondent's intent to commence a negligence action against the tortfeasor, who maintained liability coverage limits of 25/50, and, thus, of the potential for an SUM claim. The second stated that the respondent and the tortfeasor agreed to a binding arbitration proceeding. The respondent was awarded $50,000 in the arbitration and thereafter executed a general release with the tortfeasor in the amount of $25,000 and filed a request for an SUM claim. The petitioner denied the SUM claim on the ground that it did not receive a written notice of an intention to settle or a request for consent to settle with the tortfeasor. The respondent's contention that his second letter satisfied the written notice requirement and that the petitioner acquiesced to the settlement by its silence in response thereto was rejected by the court. That letter did not contain any reference to any intention to settle – only to an intention to arbitrate. Thus, notice was not provided as required by the SUM policy, which impermissibly impaired the petitioner's subrogation rights.

In *GEICO v. Morris*,[83] the issue was whether the respondent ever sent to the petitioner a written request for consent to settle. Although the petitioner denied receiving any written request for consent to settle, the claimant's counsel stated that he sent such a letter and that the petitioner had twice orally assured him that such written consent would be sent. At the conclusion of a framed issue hearing, the supreme court held that the respondent never sought the petitioner's written consent to settle, and, thus, granted the petition for a permanent stay of arbitration. The Appellate Division affirmed, noting that the petitioner had effectively rebutted the presumption that a properly-mailed item was received by the addressee by submitting evidence demonstrating its "regular practices and procedures in retrieving, opening, and indexing its mail and in maintaining its files on existing claims." The court also upheld the supreme court's credibility determinations.

In *Day v. One Beacon Ins.*,[84] the court held that the "Release or Advance" Condition of the SUM Endorsement (Condition 10) applies only to settlements with motor vehicle bodily injury insurers, and not to settlements with non-motor vehicle defendants. In addition, the court held that the provision in Condition 10 that prohibits settlement with "any negligent party" without the SUM insurer's written consent, did not apply only to motorist tortfeasors, but included non-motorist tortfeasors, as against whom the SUM insurer would have a subrogation right pursuant to Condition 13 (Subrogation) of the Endorsement ("any person legally responsible for the bodily injury or loss"). As explained by the court in expressly rejecting the claim-

ant's contention that the consent to settle provision applies only to motor vehicle defendants,

> [t]he provision on its face plainly refers to settlements with "any negligent party" and does not refer merely to motorist tortfeasors. We thus reject plaintiff's "strained, unnatural and unreasonable" interpretation of that policy condition. Plaintiff's interpretation would require the replacement of the word "motorist" for "party" in the last sentence of Condition 10, such that the phrase would read "negligent motorist" rather than "negligent party." Had the sentence been intended to read in the manner suggested by plaintiff, it would have been easy enough to phrase it that way.[85]

Thus, in this case, where the SUM insurer offered to advance the amount of the settlement offered by the motor vehicle tortfeasor, but not the amount offered by the non-motor vehicle tortfeasor, the court held that it complied fully with its obligations under Condition 10. Moreover, where the claimant settled with both the motor vehicle tortfeasor and the non-motor vehicle tortfeasor without the insurer's consent, the court held that the claimant violated Conditions 10 and 13 of the Endorsement and, thus, vitiated the SUM coverage provided by that policy. The court, therefore, granted the insurer's motion for summary judgment dismissing the breach of contract complaint against it.[86]

In *Warner v. New York Central Mutual Fire Ins. Co.*,[87] the plaintiff, who was injured in a two-car accident, commenced a personal injury action against the owner/operator of the other vehicle and notified New York Central, his insurer, that he would be pursuing an SUM claim. Thereafter, the plaintiff's counsel advised New York Central (in writing, following a telephone call with an associate liability examiner) that the tortfeasor's policy limits had not yet been offered, and that the case would be proceeding to trial or "there [was] a possibility that the case would be arbitrated instead." Counsel's letter noted that the liability examiner with whom he had spoken had advised that "regardless of whether the [tortfeasor's] $25,000 policy limit is paid as a result of settlement, trial or arbitration, there would be no effect on [the plaintiff's] right to pursue his SUM claim."[88] New York Central did not respond or refute this assertion. The plaintiff then proceeded to a high/low arbitration in which the agreement was that the plaintiff would receive at least $7,500 regardless of the arbitrator's decision, and, if the arbitrator found that the case was worth at least $25,000, the tortfeasor's carrier would tender the policy limit. The arbitrator did find that the claim was worth "in excess of $25,000," without specifying the amount, and the plaintiff advised New York Central of this decision and requested its consent to settle for the full $25,000 of the tortfeasor's policy. New York Central then disclaimed SUM coverage on the ground that the plaintiff had violated the policy by entering into arbitration without its written consent and by compromising its subrogation rights. The plaintiff thereafter went ahead and settled with the tortfeasor, issuing a general release, and then commenced this action for declaratory judgment against New York Central. Both parties moved for summary judgment.

The court denied summary judgment to both parties, finding in the record the existence of issues of fact. First, the court noted that although the plaintiff entered into "binding" arbitration, it was unclear whether the plaintiff was in fact bound to accept the policy offer from the tortfeasor. If the plaintiff was not so bound, the arbitration proceeding did not impair, or even affect, New York Central's subrogation rights. If, in fact, New York Central's rights were still preserved after the plaintiff received the policy offer and notified it of the offer, as required, "then, in accord with the policy terms, [New York Central] could have advanced the proposed settlement funds to plaintiff and stepped into the litigation, requiring plaintiff's cooperation in the pending claim."[89] Indeed, if New York Central's rights were fully protected at the time the plaintiff formally notified it of the policy limits offer, then execution of the general release more than 30 days later was also proper, pursuant to the terms of the Release or Advance provision. The court noted that, under these circumstances, "we discern no reason why the parties' obligations under the SUM policy should be altered merely because the policy limits were tendered as the result of an arbitration proceeding rather than through negotiation."[90] There was, however, insufficient proof in the record as to the parties' understanding of the high/low agreement to warrant summary judgment in favor of the plaintiff. In addition, there was an issue of fact as to whether New York Central should be estopped from disclaiming coverage based on its alleged representations and acquiescence to the plaintiff regarding participation in the arbitration. While the plaintiff's counsel set forth those representations in an affidavit, New York Central denied that consent was given in the affidavit of its liability examiner, thus warranting the denial of summary judgment.

Offset/Reduction in Coverage

In *Rivera v. Amica Mutual Ins. Co.*,[91] the court held that the offset/reduction-in-coverage provision of the SUM Endorsement (Condition 6) was not ambiguous because it referred to "[t]he SUM limit shown on the Declarations," and the Declarations clearly set forth a "per accident" limit. In so holding, the First Department aligned itself with the Fourth Department in *In re Graphic Arts Mutual Ins. Co. (Dunham)*,[92] and the Second Department in *Automobile Ins. Co. of Hartford v. Ray*[93] and *GEICO v. Young*,[94] and disagreed with the Third Department in *Butler v. New York Central Mutual Fire Ins. Co.*[95]

Non-Duplication

Regulation 35-D's SUM Endorsement contains a provision entitled "Non-Duplication" (Condition 11), which

provides that the SUM coverage shall not duplicate any of the following:

> (a) benefits payable under workers' compensation or other similar laws;
> (b) non-occupational disability benefits under article nine of the Workers' Compensation Law or other similar law;
> (c) any amounts recovered or recoverable pursuant to article fifty-one of the New York Insurance Law or any similar motor vehicle insurance payable without regard to fault;
> (d) any valid or collectible motor vehicle medical payments insurance; or
> (e) any amounts recovered as bodily injury damages from sources other than motor vehicle bodily injury liability insurance policies or bonds.

In *Weiss v. Tri-State Ins. Co.*,[96] the court held that where the maximum SUM coverage was $500,000 per accident, and the claimants settled the underlying bodily injury action by accepting the $100,000 coverage limits of the offending vehicle, and an additional $255,000 from a defendant bar / diner, in settlement of Dram Shop claims against them – for a total settlement of $355,000 – the SUM coverage was reduced to $145,000. As noted by the court, the Dram Shop recovery constituted under Condition 11(e) ("Non-Duplication") an amount "recovered as bodily injury damages from sources other than motor vehicle bodily injury insurance policies or bonds."[97] Since Condition 11 does not allow duplicate recovery of such damages "under the terms of the SUM endorsement, the plaintiff's receipt of the Dram Shop recovery reduces, by that same $255,000, the amount payable under the SUM endorsement. The plaintiffs are not penalized by this reduction, since they secured the maximum amount for which they are covered under the SUM endorsement" (i.e., $500,000). Note, however, that the court did not appear to consider the question of whether, in fact, the recovery from the Dram Shop defendants constituted duplication, or simply additional benefits required to make the severely injured plaintiff whole. ■

