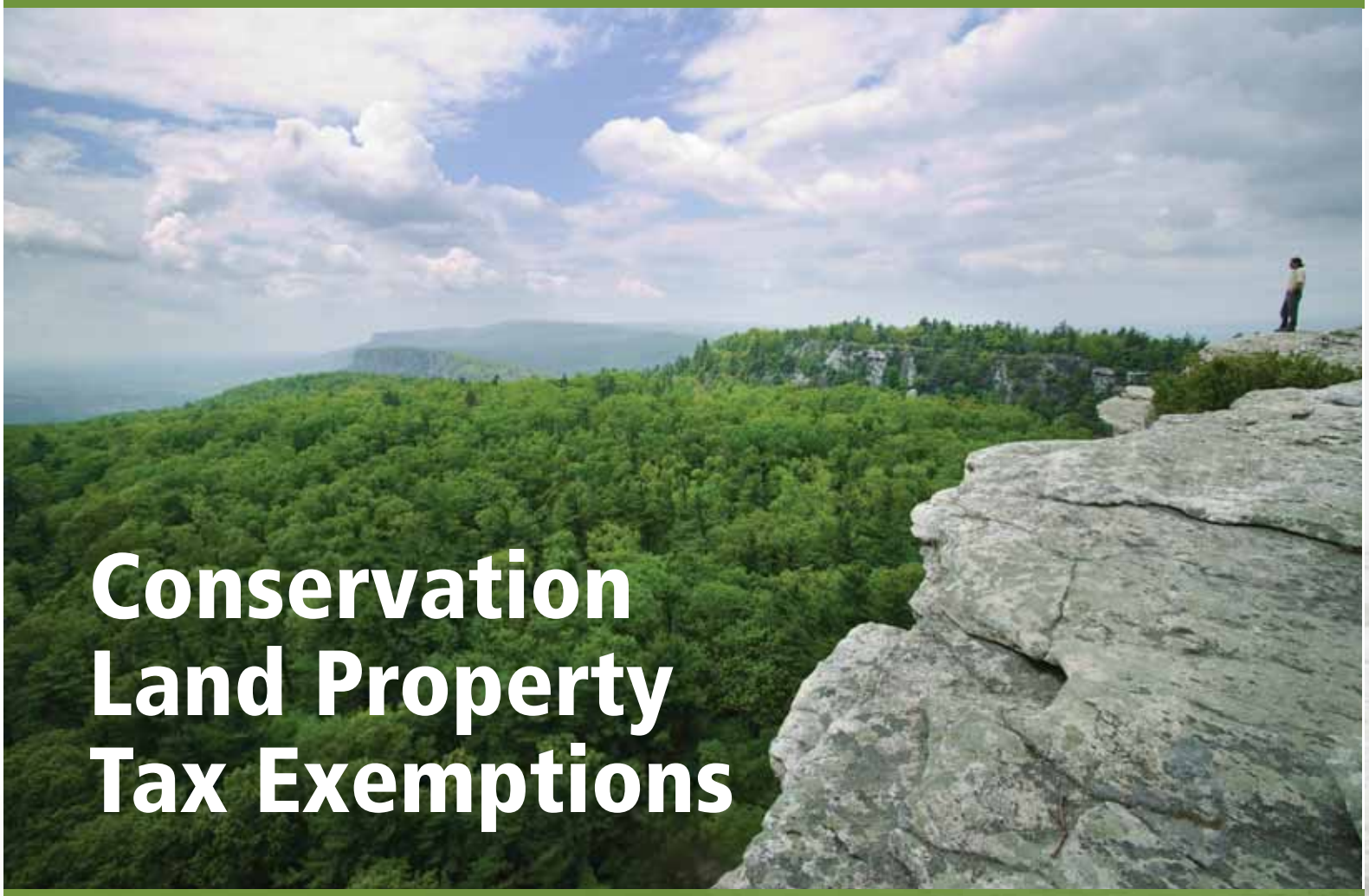
NEW YORK STATE BAR ASSOCIATION
Journal
MARCH/APRIL 2015
VOL. 87 | NO. 3



# Conservation Land Property Tax Exemptions

## The Mohonk Preserve Experience

*By David C. Wilkes and Glenn D. Hoagland*

### *Also in this Issue*

You're a New York State Bar Association member.

You recognize the value and relevance of NYSBA membership.

For that, we say **thank you**.


The NYSBA leadership and staff extend thanks to you and our more than 74,000 members — from every state in our nation and 120 countries — for your membership support in 2015.

Your commitment as members has made NYSBA the largest voluntary state bar association in the country. You keep us vibrant and help make us a strong, effective voice for the profession.

Glenn Lau-Kee
President

David R. Watson
Executive Director

NYSBA

# BESTSELLERS

## FROM THE NYSBA BOOKSTORE

**March/April 2015**

**Best Practices in Legal Management**
The most complete treatment of the business of running a law firm. With forms on CD.

PN: 4131 / **Member $139** / List $179 / 498 pages

**Criminal and Civil Contempt, 2nd Ed.**
This second edition explores a number of aspects of criminal and civil contempt under New York's Judiciary and Penal Laws, focusing on contempt arising out of grand jury and trial proceedings.

PN: 40622 / **Member $40** / List $55 / 294 pages

**Disability Law and Practice: Book One**
This first book in a series that will provide a broad education in all aspects of disability law and practice focuses on special education, assistive technology and vocational rehabilitation.

PN 42153-1 / **Member $60** / List $75 / 382 pages

**Entertainment Law, 4th Ed.**
Completely revised, *Entertainment Law*, 4th Edition covers the principal areas of entertainment law.

PN 40862 / **Member $150** / List $175 / 986 pages loose-leaf

**Impasse Resolution Under the Taylor Law, 2nd Ed.**
An invaluable resource for attorneys whose practice may involve public sector labor law issues. The Second Edition is current through the end of the 2013 state legislative session.

PN 41223 / **Member $30** / List $40 / 130 pages

**N.Y. Municipal Formbook, 4th Ed.**
A must-have for attorneys whose practice touches on zoning law, labor issues, real property rights within towns and villages, telecommunications and other public contracts, roads and highways, FOIL requests, and use of public lands. More than 1500 forms on CD.

PN 41603 / **Member $150** / List $185 / 228 pages

**Practice of Criminal Law Under the CPLR and Related Civil Procedure Statutes, 6th Ed.**
This new edition compiles the rules regarding jurisdiction, evidence and motion practice and those applying to criminal law practice found in statutes governing civil procedure.

PN: 40699 / **Member $50** / List $60 / 230 pages

**Products Liability in New York, 2nd Ed.**
A comprehensive text on this challenging and complex area of law.

PN: 41979 / **Member $120** / List $170 / 2 vols.

**Public Sector Labor and Employment Law, 3rd Ed., 2014 Revision**
The leading reference on public sector labor and employment law in New York State is completely revised with updated case and statutory law.

PN: 42057 / **Member $160** / List $195 / 2 vols.

# NEW!

**Contesting New York State Tax Assessments, 4th ed.**
New York's Division of Tax Appeals and its judicial courts are often the forum for resolution of tax disputes. This book supplies New York tax lawyers with the thorough knowledge of practice and procedure they need.

PN: 40505 / **Member $50** / List $65 / 244 pages

**Estate Planning and Will Drafting in New York 2015**
Completely updated, this comprehensive text will benefit those who are just entering this growing area. Experienced practitioners may also benefit from the practical guidance offered. Forms on CD.

PN 4095C / **Member $185** / List $220 / 896 pages / loose-leaf

**Foundation Evidence, Questions and Courtroom Protocols, 5th Ed.**
The new edition of this classic text has been completely reorganized to better follow the process of a trial; the sections on Direct, Re-direct and Cross Examination have been greatly expanded.

PN: 41074 / **Member $65** / List $80 / 344 pages

**Legal Manual for N.Y. Physicians, 4th Ed.**
The Fourth Edition of *Legal Manual for New York Physicians* has been expanded to two volumes covering 56 topics and includes a new chapter on Medicare Audits of Physician Claims and the Medicare Appeals Process.

PN: 41324 / **Member $135** / List $165 / 1,170 pages / 2 vols.

**Grow Your Practice: Legal Marketing and Business Development Strategies**
*Grow Your Practice* introduces attorneys to marketing and management resources that focus on clients and complement today's dynamic legal practice.

PN: 41265 / **Member $50** / List $65 / 302 pages

**New York Contract Law: A Guide for Non-New York Attorneys**
This is a practical, authoritative reference for questions and answers about New York contract law.

PN: 4172 | **Member $95** | List $120 | 622 pages

**N.Y. Lawyer's Deskbook and Formbook (2014–2015)**
Award-winning and packed with new information and forms for use in over 25 practice areas.

**N.Y. Lawyers' Practical Skills Series (2014–2015)**
An essential reference, guiding the practitioner through a common case or transaction in 25 areas of practice. Nineteen titles; 16 include forms on CD.

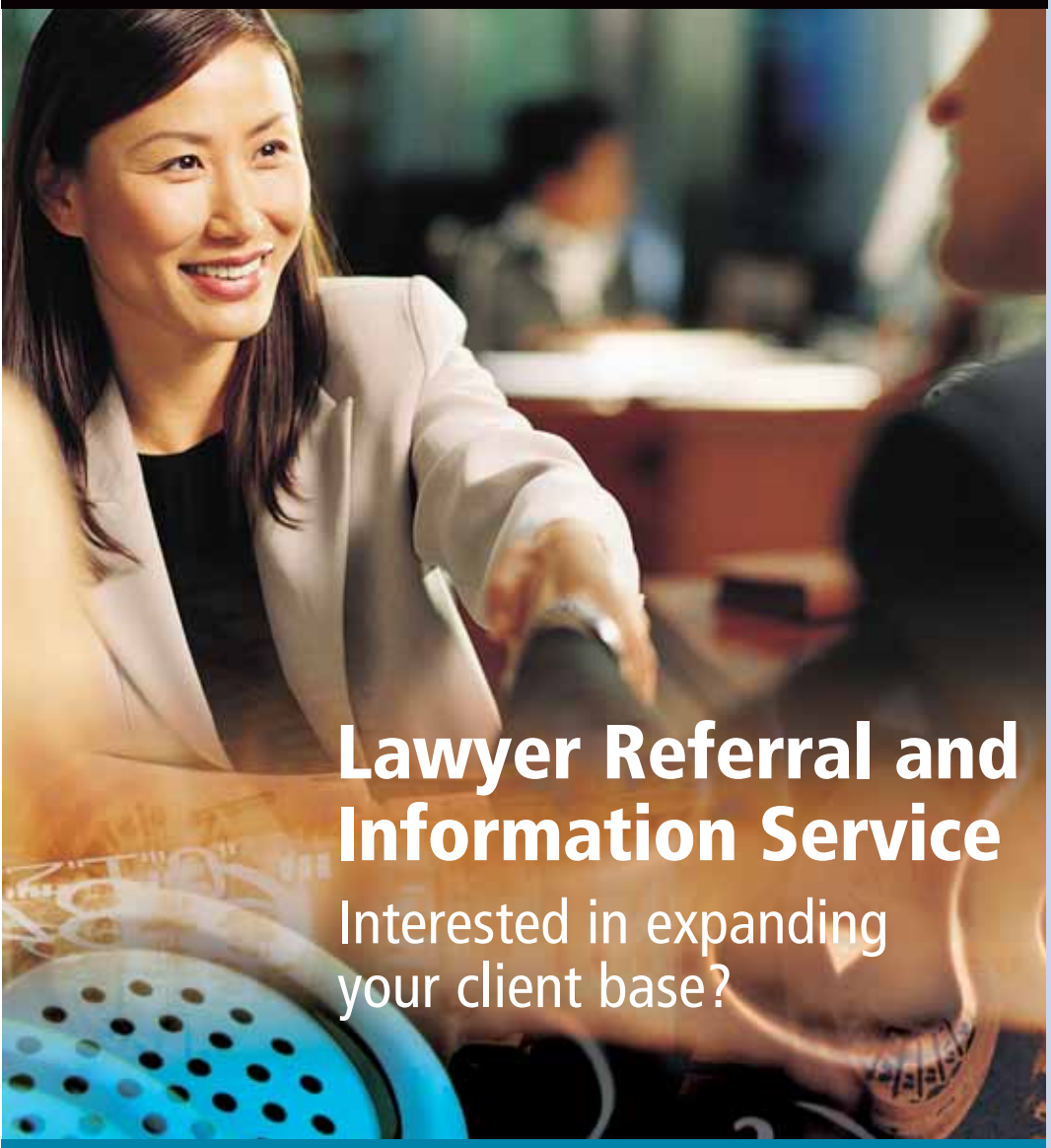
**NYSBA Practice Forms on CD 2014–2015**
More than 500 of the forms from *Deskbook* and *Formbook* used by experienced practitioners in their daily practice.

## Expand your professional knowledge

1.800.582.2452 www.nysba.org/pubs **Mention Code: PUB3010**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

NYSBA




## Join the Lawyer Referral & Information Service

### Why Join?

> Expand your client base
> Benefit from our marketing strategies
> Increase your bottom line

### Overview of the Program

The New York State Bar Association Lawyer Referral and Information Service (LRIS) has been in existence since 1981. Our service provides referrals to attorneys like you in 44 counties (check our website for a list of the eligible counties). Lawyers who are members of LRIS pay an annual fee of $75 ($125 for non-NYSBA members). Proof of malpractice insurance in the minimum amount of $100,000 is required of all participants. If you are retained by a referred client, you are required to pay LRIS a referral fee of 10% for any case fee of $500 or more. For additional information, visit **www.nysba.org/joinlr**.

### Sign me up

Download the LRIS application at **www.nysba.org/joinlr** or call **1.800.342.3661** or e-mail **lr@nysba.org** to have an application sent to you.

**Give us a call!**
**800.342.3661**

NYSBA

ABA MEETS ABA STANDARDS FOR LAWYER REFERRAL
AMERICAN BAR ASSOCIATION
THE RIGHT CALL FOR THE RIGHT LAWYER

NEW YORK STATE BAR ASSOCIATION
Journal

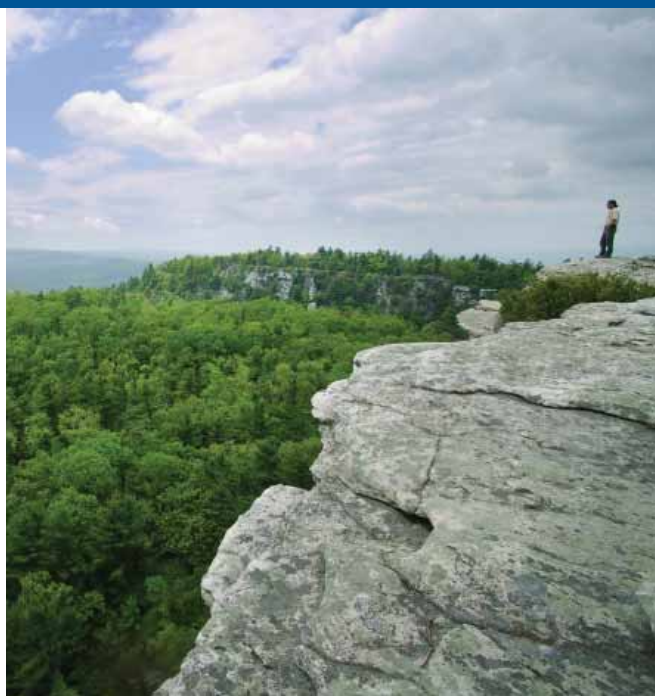
# CONTENTS

MARCH/APRIL 2015

## CONSERVATION LAND PROPERTY TAX EXEMPTIONS

### The Mohonk Preserve Experience 10

BY DAVID C. WILKES AND GLENN D. HOAGLAND



## DEPARTMENTS



CARTOONS © CARTOONRESOURCE.COM

The New York State Bar Association
Insurance Program

Advised and administered by
USI AFFINITY

# This is where lawyers go for protection.

## As a national leader in legal insurance, USI Affinity is proud to carry the endorsement of the New York State Bar Association.

Sometimes even attorneys need a little counsel of their own. That's why they turn to USI Affinity, the company that has been advising attorneys on insurance for 75 years. We know more about the kind of protection attorneys need and can offer a variety of insurance options for firms of any size.

## We go beyond professional liability to offer a complete range of insurance solutions covering all of your needs.

USI Affinity's extensive experience and strong relationships with the country's most respected insurance companies give us the ability to design customized coverage at competitive prices.

**Coverage includes:**

- Lawyers' Professional Liability
- Business Insurance
- Medical & Dental
- Life & Disability
- Personal & Financial

## Call 1.855.USI.0100 PIN 406 now for your FREE quote.

Or go to www.mybarinsurance.com

Call today for more information on the insurance products available to New York State Bar Association members, including professional membership credit and risk management credit.

GLENN LAU-KEE

# The Evolving Legal Landscape

Change is happening in our profession, regardless of whether we acknowledge it or not. As it was for the national economy, the 2008 recession was both an axe blow and the impetus for transformations in the legal profession. Still, some seven years later, even as our economy is recovering, most of us realize that many of the shifts spurred by the recession have become the new reality for our profession. Today, attorneys face more pressure from clients to lower costs and change long-standing legal practices like hourly billing, and more competition with nontraditional legal service providers.

In the past five years, the number of legal startups has multiplied, riding on the waves of developing technology and increased demand from today's more budget-minded, DIY-oriented consumers for cheaper, unbundled legal services. There is a trend toward having some entry-level legal tasks done by non-attorneys; later this month in Washington State, the first group of non-lawyers will sit for an exam to be licensed by the court as Limited License Legal Technicians, or LLLTs, to do limited legal work.

It is paramount that we each take the time to understand the evolving landscape. While it is easy to think that the new economic reality affects only the largest law firms, the truth is that every law firm – from those employing thousands of attorneys in offices throughout the world to small firms and solo practitioners – will be impacted by the shift in the nature of demand for legal services. These changes are happening, they are happening rapidly, and many are outside of our control. Through understanding the mechanics of and demand for these changes, we can better identify how we each can respond and adapt our individual practices to create benefits for our clients and ourselves.

How much things have changed came into focus when I listened to Mark Britton, the CEO of Avvo Inc., one of several different legal providers testifying at a hearing held by the American Bar Association's new Commission on the Future of Legal Services. Britton estimates that Avvo, an online legal marketplace, has generated $8.5 billion in business for attorneys since its founding in 2007.

And the growth in legal startups has strengthened as the economy recovers. In 2013, legal startups attracted an estimated $458 million in investment – a spike of almost 600% over the 2012 investment of $66 million, according to TechCocktail.com. Many startups offer cheaper and, in some cases, more efficient methods for the processes of the legal profession: legal research, discovery, and the administrative tasks involved in the practice of law. Other startups, like Avvo, zero in on the consumer, providing new, less expensive ways for consumers to get legal advice. Since last year, Avvo has offered a fixed-fee consultation: for $39.95, one can purchase a 15-minute consultation "within minutes" with a top-rated attorney, rated according to an algorithm. The attorney earns the consulting fee, while paying Avvo a marketing fee of $10 for each consultation.

Britton urges the legal profession to follow the model of the medical profession and create a more open flow of information for the consumer. He said he is working toward the day when a legal checkup will be as common, understood, and ubiquitous as a medical checkup. The legal profession is not doing enough to service the customer demand – "massive numbers, massive opportunity" – that is out there, Britton testified. Research shows that among moderate- and high-income individuals, half do not hire lawyers. Among low-income individuals, the number approaches 85%. Too often, Britton said, lawyers sit on their hands and do nothing to try to reach consumers. Avvo advertises its business with the tag line, "Legal. Easier." Every month eight million people visit its website looking for legal help. The site houses an archive of 6.5 million answers from the 200,000 attorneys who are active on Avvo. Many of these attorneys connect to the site through an app. Britton said this initial contact through Avvo's Q&A link often leads to a consumer hiring a lawyer.

LegalZoom is another large start-up that is transforming how people address legal problems. It provides kits or flat-fee legal services for common legal problems, including copyrights, DBAs, business formation, trusts, wills,

GLENN LAU-KEE can be reached at glau-kee@nysba.org.

real estate leases, and trademark registration. In 2012, in a prospectus filed with the SEC, LegalZoom reported that it earned $156 million in revenues in 2011 and had served two million customers since its founding in 2001. Last year, LegalZoom attracted a $200 million private equity investment from a London firm. Recently, LegalZoom entered into an agreement with Sam's Club to offer a $299 package for a will, living trust, and power of attorney, which includes a year of revisions and attorney consultations and discounts on other LegalZoom documents.

Yet, we cannot let the market alone drive and determine the nature of the legal profession.

The Bar Association has been proactive in exploring how we can respond to the shifts in the legal landscape and best position our members to adapt – and benefit – in new ways. In June 2010, then President Stephen Younger convened the Task Force on the Future of the Legal Profession, comprising a diverse range of legal practitioners. The Task Force's mission was to study the issue and recommend ways to create a roadmap for the future of technology in the profession, to improve legal education and training, to establish proper work/life balance for attorneys, and to reform the billing structure in law firms. My immediate predecessor, David Schraver, did much to examine how the education and training of lawyers need to evolve to best address the changing environment.

My own focus is on the changes in the delivery of legal services. These new models meet and create new consumer expectations that affect our daily practice and our strategies for developing our practices further. Through its new Commission, the ABA's goal is to study and learn, so it can propose innovations and new approaches for delivering legal services that are financially viable and meet the public's needs for more affordable legal services. Only through learning about the new models and practices can our Association act to ensure that as our profession evolves in the changed and changing economy, the legal profession maintains its core values of ensuring justice for all, protecting the public, and increasing diversity and inclusion in the profession.

As part of our Association's ongoing effort to keep our members informed, I have asked the ABA to send a representative from its Commission on the Future of Legal Services to address our March 28 House of Delegates Meeting in Albany. Doing nothing is not an option. The more we understand, the better able we will be to make needed changes in how we work as attorneys to provide better and more affordable legal help. If we lead the change, we will ensure that the core values of our profession are upheld and strengthened. ■

# Settle. Without settling.

NAM is ranked the #1 ADR firm in the U.S. by the National Law Journal Reader Rankings Survey and has been ranked the #1 ADR firm in NY by the New York Law Journal Reader Rankings Survey four years in a row.

NAM
NATIONAL ARBITRATION AND MEDIATION
**The Better Solution®**

**122 East 42nd Street, Suite 803, New York, New York 10168**

Additional Locations: Garden City, Brooklyn, Staten Island, Westchester and Buffalo (800) 358-2550 | www.namadr.com

# NYSBACLE

## Tentative Schedule of Spring Programs *(Subject to Change)*

**The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.**

**Property Battles: Easements, Adverse Possession and Other Boundary Line Disputes**
(9:00 a.m. – 1:00 p.m.)
March 25 New York City

**Human Trafficking in New York State: Legal Issues and Advocating for the Victim**
(12:00 p.m. – 2:30 p.m.; live & webcast)
March 25 Albany

**David Paul Horowitz's 2015 CPLR Update**
March 26 Long Island (5:30 p.m. – 9:10 p.m.)
April 18 Buffalo (9:00 a.m. – 12:40 p.m.)
May 13 New York City (5:30 p.m. – 9:10 p.m.)

