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By Robert W. Wood

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BY ROBERT W. WOOD

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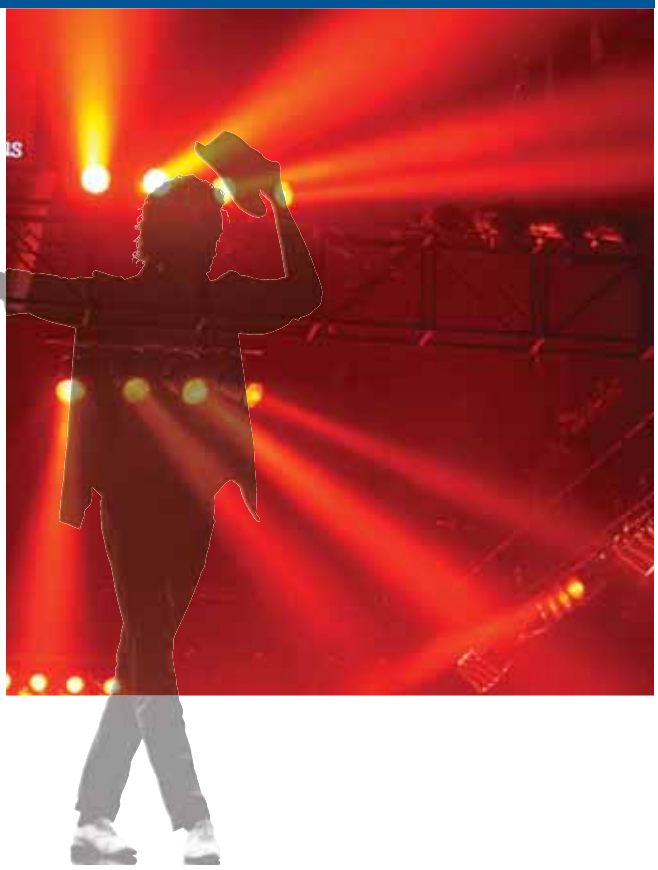

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Giving Thanks

During this season of thanksgiving, it is fitting to reflect on our nation's history, our democratic system of government and those who have sacrificed to preserve and protect it. As attorneys, we are mindful of the importance of our justice system and the rule of law, and grateful for our ongoing American experiment.

It is due to our appreciation of the rule of law that our Association has taken vocal positions on sequestration and other issues that can have an enormous impact on our judicial system and access to justice. We have joined with leaders in the bar and the business community to bring our message about the negative consequences of sequestration to many audiences. In November 2012, we issued a joint letter with 15 local bar leaders from across New York State urging our congressional delegation to take action to avoid sequestration. We have issued press statements and coordinated lobby visits in Washington, D.C., to call on Congress to fund the federal courts and the Legal Services Corporation at levels that are adequate for them to function effectively.

Last month, we joined with six bar associations from other states to ask our respective members of Congress to remain mindful of the negative impact of sequestration as they sought a resolution to the federal budget stalemate. In our recent letter to Congress, we emphasized that the fair administration of justice provides the cornerstone of our free and democratic society. Cuts in funding for our judiciary can result in slower processing of cases and even threaten the constitutional right to effective assistance of counsel and a speedy trial. In order to preserve the public trust and maintain the rule of law, we must have an adequately funded and properly functioning justice system.

As we observe Veterans Day, we are especially thankful to the millions of men and women who have served our nation. Too many veterans and active duty members of the military face unique challenges that are related to their military service. They may have trouble accessing their benefits or struggle with consumer debt, housing, or unemployment. These and other relatively routine legal issues can be complicated by combat-related injuries or disability and extended periods of time away from home. In 2011, the Association established the Special Committee on Veterans to assess the legal needs of past and present military members and their families and to recommend strategies to meet those needs. The committee, chaired by Michael Lancer and Karen Hennigan, issued a report in 2012 and has since been designated a standing committee of the Association.

The committee has focused on three key areas: legal education, legal services and veterans courts. It has held numerous trainings to familiarize attorneys with the issues commonly faced by veterans and to encourage pro bono service to veterans. Last month, the Committee on Veterans held a CLE program designed to assist attorneys in meeting the qualifications for Veterans Administration certification. The committee has also worked to develop legal education materials for veterans in need of assistance to connect them with free or affordable legal representation and other resources.

In its report, the Committee on Veterans also recommended the expansion of special problem-solving veterans courts throughout New York State. Veterans courts take a constructive approach with veterans who become involved in the criminal justice system, engaging them in a non-adversarial way to better address the unique issues they face. These courts currently exist in several counties throughout the state, and they have had excellent results. It is our hope that one day, every veteran eligible to have his or her charges transferred to this type of problem-solving court will have access to one. It is vitally important that we as a nation support the veterans who have sacrificed so much to defend our national security and the rule of law. If you would like to get involved, visit the Pro Bono Opportunities Guide on our website at www.probono.net/ny/nysba_oppsguide. ■

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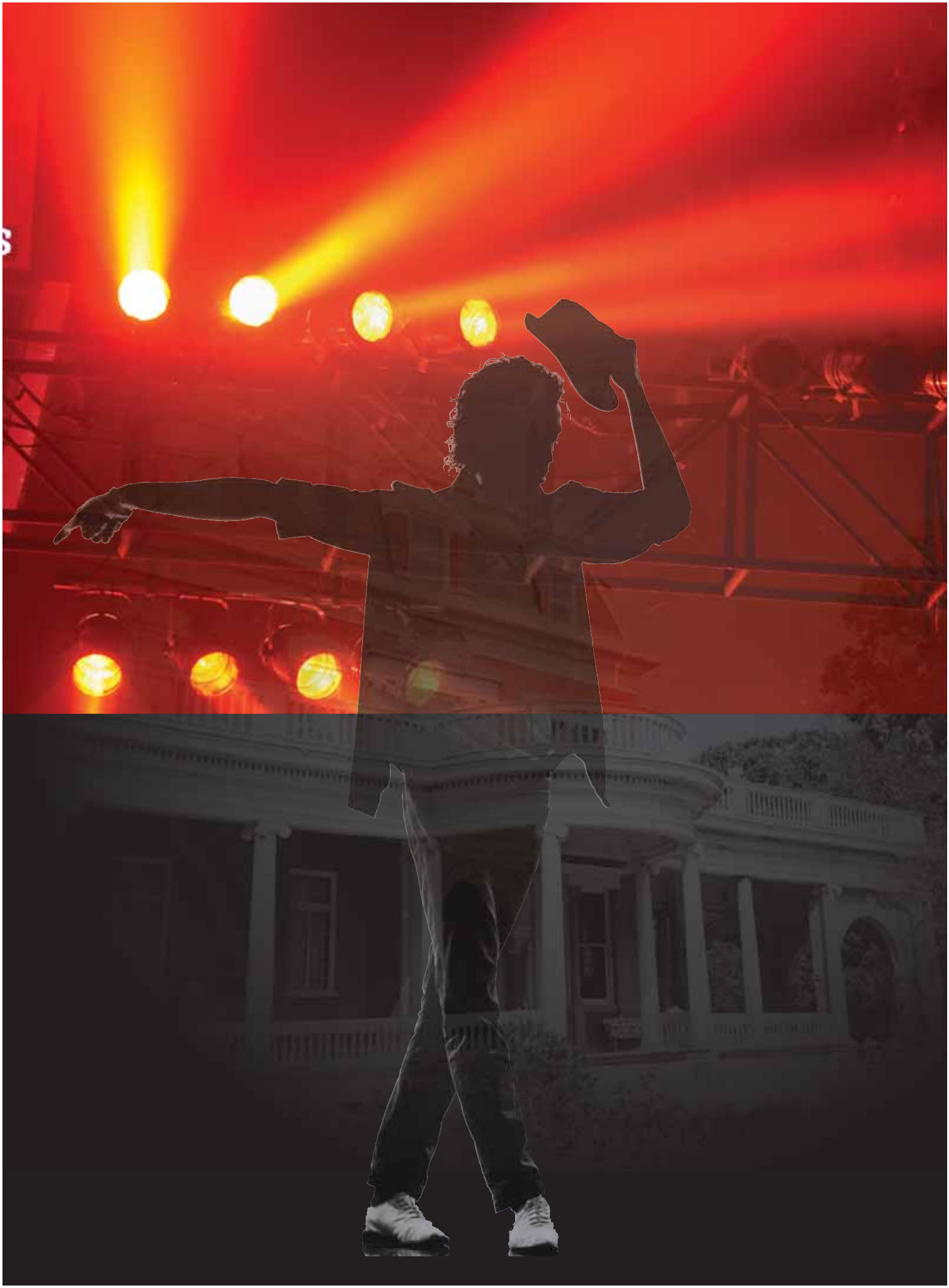


Robert W. Wood (Wood@WoodLLP.com) is a tax lawyer with a nationwide practice (www.WoodLLP.com). He is the author of more than 30 books including *Taxation of Damage Awards & Settlement Payments* (4th ed. 2009 with 2012 Supplement, www.TaxInstitute.com). This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.

Jackson Estate Says, "Beat It, IRS."

By Robert W. Wood

Michael Jackson was no stranger to lawyers while he was alive. He used the services of many lawyers. His successful defense against sex abuse charges alone reportedly cost him $20 million. He was a big spender in general, of course, and his legal bills over the course of his storied career were worthy of the King of Pop.

Mr. Jackson died unexpectedly on June 25, 2009, at the age of 50. Even after his death, he is keeping lawyers busy. As frequently occurs with top entertainers, the star's efforts during his lifetime have continued to produce a steady stream of income, and, as always, the IRS wants its cut. So, while the estate is raking in hundreds of millions of dollars, it is also paying lots of taxes. Despite the size of the checks the IRS is receiving, however, the agency wants more.

There's Income Tax

First, there are income taxes, which are distinct from estate taxes.

Just as in the case of a living individual, the income collected by an estate is subject to income tax, and Mr. Jackson's estate continues to generate considerable income. Although Mr. Jackson himself is deceased and is therefore not required to continue filing income tax returns, his *estate* is still required to file. These are *income* tax returns but filed by the *estate* because it is still collecting income. And that income is considerable.

Reports suggest that the Jackson Estate has collected hundreds of millions of dollars since the star's death. There was a $60 million advance for the film *This Is It* and a new recording contract worth up to $250 million. His estate reportedly collected $170 million in 2011 and $145 million in 2012. There are still two Jackson-themed Cirque du Soleil tours – *Michael Jackson One* in Las Vegas and the *Michael Jackson Immortal World Tour*.

Then There's the Estate Tax

Then, there are estate taxes. You might think that after collecting all that *income* tax, the IRS would not ask for more. But the IRS and Jackson's estate are locked in a Tax Court battle over estate taxes.[1] The IRS would like more than his estate reported on its federal estate tax return.

The IRS has valued Mr. Jackson's estate at more than $1.1 billion and alleges that the executors significantly undervalued his property. The IRS claims that the Jackson Estate owes a whopping $505.1 million in additional taxes and another $196.9 million in penalties.[2] The penalties are based on the taxes due, so if the tax charge is struck down, the penalties will go with it. Currently, the federal estate tax law allows $5.25 million per person to be passed on tax-free to their estate after death. But the year Jackson died, the exemption amount was only $3.5 million.

For someone who died in 2009, assets in excess of that amount are taxed at up to 45%. Given the considerable upheaval in the estate tax law over the last few years,[3] the Jackson Estate will pay a 45% rate once the valuation dispute is resolved, even though the current estate tax rate is 40%. If only Jackson had died in 2010 – like billionaires George Steinbrenner, Dan Duncan and Walter Shorenstein – when there was no federal estate tax at all.

Valuation

The estate tax is calculated based on the value of the estate as of the date of death. Alternatively, the estate can elect to value the assets six months after death, something known as the alternate valuation date. Executors will often determine which value is lower and report that lower figure, because the IRS gets a share based on the value of the estate.

And that brings us to valuation, the key in most estate tax disputes. Unlike income tax cases, where the amount of cash usually can't be disputed, estate tax cases are often about valuing something. Whether it is raw land, a mountain retreat, a conservation easement or a rare piece of art, valuation disputes can be maddening.

For estate tax purposes, only net value – assets minus liabilities – is subject to tax. If the estate includes an asset worth $100 million but there is $50 million of debt, only $50 million is taxed. The presence and details of debts could be key variables for the Jackson Estate, because while Mr. Jackson reportedly had many high-value assets he had many large debts too.

The specific assets must be valued as well. Mr. Jackson owned a 50% share in a valuable Sony music catalogue, and he owned his own music catalogue, real estate and art. And don't forget Neverland Ranch. Although the law may presume that every piece of real estate is unique, it is usually possible to hash out the value of a property based on comparable parcels, possible development use, legal restrictions, etc. Neverland Ranch may be in an especially unique category, however, because it is so intimately tied up with Mr. Jackson's image. That makes its value harder to fix.

Valuing Intangibles

Above all else, the tax case between the Jackson Estate and the IRS is about the value of the singer's image, likeness and intellectual properties. The value of these rights accrues to the estate, but valuation swings for assets of that variety can be huge. To give you an idea of how wild the differences in perception of valuation can be, the IRS is said to have valued the estate's rights to Mr. Jackson's image and likeness at $434 million. In contrast, the estate reportedly listed these rights on the federal estate tax return as worth only $2,105.

Are some celebrities worth more dead than alive? It sounds morbid, but perhaps. Mr. Jackson's recording sales and other income did seem to spike after his death. Of course, the IRS was entitled to income tax on the income generated post-death.

But is the IRS also entitled to *estate* taxes on the value of Mr. Jackson's image and likeness? The disturbing question presented by the Jackson case is the strange connection between streams of income that are subject to the income tax and the valuation of one's image and likeness. The latter could be subject to the estate tax, which seems like double dipping.

It is, of course, true that income and estate tax often work in tandem. If the decedent was the owner of an office building, the value of the building is subject to estate tax. Yet the rental income the building generates thereafter is subject to income tax too. It is this model the IRS seeks to exploit.

Even so, many estate planners note that it is unusual for the IRS to value a decedent's image and likeness in this way. Including Jackson's image and likeness as factors in his estate's value is not something on which everyone agrees. Add to that the fact that the government has argued for this so aggressively and you have a big fight.

The value of a celebrity's image and likeness does come up in some income tax cases. For example, it can play into the sourcing of sponsorship payments, which has landed some professional athletes in tax disputes. Even if a decedent's image and likeness rights are subject to estate tax, valuation is tough. And having major estate tax dollars hinge on such rights is something new.

Timing in valuation disputes is key. Assuming that the IRS is allowed to include these rights in the estate for tax purposes, the value on the date of death is colored by what we now know occurred. Mr. Jackson's sales and income rose. But was that predictable on the date of his death?

As frequently occurs in valuation disputes, both sides may have to compromise. Indeed, just as the IRS may have been overly aggressive with its pie in the sky $434 million valuation, the estate may have been overly aggressive in pegging the value of the rights at $2,105. Judges in tax cases – particularly in the U.S. Tax Court where the Jackson Estate case is pending – often complain to both parties that their valuation claims need to be reasonable.

Yet it can be hard to compromise with such polarized figures. Such valuation disputes often boil down to a battle of the experts with each side arguing for an

aggressive number. In this case, the estate is sure to argue that the meteoric rise in Mr. Jackson's fortunes after his death could not have been foreseen.

Rights to receive future payments must be valued for federal estate tax purposes. Their value is the projected future worth (or the aggregate of the future payment stream) discounted to present value. Reminding us of David "Bowie Bonds," the IRS asks what a third party would pay today for the right to receive those payments in the future.[4]

Often, such calculations can be figured based on average annual earnings. However, that is difficult if not impossible when the subject's earnings have not followed a predictable path but instead have fluctuated wildly. And Mr. Jackson did have dramatic swings in earnings and productivity.

Mr. Jackson's past legal and public relations challenges may actually materially help his tax case. At the time of his death, Mr. Jackson was said to be spending more than he was making. In 2006, the *New York Times* reported that Mr. Jackson had churned through hundreds of millions of dollars of loans and lines of credit.[5] His album production was low and his music wasn't selling in the fashion of *Thriller*.

Then there were the repeated negative impacts on his image and likeness. There were the sexual abuse charges, his physical appearance controversies, gaffes with his kids, and his Martin Bashir interview. There were drug abuse rumors, and more.

In short, Mr. Jackson's star was falling, not rising. The value of his likeness and image was on the decline. His tax lawyers can be expected to exploit that history now, presumably with facts and figures.

For example, they may argue that the *This Is It* movie released after Mr. Jackson's death was popular because of the star's sad death, not in spite of it. His scheduled concert tour, in rehearsal at the time of his death, can be presented as – and probably was – a huge gamble. And even if it had succeeded, there are degrees of success.

Indeed, when one looks at the history and thinks like an odds-maker, it is conceivable that the market response to Mr. Jackson would have been tepid. In a dispute of this nature, all of that translates into dollars and cents. Placing a value on the star's projected earnings may involve more art than science, but someone must do it if the estate is to be closed and the IRS is to be on its way.

As you would expect, the Jackson Estate employed an appraiser; the IRS has too. But this will be a legal battle as well as a battle of the appraisers. The estate can be expected to contend that Mr. Jackson's earning power and the value of his brand was low as of the date of his death. His fortunes soared after his death, as reflected in the estate's high earnings, on which it paid income tax. But that does not mean the estate was worth all of that money on the date of his death.

Valuation is subjective. Because estate tax matters so often hinge on valuation, there are special IRS penalties. If the estate is found to have misrepresented the value of items on the federal estate tax return, penalties could run as high as 40%. That only adds to the *Thriller*-sized dollars in question.

Taxes influence who gets what, or at least how much each beneficiary receives. In this case, clearly the IRS will collect, but the question is exactly how much. The beneficiaries of the estate include charities, Mr. Jackson's mother Katherine, and his children. Notably, his father Joseph Jackson receives nothing. The senior Mr. Jackson did go to court in 2009 to challenge his son's will, but lost.

It is too soon to say whether the IRS or the Jackson Estate will win. Most such disputes end up being settled via compromise. But with millions of dollars at stake and the treasure trove of assets, star power and gossip that will likely be exploited by the estate, I would put my money on the estate. Beat it, IRS. ■

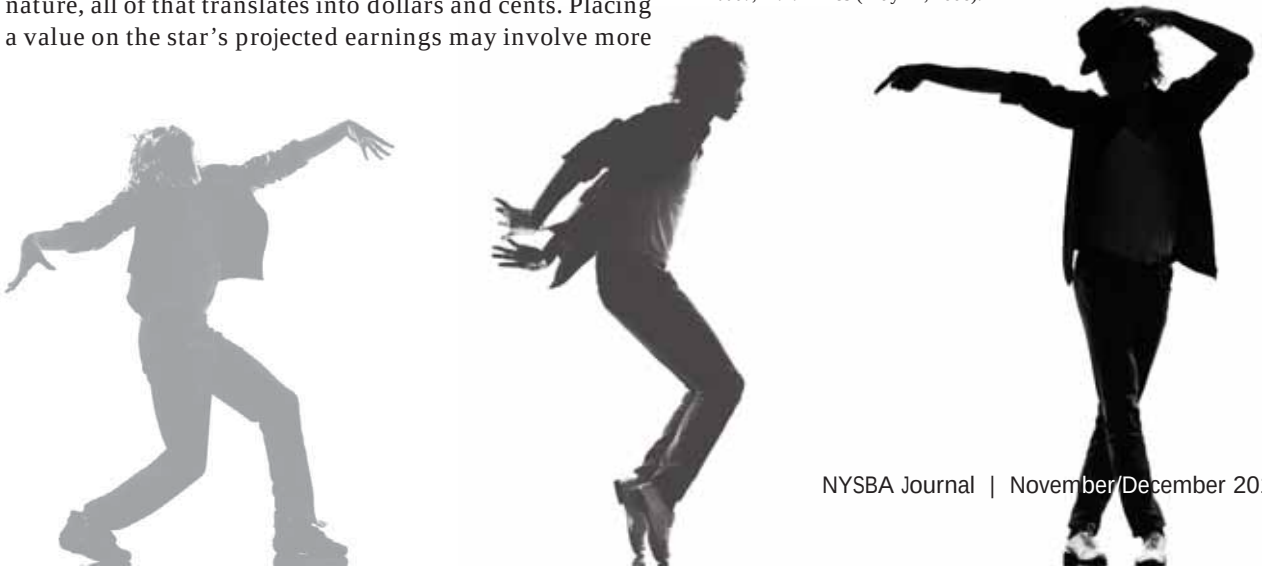
1. *See Estate of Michael Jackson v. Comm'r* (017152-13 U.S. Tax Court).

2. *See* Patrick Temple-West, *U.S. Agency Says Michael Jackson Estate Owes $702 Million in Taxes*, Reuters (Aug. 23, 2013).

3. *See* American Taxpayer Relief Act of 2012, P.L. 112-240, enacted on January 2, 2013.

4. Celebrity bonds, known as Bowie Bonds, are commercial debt securities issued by a holder of fame-based intellectual property rights to receive money up front from investors on behalf of the bond issuer and their celebrity clients in exchange for assigning investors the right to collect future royalty monies to the works covered by the intellectual property rights listed in the bond. They were pioneered in 1997 by rock and roll investment banker David Pullman. en.wikipedia.org/wiki/Celebrity_bond.

5. *See* Timothy L. O'Brien, *What Happened to the Fortune Michael Jackson Made?*, N.Y. Times (May 14, 2006).



BY DAVID PAUL HOROWITZ

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The Value of Life

Introduction

I have a confession to make: I am not a big fan of poetry, and this has created a bit of familial discord. My mother, an English Major[1] (ironically non-English-speaking by birth), is at a loss to understand how a reasonably intelligent and well-educated person, not to mention her son, fails to appreciate poetry.

Now, I am a fan of the occasional limerick, generally of the "[t]here once was a man from Nantucket . . ." variety, but have been assured by my betters that such are most definitely not poems. Perhaps it is my Bronx upbringing. After all, Brooklynites (Kings Countyites to those in our profession) do not have a monopoly on linguistic gems such as "fuggedaboutit" or "Toid Avenue," and growing up in that environment one is unlikely to appreciate the metre of Shakespeare's Sonnets or the simplicity of Haiku. Besides, those foolish enough to recite poetry on my block would have their lunch money stolen on a daily basis.

I can think of only one time, many years ago, when I was moved by a poem. In an article about the Names Project AIDS Memorial Quilt being displayed on the Washington Mall in 1987,[2] the author described the panel sewn by a mother mourning the untimely and unfathomable death of her son. She inscribed it with a passage from "Dirge Without Music," by Edna St. Vincent Millay:

> More precious was the light in your eyes than all the roses in the world.[3]

I immediately thought of that line when I read *Thurston v. The State of New York*.[4]

The Undisputed Facts in *Thurston v. State*

The action was brought in the Court of Claims by Laurie Thurston, seeking recovery for the wrongful death and pain and suffering of her sister, Cheryl:

> The claim relates to a tragic incident that occurred at the Defendant's Office for People with Developmental Disabilities facility on Hilltop Drive in Pittsford, New York, on the evening of August 30, 2008. At that time, Cheryl was an inpatient in Defendant's facility. It is undisputed that Cheryl was mentally and physically handicapped and dependent upon Defendant for care and supervision. Cheryl also suffered from a seizure disorder which, at times, such as when she was bathing, required constant, one-on-one supervision. Despite this fact, Defendant concedes that on August 30, 2008, Cheryl was improperly left alone and unsupervised in her bath. It appears that the person responsible for her supervision had gone to Cheryl's room to get a change of clothes for her while Cheryl was in the bath. Upon returning, she found Cheryl unconscious and unresponsive in the bathtub. An ambulance was called and Cheryl was transported to Strong Memorial Hospital. Cheryl never regained consciousness and passed away approximately 14 hours later, after she was removed from life support. The expert affirmations received from both parties demonstrate that Cheryl suffered a seizure while unattended in the bathtub and drowned.[5]

There was also no dispute about the impact Cheryl's death had on her sister:

> In this case, Claimant Laurie A. Thurston has submitted a candid and heartfelt affidavit that poignantly demonstrates how important Cheryl was to her. It detailed the pain of her loss, the dear memories she holds, the grief caused by the State's negligence, and the hole left in Claimant's life.[6]

An open-and-shut case of negligence if ever there was one. Which begs the question: Why did Judge Renée Forgensi Minarik begin her decision this way:

> Hard cases make bad law. The decision on this motion has been one of the easiest and one of the hardest I have ever made. The law is clear, and its application to the undisputed facts is obvious. And yet, the obvious and correct result feels so much like injustice.[7]

What Was the Injustice?