1. 85 A.D.3d 1157 (2d Dep't 2011), *lv. to appeal denied*, 18 N.Y.3d 803 (2012).
2. The court did not address Pelszynski's second argument, i.e., that he was covered under the volunteer fire department's policy because he was occupying a vehicle which was being operated by the fire department and for its benefit.
3. 2013 N.Y. Laws ch. 11 (eff. Apr. 16, 2013).
4. *See* Norman H. Dachs & Jonathan A. Dachs, *SUM Legislation – Good News/Bad News*, N.Y.L.J., Mar. 12, 2013, p. 3, col. 1.
5. 35 Misc. 3d 200 (Sup. Ct., Essex Co. 2012).
6. *Id.* at 206–07.
7. *Id.* at 207–08 (some citations omitted).
8. 240 A.D.2d 566 (2d Dep't), *lv. to appeal denied*, 90 N.Y.2d 810 (1997).
9. 94 A.D.3d 725 (2d Dep't 2012).
10. *Id.* at 725–26 (citations omitted). *See also Schenback v. United Frontier Mut. Ins. Co.*, 101 A.D.3d 1788 (4th Dep't 2012) ("[a] resident is one who lives in the household with a certain degree of permanency and intention to remain").
11. 38 Misc. 3d 478, 480 (Sup. Ct., Dutchess Co. 2012).
12. *See Albano-Plotkin v. Travelers Ins. Co.*, 101 A.D.3d 657 (2d Dep't 2012); *Donald Braasch Constr., Inc. v. State Ins. Fund*, 98 A.D.3d 1302 (4th Dep't 2012); *AH Prop., LLC v. New Hampshire Ins. Co.*, 95 A.D.3d 1243 (2d Dep't 2012); *see also Spartacus Sch. of Sports, Inc. v. Nationwide Mut. Ins. Co.*, 101 A.D.3d 1105 (2d Dep't 2012); *Gilliard v. Progressive*, 96 A.D.3d 718 (2d Dep't 2012).
13. *Konig v. Hermitage Ins. Co.*, 93 A.D.3d 643 (2d Dep't 2012).
14. *Gilliard*, 96 A.D.3d at 718–19 (citations omitted).
15. 101 A.D.3d 1310, 1312–13 (3d Dep't 2012) (citations omitted). *See also Prince Seating Corp. v. QBE Ins. Co.*, 99 A.D.3d 881 (2d Dep't 2012).
16. 93 A.D.3d 643, 645 (2d Dep't 2012) (citations omitted).
17. 100 A.D.3d 411 (1st Dep't 2012).
18. 95 A.D.3d 1413 (3d Dep't 2012).
19. 95 A.D.3d 693 (1st Dep't 2012).
20. Ins. Law § 3420(a)(5), as added by N.Y. Laws 2008, ch. 388, § 2 (eff. Jan. 17, 2009). *See, e.g., Rosier*, 101 A.D.3d 1310; *Chiarello v. Rio*, 101 A.D.3d 793 (2d Dep't 2012); *Avenue New Realty, LLC v. Alea N. Am. Ins. Co.*, 96 A.D.3d 489 (1st Dep't 2012); *AH Prop., LLC v. New Hampshire Ins. Co.*, 95 A.D.3d 124 (2d Dep't 2012).
21. *Waldron v. N.Y. Cent. Mut. Fire Ins. Co.*, 88 A.D.3d 1053 (3d Dep't 2011). *See Rekemeyer v. State Farm Mut. Auto. Ins. Co.*, 4 N.Y.3d 468, 476 (2005); *In re Brandon (Nationwide Mut. Ins. Co.)*, 97 N.Y.2d 491, 498 (2002); *Bhatt v. Nationwide Mut. Ins. Co.*, 61 A.D.3d 1406, 1406–07 (4th Dep't 2009).
22. 98 A.D.3d 1302 (4th Dep't 2012).
23. *Id.* at 1303 (citations omitted); *see Chiarello*, 101 A.D.3d 793.
24. *Albano-Plotkin v. Travelers Ins. Co.*, 101 A.D.3d 657 (2d Dep't 2012); *Hermitage Ins. Co. v. JDG Lexington Corp.*, 99 A.D.3d 428 (1st Dep't 2012); *Lancer Ins. Co. v. Super Value, Inc.*, 96 A.D.3d 807, 946 N.Y.S.2d 213 (2d Dep't 2012); *AH Prop., LLC*, 95 A.D.3d 1243; *Chiarello*, 101 A.D.3d 793; *Castlepoint Ins. Co. v. Mike's Pipe Yard & Building Supply Corp.*, 101 A.D.3d 504 (1st Dep't 2012); *Szczukowski v. Progressive Ne. Ins. Co.*, 100 A.D.3d 1454 (4th Dep't 2012); *Aponte v. GEICO*, 92 A.D.3d 476 (1st Dep't 2012); *Kalthoff v. Arrowood Indem. Co.*, 95 A.D.3d 1413 (3d Dep't 2012).
25. 96 A.D.3d 855 (2d Dep't 2012).
26. 96 A.D.3d 629 (1st Dep't 2012).
27. *Id.* at 629 (citation omitted).
28. 92 A.D.3d 844 (2d Dep't 2012).
29. *Id.* at 845 (citations omitted).
30. 91 A.D.3d 502, 502 (1st Dep't 2012).
31. *Id.*
32. 91 A.D.3d 870 (2d Dep't 2012).
33. *Id.* at 871; see *In re Allcity Ins. Co. (Russo)*, 199 A.D.2d 88 (1st Dep't 1993).
34. 97 A.D.3d 1103, 1104, *lv. to appeal denied*, 98 A.D.3d 1326 (4th Dep't 2012), *lv. to appeal denied*, 20 N.Y.3d 1055 (2013) (citations omitted).
35. 100 A.D.3d 878 (2d Dep't 2012).
36. *Id.* at 878 (citing *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479–80 (2006)).
37. 93 A.D.3d 673, 673 (2d Dep't), *lv. to appeal denied*, 19 N.Y.3d 805 (2012) (citations omitted).
38. 94 A.D.3d 1002 (2d Dep't), *motion for lv. to appeal denied*, 19 N.Y.3d 815 (2012).
39. 98 A.D.3d 580 (2d Dep't 2012).
40. 95 A.D.3d 732, 733 (1st Dep't 2012) (citations omitted).
41. *RLI Ins. Co. v. Smiedala*, 96 A.D.3d 1409, 1412 (4th Dep't 2012).
42. 92 A.D.3d 568, 568, *recalled, vacated & substituted by* 95 A.D.3d 627 (1st Dep't 2012).
43. 96 A.D.3d 1409.
44. 92 A.D.3d 104 (1st Dep't 2012).
45. 6 A.D.3d 344, 346 (1st Dep't), *lv. to appeal denied*, 3 N.Y.3d 608 (2004).
46. *George Campbell Painting*, 92 A.D.3d at 105.
47. *See City of N.Y. v. Northern Ins. Co. of N.Y.*, 284 A.D.2d 291 (2d Dep't), *lv. dismissed*, 97 N.Y.2d 638 (2001).
48. *George Campbell Painting*, 92 A.D.3d at 106.
49. *Id.*
50. *Id.* at 111.
51. 94 A.D.3d 642, 643 (1st Dep't 2012).
52. 96 A.D.3d 429 (2d Dep't 2012).
53. *See also Munoz v. City of N.Y.*, 95 A.D.3d 648 (1st Dep't 2012) (43 days).
54. 95 A.D.3d 732 (1st Dep't 2012).
55. 99 A.D.3d 582 (1st Dep't 2012).
56. *Id.* at 582–83.
57. 96 A.D.3d 431 (1st Dep't 2012).
58. 92 A.D.3d 568, *recalled, vacated & substituted by* 95 A.D.3d 627 (1st Dep't 2012).
59. 93 A.D.3d 618 (2d Dep't 2012).

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am always conscious about running up unnecessary legal fees in litigation matters and I am acutely aware that, in this current economic climate, clients scrutinize legal bills more than ever. I recently succeeded in winning summary judgment on liability for my client in a breach of contract matter and the trial court subsequently directed a hearing on damages in which my adversary, David Delayer (Delayer), moved for a stay in the appellate court. The stay was granted, however, on the condition that Delayer's client post an undertaking. The day after the stay was granted, I emailed Delayer asking if his client would be posting the undertaking directed by the appellate court. His response was, "We have not made that determination as of yet." A few days later, at a conference before the trial court, Delayer said that his clients "were not seeking to obtain an undertaking." Since Delayer represented that he was not going to seek an undertaking, the trial court scheduled a damages hearing at the conference to occur in 30 days. The day after the conference and in preparation for the hearing, I served a document subpoena upon Delayer, which he moved to quash. That motion was argued a few days before the damages hearing and was granted in part by the trial court. The following morning, I was informed by Delayer that his client had posted the undertaking directed by the appellate court which it had required in order to stay the damages hearing. That afternoon, counsel for the insurance company (which issued the undertaking) informed me that Delayer had applied for the bond "weeks earlier." This is the first I had heard about the timing of the application for the bond, and from past experience I know that a bond is usually issued in a matter of days (if not the same day). Had I known that Delayer had applied for the bond weeks ago (and assuming it was issued shortly after he applied for it), then I would not have been forced to spend unnecessary time opposing his motion to quash since he likely knew weeks prior that the bond was issued, thereby staying the damages hearing.

I believe that Delayer's actions are unprofessional. At a minimum, Delayer's behavior is a clear example of uncivil (perhaps unethical) conduct motivated solely for the purpose of increasing my client's litigation expenses.

My questions for the Forum: Did my adversary act unprofessionally? Is Delayer's conduct sanctionable?

Sincerely,

A. Barrister

Dear A. Barrister:

What constitutes sanctionable conduct is one of the most hotly debated matters faced by the bench and the bar. Section 130-1 of the Rules of the Chief Administrator of the Courts, 22 N.Y.C.R.R. 130-1 (Rule 130-1 or Part 130) sets forth the provisions governing how costs and sanctions may be awarded by a court when it finds that a party or its attorney has acted in a manner warranting the imposition of costs or sanctions. Specifically, Rule 130-1.1 states:

> (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.
>
> (b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.
>
> (c) For purposes of this Part, conduct is frivolous if:
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.
>
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.
>
> (d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

Although a full discussion of what constitutes sanctionable conduct could take up volumes of this *Journal*, it appears that the situation which you have described focuses primarily on the question of whether a potentially expensive delay caused by an adversary rises to the level of frivolous conduct and should be sanctioned. Rule 130-1.1(c)(2) notes that frivolous conduct includes actions which are "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." Rule 130-1.1(c)(2). One example of sanctionable delay involved a law firm which had hindered the resolution of a litigation by twice moving for additional time to submit an appeal brief while withholding for many months information regarding a related settlement in another state that mooted the appeal and of the firm's intention to move to dismiss the appeal on that ground. *See Naposki v. First National Bank of Atlanta*, 18 A.D.3d 835 (2d Dep't 2005).

Of course, an analysis as to what constitutes sanctionable conduct would be incomplete without mentioning Rule 11 of the Federal Rules of Civil Procedure. Although the federal courts are often hesitant to order sanctions when faced with the allegation that a party or its counsel engaged in conduct intended to "cause unnecessary delay, or needlessly increase the cost of litigation . . ." (*see* Fed R. Civ. P. 11(b)(1)), Rule 11 is not by itself the only weapon to combat delay tactics by an attorney. 28 U.S.C.A. § 1927 states that

> [a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

In *Wechsler v. Hunt Health Systems, Ltd.*, 216 F. Supp. 2d 347 (S.D.N.Y. 2002), the District Court granted sanctions pursuant to both Rule 11 and 28 U.S.C. § 1927 against a defense counsel who "on the eve of [a] . . . pre-trial conference to set a trial date . . . sought [a] procedurally unsound motion for summary judgment." *Id.* at 357. The court in *Wechsler* noted that such conduct by defense counsel "sought to needlessly delay th[e] action." *Id.* at 358.

Naposki and *Wechsler* show just two examples of how courts view delay tactics – they are not taken lightly. While we all know that delay and expense are often inevitable in litigation, smart lawyers recognize that they only create problems for themselves when they engage in delay tactics that include unnecessary motion practice (as seen in *Wechsler*) or discovery "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." *See* Rule 130-1.1(c)(2).

We are sure that there are many members of our profession who would consider completely unprofessional Delayer's failure to inform you about the status of the bond in a timely manner. Certainly, many would view Delayer's conduct as violations of multiple provisions of the Standards of Civility (the Standards) (*see* 22 N.Y.C.R.R. § 1200, App. A). Part VI of the Standards provides that "[a] lawyer should not use any aspect of the litigation process . . . for the purpose of unnecessarily prolonging litigation or increasing litigation expenses." Furthermore, Part IX of the Standards states that "[l]awyers should not mislead other persons involved in the litigation process" and Part IX(b) provides that "[a] lawyer should not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct."

You mentioned that you had emailed Delayer the day after the stay was granted by the appellate court asking if his client would be posting the undertaking directed by the appellate court and that Delayer claimed he had not made that determination. As you noted above, Delayer thereafter made a representation before the trial court that his clients "were not seeking to obtain an undertaking." It is entirely possible that Delayer misrepresented his position concerning the undertaking in his exchange with you (a potential violation of Rule 4.1 of the New York Rules of Professional Conduct (the RPC) which requires that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person"). Of greater concern is that Delayer may have misrepresented himself before the trial court concerning the status of the undertaking. Such misstatement could amount to a violation of Rule 3.3(a)(1) of the RPC which states that "[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal . . ."

If you had known that Delayer had actually received the undertaking earlier in time than he later told you, then you would not have had to operate under the assumption that the damages hearing was going forward as previously scheduled by the trial court and you would not have been forced to engage in an unnecessary discovery dispute in advance of the previously scheduled hearing date. By keeping you in the dark as to the status of the undertaking,

Delayer's conduct likely caused you to incur unnecessary litigation expenses (a violation of Part VI of the Standards) and the position he took as to the undertaking may have been both misleading and contrary to what he represented to you in prior conversations (a violation of Part IX of the Standards).

Now, was Delayer's conduct sanctionable? Perhaps wanting to go in the other direction, one court recently answered this question in the negative. *Conason v. Megan Holding, LLC*, N.Y.L.J., May 7, 2013, at 22 (Sup. Ct., N.Y. Co. Apr. 18, 2013), was an action for alleged rent overcharges. The plaintiffs won summary judgment on liability. The court directed an assessment of damages by way of a hearing and ordered an award of attorney fees for the plaintiffs. The defendants sought a stay of the damages hearing in the Appellate Division and further perfected their appeal. The Appellate Division stayed the damages hearing on the condition that the defendants post an undertaking. The plaintiffs thereafter moved for costs in the form of attorney fees, claiming that the defendants failed to inform them they were applying for a bond, thus causing the plaintiffs unnecessary work in litigating a subpoena, among other motion practice. The court addressed the issue of whether a party could be sanctioned for failing to save its adversary money, noting doing so would cause no prejudice to itself. In the end, the court denied the plaintiffs' motion for costs and found that the conduct at issue was not sanctionable. The court stated that while Part 130 could expressly provide that failing to save an adversary money was sanctionable, it did not, and questioned where "to draw the line between mere discourtesy and sanctionable misconduct." In addition, the court found that a code of conduct prohibiting causing an adversary to waste money would be difficult to interpret and enforce.