**2015 Marketing Conference**
(live & webcast)
March 27 New York City

**Forming Legal Entities in Others States: The Pros and Cons**
(12:00 p.m. – 2:00 p.m.; live & webcast)
April 1 Albany

**Cell Phone Forensics for Civil and Criminal Attorneys**
(12:00 p.m. – 2:00 p.m.; live & webcast)
April 16 Albany

**Practical Skills – Family Court Practice**
April 14 Westchester
April 15 Albany; Long Island
April 16 New York City; Syracuse
April 17 Buffalo

**Introductory Lessons on Ethics and Civility 2015**
(9:00 a.m. – 12:45 p.m.)
April 17 Rochester
April 24 Albany; Buffalo; Long Island
May 1 New York City

**Divorce Anniversaries II: Valuation and Executive Compensation**
(9:00 a.m. – 1:35 p.m.)
April 24 Long Island; Rochester
May 8 Westchester
May 29 Albany
June 5 New York City

**Trademark, A to Z: From Clearance Search to Litigation**
(live & webcast)
April 24 New York City

**Utilizing Supplemental Needs Trusts for Persons With Disabilities**
April 29 Long Island; Rochester
May 5 New York City
May 12 Westchester
May 15 Albany
May 29 Syracuse

**Retirement, Annuity and Life Insurance Benefit Planning**
April 30 Long Island
May 6 Albany
May 14 White Plains
May 20 Buffalo
May 29 New York City
June 9 Syracuse

**Practical Skills – Purchases and Sales of Homes**
May 5 Albany; Long Island; Rochester
May 6 Buffalo; Westchester
May 7 New York City; Syracuse

**The Freedom of Information and the Open Meetings Laws**
(9:00 a.m. – 12:00 p.m.; live & webcast)
May 7 Albany

**Insurance Coverage Update 2015**
May 8 New York City; Syracuse
May 15 Buffalo; Long Island
May 29 Albany

## Register

For more information call toll free **1-800-582-2452**

In Albany and surrounding areas dial (518) 463-3724 • Or fax your request to (518) 487-5618
**www.nysba.org/CLE** (Note: As a NYSBA member, you'll receive a substantial discount)

† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

**DWI on Trial – Big Apple XV**
(live & webcast)
May 14 New York City

**Starting a Practice in New York**
(live & webcast)
May 14 New York City

**Social Media Ethics for Attorneys**
(3:00 p.m. – 6:00 p.m.; live & webcast)
May 20 New York City

**High Frequency Trading: Recent Developments in Enforcement and Regulation**
(9:00 a.m. – 12:00 p.m.; live & webcast)
May 28 New York City

**Best Practices in Setting Up and Maintaining Client Relationships**
(1:00 p.m. – 4:35 p.m.; live & webcast)
June 3 New York City

**Superior Legal Writing: A Workshop for Litigators**
(live & webcast)
June 3 New York City

**Automobile Litigation Update**
June 4 Buffalo; Long Island
June 5 Albany
June 10 New York City; Syracuse

**"Sweat Equity" in Startups and Early Stage Businesses**
(9:00 a.m. – 1:00 p.m.; live & webcast)
June 4 New York City

**Superior Legal Writing: A Workshop for Transactional Attorneys**
(live & webcast)
June 4 New York City

**Traditional and New Trends in Trade Publishing: Business Models, Contracts and Other Legal Issues**
(9:00 a.m. – 12:00 p.m.; live & webcast)
June 12 New York City

**Nuts and Bolts of Contract Drafting**
(live & webcast)
June 16 New York City

NYSBA

# NYSBA's Online Communities

NYSBA's Communities are private, online professional networks designed to facilitate the sharing of knowledge and forging of connections among members. Communities are replacing NYSBA's popular listserves – they are customized and feature all the functionality of former listserves, including multiple options for format and timing of emails. Communities help you gain a competitive edge, plus you get immediate advice and tips in your area(s) of practice.

To be an active part of NYSBA's Online Communities access them on the web directly at **http://communities.nysba.org**.

NYSBA

# Conservation Land Property Tax Exemptions

## The Mohonk Preserve Experience

By David C. Wilkes and Glenn D. Hoagland

What is the value of preserved open space? That may seem like an esoteric question, but it is one that we answer every day in real dollar terms for those privately owned parcels of land that meet the strict criteria for an exemption from property taxes. Put another way, where a municipal or school budget must be levied, and some lands are deemed worthy of the benefit of a tax exemption, the cost is borne by other landowners. Tax exemptions in general represent the value that the community places, through legislation and local review, on certain desirable land uses and types of organizations that have been recognized to provide a valuable service or benefit to their community or constituency that government cannot afford to deliver with taxpayer dollars. And these exempt entities cannot survive – or would do so at an unacceptably diminished capacity – absent the civic financial support that comes in the form of property taxes forgone by the taxing authority.

Photo Credits:
Dafna Tal - View of Shawangunk Ridge, cover.
Frank Tkac - View of Shawangunk Ridge Trapps, pages 10–11.
Jim Longbotham - Summit Bonticou Crag, page 11.
Carol Natoli - View of Ridge From Brook Farm, page 16.

**David C. Wilkes** (dwilkes@huffwilkes.com) is a partner at the law firm Huff Wilkes, LLP, and is editor-in-chief of the *Journal*. He is a Life Member of the Mohonk Preserve and one of its legal advisors, concentrating his practice in the field of property tax law. He is the former Chairman of The Appraisal Foundation, which is the congressionally authorized source of national appraisal standards, and a co-founder of the National Association of Property Tax Attorneys. He is also the Global Consultant to Cushman & Wakefield's Property Tax Services Group. He earned his law degree from Boston University, and a Master's Degree in Real Estate Finance and Valuation from New York University.

**Glenn D. Hoagland** (ghoagland@mohonkpreserve.org) has served as the Executive Director of the Mohonk Preserve since 1993. He serves on the National Leadership Council and the New York State Advisory Board of the Land Trust Alliance, is a member of the Association of Nature Center Administrators and graduate of its Leadership Institute, and serves on the Board of Hudson Valley Pattern for Progress. Mr. Hoagland received a BA in Geography from SUNY New Paltz and a Master's in Rural Planning from the University of Guelph in Ontario, Canada.

Open spaces that are not owned by government in the form of municipal or state parks, or held by private owners, are likely to be acquired, held, and managed for public benefit by nonprofit land conservation organizations or "land trusts." Of all the myriad tax exemptions available, the exemptions given to nonprofit land trusts that own preserved open space can be among the most provocative when a local government is struggling to close a budget gap and facing taxpayer pressure resulting from the prospect of increased tax rates. They are also, in the view of this article's authors, among the most necessary.

This is, no doubt, a value judgment, but one that is amply supported by academic research, principles of good governance, the evolution of civil society in Western culture, sound reason, and general popular opinion spanning many decades. The tax exemption of real property used by nonprofit organizations to further their public benefit activities reflects a broadly based public policy that has evolved in support of this sector of our society.

This article examines the historical and current legal framework and rationale for conservation land exemptions in New York State; debunks some of the popular myths that exaggerate the extent to which such exemptions cut into the public fisc; and considers the significant value added by the encouragement of preserved open space, even if somewhat intangible. Portions of the article highlight the Mohonk Preserve's experience in defending its exemption as well as the tax-related actions of the Town of New Paltz, in which the Preserve is partly located, but the principles and policies described apply well beyond the boundaries of New Paltz.

## Defining Open Spaces That Are Conservation Priorities

We define open space as land that has been deemed to have significant value for conservation in its natural state. Most often, such land has been identified through public planning processes where citizens and planning experts are tasked with inventorying and prioritizing the most significant lands that should be permanently conserved and remain undeveloped for the environmental, health, and economic benefits they yield to a community or region.[1]

Such conservation open space may be forestland that provides such valuable natural functions as storing carbon that would otherwise be released as greenhouse gas, filtering pollutants out of the air, retaining soils on steep slopes, acting as a watershed, purifying water filtering through the forest floor to recharge aquifers that supply drinking water; or may be wetland, stream corridors, or floodplains that manage large rainfalls by serving as natural spillways to attenuate flooding and absorb stormwater runoff. Such open spaces can be valued for the services that nature provides for free, and thus calculated in terms of long-term cost avoidance and savings to government.[2] In addition to these "ecosystem services" that help make communities resilient, such lands often protect important plant and wildlife habitat to allow for species to breed and migrate across the landscape.

Open space may have scenic views enjoyed by the public; it may be farm land contributing to the food supply; or it may have historic, cultural or landscape attributes important to our heritage. Furthermore, such protected open space may provide recreational access for walking, hiking, cycling, horseback riding, cross-country skiing, snowshoeing, and in some site-specific locations, activities such as rock climbing. It may inspire artists, photographers, and writers.[3] Moreover, protected lands may be made publicly available to bring people of all ages closer to nature, for family and community-oriented nature programs or formal education for grade school to the college level. Examples include guided nature observation outings led by naturalists, school field studies that extend the K-12 curriculum to the outdoors for schoolchildren, or scientific study and observation of natural phenomena that are conducted either by expert scientists or college faculty and their students. Citizen science programs engage participants in collecting data such as bird nesting, breeding and migrations, and insect surveys, and conducting other surveys of flora and fauna to record species present and add to observational databases. Further, such protected open spaces may attract volunteers individually or in groups to perform such community services as trail maintenance and litter cleanup, or serve as guides to interpret the resource to others, or to assist others in wayfinding.

Legislatures across the United States, and New York's local governments in particular, have at times struggled to define preserved open space in the context of exemption law and the criteria that must be met to qualify for

exempt status. And despite a solid foundation established through court decisions at the highest level, in some communities in New York tax-exempt conserved land faces an annual practical threat to its existence.

In New York State, local government finances are based primarily on property taxes. As exemptions proliferate in some communities, taxable assessed value is removed from the tax rolls resulting in a shift of the tax burden to privately owned, non-exempt property. However, in some communities, there has been an expressed willingness to accept some tax shift if it is to preserve open spaces valued by the community. For example, those residents of the town and village of New Paltz, who responded to a 2004 survey as part of the development of the town's Open Space Plan, affirmed the following:

- 77% said the town and village should actively pursue protecting open space as a strategy to keep New Paltz fiscally healthy and affordable.
- 66% supported concentrating development in or near the village center of New Paltz, and preserving open space in outlying areas.
- An overwhelming number (82%) supported policies to retain agricultural activity in the community.
- Over two-thirds of respondents (67%) favored some level of a tax increase to support open space protection.
- Of those who would accept a tax increase for open space, two-thirds supported a range of $10 to $100 per year. Another third supported a range of $100 to $300 per year.
- Over 75% of the people believed the community should pursue innovative strategies to protect open space.[4]

In addition to tax-exempt lands held by nonprofits, all communities have some government-owned properties that are not taxed, such as firehouses, police stations, municipal offices, town refuse recycling facilities, sewage treatment plants, and school district property. Yet, in New York State, these nontaxable municipal and school properties are lumped in with nonprofit exempt properties in the overall calculation of exempt properties. The result is an unwarranted mashing-up of all non-taxable properties, taxpayer confusion, and an exaggeration of the impact resulting from non-governmental exempt property. We will discuss this further below.

No exemption finds uniform support throughout a municipality. Starkly differing views are often expressed about the merits of exempting preserved open space: for some, it is a significant and worthy benefit that enhances not only the quality of life in their community, but their own property value; for others, is an unjustified addition to the tax burden that unfairly discriminates among landowners. Preserved open space is challenging to "value" from a purely economic standpoint, because it is removed from what some might consider to be its highest and best economically productive use as improved or developed land. And yet others would contend that as open space it is most useful, valuable, desirable and necessary to the fabric, balance, and robust health of the community as a whole. "Value" can be quite subjective. Bertram Lewis, an appraiser, wrote that "there is no such thing as 'value,' except in the eyes of the beholder. And one must understand where the beholder is coming from."[5]

> The exemptions given to nonprofit land trusts that own preserved open space can be among the most provocative.

## The Legal Basis for New York's Open Space Conservation Tax Exemption

Plainly, not every individual within a community will make actual use of all the properties that enjoy exemptions (whether preserved natural areas, churches, schools, and even hospitals), and often may outright oppose the mission of one or more organizations that claim qualification for a particular exemption. And yet, exempt status is provided by legislative consensus and local review and approval, generally on an annual basis. The field of exemption law is flush with examples of hotly and frequently litigated questions of qualification, reflecting the ongoing tension that has always existed where one property owner seeks to be relieved of a tax obligation that is borne by its neighbors.[6] Like nearly all tax issues, what is done for one landowner impacts every other landowner. As a result, exemption statutes are strictly construed against the one seeking the exemption.[7] But exemptions are also not to be construed so literally and narrowly that the construction defeats the purposes of the exemption.[8]

In some states, preserved open land is sheltered from property taxation (or at least statutorily valued in a manner that ignores development potential) by clear legislative directive that refers to open space or some other related term.[9] While this article focuses on the framework for wholly exempt property, there are also many types of partial exemptions (sometimes called preferential assessments). These vary widely and include partial exemptions for industrial and commercial property, Urban Renewal housing, medical offices, private subsidized multi-family housing, etc.[10] Our focus, however, is on open space conserved by nonprofit land conservation organizations (land trusts) that acquire and own land deemed to be of significant public benefit, thus qualifying for removal of real property from the tax rolls for purposes of town, county and school district taxes, including ad valorem levies and special district assessments.[11] In New York State, preserved open space owned and managed for the

benefit of the public by nonprofit land trusts qualifies for such a "whole" exemption and removes all property tax obligations from a parcel of land. This whole exemption for land conservation falls under the "charitable purpose" category of Real Property Tax Law (RPTL) § 420-a.

New York's case law has settled the question as to the validity of the publicly beneficial use and purpose of land owned and managed by qualified nonprofits for multiple conservation and environmental education values, and thus qualification for a whole exemption from taxation. However, nowhere in the words of the statute is to be found an express mention of preserved conservation land, although perhaps this will someday be addressed by the Legislature.

Nonetheless, under RPTL § 420-a, the law provides, in part:

> Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral and mental improvement . . . purposes, and used exclusively for carrying out thereupon . . . such purpose[] either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.[12]

Typical organizations falling under the "charitable" category of this provision are beneficial to the public interest and include churches, philanthropies, anti-poverty organizations, organizations for the advancement of human rights, land and wildlife conservation organizations, educational institutions, hospitals, and many others. The exemption from taxes of these types of organizations is considered mandatory, and the mandatory classification applies equally to qualifying religious and educational corporate missions.[13] The "mandatory" exemption class is in distinction from the "permissive" class, provided by RPTL § 420-b, where an assessor can determine a use to fall under § 420-b and thus be taxable. The two classes are sometimes confused or misapplied.

The landowner must satisfy two broad requirements to qualify for the § 420-a mandatory exemption. The ownership organization must have a not-for-profit purpose, and the use of the property must be exclusively for executing that purpose. Interestingly, the use, or even multiple uses, need not be carried out by the owner itself, so long as the entities and uses involved satisfy the requirements of the statute. The legal interpretation of "ownership" and "exclusive use" have broad interpretations in the case law that often stretch beyond what you might guess from a simple read, and a comprehensive examination of these terms is beyond the scope of this article. However, clearly, because conserved open space land has been held to qualify in some circumstances for the § 420-a exemption, and yet is not expressly mentioned in the statute, it will be helpful to look at how some nonprofit organizations devoted to preserving nature, and a use of property that provides the public with the benefits of such preservation, came to be squarely within the scope of the charitable exemption category of RPTL § 420-a.

The underlying support for tax exemptions generally comes from one or a combination of two long-held civic rationales. First is the "burden" theory, which suggests that the property's use for a particular purpose relieves government of a cost that it would otherwise incur and, therefore, the private performance of a public responsibility creates a savings or a government cost avoidance that offsets the loss of tax revenue. Second is the "benefit" theory, which is less concerned with fiscal implications and instead posits that government should encourage property uses that benefit the community by lessening the owner's share of the tax burden.[14]

Under the benefit theory, land identified as significant for conservation by a public planning process that has identified it as a conservation priority for a community, region or state, that is owned and managed by a nonprofit organization, promotes environmental and human health, advances the education of the community and provides other related services to the community, so it is deserving of a tax break.[15] Partly as a result of this dynamic, and the somewhat odd nature of the legislation that protects preserved open space in New York State, significant litigation was required to establish this form of tax exemption, which came about in 1979, in a historic decision by the Court of Appeals in *Mohonk Trust v. Board of Assessors of Town of Gardiner*.[16] This decision has since been cited in several subsequent cases establishing well-settled law on the tax exemption of legitimate conservation organizations and the lands they hold in trust for the public.

Exemptions for nonprofit organizations fall generally under one of two statutes: either RPTL § 420-a, mandatory exemption class,[17] or § 420-b, permissive class, in which certain tax-exempt entities may be taxed. The permissive class statute allows municipalities to adopt a local law by which organizations organized exclusively for bible tract, benevolent, missionary, infirmary, public playground, scientific, literary, bar association, library, medical society, patriotic or historical, as well as others, may be taxed.

The Court of Appeals's *Mohonk Trust* decision unanimously reversed lower court rulings, determining that wild lands held by The Mohonk Trust[18] for conservation purposes indeed qualify as wholly exempt in the mandatory class under the statute.[19] Justice Gabrielli, writing for the Court, stated:

> Clearly, the Trust land is not used for religious, hospital or cemetery purposes. We conclude that it is, however, used primarily for an assortment of "charitable . . . educational [and] moral improvement of men, women, or children" purposes, for we see no reason why these categories should not encompass lands

used for environmental and conservation purposes which are necessary to the public good and which are open to and enjoyed by the public. . . .[20]

Contained within this opinion was another key clarification:

"[W]hile exemption statutes should be construed strictly against the taxpayer seeking the benefit of the exemption, an interpretation so literal and narrow that it defeats the exemption's settled purpose is to be avoided. . . . Accordingly, 'exclusive' as used in the context of these exemption statutes has been held to connote 'principal' or 'primary.' . . . Hence, purposes and uses merely auxiliary or incidental to the main and exempt purpose and use will not defeat the exemption." (*Matter of Association of Bar of City of N.Y. v. Lewisohn*, 34 NY2d 143, 153).[21]

The Court thus affirmed an important distinction that had been made by an amendment to § 421(1)[22] in 1971 to add "organized and conducted" for exempt purposes.[23] Before 1971, an applicant for a charitable exemption qualified only if it was "organized" exclusively for exempt purposes. The determination was limited to an examination of its organizational documents, that is, its certificate of incorporation and by-laws. The Court interpreted the addition of the word "conducted" to mean that determination of an organization's purposes may turn on the extent to which it pursues the various purposes for which it was created. Therefore, in the mandatory class, the determination is no longer dependent solely on the language of the applicant's organizational documents, and assessors are instructed to apply a broader organization purpose test, as well as a use test.[24]

The *Mohonk* case also addressed an assertion that because individuals from the Smiley family, who founded the Trust and donated land to it, continued to reside and operate a business on adjacent land, the purported public benefit was a mere pretext to shield from taxation what was essentially a private enclave. The Court opined that tax-exempt status should not be denied because those who have donated property to an exempt organization continue to enjoy the same benefits afforded other members of the public who live in the vicinity of the land.

[W]e reject the suggestion that simply because the Smiley family may receive some benefits by reason of the fact that their hotel is adjacent to the Trust property, the Trust thereby is converted into a commercial organization. The Trust itself is plainly a nonprofit organization which serves an essential public need. Hence, in the absence of any indication that the Trust is merely a device used to shield a profit-seeking enterprise, which is not the case here, the fact that nearby landowners in fact do benefit by the existence and operation of the Trust is irrelevant to its tax-exempt status.[25]

On the basis of the *Mohonk Trust* decision, the Court of Appeals then held, in *North Manursing Wildlife Sanctuary, Inc. v. City of Rye*,[26] that a wildlife sanctuary operated for the benefit of the public, but which placed some limits on the number of visitors to the property, as well as where they could go within the property in order to protect the bird habitat, was not in fact a private park operated for the benefit of the landowners of North Manursing Island.

## The Evolution of the Nonprofit Sector and Property Tax Exemptions

Modern charitable exemptions can be traced back at least as far as the Statute of Charitable Uses in England, enacted in 1601.[27] The colonists brought with them to America the English tradition of conferring special status and benefits on associations dedicated to "charitable" causes. Thus, colonial America was hospitable from its inception to exempting uses that were deemed to have community value. Following the Revolution, charitable associations organized and evolved under state corporate governance laws, and states continued the colonial practice of conferring property tax exemptions on charitable organizations.[28]

When Alexis de Tocqueville toured America in 1831, "with the intention of examining in detail as scientifically as possible all the mechanism (ressorts) of . . . American society . . . [*sic*]," [29] he described what he saw as the expanding nonprofit sector.