The defendant moved to dismiss, and the claimant cross-moved for summary judgment on liability. The easy part first:

> In this instance, it is clear that Defendant had a duty to provide Cheryl Thurston with one-on-one observation while she bathed; that Defendant breached this duty; and

that as a result, Claimant's sister Cheryl Thurston drowned. Clearly, Defendant was negligent and this negligence was the proximate cause of Cheryl Thurston's death.[8]

> Hard cases make bad law, and bad laws make hard cases.

While the defendant did not concede liability, Judge Minarik noted:

> Defendant offers no opposition to Claimant's argument that Defendant was negligent in its care for Cheryl, and that this negligence [led] to Cheryl's death. Although Defendant has not technically conceded that it was negligent, Defendant posits in defense of the claim for conscious pain and suffering, that Cheryl first suffered a seizure that rendered her unconscious, and then drowned. This defense implicitly acknowledges Defendant's negligence in leaving Cheryl unattended.[9]

Now for the hard part:

> Defendant argues that the claim must nevertheless be dismissed because Claimant cannot prove compensable damages under either theory of liability set forth in the claim. Specifically, Claimant's cause of action for wrongful death must fail because there has been no pecuniary injury. And, further, the action for conscious pain and suffering must fail because Cheryl was unconscious from the time of her seizure until the time of her death.
>
> Claimant's action for wrongful death is governed by statute. In accordance with Estates, Powers and Trusts Law (EPTL) § 5-4.3 (a), damages in a wrongful death action are to be "fair and just compensation for the *pecuniary* injuries" resulting from the decedent's death for the distributees for whom the action was brought.[10]

Evaluating the claimant's wrongful death claim Judge Minarik concluded:

> Claimant's submissions also demonstrate that, although Cheryl's death caused great emotional injury, it caused no pecuniary injury, which is the only kind that can be compensated under New York Law (citation omitted).[11]

And what about the claimant's claim for pain and suffering?

> [A]lthough the claim includes a cause of action for the pain and suffering Cheryl endured, there simply can be no recovery without some evidence that Cheryl was, for some period of time, conscious and aware of what was happening. Here, not only has Claimant failed to offer any evidence that Cheryl was conscious for any period of time following the incident, but Defendant's expert's uncontradicted testimony demonstrates that the seizure Cheryl apparently suffered before drowning would have rendered her unconscious. Cheryl suffered a seizure, lost consciousness and then drowned. She lived for 14 more hours, but never regained consciousness. For this reason Claimant's "survival action" for the conscious pain and suffering Cheryl suffered must also be dismissed.[12]

How Is This Possible?

Judge Minarik's decision concluded by explaining why New York law compelled this "draconian" result:

> Yes, hard cases make bad law, and the corollary is that bad laws make hard cases. The application of New York law to the facts of this case lead to the inevitable and

CONTINUED ON PAGE 16

Continued from Page 15

very unpleasant conclusion that, although Defendant was negligent, and this negligence led directly to Cheryl Thurston's death, there can be no recovery in this action. I find cold comfort in the fact that I am not the only judge to have struggled with the fact that the laws of this great State appear to place no intrinsic value on human life. In Gary v. Schwartz, the Hon. Daniel Albert eloquently lamented New York's "callous approach" to the valuation of a human life. He points out that our draconian wrongful death statute has changed little since 1846 (Lord Campbell's Act), when it grew out of exploitative child labor laws. "Since the appalling child-labor conditions have long since been eradicated, how can a formula based upon such a condition remain applicable?" The ultimate scandalous irony is that, had Cheryl been chattel rather than a human being, Claimant could recover the lost value of her property.

It is repugnant to the Court to have to enforce this law which places no intrinsic value on human life and is "no longer relevant and applicable to our contemporary social structure and mores." Although I add my voice to the chorus of those who would call upon our legislature to address this fundamental injustice in our wrongful death statute, I have no choice but to honor and faithfully apply the law as it now stands, and dismiss Claimant's action in its entirety.[13]

Conclusion

January's column will discuss proof of damages in wrongful death cases.

Until then, and after this issue of the *Journal* tumbles out of your mailbox at the height of the Holiday Season, in that languorous stretch between Thanksgiving (and this year Hanukkah, a confluence that will not recur until the year 79811[14]) and Christmas, consider this: In the spirit of the holidays, wouldn't it be both kind and just to work to change this law and right this wrong?

"Dirge Without Music" concludes:

I know. But I do not approve. And
I am not resigned.

Which is precisely how I feel about New York's archaic and anachronistic wrongful death law. ■

1. No, not an officer in the Queen's Guard, but a member of the teaching profession.
2. http://www.aidsquilt.org/about/the-aids-memorial-quilt.
3. Dirge Without Music

I am not resigned to the shutting away
of loving hearts in the hard ground.
So it is, and so it will be, for so it has
been, time out of mind:
Into the darkness they go, the wise and
the lovely. Crowned
With lilies and with laurel they go; but I
am not resigned.
Lovers and thinkers, into the earth with
you.
Be one with the dull, the indiscriminate
dust.
A fragment of what you felt, of what
you knew,
A formula, a phrase remains,—but the
best is lost.
The answers quick and keen, the honest
look, the laughter, the love,—
They are gone. They are gone to feed the
roses. Elegant and curled
Is the blossom. Fragrant is the blossom.
I know. But I do not approve.
More precious was the light in your
eyes than all the roses in the world.
Down, down, down into the darkness
of the grave
Gently they go, the beautiful, the tender,
the kind;
Quietly they go, the intelligent, the
witty, the brave.
I know. But I do not approve. And I am
not resigned.

http://www.poemhunter.com/poem/dirge-without-music/.

4. *Laurie A. Thurston v. The State of New York*, 2013-031-019, NYLJ 1202602796553, at *1 (Ct. of Clms., NY, decided May 2, 2013).
5. *Id.* (record references omitted).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* (emphasis in original).
11. *Id.* (citation omitted).
12. *Id.* (citation omitted).
13. *Id.* (citations omitted).
14. Creating a joint holiday some are calling "Thanksgivukkah," when the toast at dinner will be "Gobble tov!"

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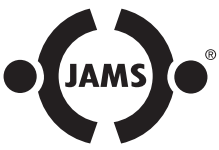

Bloggers, Journalists, Reporting, and Privilege

By Ronald D. Coleman

Introduction

Are bloggers journalists? Does it matter?

The question has become more ripe in recent months in view of the scandals involving leaks of government secrets and the resulting renewed focus on whether journalists can be forced to disclose confidential sources and other newsgathering material. The legal status of bloggers is among the more controversial questions in connection with defining who is, and who is not, a journalist. From a strict legal point of view, the fulcrum of the question is what right and privileges are afforded to journalists that may or may not encompass publication by bloggers. No single legal right is so dependent on the status and definition of a journalist as the "reporter's privilege."

In a recent New Jersey decision,[1] for example, a Superior Court judge ruled that a blogger acting as a journalist was protected by that state's journalist's shield law. That law provides as follows in relevant part:[2]

> [A] person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasilegal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere. . . .
>
> a. "News media" means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.

Interpreting this statute and a number of appellate decisions that had analyzed its application to online publications, the trial court found that while Internet message boards do not qualify for protection under New Jersey's shield law, under the circumstances presented a blog could and, in that case, did qualify. The court based this conclusion on its findings that (notwithstanding its uneven quality) (1) the blog provided the public with reporting relating to Union County governance and politics not covered, or not covered as thoroughly, by traditional media, and (2) notwithstanding the blogger's lack of affiliation with a recognized traditional news outlet, her reporting involved recognized journalistic information-gathering techniques, constituting a sufficient "connection to the news media" as contemplated by the statute.[3] The court also found support for the conclusion that the blogger's activities were "similar" to the enumerated news outlets in the evidence that her blog disseminated news and had "wide readership" of 500–600 unique users per day.[4] Given that the information she sought to protect from disclosure under the shield law was itself information gathered in connection with these protected activities, her blog-based reporting was deemed protected under the New Jersey statute.[5]

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The New York "Shield Law," codified as Civil Rights Law § 79-h, also provides an absolute privilege against forced disclosure of materials obtained or received in confidence by a "professional journalist or newscaster," including the identity of sources on which press reports are based.[6] The original statute defined a professional journalist as someone who works in the chain of newsgathering and publication "for gain or livelihood."[7] In 1981, the statute was amended, and the term "professional journalist" was revised to include "not only those working for traditional news media (newspapers, magazines, and broadcast media), but those working for any 'professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public,' as well."[8]

The limitation of the Shield Law's protections to a narrowly defined class of "professional" journalists may appear archaic now, even though it is in fact typical.[9] The statutory definition is wordy because the very concept of the journalism "profession" was a conceit. There are no formal qualifications, licenses, or training required to be a journalist. The statute therefore focuses on what this category of person does – and significantly, where he or she does it, i.e., mainly at "real" journalistic enterprises that would be familiar to our grandparents and probably theirs as well: newspapers, wire services, magazines, broadcasters.[10]

Today, in light of the Internet, the employment-based definition of "journalist" seems problematic, but until fairly recently it seemed pretty sensible. Decrying what sometimes seems like the cancerous growth of malicious online defamation cloaked by the anonymity that is unique to the Internet, I wrote this in 2006:

> During the entire previous history of humanity until just a few minutes ago, elites – who usually had the stability of society, for good or for bad, as a central goal, as elites will – controlled the medium and the message. And the result was indeed a high degree of stability. You could not easily ruin a man's life by communicating something false or scurrilous, though if you did it could hardly be undone. And little saw the light of day in print – be it by the hand of a scribe painstaking scratching out sacred writ, as the product of the crudest printing presses or over the air of the oligopoly broadcasters – without being weighed and vetted – no, not always, maybe not even mostly, for truth or neutrality, but at least for cost and usually for effect.
>
> This sense of accountability flowed from the fact of accountability, often in its literal sense. Your quills could be blunted, your press smashed, and in a more enlightened era and place, your assets and good name put at risk through legal process. There was a high cost of entry to the market of expression, and that cost was, especially in unfree societies (as is still the case), often far greater than any true economic assessment; but once borne, this cost provided a counterweight – not a perfect one, but a real one – to the inclination to take no consideration of what costs others might bear as a result of your expression. . . .
>
> In the old days, cranks and complainers and scandalmongers [lacking such accountability] used to peddle [their] wares via stolen reams of photocopy paper or purple mimeograph printouts. Mailed anonymously or pinned up on storefronts they were easily enough recognized as the rantings of marginal people; once pulled down and crumpled up, they were gone forever, and usually rightfully so.[11]

That was true when the Shield Law was enacted and when it was amended in 1981. But a lot has changed since 1981. You remember the state of blogging and the Internet in 1981, don't you? Here's a reminder: "The IBM PC, Commodore 64 and the ZX81 were among personal computers to hit the shelves in 1981. The first IBM PC had a 4.7 MHz processor and the cheapest model had 16K of memory. Disk drives were an optional extra but each 5.25-inch disk could hold 160K of data.…"[12] There was no blogging because there was no Internet – well, not for you and me, although in 1981, following in the footsteps of ARPANET, the City University of New York established BITNET to provide electronic mail, listserv servers and file transfers to member academic institutions.[13] This was not exactly Facebook. Indeed, as anyone who did legal research on a Westlaw "Walt" terminal in the 1980s will recall, it would be four more years before connection speeds on these Internet precursors would reach a blazing 56 Kbps.[14] Even then any serious multi-database search run online entitled the lawyer running it to a leisurely dinner while the result seemingly walked out to Minnesota, where Westlaw's servers live, clunked and chunked through their state-of-the-art computers, and then ambled back to New York, squeezing its way, one character at a time (thank God for sans-serif type!), through an electronic pinhole, if it didn't get flagged down for speeding in Ohio on the way.

The Press, the Powerful, and the Proposed Federal Shield Law

That Internet experience with information dissemination was still a dream in 1981. In that year former Assemblyman Charles "Chuck" Schumer began his first term in Congress[15] and his legendary love affair with the establishment press – which in 1981, was the only press that mattered. Senator Schumer's relationship with the traditional press is widely acknowledged. A standing joke in Washington: "What's the most dangerous place on Capitol Hill? Between Chuck Schumer and a television camera."[16] Senator Schumer has sought to repay the attention those cameras lavish on him, prompting President Barack Obama to joke that Schumer brought along the press to a banquet as his "loved ones."[17]

One manifestation of that love was Senator Schumer's introduction of an amendment to a 2009 Senate bill that proposed to create a federal reporter's shield law much

like the New York Shield Law. It was an amendment that, when he first got to Congress in 1981, might have made perfect sense but, in 2009, could hardly be justified on principled grounds. Like the original New York law, it required that to benefit from the privilege a journalist had to be a "professional" journalist, i.e., one who was paid to report by a traditional press entity.[18] As a blogger for the Berkman Center for Internet & Society at Harvard wrote, in what was at once an accurate analysis of the amendment and a fusillade of what can charitably be called naïve earnestness:

> This language is in fact more restrictive than its House counterpart, which only limits the shield to those who gather or disseminate news "for a substantial portion of [their] livelihood or for substantial financial gain." The Judiciary Committee's "salaried employee . . . or independent contractor" language on its own would be sufficient to deprive most non-traditional journalists of protection. But the requirement that the hosting entity both disseminate information by electronic means and operate a publishing, broadcasting, or news service of some kind ices it. . . .
>
> Of course, a cynical fellow might suggest that perhaps the Senate isn't so concerned about people getting "the most up-to-date, accurate information." But I think it's far more likely that citizen journalists just aren't on the radar of your average senator. . . .[19]

"Cynical fellows," however, were not hard to find. One opined:

> Why on Earth did Schumer do this? Schumer's spokespeople were not available for comment. But I've been taking a look at the matter, and from my vantage point, what seems to be at work here is an effort to find common ground between a Justice Department that does not want to expend its resources extending blanket protection to all journalistic entities, and powerful corporate media interests who don't want to expend their dwindling resources keeping their reporters out of the stir. Schumer's amendment creates this common ground by putting up a big sign that reads: NO BLOGGER OR CITIZEN JOURNALIST WELCOME.
>
> Keep in mind: big media has been extensively lobbying for federal shield law protection for some time now. On September 9, over 70 news organizations sent a letter to Senator Pat Leahy (D-Vt.), asking him to not water down the bill, which was wending its way through his Senate Judiciary Committee. Good news for them – the changes that Schumer made to the bill won't affect them in the least. . . .
>
> I looked into the idea that Schumer's amendment was influenced by lobbyists and, indeed, a cursory examination of Schumer's funding sources reveals that he is the go-to Senator when big media wants to make a donation in return for a favor.[20]

No one knows for sure if the cynical view of the matter was the correct one; the bill may have simply reflected Senator Schumer's longstanding discomfort with the Internet. According to one source, Schumer opposed placing DARPA – the successor to ARPA, which eventually became the Internet as we know it now – into the public domain, describing it as a "waste of the taxpayers' money."[21] Later he sponsored the unsuccessful PROTECT IP Act, also known as PIPA,[22] which failed as a result of critics' vigorous opposition to it as a grant of unprecedented power to government to unilaterally protect the rights of intellectual property stakeholders.[23] Whatever the case, the federal shield bill went nowhere, derailed by the Wikileaks controversy.

Today, in light of the Internet, the employment-based definition of "journalist" seems problematic, but until fairly recently it seemed pretty sensible.

But the year of Senator Schumer's "professional journalists only need apply" amendment was also the year an equal and opposite amendment to New York's existing Shield Law was proposed by State Senator Thomas K. Duane and Assemblywoman Linda B. Rosenthal.[24] One commentator observed that rather than *adding* bloggers to an already awkward statute, it would make more sense simply to eliminate the fiction of "professional journalism":

> Lucy A. Dalglish, executive director of the Reporters Committee for Freedom of the Press, an organization in Arlington, Va., that defends First Amendment rights of journalists, said she was sympathetic with the bill's mission, but she said that using the word "blog" in the language of the proposal might be too broad.…
>
> "Blogging is a technology and a method of delivery," Ms. Dalglish said in a phone interview. "Some people are doing valuable journalism when they blog. Others do not. What you are trying to protect is the journalism function, not the technology or the platform."[25]

Dalglish hit on a point that many had been making for years. In an echo of Wittgenstein's axiom that philosophy is properly seen not as a theory "but an activity,"[26] Dalglish argued that only a person who is **doing journalism** is a journalist – regardless of job description, rate of pay, or motivation. A similar conclusion was reached in an award-winning student law review article that questioned the posited distinctions between traditional

journalistic outlets and bloggers who perform journalistic functions:

> A federal shield law for reporters and citizen journalists would benefit the public by protecting whistleblowers and encouraging anonymous sources to reveal information to responsible disseminators of the news. Because the purpose of the privilege is to help the flow of information to the public, Congress should pass a federal shield reporter's shield law that protects traditional and citizen journalists. The privilege should not simply cover members of the traditional press, for "[t]he First Amendment does not guarantee the press a constitutional right . . . not available to the public generally." Congress should combine the traditional definition of a reporter associated with a media entity with an intent-based inquiry based on the function of journalism to create a federal reporter's shield law to enhance the First Amendment and encourage the free flow of information in our democracy.[27]

The Duane-Rosenthal amendment did not pass in 2009,[28] for reasons I have been unable to determine. It is still rattling around Albany, but it is, by all indications, going nowhere.[29]

Defining Journalists: Not "Who" or "How" but "What"

Perhaps it is just as well, however. The concept that journalism is an activity, not a status, does not lead all commentators to the conclusion that bloggers should be included in press shield laws. Rather, it calls into question the wisdom of press shield laws. Perhaps the most prominent spokesman for this view is law professor Glenn Reynolds, one of the most influential bloggers on the Internet.[30] He argues:[31]

> Ordinarily, people are required to respond to subpoenas by providing information.…
>
> Journalists, however, claim a special status: They argue that complying with subpoenas in ways that would identify their sources might make people less likely to confide in them in the future. There are two problems with this argument: The first is that the Constitution doesn't require it. The second is that we're all journalists now.
>
> The Constitution merely protects the freedom of speech and publication – not the freedom to keep secrets, which is what journalists are asking for when they seek special privileges of non-disclosure.…
>
> The other problem with journalist shield laws is that journalism isn't a profession; it's an activity, one now engaged in by many. With the proliferation of blogs, podcasts, YouTube videos and the like, anyone can be a journalist. But if anyone could assert a journalistic privilege not to disclose sources, the work of the courts would be far tougher.
>
> Efforts to limit the privilege to "professional" journalists, on the other hand, quickly transform into a sort of guild or licensing system for the press – ironically, something that the First Amendment clearly prohibits.

Reynolds is not alone in this view; even some journalists agree with it. One editorial page editor wrote back in 2005 that it is "contradictory that a free and independent press, which is supposed to be the 'watchdog of the government,' would be, in effect, licensed by that government. . . . The First Amendment was not drafted for the benefit of an elite few; it was meant to protect the rights of all Americans to express themselves in a robust, cantankerous exchange of opinions. In case you hadn't noticed, 'the press' is rapidly becoming 'the people.'"[32]

> Application of even the broadest shield laws by sympathetic courts turns on fairly arbitrary line-drawing.

More recent commentators have made the same point, especially in light of the growth of popular journalism and in response to news in recent months that the White House, under criticism for its surveillance of Associated Press reporters in connection with leak investigations, has asked Senator Schumer to revive his federal reporter's shield law bill.[33] For example, the *Washington Times* opined that a shield law for the media "gives the government the chance to decide who does, and who does not, qualify for this privilege. In that respect, a media shield law represents a diminution of liberty. Free speech is something that belongs to everyone."[34]

On the other hand, Christopher Daly, a journalism professor and former AP reporter, opposed the legislation on the ground that "a proper reading of the First Amendment makes a shield law superfluous,"[35] though he cited the U.S. Supreme Court's decision in *Branzburg v. Hayes*, which, he acknowledged, held otherwise. "The practice of journalism includes both a news-gathering function and a news-disseminating function," Daly insisted.

> Neither one is of much use without the other. That is, if journalists are free to disseminate news but not to gather it, they will have nothing of value to share with the people. Conversely, if they are free to gather news but not to disseminate it, the people will again be thwarted in their ability to learn the things they need to know to govern themselves. Thus, journalists must be free to gather news (by reporting) and to disseminate news (by printing, broadcasting or posting).

Because journalists typically cannot bring important investigative stories to light without promising their sources confidentiality, he stated, they must be allowed to honor that commitment. He added:

> It is perfectly predictable that those in power (from either party) will reflexively attempt to control the flow of information to the people. One attractive mechanism for doing that is to force journalists to name their confidential sources and then to go after the sources and punish them. If I were a tyrant seeking to use the limited powers of government to create unlimited personal power, that is one of the ways I would go about it.
>
> That is exactly what Thomas Jefferson and his supporters among the Founders foresaw and sought to prevent. One of the remedies they came up with was an absolute guarantee of press freedom. That's why I believe we journalists do not need to ask Congress to bestow such protections on the practice of journalism. Indeed, we should be wary of inviting Congress to legislate about the press at all, because once legislators start writing laws, it is exceedingly difficult to get them to stop. Today, they may say they are proposing to do us a favor by granting us a shield. Tomorrow, having established the precedent, they may decide to improve that law by "clarifying" just who is a journalist. Before long, Congress might decide to license journalists or protect confidential sources in the Executive branch but deny such protection to their own staffers. There would be no end to it.

Not everyone agrees with Daly.[36] More generally, however, while Daly did not use the "journalism is an activity, not a station" formula, his argument implies that no legislature should be permitted to define who is a journalist – or, axiomatically, to deprive a journalist of whatever protection he is entitled to by fiat. Indeed, as Daly noted in another post responding to the National Security Agency leak first reported by writer Glenn Greenwald:[37]

> [T]he entire [journalism] industry was based on content created by people with an ax to grind. Often, they were political activists (like Sam Adams or Tom Paine) or surrogates for office-holders (like James Callender).
>
> The idea that a journalist should be defined as a full-time, professional fact-gatherer who has no political allegiances is not only unrealistic, but it is already a historical artifact.