The court in *Conason* apparently felt constrained by the fact that (unlike in Rule 11) there is no express language in Part 130 permitting an award of costs and sanctions when attorneys engage in conduct that unnecessarily adds to the cost of a case. Nevertheless the court expressed the view that attorneys potentially have both a moral duty and a heightened ethical duty not to engage in conduct that could result in one's adversary being forced to incur unnecessary litigation expenses. In the words of the court, "the day may come when the law takes a more moralistic, one might say 'holistic,' approach," adding that "we all gain when nobody is allowed gratuitously to cause another's loss." *Id.* Furthermore, the court embraced the idea that "[i]n normal civil society, the failure to save someone else money is bad form" and that "[w]hat in normal civil society is common courtesy may some day in law become ethical obligation." *Id.*

While counsel's tactics in *Conason* may not have risen to the level of sanctionable conduct, we can think of situations that might warrant a different result. Consider, for example, the adversary who insists that a deposition must be scheduled in a distant location on a holiday week, claiming that is the only place and time the witness will be available for the next six months. The fact, as discovered when the deposition is taken, is that the attorney knew full well that the witness was available in the adversary's home city for much of that time and there was no reason for the out-of-town deposition. Was the concealment of this fact frivolous conduct within the meaning of Part 130? We are sure that many of us would view it as such.

Although Delayer's conduct (which bears a striking resemblance to the conduct at issue in *Conason*) may not, at least in the view of one judge, have been sanctionable, it should be a cautionary tale for attorneys in their dealings with opposing counsel. The lesson to be learned is that the case law may not always keep pace with the conduct. Lawyers take a great risk when they engage in practices which delay cases and cause unnecessary litigation expense.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq., and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse
& Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I have been trying to develop an appellate practice and decided a few years ago to write a quarterly electronic newsletter discussing recent appellate decisions on issues that are of interest to my colleagues and potential clients. My thought was that the newsletter would give me an opportunity to demonstrate my writing and analytical abilities, and attract clients.

The newsletter (known as "The Able Law Firm Letter") targets attorneys and members of the business community who might refer business to my firm, and it includes my biographical and contact information. When I write about a case, I give the citation. I discuss the decision, its implications to the particular practice area and whether the decision is in my opinion correct. I never mention the names of the attorneys who handled the case. My plan is working, and I have gotten several clients who tell me they decided to hire me because of the newsletter. Recently, I had a case in the Court of Appeals which resulted in a major victory for me. I have decided to write about the case in my newsletter and plan on identifying the name of my client and highlighting the fact that I was the attorney who successfully handled the case.

A number of colleagues have suggested that my newsletter is attorney advertising, and that it is unprofessional for me to tout my victory by writing about it. Frankly, I do not think my colleagues are correct, but I am wondering whether it is possible that I am doing something wrong. I have also been told that even though my Court of Appeals decision is a reported case, I need the permission of my client to write about the case and identify its name.

Sincerely,
I.A.M. Able, Esq.

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Jessica Ruth Rubin-Wills
Inna Rudman
Yury Sakharov
Alexander F. L. Sand
Thomas Joseph Sander
Matthew Joseph Schommer
Samantha Leah Schott
John L. Schwab
Zev Schwartz
Gina Shlaferman
Stanislav Skarbo
James Slattery
Peter Harold Smiley
Russell Mark Smith
Philip Anderson Smithback
Rebecca Claire Smithwick
Victoria Smolyar
Robert B. Sobelman
Mariya Solovey
Justin L. Sowa
Gregory Sparer
Phillip W. Starkweather
Jawaid Hasan Stationwala
Shimon Sternhell
Mariangela Carroll Sullivan
Yvette Sutton
Robin Lynn Swartout
Meredith Davidson Symonds
David Michael Teslicko
Helen Elizabeth Tsibelman
Enisa Tutovic
Stan Ulis
John Carlos Vazquez
Nadirah Renee Vincent
Peter Michael Wade
Charles Dallas Wakefield
Lauren Amanda Wansor
Michael A. Wertheim
Celadon Charles Whitehurst
Derek Wikstrom
Melanie Catherine Jennifer Williams
Angharad Katharina Wilson
Stephen Todd Wishner
Dovid L. Wolosow
John Russell Wunderlin
Alexander S. Yellen
Daniel J. Yost
Sarah Marie Young
Farah Yasmin Zaman
Alexander Ian Ziccardi

THIRD DISTRICT

Craig Daniel Alfred
Ari Fabian Ambrose
Brianna LeClair Bailey-Gevlin
Alaina M. Bergerstock
David Philip Berson
Benjamin Casolaro
Dustin S. Delp
Jenna Marie Dicostanzo
Lance A. Dunning
Mark Harrison Foster
Michael T. Grady
Jennifer E. Jack
Martin Louis Levine
Diana Marin
Anna R. Mumford
Christopher J. Ritchey
Diana Schaffner
Michael C. Tedesco
Rebekah E. Weiler

FOURTH DISTRICT

Jordan Austin
Daniel Martin Chauvin
Katherine J. Demartino
Aimee Bharatkumar Kehoe
Janelle Lavigne
Brianna J. Rinkewich

FIFTH DISTRICT

Daniel J. Bobbett
Michael D. Brown
Alex Jared Chase
Timothy Doolittle
Daniel Stephen Engle
Anne J. Fletcher
Roy G. Franks
Meghan J. Gilligan
Milton A. Gregory
Jacquelyn Grippe
John Carlo Jensen
Benjamin Dane Ritter
Leia Danielle Schmidt
Benjamin D. Snyder
Kristopher Stevens
Daniel T. Tedford
Ashley M. Van Hoff
Lauren M. Wojnowicz
Travis J. Yoxall

SIXTH DISTRICT

Allison Julie Arotsky
Christopher John Austin
Patrick Wyatt Blakemore
Mark Yun (Allen) Chen
Gabriel Alejandro De Corral
Andrew Bernard Des Rault
Tamaron Dawn Greene
Diana Lucy Hallett
Kerry Anne Harnett
Guillaume A. Hess
James Byron Hicks
Colin Angus Leslie
Todd Marks
Matthew T. Pineo
Drew Godfrey Rolle
Michael Murray Shaw
Yang Yang
Jordan Jacob Yorke

SEVENTH DISTRICT

Casey Patrick Acker
Nicholas E. Arazoza
Alexa L. Ashworth
Melanie Jennifer Bailey
Kevin Lewis Bray
Colin Richard Bruckel
Terance Rowe Calcagno
Alex James Cameron
Steven Michael Cammarata
Todd James Casella
Benjamin J. Casilio
Leigh Ann Chute
Schauna M. Comfort
Adam J. Falcheck
Diana Teresa Ferretti
Katherine Gavagan
Mary Johanna Hanzlik
Elizabeth Ludington Heins
Christa Marie Hibbard
Robert Cooley Jeffries
Jennifer Laura Karnes
Andrew D. Kleehammer
Amanda Blair Lawrence
Kurt Odenbach
Michael Tyler Pattison
Christina Perinelli
Danielle Denise Ponder
Candice Ann Sengillo
Benjamin Thomas Skomsky
Stephen J. Sorensen
Kelly N. Thaw
Alexander Freund Tilton
Peter M. Van Dellon

EIGHTH DISTRICT

Julie Aline Barnes
James Peter Blenk
Richard Ruben Capote
Kelly Lin Carr
Brian Thomas Cook
Thomas J. Deboy
Martha Ellen Donovan
Brian Michael Eberle
Jeffrey Christopher Ertel
Jonathan David Falk
Maureen Renee Finn
Nicole Marie Flaig
Kathleen Joanna Gabel
Jeffrey Brooks Hitchings
Rebecca Richelle Josefiak
Michael McKevitt Kane
Jennifer Katz
Steven Christopher Kos
Marie Lampropoulos
Andrew C. Lotempio
Parker Roy Mackay
Scott R. MacPherson
Liam A. McMahon
Katelyn Jill Murray
Kelly Ann O'Brien
Melissa A. Palmer
Jennifer Marie Paulino
Bridget Elizabeth Rochester
Matthea W. Ross
Danielle Elizabeth Schembri
Joshua Charles Sibenik
Matthew Scott Szalkowski
Phillip Victor Urban
Amanda Zafur

NINTH DISTRICT

Jamal Ben Al-Haj
Sarah Rheagan Alexander
John M. Amandolare
Elizabeth Ashley Anderson
Kristen Elizabeth Andreoli
Jacob Joseph Awad
Hinna Lamba Bailey
Raphael John Basso
Joseph G. Bernard
Bobbi M. Bittker
Jared Evan Blumetti
Rory Kennedy Brady
Shaina Brenner
Coleman P. Burke
Lisa Capone
Robin D. Carton
Antoinette Maire Caruso
Dalila Christine Castillo
Elizardi Castro
Michael Albert Collado
Amanda Connor
Kerry E. Costello
Nicholas Curtiss-Rowlands
Lindsay Dembner
Caitlin Simone Demko
Anthony Michael Desiato
Christina Ambrosio DiFiore
Andrew J. Donovan
Kristin Erika Drennan
Yousra A. Elmadfai
Aaron Feuer
Robert A. Feuerstein
Julia Flockermann
Robert Wilkins Forster
Alex Justin Freundlich
Allan Goldfarb
Tawfik Ahmed Goma
Julia Beth Gordon
Ivie A. Guobadia
Hope Halpern
Megan Kathleen Hannon
Jacob J. Herbst
Jasmine Celeste Hernandez
Stacey L. Horan
Jenelle Lindsey Hubbard
Joseph Aaron Jacobson
Mecene Jophard Jourdain
Alexandra Tara Kamenetsky
Claire E. Knittel
Eugene Adam Kornel
Jennifer G. Kumar
Yeshaya A. Larkin
Erin Carol Larocca
Jessica Louise Lovejoy
Casey Milton Lovell
Samantha Ashley Lyons
Melody Joy Mahla
Michael Louis Mangini
Christy Jean Mazzola
Thomas J. McDonald
Yaneike Nicole McKenzie-Coley

Debra Lynn Mechanick
Jennifer M. Nath
James E. Nelson
Caroline G. Orlando
Meju Michelle Park
Thomas Leonardo Patalano
Leroy J. Pelicci
Rebecca Ann Regan
Rachael K. Reid
John Leikin Reinus
Craig Relles
Caitriona A. Rowland
Zachary H. Saltzman
Nicole Teresa Sardinha
Jay J. Scharf
Riti Priya Singh
Jeffrey Eric Smith
Rebecca A. Stockel
Brian Taylor Sumner
Jaime Trevino
Ellen J. Wardrop
Thomas Matthew Zegarelli
Zhiyao Zhu