Americans of all ages, all conditions, and all dispositions constantly form associations . . . religious, moral,

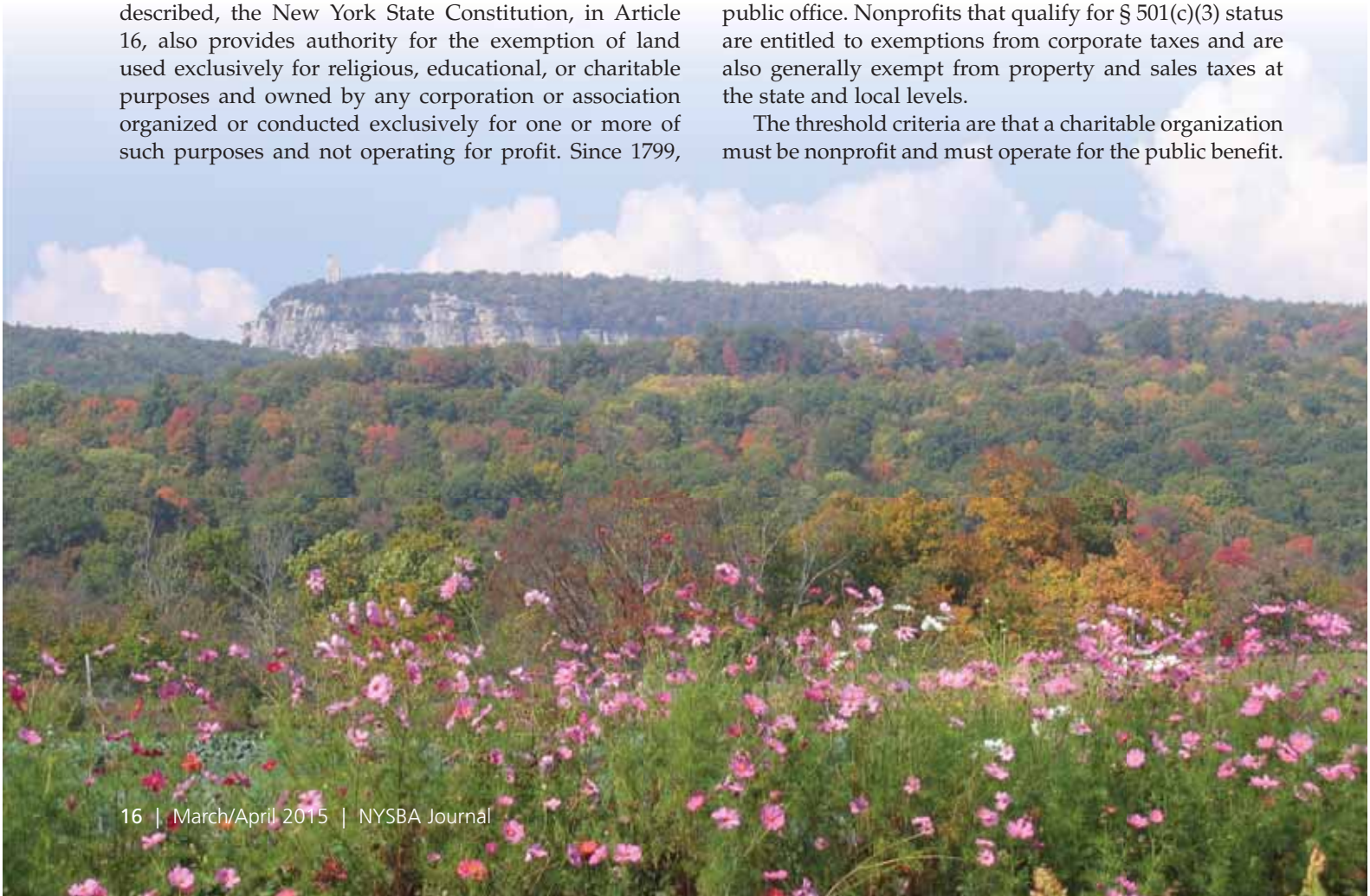
> serious, general or restricted, enormous or diminutive . . . if it is proposed to inculcate some truth or to foster some feeling by the encouragement of a grant example, they form a society.[30]

The work of the various kinds of charitable organizations that make up the nonprofit sector in America today has become a significant factor in the economy and cultural life of communities across the nation. The nonprofit sector has evolved as the third sector of society, alongside the private and the government sectors, and is closely intertwined with both. In New York's Hudson Valley, for example, a 2006 report by the Dyson Foundation estimated that the aggregate economic impact of nonprofits in the seven-county Mid-Hudson Region was about $6.5 billion, or 14% of the total output of the region.[31] This included a total of 89,000 jobs attributable to the nonprofit sector and about 23% of the wage and salary positions of the region. And while some nonprofit organizations are legally exempt from property and other taxes, the revenues their activities generate to the state and local government nonetheless span a range of taxes and fees. Analyzing revenue from only two of these taxes, personal income tax receipts and state and local sales tax receipts, it was estimated that the nonprofit sector contributes about $109 million annually in the Mid-Hudson area.[32]

The property tax exemption based upon charitable purposes was first enacted in New York in 1799. In addition to the two provisions of the RPTL previously described, the New York State Constitution, in Article 16, also provides authority for the exemption of land used exclusively for religious, educational, or charitable purposes and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit. Since 1799, the mandatory exemption remained substantially intact in subsequent legislative enactments[33] and survived the amalgamation of these statutes.[34] In 1893, the statutory exemptions relating to property owned by a charitable organization and used for charitable purposes began to take a form similar to that now found in § 420-a of the RPTL. The language contained in the Laws of 1893 remained substantially unchanged when the Tax Law was codified in 1896[35] and was set forth in subdivision 7, section 4 of that law.[36] The language was changed in 1948 when a legislative amendment was adopted to permit a tax-exempt organization to lease its property to another tax-exempt organization.[37] However, a more detailed review of the subject of exemptions on property leased by one charitable organization to another is beyond the scope of this article.

At the federal level, the U.S. government initially enacted a statute exempting charitable associations from taxation in 1894, when it passed the first income tax law. Today, organizations that qualify for exempt status as "publicly supported charities" under § 501(c)(3) of the Internal Revenue Code must serve "religious, charitable, scientific, testing for public safety, literary, or educational purposes." They must not distribute proceeds from their work for the pecuniary benefit of individual members or employees, but rather must reinvest the proceeds in their mission to serve a broad membership and/or the general public, and they must not campaign for candidates for public office. Nonprofits that qualify for § 501(c)(3) status are entitled to exemptions from corporate taxes and are also generally exempt from property and sales taxes at the state and local levels.

The threshold criteria are that a charitable organization must be nonprofit and must operate for the public benefit.



The more difficult issue can be determining what is charitable in nature. When seeking or renewing a real property tax exemption in New York State, the applicant organization must submit forms, prescribed by the State Office of Taxation and Finance, to the local assessor seeking either an initial exemption or annual renewal of exemption. The answers to questions on the forms must include specific and sufficient detail about primary and secondary purposes and activities, and about how the organization was formed. When attempting to determine whether a nonprofit is a charity entitled to a mandatory exemption under RPTL § 420-a, or should otherwise be in the permissive class under RPTL § 420-b, the assessor is instructed to request documentation from the organization evidencing its federal charity status. Assessors are instructed:

> In most instances, the applicant will be exempt from federal income taxes under section 501(c)(3) of the Internal Revenue code. . . . Since the IRS requires organizations to be nonprofit in order to be exempt from federal income taxes, the assessor may consider the applicant's federal exempt status to be proof that it satisfies the nonprofit requirement of sections 420-a and 420-b.[38]

Assessors are further advised: "However, exempt status under the Internal Revenue Code is not conclusive with regard to exempt status under the Real Property Tax Law."[39] Assessors are also encouraged to check with the New York State Department of Law, Charities Bureau, which maintains a registry of (a) organizations administering charitable assets; (b) organizations soliciting more than $25,000 per year in charitable funds; and (c) organizations receiving any property for charitable purposes in the state.

Some categories of exemptions, such as those for bona fide religious or educational purposes, so long as properly applied to the individual facts, are relatively straightforward and are accepted by most as a given part of the tax structure. Since 1938 these uses have been incorporated into the New York State Constitution in Article 16, § 1, and also in the statute. "Although the word 'charitable' is not defined in the [state] constitution or in general statutory terms, case law sets important precedent and helps define charitable use."[40] A case in 1917 developed a flexible definition of "charitable." In *Estate of Rockefeller*, the court stated that "a charitable use . . . may be applied to almost any thing that tends to promote the well-doing and well-being of social man."[41] The exemption category of "religious" under RPTL § 420-a leads one naturally to think of churches, synagogues, and the like. Others, such as exemptions related to desirable types of construction for purposes such as affordable housing, may be objected to by some on policy grounds but are reasonably straightforward to apply and clear enough in the statutory descriptions.

And then some forms of property tax exemption, while settled law in New York by the courts, nonetheless beg for greater clarity in the enabling statute. Land conservation is clearly such a use.

There is case law predating and following the *Mohonk Trust* decision that confirms that use of land for conservation purposes is considered a charitable use. For example, in *People ex rel. Untermyer v. McGregor*,[42] decided in 1946, the preservation of park-like grounds devoted to the exhibition of flowering plants was held to be a charitable use. In *Untermyer*, the testator bequeathed his estate to the public to be used as a park. When the state renounced the gift, the executors of the estate formed a nonprofit corporation and sought an exemption for the land. The Court of Appeals held that the public use and enjoyment of park-like grounds "for physical activity and relaxation [and for] aesthetic pleasure and inspiration" was charitable in nature and thus exempt under the statute.[43]

Some categories of exemptions are relatively straightforward and are accepted by most as a given part of the tax structure.

*In re De Forest*[44] concerned a trust that had been created to preserve certain forests, lakes and mountains in the Adirondacks. The exemption had been denied because there was private profit. However, the court stated in dicta that where a trust is created "for the general purpose of preserving forests or the scenic beauty of lands . . . and the property is dedicated to the general public use it is undoubtedly valid as a charitable trust."[45]

In *New York Botanical Gardens v. Assessors of Town of Washington*,[46] the Town of Washington had denied a previously granted exemption to a nonprofit, the Cary Arboretum, part of the Bronx Botanical Garden, on the basis that its primary purpose was "scientific," which is in the "permissive class" under then-RPTL § 421(1)(b) (now RPTL § 420-b). The property was open to the public, subject to supervision and limitations on access, and nature trails were maintained for the public use. Numerous educational programs had been established in collaboration with high schools, colleges and universities. The Court held that the land in question was

> dedicated to a number of general activities, the most predominant of which are conservation, preservation, instruction, recreation and ecological study. . . . [T]he use to which this particular parcel is put accomplishes several exempt purposes, including educational, charitable and moral improvement purposes. We see no reason to depart from our prior holdings that lands used for such a combination of purposes should be deemed to fall within the broader categories of absolutely exempt uses.[47]

The Court of Appeals affirmed, holding that in seeking to withdraw a previously granted exemption, the municipality bears the burden of proving that the property is subject to taxation.

## Public Policy in New York State Encourages Forest and Wildlife Conservation

Is there a policy basis for the work of tax-exempt nonprofit organizations in protecting land identified as important for conservation? The state Constitution declares:

> Forest and wildlife conservation are hereby declared to be policies of the state. For the purpose of carrying out such policies the legislature may appropriate moneys for the acquisition by the state of land, outside of the Adirondack and Catskill parks as now fixed by law, for the practice of forest or wild life conservation.[48]

New York State continues to directly acquire land to be owned and managed by the state. However, increasingly the state has also relied on nonprofit land trusts to acquire and hold such priority conservation lands for eventual transfer to the state, and has made state funds available, through annual legislative appropriation to the Environmental Protection Fund, to nonprofit land trust organizations in the form of competitive grants. Funds are awarded (which must be matched by private philanthropic support) to acquire and manage land in nonprofit ownership that will likely never be transferred to the state, but which has been identified in the New York State Open Space Conservation Plan as a priority for conservation.[49] Carrying out these state policies for land conservation is another way for a charitable nonprofit land trust organization to demonstrate public benefit, and the leverage of public sector investments, in return for mandatory exemption under RPTL § 420-a.

## The Discretionary Exemption Under RPTL § 420-b and Its Potential for Abuse

From 1938 until 1971, New York's real property tax exemptions were contained only in RPTL § 421(1) and Article 16 of the state Constitution. In 1971 and 1972, the Legislature modified the scheme and added RPTL § 421(1)(b), under which exemptions could be granted or denied at the discretion of the local assessor, provided a municipality first adopted a local enabling law. The all-inclusive language of the original RPTL § 421(1) was segregated into the narrowly affirmed, constitutionally protected religious, charitable and educational uses in § 421(1)(a), and the new § 421(1)(b) with uses that had been categorized by the courts as distinct from the constitutionally protected categories, and there was thus no constitutional bar to their removal.[50] In 1981, these sections became § 420-a, the "mandatory class" and § 420-b, the "permissive class."[51] The § 420-b uses, which are now subject to assessor discretion and may be taxed, include, as previously noted, entities organized exclusively for bible tract, benevolent, missionary, infirmary, public playground, scientific, literary, bar association, library, medical society, patriotic or historical, and other purposes.

The creation of two distinct classes, one of which is constitutionally protected and the other which is not, is significant to the protection of conservation lands. While there was no constitutional bar to the removal of § 420-b (permissive) uses, there remains a constitutional bar to the removal of conservation lands held by nonprofit organizations and dedicated for the benefit of the general public, even if not explicitly expressed in the language of RPTL § 420-a. As shown, New York's highest Court has confirmed that land conservation is a charitable use.[52] Furthermore, it has been confirmed that

> organizations which qualify for exemption under Section 420-a of the RPTL are not statutorily required to apply for exemptions, as the provisions of the [RPTL] expressly state that property once exempt remains exempt so long as it continues to be owned and used for exempt purposes, and there is no requirement that the owner and user continually prove exempt status after it has been initially established.[53]

Nearly one-half of properties that are not taxed statewide are government or school-owned public property, and generally classified as "exempt."

Why is this significant, and what would justify a land trust's fear that it might be miscategorized for consideration as permissive rather than mandatory exemption from taxes? In 1982, barely three years after the *Mohonk Trust* decision, the Town of New Paltz passed a local law[54] that would appear to have been in response to the new "permissive class" created by the Legislature the year before. The local law did not reference the authority conferred by § 420-b; it makes for challenging reading. In its first section, the law conflates all enumerated § 420-a and § 420-b uses into one, lengthy, run-on sentence that attempts to define "nonprofit organization" and adds "museum, environmental and *conservation*" (emphasis added). This is followed by a second section, "Taxation of Property of Certain Organizations," which states,

> All properties of nonprofit organizations, as defined [herein] in the Town of New Paltz shall be taxable by the Town of New Paltz for all purposes, including special ad valorem levies and special and regular assessments by districts established pursuant to the Town Law.[55]

Thus the town appears to be assuming local taxing authority for both § 420-a and § 420-b properties, regard-

less of their constitutional protection from taxation, and obscuring or contravening the distinctions expressly created by the § 420-a and § 420-b classifications in the RPTL.

Interestingly, the New Paltz local law remained dormant for more than 30 years; it was not applied until 2014, when it was cited by the town as the basis to threaten to remove the long-held and previously granted exemptions of several exempt nonprofits in the Town of New Paltz.

Among those that were denied exemptions on certain properties previously granted such exemptions were Open Space Institute, Inc., a nonprofit land conservation organization formed in 1974, which has protected over 850 acres that it had already held as exempt in the town; Wallkill Valley Land Trust, a nonprofit land conservation organization established in 1985 and holding land exempted previously; and Historic Huguenot Street, one of America's oldest nonprofit educational museum corporations originally chartered in 1894 and chartered by the New York State Board of Regents in 1971.

Aside from the local law's near incomprehensibility, its most significant flaw is that it incorrectly puts "environmental and conservation" into a permissive class, which is contrary to the long history of protection afforded to such organizations by the courts. Whether by design or simple draftsman's error, this has created confusion and led to unwarranted and legally impermissible challenges to established exemptions. Such practices flout the guidance and legal opinions provided by the New York State Department of Taxation and Finance and the aforementioned judicial decisions, which provide a roadmap based on well-settled law.[56] One is also left to wonder whether the Town of New Paltz is the only local government in New York State to have sought to generate additional and unauthorized tax revenue by such means.

Of course, in the grander scheme, so long as such local laws remain on the books, whether enforced or not, they create a tool by which local government can disrupt nonprofit operations; impose additional and unnecessary costs to unravel the damage done; extract non-tax concessions in exchange for settlement; create the annual threat of a costly legal battle over entitlement to a mandatory exemption; and, most significantly, raise the specter of turning an otherwise supportive community against the nonprofit that simply seeks to preserve its constitutional right so that it can continue to operate.

The resolution is a simple one. Legitimate sample local laws drafted to serve the true purpose of RPTL § 420-b are readily available, as is guidance provided by New York State's Counsel to the Office of Real Property Tax Services (ORPTS) as well as informed local municipal counsel. No qualifying nonprofit should be left to wonder each year whether it may be strong-armed into a tax payment or some other concession merely as a result of local politics and inartfully drafted local laws that do not meet constitutional muster.

## "Exempt Property" Exaggerations That Mislead the Public

There is a widely held perception that exempt nonprofits (such as land trusts) occupy a significant share of the non-taxable assessment roll and thus pose a major fiscal burden to local governments. In reality, the burden from these nonprofit exemptions statewide, and in most municipalities, is *de minimis*.

Nearly one-half of properties that are not taxed statewide are government or school-owned public property, and generally classified as "exempt," regardless of the fact that the non-taxable nature of the property is inherently different from privately owned property qualifying under RPTL § 420-a. Statistics published annually by the State Department of Taxation and Finance show that "wholly exempt, private organizations" account for only 1.6% of the total number of exemptions statewide, with the majority, 95.2%, of those exemptions being partial exemptions given to myriad private entities such as to encourage development, etc.

When viewed from the standpoint of the *percent* of exempt value, "wholly exempt private" exemptions account for 14.9% while "wholly exempt public," i.e., government properties, total 49%.[57] Government property is not tax-exempt. It has been relieved of the burden of local taxation because it was not taxable in the first instance. Real property owned by local governments and school districts is technically not immune from taxation, but as a practical matter, it would be a futile gesture for government to tax itself.[58]

Ulster County, New York, is an example of a county in which the burden of nonprofit exemptions is relatively low. As compared to all 57 upstate counties analyzed by the Department of Taxation and Finance, Ulster was the fourth lowest in incidence of exempt value on the 2012 assessment rolls, at 14.12%. In the Ulster County Town of Gardiner, a more rural town, the percent of wholly exempt assessed value is only 2%. This 2% comprises 56 exempt parcels, but on closer examination, 25 of those 56 properties are actually town government properties, leaving just 31 parcels of the total being held by exempt nonprofit organizations.

In the more populous neighboring Town of New Paltz, wholly exempt parcels total 31% of the assessed value in the town. However, New Paltz has more municipal infrastructure; it is where the properties of the New Paltz Central School District are located and is also home to a major state university campus and the state Department of Environmental Conservation regional headquarters. Accordingly, about a third of these "exempt" parcels are government property, so just about 66% of the exempt parcels are actually held by wholly exempt nonprofit organizations.[59] By treating government property as "exempt," and then merging it with nonprofit exempt property for statistical purposes, New York State presents a misleading picture of the impacts of land being off the

tax rolls. This basic distinction – that much of what is not taxed is in fact government land excused from taxation – is often ignored, and the result is an inflation of the exemption statistics and an exaggeration of the loss of tax revenue due to the exempt landholdings of nonprofits.

## The Effect of Access Fees and Public Access Limits on the Exemption

An argument often used by municipalities seeking to challenge a land conservation organization's exemption (as well as those of other types of nonprofits) is that the organization charges a fee for access or use of some or all of its facilities or services. Challenges have also contended that public access to the exempt property is too limited. The courts have repeatedly affirmed that neither the charging of fees nor reasonably limiting public access for mission-related reasons defeats exempt use or purposes. In *Mohonk Trust*, it was noted that the Trust is supported not only by outside charitable contributions, but in part by the day fees it charges to visitors from the general public and annual memberships providing year-round access available to anyone who wishes to purchase one. Thus, the Trust was serving a broad public and not limiting access to specific classes of individuals or to specific individuals. This income is used to maintain the Trust land and carry on a variety of educational programs across the entire property, in accordance with its land conservation mission.

In an interesting decision on this point, the Court of Appeals, in *Symphony Space v. Tishelman,*[60] reversed a lower court finding that a nonprofit theater and performing arts organization was not entitled to the exemption provided by RPTL § 420-a because the group rented its theater to outside groups, and often charges admission, creating a "commercial patina" that tended to negate the application of the charitable and educational categories, in that it is not organized and conducted exclusively for an exempt purpose. Citing *Mohonk Trust*, the Court reversed, stating,

> [T]he word "exclusive" has been held to connote "principal" or "primary" [and that a] "commercial patina" alone is not enough to defeat tax-exempt status especially when such rentals [or admission fees] are merely incidental or auxiliary to the main exempt purpose and do not realize a profit but are used to cover petitioner's costs. Moreover, restrictions placed on the use of or public access to the property do not strip the property of its tax-exempt character which requires that it be "open to and enjoyed by the public," as long as the restrictions imposed are not inconsistent with the public purpose for which the property is being used.[61]

Likewise, in *North Manursing* and in *New York Botanical Garden*, the Court held that a wildlife sanctuary would qualify for an exemption even if not entirely open to the public and that, as managers of land with a nature preserve purpose, placing reasonable limitations on where people could go within the property to protect its more fragile natural areas, including bird habitats, did not defeat the use of the property by the public in a meaningful way and thus defeat its exemption. Similarly, in *Adirondack Land Trust v. Town of Putnam Assessor*,[62] the Appellate Division held that a remote parcel on Lake George, acquired by the nonprofit trust for environmental and conservation purposes, but with limited public access, was in keeping with its mission as a nature preserve. The Court observed:

> Use of property as a wildlife or nature sanctuary is a use in keeping with charitable purposes. Furthermore, it is recognized that "restricted access to and use of a wildlife sanctuary is essential lest the sanctuary fail of its purpose." That the restrictions are necessitated by the . . . land itself, rather than by the owner's affirmative acts, is irrelevant, if they are not inconsistent with maintaining the habitat in its natural state and protecting the wildlife – which on petitioner's land includes a threatened species, the timber rattlesnake – from undue interference.[63]

In the state manual guiding assessors on making nonprofit status determinations pursuant to RPTL §§ 420-a and 420-b, assessors are advised to verify that the services being provided and activities engaged in by the nonprofit are appropriate to its stated purposes. Under the section "Administration of Services" there is guidance that in order to be considered as operating in furtherance of exempt purposes an organization (1) must be controlled by persons who are competent to manage the organization and who have no personal financial interest in it, and (2) must make its services available to an entire community (in some cases, to the general public and, in other cases, to the organization's membership) rather than to specific individuals.

The conditions under which an organization charges for services may be requested by the assessor to ensure that services are not limited just to certain specific classes of individuals. Under "Financial Criteria," guidance to assessors indicates that an organization satisfies the nonprofit requirement if its net income does not inure to the benefit of private shareholders or individuals, but rather is used in furtherance of corporate purposes.[64]

## Summary and Recommendations

The landmark *Mohonk Trust* decision, subsequent cases, and opinions of counsel to ORPTS that have relied upon *Mohonk*, establish that conservation land owned and used by a bona fide entity qualifies under New York State law for tax-exempt status under the umbrella of having a charitable purpose. These decisions expressly recognize the importance and value of preserved open space to our quality of life and natural environment. We opened this article by inquiring into the value of open space. While it is apparent that there may be no reliable way to formulaically determine its market worth, open space undoubt-

edly has been acknowledged to hold great intangible and intrinsic value to New Yorkers that is worthy of promotion, and that matches or exceeds any costs incurred by reason of forgone tax revenue.[65]

Nonprofit organizations complement and supplement the work of both the private and government sectors. Nonprofit land conservation organizations conserve land in private ownership and management for the benefit of the public. They are supported largely by voluntary philanthropic contributions from individuals, often supplemented by modest site access fees from visitors, memberships, or program service fees from participants to defray ongoing management costs, and are thus a viable alternative to taxpayer-funded open space purchase, and public ownership and management.

While the exemption granted by tax policy to such entities causes a *de minimis* tax burden shift to taxable properties within a municipality, many believe the quality of life dividends these lands generate are well worth the cost. The forgone revenues from taxing these lands is more than made up in offsetting revenues from increased property values near open space and economic activity and jobs sustained from outdoor recreation and tourism. Home values are arguably significantly enhanced by proximity to a major destination such as the Mohonk Preserve. Moreover, such lands generate free ecosystem services to protect natural resources that keep communities resilient and environmentally healthy. Immersion in nature for adults, families, and schoolchildren, and participatory volunteerism in land stewardship and natural science, are priceless, life-affirming experiences that help forge indelible individual and societal land ethics.