As another recent commentator noted in the telling title of his column, "The Value of a New Media Shield Law Depends on Your Definition of 'Media.'"[38]

The Standoff

Clearly, however, certain elites continue to resist an understanding of the genuine journalistic value of non-traditional media while displaying what is actually a counterintuitive fetish for ascribing higher journalistic value to people who profit financially. Thus, Senator Lindsey Graham asks: "[I]f classified information is leaked out on a personal website or [by] some blogger, do they have the same First Amendments rights as somebody who gets paid [in] traditional journalism?"[39] In fact, Senator Schumer's new shield law bill does not make this distinction. Rather, it would apply anyone who "regularly" gathers and disseminates news:

> COVERED PERSON – The term "covered person" –
>
> (A) means a person who –
>
> (i) with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes on such matters by –
>
> (I) conducting interviews;
>
> (II) making direct observation of events; or
>
> (III) collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs, recordings, tapes, materials, data, or other information whether in paper, electronic, or other form;
>
> (ii) has such intent at the inception of the process of gathering the news or information sought; and
>
> (iii) obtains the news or information sought in order to disseminate the news or information by means of print (including newspapers, books, wire services, news agencies, or magazines), broadcasting (including dissemination through networks, cable, satellite carriers, broadcast stations, or a channel or programming service for any such media), mechanical, photographic, electronic, or other means.[40]

This is a broad definition of a "covered person" – to the extent, of course, it is not eviscerated in practice by the bill's qualifications, exceptions, and limitations on its protection for "covered persons."[41]

Notwithstanding Senator Schumer's evident, if qualified, acceptance of a modern definition of the journalistic enterprise, however, other members of the Senate are still stuck on a more traditional conception. In addition to the view of Senator Lindsey Graham, noted above, Senator Richard Durbin of Illinois wrote the following in a July 2013 op-ed:

> Journalists should have reasonable legal protections to do their important work. But not every blogger, tweeter or Facebook user is a "journalist." While social media allows tens of millions of people to share information publicly, it does not entitle them to special legal protections to ignore requests for documents or information from grand juries, judges or other law enforcement personnel.
>
> A journalist gathers information for a media outlet that disseminates the information through a broadly defined "medium" – including newspaper, nonfiction book, wire service, magazine, news website, television, radio or motion picture – for public use. This broad definition covers every form of legitimate journalism.[42]

To Senator Durbin, there is journalism, and there is "legitimate" journalism – the latter defined by affiliation with traditional media ("motion picture"?) that he describes as being produced "for public use" – as opposed to social media, which, by his own definition, "allows tens of millions of people to share information publicly."

Durbin's "public use" versus "tens of millions of people sharing information" distinction is not only an obvious factual contradiction. It is one that, if challenged legally, arguably would be deemed unconstitutional, or at least arbitrary and capricious. It also reminds one perusing the New Jersey blogger decision discussed above that application of even the broadest shield laws by sympathetic courts turns on fairly arbitrary line-drawing. This is so not only with respect to defining what kind of "affiliation," if any, a journalist seeking shield protection must have with a "news organization" – a fundamentally indefensible position – it also raises questions about how to apply the vaunted "what you do, not who you are" standard. Senator Durbin scoffs at tens of millions of Twitter users passing along some datum as unworthy of protection, but a New Jersey court finds 500–600 unique website visitors a day to be an adequate basis for finding a journalistic enterprise.

As long as courts utilize arbitrary quantitative criteria for qualifying as a journalist based on popularity, whether in terms of circulation, listenership, unique visitors, or otherwise – standards that are empirically and conceptually unexamined – the application of journalist shield laws will raise unexamined, and troubling, doctrinal and constitutional questions. At the very least, the use of such criteria will, as critics maintain, nearly always result in a practical bias respecting the application of the shield in favor of larger media outlets, even if formal affiliation is not required. And this will be true regardless of the accuracy, quality, or other purported indicia of "legitimacy" in journalism, including the subjective intent of the writer or publisher, as demonstrated by the published work in question.

Conclusion

Regardless whether Professor Daly is right as to whether there is, or should be, a penumbral journalistic privilege emanating from the First Amendment, his formulation is probably the most useful one. It provides solid ground for the argument, hinted at in the arguably radical approach of commentators such as Glenn Reynolds, that legislation that extends membership in the Fourth Estate and any appurtenant legal privilege to an elite, presumably favored, class of old-media stakeholders is itself likely a violation of the First Amendment.

Ultimately, as the NSA scandal and the Wikileaks controversies demonstrate, much of the debate is itself arguably hurtling toward irrelevance. Today, those who possess confidential information have little use for media interlocutors, digital or otherwise. They publish the secrets with which they have been entrusted on their own, utilizing famous media outlets or journalists merely as leverage to garner publicity for their initial rollout of secrets. In an era that has little use for privacy and exalts narcissism, and where former politicians masquerade on "the news" as journalists, confidentiality itself is

arguably becoming as antique a concept as press passes, journalistic "ethics," and editorial responsibility.

Are bloggers journalists? If it matters at all now, it is doubtful that it will for much longer. To the extent the government can and will bring its destructive investigative and prosecutorial powers to bear on those who do not work for supposedly "legitimate" or "real media" outlets, while those who do are exempt from such treatment, there is, in 2013, no principled argument to support such a distinction. Nor is there a cogent ground for such a counterproductive policy, which will produce only more direct leakers, exiles, and media stars out of those who have erroneously been trusted with secrets. ■

1. *In re January 11, 2013 Subpoena by the Grand Jury of Union County, New Jersey* (Sup. Ct. of New Jersey, Union County, Criminal Div., Docket No. 13-001, Apr. 12, 2013), http://unioncountywatchdog.org/docs/Renna%20is%20a%20Journalist.pdf) (*Union County*).

2. N.J.S.A. 2A:84A-21, *et seq.*

3. *Union County* at 15-17.

4. *Id.* at 18.

5. *Id.* at 19-20.

6. Laura Handman, Peter Karanjia, Bryan Tallevi & Elissa Krall, *New York – Privilege Compendium; I. Introduction: History and Background*, Reporters Committee for Freedom of the Press, http://www.rcfp.org/new-york-privilege-compendium/i-introduction-history-background.

7. Civil Rights Law § 79-h(a)(6).

8. *Id.*

9. "Protecting the New Media: Application of the Journalist's Privilege to Bloggers," 120 Harv. L. Rev. 996, 1002 (2007) ("Although a blogger has little chance of prevailing under a shield law protecting only 'newspapers,' most shield laws include definitional language that leaves open the question whether bloggers are covered. Most commonly, statutes require that the claimant be affiliated with – or in some cases be affiliated with a medium similar to – one of several enumerated news media, usually including 'newspaper,' but also usually including 'magazine,' 'journal,' or 'periodical.'").

10. Civil Rights Law § 79-h reads: (a) Definitions. As used in this section, the following definitions shall apply:

> (1) "Newspaper" shall mean a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at United States post-office as second-class matter.
>
> (2) "Magazine" shall mean a publication containing news which is published and distributed periodically, and has done so for at least one year, has a paid circulation and has been entered at a United States post-office as second-class matter.
>
> (3) "News agency" shall mean a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.
>
> (4) "Press association" shall mean an association of newspapers and/or magazines formed to gather and distribute news to its members.
>
> (5) "Wire service" shall mean a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.
>
> (6) "Professional journalist" shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.
>
> (7) "Newscaster" shall mean a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission.
>
> (8) "News" shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.…
>
> (f) The privilege contained within this section shall apply to supervisory or employer third person or organization having authority over the person described in this section.

11. Ron Coleman, *Asymmetric Cultural Warfare*, Dean's World Blog, Oct. 10, 2006, http://deanesmay.com/2006/10/04/asymmetric-cultural-warfare/.

12. *Royal Wedding: The Way We Were in 1981*, BBC News Mag., Nov. 19, 2010, http://www.bbc.co.uk/news/uk-11789191.

13. Robert Zakon, "Hobbes' Internet Timeline 10.2" (found at http://www.zakon.org/robert/internet/timeline/).

14. *Id.*

15. "About Chuck," Senator Charles E. Schumer official website, http://www.schumer.senate.gov/About%20Chuck/biography.htm.

16. Todd Purdum, *I Yam What I Yam*, Vanity Fair, Feb. 7, 2013, http://www.vanityfair.com/politics/purdum/2013/02/chuck-schumer-show-horse-workhorse-profile.

17. "Chuck Schumer," Wikipedia, https://en.wikipedia.org/wiki/Chuck_Schumer (accessed June 30, 2013).

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19. Arthur Bright, "Senate Cuts Citizen Bloggers from Federal Shield Bill," Digital Media Law Project blog, Sept. 28, 2009, http://www.dmlp.org/blog/2009/senate-cuts-citizen-bloggers-from-federal-shield-bill.

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28. Bill S2353-2013, Open NY Senate Website, http://open.nysenate.gov/legislation/bill/S2353-2013.

29. *Id.*

30. "[C]onsider Glenn Reynolds '85JD whose blog *Instapundit* is one of the most influential on the Web. (It's also one of the oldest – *Wired* called him The Blogfather.)" Yale Alumni Mag., Feb. 1, 2008, http://www.yalealumnimagazine.com/blog_posts/888.

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36. *See, e.g.*, Laura Durity, *Shielding Journalist-"Bloggers": The Need to Protect Newsgathering Despite the Distribution Medium*, Duke L. & Tech. Rev., Apr. 7 2006, at 11, 13 ("Despite the legislative history of [Federal] Rule [of Evidence] 501 and the recognition by more than thirty state legislatures of the need to protect a reporter's sources, the Supreme Court has not recognized a reporter privilege. Further, the Supreme Court's refusal to grant certiorari in *Miller* suggests that the Court is unlikely to recognize a reporter's privilege in the immediate future.").

37. Christopher Daly, *NSA Leak: Is Greenwald a Journalist or an Activist?*, Prof. Chris Daly's Blog, June 29, 2013, http://journalismprofessor.com/2013/07/01/nsa-leak-is-greenwald-a-journalist-or-activist-does-it-matter/).

38. Phillip Blum, *The Value of a New Media Shield Law Depends on Your Definition of "Media,"* Atlanticwire.com blog (*Atlantic* magazine), June 5 2013, http://www.theatlanticwire.com/politics/2013/06/value-new-media-shield-law-depends-your-definition-media/65930/.

39. *Id.*

40. "Free Flow of Information Act of 2013," Bill Text 113th Congress (2013-2014) S.987.IS, http://thomas.loc.gov/cgi-bin/query/z?c113:S.987.

41. The efficacy of the bill as written, even to the extent it covers new media, has been questioned. One commentator, focusing on the bill's many hedges and exceptions, doubted that this extent was truly as broad as advertised, especially in light of the many hedges and exceptions in the bill as currently written:

> The act will go a long way toward establishing a government-sanctioned journalistic class. There will be, on the one hand, approved reporters who are immune to certain kinds of governmental inquiry, and, on the other hand, everyone else, those less exalted citizens who, faced with the same governmental inquiry, would just have to suck it up. The act is a classic restraint of trade, protecting favored journalists from the pressure of competitors who lack the proper credential. . . .
>
> By the time Schumer's 2009 bill died, Obama's Justice Department had managed to weaken the journalistic privilege with special exceptions, allowing judges to approve the release of private records to prosecutors and to compel reporters to testify about leaks that endanger national security.
>
> Those exceptions will likely remain in the current bill, which means it could not have inhibited the Justice Department from doing what it did to the AP and its phone records. The Free Flow of Information Act is, in other words, completely beside the point. But if it passes now it will not be without effects, most of them pernicious.

Andrew Ferguson, *Shielding What From Whom?*, The Weekly Standard, June 2, 2013, http://www.weeklystandard.com/articles/shielding-what-whom_729012.html?page=1.

42. Dick Durbin, *Sen. Dick Durbin: It's Time to Say Who's a Real Reporter*, Chicago Sun-Times, June 26, 2013, http://www.suntimes.com/news/otherviews/20978789-452/sen-dick-durbin-its-time-to-say-whos-a-real-reporter.html.

New Criminal Justice Legislation

By Barry Kamins

This article will discuss new criminal justice legislation signed into law by Governor Andrew Cuomo, amending the Penal Law (PL), Criminal Procedure Law (CPL) and other related statutes. While, in total, the Legislature passed the third lowest number of bills since 1915, there was no dearth of criminal justice measures. It is recommended that the reader review the legislation for specific details, as the following discussion will primarily highlight key provisions of the new laws. In some instances, where indicated, legislation enacted by both houses was awaiting the Governor's signature at the time the article was published.

SAFE Act

The major piece of criminal justice legislation in the past session was the New York Secure Ammunition and Firearms Enforcement Act.[1] Since enacting that law, the Legislature has passed an amendment that would exempt certain retired law enforcement officers from the ban on possessing assault weapons and large capacity ammunition feeding devices. The exemption would apply only to New York or federal law enforcement officers who have retired in good standing after having served for at least five years at the time of retirement, and who were trained to use these weapons within 12 months of retirement. In addition, the retired officers must re-qualify every three years in the use of large ammunition feeding devices, and they must register the assault weapons within 60 days of retirement.[2]

Paper Terrorism

A number of significant procedural changes were enacted in the past legislative session. One new law addresses the problem of "paper terrorism" that has increasingly plagued judges and other public servants. Members of separatist groups asserting sovereign status – frequently inmates who believe they are victims of unjust action – attempt to use the court system to retaliate against government officials who are merely performing their official duties. They do this by filing fraudulent financing statements against those officials – usually judges – hoping to create personal financial problems for them. These individuals may file either a false filing statement alleging a claim that does not exist, or a statement asserting a frivolous claim of copyright infringement of their name when

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it is used without their permission in a public proceeding. The former is more common and the filings, although fraudulent, must be accepted by the Secretary of State for recording and made available for public viewing, no matter their validity. This can affect the target's credit status.

To combat this abuse, a number of measures have been taken. The Uniform Commercial Code has been amended to create a special proceeding to summarily invalidate fraudulent liens; the proceeding may be brought by the target – either the public servant or the criminal defense attorney who represented the individual who filed the false lien. The petitioner must establish that the financing statement was filed to retaliate for the petitioner's performance of his or her official duties or, in the case of a defense attorney, for the duties as an attorney representing the filer. Upon sufficient proof, the court may expunge the financing statement and must cause its order to be filed with the Secretary of State. In addition, the filing of a fraudulent UCC financing statement against a public servant in retaliation for the performance of the official's duties now constitutes a Class E felony.[3]

Probation

A new law affords judges the discretion to choose the length of probation in both felony and misdemeanor cases. In felony cases, the court can now impose a probation term of three, four or five years except for any felony involving a sexual assault, a Class A-II drug felony and certain Class B felony drug convictions. For a Class A misdemeanor, the court can impose a probation term of two or three years except for a sexual assault. For an unclassified misdemeanor, the court can impose a probation term of two or three years where the sentence of imprisonment is greater than three months. A court will now be able to choose a probation term based upon a defendant's prior criminal history, the degree of culpability and the actuarially determined risk of re-offense. This will permit the sentence of probation – rather than the conviction – to be tied to the offender. In addition, the new law eliminates the costly requirement of pre-sentence investigation reports in cities with a population of one million or more, where there is a negotiated sentence of imprisonment of 365 days or less.[4]

Procedural Changes

The Legislature has expanded the jury selection process for Criminal Court to permit judges to fill the jury box in the same manner as in the Supreme Court. The parties must now select not less than six prospective jurors for *voir dire*; previously, the parties were limited to no more than six individuals at a time.[5] In prosecutions for arson, a sentencing court can now order that restitution be made to a volunteer fire company.[6]

In another procedural change, when 16- and 17-year-olds are arrested for prostitution charges, a judge can convert the matter into a PINS proceeding under the Family Court Act.[7] Thus a court can offer the defendants the same services that younger children arrested on prostitution-related charges currently receive in Family Court proceedings. Another procedural change addresses a final order of observation issued involving an incapacitated person. The prosecutor will now be required to transmit the names of any persons who may reasonably be expected to be a victim of an assault or violent felony offense to the Commissioner of Mental Health. This will enable the Commissioner to fulfill his or her responsibility of notifying the victims that the defendant has been discharged from custody.[8]

In addition to the above procedural changes, the Penal Law has been amended to expand the definition of certain crimes and to increase the penalties for others. For example, the Legislature has closed a loophole in the current law prohibiting the sale of "bath salts," which are drug-like products that can cause serious and dangerous health problems. While an earlier law had added a group of these compounds to the list of Schedule I controlled substances, drug dealers made minor alterations to produce newer compounds to skirt the law. The new law adds to the list a category of bath salts called substituted cathinones.[9]

Increased Protection

The Legislature has increased protection for children who are assaulted by the same person over a period of time. Previously, a person over 18 years of age could be convicted of Aggravated Assault, a Class E felony, if he or she assaulted a child and had previously been convicted of assault within the past three years. The new bill expands the look-back period for the prior conviction to 10 years.[10] A new law also increases protection for prosecutors who are assaulted. The law elevates assault on a prosecutor to the crime of Assault in the Second Degree, by adding prosecutors to the list of service professionals, which includes police officers and firefighters, against whom an assault is elevated to a Class D felony.[11] The legislation was proposed after the assassination of an assistant district attorney in Texas earlier this year.

Corrections officers have also been given additional protection by a new law that expands the definition of Aggravated Harassment of an Employee by an Inmate. Inmates can now be prosecuted for throwing the contents of a toilet bowl at a corrections officer.[12] Finally, a person can now be prosecuted for Illegal Possession of a Vehicle Identification Number by manufacturing or producing the number as well as possessing it.[13]

This past legislative session produced a number of new laws designed to protect crime victims. One law clarifies that in domestic violence cases, protected parties in whose favor an order of protection is issued may not be arrested for violating the order if they choose to have contact with their abuser. This amendment responds to the

concern that victims of family offenses have been charged criminally for violating their own orders of protection; this is contrary to the intent and purpose of orders of protection. In addition, orders will now include a notice that makes clear that the order will remain in effect even if the protected party contacts or communicates with the restrained party.[14]

A second new law addresses the economic abuse that frequently accompanies other forms of domestic abuse. As a result, Family Court and Criminal Court will now have concurrent jurisdiction over certain crimes that cause such abuse, e.g., identity theft and grand larceny, and domestic abuse victims will now be able to obtain orders of protection in Family Court for these offenses. In addition, when an order of protection is issued, either in Family Court or Criminal Court, a judge will now be able to direct the defendant to return certain identification and financial documents as a condition of the order.[15] Another new law grants employees of the Department of Corrections and local correctional facilities access to the statewide computerized registry of orders of protection. These employees need this information to make programming assignments as well as decisions concerning temporary release and re-entry that could impact the safety of victims.[16]

Victims of domestic violence who have an order of protection or a temporary order of protection will now be able to get a new telephone number within 15 days of the request; this will provide them greater privacy from their abusers.[17] Crime victims in general have been given two new benefits. First, when an award is made by the Office of Victim Services for relocation expenses, the award will now include reasonable costs of moving and transporting the victim's spouse and dependents.[18] Second, an award will now be made in homicide cases to the victim's family to cover the costs of cleaning up the crime scene.[19]

New Crimes

Each year the Legislature enacts a number of new crimes, and this year was no exception. A new law was enacted to address the growing proliferation of counterfeit automobile parts arriving in the United States. Of particular concern is the distribution and installation of counterfeit airbags in automobiles; recent testing of these bags has shown substantial malfunctioning, which has raised a concern for the safety of drivers and passengers. It is now a Class A misdemeanor for an individual to traffic knowingly in, or install, counterfeit or non-functioning airbags. In addition, the law establishes a civil penalty of up to $1,000 per violation.[20]

Another new law creates the crime of Killing a Police Work Dog or Police Work Horse. Law enforcement agencies have increasingly relied on the use of animals to solve crimes, and it is now a Class E felony if a person kills a police work dog or horse while the animal is in the performance of its duties.[21] Finally, the Penal Law sections dealing with the possession and sale of fireworks has been rewritten to provide clearer definitions of "fireworks," "dangerous fireworks" and "novelty devices." In the past a number of courts have dismissed indictments because of ambiguities in the definition of these items.[22]

The major piece of criminal justice legislation in the past session was the New York Secure Ammunition and Firearms Enforcement Act.

Driver-Related Offenses

A number of changes have been made in driver-related offenses under the Vehicle and Traffic Law (VTL). One new law serves to address several issues that have surfaced in the three years since "Leandra's Law" has been in effect. Under that law, a person can be charged with a felony if he or she is operating a vehicle while intoxicated and a person 15 years of age or younger is in the vehicle. The law also introduced the concept of ignition interlock devices that must be installed when a person is convicted of driving while intoxicated.

In the past legislative session, a number of measures were enacted to strengthen the law and clarify some ambiguities. First, the new law tightens a loophole that was addressed by the Court of Appeals in *People v. Rivera*.[23] A person with a conditional license operating a vehicle while intoxicated or impaired will now be subject to a charge of Aggravated Operation of a Motor Vehicle in the First Degree, a Class E felony.

Second, Leandra's Law now applies to defendants adjudicated as youthful offenders. Third, the minimum period of interlock installation will be increased to 12 months but reduced to six months upon submission of proof that the defendant installed and maintained an interlock device for at least six months. The interlock period will commence either from the date of sentencing or the date the device was installed in advance of sentencing, whichever is earlier. Previously, if the device was installed before sentencing, no credit was given.

Finally, the original law gave a driver the option of selling his car and not driving for a period of time. To avoid installing the interlock device, many defendants chose that option and then drove a different vehicle. The amendment attempts to close that loophole by requiring a defendant to swear under oath that the vehicle has been

sold and that he or she is not the owner of a vehicle and will not operate any vehicle during the period of interlock restriction. Under those conditions, a court can now find good cause to excuse the failure to install an interlock device.[24] In addition, the law clarifies that "the owner of a vehicle" includes the person possessing the title.

The Legislature has also taken a number of measures to protect motorists from new or youthful drivers who use their cell phones or text while operating a vehicle. A new law has increased penalties for these offenses when they are committed by drivers with probationary and junior licenses. The penalties will now be the same as the penalties for speeding and reckless driving: 60-day suspensions for first convictions and revocations of 60 days (for junior licenses) or six months (for probationary licenses) for subsequent convictions within six months of the time a license is restored after suspension.[25]

Another new law increases the fines for all motorists who text or use cell phones while operating a vehicle. A first offense now carries a fine of $50 to $150 (previously not more than $100). A second offense in 18 months carries a fine of $50 to $200. A third or subsequent offense in 18 months carries a fine of $50 to $400.[26] Governor Cuomo also directed the Department of Motor Vehicles to increase, from three to five, the number of points imposed for these violations.

Sentencing

In the area of sentencing, the Legislature has enacted a bill to protect inmates under the age of 18 who do not have parents or a legal guardian or where these individuals cannot be located. Correctional facilities must receive consent from parents or guardians before they can provide routine medical care to inmates who are minors. Thus, the new law gives minors the ability to consent to necessary medical treatment. The law does not preclude parents from objecting to this treatment.[27]

Extended Statutes

Each year the Legislature enacts laws that either extend or repeal existing statutes. This year the Legislature extended a number of laws set to expire on September 1, 2013, dealing with programs in correctional facilities, such as certain prisoner furloughs, work release programs, and electronic court appearances in certain counties. The sunset date was extended to September 1, 2015.[28] Another law extends the sunset provision for the program that notifies parents paying child support that their licenses will be suspended unless they begin to make their child support payments. The sunset date was extended until June 30, 2015.[29]

Attorney Conduct

The conduct of attorneys was the subject of two bills passed in the recent session. First, attorneys will now be required to report convictions for a crime even if they arise in courts other than courts of record, i.e., justice, town and village courts.[30] Second, a new law clarifies that two categories of professionals do not come within the definition of the unauthorized practice of law: legal consultants who comply with the rules of the court and those out-of-state attorneys who are admitted *pro hoc vice*.[31]

New York City Laws

The City Council of New York City has enacted several measures that will impact the lives of those living within the city. One bill requires the Commissioner of the Department of Investigation to appoint an individual, acting as an inspector general with subpoena power, to study and make policy recommendations to the Police Department.[32] A second measure creates a new private right of action against individual police officers and the Police Department for "bias-based profiling." The lawsuits can be brought in state court but would be limited to injunctive and declaratory relief.[33] The law expands the definition of profiling to categories that include age, gender, gender identity, sexual orientation, immigration status, disability and housing status. A third bill precludes the Police Department and Department of Corrections from honoring civil immigration detainers in certain classes of cases.[34]

Miscellaneous Laws

In various miscellaneous laws, one new measure addresses the problem that occurs after a prosecution for animal cruelty or animal fighting is brought. As a result of the arrest, the victimized animal is seized and cared for by various agencies, including humane societies. A new law permits a prosecutor, on behalf of the impounding organization, to petition a court to require the animal's owner to post a security for the reasonable expenses incurred by the agency.[35] Another law permits the manufacturers of gambling devices to transport them into New York State for the purpose of exhibition and marketing.[36] Finally, a new law prohibits smoking at playgrounds during the hours between sunrise and sunset, when one or more persons under the age of 12 is present. However, the law also provides that no law enforcement officer can arrest, ticket, stop or question any person based upon a violation of this law, nor can they conduct a frisk or search.[37] ■

1. *See* Barry Kamins, *2013 Gun Legislation: New Crimes and Enhanced Criminal Penalties*, N.Y.L.J. Apr. 8, 2013, p. 3, col. 1.