TENTH DISTRICT

Mariam Ahmad
Gregory Michael Ainsley
George S. Asllani
Gil Auslander
Colleen Marie Baktis
Alimi A. Banjoko
Nicole Chealisse Bayer
Kristy Lynn Behr
Jack Anthony Bennardo
Orly Kaye Bertel
Samir N. Bhalodkar
Emily Nicole Blatt
William Gerald Blum
James Brian Bouklas
Oana Elena Brebenel
Gregory Nicholas Brescia
Laura Rose Bugdin
Stephen V. Buonomo
Ilana Blake Canner
Lauren Ashley Carrabs
Raymond A. Castronovo
Evelyn C. Centeno
Rita Chang
Mitchell Roger Charchalis
Meredith E. Chesler
Jason Eric Chimon
Jeffrey David Cohan
Brett R. Cohen
Sean Edward Comerford
Kristen Brett Conway
Meredith Allyn Coppola
Mariel Crippen
Ashley Michelle Cuneo
Nancy Dalien
Shari Alexandra Dawkins
Marissa Maureen Debellis
Jaclyn Delle
Laura Emily Deluca
Dahlia N. DeSimone
Chaim M. Dienstag
Erica C. Diner
Corinne E. Donohue
Joseph R. Einav
Ashley Renee Elem
Marissa Christina Eliades
Robert William Elliott
Talia Stephanie Englander
Brett Donald Erland
Natalia Fekula
Richard John Femia
Jessica Hope Ferguson
William K. Field
Brian Fishkin
David Samuel Fooden
Brendan Michael Fredette
Stephen Edward Fregosi
Kassandra Danielle Friedman
Ivana Garbowski
Mark Gaylord
Diana Renee Gesualdi
Kenneth Elswood Gillespie
Marissa Lynn Glass
Steve Gokberk
Raquel Lauren Goldstein
Michael John Graff
Jason William Hake
Philip Hammarberg
Jenny Soohl Han
Kenneth Kiseung Han
Ian Edward Hannon
Ethan Alexander Harris
Rachel Meredith Haskell
Chauncey Henry
Randall Holman
Bryan R. Houde
Jaime Sarah Hyman
Ruby Arlene Hypes
Tal Kenan Jawitz
Katelyn Marie Jerchau
Eric D. Kane
Jillian Leigh Kane
Michael Keane
Jessica Donna Keller
Samantha Kent
Jacquelyn Barbara Kercelius
Daniel Scott Klebanoff
Aaron M. Kleinmann
Marissa Taylor Kovary
Melissa Ellen Koven
Julia Ilona Kudlacz
Thomas Richard Lai
Alyssa Ann Laib
Erika Brittany Last
Joseph G. Leocata
Jonathan Chet-ming Li
Micah R. Liebert
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Kent Oscar Markgraf
Audrey Ayanna Mars
William Hamlet Martoccia
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Jolly-ray Paul McFarlane
Seamus Michael McGrath
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Ward McLaughlin Miller
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Lauren E. Monaghan
Elizabeth Jung Moran
Hayley Anne Morgan
Kristin Nicole Moro
James A. Morris
David M. Mott
Michael Jay Mutarelli
Kevin Nguyen
Pape Nicholls
Patrick Colm Nolan
John Jerome Norton
Alexander Joseph Papa
Christina Elizabeth Papadopoulos
Amit R. Parikh
Helen Partlow
R. Anthony Pastore
Vincent Joseph Pastore
Sara E. Pervil
Lienne Pisano
Matthew Richard Pisciotta
Paul Philip Plush
Brian Powers
Dana Purcaro
Gary V. Pustel
Robin Meredith Quitko
Jennifer Rabizadeh
Michael Joseph Rago
Joseph E. Reich
Gina M. Rodgers
Sean D. Roos
Norah Marie Roth
Andrew Michael Rothstein
Joshua Neil Rudin
Brittney Ciara Russell
Jacqueline Sabarese
Michael Anthony Sabino
Prerna Sahni
Brian Michael Sanders
Max Daniel Schlan
Arieh D. Schulman
Paul Livingston Scrom
Andrew Edward Shaughnessy
Leran Sheena
John Zachary Simon
Shikha Singhvi
Shana Ivy Slawitsky
Jessica Lynn Smith
Rebecca Kate Sorenson
Nicole Lynn Sottilo
Matthew Frank Spano
Panagiota Christen Stathakos
Rachel Joan Stein
Jason Keith Sterling
Gonzalo Gaston Suarez
Amy E. Swensen
Jaclyn Swerz
Michelle N. Tanney
Ruth Rachel Taranto
Justin Thomas Tauro
Janine Marie Townsend
Rachel Rita Troiano
James M. Tsimis
Shoira Turaeva
Jeannea Marie Varrichio
Christina Ann Vergara
Christina Virgo
Nicholas D. Vitalo
Unitah Rose Vivinetto
Marshall S. Volk
John Paul Volpe
Meaghan Ashley Walters
Rei Watanabe
Christopher J. Wesser
Joshua Lawrence Wolinsky
Calvin Woody
Lingfei Xu
Qian Jennifer Yang
David Seth Yohay
Karen Muir Young
David Edward Zahn
David John Zaleski
Shirin Zarabi
Melissa Allison Zeidler
Zachary Adam Zimmern

ELEVENTH DISTRICT

Nissim Abaev
Stella R. Adegite
Benjamin Alvarez
Kyle Philip Antonelli
Adam Antreassian
Daniel Avezbaki
Ara K. Ayvazian
Deidre Maeve Baker
Steven Thomas Beard
Jacob Bitton
Moshe Chaim Bobker
Bella Borukhova
William Michael Brown
Erin Michellle Campbell
Andrew D. Cerio
Michael Taiyuan Chen
David K. Cheung
Jinhyuk Choi
Lauren Allison Curatolo
Scott Nicholas Cutrone
Sean Patrick Damm
Jillian Marie De Chavez
Elias Demopoulos
Alexander N. Dergarabedian
Pranav M. Desai
Jamie Porter Devries
Adrian Ihor Dlaboha
Raymond Patrick Fernandez
Ann M. Ferrara
Paul J. Giovanniello
Jeffrey Ephraim Glatt
Jesse Avram Goldberg
Angel Manuel Guardiola
Carla Bess Gunther
Joshua Seth Guttman
Adina J. Halpern
Evan Blackley Hannay
Theodore William Hastings
Simone Sigma Hicks
Sarah Lynn Hollender
Timothy Chichen Hou
Anna Hwang
Mikhail Ibragimov
Edgar O. Irizarry
Veronica Joya
John Michael Kalinowski
Constantine Kalogiannis
Jennifer Diane Kelly
Aleksandr Khutoryansky
Robert Nam Su Kim
Yeunjo Kim
Shintaro Kitayama
Sergey Korolev
Paras D. Kothari
Julia Kourasheva
Jason William Krawitz
Jennifer Kucuk
Angelina Amrita Lachhman
Wen-wei Lai
Sonia Laird
Nicole Lapsatis
Stamatios Nikolas Lathourakis
Clair S. Lee
Lilian Lee
Arely D. Lemus
Janelle Melissa Lewis
Jessica Palumbo Limbacher
Shelly Lin
Xiaolin Liu
Joyce Man-ning Lo
Ramy Louis
Leila Lucevic
Patricia Helen Lui
Sophia Luu
Florina Malakh
Sekinat Olubunmi Malik
Besmir Martinaj
Ellen Catherine McGrath
Caitlin Mary Meagher
Mordechai Mendlowitz
Gabriel Gilbert Mendoza
Jenna Rae Minor
David Hugh Montgomery
Paola Monzon-cheng
Melisa S. Morgan
Shirin Movahed
Ester Murdukhayeva
Daniel Sophokles Nakos
Megan McDonald Neal
Diana Mary Nevins
Michelle K. Ng
Oluwatosin Ojo
Leonard Yehuda Oppenheimer
John-Paul Ovadia
Steve Jungsuk Park
Suvano Pinyochotiwong
Eliezer Poupko
Maureen Michelle Pritchard
Karen Camille Queensborough-Evans
Amir Rasoulpour
Nicole Joy Alyssa Reid
Ariuntuya Rentsen
Jorge Adriel Rodriguez
Matthew Thomas Rosenthal
Andrew David Rossel
Laura S. Rossi
Dana Theresa Russo
Frank Paul Sabatini
John Michael Saragas
Elie Schulman
Deena Bailey Schwartz
Jesse A. Seiden
Anna Shalomova
Ryo Shiba
Jamie Sinclair
Ariana C. Smith
Jennifer Ann Smith
Rachel Serenity Sparks Bradley
Danielle Marie Stevens
Frasilie Stinvil
Hao Tao
Alexander Tapia
James Allen Thurtell
Daniel Toca
Jonathan S. Tomberg
Joann Tsempelis
Nkechinyelum Udogwu
Mary Van Noy
Jessenia Leonor Vazcones-Yagual
Alla Voronovitskaia
Dingding Wang
Songyan Wang
Yangyu Wang
Elisha Wellerstein
Sholom Wohlgelernter
Kirsten Marie Wolf
Bryan J. Wolin
Takuro Yamaguchi
Boyuan Yang
Vladimir Yelizarov
Ayda Zaghi
Michael Wesley Zimmerman
Irene Apostolou Zoupaniotis

TWELFTH DISTRICT

Rolfi Jason Adon
Henrietta Asiedu
Jennifer Marie Brannon
David Marc Chaise
Katerina Davydov
Daniel Davis Gamer
Nicole Alayne Gentile
Laura Anne Godfrey
Daniel Goldmintz
Paula Luz Gutierrez-Rivera
Rachael Anne Harding
Hadassah Leah Holmes
Lucienne Nicole Lozada
Cynthia Adjo Markham
Etondi M. Mbame
Madeline M. Moore
Robert M. Murray
Ehimwenma Osayande
Stephanie Peguero
Holly Anne Robertson
Heidy M. Rodriguez
Krystle Eve Rodriguez
Orleny Altagracia Rojas
Luisa Maria Rosario
Brad Anthony Smith
Adam Daniel Steinmetz
Madeleine Elizabeth Stokes
Brian Dexter Thomas
Helen Dilenia Torres
Trinh Tran
Elizabeth Feldmeier Vieyra
Rebecca Lynn Visgaitis
Ekaterina Vyrkin
Philip Richard Weissman
Samuel Yaggy
Lisa Marie Zayas

THIRTEENTH DISTRICT

Theresa Omotayo Adewale
Kimberly Azucena Bello
Aiden Eugene Cotter
John Culotta
Joshua Degenstein
Steven Demizio
Jesse David Eisenberg
Michael S. Elias
Lauren Marie Flynn
Findayawah Munjai Gbollie
Magdalena Kuczynska
Cristina Maria Masiello
Elizabeth Anne Murphy
Gary Michael Ricci
Julia Sobolev
Roman Tchaikovsky
Jessica A. Termini
Julienne Nicole Verdi