One might ask whether the New York State Legislature should revisit and tighten the language of RPTL §§ 420-a and 420-b to improve clarity for assessors and nonprofits, particularly as the law applies to preserved open space. Changes to § 420-a would also likely require a state constitutional amendment to clarify portions of Article 16. We would respond that while such amendments might make it less likely that local governments would attempt to remove such exemptions, such changes should be unnecessary because the courts have definitively clarified that land conservation for public benefit is included within the scope of the charitable category of § 420-a and, in some cases, may also be considered uses that qualify as educational as well as for moral and mental improvement, or a combination thereof. The State Department of Taxation and Finance provides ample guidance to local assessors on how to review and determine a nonprofit's classification under §§ 420-a and 420-b, and also provides extensive application forms and supporting documentation requirements for nonprofits to make the case for their exemptions.

As discussed, the combined incremental tax shift burden to taxpayers resulting from exempt §§ 420-a and 420-b properties in most municipalities is relatively minimal. However, given the need to raise revenues and balance municipal budgets, § 420-b does provide municipalities with discretion and a roadmap as to which non-protected exemption options they may wish to close to increase revenue by denying those exemptions over which they have legitimate discretion. Municipalities should understand, however, and perform a cost/benefit analysis, as to whether and how such decisions could impact the delivery of programs and services by qualifying § 420-b nonprofits that the community may have come to rely on. Perhaps most important is to ensure that municipalities enact clear local laws enabling them to properly apply § 420-b, and that assessors have the guidance to properly apply the law. Legal counsel can play a key role serving municipal and nonprofit clients to advise and educate both assessors and nonprofits as to their roles and responsibilities in the process.

> This basic distinction – that much of what is not taxed is in fact government land excused from taxation – is often ignored.

Nonprofits must become more adept at communicating with their local assessor, and more thorough in describing and documenting their nonprofit status annually, on their § 420-a and § 420-b forms in order to assist the assessor in understanding the organization's mission and purposes, and in timely filing their applications prior to the applicable deadline in each municipality.[66]

Legal advisors can make sure nonprofits know and understand their tax-exempt status and which exemption category applies, whether "mandatory" or "permissive," and ascertain that these clients are informed about their exemption rights as conferred by court decisions, statutes, state policies, and the New York State Constitution. In most cases, this will avoid protracted tax proceedings that may be financially costly to both sides, as well as result in the loss of strong community support for the nonprofit organization. ■

1. *2014 Draft New York State Open Space Conservation Plan (Plan) & Draft Generic Environmental Impact Statement* – The Draft Plan is an update and revision of the 2009 Plan; September 2014 Andrew M. Cuomo, Governor. http://www.dec.ny.gov/lands/98720.html; *see also Town of New Paltz Open Space Plan: A Framework for Conservation*; May 2006; Behan Planning Associates, LLC; Copyright 2006 Behan Planning Associates, LLC. This open space plan was created by a joint committee composed of citizens from the Village and the Town of New Paltz as a cooperative inter-municipal effort. The joint committee was aided by several community planning consultants throughout the project, including AKRF, Inc. (for inventory services in 2003), Shingebiss Associates (for fiscal/conservation finance research services in 2004), and culminating with final assistance from Behan Planning Associates, LLC (for open space planning consulting services and plan report preparation), http://www.townofnewpaltz.org/building/pages/open-space-plan-2006.)

2. *The Economic Benefits of Protecting Healthy Watersheds*, U.S. Envtl. Prot. Agency, 841-N-12-004, April 2012.

3. *E.g.,* http://www.mohonkpreserve.org/visit-us.

4. New Paltz Open Space Plan, § 1, p. 42006.

5. Bertram Lewis, *Do Syndicators Overpay?*, Appraisal J. (Apr. 1985).

6. *See, e.g., Am.-Russian Aid Ass'n v. City of Glen Cove*, 41 Misc. 2d 622 (Sup. Ct., Nassau Co. 1964); *Mohonk Trust v. Bd. of Assessors Town of Gardiner*, 47 N.Y.2d 476 (1979); *People ex rel. Untermyer v. McGregor*, 295 N.Y. 237 (1946); 11 Op. Counsel SBRPS No. 48.

7. *See, e.g., United Parcel Serv., Inc. v. Tax Appeals Trib. of the State of N.Y.*, 98 A.D.3d 796 (3d Dep't 2012); *Astoria Generating Co. v. Gen. Counsel of the N.Y. State Dep't of Envtl. Conservation*, 299 A.D.2d 706 (3d Dep't 2002); *City of N.Y. v. Assessors of the Town of Roxbury*, 296 A.D.2d 625 (3d Dep't 2002); *Lackawanna v. State Bd. of Equalization & Assessment*, 16 N.Y.2d 222 (1965).

8. *Delancy St. Found. v. Bd. of Assess. Review of Town of Se.*, 112 A.D.2d 132 (2d Dep't 1985); *see also App. of N.Y. Conf. of Ass'n of Seventh-Day Adventists*, 80 N.Y.S.2d 8 (S. Ct. 1948), *rev'd on other grounds*, 275 A.D. 742 (4th Dep't 1949).

9. For example, in Connecticut, subject to qualification, property used for open space land preservation is exempt from taxation under CGS 12-81(7); the State of Washington provides that such lands are to be valued at their current use, i.e., as restricted from development, rather than their highest and best use, such that the resulting assessed value produces the equivalent of a partial exemption, *see* Washington Open Space Taxation Act (1970), Revised Code of Washington Chs. 84.33, 84.34, and Washington Administrative Code, Ch. 458-30; Rhode Island permits land burdened with a conservation easement to be assessed as part of the Farm, Forest and Open Space Program, which, like Washington, values based on "use value" rather than ordinary market value, *see* Rhode Island G.L. Ch. 44-27, § 44-27-2 and Ch. 44-5, § 44-5-12; In South Carolina, § 27-8-70 of the Conservation Easement Act of 1991 recognizes a similar form of assessment exemption of value for conservation lands, stating: "For *ad valorem* tax purposes real property that is burdened by a conservation easement must be assessed and taxed on a basis that reflects the existence of the easement."

10. For land conservation, New York has created incentives in the form of partial real property tax abatements for private owners of such qualifying working lands as active farmland enrolled in an Agricultural District (*see* N.Y. Agriculture & Markets Law, art. 25AA, § 305) and managed forest land enrolled in the Forest Tax Program (*see* RPTL § 480a). These partial tax abatements are in return for an agreement by the private owner to stay enrolled in farming or forestry programs for a specified term of years, and carry penalties for premature exit from the programs. In addition, those private landowners who voluntarily donate a permanent conservation easement on their land to government or to a qualified nonprofit conservation organization pursuant to New York State's conservation easement statute (*see* N.Y. Envtl. Conservation Law, art. 49, tit. 3) can obtain a limited real property tax credit of up to 25% of the town, county, and school district taxes, not to exceed $5,000 (*see* Tax Law art. 9-A, § 210(22), art. 2, § 606(kk)). These partial exemptions recognize the limitations on development to which the landowner has agreed, and in theory they compensate for the diminution in the land's highest and best use value.

11. Land trusts are typically qualified as "publicly supported charities" under § 501(c)(3) of the I.R.C. and most often as N.Y. state nonprofit corporations under § 402 of N.Y. Not-for-Profit Corp. Law.

12. RPTL § 420-a(1).

13. *Id.*

14. William R. Ginsberg, *The Real Property Tax Exemption of Nonprofit Organizations: A Perspective*, Temple L. Quarterly 53, p. 291, 307.

15. *Id.* at 314 *and see* n. 72 referencing the Restatement of Trusts. *N. Manursing Wildlife Sanctuary v. City of Rye*, 48 N.Y.2d 135 (1979).

16. 47 N.Y.2d 476 (1979).

17. Lands owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, moral or mental improvement of men, women or children, or cemetery purposes, or for any two or more such purposes, and used exclusively for carrying out thereupon such purposes.

18. Later renamed Mohonk Preserve, Inc.

19. Note that the statute in question was then RPTL § 421 and has since been renumbered as 420-a.

20. *Mohonk Trust*, 47 N.Y.2d at 484.

21. *Id. at* 483.

22. Now RPTL § 420-a.

23. 1971 N.Y. Laws, ch. 414.

24. State Office of Taxation and Finance, Exemption Administration Manual, Part 2: Private Community Service and Social Organizations.

25. *Mohonk Trust*, 47 N.Y.2d at 485.

26. 48 N.Y.2d 135 (1979).

27. Ginsberg, *supra* note 14, p. 314.

28. Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 Cornell J. L. & Pub. Pol'y, 1998.

29. *Id.* at 557 (quoting Alexis De Tocqueville, 2 Democracy in America 517 (J.P. Mayer ed. & George Lawrence trans., Harper Perennial 1966) (1840)).

30. George Wilson Pierson, Tocqueville and Beaumont in America 32 (John Hopkins Univ. Press 1996) (1938).

31. Kent Gardner, Ph.D., Sarah Boyce, MSPH, The Nonprofit Sector: A Vital Economic Force in the Mid-Hudson Valley, Dyson Found. (July 2006), http://www.dysonfoundation.org/images/stories/documents/mhv%20nonprofit%20econ%20impact%20report.pdf.

32. *Id.*

33. *See* 1801 N.Y. Laws ch. 179; 1823 N.Y. Laws ch. 262.

34. Rev. Stat. of N.Y. 1829, vol. 1, ch. 13, tit. 1, s. 4.

35. 1896 N.Y. Laws ch. 908.

36. *See Sisters of Saint Joseph v. City of N.Y.*, 49 N.Y.2d 429 (1980).

37. 1948 N.Y. Laws ch. 622.

38. Exempt Administration Manual, *supra* note 24 at p. 21.

39. *Id. at* 11.

40. Gail Miers, *Mohonk Trust v. Board of Assessors* 451, 456, Hofstra L. Rev., vol. 8, Iss. 2, Article 4, 1980.

41. 177 A.D. 786 (1st Dep't 1917).

42. 295 N.Y. 237 (1946).

43. *Id.* at 243.

44. 147 Misc. 82 (1933).

45. *Id.* at 85.

46. 55 N.Y.2d 328 (1982).

47. *Id.* at 336.

48. N.Y. Const. art. XIV, § 3(1)(a); *see* Envtl. Conserv. Law § 1-0101.

49. NYS Open Space Conservation Plan; *see also* Environmental Protection Fund, 1993 N.Y. Laws ch. 610.

50. Miers, *supra* note 40 at 455.

51. As amended by 1981 N.Y. Laws ch. 919.

52. *See also* Miers, *supra* note 40 at 456.

53. Opinion of Counsel, SBEA, No. 51.

54. Code of the Town of New Paltz, Chapter 127, Taxation, Local Law # 1, 1982.

55. *Id.*

56. *See, e.g.*, Opinion of Counsel, State Board of Real Property Services, No. 68, March 6, 1991.

57. Exemptions from Real Property Taxation in New York State: 2011 County, City & Town Assessment Rolls. NY State Department of Taxation & Finance, Office of Tax Policy Analysis, September 2012.

58. Ginsberg, *supra*, note 14, pp. 298–300.

59. "Wholly-Exempt Properties: What Do They Cost Ulster County Taxpayers?" Office of the Ulster County Comptroller, December 31, 2013.

60. 60 N.Y.2d 33 (1983).

61. *Id.* at 38–39 (citations omitted).

62. 203 A.D.2d 861 (3d Dep't 1994).

63. *Id.* at 862 (citations omitted).

64. Exemption Administration Manual, *supra* note 24 at pp. 22–24.

65. *See, e.g.,* "Economic Benefits of Open Space Preservation," Office of the State Comptroller, March 2010.

66. Refer to ORPTS Forms RP-420-a-Org and 420-b-Org; RP-420-a/b Use; Schedule A, RP-420-a/b-Org, Organization and Schedule A. If for annual renewal, Form RP-420-a/b Rnw-I (organization purpose) and RP-420 a/b Rnw-II (property use, and if necessary Schedule A, RP-420 a/b Rnw-I (nonprofit status).

BY DAVID PAUL HOROWITZ

**David Paul Horowitz** (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for more than 25 years and is "of counsel" to Ressler & Ressler in New York City. He is the author of *Bender's New York Evidence* and *New York Civil Disclosure* (LexisNexis), as well as the 2008 and forthcoming 2014 Supplements to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches *inter alia*, New York Practice at Columbia Law School and Brooklyn Law School. He serves on the Office of Court Administration's Civil Practice Advisory Committee, as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee, and is a frequent lecturer and writer on these subjects.

# "What's Your Excuse?"

## Introduction

To err is human, on that we can agree. We are taught from early childhood that admitting mistakes is a salutary activity, and that, where possible, mistakes need to be corrected.

This is true in the world of depositions, where deponents have the opportunity to correct mistakes in their transcripts. Or do they?

## CPLR 3116(a)

Once a deponent has given oral testimony at deposition, the deponent has the opportunity to review the transcript for accuracy and make changes. CPLR 3116(a) provides:

> Signing deposition; physical preparation; copies.
>
> (a) Signing. The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.

The language of the rule is straightforward: "any changes in form or substance which the witness desires to make." When a witness makes changes, "a statement of the reasons given, by the witness for making them" is required.

The 1996 Recommendation of the Advisory Committee on Civil Practice stated:

> The Committee recommends the amendment of CPLR 3116(a) to require that a deponent make any changes he or she wishes to make to the transcript within sixty days from the date the deposition is submitted to the witness.

## Changes to Deposition Testimony

Changes that are substantive, even potentially outcome determinative, are permitted. In *Natale v. Woodcock*,[1] the plaintiff contended the collision with the defendant's vehicle, at night, occurred in part because the defendant's vehicle's headlights were not on. The defendant made changes to the transcript of his deposition testimony:

> [D]efendant was asked two separate times whether his headlights were on and both times responded, "I don't believe so." Thereafter, he supplied an errata sheet in compliance with CPLR 3116 (a), correcting one of the responses to: "Yes, my headlights were on." The reason provided for the correction was that "[a]fter reading the statement, it came back to me."[2]

The Third Department addressed these deposition changes in the context of a motion for summary judgment, made by the defendant, and relying on the changed deposition testimony. Reversing the trial court's denial of the defendant's motion,[3] the appellate court held:

> Even overlooking the fact that defendant corrected only one of his statements from his deposition regarding his headlights, summary judgment should not have been granted. Where, as here, there is a significant conflict on a material issue between the original deposition testimony and the correction on the errata sheet a credibility issue is created that cannot be resolved by summary judgment. The explanation offered for the change was insufficient to extinguish the factual issue.[4]

So, the takeaway from *Natale* is that significant changes to testimony are permitted, but the original answer remains as part of the record, thus creating a credibility issue between the original and changed testimony. The credibility issue must be resolved by the factfinder.

This was also the case in *Breco Environmental Contractors, Inc. v. Town of Smithtown*,[5] where the Second Department held that the defendant's motion for summary judgment was properly denied due to credibility issues arising from changes the plaintiff made to his deposition transcript:

> [Plaintiff] testified at his deposition that although he signed the document he had no affirmative recollection of having ever reviewed the document or of personal knowledge of the basis for the claim. Shortly thereafter [plaintiff] furnished an errata sheet in accordance with CPLR 3116 (a),

in which he corrected the substance of his deposition testimony, claiming that after refreshing his recollection about a meeting he attended before preparation of the notice of claim, he now recalled that he had adequate knowledge about the basis of the claim and had in fact reviewed the document before he signed it.[6]

So, per *Breco*, a witness whose recollection is refreshed after the deposition may furnish changes to the testimony based upon that refreshed recollection.

The First Department, in *Cillo v. Resjefal Corp.*,[7] permitted "substantive" changes that were accompanied by a statement of the reason for the changes:

> Defendant's motion to strike plaintiffs' amended errata sheets or for further depositions was properly denied since a witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefor. Plaintiffs' amended errata sheets are accompanied by such a statement. The changes raise issues of credibility that do not warrant further depositions but rather should be left for trial.[8]

*Cillo* makes clear that resolving the credibility issue created by the deponent's deposition transcript changes is for the finder of fact.

The right to make changes to deposition testimony was recognized before the enactment of CPLR 3116(a). In *Skeaney v. Silver Beach Realty Corp.*,[9] decided under the Civil Practice Act (CPA), predecessor to the CPLR, the First Department held:

> The right to make corrections or changes in the testimony is recognized by decision and is implicit in the statute by the requirement that "[t]he deposition, when completed, must be read by, or carefully read to, the person examined and must be subscribed by him."[10]

Although the CPA did not explicitly permit changes to the deposition transcript by the deponent, the First Department, in *Van Son v. Herbst*,[11] held that such right was inherent in the requirement that the transcript be reviewed by the witness:

> That he must do so without making such changes in it as are properly to be made, in order to have it conform to his more deliberate recollection of the facts, is not directed by the rule. Otherwise there would be no need of having the transcribed testimony read before it is signed. It is read so that corrections may be made and we see no changes, such as plaintiff might not properly have caused to be made. Indeed the new matter would have to be very remarkable or quite unresponsive and unjustified by the questions to require its exclusion.[12]

**Significant changes to testimony are permitted, but the original answer remains as part of the record.**

## Failing to Provide Reason for Change

Where the deponent makes changes to the transcript but fails to give a reason for the changes, the changes will not be considered by the court:

> The IAS Court properly refused to consider plaintiff's correction sheet to her deposition testimony, in which she claimed that the hole over which she tripped was in the street and not, as she had testified, on the sidewalk in front of the house owned by defendants, on the ground that the correction sheet lacked a statement of the reasons for making the corrections (CPLR 3116[a]). Nor are we persuaded by the reason that was offered in plaintiff's opposition to the motion, that she has difficulty communicating in English. The record shows that plaintiff testified through an interpreter whose adequacy was never challenged by her lawyer, acknowledged having fallen in the street more than on the single occasion that she wants to correct, and fully comprehended the questions posed to her.[13]

In *Dima v. Morrow Street Associates, LLC*,[14] the Second Department held that "the Supreme Court properly declined to consider the plaintiff's correction sheet to her deposition testimony which lacked a statement of the reasons for making the corrections."[15]

## Late Deposition Corrections

CPLR 3116(a) requires timely submission of deposition changes: "No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination." Quoting Professor Siegel, the First Department in *Zamir v. Hilton Hotels Corp.*,[16] discussed the reason for the 60-day requirement:

> As further noted in the Practice Commentary, "[a]ccording to the Advisory Committee, the statutory purpose of imposing the 60-day restriction in the first place is to enable other parties, including the party who took the deposition, 'to rely upon the deposition as final,' an aim that would be frustrated by '[l]ast-minute changes.'" We agree that courts should be circumspect about extending the 60-day period inasmuch as "[a]n indication from the courts that an extension will be allowed without a strong showing of justification will quickly evolve a dilatory attitude that can undermine the purpose of CPLR 3116 (a)'s time limit altogether."[17]

The *Zamir* court noted that an extension of the 60-day period would require a showing of good cause, which the plaintiff failed to provide:

> [T]he 60-day period, not being a rigid statute of limitations, is presumably extendable pursuant to CPLR 2004. Nevertheless, CPLR 2004, while giving courts discre-

tion to extend nearly all time limits in the CPLR for doing "any act," nevertheless premises such relief upon a showing of good cause.[18]

A slight delay in furnishing a deposition errata sheet was excused by the First Department in *Binh v. Bagland USA, Inc.*:[19]

> The motion court, stating its preference for disposing of cases on the merits, properly exercised its discretion in forgiving plaintiff's slight delay in furnishing the errata sheet, and correctly ruled that the conflict between the original deposition testimony and the errata sheet raised an issue of credibility inappropriate for summary judgment treatment. Upon this record, plaintiff's deposition correction does not appear to be patently untrue or tailored to avoid the consequences of his earlier testimony, made as it was before defendants moved for summary judgment.[20]

The timing of the submission of deposition corrections, vis-á-vis the making of a motion for summary judgment by an adverse party, is a critical issue when the claim is that the errata sheet or an affidavit submitted in opposition is feigned or tailored.

## Conclusion

Excuses for deposition changes that have passed muster with the courts include "[a]fter reading the statement, it came back to me," and post-deposition refreshing of recollection leading to recalled facts.

Next issue's column will discuss excuses for deposition changes that have been rejected by courts because the testimony is deemed, as a matter of law, to be feigned and/or tailored. ■

1. 35 A.D.3d 1128 (3d Dep't 2006).
2. *Id.* at 1129.
3. It is unclear how defendant prevailed on the motion below (presumably there was proof adduced to support plaintiff's contention that defendant's headlights were not lit).
4. *Natale*, 35 A.D.3d 1128 (citations omitted).
5. 31 A.D.3d 359 (2d Dep't 2006).
6. *Id.* at 360.
7. 295 A.D.2d 257 (1st Dep't 2002).
8. *Id.* at 257 (citations omitted).
9. 10 A.D.2d 537 (1st Dep't 1960).
10. *Id.* at 538 (citations omitted).
11. 215 A.D. 563 (1st Dep't 1926).
12. *Id.* at 564.
13. *Rodriguez v. Jones*, 227 A.D.2d 220 (1st Dep't 1996); *see also Schachat v. Bell Atl. Corp.*, 282 A.D.2d 329 (1st Dep't 2001).
14. 31 A.D.3d 697 (2d Dep't 2006).
15. *Id.* (citations omitted).
16. 304 A.D.2d 493 (1st Dep't 2003).
17. *Id.* at 494 (citations omitted).
18. *Id.* at 493 (citation omitted).
19. 286 A.D.2d 613 (1st Dep't 2001).
20. *Id.* at 614 (citations omitted). *See* CPLR 3116(a).


**Philip Foglia** is a former Assistant District Attorney in Bronx and Queens Counties, a Special Assistant United States Attorney (SDNY) and is currently Special Deputy Inspector General for the State of New York.

# The Lawyer Who Lit the Fuse of the American Revolution

**By Philip Foglia**

Fifteen years before America declared independence, a little-recognized and long-forgotten lawyer lit the fuse that started the Revolutionary War. While American schoolchildren can recite the opening refrain from Longfellow's epic poem, "The Midnight Ride of Paul Revere," the story of the prelude to the "Shot Heard Round the World" first fired by British soldiers at Lexington and later on Concord Green, the name James Otis, Jr. is not on the tip of anyone's tongue. Yet, Otis led the first significant protest to British oppression, which ultimately led to armed conflict by a ragtag group of colonial soldiers against the strongest military power on earth. His sister, Mercy Otis Warren, was an eyewitness to the seminal events and wrote the first comprehensive history of the Revolution.

## The Navigation Act, Taxes and Writs of Assistance

More than a century prior to the American Revolution, the Navigation Acts mandated that the colonists trade exclusively with the British Empire, severely limiting colonial commerce and establishing royal dominance in North America. In 1733, Britain established the Molasses Act, heavily taxing all non-British imported sugars with the dual purpose of raising revenue for the Crown and protecting sugar profits in the British West Indies. Sugar was an important commodity in colonial America because it was distilled into rum and then grog, an immensely popular intoxicant that colonists also believed had medicinal value.

In the early 1760s, the Crown granted even greater powers of enforcement over the colonies. In response to the royal initiatives, colonial mariners became proficient at smuggling and piracy, successfully neutering Parliament's maritime laws. Frustrated by this evasion of British law, in 1760 the Newcastle administration under King George III imposed new customs laws and taxes on the American colonies under the guise of recouping costs associated with its defense of the colonies during the French and Indian War.