2. 2013 N.Y. Laws ch. 98 (amending PL §§ 265.00, 265.20, 400.00, eff. July 5, 2013).

3. A. 08013, 236th Leg., Reg. Sess. (N.Y. 2013) (not yet signed by the Governor).

4. S. 4664, 236th Leg., Reg. Sess. (N.Y. 2013) (not yet signed by the Governor).

5. 2013 N.Y. Laws ch. 287 (amending CPL § 360.20, eff. July 31, 2013).

6. 2013 N.Y. Laws ch. 356 (amending PL § 60.27(10), eff. Sept. 27, 2013).

7. A. 8071, 236th Leg., Reg. Sess. (N.Y. 2013) (not yet signed by the Governor).

8. 2013 N.Y. Laws ch. 7 (amending CPL § 730.40(1), eff. Mar. 15, 2013).

9. 2013 N.Y. Laws ch. 346 (amending Public Health Law § 3306(9), (10), eff. Dec. 11, 2013).

10. 2013 N.Y. Laws ch. 172 (amending PL § 120.12, eff. July 29, 2013).

11. 2013 N.Y. Laws ch. 259 (amending PL § 120.05, eff. Jan. 27, 2014).

12. 2013 N.Y. Laws ch. 180 (amending PL § 240.32, eff. Nov. 1, 2013).

13. 2013 N.Y. Laws ch. 186 (adding PL § 170.65(4), eff. Nov. 1, 2013).

14. A. 6547, 236th Leg., Reg. Sess. (N.Y. 2013) (not yet signed by the Governor).

15. A. 7400, 236th Leg., Reg. Sess. (N.Y. 2013) (not yet signed by the Governor).

16. 2013 N.Y. Laws ch. 368 (amending Executive Law § 221-a(4), eff. Oct. 27, 2013) (Exec. Law).

17. 2013 N.Y. Laws ch. 202 (amending Public Service Law § 91(7), eff. July 31, 2013).

18. 2013 N.Y. Laws ch. 261 (amending Exec. Law § 621(23), eff. Aug. 30, 2013).

19. 2013 N.Y. Laws ch. 119 (amending Exec. Law § 631, eff. Aug. 11, 2013).

20. 2013 N.Y. Laws ch. 201 (adding General Business Law § 349-e, eff. Nov. 1, 2013).

21. 2013 N.Y. Laws ch. 162 (adding PL § 195.06-a, eff. Nov. 1, 2013).

22. S.4718-a, 236th Leg., Reg. Sess. (N.Y. 2013) (not yet signed by the Governor).

23. 16 N.Y.3d 654 (2011).

24. 2013 N.Y. Laws ch. 169 (amending VTL §§ 511(3)(a)(iii), 1193(1)(b), (c), 1198(4)(a), eff. Nov. l, 2013).

25. 2013 N.Y. Laws ch. 91(amending VTL §§ 510-b(1), 510-c(2), eff. July 26, 2013).

26. 2013 N.Y. Laws ch. 55 (amending VTL §§ 1225-c(4), 1225-d(6), eff. July l, 2013).

27. 2013 N.Y. Laws ch. 437 (amending PL § 70.20(2)(c), eff. Oct. 23, 2013).

28. 2013 N.Y. Laws ch. 55 (amending PL §§ 205.16–205.19; Correction Law §§ 72, 851–856, 201, 500-b, 500-c, 500-g, 500-n; CPL §§ 65.00–65.30, 182.10–182.40; Exec. Law §§ 266–267; 259-m, 259-mm).

29. 2013 N.Y. Laws ch. 87 (amending VTL §§ 510, 530; Social Service Law § 111-b, eff. Jan. 30, 2013).

30. 2013 N.Y. Laws ch. 283 (amending Judiciary Law § 90(4)(c), eff. July 31, 2013) (Jud. Law).

31. 2013 N.Y. Laws ch. 22 (amending Jud. Law § 484, eff. May 2, 2013).

32. No. 2013 / 070 (eff. Jan. 1, 2014).

33. No. 2013 / 071 (eff. Nov. 20, 2013).

34. Local Laws 2013 / 021, 2013 / 022 (eff. July 16, 2013)

35. S. 02665-B, 236th Leg., Reg. Sess. (N.Y. 2013) (not yet signed by the Governor).

36. 2013 N.Y. Laws ch. 47 (amending PL § 225.30, eff. June 4, 2013).

37. 2013 N.Y. Laws ch. 102 (adding Public Health Law § 1399-o-l, eff. Oct. 10, 2013).

The Supreme Court's New Plea Counsel Cases and Retroactivity

Should New York Revisit *Eastman-Teague*'s Retroactivity Rubric?

By Marcy L. Kahn and Christopher H. Benbow

Introduction

Nearly two decades ago, in *People v. Eastman*,[1] the New York Court of Appeals, in considering whether to apply a newly announced rule of criminal procedure under the federal Constitution to criminal cases pending solely on state court collateral review, concluded that state courts were "constitutionally commanded" to apply the rubric fashioned by the U.S. Supreme Court in *Teague v. Lane*[2] and its federal common law sequellae in determining such issues. The *Eastman* court ruled well prior to the Supreme Court's clarifying decision in *Danforth v. Minnesota*,[3] however, which expressly relieved state courts of any obligation to adhere to its *Teague* jurisprudence.

The recent series of landmark Sixth Amendment rulings by the Supreme Court in *Padilla v. Kentucky*,[4] *Missouri v. Frye*[5] and *Lafler v. Cooper*,[6] expanding its *Strickland v. Washington*[7] jurisprudence to include the right to effective assistance of counsel during plea bargaining, and the Court's subsequent ruling in *Chaidez v. United States*,[8] restricting the retroactive application of its ruling in *Padilla* under *Teague*, affords the N.Y. Court of Appeals the opportunity to assess the continuing util-

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A broader analysis of the issues presented will appear in the forthcoming Volume 99, December 2013, issue of the *Cornell Law Review Online* as M.L. Kahn and C.H. Benbow, *Revisiting Constitutional Retroactivity in New York After* Danforth: *Should* Padilla and *Other Supreme Court Guilty Plea Counsel Cases Prompt a Change from* Eastman-Teague, or *Adherence to* Chaidez?, 99 Cornell L. Rev. Online (December 2013), *available at* www.cornelllawreview.org/clronline/.

ity of its ruling in *Eastman*.[9] This article examines the possible approaches the Court of Appeals might take when addressing *Eastman*'s application to these newly announced federal right to counsel rules, and what each option would portend for New York's future consideration of the retroactive application of new rules of federal criminal constitutional procedure in right to counsel plea cases, and generally.

The Supreme Court's Recent Plea Counsel Decisions

In the course of the past four years, the Supreme Court has issued three major decisions concerning a criminal defendant's Sixth Amendment right to the effective assistance of counsel in the context of guilty pleas.

Padilla v. Kentucky

In 2010, the Supreme Court in *Padilla v. Kentucky* held that "[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea."[10] The Court reasoned that where the consequences of a defendant's plea may be readily determined under well-settled provisions of the Immigration and Nationality Act,[11] and the deportation result is "truly clear, . . . the duty to give correct advice is equally clear."[12]

In *Padilla*, the Kentucky Supreme Court had rejected the petitioner's claim that he had received ineffective assistance due to his defense counsel's failure to warn him of the deportation consequences of his guilty plea, reasoning that deportation is not a direct consequence of a plea, but merely a collateral one, that is, a matter not within the sentencing authority of the state trial court and therefore "outside the scope of representation required by the Sixth Amendment."[13] Upon its own review of Padilla's claim under its *Strickland* standard, the U.S. Supreme Court eschewed any direct/collateral analysis however, explaining that it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' . . . [and] that distinction . . . need not [be] consider[ed] in this case because of the unique nature of deportation."[14] The Court then applied the first prong of the *Strickland* test to Padilla's claim, finding that, due to his plea counsel's failure to advise him of the deportation consequences of his plea, his counsel's representation fell below contemporaneous objective standards of reasonableness and remanded the case to the Kentucky Supreme Court for its determination as to whether Padilla's claim satisfied the prejudice prong of *Strickland*.[15]

Missouri v. Frye

In *Missouri v. Frye*, the Supreme Court recognized the constitutional duty of a defendant's plea counsel to communicate favorable guilty plea offers to the accused and held that a failure to do so constitutes ineffective assistance under the Sixth Amendment standard.[16] In *Frye*, the Court concluded that by failing to communicate a favorable plea offer to the client in a timely manner, plea counsel's representation fell below an objective standard of reasonableness under *Strickland*. The Court further concluded that, because the defendant had accepted a later, and less favorable, plea offer, there appeared to be a reasonable possibility that, had the defendant known of the earlier and more favorable offer, he would have accepted it, thereby satisfying the prejudice prong of *Strickland*.[17]

Lafler v. Cooper

In *Lafler v. Cooper*, decided the same day as *Frye*, the Supreme Court similarly held that a defense counsel's affirmative misadvice as to the defendant's exposure at trial, which led the defendant to reject a favorable plea offer, constituted ineffective assistance of counsel.[18] In *Cooper*, the Court also found resulting prejudice in the significantly more severe sentence imposed on the defendant after trial.[19]

Historical Background on Retroactivity

Federal Rules on Retroactivity

Historically at common law, new rules of decisional law were perceived as having always existed, even if they had not been previously recognized.[20] As the "correct" law was newly "pronounced," it would be applied to cases then pending on direct appeal, but once a judgment had become final, it would not be affected by declarations of the law occurring thereafter.[21]

Beginning in the 1960s, the U.S. Supreme Court employed various forms of retroactivity in its Fourteenth Amendment due process incorporation jurisprudence, in some instances allowing new rules to provide the basis for collateral attack on judgments which had long been final,[22] while in others applying the new rules only to judgments still in the direct appellate process[23] or even limiting them to prospective application exclusively.[24] In *Linkletter v. Walker*, the Court concluded that "the Constitution neither prohibits nor requires retrospective effect" for decisions announcing new constitutional rules affecting criminal trials, quoting Justice Cardozo in stating "[w]e think the Federal Constitution has no voice upon the subject."[25] The *Linkletter* Court then announced the approach it would take to determine when new decisional law would be applied to cases in which appeals had been concluded prior to the issuance of the new rule: "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[26] After reviewing the considerations and the factors to be weighed in taking such an approach, the *Linkletter* Court summarized those factors by stating that

courts "must look to the purpose of the [new] rule; the reliance placed upon the [old rule]; and the effect on the administration of justice of a retrospective application of [the new rule]."[27] Four years later, in *Desist v. United States*, the Supreme Court restated the *Linkletter* standard as a tripartite test for determining the degree of retroactivity it would afford new constitutional rules affecting criminal trials.[28]

The Court's varied approach to the retroactivity issue drew a stinging rebuke from Justice Harlan in his now-famous dissent in *Desist*.[29] Justice Harlan criticized the application of the purpose-reliance-effect test to determine retroactivity for cases on direct review and opined that the Court's rules on retroactivity should be reconsidered.[30] All cases which were pending on direct review at the time of the change in the law should receive the benefit of the new rule equally, he suggested.[31] With respect to cases on *habeas corpus* review, different considerations pertained, namely the value to state courts of the finality of their criminal convictions and the impossibility of their predicting every new change in federal constitutional criminal procedure.[32] Justice Harlan opined that the Supreme Court's elimination in *Fay v. Noia*[33] of its prior *habeas* preservation requirement had since 1963 subjected the federal courts to a flood of "new rule" challenges to state court convictions, spawning a judicial federalism problem.[34] His solution was to apply new rules retroactively on *habeas* review only where they furthered the purpose of the collateral proceeding to prevent the conviction of the innocent by significantly improving fact-finding and the truth-seeking process.[35] In all other cases, a *habeas corpus* petition should be examined in light of the standards prevailing at the time of the underlying state court conviction.[36] The focus of the Harlan analysis was to shift away from the tripartite purpose-reliance-effect test and toward an analysis of whether the decision in question announced a rule which was, in fact, "new," and to apply it retroactively on collateral review only where it held the potential for substantially impacting the determination of guilt or innocence.[37]

Eventually, the Supreme Court effectively embraced Justice Harlan's view, determining in *Griffith v. Kentucky* that its new rules of federal constitutional procedure would apply retroactively to all federal and state cases which were then pending, or not yet final, on direct review, whether or not they constituted a "clear break" from past law.[38]

With respect to cases on collateral review, the Court adopted its current approach in *Teague v. Lane*, establishing as a general rule that a "new" rule of constitutional criminal procedure would not be applied retroactively. The Court explained that, generally, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government" or was not "*dictated* by precedent existing at the time the defendant's conviction became final."[39]

The Court carved out two narrow exceptions to this general rule. The first *Teague* exception, which applies to substantive rules,[40] is that a new rule must be applied retroactively on collateral review if it places "private individual conduct beyond the power of the criminal law-making authority to proscribe."[41] The second exception applies if the new rule constitutes a "watershed rule" of criminal procedure that is "implicit in the concept of ordered liberty."[42] In order to be a "watershed rule," that is, one which affected a "bedrock procedural element" of a conviction, the new rule must "undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction . . . ."[43] Subsequent to its ruling in *Teague*, the Supreme Court has characterized the class of watershed rules that warrant retroactive application under the second *Teague* exception as "extremely narrow," and has commented that it is "unlikely that any [has] yet to emerge."[44]

New York Rules on Retroactivity

The *Pepper* Rule

The current New York rule on retroactivity of new state decisional law principles was announced in 1981 in *People v. Pepper*,[45] well before the Supreme Court devised its current standard in *Teague*. In *Pepper*, also a right to counsel case, the Court of Appeals sought to resolve the tension between on the one hand, affording full retroactive application of the then-newly declared *Samuels*[46] state constitutional principles to all cases, whether or not still in the direct appellate process and, on the other, avoiding the hardships which could be occasioned by abrupt changes in the jurisdiction's decisional law by adopting an exclusively prospective application of the new rule. Recognizing that no "definitive standards" for retroactivity had by then evolved, either in its own jurisprudence or in that of the Supreme Court, the N.Y. Court of Appeals found guidance in the Supreme Court's formulation of the *Linkletter* tripartite "purpose-reliance-effect" test, as restated in *Desist*.[47] The Court further followed the pronouncement in *Desist* that the second and third factors, that is, reliance on the old standard and the likely effect on criminal justice administration of a retroactive change, were of substantial significance "only when the answer to the retroactivity question is not to be found in the purpose of the new rule itself."[48]

The *Pepper* court next observed the outer boundaries marked by the application of the *Linkletter-Desist* test in federal practice, with new constitutional standards "that go to the heart of a reliable determination of guilt or innocence" being applied retroactively where necessary to avoid "a complete miscarriage of justice," while new rules which are "only collateral to or relatively far removed from the fact-finding process at trial" are limited to prospective application only.[49] As an example of the former circumstance, the *Pepper* court pointed to New

York's unique right to counsel decisions deemed necessary to guarantee a fair trial,[50] while its example of the latter category involved application of the exclusionary rule in search and seizure cases.[51] The Court identified the issue of the application of the *Samuels* rule – involving an accused's pre-trial right to counsel at police interrogations – as presenting a middle ground between those two extremes. In its prior decisions involving pre-trial right to counsel issues, the Court observed that it had applied its new state constitutional rules retroactively to cases still pending on direct review, but had denied retroactive application where the appeals process had been exhausted.[52] Characterizing uncounseled stationhouse interrogations as "not insignificant events," but noting that they did not go to the question of guilt or innocence, the Court determined to adhere to its middle ground approach in the case. It also dispatched arguments under the second and third factors of the tripartite test, saying that the *Samuels* decision had been foreshadowed by its earlier case law[53] and that the administration of justice would not be adversely impacted by limiting the application of the new decision to those relatively few cases which were still on direct appeal.[54]

Following *Pepper*, the Court of Appeals has applied its articulation of the *Linkletter-Desist* tripartite test in determining whether to give retroactive application to newly announced rules of New York law, including not only those emanating from New York's constitution, as in *Pepper*, but also from its statutory and common law.[55]

The *Eastman* Rule

In 1995, in *People v. Eastman*, the Court of Appeals applied *Teague*'s retroactivity analysis to determine that the U.S. Supreme Court's confrontation clause ruling in *Cruz v. New York*[56] should be retroactively applied, notwithstanding the Supreme Court not having addressed the issue, concluding that the application of the *Teague* rubric was "constitutionally commanded."[57] The *Eastman* court reasoned that because *Cruz* pertained to a "fundamental right embodied in the Confrontation Clause" of the Sixth Amendment of the federal constitution, "the principles of retroactivity developed by the Supreme Court in construing Federal Constitutional law [in *Teague*] govern the disposition of this case."[58] Relying upon the language from *Teague* defining a "new" rule as one that "breaks new ground or imposes a new obligation on the States or Federal Government,"[59] the *Eastman* court characterized *Cruz* as articulating a "new" constitutional principle, "mark[ing] a break from both Federal and State law precedents" and "fundamentally alter[ing] the Federal constitutional landscape . . ."[60] The *Eastman* court then applied *Teague*'s second exception, finding that *Cruz* "implicate[d] a bedrock procedural element – the Sixth Amendment right of confrontation," as well as announced a rule that is "central to an accurate determination of guilt or innocence," in that admission of such a confession without the opportunity to cross-examine the co-defendant could "undermine[] the fundamental fairness of the trial."[61] The Court concluded that, under *Teague*, the Supreme Court's rule in *Cruz* should be applied retroactively on collateral review.

> Historically at common law, new rules of decisional law were perceived as having always existed, even if they had not been previously recognized.

Contrast Between the *Teague* (*Eastman*) and *Linkletter* (*Pepper*) Tests

A comparison of the standards for retroactive application of newly announced rules of constitutional criminal procedure in *Teague* and *Linkletter* reveals their contrasting purpose and effect.

Teague is a bright line test that is applicable to all federal *habeas* review of state court convictions. The *Teague* standard first inquires whether the rule in question is a "new" rule and, if so, generally bars its retroactive application, unless the new principle falls within one of two narrow exceptions. Thus, *Teague* provides a uniform standard applicable by federal courts to all state jurisdictions and promotes both uniformity and predictability. By narrowly tailoring its two exceptions, *Teague* furthers its dual purpose of promoting comity with state courts and according finality to state judgments. The importance of deference to comity with state courts is not a relevant consideration, however, where state courts are conducting collateral reviews of their own convictions.[62] Notably, the *Teague* bright line rule conflates the "reliance by law enforcement authorities on the old standards" and "the effect on the administration of justice of the new standards" factors of the *Linkletter* balancing test by its use of a threshold inquiry as to whether a rule is "new."[63]

Linkletter, on the other hand, is a balancing test involving an individualized case-by-case analysis that weighs three different factors, at times somewhat differently, depending on the case. As the N.Y. Court of Appeals has observed, the *Linkletter* test also permits the promotion of its own state's values in the particular case by deeming them more important in some instances than finality.[64] Further, the flexibility of the tripartite test permits calibrated balancing of the various factors, depending upon the circumstances presented and their relative importance in the individual case. The Court has further noted

that the tripartite test may be effectively applied regardless of whether the rule in question is "new."[65] Thus, the *Linkletter* standard affords flexibility, but may, as Justice Harlan warned in *Desist*, lead to inconsistent and unpredictable results.

Danforth's Limits on *Teague* and Its Sequellae

Danforth v. Minnesota

In 2008, the Supreme Court offered an interpretation of the binding effect of *Teague* in state court proceedings that was strikingly different from the understanding of the concept expressed by the Court of Appeals in *Eastman*. In *Danforth v. Minnesota*, the Supreme Court considered the extent to which the *Teague* rule binds state courts considering the retroactive application of new rules of constitutional criminal procedure in state collateral review cases and found it to be binding only on *habeas corpus* review conducted by federal courts. As the *Danforth* Court explained: "A close reading of the *Teague* opinion makes clear that the rule it established was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings than required by that opinion."[66]

Justice Stevens, writing for the Court, further observed that *Teague*'s general rule of nonretroactivity derived from the federal *habeas corpus* statute, and as "*Teague* is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts."[67] In upholding the right of state courts to depart from *Teague*, the *Danforth* Court referenced Justice O'Connor's statement in her plurality opinion in *Teague* that such a limitation on the reach of *Teague* was consistent with the considerations of comity and the finality of state convictions which were the two central underpinnings of the Court's ruling in *Teague*: "If anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*."[68] Having identified these indicia of the limited applicability of *Teague*, the *Danforth* Court concluded: "It is thus abundantly clear that the *Teague* rule of nonretroactivity was fashioned to achieve the goals of federal *habeas* while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority of federal courts to overturn state convictions – not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions."[69]

U.S. Supreme Court Decisions Subsequent to *Teague*

In cases subsequent to *Teague*, the Supreme Court has yet to find that any of its newly announced rules of constitutional criminal procedure have fallen within either of the *Teague* exceptions and thereby been made retroactively applicable by federal courts on collateral review. These subsequent rulings have further served the federal comity rationale identified in *Danforth*. For example, in *Whorton v. Bockting*,[70] a case involving *habeas corpus* review of a Nevada state trial court conviction, the Supreme Court addressed whether its previous confrontation clause holding in *Crawford v. Washington* was retroactively applicable. It found that *Crawford* had announced a "new" rule of criminal procedure, but one that was not a "watershed" rule, and was therefore not retroactively applicable to cases on collateral review.[71] In so holding, the *Whorton* Court observed that the "bedrock procedural element" or "watershed" exception to the *Teague* general rule of nonretroactivity was "extremely narrow" and that the Court had, since *Teague*, rejected "every claim that a new rule satisfied the requirements for watershed status . . . ."[72]

Chaidez v. United States

In *Chaidez v. United States*,[73] the Supreme Court applied *Teague* to determine that its rule announced in *Padilla* was not to be applied retroactively on *habeas corpus* review by federal courts to cases no longer pending on direct appellate review. In *Chaidez*, the petitioner, against whom removal proceedings had been commenced in 2009 following her plea of guilty to federal crimes, filed a petition for a writ of *coram nobis*, claiming that her plea counsel was ineffective because counsel failed to advise her of the deportation consequences of her plea. In 2010, while her petition was pending, *Padilla* was decided. The petitioner argued that *Padilla* should be applied retroactively to her case because *Padilla* did nothing more than apply an "old rule," namely, *Strickland*, in the context of the deportation consequences of a plea.