OUT OF STATE

Mariame Aana
Yussuf Salah Abdel-aleem
Allen F. Acosta
Lucas Charles Adams
Yaniv Adar
Adewole Ebenezer Adebayo
Adefoyeke Abimbola Adedeji
Jawad Ahmad
Sogol Ahmadinia
Kwangmin Ahn
Adam Munther Ajlouni
Suhaib Al-ali
Justin Philip Alexander
Martin Alexandre
Christopher Michael Alexion
Rafael Antonio Altimari
Jaclyn Georgette Ambriscoe
Dante N. Amenta
Steven Augustine Andreacchi
Kristine Aisa De Paz Antoja
Alvaro Antoni Perez
Aurelia Antonietti
Alexandra Sergeyevna Appatova
Sarah Apsel
Lauren Grace Aranguren
Kerry-ann Candice Archer
Agatha Archibong
Rania Samir Arja
Rebecca Kelly Arnold
Nima Ashtyani-asl
Maya Atrakchi
Jonas Walter Jakob Attenhofer
Kyle Thomas Auty
Nassy Avramidis
Sahar L. Azar
Kevin Babikian
Alexander Paul Bachuwa
Stephanie Marie Backes
Kathryne Elisabeth Badura
Kwang Ja Baek
Ashley L. Baelz
Andrew Monroe Baer
Suzanne Kadijeh Baidon-Ciobanu
Shanna Bailey
Maria Luisa Celeste Balasta
Negisa Balluku
Gina Marie Barbieri
Paul Nathan Barger
Daniel Nathan Baronofsky
Christine Barratt
Michael Anthony Barsimanto
Jina Louise Bartholomew
Caroline Firth Bartlett
Mukerrem Onur Basar
Leslie Beth Baskin
Aveet Anil Basnyat
Wellesley Wenger Baun
Anna-Lee Bayley
Ria Mariana Bazie
Paul Kenneth Beck
Justin Ross Becker
Jennifer Marie Bennett
Malgorzata Elzbieta Bereziewicz
Kyle Thomas Berglin
Amanda Jean Brillantes Bernardo
Maria Loreste Bernido
Justin Lewis Bernstein
Erin Elizabeth Berry
Moran Bickel
Mitchell S. Bierman
Grisel Blanco-Obregon
Ryan Patrick Blaney
Valentine Anna Bleicher
Harold William Bloom
David Edward Bocan
Richard Norman Boe
Clare Elizabeth Bogdanowicz
Sharon T. Boland
Brian William Bombassaro
Emma Eaton Bond
Kateryna Bondar
Daniel Eduardo Bonilla
Derek Adam Borchardt
Nicolaj Bording
Charles J. Bordonaro
Andrew James Borek
Maria Grigorievna Borodina
Kate Bousfield
J. Alexis Bowie
Jennifer N. Boyd
Dennis Edward Boyle
Adrienne R.W. Bradley
Kathryn Joyce Bradley
Daniel Justin Bremmer
Lauren Aimee Broccoli
Richard Michael Brodsky
Astrid Suzanne Brouillard
Heather Michelle Brown
Anne Marie Buckley
Matthew Koch Bugher
Kenneth Anthony Bukowski
Hagit Hadas Bulmash
Joseph Frank Buono
Nathan Robert Burby
Kevin Patrick Burke
Ladawn Lynee Burnett
Adam David Burns
Rudolph John Burshnic
Tafara Leslie Burutsa
Benjamin Reed Cady
Anne-laure Virginie Cagniart
Mark G. Califano
Aikaterini Despoina Callahan
Christopher Callahan
Kristan Elizabeth Callahan
Curt D. Campbell
Michael Anthony Candelmo
John Richard Canney
Charles Capouet
Cristina Frances Caratzola
Martha Jo Cardi
Jonathan Sloan Carter
Nicole Lauren Castle
Molly Rebecca Catchen
Oded Cedar
Michael David Celentano
Scott Steven Centrella
Margo Kim Ceresney
Irina Ceric
Ishpreet S. Chadha
Huijin Chae
Jooyup Chae
Rasika Chakravarthy
Allison Chan
Chao-tien Chang
Jeffrey Yen Chang
Lucy Ok Chang
Megan C. Chang
Jennifer Morgan Chapkin
Brian R. Chase
Darren Jon Check
Dandan Chen
Fang Chen
Sheng Chen
Shiyi Chen
Maya Cheriyan
Serene Chew
Sunita Vij Chhabra
Nancy Aris Chidlovsky
Jessica Vivian Chiu
Suraj Chivukula
Dennis Cho
Dustin Gary Cho
Hyun Mi Cho
In Young Cho
Yen-an Cho
Wonjin Choi
Bilal Mohammed Choksi
So Jung Choo
Isabel Deway Chou
Chun Wing Chow
Wamiq Shaheer Chowdhury
Olivia Chriqui
Matthew Robert Christiansen
David Seung Kyun Chung
Janghwan Chung
Kyoung Hun Chung
Matthew Tully Clark
Lauren Whitney Clarke
Jillian Beth Clayton
Michael Tripp Cofield
Aaron David Cohen
Roy S. Cohen
Lauren Collins
Allison Kendall Condon
Melinda Jean Cooperman
Jason Andrew Copley
Cyriane Marie Coste
Dawn Marie Coulson
Rafael A. Cox Alomar
Marc Christopher Cozzolino
Jacopo Nicolo Crivellaro
Aisling Mary Cronin
Kelly Elizabeth Cruze
Sabrina Leanne Cua
Nicole Marie Cueto
Guillermo Ernesto Cuevas
Daniel Cullen
Christopher James Cunio
Alex Custin
Michael Christopher Cyr
Taras Michael Czebiniak
Michael Christopher D'Agostino
Johan Magnus Dagergard
Marika Denise Dagounis
Lauren Cole Daniel
Pauline Eulalie Daraux
Richard Dassin
Ashley Lauren Davidson
Jason Gregory Davila
Anastasia Davis Bondarenko
Peter John Davis
Polly Deveau Davis
Lynn Alvey Dawson
Brian Kerwin Day
Lisa Nicole De Gray
Juan Pablo Dechamps
Denise Maria Del Priore
Amanada Kay Dewyer
Pavandeep Dhillon
Alhousmi Diallo
Jean-marc Dibattista
Mark Dicicco
Nayna Rio Diehl
Moira Thornton Dillaway
Elan Kazruth Dimaio
Matar Diouf
Vanessa L. Dohner
Lynn A. Donohue
Tracy A. Doudt
Jochem Dousi
Andrea Dufaure
Siobhan Maria Clare Metcalf Duff
Sarah Kathryn Dugan
Georgia Bennett Dunphy
Hiroyuki Ebisawa
Jason J. Edler
Michael James Edwards
Lynn Eisenberg
Mallory Kim Elizondo
Stefan Jesse Erwin
Whitney Ann Evans
Robin Fagan
James Allen Fantau
Aaron Fanwick
Jennifer Lynn Fasolino
Jiajia Fei
Cheryl D. Feinberg
Eric William Feinberg
Peter Lim Felton
Amie Elizabeth Ferriero
Michael Joseph Figura
Marc Edward Finkel
Daniella Fischetti
Julianne Christine Fitzpatrick
Brian Liam Flood
Melissa Katherine Flores
Todd Flubacher
Sherif Mohamed Foda
Michael Angelo Formichelli
Mariko Alice Foster
Cherine Fuad Foty
Stephen Allen Fraser
Alison Ellis Frick
Matthew Ross Friedman
Dao Fu
Leyue Fu
Xin Fu
Daniel Fuentes
Marc Furman
Andrew Joseph Gallo
Matthew Paul Gallo
David Carl Galusi
Lindsay Michele Gamble
Stephanie L. Gardner
Jessica Garestier
Anton Garmoza
Jennifer P. Garner
Jessica Lee Gavrich
Rahwa Gebretnsaie
Andrew David Geibel
Jing Geng
Courtney Chyrell George
Brian Anthony Giantonio
Todd Andrew Gilbert
James Evans Gillenwater
Michael Aaron Ginzburg
Jason Edward Glick
Arkady Alexander Goldinstein
Eitan Michael Goldstein
James Christopher Good
Desiree Grace
Sean Thomas Greecher
John Alan Greenhall
Rebecca Gregory
Susan Perrault Groden
Marc J. Gross
Elizabeth Grossman
David Matthew Guess
Yi Guo
Rochelle Marie Gutfran
Yalda M. Haery
David Haffner
Lucy Gemma Haley
Liselle Marion Hamilton
Chao Han
Dong Young Han
Michelle Ann Han
Luis Hansen
Mie Struwe Hansen
Anam S. Haroon
Mizuki Hayashi
Ian Murray Hazlett
Holly Angela Heath
Jonathan William Heaton
Michael Heck
Mark Jason Heftler
Ashley Heisler
Julie Estee Heller
Eliyahu Dov Hendeles
Clifford Chad Henson
Edward George Higbee
Brandon H. Hill
Brian David Hill
Christopher Hirl
Kazuhisa Hirose
Norman Pai Ho
Jia Lin Hoe
Shane Christian Hoffmann
Estelle Hofschneider
Bradley Neil Holland
Danielle Dabritz Holmes
Benjamin Aaron Hooper
Shinichiro Horaguchi
Luke Roosevelt Hornblower
Ashley Elizabeth Horton
Ping Kuo Hsiao
Alex Hsu
Barbie Paiyin Hsu
Chao Tsung Huang
Kuan-chen Huang
Yuqian Huang
Zhe Huang
Siavash Human
Ashley Humphries
Shonnie Hur
Madoka Iida
Thor Gerald Imsdahl
Kyle Innes
Sophia Moena Isani
Yuka Iwai
Jonathan Aaron Jablon
Matthew Aaron Jackson
Edward Gerard Jager
Sonia Jain
Pooja Jaitly
Jeffrey Allen Jaketic
Carolina Jara Ronda
Michel A. Jeanniot
Yumi Jee
Shu-chin Jen
Gary E. Jenkins
Mallory Ann Jensen
Theresa Marie Jensen
Cyun-ren Jhou
Fei Jiang
Hang Jiang
Kezhen Jiang
Neville Jiang
Xin Jiang
Sandra Teresa Jimenez
Hayley Fraser Jodoin
Amanda Denise Johnson
Jessica Lynn Johnson
Surraya Johnson
Kaitlyn N. Jorge
Corey Lynn Judson
Cheryl Li Anne Kam
Yuko Kanamaru
Tae Sun Kang
Neema J. Kassaii
William Gordon Kaupp
Andleev Kaur
Joel E. Kaye
Jared Ryan Kelly
John Eugene Kelly
Chad B. Kempen
J. Michael Keyes
Gina Kim
Hae Young Kim
Hye-shil Kim
Hyunah Kim