In response, colonial resistance on the high seas intensified. As a counterpunch, the Crown then authorized Writs of Assistance. The Writs were general search warrants that could be utilized by government agents to search for smuggled goods in homes, warehouses, ships

or anywhere else they wished. With no legal need for a sworn declaration, notice, or probable cause, the Crown ran roughshod over colonial ports. The colonists were not amused. Not only were they being taxed by Parliament without any representation but the sacred principle that every "Englishman's home is his castle" was being ignored. The colonists were very well aware that they were being treated as second-class citizens – or not even British citizens at all.

## James Otis, Jr.

Enter Harvard-educated lawyer James Otis, Jr. Born into prosperity in the Cape Cod farming village of West Barnstable in 1725, Otis was the oldest of 13 children in a family descended from early Pilgrim settlers.[1] His father, James Otis, Sr., an attorney, was a member of the Colonial Council in Massachusetts and later a judge. His sister, Mercy Otis Warren, considered one of the first proto-feminists, was a poet, playwright and historian, whose writings were influential in helping foment the American Revolution.

Otis graduated from Harvard in 1743 and pursued a legal education under the tutelage of Jeremiah Gridley, a prominent attorney and a member of the General Court of Massachusetts. The youthful Otis began practicing in Plymouth but soon moved to Boston where he built a reputation as a brilliant lawyer and skilled politician. He won appointment in 1756 as a Justice of the Peace in the Vice Admiralty Court. He became its Advocate General in 1760 and was tasked with enforcing the dreaded maritime laws that primarily restricted the colonists' trade to the British Empire.

## The Vice Admiralty Court

The Vice Admiralty Court was not merely a provincial court but rather a branch of the High Court of Admiralty sitting in London. To add insult to injury, the colonists' cases could be tried anywhere in the British Empire, resulting in many such cases being venued in Nova Scotia, which added to the burdens of defense.

In truth, the British simply saw the colonies as an endless supply of raw materials for the mother country and the Court was the primary vehicle for keeping the colonists under the British thumb. The Court brutally enforced the Navigation Acts to ensure that colonies traded only with England, and any non-English goods shipped to the colonies had to pass through England to be taxed. In addition, any colonial exports had to first go to an English port to be taxed before being sent elsewhere. All the Crown's measures were designed to keep the American colonies in an economically subordinate position. The American response was often violent and lawless, justifying the Crown's widespread use of the warrantless searches known as Writs of Assistance.

This was an unprecedented tactic because in the decades preceding the American Revolution, warrantless searches other than searches incident to an arrest were largely unknown to British citizens and their colonial counterparts. The Writs of Assistance were available if authorized under seal of the king according to his unfettered discretion as codified in the 1662 Act of Frauds. However, the Writs were valid only during the life of the monarch who authorized them and indeed were not used in the American colonies.[2] The Writs of Assistance previously issued by King George II had expired following his death. Fed up with defiance by his American colonists, in 1760 King George III authorized new Writs to bring the colonial smugglers and pirates to heel.

> Otis led the first significant protest to British oppression.

## From Loyalist to Patriot

Otis was only 31 years of age when he was appointed to the Court, and a loyal, conservative subject of the Crown. However, all that changed in 1761. His growing disenchantment with the oppressive maritime laws and his abhorrence of the newly imposed Writs of Assistance, which as Advocate General he would have to defend, made Otis reconsider his alliance with the Crown. The final straw emerged when Royal Governor Francis Bernard did not appoint James Otis, Sr. Chief Judge of Boston's highest court, as was widely expected, but instead chose Thomas Hutchinson for the post. (Hutchinson would go on to later infamy for his dealings with colonial Massachusetts during the turmoil of 1775, thereby becoming the most despised man in the colonies and a target of the newly formed Sons of Liberty.) Increasingly uncomfortable with his official position of defending the Crown along with anger at what he believed to be an outrageous affront to his father, Otis, Jr. resigned his position as Advocate General.

Motivated perhaps by principle or revenge, soon after his resignation Otis was recruited by and accepted representation of a group of 53 Boston merchants to fight the extended authority of the Writs of Assistance. A countersuit was filed by British customs agent James Paxton, thus labeling the matter the "Paxton Case" for posterity. Appearing pro bono, Otis challenged the legality of the writs, which enabled British authorities to enter any colonist's home without advance notice, probable cause or reason given, as having little or no precedent in English law.

In a five-hour oration, Otis argued his case at the Massachusetts State House,[3] informing the tribunal that he "was solicited to argue this cause as Advocate General;

and because I would not, I have been charged with desertion from my office. I renounced that office and I argue this cause from the same principle; and I argue it with greater pleasure, as it is in favor of British liberty." Otis reminded the judges that the arbitrary use of power by the Crown "in former periods of history cost one king of England his head and another his throne." Provocative words for sure but buttressed by an appeal to law as he declared that "[i]t [the Writs of Assistance] appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English law-book." Turning a memorable phrase, Otis declared,

> [A] man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.[4]

Otis presciently predicted that use of the Writs will result in "tumult and in blood."[5] John Adams, who as a young attorney was present for Otis's oral argument against the Writs of Assistance, declared years later in a letter to William Tudor, "Then and there, the child independence was born."[6] About Otis's speech Adams also wrote, "I solemnly say I have never known a man whose love of country was more ardent or sincere, never one who suffered so much, never one, whose service for any ten years of his life were so important and essential to the cause of his country, as those of Mr. Otis from 1760 to 1770."[7]

But Otis did not merely rail against the Writs, he set out parameters for the legal issuance of writs: "to search such and such houses, specially named, in which the complainant has before sworn that he suspects his goods are concealed." Short of these safeguards, Otis argued, "Every one with this writ may be a tyrant . . . also may control, imprison or murder anyone within the realm." Otis offered an alternative process, warrants for stolen goods that would be directed to special officers to search certain houses specifically set forth in the writ based upon an oath "that he suspects such goods to be concealed in those very places he desires to search."[8] Otis also wisely argued that the invasion be ultimately determined by a judge, a right we take for granted today.

A direct line can be drawn from Otis's argument to John Adams's authorship of Article 14 of the Massachusetts Declaration of Rights in 1780 that listed four protected objects – persons, houses, papers and effects – to our cherished Fourth Amendment.[9]

Although Otis's argument did not prevail, the patriot cause was advanced mightily and he was thrust into political ascendancy as the acknowledged leader in the defense of the colonists' liberties. Colonists had rightly concluded that the mother country had carved them out of their basic rights, the most cherished embodied in the concept of every Englishman being a king in his own home. This disrespect was the beginning of the end of British rule in America, and Otis was the catalyst.

## Leading the Opposition

His passionate and articulate opposition in the Writs case propelled Otis to a position of leadership as a stalwart of opposition to British rule – along with John Hancock and Sam Adams. Otis's popularity was evidenced by his selection as a Massachusetts representative to the Stamp Act Congress and his repeated election to the Massachusetts House of Representatives. While widely admired by his contemporaries, Otis was despised by the royal governor, Thomas Hutchinson.

Otis became intimately aligned with fellow Harvard-educated firebrand Samuel Adams and they inundated Boston's editors with propaganda leaflets that the Loyalist *Boston Evening Post* labeled "mad rant and porterly reviling."[10] Otis professed far more radical views at an earlier stage than Adams, but while Otis's radicalism was of ideas, Adams directed violent unruly street toughs in action. One such mob trashed the home of Royal Governor Hutchinson, breaking down its massive doors and setting fires in each room of the mansion. Adams also orchestrated the Boston Tea Party. He was considered so dangerous by British military officials that they sent thousands of troops to arrest him and John Hancock, as well as to seize weapons and gunpowder, at Lexington on April 18, 1775, the date now celebrated as Patriot's Day.

Although Otis adopted the economic arguments Adams proposed, including non-importation and boycott, he was even more aggressive, warning British authorities that colonists would start smuggling on an even grander scale and start engaging in the commercial production of wool, which the British had banned.[11] Otis angrily stormed out of the Stamp Act Congress when it condemned the Stamp Act but proclaimed that "subordination to Parliament is universally acknowledged."[12] Otis went on to author a number of revolutionary pamphlets advocating the rights of colonists and railing against oppressive legislation emanating from Parliament. His "The Rights of the British Colonies Asserted and Proved" (1764) was a rabid repudiation of the Sugar Act.[13] He opened his essay with a summary of what the great philosopher John Locke had opined about the conditions under which a people might legitimately rebel against their government, which was viewed by the British as treason. He emphasized the theories of natural rights, arguing that the power of Parliament was limited and that it could not justifiably tax the colonists since the colonists were not represented in that body.

Predictably, Otis became a persona non grata to the Crown. When Otis was elected as Speaker of the Massa-

chusetts General Court in 1766, the royal governor vetoed his position, effectively disenfranchising the populace. Angered by reports that customs commissioners considered him an enemy of the King, Otis authored a scathing article in 1769 denouncing Commissioner John Robinson and three others, upping the ante by stating that he asked for personal satisfaction (a duel) but had not received a response. At an English coffeehouse shortly thereafter, he was set upon by Commissioner Robinson and at least three other Tories. During the attack Robinson viciously struck Otis in the head with his walking stick, causing serious brain injuries that tested his sanity for the duration of his life. Sam Adams later claimed that Robinson had conspired to assassinate Otis.

The consummate lawyer, Otis took John Robinson to court for compensation and won, magnanimously accepting a public apology as the fruit of his court victory. However, the attack effectively ended Otis's revolutionary activities and deprived the Patriot movement of one of its most effective and cogent voices. He retired from public life and his increasing incapacity required that his brother be appointed his guardian. Otis moved to Andover where he lived out the remainder of his life. In a letter to his sister Mercy Otis Warren, he wrote, "I hope, when God Almighty in his righteous providence, shall take me out of time into eternity that it will be by a flash of lightning." On May 23, 1783, James Otis, Jr., the firebrand patriot and lawyer, was in the doorway of his home chatting with friends who were sitting inside when a storm erupted. As thunder shook the house unmercifully, a bolt of lightning struck him dead. A reminder to all to be careful what you wish for.

Otis is buried in Granary Burial Ground in Boston, interred in the Cunningham Tomb owned by his wife's family.

## Mercy Otis Warren

Mercy Otis Warren achieved fame in her own right. She was present at numerous important Patriot meetings with her brother, where she was well regarded for her intellect and zeal, befriending Abigail Adams and later Martha Washington. Cokie Roberts, in her beautifully written book *Founding Mothers*, observed, "No political campaign can succeed without propagandists. . . . In colonial times the pamphlet was the delivery system of choice, and one of the great pamphleteers of the time was a woman – Mercy Otis Warren."[14] After her brother was beaten by Commissioner Robinson, Otis Warren stepped up her own revolutionary activities. She authored numerous provocative Patriot essays and poems, most published anonymously in newspapers. Her most effective propaganda, however, were her three satirical plays, a first for an American woman, although they were printed, not performed, since Puritan Boston forbade live performances. (Boston did not have a theater until 1794.[15]) Each play explores the moral decay of the Crown's administration of government in Massachusetts. Governor Hutchinson was a particular target of her venomous pen, which painted him as a villain named Rapatio, a hypocritical, crass, oppressive policymaker. Governor Hutchinson despised Mercy Otis Warren as much as he had her brother. In 1781, Otis Warren and her husband had the pleasure of purchasing the estate of the banished and humiliated Hutchinson.

Perhaps Otis Warren's greatest work, however, was her *History of the Rise, Progress and Termination of the American Revolution*, written in three volumes, completed in 1805 and 25 years in the making. As Otis Warren points out in her preface, she was uniquely positioned to chronicle the events leading up to the Revolution because she had direct experience of them and knew well many of the leaders who took part in the various military campaigns.

James Otis, Jr. lived long enough to see the Continental Army win the war, and he had the satisfaction of knowing that his daughter's father-in-law, General Benjamin Lincoln, was presented with the sword of surrender from General Cornwallis at Yorktown. Unfortunately, Otis's tragic and untimely death in May 1783 occurred just months before the conclusion of the peace treaty that officially ended the war with the British Empire and recognized the United States of America. He also could not bask in the pride of seeing his younger brother Samuel Allyne Otis sworn in as United States Senator from Massachusetts, where he served until 1814. ■

1. *See generally* William Tudor, The Life of James Otis of Massachusetts (Boston: Wells & Lilly 1823).

2. British Act of Frauds 5(2) (1662).

3. Ironically, his adversary, the Attorney for the Crown, was his former mentor Jeremiah Gridley.

4. James Otis, Against Writs of Assistance, February 24, 1761, National Humanities Institute (1998), www/nhinet.org/ccs/docs/writs.htm.

5. *Id.*

6. John Adams, letter to William Tudor (1818).

7. John Adams, Political Essays (Boston: Hews & Goss 1819).

8. 2 The Works of John Adams, app. A at 524–25 (Little Brown & Co. 1856).

9. The Fourth Amendment to the U.S. Constitution reads: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

10. Harlow Giles Unger, Lion of Liberty 32 (DaCapo Press 2010).

11. John K. Alexander, Samuel Adams, The Life of an American Revolutionary 32 (Rowman and Littlefield 2011).

12. Henry Lawrence Gipson, The Coming of the Revolution, 1763–1775 100 (N.Y.: Harper & Brothers 1954).

13. As noted, the Sugar Act of 1764 was a revision of the unenforced Molasses Act of 1733 that imposed duties on sugar and molasses imported into the colonies. Sugar was mostly distilled into rum, a popular drink in the colonies.

14. Cokie Roberts, Founding Mothers, The Women Who Raised Our Nation 45 (Harper Collins 2004).

15. The Adulateur (1772), The Defeat (1773) and The Group (1775).

# Forfeiture and New York's "Slayer Rule"

**By Ilene S. Cooper and Jaclene D'Agostino**


New York's "slayer rule" essentially provides that an individual who kills another person forfeits any interest in the victim's estate. The rationale is simple – no one should financially benefit from his or her own crime.

This long-standing rule has never been codified in New York, but it is a common law principle emanating from the 1889 Court of Appeals decision in *Riggs v. Palmer*.[1] There, a grandson, who intentionally killed his grandfather to ensure his inheritance, was barred from profiting from his own wrong. The Court stated:

> Palmer cannot take any of this property as heir. Just before the murder he was not an heir, and it was not certain that he ever would be. He might have died before his grandfather [the murdered man], or might have been disinherited by him. He made himself an heir by the murder, and he seeks to take property as the fruit of his crime. What has before been said as to him as legatee applies to him with equal force as an heir. He cannot vest himself with title by crime.[2]

Application of the slayer rule is generally straightforward, but in certain cases, the lines can become blurred. This was evidenced this past year in *In re Edwards*,[3] in which the killer sought to inherit from his victim's estate, indirectly, through the estate of his post-deceased spouse, and in the cases of *In re Demesyeux*,[4] and *In re Ledson*,[5] wherein the killers were determined not responsible for their actions by reason of mental disease or defect.

In *Edwards*, the decedent's son-in-law, Brandon, pleaded guilty to manslaughter. Brandon's wife, Deanna, was the decedent's only child, and sole beneficiary of her estate. Less than a year later – and before Brandon's guilty plea – Deanna died intestate, as a result of an accidental drug overdose. Brandon was Deanna's sole distributee and thus stood in a position to inherit his mother-in-law's entire estate indirectly through his wife's estate. In a 2012 decision, Surr. John M. Czygier, Surrogate's Court, Suffolk County, opined that the slayer rule should be extended upon equitable principles to prohibit Brandon from inheriting.[6] The Appellate Division, Second Department recently affirmed.[7]

Acknowledging that this was a case of first impression, the Second Department was guided largely by its decision in *Campbell v. Thomas*.[8] There, the court held that a surviving spouse forfeited her elective share as a result of her own wrongdoing, having knowingly taken

**Ilene S. Cooper** (ICooper@FarrellFritz.com) is a partner, and **Jaclene D'Agostino** is an associate, in the Trusts & Estates Litigation Department at Farrell Fritz, P.C., in Uniondale, New York.

advantage of the decedent in a deathbed marriage for her own pecuniary gain. Although none of the statutory disqualification provisions of Estates, Powers & Trusts Law (EPTL) 5-1.2 applied to that situation, the court relied upon principles of equity in making its determination.[9]

The court also relied upon an analogous Illinois case, *In re Estate of Vallerius*.[10] There, the decedent was murdered by two of her grandsons. Their mother postdeceased the decedent mere months later, leaving them as her only heirs. The Illinois court held that the grandsons could not indirectly benefit from their own crime by inheriting their grandmother's estate, albeit through their mother's estate, and explained that an intervening estate "should not expurgate the wrong of the murderer or thwart the intent of the legislature that the murderer not profit by his wrong."[11]

The Second Department utilized this rationale in its *Edwards* decision, opining that the case was similar to both *Campbell* and *Vallerius* in that there was "a clear causal link between the wrongdoing and the benefits sought."[12] Accordingly, it affirmed the Surrogate's Court's decree to exercise its equitable powers in extending the slayer rule to the case.[13]

Notably, the Second Department rejected arguments that (1) Deanna's inheritance from her mother's estate vested immediately upon her mother's death, allowing her to do what she wished with the property; and (2) extension of the slayer rule would raise "a host of enforceability problems."[14] The court explained that it was unpersuaded by hypothetical scenarios that Deanna's estate raised and concluded that the rule as extended would be applied on a fact-specific basis. It remains to be seen how, and to what extent, different facts may support a different result.

The decision in *Ledson* presented another scenario, but turned on the identical issue addressed in *Edwards* – that is, whether the killer should be disqualified from participating as a beneficiary of a fund that was not directly derived from his wrongful conduct. There, Surrogate's Court, Kings County, addressed the distribution of settlement proceeds following an action for injuries the decedent had sustained from asbestos exposure. In connection with that proceeding, the petitioner requested that the court disqualify one of the decedent's children, Gary Ledson, from sharing in the recovery based upon the slayer rule. Gary was criminally charged with the decedent's death, entered a plea of not guilty by reason of mental disease or defect, and was subsequently committed to a psychiatric facility. The guardian *ad litem* appointed to represent Gary's interests argued that the slayer rule was inapplicable because Gary had lacked the requisite intent to commit murder.

Explaining that New York courts have historically found the slayer rule inapplicable where a distributee or beneficiary was held not responsible for the decedent's death by reason of mental disease or defect, the court agreed with the guardian *ad litem* and the long-standing principle that "punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong."[15] Accordingly, the court held that Gary was entitled to a share of the settlement proceeds for his father's pain and suffering despite having been criminally charged with his death.

In reaching this result, the court disagreed with the rationale employed by Surrogate's Court, Nassau County, in the 2013 decision of *In re Demesyeux*.[16] That case also addressed the applicability of the slayer rule where the killer was found not responsible by reason of mental disease or defect. However, as compared to *Ledson*, the question was whether the killer, who was the mother of the subject decedents, was entitled to share in the proceeds of a wrongful death settlement that arose from her own conduct. According to the Nassau County surrogate's court, this issue presented a matter of first impression in New York.

The facts of *Demesyeux* are particularly disturbing. Leatrice Brewer admitted to intentionally killing her young children to protect them from voodoo. She pleaded and was found not guilty by reason of mental disease or defect. Innocent Demesyeux, the father of two of the children, sought to disqualify her from taking any share of the wrongful death proceeds that were to be paid as a result of her actions.

> Application of the slayer rule is generally straightforward, but in certain cases, the lines can become blurred.

Prior to addressing disqualification under the slayer rule, the court began its analysis with the question of whether Leatrice should be disqualified under the relevant wrongful death statutes. The court explained that, in construing the statutes, courts "should consider the mischief sought to be remedied by the legislation, and they should construe the act in question so as to suppress the evil and advance the remedy."[17]

The court recited the pertinent portion of EPTL 5-4.3(a), providing that damages awarded in the context of wrongful death represent "'*fair and just compensation* for the pecuniary injuries resulting from the decedent's death'"; under EPTL 5-4.4(a) "the damages are to be distributed 'in proportion to the pecuniary injuries suffered by [the decedent's distributees].'"[18]

Although the court characterized the concept of a parent suffering pecuniary injury by the death of her minor child as "something of a fiction," it went on to analyze whether she would be entitled to "fair and just compensation" for that pecuniary injury in the event it had

existed, or whether she had forfeited that right by killing her children. The court further noted that abandonment of a child may, in and of itself, disqualify a parent from compensation for any pecuniary injury that may have occurred in the wrongful death context.

In this latter regard, the court cited two cases, to wit: *Mark G. v. Sabol*,[19] in which parents whose physical abuse of their child caused the child's death were disqualified from sharing in wrongful death proceeds under EPTL 4-4.4(a) by virtue of abandonment; and *In re Pesante*,[20] wherein the deceased child's mother was disqualified from sharing in wrongful death proceeds because the death occurred as a result of the mother's neglect.[21] Despite the foregoing precedent, the court noted that the facts of *Demesyeux* were more complicated by virtue of Leatrice's plea of not responsible for her children's deaths by reason of mental disease or defect. Thus, the court turned to the question of whether the slayer rule disqualified Leatrice from sharing in the wrongful death proceeds.

Indeed, while the court recognized that the slayer rule, as emanating from *Riggs v. Palmer*,[22] is intended to prevent an individual profiting from taking the life of another, it further acknowledged that application of the rule is not always straightforward. The court went on to state that while New York courts had previously addressed the issue of whether a person who is found not responsible for his or her actions by reason of mental disease or defect is disqualified from sharing in the victim's estate, none of those cases appeared within the context of a wrongful death proceeding.

The court characterized the case as

> a classic illustration of the equitable dilemma between two moral public policies. On the one hand, [prior New York cases] demonstrate the judicial attempt to apply the enlightened definition of criminal insanity recognizing there should be no punishment where the slayer is mentally ill. On the other hand, principles of equity, justice and morality dictate that one should not profit from his own wrong.[23]

In balancing the foregoing principles, the court could not ignore Leatrice's admissions concerning the "methodical manner" in which she killed her children, and opined that to ignore those admissions by allowing her to share in a profit that would not have existed but for her actions "disturbs the conscience of the court" as a court of equity. Indeed, in reaching its result, the court relied heavily upon Leatrice's admission that she intended to kill her children to protect them from voodoo, and her acknowledgment at her plea allocution that she intended to cause her children's deaths. The killer's expressed intent to kill her children, despite her plea, was the factor that distinguished Leatrice from parents who were responsible for their children's deaths in negligence cases.[24]

In view of these facts, the court adopted the position of the dissenting opinion in *Ford v. Ford*,[25] which stated, "[T]he fact that the State cannot criminally punish an insane defendant is irrelevant to a determination of whether it is equitable for the killer to inherit from her victim."[26] The court concluded that while one who suffers from insanity is excused from criminal punishment for the crime, "the principles of morality and equity dictate that the murderer is still morally responsible for her crime,"[27] opining that "[a] finding of insanity in the criminal context is not tantamount to an absence of a mens rea necessary in this context to render [Leatrice] disqualified as a distributee."[28] In other words, the court determined that a lower standard of *mens rea* should apply in the civil context for purposes of disqualification, and concluded that "equity must intervene to combat the unjust enrichment" that would otherwise inure to Leatrice as the killer of her children.[29]

As the Kings County surrogate's court noted in *Ledson*, the decision in *Demesyeux* certainly appears to be a deviation from existing precedent. However, as Surrogate's Court, Nassau County, explained, *Demesyeux* was a case of first impression that seemed to provoke a slightly distinguishable equitable analysis, perhaps because, despite her plea of insanity, the murderer articulated the "methodical manner" in which she killed her children, and the wrongful death settlement at issue was directly derived from the killer's own conduct. The settlement proceeds at issue in *Ledson* were not.