The Supreme Court rejected the petitioner's argument, holding that *Padilla v. Kentucky* had announced a "new" rule within the meaning of the *Teague* standard. While acknowledging that *Padilla* did apply the *Strickland* test, the *Chaidez* Court then explained that *Padilla* differed from "the normal *Strickland* case" in that "*Padilla* had a different starting point" for its analysis of the right to counsel issue:

> Before asking whether the performance of Padilla's attorney was deficient under *Strickland*, we considered . . . whether *Strickland* applied at all. Many courts, we acknowledged, had excluded advice about collateral matters from the Sixth Amendment's ambit; and deportation, because the consequence of a distinct civil proceeding, could well be viewed as such a matter. But, we continued, no decision of our own committed us to "appl[y] a distinction between direct and collateral consequences to define the scope" of the right to counsel. And however apt that distinction might be in other contexts, it should not exempt from Sixth Amendment scrutiny a lawyer's advice (or nonadvice) about a plea's deportation risk. Deportation, we stated, is "unique." It is a "particularly severe" penalty, and one "intimately related to the criminal

process"; indeed, immigration statutes make it "nearly an automatic result" of some convictions. We thus resolved the threshold question before us by breaching the previously chink-free wall between direct and collateral consequences: Notwithstanding the then-dominant view, "*Strickland* applies to Padilla's claim."[74]

Thus, the *Chaidez* Court found that *Padilla* decision "count[ed] as 'break[ing] new ground or 'impos[ing] a new obligation'" under the *Teague* rule[75] and that because "*Padilla*'s holding that the failure to advise about a non-criminal consequence could violate the Sixth Amendment would not have been – in fact, was not – 'apparent to all reasonable jurists' prior to our decision . . . . *Padilla* thus announced a 'new rule.'"[76] For that reason, the *Chaidez* Court concluded that *Padilla* was not retroactive on collateral review to cases final on direct review prior to the issuance of the *Padilla* decision.[77]

Options for the N.Y. Court of Appeals

The N.Y. Court of Appeals will soon have occasion to consider whether the *Padilla* rule should be applied retroactively on collateral review, as held by the Appellate Division, First Department in *People v. Baret*.[78] In doing so, the Court will have an opportunity to revisit its 1995 ruling in *Eastman* and decide whether it will continue to apply the *Teague* standard, and the Supreme Court's decisional law applying it, as in *Chaidez*, in determining the retroactive effect New York state courts must give to new rules of federal constitutional criminal procedure in collateral review of the state's criminal convictions.

The Court has several options available, and their differing benefits and complications will be examined in turn, should the Court of Appeals select the Supreme Court's recent Sixth Amendment guilty plea decisions, particularly in *Padilla*, but also in *Frye* and *Cooper*, as the vehicle for reconsidering its own *Eastman* standard. It is beyond the scope of this article, however, to consider the application of any particular retroactivity rubric to the guilty plea / right-to-counsel scenarios under discussion.

Interpret *Eastman* to Continue to Require New York to Follow the Supreme Court's *Teague* Jurisprudence (Strict *Eastman-Teague*)

The first option is for the Court of Appeals to continue to apply its earlier ruling in *Eastman*, following the Supreme Court's own post-*Teague* jurisprudence. Specifically, with respect to the retroactivity of *Padilla*, the Court could decide to adopt the reasoning of the Supreme Court in *Chaidez* in determining that state post-conviction litigants, like federal *habeas* petitioners, could not avail themselves of the Supreme Court's Sixth Amendment ruling in *Padilla* in cases final on appeal, reserving the benefits of the new rule for prospective application and for any cases which were still pending on direct review when *Padilla* was issued.

In taking such an approach, the Court would need make no adjustment to its *Eastman* jurisprudence. The Court could continue instead to look to the Supreme Court's *Teague* standard and its resulting federal common law rulings to determine retroactivity of new rules of constitutional criminal procedure. This strict *Eastman-Teague* approach is consistent with, and follows directly from, *Eastman* itself, as the Court there assumed the applicability in state court jurisprudence of the federal common law rules on retroactivity of new rules of federal constitutional criminal procedure. This approach would make New York's common law consistent with federal common law, as well as with the law in most other states.[79] It would also afford New York courts significant predictability: as soon as the Supreme Court had opined on the subject, the result would be known for state collateral retroactivity purposes. For example, in the context of the guilty plea / right-to-counsel cases, the outcome as to *Padilla* claims would follow the Supreme Court's ruling in *Chaidez*. Although the fate of *Frye* and *Cooper* claims would be, as of this writing, unknown, as the Supreme Court has yet to rule on the issue of collateral retroactivity as to them, extrapolating from that Court's *Teague* jurisprudence would offer substantial guidance as to the outcome.[80]

Another benefit of strict adherence to *Eastman-Teague* would be that it would serve the goal shared by federal and state courts of according finality to past judgments. Finality is especially important where the conviction has resulted from an admission of guilt, as occurs in the vast majority of criminal prosecutions, and solid policy considerations favor applying the law as it was at the time of the guilty plea in such cases. By applying the new rule in *Padilla* only prospectively and to those few cases that were in the appellate process at the time the decision was issued, the potential for a torrent of new claims in cases long considered final would be avoided, constitutional rules not in effect at the time of their resolution would not be invoked, and there would be no "undermin[ing of] the principle of finality which is essential to the operation of our criminal justice system."[81]

Moreover, with respect to the *Frye* and *Cooper* claims, a decision to continue to apply the *Eastman-Teague* standard to determine retroactivity of the federal rules would not automatically preclude judicial review of such claims. The federal constitutional rules announced in those cases are, in contrast to that in *Padilla*, consistent with the well-settled New York state constitutional standard on right to counsel at guilty pleas,[82] as to which post-conviction review is governed by resort to the *Pepper* standard, and the litigation of which would neither trigger an onslaught of claims not previously cognizable in New York nor impose any limitation on claims currently available under New York law.

Further, these latter claimed deprivations might also be susceptible of collateral review on due process grounds after final appeal. In *People v. Monk*, the Court

of Appeals, in reaffirming its standard for assessing due process compliance by a plea court, explained:

> We have repeatedly held that a trial court "must advise a defendant of the direct consequences of [a] plea," but "has no obligation to explain to defendants who plead guilty the possibility that collateral consequences may attach to their criminal convictions." . . . [D]irect consequences consist of "the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, a fine." By contrast, collateral consequences are "peculiar to the individual and generally result from the actions taken by agencies the court does not control."[83]

By this standard, the sentencing terms of a plea bargain and the maximum sentencing range available after trial might be seen as direct consequences of a decision to take or reject the plea offer, and a court's failure to inform a defendant accordingly might be actionable on due process grounds on collateral review. Because, unlike a *Padilla* claim, such a claim would not be based upon a "new" rule, and such review could occur after final appeals were exhausted.

Nonetheless, should the Court of Appeals choose to follow the strict *Eastman-Teague* approach, federal Sixth Amendment guilty plea/right-to-counsel issues, at least under *Padilla*, if not under *Frye* and *Cooper*, might evade appellate review entirely in New York. They would almost never be raised on direct appeal, as such claims would nearly always involve off-record conversations between counsel and the defendant, rather than matters reflected in the record of proceedings.[84] Under *Chaidez*, if concluded on direct appeal at the time of *Padilla*'s issuance, they could not be raised on federal *habeas corpus* review. And if completely barred from N.Y. Criminal Procedure Law § 440.10 (CPL) review by the bright line test of *Teague*, *Padilla*-violative cases concluded prior to the Supreme Court's decision would likewise not be reviewable in state collateral proceedings. The right to effective plea counsel, then, at least on deportation advice, would be effectively diminished, if not eliminated for many defendants:[85] unlike many other constitutional claims, they would be reviewable neither on direct appeal nor in post-conviction proceedings.[86] And in contrast to the Supreme Court's determination in *Chaidez* to deny a second review of a claim which had previously been thoroughly reviewed by the state courts on grounds of comity, a decision by the Court of Appeals to employ a strict *Eastman-Teague* approach would, in many cases, deny the first and only review to be given to that claim.

Similarly undermined would be the special regard in which a defendant's right to counsel is held under New York jurisprudence.[87] Perhaps this possibility of total unreviewability of the claims now being raised by individuals who were rendered subject to deportation without having received any warning of the fact was a consideration for the appellate courts which had held

New York will soon have occasion to consider whether the *Padilla* rule should be applied retroactively on collateral review.

Padilla to be retroactive under *Eastman* prior to *Chaidez*.[88] And, perhaps, it has also informed the practice of some sympathetic prosecutors in the state to consider negotiating repleader agreements in response to CPL § 440.10 motions raising *Padilla* claims, replacing, while not eliminating, the original conviction with an offense not involving certain deportation.[89]

Interpret *Eastman* to Require New York to Follow *Teague*, but to Apply the *Teague* Rubric in a Modified Manner (Modified *Teague*)

A second option for the Court of Appeals is to adhere to the *Eastman-Teague* rubric as a general principle but to apply it in a modified fashion. For example, in *Colwell v. State*, the Nevada Supreme Court adopted the *Teague* framework but used its own criteria to determine whether the rule in question was "new" and thus came within *Teague*'s general prohibition on retroactive collateral application.[90] The Nevada court also adopted *Teague*'s first exception pertaining to rules establishing the unconstitutionality of the proscription of certain conduct as criminal but, rather than limit the exception to "primary, private individual conduct" as in *Teague*, broadened it to include within the exception rules banning punishment based upon a defendant's status or offense.[91] In addition, the Nevada court adopted the second *Teague* exception but, again, broadened it, stating that the rule in question need neither be a "watershed" rule nor implicate a "bedrock" procedural element of the conviction. Rather, if the likelihood of an accurate conviction would be seriously diminished without the rule, that rule would fall within the exception.[92]

Another example of a modified approach to *Teague* is that employed by the Supreme Court of Florida in *State v. Johnson*,[93] which adopts the *Teague* framework to the extent of accepting both the *Teague* definition of a new rule and the first *Teague* exception. Rather than adopt the second *Teague* exception, however, the Florida court applied the tripartite *Linkletter* test in order to determine whether that rule in question was "of sufficient magnitude to necessitate retroactive application."[94]

A third approach to modification of *Teague* is the decision of the Idaho Supreme Court in *Rhoades v. State*.[95] In *Rhoades*, the court adopted *Teague* with respect to the retroactivity of both federal and state constitutional rules.[96] The Idaho court chose to exercise its own independent judgment as to the definition of a "new" rule, however.[97] It also adopted both *Teague* exceptions but, as to the sec-

ond exception, elected to define for itself what constitutes a "watershed rule," adding that it would independently review cases in which the retroactivity of a rule of law is at issue in light of its own state values, not involving the application of the *Linkletter* tripartite test.[98]

comity. While finality is a shared goal of both federal and state courts and its achievement stands as an apt uniform national standard, the promotion of comity is a goal of federal courts only. Indeed, for the federal judiciary, when engaging in *habeas* review of state court convictions, the deference shown to the finality of state judgments actually serves as a means of advancing judicial federalism and its concern with comity. For state courts, however, no such comity concerns are present. Moreover, our Court of Appeals has recognized that even the interest of finality must sometimes yield to the preservation of the state's highest values,[103] which might or might not include New York's unique right to counsel rules in the plea bargaining context.

> This state's long-recognized constitutional protections guaranteeing the privilege against self-incrimination and the right to due process of law, as well as the right to the effective assistance of counsel, far exceed those recognized by the federal government.

The N.Y. Court of Appeals could choose an approach similar to those just described, adhering to the *Eastman-Teague* standard, but modifying its application, either generally or in its exceptions. For example, similarly to the Idaho court *Rhoades*, the Court could adhere to the *Teague* rubric as to the general rule of nonretroactivity of "new" constitutional rules, which it adopted in *Eastman*, yet modify the *Teague* exceptions in a manner that the Court believes best serves the values and concerns of this state, including the more expansive protections New York accords under our state constitution of the right to effective assistance of counsel. Whether doing so would ultimately propel the Court back to strict adherence to *Teague*, as has occurred in at least one state,[99] as the desire for a uniform standard emerges, would remain to be seen.

Abandon *Eastman-Teague* and Return to the pre-*Teague* Tripartite *Linkletter-Desist* Retroactivity Standard Adopted by New York in *Pepper* (Return to *Linkletter*)

A third option for the Court of Appeals is to abandon the *Eastman-Teague* rule and employ the tripartite "purpose-reliance-effect" rule originated in *Linkletter* and *Desist* and adopted by New York in *Pepper*. For example, in *Cowell v. Leapley*,[100] the South Dakota Supreme Court rejected the *Teague* rule as "unduly narrow," choosing instead to apply the *Linkletter* tripartite test as adopted by its own state.[101] This approach would be, in effect, a return to New York's *Pepper* standard for this purpose.

This option would be beneficial in the sense that it would result in a consistent standard for the review of retroactivity of new state statutes and new federal and state constitutional rules, as well as new state statutory and common law. With this more flexible standard, rather than the bright line approach of *Teague*, each case could be evaluated individually in light of the New York policies and common law rules to be served.[102]

Furthermore, this approach would have the additional benefit of not binding New York to rules designed to serve the ends of federal-state comity. As the U.S. Supreme Court observed in *Danforth*, the *Teague* rule was established with two interests in mind, namely, the finality of judgments and the promotion of federal-state

Adopting the tripartite test for federal right to counsel claims based upon *Frye* and *Cooper* would be consistent with the approach taken under *Pepper* to claims raising state constitutional violations on such grounds already actionable under the New York State Constitution. On the other hand, rejection of the bright-line *Eastman-Teague* standard leaves open the possibilities of uncertain and uneven application of the retroactivity rule pending review of a particular issue in the Court of Appeals, raising the concerns voiced by Justice Harlan's warnings in *Desist*.

Continue Nominally to Follow *Eastman-Teague*, but Emphasizing Independent New York State Constitutional Rules (Nominal *Eastman-Teague*/ Independent State Grounds)

Another course open to the Court of Appeals is to continue, at least nominally, its *Eastman-Teague* jurisprudence but to place greater emphasis on recognizing criminal procedural rights under the state constitution. In some instances, the state rule might expand the protections of its federal counterpart, while in others, it might merely rely on a parallel provision to it. Our Court of Appeals has observed that "[u]nder established principles of federalism . . . the States also have sovereign powers [and] [a]lthough State courts may not circumscribe rights guaranteed by the Federal Constitution, they may interpret their own law to supplement or expand them . . . ."[104] This course of action is one with which the Court has long been familiar, as it has historically not hesitated to announce new state constitutional rights where it concluded that the Supreme Court's articulation of federal constitutional rights was not sufficiently congruent with New York's "long tradition of interpreting our State

Constitution to protect individual rights"[105] including, as noted, the right to counsel.

The Court of Appeals has repeatedly emphasized that because its carefully considered body of law with regard to the right to counsel emanates from this state's long-recognized constitutional protections guaranteeing the privilege against self-incrimination and the right to due process of law, as well as the right to the effective assistance of counsel, its established protections far exceed those recognized by the federal government or extant in other states.[106] Thus, a choice recognizing parallel or expanded state constitutional rights in deciding the retroactivity question would thus be a familiar one to the Court in addressing the new rules relating to the right to effective plea counsel.

A recent Appellate Division case appears to have taken this approach. In *People v. Andrews*, the Appellate Division, Second Department was asked to apply the Supreme Court's Sixth Amendment *Padilla* right to counsel rule retroactively on CPL § 440.10 review, by exercising its independence, as recognized in *Danforth v. Minnesota*, to refrain from applying the *Teague* rubric by following *Chaidez*. The defendant, who had concluded his direct appeals well before *Padilla* was decided, also sought relief under the New York State Constitution.

After declining, without discussion and without any mention of *Eastman*, to depart from a strict application of *Teague*, and following *Chaidez* on the defendant's federal claim, the Second Department in *Andrews* considered whether relief should be accorded retroactively on his parallel state constitutional claim.[107] The Appellate Division, applying *Pepper*, concluded that "under New York law, the *Padilla* rule should not be retroactively applied" to cases final on direct review at the time *Padilla* was decided.[108]

Should it choose to do so, the Court of Appeals could determine the retroactivity of a newly announced federal constitutional rule in similar fashion to that of the *Andrews* court, following either a strict *Eastman-Teague* approach or a modified *Eastman-Teague* approach, but focusing its retroactivity analysis on a state constitutional claim (either parallel to the corresponding federal right, as in *Andrews*, or expanded beyond it), using the traditional *Pepper* tripartite test for New York state law claims. And the Court may decide that a case in which the retroactivity of *Padilla*, *Frye* or *Cooper* is at issue is suitable for taking such an approach. Doing so in the guilty plea / right-to-counsel context would enable the court to address such claims independently and on an individualized basis, which the Court may find appropriate. And given the "unique protections [it has found] guaranteed by New York's Right to Counsel Clause,"[109] and its commitment to affording this "cherished principle" the "highest degree of [judicial] vigilance,"[110] the Court may find the plea counsel cases to be a ripe opportunity for revisiting the retroactivity standard to emphasize independent state constitutional rules.

The Court of Appeals may, however, prefer to employ a future case involving a federal constitutional rule other than those set forth in the recent guilty plea / right-to-counsel cases, because it may view a case involving a collateral attack on grounds other than *Padilla*, *Frye* or *Cooper* as a better vehicle for retaining an existing retroactivity rubric or formulating a new standard applicable to *all* new federal constitutional rules, not merely those involving the right to counsel in the context of a guilty plea. The Court could pursue such a course in the interests of uniformity and the avoidance of unpredictable and inconsistent results.

Abandon *Eastman* and Adopt a New Retroactivity Rule for New Federal Rules (Abandonment of *Eastman*/Modified *Linkletter-Pepper*)

The remaining option for the Court of Appeals in considering the retroactivity question in the context of the guilty plea / right-to-counsel cases would be to abandon *Eastman* and its adherence to *Teague* completely and to adopt a new approach to retroactivity analysis for federal constitutional criminal procedure, not so dominated by the determination of whether the rule is "new," to determine the retroactivity of recently promulgated rules of federal constitutional criminal procedure.

One approach would be to modify the *Linkletter-Pepper* purpose-reliance-effect test to more fully embody the concept of fundamental fairness emblematic of New York's special solicitude for important rights and liberties,[111] including the singular and fundamental right to the effective assistance of counsel, especially where the waiver of some other constitutional right is concerned.[112] For example, just as the Court of Appeals has historically accorded the right to counsel special importance where the waiver of the right to post-arrest silence is concerned, the Court might find New York's view of the role of counsel in the waiver of the rights to trial and freedom from self-incrimination inherent in guilty pleas to weigh more heavily in the balance when deciding how far to extend the new rules involving right to counsel at guilty pleas. This result could be achieved by expanding the first element of the tripartite test, the purpose of the new rule, to reach beyond the fact finding and the establishment of guilt or innocence at trial, and to include the fair, expeditious and final resolution of the case through the waiver of the constitutional rights of the privilege against self-incrimination and right to trial by jury. Such a redefinition could, in cases where the right to effective plea counsel is at issue, help insure that the plea was knowing and intelligent and that the waivers of the rights to silence and trial were fairly accomplished – all goals well established in our state's jurisprudence.

A factor the Court might find important in evaluating the fairness of the plea procedure might be the likelihood

of the issue escaping judicial review entirely if not examined retroactively on collateral review. The Court might decide that, without recourse to the direct appellate process for such claims, defendants' rights to fairness in the plea process should be more broadly extended.

Another factor the Court might consider in determining whether the aspiration of a fair, expeditious and final adjudication can be achieved without retroactive application of the rule might be the severity of the consequences to the defendant, should the issue prove unreviewable. In the case of a *Padilla* claim, where "the stakes [of the uncounseled plea] are high and momentous"[113] and the penalties "particularly severe,"[114] the factor may be weighed more heavily than in typical cases involving *Frye* and *Cooper* claims, particularly given the possibility of redress for the latter two categories of claims, but not the former, on due process grounds.[115] As with any guilty plea, "[c]ounsel is needed so that the accused may know precisely what he is doing . . . ."[116]

The second and third *Pepper* factors, reliance by law enforcement on the existence of the previous rule and the effect that retroactive application of the new rule would have on judicial administration, might not change under this scenario. Although the reliance factor might have little application in the guilty plea / right-to-counsel context, retaining the effect factor would preserve the interest of the judicial system in the finality of its judgments. The admonishment in *Desist* which was adopted in *Pepper*, that these latter two factors would be of substantial significance only if the retroactivity question could not be determined by reference to the purpose factor, could likewise be retained. By expanding the contours of the purpose factor, the latter two factors would likely diminish in importance, where state interests required the balance to be struck in favor of the important purpose being served. New York's retroactivity jurisprudence could likely weather such a recalibration in the context of right to counsel in guilty pleas, where the area of its application is circumscribed, where the reliance factor is unlikely to have any application and where the effect factor is mitigated, either because the result of retroactive application has been anticipated by the new federal rule's longtime existence in this state's own constitutional jurisprudence (*Frye* and *Cooper*), or because the claim is susceptible of a negotiated resolution without affecting the finality of the judgment or engendering additional litigation (*Padilla*).[117]

Adoption by the Court of Appeals of a new retroactivity rule with such an expanded "purpose" test, however, could result in a flood of collateral attacks on long-settled state court convictions on *Padilla* grounds, where prosecutors are not amenable to negotiating repleaders. The retention of the "effect" prong of the tripartite test, however, should the Court of Appeals choose to formulate a new retroactivity rule, would enable it to consider the potential flood of *Padilla* claims as a factor to be weighed. Because *Frye* and *Cooper* claims have long been cognizable on state constitutional right to counsel grounds and may also be subject to review on state due process grounds, a new retroactivity rule for their collateral review would not raise similar floodgates concerns.

Conclusion

The Court of Appeals has these, and, likely, other options available to it as it approaches consideration of application of its 1995 *Eastman* rule to the Supreme Court's recent guilty plea / right-to-counsel decisions in *Padilla*, *Frye* and *Cooper*. Some of these options, such as "strict *Eastman-Teague*" and, to a lesser degree, "modified *Teague*," favor predictability and uniformity with federal standards and the standards of most other states, as well as serving the goal of according finality to past judgments. Other possible choices, such as "return to *Linkletter*," "nominal *Eastman-Teague* / independent state grounds" and "abandonment of *Eastman* / modified *Linkletter-Pepper*," favor both individual case consideration and the preservation of important New York values, but create uncertainty and the opportunity for relitigation of cases long concluded.

In any event, the recent decisions in *Padilla*, *Frye* and *Cooper*, all pertaining to the right to counsel in the context of a guilty plea, might afford a more fertile opportunity to revisit the decision of the Court of Appeals in *Eastman* than other cases might, although not without presenting certain problems for the Court to resolve. How the Court will choose to proceed, only time will tell. ■

1. 85 N.Y.2d 265, 276 (1995).
2. 489 U.S. 288 (1989).
3. 552 U.S. 264 (2008).
4. 559 U.S. 356 (2010).
5. 132 S. Ct. 1399 (Mar. 21, 2012).
6. 132 S. Ct. 1376 (Mar. 21, 2012).
7. 466 U.S. 668 (1984). In order to establish ineffective assistance of counsel under the federal Sixth Amendment standard, a defendant must satisfy a two-pronged test, demonstrating first that "counsel's representation fell below an objective standard of reasonableness" (*id.* at 688), and second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.
8. 133 S. Ct. 1103 (Feb. 20, 2013).
9. *See People v. Baret*, 99 A.D.3d 408 (1st Dep't 2012) (holding, prior to *Chaidez*, that *Padilla* is retroactively applicable on collateral review), *lv. granted*, 21 N.Y.3d 1002 (2013), and *appeal pending*.
10. 559 U.S. at 372.
11. 8 U.S.C. § 1101 *et seq.*
12. *Padilla*, 559 U.S. at 369.
13. *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd*, 559 U.S. 356 (2010). In *People v. Ford*, 86 N.Y.2d 397 (1995), issued prior to the U.S. Supreme Court's decision in *Padilla*, the N.Y. Court of Appeals took a position similar to that of the Kentucky Court, relying upon cases in which federal circuit courts of appeals had rejected similar claims on the ground that deportation is a collateral consequence of a plea. *Id.* at 405 (citing *United States v. Del Rosario*, 902 F.2d 55, 59 (D.C. Cir.), *cert. denied*, 498 U.S. 942 (1990); *United States v. Campbell*, 778 F.2d 764, 768 (11th Cir.1985); *United States v. Gavilan*, 761 F.2d 226, 228 (5th Cir.1985)). At the time of the Supreme Court's ruling, eleven federal circuit courts of appeals and more than thirty state courts had concluded that the deportation consequences of a plea were a collateral matter which need not be addressed by counsel. *Padilla*, 559 U.S. at 376 (Alito, J., concurring).