Ja Hyun Kim
Jeesun Kim
Ji Yung Kim
Minar Kim
Minkyung Kim
Matthew James Kinnier
Paul C. Kleist
Dina Kleyman
Annmarie Elizabeth Klimowicz
Charles Christian Kline
Katherine Klonick
Marguerita Kniesser
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Jasmin Kocak
Larissa Mika Koehler
Daniel Harris Kohn
Perri J. Koll
Seiichi Kondo
Masashi Konno
Caroline Jungsun Koo
Andrew W. Koster
Tara Michelle Krieger
Tomasz Krzywicki
Iuliia Mykolayivna Kuchma
Colleen Depman Kukowski
Vera N. Kurnia
Yen-fu Lai
Priya Lamba
Jeffrey Greg Landis
Abigail Echlin Langer
Brendan Patrick Lanigan
Maria Camille Galvez Lantion
Sarah Lavin
Jessica Ann Lawless
Kelli Ann Layton
Tatiana Lazaro-Lopez
Hanh Hong Le
Chung Eun Lee
Heather Danielle Lee
Hui-chun Rose Lee
Hyung Won Lee
Hyuntaik Lee
Joyce Jayoon Lee
Lu Lei
Nancy Leon
John J. Leshinski
Peter Houghton Levan
Lindsay Erin Levin
Shmuel Dovid Levin
Alexander Nuo Li
Guanwen Li
Mengyang Li
Yifei Li
Siwei Liao
Lisa Dorothy Liebherr
David G. Lim
Christy Chieh-fang Lin
Shuna Lin
Maria-Luisa Valls Link
Regina Kuang Rong Liou
Eva Litina
David Emerson Littlejohn
Yuechuan Liu
Zhiqiang Liu
Dana Livne
Paula Frida Lobeck
Susie Elizabeth Lockwood
Rachel Logan
Meghan Feronie Loisel
Alana Mary Longmoore
Harriet Elizabeth Loos
Gabriel Lopez
John J. Lovejoy
Adam Seth Lovett
David Low
Qinghua Luan
Richard Cong Luong
Michael Thet Lwin
Kara Ann Lynch
Elizabeth Anne Lyon
Donald Lee Mabry
Ashley E. MacDonald
Nicole Marie Maciejunes
Christopher Thomas Madden
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Sonya Malhotra
Matthew Richard Maline
Erin P. Malone
John Joseph Mangin
Joel Marrero
Claire Martin
Toi Monique Mason
James J. Mavrikidis
Lisa Marie McElligott
Michael Scott McGetrick
Michael Casey McQueeny
Eva Maria Colette Meeuwis
Madeline A. Meibergen
Eric Meng
Robert Menzel
Carissa Meyer
Kenneth Charles Michaels
Yasufumi Miki
Diana Milanesi
Andrew Jacob Miller
Blake Richard Miller
Christopher Caldwell Miller
Michele Nicole Miller
Todd L. Miller
John G. Mills
Byungsuh Min
Jonathan Yakov Mincer
Lucas Jeremy Minkowski
Andrei Molchynskyy
Renee Marie Moorad
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Adam Morris
Steven Morris
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Mia Motiee
Bridgitte Elizabeth Mott
Sheen Munshi
Rehan Murad
Mariel Jacobsen Murray
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Esfand Yar Nafisi
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Sae Hyun Nam
Nicole Marie Nash
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Daniel Christian Needham
David Needham
Clemence Marie Germaine Neulat
Michael Richard Newman
Elizabeth Carolyn Nielsen
Jonathan William Noltie
Michael Ross Noveck
Eric Gregory Null
Timur John Nusratty
Michael Haynes O'Connell
William Matthews O'Connell
Erin Ann O'Dea
Breabdan O'Donnell
Samuel Oduro
Shogik Oganisyan
Hyolim Oh
Naoki Okumura
Moshood Afolabi Olajide
Christopher James Oliver
Carl D. Owens
Aurelie Pacaud
Diana Marcela Pak Yi
Serena Gayle Palastrand
Jeffrey Alan Palumbo
Danielle Sue Parent
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Sanghyun Park
Thomas Won Park
Christopher John Parker
Kerry M. Parker
Nicholas Owen Paslow
Florent Patoret
Shanelle Chante Patterson
Kathryn Shirilla Pearson
Stephen Pearson
Jing Pei
Lawrence Robert Perchick
Giancarlo Petroro
Justin Pevnick
Chetan Phull
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Christopher John Rubino
Charles Kevin Ruck
Howard David Ruddell
Jolanta Rusinski
Alyssa Beth Russell
Matthew Paul Russo
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Hyun Kyung Ryu Koo
Mariah Nel Samost
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Ryan Taliaferro Sanson
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Deeban Mani Siva
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Meg Slachetka
Maria Slobadehikova
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Molly Rebecca Soiffer
Caroline Carmichael Solis
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Douglas Steven Sunshine
Randall Adam Swick
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Kengo Takaki
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Nicholas Gavin Taliercio
Cynthia Tan
Sze Yao Tan
Terence Ky Won Tan
Xiao Tang
Yuan Tao
Julie Lynn Tersigni
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Elnaz Teymouri
Jeffrey Michael Thibault
Angelique Barbara Thomas
Michael B. Thomas
Rosalee Belinda Connell Thomas
Amelia Ann Thompson
Hugh Anthony Thompson
Grant Alexander Toeppen
Christie Kimberly Tomm
Carl-erik Torgersen
Meagan Jayne Tousley
Etienne Clement Toussaint
Wynn Phuong Tran
Dennis Brandon Trice
Marie Chantal Tuffet
Ajinkya Mahesh Tulpule
John Alfred Turner
Seth Charles Turner
Max Baba Twine
Matthew Joseph Tynan
Neal Ramesh Ubriani
Elena Vaccari
Carlos Aksel Valdivia
Elizabeth J. Varas
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Victoria Anne Vaskov
Agustin Manuel Vazquez
Junichi Veda
Brent Cameron Vegliacich
Nisha Venkataraman
Nicole Anne Veno
Daniel Louise Villalobos
Raquel Villar
Michael Vincenti
Keisuke Wada
Joseph Gibson Walker
Damon Wallace
William Thomas Wallace
Ruiqing Wang
Stephanie Wei-ming Wang
Ting Wang
Yiru Wang
Yue Wang
Zhaojing Wang
Zi Wang
Shawn Watts
Colinette Waugh
Erin Ashley Weber
Ingram Weber
Jiannan Wei
Saranne Elizabeth Weimer
Stewart Marvin Weintraub
Aaron Matthew Weisbuch
Jenny Rachel Weisenbeck
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Amy Elizabeth Wesner
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La Wanda Dyson White
Michael Whitlock
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Amy Frances Willey
Sean Barry Tobias Williams
Tasha Latrice Williams
Annie May Willis
James Scott Fraser Wilson
Lawrence Bernard Wiseman
Sanders Witkow
Ilana Wolk
Henry Blake Wong
Ilan Wong
Alexandra Brittany Wood
Katherine Tricia Wood
Hsiao-chien Wu
Jinfeng Wu
Linqi Wu
Yiyang Wu
Douglas Karl Wyatt
Jan-henning Wyen
Zhuoer Xu
Lisha Yakub
Chunyang Yan
Tomoki Yanagisawa
Kwanseok Yang
Zi Yang
Qinglan Ye
Yaozhi Ye
Wan-hsun Yen
Elisa Yi
Netta Yochay
Byung Ho Yoon
Jaesik Yoon
Josiah Monroe Young
Miguel Yturbe Redo
Tong Yun
Jeremy Lincoln Zacker
Robert Zalcman
Zachary Herman Zarnow
Aaron Simcha Jon Zelinsky
Hui Zeng
Hui Zeng
Jingxin Zhan
Anqi Zhang
Siyu Zhang
Peizhi Zhao
Meng Zhou
Shudan Zhou
Xiaoling Zhou
Bo Zhu
Li Zhu
Ian P. Zimmerman
Lauren M. Zink

If your lawsuit has multiple plaintiffs or multiple defendants, specify clearly which party is responding to the notice to admit and which party sought the admissions.

Total Denial

If you deny something from a notice to admit, don't equivocate. Deny the item outright. You can't deny items from the purpose of the pending action, not another action or future action,[12] even if the parties are the same.[13]

If you deny an item from the notice to admit and your adversary proves at trial that the item you denied was true, your adversary may seek costs and attorney fees.

You don't need to repeat in your response your adversary's requests from its notice to admit. It's time consuming and unnecessary. And CPLR 3123 doesn't require you to rewrite your adversary's request. Just respond to the requests. *Example:*

Response to Request No. 1

Admitted.

Response to Request No. 2

Denied.

Aside from not responding to a notice to admit — silence is an option — you have six other options in responding to a notice to admit: (1) admit the fact(s); (2) deny the fact(s); (3) state your inability to admit or deny the fact(s); (4) partly admit the fact(s) or admit with a qualification or explanation; (5) state that the fact(s) is a trade secret, privileged, or "immunized matter under CPLR 3101(b)-(d)";[10] or (6) move for a protective order.[11]

Total Admission

If you agree with the request, admit it. It's best to admit a request expressly if you know that the fact is true. If you don't admit a fact in your response and your adversary later proves that fact at trial, your client might be liable for your adversary's expenses in proving that fact at trial. For more information, see "Post-Trial Sanctions Motion," later in this column. If you're unsure whether a request is true, admit the fact with a qualification or explanation. If you admit something from a notice to admit, the admission is for a notice to admit the same way you would deny items in pleadings. You can't deny items from a notice to admit based "upon information and belief" or upon "knowledge of information sufficient to form a belief."[14]

Inability to Admit or Deny

You may serve a sworn statement explaining why you can't truthfully admit or deny the request.[15] One reason might be that you lack information to admit or deny the request. But you'll have to state that you've made a "reasonable inquiry" to get the information sought.[16]

Assume that Charlene Lowe was injured by an air conditioner that fell from a window of an eight-story building while she was riding on her pink Vespa. Here's an example of a request in the notice to admit and the response:

Request No. 3

The air conditioner, which injured Charlene Lowe, was manufactured in Québec, Canada.

Response to Request No. 3

After reasonable inquiry, plaintiff Charlene Lowe has insufficient information, either known or readily obtainable, to enable her to admit or deny the statement in Request No. 3.[17]

Partial Admission or Admission With a Qualification or Explanation

If you believe that the matters sought in a notice to admit can't be fairly admitted without some material qualification or explanation, you may, under CPLR 3123(a), qualify or explain your responses. A request in a notice to admit might contain facts that are true (which you'll admit), facts that are false (which you'll deny), and facts that you can't admit or deny.

Assume that your client is suing the defendant, Kevin Bourne, after the defendant crashed his Harley-Davidson into your client causing injuries and other damages. Here's an example of a request in the notice to admit and your response:

Request No. 4

On May 29, 2010, defendant, Kevin Bourne, was driving an illegally modified Harley-Davidson motorcycle manufactured in Flint, Michigan.[18]

Response to Request No. 4

Defendant, Kevin Bourne, admits that on May 29, 2010, he was driving a Harley-Davidson motorcycle. Bourne denies that the Harley-Davidson motorcycle was illegally modified. Bourne further states after reasonable inquiry that he has insufficient information, either known or readily obtainable, to enable him to admit or deny whether the Harley-Davidson motorcycle was manufactured in Flint, Michigan.[19]

Trade Secret or Privileged or Immunized Matter

You may serve a sworn statement explaining in detail that an item sought in a notice to admit is privileged or involves a trade secret or that an individual is privileged or disqualified from testifying as a witness.[20] Many of these items fall under the category of "immunized matter" discussed in CPLR 3101(b) through (d),[21] such as attorney-work product. *Examples:*

Response to Request No. 5
Plaintiff's request seeks information protected by a spousal privilege.
Response to Request No. 6
Plaintiff's request seeks information from defendant that will reveal a trade secret.
Response to Request No. 7
Plaintiff's request seeks attorney-work product.
Response to Request No. 8
Plaintiff's request seeks information that is attorney-client privileged.

Moving for a Protective Order

If you believe that the notice to admit — in its entirety or as to specific requests — is unreasonable, you may move for a protective order under CPLR 3103.[22] A good reason to move for a protective order is when your adversary's notice to admit is vague or ambiguous. Another reason to move is when your adversary seeks information that's "patently burdensome, unnecessarily prolix, and unduly protracted."[23] Also move for a protective order if your adversary seeks information beyond what's permissible in a notice to admit.[24]

You may ask the court to "deny[], limit[], condition[], or regulate[] the use of a notice to admit."[25] The court may strike or modify a request in a notice to admit; it may also condition a response or do something else to correct the improper request.[26]

Move for a protective order within your 20-day deadline. Moving for a protective order won't toll your 20-day deadline to respond to the notice to admit, though.[27] You must still serve, by the 20-day deadline to respond, a response to any request that you're not challenging in the notice to admit or seek an extension of time from the court.[28] If you need more time to respond to the requests you're not challenging, move to extend your time to respond.

You don't have to move for a protective order. Writing a response in examples 5 through 8 above is sufficient. But your adversary may be unsatisfied with your response and move to challenge your response as insufficient.

Sworn Statement

CPLR 3213(a) provides that you serve a "sworn statement." It's unclear who may provide the sworn statement. One treatise advises that any person who could have verified a pleading[29] may provide the sworn statement in response to a notice to admit.[30] But a notice to admit isn't a pleading. Another treatise recommends that your client provide the sworn statement.[31]

Also unclear is whether an attorney may provide the sworn statement.[32] The best advice for an attorney is that an attorney may provide the sworn statement only if the attorney has personal knowledge of the facts sought or if the attorney's knowledge is based on documentary evidence.[33]

Because "the stakes are high,"[34] consult with your client (or the appropriate person) before responding to a notice to admit. If your client is a corporation, one of the corporation's officers or authorized employees should provide the sworn statement.

Make sure your responses are accurate. The sworn statement, which appears at the end of your response, might look like this:

Defendant, Genevieve Pierson, being duly sworn, deposes and says: I have read the within denials, claims of privilege and trade secrets, qualifications and explanations to admissions, and statements of my inability to admit or deny, and they are true.

_____ [signature]
Sworn to before me this ____ day of _____, 20__.
[Notary stamp and signature][35]

CPLR 3123 doesn't require you to provide a sworn statement for admissions. You don't need to swear or affirm to the admissions in your response.

Moving to Extend Time to Respond to a Notice to Admit

If you need more time beyond the statutory 20 days to respond to the notice to admit, you may, under CPLR 3123(a), get "such further time as the court may allow."

CPLR 3123(a) says nothing about getting your adversary to stipulate to extending your time to respond to a notice to admit. You may, however, ask your adversary for more time. Draft a stipulation extending your time to respond to the notice to admit. Then present the stipulation to the court to "so order" it. If your adversary won't agree to give you more time, move by order to show cause or by ex parte order (without notice) to extend your time to respond to the notice to admit.[36]

Seek an interim stay of your response to the notice to admit. You don't know how long the court will take to resolve your order to show cause. Some judges will decide the order to show cause immediately, from the bench, on the return date. Other judges will take longer.

Don't wait until the last minute to move to extend your time to respond.

The court might grant your motion if you show good cause for an extension of time.[37] The court might grant your motion to extend your time to respond if the requests in the notice to admit are complicated and voluminous.[38] It will help if you show that your adversary won't be prejudiced by the delay if you get an extension to respond.[39]

Moving to Amend or Withdraw an Admission

After seeking leave from the court, the court may allow you to amend or withdraw an admission if it's "just" for the court to do so.[40] You'll have to provide the court with a basis for moving to amend or withdraw; you'll also need to show the absence of prejudice on your adversary if the court amends or withdraws your admission.[41] The court's leave may be granted conditionally.[42] The court may allow you to withdraw or amend, under CPLR 3123(b), "at any time."