The equitable principles that proved to be the motivating force in *In re Demesyeux* were similarly the basis for the decision in *In re Edwards*. In fact, *Edwards* and *Demesyeux* both relied upon the equitable principles espoused by the court in *Campbell v. Thomas*.[30]

Notwithstanding the foregoing, and Surrogate's Court, Nassau County's morally compelling analysis, one must question whether the novel issue of wrongful death proceeds derived from the killer's own conduct in *Demesyeux* is truly a distinguishing factor. Indeed, in the *Riggs v. Palmer* context of benefiting from one's own wrongdoing, a pecuniary gain based upon inheritance as opposed to a wrongful death settlement is a distinction without a difference. Thus, it seems that the sole distinguishing factor of *Demesyeux* is the murderer's admitted intent to kill, which the Nassau County surrogate's court found so troubling. Then again, there is the question, can insane individuals truly have such intent? Does this contradict the very purpose of finding such individuals not responsible for their actions based upon mental disease or defect? And what authority supports a lower threshold of *mens rea* in the civil context? Only time and future developments in case law will tell.

On the other hand, while *Ledson* addressed the applicability of the slayer rule in the context of an individual who had been found not responsible by reason of insanity, the issue of the killer sharing in settlement proceeds from a personal injury action, as opposed to a wrongful death, is distinguishable to the extent that the personal

injury action does not arise from the killer's wrongdoing. Thus, while it would have been the decedent rather than the killer to take those proceeds absent the killer's actions, those actions did not directly produce the pecuniary gain as they did in *Demesyeux*.

Every case will always present a slightly different scenario. However, the manner in which the slayer rule is applied, like any other common law principle, should remain somewhat consistent. It will be interesting to see how this area of the law develops from this proverbial crossroad, but, for the time being, the divergent views that have emerged in recent years will leave practitioners wildly uncertain as to how similar cases will unfold.

1. 115 N.Y. 506 (1889).
2. *Id.* at 513.
3. 121 A.D.3d 336 (2d Dep't 2014).
4. N.Y.L.J., Jan. 6, 2014, p. 28 (Sur. Ct., Nassau Co.).
5. N.Y.L.J., July 9, 2014, p. 26, col. 5 (Sur. Ct., Kings Co.).
6. 36 Misc. 3d 486 (Sur. Ct., Suffolk Co. 2012).
7. *In re Edwards*, 121 A.D.3d 336 (2d Dep't 2014).
8. 73 A.D.3d 103 (2d Dep't 2010).
9. EPTL 5-1.2 enumerates the statutory circumstances under which a surviving spouse will be disqualified from entitlement to his or her right of election pursuant to EPTL 5-1.1-A. These include a final decree or judgment of divorce; a void, incestuous or bigamous marriage; a final decree or judgment of divorce, annulment, or dissolving the marriage on the ground of absence, not recognized as valid in New York State; a final decree or judgment of separation that was in effect when the deceased spouse died; the spouse abandoned the deceased spouse until the time of his or her death; and failure or refusals to provide support for the deceased spouse despite having the means to do so, unless this marital duty was resumed and continued until the death of the deceased spouse in need of support (*see* EPTL 5-1.2).
10. 259 Ill. App. 3d 350 (5th Dist. 1994).
11. *Id.* at 355.
12. *Edwards*, 121 A.D.3d at 341 (citations omitted).
13. *See* SCPA 201(2), providing in pertinent part, "[t]his and any grant of jurisdiction to the court shall . . . in all instances be deemed to include and confer upon the court full equity jurisdiction as to any action, proceeding or other matter over which jurisdiction is or may be conferred."
14. *Edwards*, 121 A.D.3d at 341.
15. *See In re Ledson*, N.Y.L.J., July 9, 2014, p. 26, col. 5 (Sur. Ct., Kings Co.); *see also In re Wirth*, 59 Misc. 2d 300 (Sur. Ct., Erie Co. 1969); *In re Fitzsimmons*, 64 Misc. 2d 622 (Sur. Ct., Erie Co. 1970).
16. 42 Misc. 3d 730 (Sur. Ct., Nassau Co. 2013).
17. *Id.* at 732.
18. *Id.* (emphasis in original).
19. 180 Misc. 2d 855 (Sup. Ct., N.Y. Co. 1999).
20. 37 A.D.3d 1173 (4th Dep't 2007).
21. *See In re Demesyeux*, 42 Misc. 3d 730.
22. 115 N.Y. 506 (1889).
23. *Demesyeux*, 42 Misc. 3d at 736.
24. *See, e.g.*, *In re Wigfall*, 20 Misc. 3d 648 (Sur. Ct., Westchester Co. 2008).
25. 307 Md. 105 (Ct. of Appeals, Md. 1986).
26. *Id.* at 138.
27. *Demesyeux*, 42 Misc. 3d at 737.
28. *Id.*
29. *Id.* at 738.
30. 73 A.D.3d 103 (2d Dep't 2010).

# A Guide to New York State Commercial Landlord-Tenant Law and Procedure — Part II

**By Hon. Gerald Lebovits and Michael B. Terk**

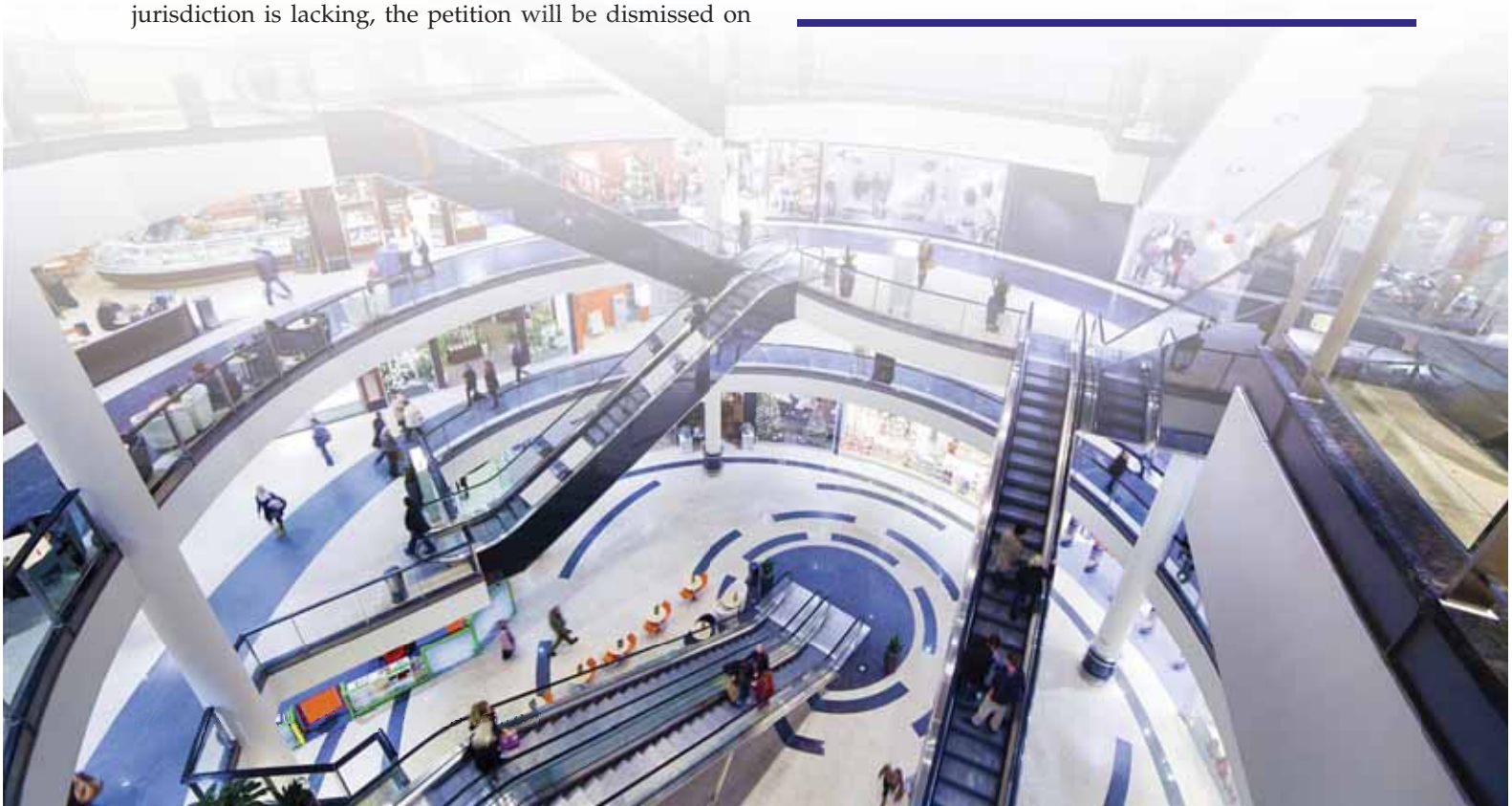
Part I of this article, published in the prior issue of the *Journal*, covered procedures and pleadings in holdover proceedings, nonpayment proceedings, and illegal-lockout proceedings. We continue with personal jurisdiction, defenses against summary proceedings, trials, settlements, defaults, courts that adjudicate summary proceedings, plenary actions between landlords and tenants, and bankruptcy implications in the landlord-tenant relationship.

## II. Summary Proceedings to Recover Possession, continued

### F. Personal Jurisdiction

The procedures for summary proceedings and the substantive law applicable to them, discussed in Part I of this article, are relevant only if personal jurisdiction over the respondent is acquired in the first place. If personal jurisdiction is lacking, the petition will be dismissed on that basis without prejudice to filing a new petition, and nothing else will be considered. To ensure that personal jurisdiction is acquired, a petitioner must follow the procedural requirements in connection with serving the notice of petition and petition on the respondent and, although less commonly litigated than service of process, the form and content of notice provided in the notice of petition.

**Gerald Lebovits**, an acting Supreme Court justice in Manhattan, is the president of the New York City Civil Court's Board of Judges and a former president of the New York City Association of Housing Court Judges. **Michael B. Terk** is an associate with David Rozenholc & Associates in Manhattan. This article is a substantially revised version of a three-part piece the authors published in the February, March, and June 2014 issues of the *Brooklyn Barrister*.



As a threshold matter, personal jurisdiction is lacking if the petitioner fails to give respondent the required notice, in the notice of petition, of when and where the matter will be heard. In a summary proceeding, just as in any special proceeding, omitting from the notice of petition the return date of the petition is a fatal defect depriving the court of personal jurisdiction and requiring dismissal without prejudice.[1]

If the courthouse has multiple courtrooms, omitting the part and room number where the petition is returnable from the notice of petition requires dismissal for lack of personal jurisdiction.[2]

The far-more involved and heavily litigated component of personal jurisdiction is service of process, the litigation of which is colloquially known as "traverse," pronounced "trav-verse" in New York and "tra-verse" nearly everywhere else. The method by which service of process is made is rarely an issue in plenary actions, but service-of-process disputes are common in summary proceedings, and it is common for petitions to be dismissed for lack of personal jurisdiction due to improper service. Attorneys who do not regularly practice landlord-tenant law and have become accustomed simply to transmitting their pleadings to a process server to serve as a ministerial matter with little thought can easily be caught unaware by the significance that the service of process takes on in summary proceedings.

Service of the notice of petition and petition is governed by RPAPL 735. Failure to comply with the statutory requirements will result in dismissal of the petition. The respondent's actual receipt of the papers, actual knowledge of the proceeding, or actual appearance in court on the return date are insufficient to confer personal jurisdiction if the service violates the statute.[3]

RPAPL 735 authorizes three methods of service of the notice of petition and petition: (i) personal (in-hand) delivery to the respondent, (ii) delivery to a person of suitable age and discretion who resides or works at the subject premises, known as "substituted service," followed by both certified and regular mailing of additional copies to the subject premises and any other address of respondent for which the petitioner has written notice, and (iii) affixing to the entrance door or a prominent part, or placing under the entrance door, of the premises sought to be recovered, known as "conspicuous place service," also followed by both certified and regular mailing of additional copies to the subject premises and any other address of the respondent for which the petitioner has written notice.

Process servers will typically go to the premises sought to be recovered to effectuate service. Under RPAPL 735, however, service by personal delivery to the respondent, unlike substituted service or conspicuous-place service, is not required to occur at the premises sought to be recovered. Although RPAPL 735, unlike CPLR Article 3, does not set forth separate methods of service for individual and corporate respondents, courts have recognized the CPLR 311(a)(1) method of service on a corporation as the proper method of personal delivery to a corporation under RPAPL 735.[4] Service by personal delivery on a corporation in a summary proceeding is effectuated by delivery to "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service."[5]

> If personal jurisdiction is lacking, the petition will be dismissed on that basis.

Personal delivery and substituted service on a person of suitable age and discretion are equally desirable methods of service. No attempt at personal delivery is required as a prerequisite to resorting to substituted service. If the process server obtains entry to the subject premises and locates a person of suitable age and discretion residing or employed there who is willing to accept service, then substituted service on that person may be effectuated regardless whether any earlier attempts occurred, so long as the required follow-up mailings are sent.[6]

If substituted service is effectuated, the papers' recipient is deemed of suitable age and discretion only if it is more likely than not that that person will actually transmit the papers to the respondent. If the person accepting delivery has interests directly adverse to those of the respondent such that is likely that this person cannot be relied on to deliver the papers to the respondent, then proper substituted service on a person of suitable age and discretion is not effectuated, and personal jurisdiction is lacking.[7] Similarly, although delivery to an employee of the respondent to be served will normally suffice as substituted service on a person of suitable age and discretion, delivery to a co-respondent or employee of a co-respondent is insufficient to qualify as substituted service on the respondent.[8]

Conspicuous-place service, on the other hand, is a less-desirable method; it may be resorted to only after the process server has made reasonable application to gain admittance to the subject premises and either to effectuate personal delivery on or locate a person of suitable age and discretion residing or working there to accept delivery and has been unsuccessful in doing so.[9] Conspicuous-place service is insufficient to confer jurisdiction if the process server does not first make the requisite reasonable application. "Reasonable application" means at least two different visits to the premises and attempts to gain admittance on two different days at different times of the day.

To qualify as reasonable application for conspicuous-place service, an attempt to serve a commercial tenant must be made when some reasonable possibility is appar-

ent that someone will be present to accept service. If an attempt is made when it is predestined to fail, such as attempting to serve in the morning hours a bar open only at night, the attempt is a nullity, insufficient to satisfy the reasonable-application standard.[10]

A mailing by both certified and regular mail to each named respondent is required for all forms of service except in-hand personal delivery. Whether substituted service or conspicuous-place service is made, the mailings must be made to the respondents at the premises sought to be recovered, and an additional mailing must be sent to any other address for the respondents of which the petitioner has written information.[11] The mailing must occur within one day after the leaving with the person of suitable age and discretion (for substituted service) or the affixing (for conspicuous-place service).[12]

If the respondent interposes an answer refuting the affidavit of service of the predicate notice, the petitioner must call its process server to prove proper service by a preponderance of the evidence. If a respondent does not challenge service of the predicate notice in its answer, a facially sufficient affidavit of service of the notice is sufficient prima facie proof of valid service.

In a holdover proceeding, and in nonpayment proceedings outside New York City, the notice of petition and petition must be served at least five days, and not more than 12, before the return date of the petition.[15] Service must be completed by then. Although service is complete upon the personal delivery in the case of personal delivery, service is not complete until the affidavit of service is filed with the court in the case of substituted or conspicuous-place service.[16]

A mailing by both certified and regular mail to each named respondent is required for all forms of service except in-hand personal delivery.

The failure to properly effectuate the follow-up mailings in the case of substituted or conspicuous place service will render the service improper and deprive the court of personal jurisdiction. A properly addressed mailing includes the unit number, if a multi-unit building is involved, and the correct zip code.[13] A properly addressed and posted mailing carries with it a presumption of receipt, but if a mailing is improperly addressed, the petitioner must prove delivery and receipt.

When multiple respondents are named, a separate copy of the notice of petition and petition must be served for each respondent. Serving only one copy for multiple respondents will deprive the court of personal jurisdiction.[14] This applies to the number of copies affixed or left with a person of suitable age and discretion, and it requires separate mailings of separate copies to each respondent that has not been served by personal delivery.

When a question of fact exists about whether service of process was properly effectuated, a traverse hearing must be held for the court to make that factual determination.

A traverse hearing is held only to determine whether the notice of petition and petition were properly served in accordance with RPAPL 735. A predicate rent demand for a nonpayment proceeding and notice to terminate a month-to-month tenancy for a holdover proceeding, which must both be served in the same manner as a notice of petition and petition, do not implicate personal jurisdiction. A petitioner must prove proper service of the predicate notice as part of its prima facie case at trial. Although a traverse hearing will not typically be held for a predicate notice, the process server might still need to testify at trial to establish service so that a petitioner can prove its prima facie case.

In the First Department, the timely completion of service by filing the affidavit of service at least five days before the return date of a holdover proceeding is jurisdictional. If the affidavit of service is not filed at least five days before the return date, service is defective and jurisdiction is not acquired.[17] In the Second Department, untimely filing proof of service is a non-jurisdictional irregularity that can be excused absent prejudice.[18]

For all three methods of service, in nonpayment and holdover proceedings alike, proof of service must be filed with the court (i) within three days after the personal delivery for service by personal delivery or (ii) within three days after the mailings for substituted or conspicuous-place service.

A tenant who voluntarily appears in the proceeding by serving or filing an answer without objecting to jurisdiction, or who makes a pre-answer motion that does not raise service, waives any objection to personal jurisdiction.[19] To be preserved, the jurisdictional objection must be raised in motion to dismiss or a pre-answer motion to dismiss, whichever comes first.[20] A tenant who has not interposed a written answer but appears on the return date and adjourns the case does not waive service. The tenant may still challenge service in the answer or pre-answer motion, unless a stipulation adjourning the case expressly waives any jurisdictional objection.[21] If an answer filed without a personal-jurisdiction defense is amended as of right within 20 days under CPLR 3025(a) to add a personal-jurisdiction defense, then the personal-jurisdiction defense remains preserved.[22]

The general rule that a challenge to service of process raised in the answer is waived if no motion to dismiss on that basis is made within 60 days thereafter does not apply to holdover and nonpayment proceedings.[23] A

traverse defense properly interposed in a respondent's answer remains a valid defense until overcome at a trial or traverse hearing. A petitioner that wishes to resolve the service issue in advance may move to dismiss the jurisdictional defense. If there is an issue of fact, the court will set the matter down for a traverse hearing.

A respondent waives any objection to personal jurisdiction and voluntarily submits to the court's jurisdiction by raising a counterclaim unrelated to the petitioner's claims; a respondent that raises only related counterclaims does not waive personal jurisdiction.[24] A counterclaim is deemed related if the failure to raise it could result in the respondent's being barred by collateral estoppel from raising it in a future action or proceeding.[25]

If a tenant defaults and service was effectuated under RPAPL 735 by conspicuous-place service after using reasonable application to gain admittance, then the landlord may obtain only a judgment of possession and not money judgment for rent, use and occupancy, or otherwise.[26] At one time, the courts enforced a strict rule that no money judgment against a defaulting tenant could be obtained absent service by personal delivery, but the trend is to allow money judgments against defaulting tenants if the landlord effectuated either substituted service or conspicuous-place service after meeting the more stringent "due diligence" standard of CPLR 308, rather than merely the RPAPL 735 "reasonable application" standard.[27]

As a practical matter, however, most judges in New York City still adhere to the older rule not to award money judgments, except when service was made by personal delivery, against defaulting tenants who never appeared.

### G. Defenses Against Summary Proceedings

Here are the more common commercial tenants' defenses against summary proceedings:

(a) Traverse/service of process/lack of personal jurisdiction.

(b) Omitting required elements of the petition. A petition is defective if it is missing or misstates required elements of the petition under RPAPL 741, such as an accurate description of each party's interest in the property and a complete and accurate description of the premises from which removal is sought. These omissions or misstatements are typically amendable. Absent prejudice to the respondent, the petitioner can usually avoid dismissal by cross-moving to amend the petition to correct those defects challenged in the respondent's dismissal motion.

(c) Defective predicate notice. The proceeding must be dismissed if a cure notice, termination notice, rent demand, or other predicate notice required by statute or lease is either not properly and timely served or is substantively defective or insufficient in its contents. Unlike a petition, predicate notices are not amendable.[28] Defects or omissions may not be corrected by amendment or otherwise. A defective predicate notice is not only fatal to the proceeding, but the petitioner must start over by issuing a new underlying predicate notice. The only exception is when the second proceeding commenced on the same notice is commenced before the first is dismissed or discontinued.

(d) Predicate notice vitiated (in holdover proceedings). A petitioner will likely be deemed to have vitiated a termination notice and reinstated the tenancy by accepting rent for a period of time after the termination date, commencing a nonpayment proceeding, or issuing a subsequent termination or cure notice.

(e) Breach of the lease waived (in breach-of-lease holdover proceedings). When the proceeding is based on a breach of the lease or a violation of a substantial obligation of the tenancy, a landlord waives its right to object to the breach if, knowing about the breach, the landlord continues to accept rent for a substantial period of time without taking any step to enforce the breached lease provision and terminate the tenancy.[29] Even a lease's "no waiver" clause can sometimes itself be waived by this acceptance of rent.[30]

(f) Stale predicate notice. The predicate notice can be stale based on the passage of time or if a termination notice was used as the predicate for an earlier dismissed or discontinued proceeding and, absent discernable prejudice to the tenant, the current proceeding was not commenced promptly while the earlier proceeding was still pending.

(g) Conditions precedent to exercising an early termination option not met (in early cancellation holdover proceedings). If the lease has an early cancellation option that allows early termination upon limited conditions, such as a planned demolition of the building, the petitioner must prove the conditions precedent to exercising the early termination option. The petitioner must prove that it is planning to demolish the building and that it did not issue the notice in bad faith merely to empty the space to rent it to another tenant at a higher rent. Early termination provisions are strictly construed in a tenant's favor.[31]

(h) Other substantive defenses in breach-of-lease disputes (in breach-of-lease holdover proceedings). When a landlord alleges a breach of a lease provision, and the parties dispute whether a breach that forms the basis for termination has occurred, the specific, substantive provisions of a lease often come into play. When the lease is on a form provided or substantially prepared by the landlord, ambiguities in the lease terms will be construed against the landlord.[32]

(i) Incorrect calculation of rent or additional rent due under the lease; payment of rent owed, and rent not owed (in nonpayment proceedings).