14. *Padilla*, 559 U.S. at 365 (quoting *Strickland*, 466 U.S. at 689); *see Chaidez*, 133 S. Ct. at 1110. The distinction between direct and collateral consequences of guilty pleas for purposes of determining violations of constitutional rights was recognized by the Supreme Court in its federal due process jurisprudence. *See Brady v. United States*, 397 U.S. 742, 755 (1970) (guilty plea valid if defendant is fully aware of its direct consequences and plea is not induced by threats, misrepresentation or improper promises (internal citation omitted))). It has been incorporated by the New York Court of Appeals in its interpretation of both due process requirements. *See, e.g.*, *People v. Monk*, 21 N.Y.3d 27, 32 (2013) (due process requires court advisement as to direct, but not collateral, consequences of a plea)) and federal constitutional right to counsel claims (*see Ford*, 86 N.Y.2d at 405, as discussed *supra* note 13).

15. *Padilla*, 559 U.S. at 366–69, 375.

16. *Frye*, 132 S. Ct. at 1408.

17. *Id.* at 1411.

18. *Cooper*, 132 S. Ct. at 1391.

19. *Id*.

20. *People v. Morales*, 37 N.Y.2d 262, 268 (1975) (citations omitted).

21. *Id.* (citations omitted). *See People v. Favor*, 82 N.Y.2d 254, 260–61 (1993), *reargument denied*, 83 N.Y.2d 801 (1994).

22. *Morales*, 37 N.Y.2d at 268 (citations omitted); *see, e.g.*, *Ashe v. Swenson*, 397 U.S. 436 (1970) (double jeopardy); *McConnell v. Rhay*, 393 U.S. 2 (1968) (right to counsel at sentencing); *Roberts v. Russell*, 392 U.S. 293 (1968) (right to confrontation); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel at trial).

23. *Morales*, 37 N.Y.2d at 268 (citations omitted); *see, e.g.*, *Linkletter v. Walker*, 381 U.S. 618 (1965) (search and seizure); *Tehan v. Shott*, 382 U.S. 406 (1966) (adverse comment on accused's failure to testify).

24. *Morales*, 37 N.Y.2d at 268 (citations omitted); *see, e.g.*, *Desist v. United States*, 394 U.S. 244 (1969) (use of illegal electronic eavesdropping).

25. *Linkletter*, 381 U.S. at 629 (quoting *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932) (Cardozo, J.)).

26. *Linkletter*, 381 U.S. at 629.

27. *Id.* at 636.

28. *Desist*, 394 U.S. at 249 (citing *Stovall v. Denno*, 388 U.S. 293, 297 (1967)) ("The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.").

29. 394 U.S. at 256–58 (Harlan, J. dissenting) ("In the four short years since we embraced the notion that our constitutional decisions in criminal cases need not be retroactively applied [in *Linkletter*] . . ., we have created an extraordinary collection of rules to govern the application of that principle. . . . I have in the past joined in some of those opinions which have, in so short a time, generated so many incompatible rules and inconsistent principles . . . [but] can no longer . . . remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle.").

30. *Id.* at 257–58.

31. *Id.* at 258.

32. *Id.* at 261–62.

33. 372 U.S. 391 (1963).

34. *Desist*, 394 U.S. at 261–62 (Harlan, J., dissenting).

35. *Id.* at 262–63.

36. *Id.* at 263.

37. *See id.* 260, 263.

38. 479 U.S. 314, 324–28 (1987) (considering retroactive application of prohibition on use of racially discriminatory use of peremptory challenges in *Batson v. Kentucky*, 476 U.S. 79 (1986)).

39. *Teague v. Lane*, 489 U.S. 288, 301 (1989) (emphasis in original; internal citation omitted).

40. *See Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004) (referring to rules falling under this exception as "more accurately characterized as substantive rules" not subject to the *Teague* general rule barring retroactivity); *see also Bousley v. United States*, 523 U.S. 614, 620–21 (1998) (limiting *Teague* to procedural rules).

41. *Teague*, 489 U.S. at 307, 311 (citation omitted).

42. *Id*. at 307, 311 (internal citations and quotations marks omitted).

43. *Id*. at 315. Examples of the first exception include criminalizing interracial marriages, prohibiting the execution of the mentally retarded (*Colwell v. State*, 118 Nev. 807, 817 (2002), *cert. denied*, 540 U.S. 981 (2003) (citations omitted)) or making criminal the purchase of contraceptives (*Cowell v. Leapley*, 458 N.W.2d 514, 518 (S.D. 1990)). An example of the second exception is assuring the right to counsel. (*Colwell*, 118 Nev. at 817; *Cowell v. Leapley*, 458 N.W.2d at 518).

44. *Schriro*, 542 U.S. at 352 (internal citations and quotation marks omitted).

45. 53 N.Y.2d 213, *cert. denied*, 454 U.S. 967 (1981), 454 U.S. 1162 (1982).

46. *People v. Samuels*, 49 N.Y.2d 218, 221–22 (1980), recognized the attachment of an indelible right to counsel once an accusatory instrument has been filed, precluding its waiver except in the presence of counsel.

47. The *Pepper* court described the test as requiring the balancing of the following factors: (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect of the administration of justice of a retroactive application of the new standards. *Pepper*, 53 N.Y.2d at 220 (citing *Desist v. United States*, 394 U.S. 244, 249 (1969)). The Court also acknowledged its own prior approval of the *Linkletter-Desist* guidelines in *People v. Morales*, 37 N.Y.2d 262, 268–69 (1975) (reviewing historic approaches to retroactivity and although not finding in federal or state cases "a set of definitive principles," given the fact that "'[e]ach constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice'" (quoting *Johnson v. New Jersey*, 384 U.S. 719, 728 (1966))) and concluded that the *Linkletter-Desist* rubric was "useful" to its direct appellate review of a judgment. *Pepper*, 53 N.Y.2d at 220.

48. *Pepper*, 53 N.Y.2d at 220 (citing *Desist*, 394 U.S. at 249). In making this choice, the Court of Appeals again looked to *Morales* (*see supra* note 47), in which the Court had given retroactive effect on direct appeal to a subsequent determination of unconstitutionality of New York's notice of alibi statute, finding that the preclusion of a defendant's untimely alibi evidence "'profoundly and directly' affected the fact-finding process itself." *Morales*, 37 N.Y.2d at 269 (citations omitted) (equating the importance of the Sixth Amendment right to present a defense with its right to counsel).

49. *Pepper*, 53 N.Y.2d at 221.

50. The Court of Appeals has made clear that the right to counsel is among the rights afforded greater protection under the New York State Constitution, stating that the right to counsel is a "'cherished principle' rooted in this State's prerevolutionary constitutional law and developed 'independent of its Federal counterpart' . . . ." *People v. Harris*, 77 N.Y.2d 434, 439 (1991) (quoting *People v. Settles*, 46 N.Y.2d 154, 160–61 (1978)). The Court has declared the state right to counsel "a matter of singular concern in New York," warranting "the highest degree of vigilance in safeguarding the right of an accused to have the assistance of an attorney at every stage of the legal proceedings." *Harris*, 77 N.Y.2d at 439 (quoting *People v. Cunningham*, 49 N.Y.2d 203, 207 (1980)). Indeed, regarding the state right to counsel, the Court has explained: "Our special solicitude for this fundamental right is based upon our belief that the presence of an attorney is the most effective means we have of minimizing the disadvantage at which an accused is placed when he is directly confronted with the awesome law enforcement machinery possessed by the State." *People v. Cunningham*, 49 N.Y.2d 203, 207 (1980) (citations omitted).

51. *Pepper*, 53 N.Y.2d at 221.

52. *See id.* at 220–21 (treating *Samuels*, 49 N.Y.2d 218, as retroactively applicable solely to cases still pending on direct review); *see also Pepper*, 53 N.Y.2d at 223 (Gabrielli, J., concurring) (observing that the rule announced in the case upon which *Samuels* was based, namely, *People v. Hobson*, 39 N.Y.2d 479 (1976), and new developments in other cases based upon *Hobson*, *e.g.*, *People v. Rogers*, 48 N.Y.2d 167 (1979), and *People v. Cunningham*, 49 N.Y.2d 203 (1980), had been applied in a similarly limited retroactive manner).

53. *Pepper*, 53 N.Y.2d at 224 (Gabrielli, J., concurring ("*Samuels* was actually no more than a predictable elaboration of a well-settled and widely understood principle of law")).

54. *Id.* at 221–22.

55. *See, e.g.*, *People v. Rudolph*, 21 N.Y.3d 497 (June 27, 2013), holding under *Pepper* that Court's new interpretation of CPL § 720.20 to require trial courts to consider youthful offender treatment in every case where the defendant is an eligible youth need not be applied retroactively on collateral review;

Policano v. Herbert, 7 N.Y.3d 588, 603–604 (2006), *cert. denied*, 555 U.S. 954 (2008) (weighing the three *Pepper* factors in determining that its newly evolved interpretation culminating in *People v. Feingold*, 7 N.Y.3d 288 (2006), of New York's depraved indifference murder statute (N.Y. Penal Law §125.25(2)) as a *mens rea* standard should not be applied retroactively); *People v. Mitchell*, 80 N.Y.2d 519, 525–28 (1992) (rejecting approach of *Griffith v. Kentucky*, 479 U.S. 314, 324–28 (1987), and concluding that new state decisional law need not be automatically applied to all cases then pending on direct review, and applying *Pepper* to deny retroactive application of *People v. Antommarchi*, 80 N.Y.2d 247, 250, *reargument denied*, 81 N.Y.2d 759 (1992) (interpreting CPL § 260.20 to require defendant's presence at sidebar discussions with prospective jurors relating to their qualifications or possible bias)); *see also*, *People v. Favor*, 82 N.Y.2d 254, 264–67 (1993), *reargument denied*, 83 N.Y.2d 801 (1994) (applying *Pepper* to afford retroactive application on direct appellate review of *People v. Dokes*, 79 N.Y.2d 656 (1992) (generally requiring defendant's presence at a pretrial *Sandoval* hearing), finding *Dokes* not a "new" rule under *Teague* standard, and distinguishing *Mitchell* in applying the reliance and effect prongs of the *Pepper* test).

56. 481 U.S. 186 (1987). In *Cruz*, the Supreme Court held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant . . . the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *Id.* at 193.

57. *People v. Eastman*, 85 N.Y.2d 265, 276 (1995).

58. *Id.* at 274–75.

59. *Id.* at 275 (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)).

60. *Id.* at 274–75.

61. *Id.* at 276.

62. As one state court has commented, "The policy concerns behind *Teague* are partly germane to collateral review by this and other state courts and partly not. We share the concern that the finality of convictions not be unduly disturbed, but the need to prevent excessive interference by federal habeas courts has no application to habeas review by state courts themselves." *Colwell v. State*, 118 Nev. 807, 818 (2002), *cert. denied*, 540 U.S. 981 (2003).

63. *See Colwell*, 118 Nev. at 816 ("[The *Teague* general] requirement [of nonretroactivity of new rules in federal collateral review] replaced an earlier, more open-ended retroactivity analysis which the Court had applied to each new constitutional rule, considering the purpose served by the new rule, the extent of reliance by law-enforcement authorities on the old rule, and the effect on the administration of justice of applying the new rule retroactively.").

64. 53 N.Y.2d 213, 221, *cert. denied*, 454 U.S. 967 (1981), 454 U.S. 1162 (1982).

65. *People v. Favor*, 82 N.Y.2d 254, 265 (1993), *reargument denied*, 83 N.Y.2d 801 (1994) (observing that whether the rule in question is a "new" rule or application of an old rule to new facts, *Pepper* analysis leads to the conclusion that retroactive application of the rule is required).

66. *Danforth v. Minnesota*, 552 U.S. 264, 277 (2008).

67. *Id.* at 278–79.

68. *Id.* at 279–80 (emphasis in original; citation omitted). This same principle had been stated by the Supreme Court decades earlier: "Of course, States are still entirely free to effectuate under their own law stricter standards than those we have laid down and to apply those standards in a broader range of cases than is required by this decision." *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966).

69. *Danforth*, 552 U.S. at 280–81. In so stating, the Court was refuting the reasoning of the Minnesota Supreme Court which had rejected the defendant's argument in *Danforth v. State* (*Danforth I*), that state courts were permitted to apply a broader retroactivity standard than that of *Teague*, and had concluded that "we are required to apply *Teague*'s principles when analyzing the retroactivity of a rule of federal constitutional criminal procedure." *Danforth I*, 718 N.W.2d 451, 455 (Minn. 2006).

70. 549 U.S. 406 (2007).

71. *Id.* at 421.

72. *Id.* at 417–18. The Court cited the following as examples of such cases: "[*Schriro v.*] *Summerlin*, *supra*, [542 U.S. at 352] (rejecting retroactivity for *Ring v. Arizona*, 536 U.S. 584 (2002)); *Beard v. Banks*, 542 U.S. 406 (2004) (rejecting retroactivity for *Mills v. Maryland*, 486 U.S. 367 [1988]); *O'Dell* [*v. Netherland*, 521 U.S. 151, 157 (1997)][rejecting retroactivity for *Simmons v. South Carolina*, 512 U.S. 154 [1994]); *Gilmore v. Taylor*, 508 U.S. 333 (1993) (rejecting retroactivity for a new rule relating to jury instructions on homicide); *Sawyer v. Smith*, 497 U.S. 227 (1990) (rejecting retroactivity for *Caldwell v. Mississippi*, 472 U.S. 320 (1985))." (parallel citations omitted).

73. 568 U.S. –, 133 S. Ct. 1103 (Feb. 20, 2013).

74. *Id.* at 1110 (quoting *Padilla*, 559 U.S. at 365–66).

75. *Id.* (quoting *Teague*, 489 U.S. at 301).

76. *Id.* at 1111 (citation omitted).

77. *See id.* at 1113. The *Chaidez* Court noted that the parties had not raised any issue as to whether either of the *Teague* exceptions was applicable. *See Chaidez*, 133 S. Ct. at 1107 n.3.

78. *See* note 9, *supra*; *accord*, *People v. Rajpaul*, 100 A.D.3d 1183, 1185 (3d Dep't 2012); *People v. Ramos*, 100 A.D.3d 487 (1st Dep't 2012), *lv. denied*, 20 N.Y.3d 1103 (2013) (citing *Baret*); *People v. Oouch*, 97 A.D.3d 904, 905–906 (3d Dep't 2012); *People v. Nunez*, 30 Misc.3d 55, 58–59 (App. Term 9th & 10th Jud. Dist. 2010), *lv. denied*, 17 N.Y.3d 820 (2011); *but see People v. Bent*, 108 A.D.3d 882, 883 (3d Dep't 2013) (declining retroactive application of *Padilla* under *Chaidez*, without reference to *Eastman* or *Danforth); People v. Andrews*, 108 A.D.3d 727, 728–29 (2d Dep't 2013), *application for lv. to appeal pending* (declining to depart from *Chaidez* under *Danforth*), discussed *infra*; *People v. Verdejo*, 109 A.D.3d 138 (1st Dep't June 27, 2013), *application for lv. to appeal pending* (holding that *Eastman* precludes retroactive application of *Padilla*, in light of *Chaidez*).

79. *See Johnson v. State*, 904 So. 2d 400, 414 (Fla. 2005) (Cantero, J. concurring) ("most states have adopted the *Teague* standard").

80. Of course, the Court of Appeals might predict the Supreme Court's ruling incorrectly, where the latter body had yet to rule on the issue. *See People v. Eastman*, 85 N.Y.2d 265, 275–76 (1995) (finding *Cruz v. New York* to apply retroactively, a conclusion never reached by the Supreme Court).

81. *Teague*, 489 U.S. at 309.

82. *See, e.g.*, *People v. Fernandez*, 5 N.Y.3d 813 (2005) (failure to convey plea offer); *People v. Rogers*, 8 A.D.3d 888 (3d Dep't 2004) (same; "Meaningful representation by counsel includes the conveyance of accurate information regarding plea negotiations, including relaying all plea offers made by the prosecution"); *People v. Brunson*, 68 A.D.3d 1551 (3d Dep't 2009), *lv. denied*, 15 N.Y.3d 748 (2010) (misadvice as to exposure at trial); *People v. Mobley*, 59 A.D.3d 741 (2d Dep't), *lv. denied*, 12 N.Y.3d 856 (2009) (same).

83. *People v. Monk*, 21 N.Y.3d 27, 32 (2013) (internal citations and quotation marks omitted).

84. Private plea discussions with one's attorney (*Cooper*), or the lack of them (*Padilla*; *Frye*), could only be reviewed collaterally, on a post-conviction motion. *See People v. Reynolds*, 309 A.D.2d 976 (3d Dep't 2003) ("where the claim of ineffective assistance of counsel is based upon an alleged failure to provide proper advice concerning sentencing exposure . . . [the] claim is typically not demonstrable on the main record, [and] it is properly raised within the context of a CPL [§] 440.10 motion."). *See also People v. Santer*, 30 A.D.3d 1129 (1st Dep't), *lv. denied*, 7 N.Y.3d 928 (2006) (same, as to immigration consequences of plea).

85. In addition, under post-conviction practice in New York, direct appeals and appeals of rulings on CPL § 440.10 motions are often heard jointly in the appellate courts and, on occasion, a CPL § 440.10 motion may precede a direct appeal. In federal *habeas* cases, however, collateral review occurs much later in the life of a case. Under the exhaustion requirement of the federal *habeas corpus* statute (28 U.S.C. § 2254(b)(1)(A)), the constitutional issue must have been raised and decided first in the state court and the appeals process completed before collateral review of the state court judgment can take place.

86. Other violations of important federal constitutional rights which are often raised on post-conviction challenges are frequently reflected in the record of proceedings and subject to review on a direct appeal from the judgment of conviction in New York practice. Examples include discriminatory use of peremptory challenges (*Batson v. Kentucky*, 476 U.S. 79 (1986)); use at trial of evidence obtained through unlawful searches and seizures (*Mapp v. Ohio*, 367 U.S. 643 (1961)); introduction of unwarned statements made in response to police questioning while in custody (*Miranda v. Arizona*, 384 U.S. 436 (1966)); admission of a witness' testimonial statement without the opportunity for cross-examination (*Crawford v. Washington*, 541 U.S. 36 (2004)); the right to have counsel at trial (*Gideon v. Wainwright*, 372 U.S. 335 (1963)); and the right to a jury trial on facts which increase the maximum penalty (*Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

87. *See* discussion at note 50, *supra*.

88. *See People v. Rajpaul*, 100 A.D.3d 1183, 1185 (3d Dep't 2012); *People v. Ramos*, 100 A.D.3d 487, 487 (1st Dep't 2012), *lv. denied*, 20 N.Y.3d 1103 (2013); *People v. Baret*, 99 A.D.3d 408, 408 (1st Dep't 2012; *People v. Nunez*, 30 Misc.3d 55, 58–59 (App. Term 9th & 10th Jud. Dist. 2010), *lv. denied*, 17 N.Y.3d 820 (2011).

89. Authors' anecdotal evidence, 2010 to date, in some cases prosecuted by the Office of the New York County District Attorney (DANY) and the Office of the Special Narcotics Prosecutor of the City of New York (OSNP). (Telephone conversations with members of DANY and OSNP legal staff, Sept. 9, 2013, confirming DANY and OSNP policies in this regard.)

90. Specifically, the *Colwell* Court found that a rule is new "when the decision announcing it overrules precedent . . . or disapprove[s] a practice this Court had arguably sanctioned in prior cases, or overturn[s] a longstanding practice that lower courts had uniformly approved." *Colwell v. State*, 118 Nev. 807, 819–20 (2002).

91. *Id.* at 821.

92. *Id.*

93. 2013 WL 3214599 (Fla. June 27, 2013).

94. *Id.* at *6, *8. A similar approach has been adopted by the Michigan Supreme Court in *People v. Maxson*, 482 Mich. 385 (2008), in which the Michigan Court applied *Teague* in full (*id.* at 387–92, 759 N.W.2d at 819–21), but also separately evaluated the rule in question under its own state law version of the tripartite test (*id.*, 482 Mich. at 392–98). Likewise, the Alaska Supreme Court in *State v. Smart*, 202 P.3d 1130 (Alaska 2009), applied the *Teague* "new rule" test (*id.* at 1139–40), followed by the tripartite test (*id.* at 1140–47). *Smart* is consistent with *Linkletter* in placing heaviest reliance on the purpose prong of the tripartite test (*see id.* at 1140–45), but it also employs concepts derived from the *Teague* "watershed rule" exception to determine the "purpose" of the new rule under *Linkletter*'s first prong (*see id.* at 1144–45).

95. 149 Idaho 130 (Idaho 2010).

96. *Id.* at 138. The court noted that it had earlier abandoned *Linkletter*. *Id.* at 137.

97. *Id.* at 139.

98. Specifically, the Idaho court stated that it would exercise its own independent judgment based upon "the concerns of this Court and the uniqueness of our state, our Constitution, and our long-standing jurisprudence." *Id.* (internal quotation marks and citation omitted). Similarly, in *Danforth v. State*, 761 N.W.2d 493 (Minn. 2009), which was decided on remand from *Danforth v. Minnesota*, 552 U.S. 264 (2008), the Minnesota Supreme Court stated that it would depart from following *Teague* to the extent that it would independently examine each case in which the retroactivity of a new constitutional rule was at issue. The Minnesota Court added that it would apply its own standards of fundamental fairness, rather than those of the United States Supreme Court, in determining whether a new rule was retroactive under the *Teague* "watershed" or "bedrock" exception. *Id.* at 500. The Court's most recent decision on this issue in *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013), appears to take a lockstep approach, however, applying *Teague* and its *sequellae* without any departure.

99. *See* note 98, *supra*.

100. 458 N.W.2d 514 (S.D. 1990).

101. *Id.* at 518. More recently, in *State v. Garcia*, 834 N.W.2d 821 (S.D. 2013), the South Dakota Supreme Court applied the *Linkletter* tripartite test it had relied upon in *Cowell* in determining that *Padilla* was not retroactively applicable to cases decided prior to *Padilla*. *Id.* at 824–26. Missouri has taken a similar approach to that taken in *Cowell*. *See State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 650–51 (Mo. 2011), *cert. denied*, 132 S. Ct. 1097, *reh'g denied*, 132 S. Ct. 1785 (2012) (declining to adopt *Teague* in favor of tripartite *Linkletter* test, which offers "greater retroactive application of new constitutional rules over procedural matters" and "comports better with Missouri's legal tradition").

102. *See People v. Mitchell*, 80 N.Y.2d 519, 528 (1992) (rejecting application of *Griffith v. Kentucky*, 479 U.S. 314 (1987), to a state statute and choosing to apply *Pepper* for reasons set forth in then-recent Court of Appeals decisions); *see also Favor*, 82 N.Y.2d at 262 (referring to "our decisions [that] give greater protection[] than appears to be constitutionally required [under Federal due-process rules])," quoting *People v. Morales*, 80 N.Y.2d 450, 456 (1992).

103. *See Mitchell*, 80 N.Y.2d at 528 ("adher[ing] to firmly established State rules . . . permits this Court to expand the protection accorded defendants when we might otherwise hesitate to do so because retroactive application threatens to "'wreak more havoc in society than society's interest in stability will tolerate'" (internal citations omitted)).