Under CPLR 3123(b), you may move to withdraw or amend a timely filed admission. You'll need to show the court a basis for your withdrawal

or amendment.[43] Your inadvertence may be a ground for the court to grant your motion.

Likewise, under CPLR 3123(b), you may move to withdraw or amend a non-admission: a response you denied or stated you were unable to admit or deny.

Using an Admission at Trial

To use an admission from a notice to admit at trial, you'll need to offer it into evidence. Before the close of the evidence, ask the court to read the admissions into the record. If your adversary never responded to your notice to admit, you'll need to show that you served your adversary and that you never received a response, or you received a late response from your adversary.[47]

Your adversary might object to the admission's admissibility.[48] Your adversary may raise any objection that may be interposed at trial.[49] Your adversary may object on the ground that it timely responded to your notice to admit. Your adversary might object on the ground of relevance.

Even if you've introduced the admissions into evidence, your adversary may ask the court to "put that answer into context by introducing other answers"[50] to give the court, or the jury, a "[]complete picture."[51]

If you deny something from a notice to admit, don't equivocate. Deny the item outright.

Also, you may move under CPLR 3123(b) to vacate an automatic admission after you've failed to respond timely to a notice to admit. You'll need to show that your failure to respond was inadvertent.[44] You may also show that your adversary made improper requests in its notice to admit, such as seeking an admission on an ultimate issue of fact. If your adversary sought improper requests, you may also seek a protective order to strike the notice.

Moving to Challenge Response to a Notice to Admit

Your adversary might respond to your notice to admit with a vague or ambiguous answer. Don't assume that your adversary's response is an admission or a denial. If you're unsatisfied with your adversary's response to your notice to admit, you may seek relief from the court. You may ask the court to declare that your adversary's responses, in their entirety or in part, are insufficient and should be deemed admitted.[45] You may ask the court to direct your adversary to serve an amended response to respond adequately to the requests in your notice to admit.[46]

If your adversary never responded to your notice to admit, you may move to compel your adversary to respond to your notice to admit. Some practitioners don't bother moving to compel because their adversary's responses will automatically be deemed admitted if their adversary fails to respond. If the court, however, finds that your requests in the notice to admit are inadequate or inappropriate, the court will likely not deem the response (or non-response) an admission.

Post-Trial Sanctions Motion

CPLR 3123 "has its own built-in penalty for a violation."[52] The CPLR 3126 sanction doesn't apply to notices to admit.[53]

If you deny an item from the notice to admit and your adversary proves at trial that the item you denied was true, your adversary may move under CPLR 3123(c) for costs and attorney fees.[54] Your adversary will have to show the court the costs that were incurred in having to prove the items at trial. The court may consider your adversary's motion for costs and attorney fees irrespective of the result of the action, even if your adversary loses the trial.[55]

The court will decide your adversary's motion for costs and attorney fees outside the jury's presence.[56]

The court might award costs and attorney fees to your adversary "[u]nless the court finds . . . good reasons for the denial or . . . refusal . . . to admit the item or [if the court finds that] the admissions sought were . . . no[t] substantial[ly] important[ ]."[57] Some judges might not be so willing to award costs and attorney fees: "The *unless* clause is a refuge for judges unenthusiastic about CPLR 3123 costs sanctions. . . . It's probably another reason for the relative disuse of CPLR 3123."[58]

Move for costs and attorney fees under CPLR 3123 "at or immediately following the trial."[59] Waiting a few days after a trial to move for costs and attorney fees is too late.[60] Make sure you have bills or other proof ready at your disposal.

The court might not award you costs if the witness you used to prove the disputed fact was the same witness you needed to prove your case.[61]

In an upcoming issue of the *Journal*, the *Legal Writer* will discuss disclosure motions in its series on civil-litigation documents. ■

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1. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 30:40, at 30-8 (2006; Dec. 2009 Supp.).

2. 6 Jack Weinstein, Harold Korn & Arthur Miller, N.Y. Civ Prac: CPLR ¶ 3123.06, at 31-539 (2d ed. 2012; Mar. 2013 Supp.) (citing *Barbara A. v. Gerald J.*, 146 Misc. 2d 1001, 1003, 553 N.Y.S.2d 638, 640 (Fam. Ct. Queens County 1990) ("The results of such privately arranged testing may be admitted into evidence upon consent of both parties or upon a notice or motion to admit (CPLR 3123) or, at trial, if it meets evidentiary criteria."), *aff'd*, 178 A.D.2d

412, 577 N.Y.S.2d 110 (2d Dep't 1991)).

3. CPLR 2103(e).

4. David D. Siegel, New York Practice § 364, at 624 (5th ed. 2011).

5. Barr et al., *supra* note 1, § 30:91, at 30-13.

6. *Id.* § 30:110, at 30-14.

7. *Id.*

8. *Id.* § 30:112, at 30-14.

9. *Id.*

10. Weinstein et al., *supra* note 2, ¶ 3123.08, at 31-540.

11. Barr et al., *supra* note 1, § 30:120, at 30-15.

12. 1 Byer's Civil Motions § 24:47 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.); Siegel, *supra* note 4, at § 364, at 624 (citing *Seidenberg v. Rosen*, 114 N.Y.S.2d 279, 280 (Sup. Ct. N.Y. County 1952)).

13. Barr et al., *supra* note 1, § 30:242, at 30-24.

14. Siegel, *supra* note 4, at § 364, at 624-25 (citing *Barnes v. Shul Private Car Serv., Inc.*, 59 Misc. 2d 967, 968, 301 N.Y.S.2d 907, 908 (Sup. Ct. Kings County 1969)); Barr et al., *supra* note 1, § 30:152, at 30-17.

15. CPLR 3123(a); Barr et al., *supra* note 1, § 30:151, at 30-17.

16. Barr et al., *supra* note 1, § 30:151, at 30-17.

17. Adapted from Barr et al., *supra* note 1, § 30:151, at 30-17.

18. *Id.* § 30:125, at 30-16.

19. *Id.*

20. Byer's Civil Motions, *supra* note 12, § 24:47; CPLR 3123(a).

21. Weinstein et al., *supra* note 2, ¶ 3123.08, at 31-540.

22. Siegel, *supra* note 4, at § 364, 624 (citing *Nader v. Gen. Motors Corp.*, 53 Misc. 2d 515, 517, 279 N.Y.S.2d 111, 114 (Sup. Ct. N.Y. County), *aff'd*, 29 A.D.2d 632, 286 N.Y.S.2d 209 (1st Dep't 1967); *Epstein v. Consol. Edison Co. of N.Y.*, 31 A.D.2d 746, 746, 297 N.Y.S.2d 260, 261 (2d Dep't 1969)).

23. Barr et al., *supra* note 1, § 30:201, at 30-20 (quoting *Nader*, 53 Misc. 2d at 516, 279 N.Y.S.2d at 112).

24. See last month's issue for more information on what's permissible in a notice to admit: *Drafting New York Civil-Litigation Documents: Part XXV — Notices to Admit*, 85 N.Y. St. B.J. 64 (June 2013).

25. Barr et al., *supra* note 1, § 30:200, at 30-19.

26. *Id.* § 30:202, at 30-20.

27. *Id.* § 30:100, at 30-13.

28. *Id.* § 30:204, at 30-20.

29. CPLR 3020(d).

30. Weinstein et al., *supra* note 2, ¶ 3123.08, at 31-540.

31. Siegel, *supra* note 4, § 364, at 625 (citing *Elrac, Inc. v. McDonald*, 186 Misc. 2d 830, 833, 720 N.Y.S.2d 912, 915 (Sup. Ct. Nassau County 2001); *contra Barnes*, 59 Misc. 2d at 968, 301 N.Y.S.2d at 908).

32. Weinstein et al., *supra* note 2, ¶ 3123.08, at 31-540 (citing *In re Weill's Estate*, 35 Misc. 2d 64, 64-65, 229 N.Y.S.2d 503, 504 (Sur. Ct. Nassau County 1962) (finding that an attorney may verify the response to a notice to admit); *contra Barnes*, 59 Misc. 2d at 968, 301 N.Y.S.2d at 908 (finding that an attorney may not verify the response to a notice to admit)).

33. *Elrac*, 186 Misc. 2d at 833, 720 N.Y.S.2d at 915 ("While the Court is not prepared to state that an attorney may never answer a notice to admit, an attorney should only be permitted to do so if the attorney has knowledge of the facts or if the answers are based on documentary evidence, in the same manner as an attorney having such knowledge or using such documentary evidence may do so in a motion for summary judgment.").

34. Barr et al., *supra* note 1, § 30:92, at 30-13.

35. Adapted from Barr et al., *supra* note 1, § 30:141, at 30-16.

36. Barr et al., *supra* note 1, § 30:190, at 30-19; CPLR 2212(b), 2214(d).

37. *Id.* § 30:192, at 30-19 (citing CPLR 2004).

38. *Id.*

39. *Id.*

40. Byer's Civil Motions, *supra* note 12, § 24:47.

41. Barr et al., *supra* note 1, § 30:212, at 30-21.

42. Siegel, *supra* note 4, at § 364, at 624 (citing CPLR 3123(b)).

43. Barr et al., *supra* note 1, § 30:215, at 30-21.

44. *Id.* § 30:216, at 30-22; Weinstein et al., *supra* note 2, ¶ 3123.13, at 31-545.

45. Barr et al., *supra* note 1, § 30:170, at 30-18.

46. *Id.*

47. *Id.* § 30:230, at 30-23.

48. CPLR 3123(b); Barr et al., *supra* note 1, § 30:04, at 30-5.

49. Barr et al., *supra* note 1, § 30:231, at 30-23.

50. *Id.* § 30:232, at 30-23.

51. *Id.* § 30:232, at 30-23.

52. Siegel, *supra* note 4, § 364, at 625.

53. *Glasser v. City of N.Y.*, 265 A.D.2d 526, 526, 697 N.Y.S.2d 167, 168 (2d Dep't 1999) ("CPLR 3123 is self-executing . . . the penalties embodied in CPLR 3126 do not apply.").

54. Byer's Civil Motions, *supra* note 12, at § 24:47 (citing *Reid v. Unique Van Serv., Inc.*, 284 A.D.2d 520, 521, 726 N.Y.S.2d 578, 578 (2d Dep't 2001)).

55. Byer's Civil Motions, *supra* note 12, § 24:47; Siegel, *supra* note 4, at § 364, at 625.

56. CPLR 3123(c).

57. CPLR 3123(c); Byer's Civil Motions, *supra* note 12, at § 24:47.

58. Siegel, *supra* note 4, § 364, at 625 (emphasis added).

59. CPLR 3123(c).

60. Siegel, *supra* note 4, § 364, at 625 (citing *Halligan v. Glazebrook*, 59 Misc. 2d 712, 713, 299 N.Y.S.2d 951, 952 (Sup. Ct. Suffolk County 1969) (finding motion made two days after trial ended untimely)).

61. Barr et al., *supra* note 1, § 30:182, at 30-18 (citing *Coyne v. State Farm Fire & Cas. Co.*, 50 Misc. 2d 58, 60, 269 N.Y.S.2d 868, 871 (Syracuse City Ct. 1966) (finding that because witness was necessary to prove plaintiff's case, plaintiff not entitled to costs for proving ancillary fact elicited from the same witness)).

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60. 95 A.D.3d 693 (1st Dep't 2012).

61. 96 A.D.3d 431 (1st Dep't 2012).

62. *See State Farm Fire & Cas. Co. v. Raabe*, 100 A.D.3d 738 (2d Dep't 2012) ("when a claim is denied because the claimant is not an insured under the policy, there is no statutory obligation to provide prompt notice of the disclaimer"). *See also Hasbani v. Nationwide Mut. Ins. Co.*, 98 A.D.3d 563 (2d Dep't 2012) ("Since the policy did not provide coverage to the plaintiffs with regard to the vehicle involved in the accident, requiring payment of a claim upon a failure to timely disclaim would create coverage where it never existed"); *Utica Mut. Ins. Co. v. GEICO*, 98 A.D.3d 502 (2d Dep't 2012); *1812 Quentin Rd., LLC v. 1812 Quentin Rd. Condominium Ltd.*, 94 A.D.3d 1070 (2d Dep't 2012); *Hough v. USAA Cas. Ins. Co.*, 93 A.D.3d 405 (1st Dep't 2012).