(j) Constructive eviction and actual eviction (in nonpayment proceedings). To prove constructive eviction sufficient to form a complete defense against the landlord's rent claim, the tenant must establish that (i) the landlord's intentional acts or omissions created conditions that rendered the premises unusable for its intended purposes and thereby deprived the tenant of the use and enjoyment of the premises and (ii) the tenant vacated and was out of possession of the premises while rent is sought.[33] To claim constructive eviction, the tenant must actually be out of possession; a tenant cannot remain in full possession and simultaneously be constructively evicted. Although the old common-law rule was an "all or nothing" rule requiring the tenant to vacate and abandon the entire premises to claim constructive eviction, the law now recognizes the concept of a partial constructive eviction, in which a tenant, to obtain a rent abatement proportional to the portion of the premises that the tenant was unable to use and which was abandoned, can claim a partial constructive eviction from only a portion of the premises.[34] An actual physical eviction that prevents the tenant from accessing all or part of the subject premises likewise constitutes a defense against all or part of the rent.[35] Lease provisions barring tenants from claiming rent abatements for interruption or loss of business contemplate situations in which the interruption or loss occurs while the tenant remains fully in possession. These provisions do not bar constructive or actual-eviction defenses.[36]

(k) Similar to but separate from a constructive-eviction defense is a tenant's entitlement to a set-off in rent if a landlord fails to provide services a lease requires. A commercial tenant is entitled to utilities and building services like heat, water, electricity, and elevator service provided by the landlord to the extent that these services are provided for in the lease. A tenant may defend against a landlord's rent claims and obtain a rent abatement if the landlord fails to provide building services required under the lease.[37] The RPL § 235-b warranty of habitability and New York City Housing Maintenance Code do not govern commercial tenancies like they do residential tenancies.

(l) If a New York City landlord illegally rents commercial premises for residential purposes, an eviction proceeding in the Civil Court's commercial landlord-tenant part — Part 52 — is improper. It must be brought in a residential Housing Part. If the petitioner leased the premises knowing that it would be used residentially or if the residential use was with the landlord's knowledge and acquiescence, the tenancy is deemed residential, even if the premises are leased under a commercial lease. A residential proceeding brought in the commercial landlord-tenant part is improper and must be dismissed.[38]

(m) In a breach-of-lease holdover, the summary-proceeding court has the equitable power to excuse a breach and dismiss the proceeding if the breach is not material but, rather, *de minimis* and inconsequential.[39]

### H. Trials in Summary Proceedings

A summary proceeding not dismissed, discontinued, or settled must be tried. A petitioner's prima facie case at trial includes:

(a) Proving that the petitioner is the real property's owner, net lessee, sublessor, or receiver, or is otherwise authorized to maintain the proceeding. An owner should introduce into evidence an original or certified copy of the deed, net lease, or other document conferring its authority as the landlord.

(b) If the subject commercial premises are in New York City and in a building that also contains three or more residential units, proof of a valid and currently effective multiple dwelling registration (MDR) statement on file with the New York City Department of Housing Preservation and Development (HPD). If applicable, the petitioner should have a certified MDR statement from HPD.

(c) Other than for month-to-month tenants, the lease between the parties. The petitioner should have the original lease or a satisfactory explanation for its absence from a credible witness if a photocopy is sought to be used.

(d) Other than a no-grounds holdover based on the natural expiration of the full term of a written lease, the predicate notice(s) (rent demand in a nonpayment proceeding or a termination notice; and, if applicable, cure notice in a holdover proceeding), and proof of service for the predicate notice(s) as required by the lease, statute, or both. This will require the testimony of the process server or individual who served the predicate notice(s) if the allegation of its service is refuted in the tenant's answer.

(e) In a nonpayment proceeding, proof that the rent demanded is owed. This should include a rent ledger setting forth each month's rent that has come due and each payment that has been made since the last undisputed zero balance. A witness must authenticate the rent ledger and explain and confirm the accuracy of the figures in the ledger based upon personal knowledge.

(f) In the case of a breach-of-lease holdover proceeding, testimonial and documentary evidence proving the respondent's breach and, if applicable, the failure to cure the breach by the deadline in the cure notice.

(g) In the case of a holdover proceeding in which the petitioner has exercised an early termination option, such as pursuant to a demolition clause, testimonial and documentary proof of the existence of the condition(s) precedent to the petitioner's right to

exercise the early termination option (such as, in the case of a demolition clause, proof of the existence demolition the landlord alleges).[40]

(h) At the end of the petitioner's prima facie case, the petitioner should ask the court to amend the pleadings to add rent (in a nonpayment proceeding) or use and occupancy that has become due, to conform the pleadings to the proof, and to take judicial notice of all the pleadings and papers in the court file.

### I. Settlements of Summary Proceedings

The overwhelming majority of landlord-tenant summary proceedings settle without a trial. There are endless permutations of settlements and settlement structures. Among the more common settlement structures are (i) in nonpayment proceedings, agreed-upon "pay-outs" of rent arrears over a period of time, with judgments of possession and warrants of eviction issued with execution stayed pending timely payment under the "pay-out" schedule, and (ii) in holdover proceedings, the respondent's agreement to vacate within an agreed-upon period of time (sometimes coupled with a rent/use and occupancy concession, sometimes not), again with judgments of possession and warrants of eviction issued with execution stayed through and including the agreed-upon vacate date. If a settlement is reached in a nonpayment proceeding, the petitioner will be able to dispense with the stay and accelerate execution of the warrant if the respondent fails timely to comply with its payment obligations under the stipulation.

Respondents prefer to settle per stipulation, without a judgment, and even to ask the petitioner for written notice of any default. These requirements will force a petitioner first to mail a notice to give the respondent a chance to correct the default, and then move for a judgment if the respondent fails to do so, thus giving the respondent extra time to satisfy the stipulation and prevent an eviction. Settling without a judgment also prevents credit problems.

A respondent that fails to make timely payments after a trial or under a payout schedule, or that requires additional time beyond the agreed-upon vacate date, may bring a post-judgment order to show cause for an extension of time to pay. Similarly, when a respondent fails timely to vacate under a judgment of possession issued upon a stipulation of settlement or after a trial in a holdover proceeding, the respondent may move by order to show cause to extend the time to vacate. If granted, the court will typically grant the stay conditioned on the respondent's paying use and occupancy for the additional time the respondent remains in possession.

Whether to decline to sign or to sign and grant these orders to show cause is reserved to the court's discretion. Judges exercise their discretion less liberally after a trial than after a stipulation resolves the proceeding. Judges are also less liberal in granting extra time in commercial cases than in residential cases.

Petitioners whose priority is to remove the respondents from possession as quickly as possible will vigorously oppose these orders to show cause to extend a respondent's time to pay or vacate under a stipulation. But it is strategically preferable for a petitioner whose priority is to be paid to consent to extensions if the petitioner believes that the respondent is likely to make additional payments with an extension of time but will be judgment-proof once evicted.

> A summary proceeding not dismissed, discontinued, or settled must be tried.

### J. Defaults in Summary Proceedings

In New York City, if the tenant fails to appear on an initial or adjourned return date in a holdover proceeding, the court will conduct an inquest. The inquest, which requires that a witness with actual knowledge offer testimony establishing the petitioner's prima facie case, is required before a default judgment may be entered and the inquest sustained. Outside New York City, courts often award default judgments in holdover proceedings without holding inquests.

If a tenant fails to answer or otherwise appear in a nonpayment proceeding and still owes the petitioner rent at the time of the default, the petitioner may apply for a judgment of possession and warrant of eviction on default. In addition, a respondent who files an answer but then fails to appear on any return date will be held in default, and a default judgment will be awarded to the landlord. Unlike in a holdover proceeding, an inquest is not held upon a respondent's default in a nonpayment proceeding. Courts may not require an inquest before issuing a default judgment in a nonpayment proceeding; the issuance of a default judgment is a nondiscretionary, ministerial act if the respondent fails to appear and the petitioner's papers, including proof of service, are sufficient on their face and free of defects.[41]

### K. Carrying Out the Eviction

Once a warrant of eviction has issued, the warrant must be delivered to an enforcement officer, along with the appropriate fees. A warrant of eviction will be executed by a city marshal in New York City and by the county sheriff's office in counties outside New York City. The sheriff or marshal must issue a final notice at least 72 hours before removal. City marshals in New York City serve notice at least six business days before the warrant is executed. Sheriffs or marshals typically serve these notices, commonly known as "eviction notices," by posting them onto the door of the subject premises.

A respondent served with a marshal's or sheriff's notice may get a stay of the eviction if, before it is carried out, the respondent files and the court signs an order to show cause staying the eviction. This might occur if the petitioner dispenses with the stay and accelerates the warrant based on the respondent's alleged failure to comply with the terms of a stipulation. If the petitioner accelerates the warrant and a respondent denies it has breached the stipulation or needs more time to comply, the respondent must, to forestall the eviction, bring an order to show cause after receiving a marshal's or sheriff's notice.

### L. The Courts in Which Summary Proceedings Are Adjudicated

The courts in which a summary eviction proceeding may be brought depend on the geographic location of the real property. Below is a breakdown of summary-proceeding courts by geography:

(a) Statewide: Supreme Court in the applicable county has the jurisdiction to hear the proceeding. As a practical matter, summary proceedings are almost never brought in Supreme Court. If they are, Supreme Court is unlikely to entertain them.

(b) New York City: Civil Court of the City of New York (governed by the New York City Civil Court Act). Each of New York City's five boroughs has a Civil Court courthouse. In each borough, nonresidential summary proceedings are commenced in a commercial landlord-tenant part known as Part 52. All commercial summary proceedings are initially on the Part 52 calendar. In Manhattan, Part 52 is a calendar part that will entertain applications for adjournments or pendente lite use and occupancy. Trials, hearings, and motions will either be adjourned in Part 52 or, if not adjourned, sent out to another Civil Court "back up part" to be heard, tried, and decided by another judge, although sometimes in Manhattan the Part 52 judge will hear a motion in Part 52 if time permits. In the outer boroughs, the entire disposition of the case, including motions and trials, will normally occur in Part 52 itself.

(c) Long Island: District Court (governed by the Uniform District Court Act). Nassau County and most of Suffolk County (with the exception of the five east-end towns of Riverhead, Southold, Shelter Island, Southampton, and East Hampton) are under the jurisdiction of the two counties' respective District Courts, which are Long Island's jurisdictional equivalents of the New York City Civil Court. The District Court has a designated landlord-tenant part in which commercial and residential summary proceedings are adjudicated.

(d) Any city outside New York City: City Court (governed by the Uniform City Court Act). City Court is the jurisdictional equivalent, in all the state's other cities, of the New York City Civil Court and the District Court.

(e) Any town or village other than on Long Island (and also within Suffolk County's five east-end towns on Long Island): town or village Justice Court (governed by the Uniform Justice Court Act). These courts are typically in session only once or twice a week, frequently in the evening, and are presided over by part-time judges who usually hold full-time day jobs and often are not attorneys. Eviction proceedings, particularly in smaller towns and villages, will often be on the same calendar as traffic tickets, violations, infractions, and small claims.

(f) Surrogate's Court: When the real property at issue is the subject of a pending probate proceeding, a summary proceeding relating to that property may be commenced in the Surrogate's Court for the applicable county.

Appeals from the above-listed courts are directed as follows:

(a) To the Appellate Term: In the First and Second Departments, appeals from (i) New York City Civil Court, (ii) District Court in Nassau County and Suffolk County, and (iii) any City Court or Justice Court in Westchester, Rockland, Putnam, Orange, Dutchess, Nassau, and Suffolk Counties are taken to an appellate part of the Supreme Court, known as the Appellate Term.

(b) To the County Court: In the Third and Fourth Departments, appeals from City Court and Justice Court are taken to the County Court for the county in which the city, town, or village is located.

(c) To the Appellate Division: Appeals from Supreme Court and Surrogate's Court are taken to the Appellate Division for the judicial department in which the county is located.

## III. Plenary Actions Between Commercial Landlords and Tenants

### A. Ejectment Actions

Before the New York Legislature's codification of the summary proceeding in 1820, recovering possession of real property through the judicial process could be effectuated only through a common-law action for ejectment.

While rare, common-law ejectment actions are still available and commenced on occasion, usually based on strategic considerations. These include a plaintiff's desire to have the matter adjudicated before the Supreme Court's Commercial Division if the plaintiff deems it a more favorable forum; a plaintiff's wish to conduct disclosure, which is available as of right in Supreme Court ejectment actions; to cause the litigation to be more expensive for the respondent; or when a petitioner is unable to maintain a summary proceeding, as when the property lacks an MDR statement.

### B. Actions for Rent or Use and Occupancy

When a tenant vacates with remaining rent arrears, damages may be recovered in an ordinary contract action for unpaid rent for the lease term.

When an occupant was or is in possession of real property and the landlord is not limited to recovering a reserved rent under a lease or rental agreement, RPL § 220 authorizes an action to recover the fair value of the use and occupancy. A claim lies against a tenant who remains in possession after the end of the tenancy term or against a nontenant who was in possession.

If the building in which the property is located is destroyed or so severely damaged by the elements as to be effectively destroyed and unusable, the tenant is entitled to break its lease, abandon the property, and be relieved of any further obligation for the duration of the lease.[42]

### C. *Yellowstone* Injunctions

The opportunity to avoid eviction by effectuating a post-judgment cure after a landlord prevails in a holdover proceeding predicated on a breach of lease and a failure to cure is available only to New York City residential tenants.[43] Commercial tenants are not entitled to a statutory cure period once the court in a holdover proceeding rules in the petitioner's favor and grants a judgment of possession. To challenge the breach alleged in the notice to cure, a tenant's only option under RPAPL Article 7 is to litigate the holdover proceeding and risk eviction if the petitioner prevails. Even if the respondent is willing and able to cure the breach, the RPAPL does not afford a commercial tenant an opportunity to cure once the holdover proceeding is adjudicated in the petitioner's favor.

When a petitioner issues a cure or default to a commercial tenant and the commercial tenant disputes that it has breached the lease and thus refuses to cure an alleged breach that the respondent maintains does not exist, the respondent may assert in defense to the holdover proceeding that no breach occurred in the first place. If the court agrees with the respondent, the tenant will prevail, and the holdover petition will be dismissed.

If the court disagrees and the petitioner prevails, the respondent will have no opportunity to cure and will lose the tenancy. Recognizing the preference against forfeiting tenancies,[44] New York law developed the *Yellowstone* injunction in *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*,[45] to prevent a commercial tenant that receives a cure notice but disputes the alleged breach from being forced to take a high-stakes gamble by allowing the termination notice to issue, defending against the holdover proceeding on the basis that no breach occurred, and hoping to prevail. A *Yellowstone* injunction action allows the tenant to get relief that will toll the running of the cure period in the cure notice pending the litigation and determination of the underlying merits of the cure notice and the landlord's allegation that the tenant has breached the lease.

In addition to commercial tenants that receive a notice to cure or notice of default and argue that there has been no breach, those that do not dispute the breach and wish to cure but which are incapable of doing so within the limited cure period a lease will afford may, through a *Yellowstone* injunction, obtain an extension of their time to cure.

*Yellowstone* injunctions are limited to tenants that have been issued a cure notice as a predicate to a holdover proceeding and are unavailable to a tenant that has been issued a rent demand as a predicate to a nonpayment proceeding to extend its time to pay.

The injunction, if granted, will stay the landlord from terminating the lease while the court determines whether a breach has occurred. *Yellowstone* actions are brought in Supreme Court, typically by filing an order to show cause seeking a preliminary *Yellowstone* injunction simultaneously with the summons and complaint and request for judicial intervention (RJI).

The order to show cause should contain a request for a temporary restraining order to toll the cure period and prohibit the landlord from terminating the tenancy pending a determination of the motion, as the cure deadline will come before the return date of the order to show cause and the order deciding it.

A *Yellowstone* injunction "maintain[s] the status quo" to permit the tenant to "challenge the landlord's assessment of [its] rights without . . . forfeiting its valuable interest in the leasehold."[46] Although a *Yellowstone* injunction is a form of preliminary injunction, courts have held that the "standards normally applicable to temporary injunctive relief have little application to a *Yellowstone* situation."[47] Courts have dispensed with the requirement that the tenant demonstrate a likelihood of success on the merits.[48]

A tenant seeking a *Yellowstone* injunction must establish four elements to be entitled to the injunction: (i) it is the tenant under a commercial lease, (ii) it has received a cure or default notice or the landlord has threatened to terminate the lease, (iii) the tenant's application for a *Yellowstone* injunction was made before the cure period expired, and (iv) the tenant has the ability to cure the alleged lease breach by any means short of vacating the premises.[49] To obtain a *Yellowstone* injunction, a tenant must demonstrate that it is ready, willing, and able to cure if Supreme Court ultimately finds that the tenant's conduct constitutes a default under the lease and that the cure notice is valid.[50]

If the tenant's conduct at issue breaches a lease incurably, *Yellowstone* relief is unavailable.[51]

In the Second Department, there is an absolute bar against an application for a *Yellowstone* injunction made after a cure period has expired.[52] Although this is generally the rule in the First Department, when the lease

requires the tenant to commence curing the breach within the cure period and the tenant has done so but cannot complete a cure within the cure period, a *Yellowstone* injunction may be granted even if it is brought after the expiration of the cure notice but before the lease terminates.[53] Nonetheless, even in the First Department, a tenant's attorney is well-advised to bring the *Yellowstone* injunction application before the expiration of the cure period rather than to rely on this narrow exception.

As a condition of a *Yellowstone* injunction, courts will typically require the tenant to pay ongoing use and occupancy during the pendency of the *Yellowstone* action, based on the rate of the monthly rent in the lease.[54] In addition to use and occupancy, upon the defendant-landlord's showing of its potential damages the court may also, at its discretion, direct the posting of an undertaking rationally related to the landlord's potential damages.[55] It is also properly in the court's discretion, if the tenant obtaining the *Yellowstone* injunction has made substantial capital improvements to the property, to direct a minimal undertaking or dispense with an undertaking altogether.[56]

Courts have also granted *Yellowstone*-type injunctive relief in other contexts, such as when a landlord threatens a tenant's time to exercise a purchase option or right of first refusal.[57]

### D. Declaratory Judgments to Excuse a Failure to Renew Timely

Excusing a failure to exercise a renewal option: If a respondent fails timely to exercise a lease renewal option, Supreme Court may exercise its equitable powers to excuse an inadvertent failure to renew under some circumstances in a tenant-commenced action for a declaration of the tenant's right to continue its tenancy, in particular if the failure to exercise the option resulted from an honest mistake, the tenant has invested substantial sums of money to improve the property, and the landlord suffers no prejudice.[58]

### E. Collateral Effect of Bankruptcy Proceedings on Landlord-Tenant Proceedings

Although not a proceeding commenced against a landlord by a tenant, a tenant's filing of a bankruptcy petition in the United States Bankruptcy Court has critical implications on landlord-tenant proceedings.

Under Bankruptcy Code § 362, a respondent's filing a bankruptcy petition effectuates an automatic stay of all proceedings against the debtor-respondent to enforce any of the creditor-petitioner's existing claims, including staying the commencement or continuation of any nonpayment or holdover proceeding.[59]

Two exceptions to this automatic stay arise. First, under Bankruptcy Code § 362(b)(22), a respondent's eviction in a pending summary proceeding may go forward if a judgment of possession has already been issued before the bankruptcy petition was filed. Second, under § 362(b)(23), an eviction based on endangering the subject property or illegally using controlled substances may go forward if the endangerment or illegal use occurred within 30 days before the bankruptcy petition was filed.[60]

If the respondent-debtor has personal property remaining in the premises after the bankruptcy petition is filed and the § 362 stay takes effect, the stay must be vacated because the remaining property might be available as funds to pay creditors in connection with the bankruptcy proceeding.[61] A petitioner seeking to claim an exception to the § 362 automatic stay must file with the Bankruptcy Court and serve on the respondent-debtor a certificate setting forth the basis for the exception. The tenant-debtor may then object to the certificate claiming an exception, in which case the Bankruptcy Court must hold a hearing to determine the petitioner's claimed exception.[62]

Once a commercial tenant files a bankruptcy petition, it must assume or reject an unexpired lease.[63] A tenant that assumes the lease must pay all outstanding arrears and continue to pay the rent as it comes due. If the tenant rejects the lease and continues in occupancy, the landlord is entitled to damages for the lease rejection.[64]

## IV. Conclusion

Commercial landlord-tenant law is a field in which seemingly minor and inconsequential details are often crucial, or even dispositive. We hope that this article has identified the more important details and most commonly litigated issues, both procedural and substantive, to enable practitioners to obtain favorable outcomes for their clients. ■

1. CPLR 403(a); *Lamb v. Mills*, 296 A.D.2d 697, 698, 745 N.Y.S.2d 245, 247 (3d Dep't 2002); *Lincoln Plaza Tenants Corp. v. Dinkins*, 171 A.D.2d 577, 577, 567 N.Y.S.2d 447, 448 (1st Dep't 1991).

2. *Montgomery Trading Co. v. Cho*, 193 Misc. 2d 468, 469–70, 748 N.Y.S.2d 904, 905–06 (Civ. Ct. N.Y. County 2002).

3. *Feinstein v. Bergner*, 48 N.Y.2d 234, 241, 397 N.E.2d 1161, 1164, 422 N.Y.S.2d 356, 359 (1979); *Kaszovitz v. Weiszman*, 110 A.D.2d 117, 120, 493 N.Y.S.2d 335, 338 (2d Dep't 1985); *10 E. End Ave. Owners, Inc. v. Gordon*, 23 Misc. 3d 139(A), 889 N.Y.S.2d 508, 2009 N.Y. Slip Op. 50959(U), *1 (App. Term 1st Dep't 2009).

4. *McDee Family LP v. Royal T's Gymnastics, Inc.*, 15 Misc. 3d 1145(A), 841 N.Y.S.2d 821, 2007 N.Y. Slip Op. 51152(U), **5–7 (Dist. Ct. Nassau County 2007); *Manhattan Embassy Co. v. Embassy Parking Corp.*, 164 Misc. 2d 977, 978–79, 627 N.Y.S.2d 245, 246–47 (Civ. Ct. N.Y. County 1995).

5. CPLR 311(a)(1).

6. *Palumbo v. Estate of Clark*, 94 Misc. 2d 1, 3, 403 N.Y.S.2d 874, 876 (Civ. Ct. Bronx County 1978).

7. *In re Cmt'y Sch. Dist. No. 13 v. Goodman*, 127 A.D.2d 837, 837, 511 N.Y.S.2d 945, 946 (2d Dep't 1987); *Bakht v. Akhtar*, 18 Misc. 3d 78, 79–80, 852 N.Y.S.2d 581, 582–83 (App. Term 2d Dep't 2009); Serge Joseph, Defending the Commercial Tenant in Summary Proceedings 6–7 (N.Y. City Civ. Ct. Bd. of Judges, Jud. Conf., Oct. 22, 2013).

8. *SYZ Holdings, LLC v. Brecht Forum, Inc.*, 30 Misc. 3d 64, 65–66, 918 N.Y.S.2d 693, 694–96 (App. Term 2d Dep't 2010); *Ilfin Co., Inc. v. Benec Indus., Inc.*, 114 Misc. 2d 411, 411–14, 451 N.Y.S.2d 643, 644–46 (Civ. Ct. N.Y. County 1982).