104. *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 301–302 (1986), *cert. denied*, 479 U.S. 1091 (1987) (citations omitted). The Court of Appeals has applied broader protections than those under the federal constitution in the areas of due process, freedom of expression, freedom of association, protection against unlawful searches and seizures, and as to the right to counsel. *Id.* at 303 (citing cases). Doing so may involve either an interpretive analysis, which includes a comparison of the language of the federal and state constitutional provisions in question, or a noninterpretive analysis, examining the right in question in terms of state statutory and common law definitions of the right, the history and traditions of the state and the attitudes of its citizenry on the subject. *Id.* at 303. With respect to right to counsel cases, the Court could employ either method, given the dissimilarity of the language of the federal and state constitutions. On the other hand, with respect to *Padilla* claims, the fact that the new federal right is contrary to New York's longstanding view would suggest that the Court of Appeals would not find a more expansive state constitutional right applicable to such claims.

105. *See, e.g., id.* at 303 ("In the past we have frequently applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties" (listing cases)); *People v. Johnson*, 66 N.Y.2d 398, 407 (1985) ("[In this case,] we believe that the aims of predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens are best promoted by applying State constitutional standards"); *People v. Bigelow*, 66 N.Y.2d 417, 427 (1985).

106. *People v. Harris*, 77 N.Y.2d 434, 439 (1991) (citations omitted); *see People v. Jones*, 2 N.Y.3d 235, 246 (2004); *People v. Bing*, 76 N.Y.2d 331, 339, *reargument denied*, 76 N.Y.2d 890 (1990); *id.* at 351 (Kaye, J., concurring and dissenting); *People v. Davis*, 75 N.Y.2d 517, 521 (1990); *People v. Cunningham*, 49 N.Y.2d 203 (1980). Rather than pursuing exceptionalism for its own sake, however, the Court has explained that it has based its rules, at least in one area of this realm, the indelible right to counsel, "on notions of common sense and fairness . . . ." *Bing*, 76 N.Y.2d at 339.

107. The Appellate Division appears to have recognized, *sub silencio*, an identical right to that announced in *Padilla* under the New York State Constitution to receive accurate advice from counsel at the time of one's guilty plea as to the deportation consequences of the conviction. *See People v. Andrews*, 108 A.D.3d 727, 728–29 (2d Dep't 2013).

108. *Id.*

109. *Jones*, 2 N.Y.3d at 240.

110. *People v. Ramos*, 99 N.Y.2d 27, 32 (2002) (citations omitted).

111. *See Bing*, 76 N.Y.2d at 352 (Kaye, J., concurring and dissenting).

112. *Id.* at 339 (majority opinion quoting *People v. Hobson*, 39 N.Y.2d 479, 484 (1976) ("[The Court] . . . by requiring the presence of counsel, [has breathed] life into the requirement that a waiver of a constitutional right must be competent, intelligent and voluntary").

113. *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

114. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (internal quotation marks omitted)).

115. Expanding the purpose factor in these ways for guilty plea / right-to-counsel cases would also seem to be consistent with *Pepper*'s characterization of right to counsel rules as being necessary to guarantee a fair resolution of the case, in contrast to matters which were more removed from the core mission of the judicial system, such as the need to deter unlawful police conduct underlying the exclusionary rule. *See People v. Pepper*, 53 N.Y.2d 213, 221 (1981).

116. *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972).

117. Although both the DANY and the OSNP have continued their discretionary repleader policies on selected *Padilla* claims after *Chaidez*, *Verdejo*, *Andrews* and *Bent* (*see* note 78, *supra*), should the Court of Appeals eliminate retroactive application of *Padilla* on collateral review, the incentive for those and other prosecutors to continue to engage in negotiations of repleaders to non-mandatory removal outcomes in *Padilla* cases would be substantially eroded.

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An Appellate Mechanism in Arbitration

By Hon. David B. Saxe

Should there be an appellate mechanism in arbitration? Some have proposed the development and use of an appeals mechanism within the context of the arbitration process itself. I believe the idea has significant merit.

This is not a wholly novel idea – at least two well-known arbitration providers offer such an option,[1] as do other, more specialized arbitration providers.[2] Further, the potential value of an appeal mechanism within the arbitration process has been discussed for years by scholars and commentators.[3] As far back as 1991, a federal judge suggested that parties should be able to contract for an appellate arbitration panel to review their arbitrator's award, because they could not contractually expand the limited standard of review statutorily imposed on the federal judiciary.[4]

Yet, to my knowledge, the option of having an appellate review process within arbitration has not been widely discussed among arbitration providers generally. Indeed, many lawyers weighing the relative merits of arbitration versus litigation are unaware of the possibility of arbitral appeal, and how it could be beneficial to their clients.

The benefits of using arbitration rather than litigation to resolve some types of disputes is well established. Arbitration is capable of achieving a final resolution far more quickly, efficiently and cheaply, although commentators have observed that, in some contexts, its procedures have come to mirror those of complex litigation, including engaging in discovery.[5] But, in general, and even in those cases that more closely mirror litigation, there is less delay in the arbitral tribunal. The process of presenting evidence is less formal, the parties can agree in advance to simplify the procedures, and, more important, the litigants do not have to wait their turn in a severely backlogged court. Other advantages are that, as a rule, the fact-finders have appropriate experience and knowledge of the field, and the proceeding itself, and its result, can be kept private.[6]

One of the most often cited advantages to arbitration is finality. Since, in this state, as well as in the federal courts and most other states, an arbitration award may be vacated only on very limited grounds, such as a showing of corruption, fraud, misconduct, or the partiality of the arbitrator,[7] arbitration generally achieves finality far more efficiently than does litigation.

However, there is another side to that coin. An arbitration award is more quickly and cheaply obtained than a court judgment, but if the arbitrator's determination is simply wrong, on the facts or the law, it often cannot be changed or vacated. As one commentator observed, "[a] swift and final resolution is only an advantage if either arbitrators make no mistakes, or the stakes are small enough that mistakes are acceptable in the interest

of continued business relations."[8] An arbitration award *must* be confirmed by a court unless a limited ground to vacate or modify the award can be made out; an error of law or fact will not suffice.[9] This is one of the limitations of arbitration.

Nor will parties to an arbitration provision controlled by either federal or New York law be able to contractually authorize the reviewing court to vacate or modify based on errors of fact or law. The U.S. Supreme Court has held that, for arbitrations under the Federal Arbitration Act (FAA), the parties cannot authorize court review of an arbitration award beyond the level of review authorized by the Act.[10] While the Court observed that review of arbitrations under other state statutes or common law need not be so limited,[11] in New York CPLR Article 75's provisions for the court's authority to review an award is as strictly limited as those of the FAA. If the parties to an arbitration agreement controlled by New York law want the award to be reviewable for errors of fact or law, such review is best assured by providing for review within the arbitration tribunal.

Review of an award within the arbitration tribunal will not necessarily eliminate the need for, or right to, judicial review of the final arbitration award. While there may be arbitration agreements in which it is possible to provide that an arbitral appeal will be the only review mechanism – that is, to provide for a "total waiver of judicial recourse"[12] – there will be other types of arbitration determinations for which a court's confirmation of the award will be necessary for enforcement purposes.[13] In those cases, the use of the arbitration provider for an appeal mechanism will admittedly add a layer to the whole process, the additional time and expense of which could militate against arranging for an appeals process within the arbitration.

In either type of case, however, in many situations it may be worthwhile for both parties, when agreeing to arbitration, to consider the possibility that the determination by the arbitrator could be seriously flawed. By agreeing at the outset to the use of an internal appeal within the arbitration forum, in which errors of law or fact could be corrected, the parties can help avoid an irrational result. Participants in arbitration can help assure that the arbitral appeal process will not become unwieldy or excessively expensive by agreeing on simplified procedures such as paper submissions only or the preclusion of new evidence in the appellate process.[14]

The often-touted benefit of "finality" in arbitration awards is useless where that final award is wrong. The abbreviated process by which arbitration awards are reviewed in court does not provide a mechanism to protect against fundamental substantive errors in arbitration awards. The inclusion in the arbitration process of an appeal mechanism can serve the valuable purpose of preventing an irrational arbitration award.

The often-touted benefit of "finality" in arbitration awards is useless where that final award is wrong.

Indeed, the use of an arbitral appeal may, in some cases, render a judicial review of the award unnecessary, or at least minimize the existence of grounds for any such proceeding. While I recognize that not every arbitrable dispute warrants providing for an internal appeal mechanism, it could be a highly valuable prospect in many situations and should be more widely available. ■

1. An optional arbitration appeal procedure has been made available by JAMS since at least 2003 (see http://www.jamsadr.com/rules-optional-appeal-procedure), and the International Institute for Conflict Prevention & Resolution (CPR) also provides its own arbitration appeal procedure (see http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/604/CPR-Arbitration-Appeal-Procedure-and-Commentary.aspx). NAM (National Arbitration and Mediation), another well-known ADR provider, does not offer an appeal option as part of its standardized arbitration process, although according to a 9/25/13 telephone interview with its President and CEO, Roy Israel, if the parties agree to its inclusion, they will accommodate the parties.

2. For a discussion of appeals in the context of international commodity arbitration, see William H. Knull III and Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 Am. Rev. Int'l Arb. 531, 557–58 (2000).

3. *See* Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, AAA Handbook on Commercial Arbitration, ch. 41 (2010), www.marrowlaw.com/articles/pdf/44-ch41-Marrow.pdf. *See also* Knull & Rubins, *supra*, note 2.

4. *Chicago Typographical Union No. 16 v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991). While there was then a split among the circuits about the issue, the U.S. Supreme Court has since ruled that parties to a contract could not authorize court review of an arbitration award beyond the level of review authorized by the Federal Arbitration Act (*see Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)).

5. *See* Curtis E. Von Kann, *Not So Quick, Not So Cheap; But a New Hybrid Form of Commercial Arbitration Has Value, Too*, N.Y.L.J., Sept. 20, 2004.

6. *See* Paul D. Friedland, *Arbitration or Litigation?*, N.Y.L.J., Nov. 20, 1995.

7. CPLR 7511; *see also* Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16.

8. Knull & Rubins, *supra*, note 2, at 541.

9. *Port Washington Union Free Sch. Dist. v. Port Washington Teachers Ass'n*, 45 N.Y.2d 411, 422 (1978).

10. *See Hall Street Assocs., LLC*, 552 U.S. 576.

11. *Id.* at 590. *See also* Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 Cardozo J. Conflict Resol. 509 (Spring 2009).

12. Knull & Rubins, *supra* note 2, at 554.

13. For example, when debt collection matters are brought in arbitration, the creditor may have to get the award confirmed in court to be able to make use of certain enforcement remedies. *See* Christopher R. Drahozal, *Why Arbitrate? Substantive Versus Procedural Theories of Private Judging*, 22 Am. Rev. Int'l Arb. 163, 179 (2011).

14. Marrow, *supra* note 3, at 489.

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Hao Yu
Song Yue
Carolina Gallart Zacrac
Kai Zhang
Xiaolu Zhang
Ling Zhu

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I have always been curious if there are any specific ethical considerations that one needs to comply with when conducting or defending depositions. I know that court rules exist in New York which specify how an attorney is supposed to conduct or defend a deposition, but I have found that a number of my adversaries do not follow these rules. In addition, I have noticed various examples of bad behavior by attorneys in the context of depositions. What rules do I need to be aware of and what behaviors should I avoid the next time I am either conducting or defending a deposition?

Sincerely,

Conscious Counsel

Dear Conscious Counsel:

There are two types of attorneys one will find in a deposition; the ones who know the rules and the ones who do not. Unfortunately, it is the ones who do not know the rules that often become fodder for judges intent on putting the bar on notice that obstructionist and uncivil conduct will not be tolerated in the deposition forum.

Part 221 of the Uniform Rules for the New York State Trial Courts sets forth the Uniform Rules for the Conduct of Depositions (Part 221). The Advisory Committee on Civil Practice's purpose behind the enactment of Part 221 was to "ensure that depositions [were] conducted as swiftly and efficiently as possible and in an atmosphere of civility and professional decorum." *See* 2006 Report of the Advisory Comm. on Civil Practice, p. 50, *available at* http://www.nycourts.gov/ip/judiciaryslegislative/CivilPractice_06.pdf.

Part 221 states as follows:

§ 221.1 Objections at Depositions

(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

(b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

§ 221.2 Refusal to answer when objection is made

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

§ 221.3 Communication with the deponent

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

Many experienced counsel often bring a copy of Part 221 to depositions so that it is readily available should the need arise. Although the tactic of having the rule with you at a deposition is not a novel idea (*see* Patrick M. Connors and Thomas F. Gleason, *New York Practice; Uniform Rules for Conduct of Depositions*, N.Y.L.J., Sept. 18, 2006, at 3), Part 221 is just seven years old. Therefore, it is important to continually spread the word that attorneys must abide by this important regulation, which was intended to promote good behavior and curtail conduct that left unchecked interferes with depositions.

New York judges have never been shy to call out attorneys for behaving badly in depositions. One court even went so far as to give a brief yet pointed analysis of how poor attorney behavior reflects badly on the entire legal profession:

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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> In this court's view, this sort of gratuitous, sardonic and wholly inappropriate comment at a deposition is precisely the type of conduct that served to enhance the deterioration of professionalism and civility in civil litigation that has unfortunately become a hallmark of contemporary trial practice.

See Adams v. Rizzo, 13 Misc. 3d 1235(A), 831 N.Y.S.2d 351 (Sup. Ct., Onodaga Co. 2006), n.26.

Some notable decisions from the 1990s still to this day serve as cautionary tales for attorneys conducting and defending depositions. In *Principe v. Assay Partners*, 154 Misc. 2d 702 (Sup. Ct., N.Y. Co. 1992), a male attorney defending a deposition was sanctioned for calling the opposing female attorney conducting a deposition such choice words as "little lady," "young girl," and "little girl." *Id.* at 704. In *In re Schiff*, 190 A.D.2d 293 (1st Dep't 1993), the First Department held that public censure of an attorney was appropriate where the attorney engaged in conduct directed at a female opposing counsel during a deposition that was "unduly intimidating and abusive toward the defendant's counsel, [where] he directed vulgar, obscene and sexist epithets toward her anatomy and gender." *Id.* at 294. Another example is *Corsini v. U-Haul Int'l*, 212 A.D.2d 288 (1st Dep't 1995), where the First Department dismissed a case because of bad behavior displayed by the plaintiff (who also happened to be an attorney), examples of which included calling opposing counsel during a deposition "scummy," "slimy" and a "scared little man" practicing "in the sewer." *Id.* at 289. More recently, the court in *Cioffi v. Habberstad*, 22 Misc. 3d 839 (Sup. Ct., Nassau Co. 2008), relying on Part 221, chose to sanction counsel on both sides of the action to varying degrees as a result of their "unprofessional, condescending, rude, insulting and obstructive" conduct in depositions. *Id.* at 845.

Outside of New York, two cases highlighting poor behavior by attorneys during depositions stand out. In *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 51–56 (Del. 1994), a nationally known attorney was found to have conducted himself during a deposition in an "extraordinarily rude, uncivil, and vulgar" manner where such conduct "demonstrate[d] such an astonishing lack of professionalism and civility that it [was] worthy of special note . . . as a lesson for the future – a lesson of conduct not to be tolerated or repeated." While some of the words used by the offending attorney are not suitable for print in this *Journal* we can offer one: it probably would not be a good idea to repeat his suggestion that opposing counsel "could gag a maggot off a meat wagon." In another case, an attorney became well-known in the blogosphere when he was found to have engaged in "deplorable behavior" by scheduling depositions at the local Dunkin' Donuts, conducting those depositions dressed in a t-shirt and shorts, and playing video games and making inappropriate drawings of opposing counsel during deposition testimony. *See Bedoya v. Aventura Limousine & Transportation Service, Inc.*, 861 F. Supp. 2d 1346, 1370 (S.D. Fla. 2012).

The New York Rules of Professional Conduct (the RPC) do not expressly state how lawyers should behave at a deposition. However, certain provisions of both the RPC and the American Bar Association's Model Rules of Professional Conduct (the Model Rules) offer guidance as to the ethical considerations that come into play when conducting or defending depositions. For example, it has been suggested that a lawyer defending a deposition who "interpose[s] the statement 'if you know' before the [witness] answers a question, thereby signaling that the witness should deny any knowledge or recollection" may violate Rule 3.5 of the Model Rules, "which prohibits conduct that disrupts a proceeding." *See* Arthur D. Berger, *When the Other Lawyer Is a Bully; Choosing the Professional High Road Goes Beyond Manners. It's Also the Ethical Thing to Do*, N.Y.L.J., Dec. 12, 2005 (LEXIS, NY Library, NYLAWJ File).

Rule 8.4(g) of the RPC, which prohibits unlawful discrimination "in the practice of law, including . . . in determining conditions of employment," is also relevant here. As noted by Professor Roy Simon, "some courts have construed the rule also to prohibit racist and sexist comments in the practice of law during trials or depositions." *See* Simon's New York Rules of Professional Conduct Annotated at 1607 (2013 ed.). Professor Simon noted that in *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, 18 Misc. 3d 1130(A) (Sup. Ct., N.Y. Co. Dec. 5, 2007), plaintiff's counsel's conduct during a deposition, which included, amongst other things, referring to a female opposing counsel as "hon" or "girl" and questioning her marital status constituted "contumacious, abusive, and strident conduct" in violation of former Disciplinary Rule 1-102(A)(6) (the precursor to the current Rule 8.4(g) of the RPC), resulted in the court ordering a referee to supervise further depositions in the case. *Id.* at *3. The *Laddcap* decision also relied on Part 221 to support its finding that court-supervised discovery was necessary because of the behavior of the offending attorney in the case. *Id.* at *10–*12.

We also suggest that lawyers take a careful look at the Standards of Civility (the Standards) (*see* 22 N.Y.C.R.R. § 1200, App. A) which contain several provisions about proper deposition behavior. Part VII of the Standards states that "[i]n depositions . . . lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect." Part VII of the Standards offers a series of guidelines which are meant to encourage lawyers to act appropriately in depositions. These include:

> A. Lawyers should not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
>
> B. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, at depositions and at conferences, and, to the best of their ability, prevent clients and witnesses from causing disorder or disruption.

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C. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary.

D. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should refrain from asking repetitive or argumentative questions and from making self-serving statements.

See Standards Part VII.

It is our view that taking the "high road" when confronted with an opposing counsel who acts inappropriately (and *not* engaging in behavior similar to that of the attorneys mentioned here) is always the best course of action. We believe that if more attorneys are knowledgeable of the rules and procedures governing deposition conduct, then disputes will be resolved more efficiently. Unfortunately, bad behavior by attorneys is a constant problem not only for the courts, but for the bar as well. In the end, such conduct only serves to hurt the profession as a whole.

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 am a first-year associate in a large international law firm. Over the first few months of my employment, I have received extensive training concerning the available technological resources (including email, discovery software and document systems) which I will be using in my day-to-day practice. The partners have explained to the first-year associates time and time again that we are ethically obligated to understand how technologies are utilized in connection with a given representation and that we should be intimately familiar in the usage of those technologies.

My uncle, Lou Ludite, has been a solo practitioner for almost his entire legal career spanning nearly 40 years. For the most part, his only office staff has consisted of one secretary and one paralegal. He's never hired an associate (in his words, associates were "utterly useless"). During family holiday gatherings while I was in law school, I would share with him everything I was learning about electronic research tools and applications which I would need to master once I began practicing law. He would always tell me, "Ned, all this technology is hogwash. Real lawyers do not need email, and this whole thing with these hand held devices, they look like something that Kirk, Spock and McCoy were playing with on *Star Trek*. It's all unnecessary."

Last week, Uncle Lou told me that Ted Techno, an attorney from a firm with whom he was working on a case, was repeatedly using emails and text messages to set up conferences to discuss strategy for an upcoming trial set to occur in three weeks. Uncle Lou boasted that he informed Ted that he doesn't read or write emails and his "policy" was to have his secretary look at his emails "no more than twice a week" and for her alone to "occasionally" reply to emails intended for Lou. Uncle Lou also told me that he had decided to take a vacation in Bali and didn't plan on returning stateside until the evening before the trial. He also said he told Ted Techno that he will be "completely unreachable" while he is away and "not even his secretary would be able to get a hold of him for any reason."

I have been taught that good communication and responsiveness are essential practice skills for all lawyers and that one cannot practice law without using email. I very fond of my Uncle Lou and think that I should speak with him. I know that I am a novice in our profession especially when compared to my uncle, which is why I would appreciate some guidance from The Forum about whether he is behaving in a professional and ethical manner.

Sincerely,
Concerned Nephew

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the note of issue. Therefore, "[l]itigants are often placed in the uncomfortable position of having to file a note of issue and certificate of readiness before all necessary disclosure has been completed."[20] Know the rules of the court you're practicing before.

Courts also differ on whether a party may seek a disclosure penalty, aside from the disclosure itself, after the note of issue (or notice of trial) is filed.[21]

Compelling Disclosure During Trial

You'll need a court order if you're seeking disclosure during trial. Most courts won't delay a trial to permit you to obtain disclosure. If you can demonstrate to the court "unusual and unanticipated circumstances that developed after the matter was placed on the trial calendar," you might convince the court to grant your motion for disclosure.[22] You might also convince the court to allow you to depose a witness if you've located the witness only after the trial has begun, if the witness is situated beyond the court's subpoena power, and if you've been diligent in attempting to locate the witness before the trial.[23]

Compelling Post-Trial Disclosure

You'll need a court order if you're seeking disclosure after trial. The only exception is if you're seeking disclosure under CPLR 5223. Under CPLR 5223, a judgment creditor may obtain disclosure about the debtor's assets any time, without a court order, before a judgment is satisfied or vacated. The judgment creditor may serve a subpoena to obtain the disclosable information. The information the judgment creditor seeks in the subpoena must be "relevant to the satisfaction of the judgment."[24]

Motion to Compel Disclosure: Practical Pointers for Motion Practice

Include as an exhibit to your motion to compel disclosure your underlying request for disclosure.[25] Prove that you served the underlying disclosure request on your adversary.[26] Or, provide a copy of the court's disclosure order.[27] Explain in your papers that the disclosure you're seeking is material and necessary.[28] Give the court evidence that your adversary has refused to provide, in whole or in part, the disclosure.[29] Be specific about what disclosure your adversary hasn't turned over. Explain in your attorney affirmation your good-faith efforts to resolve the disclosure dispute. Explain to the court that your adversary hasn't offered a valid basis for objecting and refusing to provide the disclosure.[30] Explain to the court that your adversary's conduct is willful or contumacious; or, explain that your adversary's conduct — refusing to comply with disclosure — "may be inferred to be" willful or contumacious.[31]

Tell the court how you'll be prejudiced if your adversary isn't compelled to turn over disclosure.[32] Explain to the court in detail the relief you're seeking: a disclosure response, a penalty for your adversary's failure to respond, or both.[33] Depending on whether the note of issue (or notice of trial) is filed, you might want to ask the court to extend your time to file the note of issue (or notice of trial) or to permit disclosure while the case is on the court's trial calendar.[34] Explain to the court why the disclosure you're seeking, the penalty you're seeking the court to impose, or both are appropriate.[35]

In opposing a motion to compel, you might explain to the court that you've already disclosed all the material your adversary sought. Attach as an exhibit the disclosure you've given to your adversary. If you haven't yet turned over the disclosure materials to your adversary, you might want to provide the disclosure with the motion. Likewise, attach the disclosure materials as an exhibit. Tell the court in your opposition that you have, if any exists, a "privilege or a reasonable basis for asserting that the disclosure sought is palpably improper."[36] Establish that your failure to disclose wasn't willful or contumacious.[37] Explain how your adversary hasn't been prejudiced by not receiving the improper disclosure or by "virtue of its having been furnished [with disclosure] late."[38]

Moving for Sanctions and Penalties for Nondisclosure

If you seek to penalize your adversary for not complying with your disclosure demands, move for sanctions under CPLR 3126, "the enforcement arm of the [CPLR's] disclosure article."[39] The sanctions available to the court aren't necessarily money sanctions, but the court may, among other things, penalize the disobedient party monetarily.