63. *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 168–69 (1967).

64. 100 A.D.3d 421 (1st Dep't 2012), *lv. to appeal denied*, 20 N.Y.3d 859 (2013).

65. 98 A.D.3d 6169 (2d Dep't 2012).

66. 95 A.D.3d 1322 (2d Dep't 2012).

67. *Id.* at 1323 (citations omitted).

68. *Id.* at 1322.

69. 99 A.D.3d 625 (1st Dep't 2012).

70. *Id.* at 625–626 (citation omitted).

71. 93 A.D.3d 717 (2d Dep't 2012).

72. *Id.* at 718.

73. 94 A.D.3d 888 (2d Dep't 2012).

74. 91 A.D.3d 870 (2d Dep't 2012).

75. *Id.* at 871 (citations omitted).

76. *See also GEICO v. Tuzzo*, 94 A.D.3d 996 (2d Dep't 2012).

77. 91 A.D.3d 541 (1st Dep't 2012).

78. 98 A.D.3d 1107, 1110 (2d Dep't 2012), *lv. to reargue/lv. to appeal denied*, ___ A.D.3d ___ (2d Dep't 2013).

79. 97 A.D.3d 1103, *lv. to appeal denied*, 98 A.D.3d 1326 (4th Dep't 2012), *lv. to appeal denied*, 20 N.Y.3d 1055 (2013).

80. *Id.* at 1106–07.

81. 94 A.D.3d 1314 (3d Dep't 2012).

82. *Id.* at 1314 (citations omitted). *See also Warner v. N.Y. Cent. Mut. Fire Ins. Co.*, 97 A.D.3d 1065 (3d Dep't 2012).

83. 95 A.D.3d 887 (2d Dep't 2012).

84. 96 A.D.3d 1678, *motion reargue granted in part*, 99 A.D.3d 1261 (4th Dep't 2012), *lv. to appeal dismissed*, 20 N.Y.3d 992, *lv. to appeal denied*, 20 N.Y.3d 862 (2013).

85. *Id.* at 1681 (citations omitted).

86. *See* Norman H. Dachs & Jonathan A. Dachs, *Settlement With Non-Motor Vehicle Tortfeasor Under SUM Endorsement*, N.Y.L.J., July 10, 2012, p. 3, col. 1.

87. 97 A.D.3d 1065 (3d Dep't 2012).

88. *Id.*

89. *Id.* at 1067–68.

90. *Id.* at 1068.

91. 91 A.D.3d 562 (1st Dep't 2012).

92. 303 A.D.2d 1038 (4th Dep't 2003).

93. 51 A.D.3d 788 (2d Dep't 2008).

94. 39 A.D.3d 751 (2d Dep't 2007).

95. 274 A.D.2d 924 (3d Dep't 2000).

96. 98 A.D.3d 1107 (2d Dep't 2012), *lv. to reargue/lv. to appeal denied*, ___ A.D.3d ___ (2d Dep't 2013).

97. *Id.* at 1110.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Some lawyers use the words *scrip* and *script* as if they were interchangeable, often as a truncated version of *manuscript*. Are they really synonyms?

Answer: No. During the 14th century when it was first used in English, the noun *scrip* meant "a small bag, wallet, or satchel, especially one carried by a pilgrim, a shepherd, or a beggar" (*Oxford English Dictionary*). The English noun was probably introduced by missionaries, who had been directed to travel without purse or scrip ("money or luggage"), so they had to depend on public generosity for food and clothing – thus, their identification as beggars.

The noun *script* came into Middle English from Old French *escriptum*, which was then its neuter past participle, and that past participle originally came into French from the Latin verb *scribere*, "to write." The Latin infinitive *scribere* can also mean "to prepare a text for filming." Today, the noun *script* usually distinguishes handwriting from printing, but it can also refer to a type of writing that uses cursive characters to make printed texts look like handwriting. In legal usage, *script* connotes an original document.

Another correspondent wondered whether *script* was a shortened form of *prescription*; it does have that sense, especially related to narcotic drugs. For example, the O.E.D. provides a news article from 1951 that says a (drug) addict may acquire prescripts or scripts from a doctor. The nouns *scrip* and *script* are, in this sense, interchangeable.

The O.E.D. also confirms that *scrip* derives from "subscription," which originally was defined as "a receipt for a portion of a loan subscribed." My thanks to all correspondents who expressed interested in the etymology of *scrip* and *script*; as a result of their questions I was forced to do some interesting exploration.

On another issue, New Jersey attorney Elenora Benz writes that she dislikes lawyers' misspelling of the word *tenet* – they spell it *tenant*. I see that error frequently in the writing of first-year law students. Perhaps that's understandable, for as they enter law school their interest is more focused on a place to live than on legal concepts. But somewhere during the three years between their entrance into law school and their graduation from it, they should have learned the difference in the spelling.

Attorney Benz predicted, "Your mention of [the] error probably won't change anything, but it will at least get it off my chest." I predict that she is right!

Question: When I am sending one copy of two different documents (for example, one letter and one order), which of the following two sentences is correct?

(1) I enclose copies of the letter and the order.

(2) I enclose a copy of the letter and the order.

Answer: Neither of the sentences is as clear as it should be. The second sentence could be clarified by adding "one copy" in two places of that sentence. Then the sentence would read, "I enclose one copy of the letter and one copy of the order." That sentence sounds a little redundant, but clarity – of necessity – trumps redundance in legal writing.

Another unambiguous statement would be: "I enclose one copy each of the letter and the order."

From the Mailbag

I cannot believe that you used the word substitutable *in a recent column. The word* substitute *is a noun, not an adjective. Your sentence should have read, "Mr. S. is correct in his argument that 'gender' is not a substitute for 'sex'."*

My comment: Although the reader is incorrect in his primary point, his choice of the noun *substitute* instead of the adjective *substitutable* is better than mine. The noun *substitute* is shorter and makes the point more clearly.

However, the reader is mistaken when he says that *substitute* cannot become an adjective. One of the characteristics that give English its large word-stock is its flexibility. English speakers can create new word-categories almost at will; an example is the noun *flexibility*, created from the adjective *flexible*.

English speakers can also easily change nouns into adjectives: the noun *change* becomes *changeable; remark* becomes *remarkable*; *laugh* becomes *laughable*. The suffix *-able* or *-ible* indicates ability, and it's widely used. When you hear it attached to a word for the first time, it may sound strange, and the impulse is to say, "It can't be done."

Take a fairly recent addition to English, the adjective *doable*. It was met with considerable displeasure by many correspondents, who sent emails protesting that *doable* was a "non-word." Now that most people have become used to it, the emails have ceased.

But the protests might have been avoided had the new word contained a hyphen. When a new word contains mid-placed touching vowels that usually have a single sound (in this case the vowel sound *o*) as in *coat*, *boat*, or *goat*, separate the vowels by a hyphen. (If you are old enough, you may recall that *cooperate* was originally hyphenated – *co-operate* – to avoid the sound of "coop" as its first syllable.)

Latin phrases borrowed by lawyers have also been given the English tendency to change categories. For example, legal dictionaries list the Latin verb-phrase *nolle prosequi* as primarily a noun-phrase in English, with the meaning, "the plaintiff / prosecutor will not further prosecute the case." *The American Heritage Dictionary* lists *nol pros* and the Latin *praecipe* as both nouns and verbs. ■

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

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Gutierrez, Richard M.
Kerson, Paul E.
Risi, Joseph J.
Taylor, Zenith T.
Terranova, Arthur N.
Wimpfheimer, Steven

TWELFTH DISTRICT
Calderon, Carlos M.
DiLorenzo, Christopher M.
Friedberg, Alan B.
Marinaccio, Michael A.
Millon, Steven E.
* Pfeifer, Maxwell S.
Weinberger, Richard

THIRTEENTH DISTRICT
Behrins, Jonathan B.
Cohen, Orin J.
Gaffney, Michael J.
Marangos, Denise
Marangos, John Z.
Martin, Edwina Frances
Mulhall, Robert A.

OUT-OF-STATE
Keschenat, Dr. Heidi
Perlman, David B.
Sheehan, John B.
* Walsh, Lawrence E.
Weinstock, David

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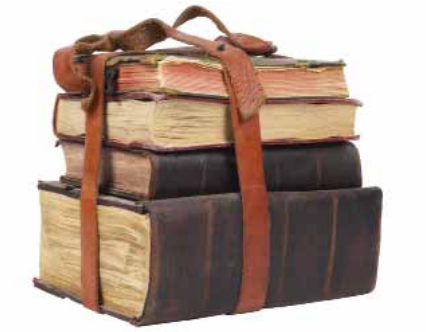
BY GERALD LEBOVITS



Drafting New York Civil-Litigation Documents: Part XXVI — Notices to Admit Continued

In the last issue, the *Legal Writer* began its discussion of notices to admit, a disclosure-like device. The *Legal Writer* gave 17 examples of proper and improper ways to write notices to admit, marked Request Nos. 1 through 17.

We continue in this issue with writing and responding to notices to admit. In this column, "adversary" distinguishes the party seeking a notice to admit (the seeking party) from the party responding to a notice to admit (the responding party). If you discuss a document in your notice to admit, CPLR 3123(a) requires you to attach the document. If you attach a document to your notice to admit, make sure you mark it as an exhibit. Plaintiffs should mark exhibit tabs using numbers, from 1 onward. Defendants should mark exhibit tabs using letters, from A onward.

Proper Ways to Use a Notice to Admit (continued)

In the last issue, the *Legal Writer* discussed using a notice to admit "to establish the foundation for admitting [a specific] document[] into evidence at trial."[1] We discussed how to request from your adversary whether a document is authentic. We also discussed how to request from your adversary whether a document is genuine or an accurate copy of the original. In the framework of establishing foundation for a document, use a notice to admit to establish that a document isn't hearsay.

Use a notice to admit to establish that a document is a business record — a hearsay exception under CPLR 4518(a). Establishing that a document is a business record before trial will make your life easier at trial. It might help you dispense with a witness who can establish the foundation for the document. *Examples:*

> Request No. 18
>
> The document, attached as Exhibit A, was prepared at or near the time of the events recorded in the document.
>
> Request No. 19
>
> The document, attached as Exhibit A, was prepared in the regular course of business.
>
> Request No. 20
>
> On [the date the document was created], making invoices like the one attached as Exhibit A was part of [insert the name of the appropriate party or entity]'s regular course of business.

Even though you can't use a notice to admit to seek technical or scientific information that only an expert would give, you may get DNA tests into evidence on a notice to admit.[2]

> Request No. 21
>
> The certified General Hospital record, dated February 2, 2011, attached as Exhibit 1, is George Grieves's DNA test.

Responding to a Notice to Admit

You have 20 days to respond to a notice to admit. Serve a copy of your responses on all parties.[3] You don't need to file your response with the court.

Your response must be in writing.

If you agree with all the items in the notice to admit, do nothing. Failing to respond to a notice to admit — by keeping silent — is an admission.[4] No court involvement is necessary.[5] Make sure, therefore, that you don't ignore notices to admit.

Although you needn't file your response with the court, your response should comply with the format requirements for court documents.[6] Your response should have a caption.

> Use a notice to admit to establish that a document is a business record.

Include the name of the court, the county, the title of the action, the index number, the names of the parties, and the title of the document.[7] The title of the document might be "Plaintiff's Response to the First Notice to Admit" or "Defendant's Response to the First Notice to Admit." If you received a second notice to admit, label your response "Plaintiff's Response to the Second Notice to Admit" or "Defendant's Response to the Second Notice to Admit." If your lawsuit has multiple parties, identify which named party is responding to the other named party's notice to admit.

Include an introductory paragraph stating who's responding to the requests, who propounded the requests, and what responses correspond to the requests in the notice to admit.[8] *Example:* "In response to plaintiff Amanda Blake's First Notice to Admit, defendant Frank Martino replies as follows, in the order corresponding to the notice to admit."[9]

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Periodicals

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