> Moving for sanctions too fast after your adversary's nondisclosure is hardball litigation.

You have no time restrictions when moving for sanctions for nondisclosure.[40] Moving for sanctions too fast after your adversary's nondisclosure might appear to the court as "hardball litigation."[41] Moving too late might make your motion academic.

Some practitioners move to compel under CPLR 3124 before moving for sanctions under CPLR 3126. Other practitioners move, in the same motion, to compel under CPLR 3124 and for sanctions under CPLR 3126.[42] One expert has opined that you don't need to move under CPLR 3124 before moving under CPLR 3126 for sanctions: "CPLR 3124 . . . is not a condition precedent to the invocation of CPLR 3126."[43] But at least one court has determined that you must move to compel before moving for sanctions.[44]

CPLR 3126 sanctions apply when "any party . . . [has] refuse[d] to obey an order for disclosure or willfully fails to disclose information." The word "party" refers to "anyone controlled by a party at the time disclosure is

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sought."[45] You can be penalized if a person in your control won't comply with disclosure. If you're seeking to compel a non-party to disclose information, use a subpoena to obtain the information.[46] If the non-party fails to disclose information pursuant to the subpoena, your remedy is to move for contempt of court.[47] The *Legal Writer* will discuss subpoenas in an upcoming issue.

CPLR 3126 applies when you've disobeyed a disclosure order or when you've "willfully" disobeyed your adversary's notice seeking some type of disclosure. CPLR 3126 also applies when you've failed to honor your CPLR 3101(h) obligation. Under CPLR 3101(h), you're required to supplement your earlier disclosure responses even though your adversary or a court hasn't required you to supplement them: "The requirement to supplement is automatic."[48]

Many judges, averse to CPLR 3126 sanctions, favor fashioning conditional disclosure orders.

Three penalties exist under CPLR 3126.

The first penalty under CPLR 3126 is a "resolving" order[49]: "[A]n order that the issues . . . [are] deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order."[50] It's also "commonly referred to as issue resolution, and has the effect of resolving facts in accordance with the claims of the party seeking relief."[51]

The second penalty under CPLR 3126 is a "preclusion" order: "an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses."[52] The court may preclude the non-complying party on a limited issue if the disclosure the demanding party sought pertained to that limited issue.[53] If the court precludes the defendant from presenting evidence at trial on a designated claim or defense, the preclusion order doesn't "relieve the plaintiff of the burden of proving its case."[54] A preclusion order is unlike the court's striking a defendant's answer: Striking a defendant's answer "effectively resolves a claim against the nondisclosing defendant."[55]

The third penalty under CPLR 3126 is to strike a party's pleading in its entirety or in part, staying further proceedings by that party until the order is obeyed, dismissing the action or any part of it, or granting a default judgment against the disobedient party.[56] What the court does "is left to the sound discretion of the court."[57] A court may strike a portion of the non-complying party's pleading if the demanding party's disclosure request pertained to that specific issue.[58] A court may also grant a judgment to the offender's adversary or dismiss the complaint if the misconduct is willful, deliberate, contumacious, or in bad faith.[59] The ultimate sanction is dismissal, an extreme penalty justified only in rare cases.

If the disobedient party is the plaintiff, courts have "little patience with recalcitrance in disclosure proceedings."[60] If the disobedient party is the defendant and the conduct rises to the level that it "warrant[s] the ultimate penalty . . . . [t]he court merely holds liability established and, if the case is one for money, sets the case down for an assessment of the plaintiff's damages."[61]

The court need not rely on the three remedies outlined in CPLR 3126. Under CPLR 3126, the court may create an order that's "just." Many judges are averse to the sanctions available under CPLR 3126 and favor fashioning their own orders — conditional disclosure orders.

In the next issue of the *Journal*, the *Legal Writer* will continue with sanctions motions under CPLR 3126, spoliation motions, and disclosure motions in special proceedings. ■

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1. Practitioners often use the terms "disclosure" and "discovery" interchangeably. In New York courts, the proper term is "disclosure." In federal court, the proper term is "discovery." Because this column is for New York State practitioners, the *Legal Writer* uses "disclosure."

2. All disclosure motions must contain an attorney affirmation explaining the movant's good-faith efforts to resolve the disclosure dispute with an adversary. The *Legal Writer* discussed good-faith affirmations in Part XXVII of this series. *See Drafting New York Civil-Litigation Documents: Part XXVII — Disclosure Motions*, 85 N.Y. St. B.J. 64 (Oct. 2013).

3. David Paul Horowitz, New York Civil Disclosure § 23.05, at 23-8 (2012).

4. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 31:72, at 31-12 (2006; Dec. 2009 Supp.).

5. *Id.* § 31:70, at 31-11.

6. CPLR 3042.

7. CPLR 3122(a), 3133(a).

8. The *Legal Writer* discussed protective orders in Part XXVII of this series. *See supra* note 2.

9. CPLR 3106(c).

10. CPLR 3130(1), (2).

11. CPLR 3124, 3042(c).

12. Horowitz, *supra* note 3, § 25.01, at 25-2.

13. *Id.* § 23.10, at 23-15 (citing 22 N.Y.C.R.R. 202.21(d)).

14. *Id.* § 25.02, at 25-5.

15. *Id.*

16. *Id.* § 25.07, at 25-10.

17. *Id.* § 25.07, at 25-11.

18. *Id.* § 23.10, at 23-15; 22 N.Y.C.R.R. § 202.21(e).

19. Horowitz, *supra* note 3, § 23.10, at 23-15.

20. *Id.* § 25.08, at 25-12 (noting the deadlines imposed in New York Supreme Court as part of the Differentiated Case Management system).

21. *Id.* § 23.10, at 23-15 (citing *Magee v. City of N.Y.*, 242 A.D.2d 239, 240, 662 N.Y.S.2d 18, 18 (1st Dep't 1997) ("Plaintiff's motion for disclosure

sanctions, which was made after he filed a note of issue but was based upon notices and orders that predated the note of issue, was not precluded by 22 N.Y.C.R.R. 202.21 (d), since the relief sought was not in the nature of disclosure."); *contra Siragusa v. Teal's Express, Inc.*, 96 A.D.2d 749, 750, 465 N.Y.S.2d 321, 323 (4th Dep't 1983)).

22. Barr et al., *supra* note 4, § 31:81, at 31-12 (citing *Gill v. United Parcel Serv., Inc.*, 249 A.D.2d 265, 266, 670 N.Y.S.2d 890, 891 (2d Dep't 1998); *Aramatys v. Edwards*, 229 A.D.2d 906, 907, 646 N.Y.S.2d 65, 66 (4th Dep't 1996); *Cole v. Rappazzo Elec. Co., Inc.*, 267 A.D.2d 550, 552, 699 N.Y.S.2d 197, 199 (3d Dep't 1999); *Audiovox Corp. v. Benyamini*, 265 A.D.2d 135, 139, 707 N.Y.S.2d 137, 138 (2d Dep't 2000)).

23. *Id.* § 31:81, at 31-13 (citing Jud. L. § 2-b; CPLR 3117(a)(3)(ii)).

24. CPLR 5223.

25. Horowitz, *supra* note 3, § 23.02, at 23-5.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* § 23.07, at 23-11.

33. *Id.* § 23.02, at 23-6.

34. *Id.* § 23.03, at 23-7.

35. *Id.* § 23.02, at 23-6.

36. *Id.* § 23.08, at 23-12.

37. *Id.*

38. *Id.* § 23.08, at 23-13.

39. David D. Siegel, New York Practice § 367, at 631 (5th ed. 2011).

40. CPLR 3126.

41. Barr et al., *supra* note 4, § 31:90, at 31-13.

42. *Id.*

43. Siegel, *supra* note 39, § 367, at 631 (noting that CPLR 3122 appears to require — although some courts have disagreed — a motion under CPLR 3124 first before moving under CPLR 3126, but only in situations involving disclosure devices under CPLR 3120 and physical or mental examination under CPLR 3121).

44. Horowitz, *supra* note 3, § 23.03, at 23-6 (citing *Double Fortune Prop. Investors Corp. v. Gordon*, 55 A.D.3d 406, 407, 866 N.Y.S.2d 111, 112 (1st Dep't 2008) ("Plaintiff having responded to defendant's discovery requests, the proper course for defendant, rather than moving to strike the complaint pursuant to CPLR 3126, was first to move to compel further discovery pursuant to CPLR 3124."); *but see id.* § 23.05, at 23-9 (citing *Fleming v. Fleming*, 50 Misc. 2d 323, 324, 270 N.Y.S.2d 352, 355 (Sup. Ct. Queens County 1996) (rejecting view that motion under CPLR 3124 is a condition precedent to a motion under CPLR 3126)).

45. Siegel, *supra* note 39, § 367, at 628.

46. CPLR 3106(b), 3120.

47. CPLR 2308, 5104.

48. Siegel, *supra* note 39, § 367, at 629.

49. *Id.*

50. CPLR 3126(1).

51. Horowitz, *supra* note 3, § 23.09, at 23-13.

52. CPLR 3126(2).

53. Barr et al., *supra* note 4, § 31:92, at 31-14 (citing *Adair v. City of N.Y.*, 290 A.D.2d 261, 261, 735 N.Y.S.2d 765, 766 (1st Dep't 2002) (precluding defendant from contesting issue of notice when defendant that failed to produce timely documents pertaining to notice)).

54. *Mendoza v. Highpoint Assocs., IX, LLC*, 83 A.D.3d 1, 6, 919 N.Y.S.2d 129, 133 (1st Dep't 2011).

55. *Id.*, 919 N.Y.S.2d at 133.

56. CPLR 3126(3).

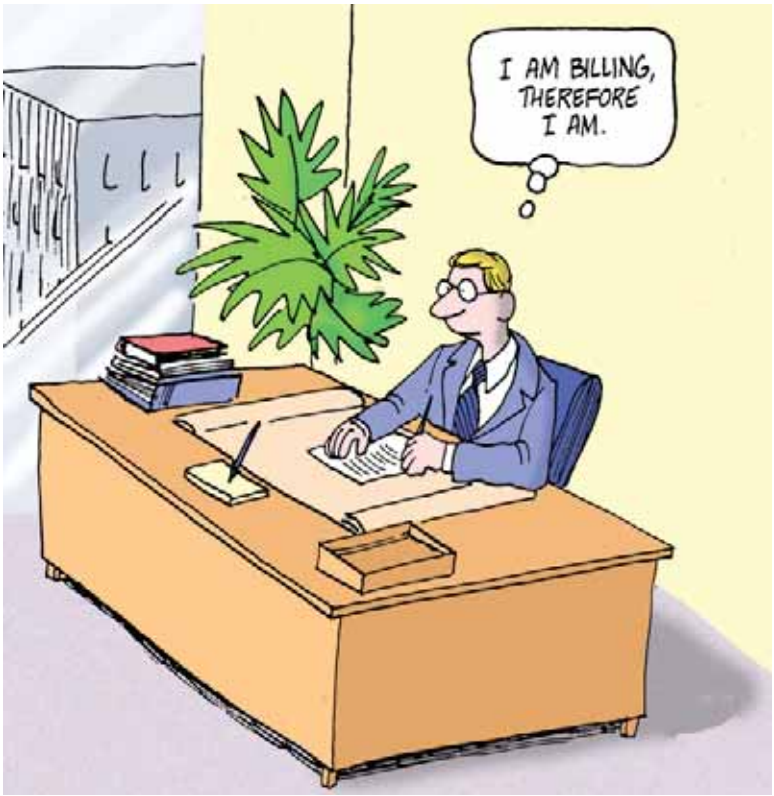
57. Siegel, *supra* note 39, § 367, at 631.

58. Barr et al., *supra* note 4, § 31:92, at 31-14 (citing *Diane v. Ricale Taxi, Inc.*, 291 A.D.2d 320, 321, 739 N.Y.S.2d 8, 10 (1st Dep't 2002) ("Since the witness whom [defendant] failed to produce pursuant to the April 2000 order would have provided testimony relevant solely to the issue of liability, [defendant's] answer should have been stricken solely as to that issue.")).

59. Horowitz, *supra* note 3, § 23.09, at 23-14 (citing *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123, 700 N.Y.S.2d 87, 90, 722 N.E.2d 55, 58 (1999); *Mazzuca v. Warren P. Wielt Trust*, 59 A.D.3d 907, 908, 875 N.Y.S.2d 291, 292 (3d Dep't 2009) ("[T]his drastic sanction is generally only justified when the party seeking dismissal demonstrates that the failure to comply with the request and order for disclosure was willful and contumacious.")); Barr et al., *supra* note 4, § 31:93, at 31-14 (citing *Polanco v. Duran*, 278 A.D.2d 397, 398, 717 N.Y.S.2d 643, 644 (2d Dep't 2000) ("[T]he defendants' willful and contumacious conduct can be inferred from their failure to comply with the court's preliminary conference order directing that depositions be held on a date certain, and their continued adjournment of scheduled depositions without an adequate excuse."); *Wolford v. Cerrone*, 184 A.D.2d 833, 833–34, 584 N.Y.S.2d 498, 499 (3d Dep't 1992) (finding plaintiffs' conduct willful when plaintiffs missed two medical examination appointment and their attorney failed to offer any explanation); *Sloben v. Stam*, 157 A.D.2d 835, 836, 551 N.Y.S.2d 533, 534 (2d Dep't 1990) ("[T]he court was clearly justified in concluding that the conduct of the appellants and their attorney in repeatedly refusing to turn over documents, which they failed to establish were not in their possession, amounted to 'dilatory conduct violative of the [respondents'] discovery rights and appears to have been designed to frustrate and impede, if not in fact to prevent, meaningful disclosure.'"); *Arantes v. Gotham Taxi Corp.*, 116 A.D.2d 539, 540–41, 497 N.Y.S.2d 682, 683 (1st Dep't 1986) (finding defendant's refusal to comply with disclosure order was deliberate and contumacious when it failed to make corporate books, records, and tax returns available for inspection); *contra Tsai v. Hernandez*, 284 A.D.2d 116, 117, 725 N.Y.S.2d 340, 341 (1st Dep't 2001) ("Dismissal is the most drastic sanction contemplated by CPLR 3126 for failure to comply with discovery. Ordinarily we look to whether the party seeking disclosure clearly demonstrates that the failure to disclose was willful, contumacious, or manifested bad faith.")).

60. Siegel, *supra* note 39, § 367, at 631.

61. *Id.* (citing *James v. Powell*, 26 A.D.2d 525, 525, 270 N.Y.S.2d 789, 790–91 (1st Dep't 1966), *rev'd on other grounds*, 19 N.Y.2d 249, 279 N.Y.S.2d 10, 225 N.E.2d 741 (1967)).



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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: What is the meaning of the phrase *as such?* I see this phrase used in vague ways, so it seems to convey no specific meaning. Does it have a specific meaning?

Answer: Yes, although it is often used vaguely or just incorrectly. In the following statement seen in a recent issue of the journal *The Tort Source*, the author used the term *as such*, in a context that seems vague or incorrect; the word "therefore" would perhaps be more accurate.

Here is the statement (my emphasis added): "Additional scrutiny by the FDA means more opportunity for a problem to be found, which could lead to increased future litigation. *As such*, compliance with the rule when promulgated will be of paramount importance to other clients of the attorney who manufacture a food product. . . ." It's hard to tell what the author intended *as such* to refer to and what, exactly, *as such* meant. Perhaps a more exact term like "therefore" would be appropriate as a substitute.

Used correctly, however, the phrase *as such* does have a specific reference and a specific meaning. It always refers to an antecedent noun (either a person or a thing previously mentioned), and it means "as being either the person or thing previously referred to" or "in that capacity" or "in or by itself or themselves."

Here are some examples of those meanings (my emphasis added):

The legal profession, *as such*, does not command the degree of respect it is entitled to. (Here, *as such* refers to and means "the legal profession.")

The members of the board of directors, *as such*, are responsible for broad decision-making. (Here, *as such* refers to and means "the board of directors in that capacity.")

Hourly pay, *as such*, is not the main point of contention. (Here *as such* refers to and means "hourly pay, in or by itself.")

Given the possibility of misunderstanding, it would be wise to substitute more appropriate language for the phrase "as such."

Question: Please define the word *notwithstanding*. It seems to me that many lawyers use that word incorrectly, as in the following statement: "Notwithstanding the preceding paragraphs, you shall pay the sum of $1,000.00 into the fund." When a previous paragraph states that you shall *not* pay $1,000.00, I believe that this statement says that you do not have to pay the sum of $1,000.00 into the fund, but fellow lawyers have stated that I'm wrong. Who is correct?

Answer: Your fellow lawyers are correct. The word *notwithstanding* in the statement above, is a preposition that means of "in spite of." So in spite of whatever previous paragraphs had to say on this subject, you must pay the $1,000.00. *Notwithstanding* can also be a conjunction, meaning "in spite of the fact(s)," as in, "It was the same cause of action, notwithstanding the difference in the facts."

Question: My law students misspell the word *foreseeable* (omitting the first *e*). Is there a rule they can apply to avoid this misspelling?

Answer: Fortunately there is. A simple and reliable test decides how to spell the prefixes *for* and *fore*. The spelling *fore* means "before." It is attached to a number of words, like *foreseeable*, *foreclosure*, and *forefather*, to mention only a few. On the other hand, the prefix *for*, which is cognate with the Modern German prefix *ver*, conveys a sense of completion, exhaustion, or destruction to the word to which it is attached. Compare, for example, the German word *verboten* to the English word *forbidden*.

Although the prefix *for* was widely used in Old English, it appears less often in Modern English. You can see it in words like *forgo* (relinquish completely), *forbid* ("prohibit utterly"), *forgive* ("excuse completely"), *forsake* ("leave irrevocably") *forswear* ("renounce unalterably"), and in a few other words.

Legal language, being traditional and conservative, probably uses the prefix *for* more frequently than it is used in general English. In general usage, people prefer to add the adverb *up* to indicate completion. Contrast, for example, the statements, "She used the paper towels," to "She used up the paper towels." But sometimes the word *up* is unnecessary and redundant, as it was in the following news item: "[Responding to a poll], readers offered up suggestions on taxes."

Law students are not alone in confusing the prefixes *for* and *fore*. Journalists and judges make that mistake too. A headline in the local newspaper recently announced, "Foresaking a Chance to Repay a Debt." And a 1981 court opinion begins, "Notwithstanding the forgoing . . . ."

Potpourri

Nancy L. D'Antuono, Professor of Italian and Chair of the Department of Modern Languages at St. Mary's College, Notre Dame, commented in an email that the word *agita* (discussed in this space some time ago, prompting a flood of emails from New York City residents) had been carried down through generations of Italian-Americans and "is now common parlance in all circles of Italian extraction."

Another reader, Harvard Lecturer Judith McLaughlin, emailed an article she had read in the *Yale Law Journal* (*Lawsuit, Shmawsuit*, 103 Yale L.J. 463 (1993)) that discussed the adoption of Yiddish words into English. The word *kosher* (which means "prepared in accordance with Jewish dietary laws") appears, not surprisingly, more than 800 times in LEXIS. But the meaning of *kosher* has also expanded and it is now also used metaphorically. In *United States v. Erwin*, 902 F.2d 510 (7th Cir. 1990), for example, the court held that the law "tell[s] the felon point-blank that weapons are not kosher." ■

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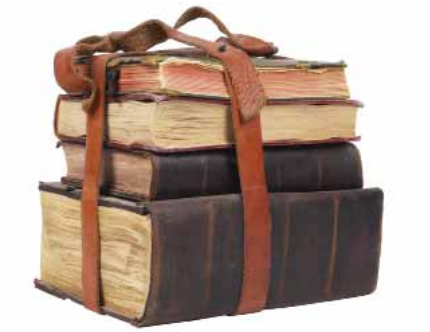

Drafting New York Civil-Litigation Documents: Part XXVIII — Disclosure Motions Continued

In the last issue, the *Legal Writer* discussed disclosure[1] motions: motions to compel disclosure, good-faith affirmations in support of disclosure motions,[2] motions to extend or expedite disclosure, motions to supervise disclosure, motions for a protective order, and motions to compel disclosure. In this issue, we continue with motions to compel disclosure. We'll also discuss sanction motions for nondisclosure.

In this column, "adversary" distinguishes the opposing party — either the demanding party seeking disclosure from you, or the non-complying, disobedient, or recalcitrant party, who hasn't complied with your disclosure requests.

Moving to Compel Disclosure Continued

In the last issue, we discussed moving to compel pre-action disclosure. Once you've commenced an action, you'll also need to know how to compel disclosure before, during, and after trial.

You may move to compel disclosure against a party or a non-party.[3]

Compelling Pre-Trial Disclosure

If your adversary fails to respond or comply before trial with "any request, notice, interrogatory, demand, question or order for disclosure except a notice to admit," move to compel compliance under CPLR 3124.[4] If you're seeking disclosure, the burden is on you to move to compel disclosure.[5]

If you've served your adversary with a set of interrogatories or a demand to produce, your adversary has 20 days to respond. Your adversary has 30 days to respond to a bill of particulars.[6] Your adversary may object, "with reasonable particularity," to some or all the items you're seeking.[7] If you believe you're entitled to information to which your adversary has objected, move under CPLR 3124 to compel your adversary to respond.

A bill of particulars isn't covered under CPLR 3124. Move to compel disclosure or for penalties under CPLR 3042(c) and CPLR 3042(d). Before compelling disclosure, the court must find that your adversary's failure to respond was willful.

Notices to admit aren't covered under CPLR 3124. CPLR 3123 has its own built-in remedies if your adversary doesn't respond to a notice to admit. If your adversary has served you with a notice to admit and you want to object, move for a protective order.[8]

Some pre-trial disclosure requires a court order; you'll need to move to compel disclosure. You'll need a court order if you're seeking to depose a prisoner even if that prisoner is a party to the action.[9] Sending your adversary interrogatories in an action in which you've used other disclosure devices will require a court order, too.[10]

You have no time restrictions when moving to compel.[11] But the sooner you move to compel, the better. Doing nothing about the motion or waiting until the last minute to move will make you look as irresponsible as your adversary.

Compelling Disclosure After Note of Issue (or Notice of Trial) Is Filed

Disclosure ends once you've filed the note of issue and statement of readiness (or notice of trial in the lower courts). Filing the note of issue (or notice of trial) signals to the court that you've completed disclosure and that you're ready for trial.[12] You waive your right to further disclosure unless you demonstrate to the court "unusual or unanticipated circumstances, an order of the court, or agreement among the parties."[13] If all parties agree to conduct disclosure after the note of issue (notice of trial) is filed, "obtain a written, executed stipulation from all parties."[14] Request that the court "so order" any stipulation between the parties.[15] The court isn't required to enforce a stipulation executed between the parties to conduct post-note-of-issue disclosure.[16] Once the court so orders the stipulation, it becomes the court's order "with recourse in the event of non-compliance to all of the available enforcement mechanisms and penalties provided by the CPLR."[17]

If you're seeking disclosure, the burden is on you to move to compel disclosure.

If your adversary filed the note of issue (or notice of trial) and disclosure remains outstanding, move to vacate the note of issue (or notice of trial) and seek additional disclosure.[18]

Some courts will allow disclosure to continue after you've filed the note of issue (or notice of trial).[19] Some courts will impose deadlines for you to file

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