9. *Eight Assoc. v. Hynes*, 102 A.D.2d 746, 748, 476 N.Y.S.2d 881, 883 (1st Dep't 1984), *aff'd*, 65 N.Y.2d 739, 740 , 481 N.E.2d 555, 556, 476 N.Y.S.2d 881, 883 (1985); *Lally v. Fasano-Lally*, 22 Misc. 3d 29, 30, 872 N.Y.S.2d 629, 630 (App. Term 2d Dep't 2008).

10. *Palumbo v. Estate of Clark*, 94 Misc. 2d 1, 3–5, 403 N.Y.S.2d 874, 876–77 (Civ. Ct. Bronx County 1978).

11. RPAPL 735(1).

12. *Id.*

13. *Avakian v. De Los Santos*, 183 A.D.2d 687, 688, 583 N.Y.S.2d 27, 28 (2d Dep't 1992); *Regency Towers LLC v. Landou*, 10 Misc. 3d 994, 995–96, 807 N.Y.S.2d 863, 864–65 (Civ. Ct. N.Y. County 2006).

14. *Raschel v. Rish*, 120 A.D.2d 945, 945, 502 N.Y.S.2d 852, 852 (4th Dep't 1986), *aff'd*, 69 N.Y.2d 694, 504 N.E.2d 389, 512 N.Y.S.2d 22 (1986).

15. RPAPL 733(1).

16. *Id.* 735(2)(b).

17. *Riverside Syndicate, Inc. v. Saltzman*, 49 A.D.3d 402, 402, 852 N.Y.S.2d 840, 840 (1st Dep't 2008).

18. *Siedlecki v. Doscher*, 33 Misc. 3d 18, 20, 931 N.Y.S.2d 203, 204–05 (App. Term 2d Dep't 2011).

19. *Baer v. Lipson*, 194 A.D.2d 787, 788, 599 N.Y.S.2d 618, 619 (2d Dep't 1993).

20. CPLR 3211(e).

21. *Rich v. Lefkovits*, 56 N.Y.2d 276, 279–80, 437 N.E.2d 260, 261–63, 452 N.Y.S.2d 1, 3 (1982); *Rochdale Vill., Inc. v. Harris,* 172 Misc. 2d 758, 765, 659 N.Y.S.2d 416, 420–21 (Civ. Ct. Queens County 1997).

22. *Iacovangelo v. Shepherd*, 5 N.Y.3d 184, 186–87, 833 N.E.2d 259, 260–61, 800 N.Y.S.2d 116, 116–17 (2005).

23. CPLR 3211(e).

24. *Textile Technology Exchange, Inc. v. Davis*, 81 N.Y.2d 56, 58, 611 N.E.2d 768, 769, 595 N.Y.S.2d 729, 730 (1993); *Port Auth. of N.Y. & N.J. v. American Stevedoring, Inc.*, 27 Misc. 3d 1218(A), 910 N.Y.S.2d 765, 2010 N.Y. Slip Op. 50795(U), *1 (Civ. Ct. Kings County 2010).

25. *Textile Technology Exchange*, 81 N.Y.2d at 58, 611 N.E.2d at 769, 595 N.Y.S.2d at 730; *Halberstam v. Kramer*, 39 Misc. 3d 126(A), 969 N.Y.S.2d 803, 2013 N.Y. Slip Op. 50408(U), *2 (App. Term 2d Dep't 2013).

26. *In re McDonald*, 225 A.D. 403, 407, 233 N.Y.S. 368, 368 (4th Dep't 1929); *Ressa Family, LLC v. Dorfman*, 193 Misc. 2d 315, 316–17, 749 N.Y.S.2d 387, 388 (Dist. Ct. Nassau County 2002).

27. *Avgush v. Berrahu*, 17 Misc. 3d 85, 90–92, 847 N.Y.S.2d 343, 346–48 (App. Term 2d Dep't 2007); *Dolan v. Linnen*, 195 Misc. 2d 298, 324–26, 753 N.Y.S.2d 682, 701–02 (Civ. Ct. Richmond & Kings Counties 2003); *Laskey v. Tillotson*, 16 Misc. 3d 1124(A), 847 N.Y.S.2d 902, 2007 N.Y. Slip Op. 51564(U), **5–8 (City Ct. City of Lockport, Niagara County, 2007).

28. *Chinatown Apts., Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 787, 412 N.E.2d 1312, 1313, 433 N.Y.S.2d 86, 87 (1980).

29. *Jefpaul Garage Corp. v. Presbyterian Hosp.*, 61 N.Y.2d 442, 446–48, 462 N.E.2d 1176, 1178–79, 474 N.Y.S.2d 458, 459–60 (1984); *Atkin's Waste Materials, Inc. v. May*, 34 N.Y.2d 422, 427, 314 N.E.2d 871, 873, 358 N.Y.S.2d 129, 132 (1974); *Woollard v. Schaffer Stores Co.*, 272 N.Y. 304, 312, 5 N.E.2d 829, 832 (1936).

30. *TSS-Seedman's, Inc. v. Elota Realty Co.*, 72 N.Y.2d 1024, 1027, 531 N.E.2d 646, 648, 534 N.Y.S.2d 925, 927 (1988); *Madison Ave. Leasehold, LLC v. Madison Bentley Assoc. LLC*, 30 A.D.3d 1, 6, 811 N.Y.S.2d 47, 51 (1st Dep't 2006).

31. *67 Wall St. Co. v. Franklin Nat'l Bank*, 37 N.Y.2d 245, 248, 333 N.E.2d 184, 187, 371 N.Y.S.2d 915, 918–19, (1975); *Greenwich Vill. Assoc. v. Salle*, 110 A.D.2d 111, 113, 493 N.Y.S.2d 461, 463 (1st Dep't 1985).

32. *Graff v. Billet*, 64 N.Y.2d 899, 902, 477 N.E.2d 212, 213, 487 N.Y.S.2d 733, 734 (1985); *151 W. Assoc. v. Printsiples Fabric Corp.*, 61 N.Y.2d 732, 733–34, 460 N.E.2d 1344, 1344–45, 472 N.Y.S.2d 909, 910 (1984); *Syed v. Normel Constr. Corp.*, 4 A.D.3d 303, 304, 773 N.Y.S.2d 345, 346 (1st Dep't 2004).

33. *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 81–85, 256 N.E.2d 707, 709–11, 308 N.Y.S.2d 649, 652–54 (1970); *Joylaine Realty Co. LLC v. Samuel*, 100 A.D.3d 706, 706–07, 954 N.Y.S.2d 179, 180 (1st Dep't 2012); *Johnson v. Cabrera*, 246 A.D.2d 578, 578–79, 668 N.Y.S.2d 45, 45 (2d Dep't 1998); Joseph, *supra* note 7, at 9–10.

34. *Minjak Co. v. Randolph*, 140 A.D.2d 245, 247–49, 528 N.Y.S.2d 554, 556–57 (1st Dep't 1988); *E. Haven Assoc. v. Gurian*, 64 Misc. 2d 276, 279, 313 N.Y.S.2d 927, 929–30 (Civ. Ct. N.Y. County 1970).

35. *Fifth Ave. Bldg. Co v. Kernochan*, 221 N.Y. 370, 372–77, 117 N.E. 579, 580–82 (1917).

36. *Camatron Sewing Machine, Inc. v. F.M. Ring Assoc., Inc.*, 179 A.D.2d 165, 168–69, 582 N.Y.S.2d 396, 398–99 (1st Dep't 1992); *Sidereal Studios v. 214 Franklin LLC*, 18 Misc. 3d 1110(A), 856 N.Y.S.2d 26, 2008 N.Y. Slip Op. 50004(U), *10 (Sup. Ct. Kings County 2008).

37. George Locker, Outside Counsel, *Defending the Commercial Tenant in Civil Court*, NYLJ, Feb. 1, 2002, at 4, col. 1.

38. *U.B.O. Realty Corp. v. Mollica*, 257 A.D.2d 460, 460, 683 N.Y.S.2d 532, 533 (1st Dep't 1999); *379 E. 10th St., LLC v. Miller*, 23 Misc. 3d 137(A), 886 N.Y.S.2d 72, 2009 N.Y. Slip Op. 50864(U), *1 (App. Term 1st Dep't 2009); *Benroal Realty Assoc., L.P. v. Lowe*, 9 Misc. 3d 4, 5–6, 801 N.Y.S.2d 114, 115–17 (App. Term 2d Dep't 2005).

39. *Helsam Realty Co., Inc. v. H.J.A. Holding Corp.*, 4 Misc. 3d 64, 66–68, 781 N.Y.S.2d 554, 556–57 (App. Term 2d Dep't 2002).

40. *Madison 45 Co. v. Travel Overseas, Inc.*, NYLJ, Nov. 7, 1999, at 28, col. 4 (Civ. Ct. N.Y. County) (determining after trial whether petitioner had a good-faith demolition consistent with the lease-demolition clause and termination notice).

41. *Brusco v. Braun*, 84 N.Y.2d 674, 679–81, 645 N.E.2d 724, 725–27, 621 N.Y.S.2d 291, 292–94 (1994).

42. RPL § 227; Locker, *supra* note 37.

43. RPAPL 753(4).

44. *JNA Realty Corp v. Cross Bay Chelsea, Inc.*, 42 N.Y.2d 392, 399–400, 366 N.E.2d 1313, 1317–18, 397 N.Y.S.2d 958, 962–63 (1977); *57 E. 54 Realty Corp. v. Gay Nineties*, 71 Misc. 2d 353, 354, 335 N.Y.S.2d 872, 873 (App. Term 1st Dep't 1972).

45. 21 N.Y.2d 630, 634–38, 237 N.E.2d 868, 689–71, 290 N.Y.S.2d 721, 722–26 (1968).

46. *Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating*, 205 A.D.2d 421, 423, 613 N.Y.S.2d 402, 403 (1st Dep't 1994). *See, e.g.*, *Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 25–26, 464 N.E.2d 125, 1237–28, 475 N.Y.S.2d 821, 823–24 (1984); *Xiotis Rest. Corp. v. LSS Leasing, LLC*, 50 A.D.3d 678, 678–79, 855 N.Y.S.2d 578, 579 (2d Dep't 2008).

47. *E.g.*, *Finley v. Park Ten Assoc.*, 83 A.D.2d 537, 538, 441 N.Y.S.2d 475, 476 (1st Dep't 1981).

48. *TSI W. 14, Inc. v. Samson Assoc.*, 8 A.D.3d 51, 53, 778 N.Y.S.2d 29, 31 (1st Dep't 2004).

49. *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 93 N.Y.2d 508, 514, 715 N.E.2d 117, 120, 693 N.Y.S.2d 91, 94–95 (1999); *Purdue Pharma, LP v. Ardsley Partners, LP*, 5 A.D.3d 654, 655, 774 N.Y.S.2d 540, 541 (2d Dep't 2004).

50. *51 Park Place LH, LLC v. Consolidated Edison Co. of N.Y.*, 34 Misc. 3d 590, 592–93, 939 N.Y.S.2d 255, 256–57 (Sup. Ct. N.Y. County 2011).

51. *Excel Graphics Tech. v. CFG/AGSCB 75 Ninth Ave.*, 1 A.D.3d 65, 70–71, 767 N.Y.S.2d 99, 103–04 (1st Dep't 2003).

52. *Korova Milk Bar of White Plains, Inc. v. PRE Props., LLC*, 70 A.D.3d 646, 647–48, 894 N.Y.S.2d 499, 500–01 (2d Dep't 2010).

53. *Vill. Ctr. for Care v. Sligo Realty & Serv. Corp.*, 95 A.D.3d 219, 220–22, 943 N.Y.S.2d 11, 11–13 (1st Dep't 2012).

54. *Metropolitan Transp. Auth. v. 2 Broadway LLC*, 279 A.D.2d 315, 315, 720 N.Y.S.2d 12, 13 (1st Dep't 2001).

55. *Medical Bldgs. Assoc. v. Abner Props. Co.*, 103 A.D.3d 488, 488–89, 959 N.Y.S.2d 476, 476–77 (1st Dep't 2013); *Sportsplex of Middletown, Inc. v. Catskill Regional Off-Track Betting Corp.*, 221 A.D.2d 428, 428–29, 633 N.Y.S.2d 588, 588 (2d Dep't 1995).

56. *John A. Reisenbach Charter Sch. v. Wolfson*, 298 A.D.2d 224, 224, 748 N.Y.S.2d 247, 247–48 (1st Dep't 2002).

57. *Syndicom Corp. v. Shoichi Takaya*, 275 A.D.2d 676, 677–78, 714 N.Y.S.2d 256, 256–57 (1st Dep't 2000); *S.B.R.'s Rest. v. Towey,* 130 A.D.2d 645, 647, 515 N.Y.S.2d 573, 575 (2d Dep't 1987).

58. *Godnig v. Belmont Realty Co..*, 124 A.D.2d 701, 702, 508 N.Y.S.2d 213, 214–15 (2d Dep't 1986).

59. *Homeside Lending, Inc. v. Watts*, 16 A.D.3d 551, 552–53, 792 N.Y.S.2d 513, 513–14 (2d Dep't 2005); Lewis A. Lindenberg, *A Commercial Tenant's Perspective to Defending Its Leasehold Interest in a Summary Proceeding* 3–4 (N.Y. City Civ. Ct. Bd. of Judges, Jud. Conf., Oct. 22, 2013).

60. Lindenberg, *supra* note 59, at 4.

61. *Id.* at 3.

62. *Id.* at 4–5.

63. *Id.* at 5–6.

64. *Id.* at 6.

BY ROBERT W. WOOD

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

# FATCA's Perfect Storm for Offshore Accounts

The United States taxes its citizens and permanent residents on their worldwide income. It does not matter in which country one resides, where the income is earned, or where else one might also pay tax. Every U.S. citizen or permanent resident must report worldwide income to the Internal Revenue Service.

Of course, the taxpayer may receive foreign tax credits for taxes paid elsewhere, which may offset some of the burden of paying tax in multiple jurisdictions. Tax treaties may help too, but treaties and tax credits rarely serve as a complete fix. These rules are not new, but enforcement is a different matter.

It isn't only U.S. worldwide tax reporting that is causing a stir. The related Report of Foreign Bank and Financial Accounts (known as FBAR) foreign account disclosures have become big business for U.S. enforcement. If you live overseas, you may not regard your local accounts as "foreign," but they are to the IRS. With draconian civil penalties and the risk of criminal prosecution, the "everyone does it" mentality about foreign accounts has faded quickly.

Finally, of course, there is FATCA, the Foreign Account Tax Compliance Act. FATCA puts the frosting on a U.S. enforcement policy that is sweeping and harsh. FATCA requires foreign banks to reveal American depositors with accounts of over $50,000. Noncompliant institutions could be frozen out of U.S. markets, so everyone is complying.

The U.S. worldwide tax reporting requirements are not new and have been a part of U.S. law for decades, as have FBAR filing requirements. FBARs date to 1970 and require filing for all non-U.S. accounts having a combined value of more than $10,000 at any time during the year. But compliance with all these rules was fairly low until the last five years or so.

Not anymore. In 2009, the IRS struck a groundbreaking deal with UBS (Switzerland's largest bank) for $780 million in penalties and disclosure of the names of American depositors. FATCA was enacted in 2010 as related enforcement developments were unfolding. But it took four years of ramp-up before FATCA's impact took hold.

The idea behind FATCA was to cut off companies' access to critical U.S. financial markets if they failed to pass along American data. More than 100 nations have agreed to the law, as have over 77,000 financial institutions. Even notoriously difficult China and Russia are on board.

Foreign Financial Institutions (FFIs, a term defined in FATCA) must report account numbers, balances, names, addresses, and U.S. identification numbers. For U.S.-owned foreign entities, FFIs must report the name, address, and U.S. Taxpayer Identification Number of each substantial U.S. owner. Some characterize this as a kind of global witch hunt. American indicia will likely mean a letter from the bank asking about U.S. compliance and stating the need to verify the information so the bank can be compliant with the United States as well.

## FBARs Still Required

FATCA adds to the burden by including the filing of IRS Form 8938, but it does not replace FBARs. The latter have taken on huge importance since 2009. U.S. persons with foreign bank accounts exceeding $10,000 must file an FBAR by June 30. These forms are serious, as are the criminal and civil penalties.

FBAR failures can mean fines up to $500,000 and prison terms up to 10 years. Even a non-willful civil FBAR penalty can result in a $10,000 fine. Willful FBAR violations can draw the greater of $100,000 or 50% of the account for each violation – and each year is separate. The numbers can add up fast.

Republicans have mounted a FATCA repeal effort, although many observers think the likelihood of repeal is small. Meanwhile, Canadians have filed suit to block FATCA and to prohibit the handover of U.S. names to the IRS.[1] The suit claims the Inter-Governmental Agreement, under which

Canada can turn over private bank account information, is illegal.

## IRS Voluntary Disclosure Programs

Starting in 2009, with changes in 2011, 2012, and 2014, the IRS has given taxpayers a way to resolve their noncompliance with these rules, and over the last five years, tens of thousands of people have done so. Since June 18, 2014, there are now several programs from which to choose.

The IRS has kept the Offshore Voluntary Disclosure Program (OVDP), involving eight years of amended tax returns and FBARs. You pay taxes, interest and a 20% penalty on whatever taxes you owe. Often, the amount of unreported income from the undisclosed accounts is fairly modest. However, for most people, there is also a 27.5% penalty on your highest offshore account balance.

In some cases, that penalty may be 50% depending on whether the taxpayer has accounts at a dozen or so already identified banks. Notably, this list of "bad banks" includes UBS and Credit Suisse, both of which settled charges with the United States. But even with the penalties, the OVDP is still highly attractive and better than the risk of higher penalties or even prosecution.

The Streamlined program can also be attractive, although it provides fewer assurances than the OVDP. The OVDP protects you from prosecution, while the Streamlined program does not. The OVDP costs more, but you get more. And if the taxpayer has bad facts, the OVDP absolves them.

In contrast, the Streamlined program hinges on the taxpayer certifying under penalties of perjury that he or she was non-willful. Caution is in order here, since the IRS can examine the taxpayer. If there are signs your tax missteps were willful, the IRS may be harsh.

The Streamlined program actually consists of a Domestic Streamlined program for people in the United States, and a Foreign Streamlined program for those living abroad. Both Streamlined programs involve three years of tax returns, not eight. Both Streamlined programs require FBARs for six years instead of three, to match the six-year FBAR statute of limitations.

The Foreign Streamlined program has no penalty. The Domestic Streamlined program applies a 5% penalty to the highest year-end balance in the offshore accounts over the six FBAR years. It is inevitable that taxpayers may gravitate to the Streamlined program.

Indeed, if you are not worried about the willfulness element of your facts, comparing the 27.5% OVDP penalty with the 5% Domestic Streamlined penalty seems like a no-brainer. Yet as it turns out, there are differences in how the 5% and the 27.5% penalties are computed. The Domestic Streamlined penalty is calculated on the year-end account balances and year-end asset values.

> If you live overseas, you may not regard your local accounts as "foreign," but they are to the IRS.

This is different from the OVDP which typically requires you to take the highest value of the account during the year.[2] More important than what goes into the penalty is what you can take out. For the 27.5% OVDP penalty, you can typically remove accounts that are tax compliant but were not reported.[3] The Domestic Streamlined base is broader. For the 5% Domestic Streamlined penalty, you must include all accounts that were either unreported or tax non-compliant.

For those people already in the OVDP process before July 1, 2014, but who still have open cases, the IRS has a Transitional Relief program. You still go through eight years of tax returns and FBARs, and you also make a non-willful certification. The result is a kind of blend: the security of the OVDP, but instead of the 27.5% penalty, you can get a 5% Streamlined penalty.[4]

Clients who reported all of their income and paid all of their taxes but forgot to file FBARs may be able to escape the penalties entirely by sending in their delinquent paperwork. This used to be covered under OVDP FAQs #17 and #18, but the IRS has rebranded them under the Delinquent FBAR and Delinquent International Information Return procedures.[5] However, you should be careful with these too, as the IRS can be harsh if it thinks you are willful.

To get beyond the reach of the IRS, a citizen must give up U.S. citizenship. A permanent resident (green card holder) must give up that status. It is also relevant to distinguish between residents and long-term residents. That is, how long has the person had a U.S. green card?

A long-term resident is a non-U.S. citizen who has been a lawful permanent resident of the United States for at least eight years during the 15-year period before that person's residency ends. Nevertheless, a person is not treated as a lawful permanent resident for purposes of this eight-year test in a year in which that person is treated as a resident of a foreign country under a tax treaty, and who does not waive the treaty benefits applicable to the residents of that country. However, as a word of caution: holding a green card for even *one day* during a year will taint the whole year.

## Tax Avoidance and Exit Tax

The U.S. tax law on expatriating changed multiple times over the last few decades. For example, in 2004, Congress discarded tax avoidance motives altogether. In 2008, Congress made further changes. A law generally known as the Heroes Act changed the method of taxation for those who became expatriates on or after June 17, 2008, adding more complexity and, usually, higher U.S. taxes.

This remains the current law. If a U.S. citizen or long-term resident expatriates on or after June 17, 2008, the expatriate is deemed to have sold all of his or her worldwide property

for its fair market value *the day before* leaving the United States. This deemed gain is subject to U.S. tax at the capital gain rate.

However, none of the exemptions, exclusions, non-recognition or rollover provisions in the tax code that might provide tax relief will apply. The exit tax is analogous to an estate tax. Just as all assets that would be part of one's estate would be included in one's gross estate, the expatriate's assets will be subject to income tax on unrealized gains as of the day before the person expatriates.

But there are exceptions to its application. First, there is the net annual income tax threshold. An individual is subject to expatriation tax only if he or she has an average net annual income tax of $160,000 for the five years preceding expatriation or has a net worth of $2 million or more on the date of expatriation. But another way of being hit with this exit tax is if you fail to certify on Form 8854 that you have complied with all U.S. federal tax obligations for the five years preceding the date of your expatriation or termination of residency.

There is also a gain-on-sale threshold. If a taxpayer has less than $600,000 of income from the deemed sale of assets on expatriation, there is no tax due. This exemption amount is adjusted for inflation ($690,000 for 2015 and $680,000 for 2014). If the expatriate's gain exceeds this amount, he or she must allocate the gain pro rata among all appreciated property.

Nonetheless, this exclusion amount must be allocated to each item of property with built-in gain on a proportional basis. This involves a complicated process of multiplying the exclusion amount by the ratio of the built-in gain for *each gain asset* over the total built-in gain of *all gain assets*. The exclusion amount allocated to each gain asset may not exceed the amount of that asset's built-in gain.

Moreover, if the total allowable gain of all gain assets is less than the exclusion amount, the exclusion amount that can be allocated to the gain assets will be limited to that amount of gain. For example, in 2015, if the total allowable gain in an expatriate's assets was $500,000, then that $500,000 would be the limit instead of $690,000. As this suggests, there are traps here, so be careful.

Is anyone exempt? Yes, some people born with dual citizenship who have not had a substantial presence in the United States are exempt, as are certain minors who expatriated before the age of 18½. Still, these people must file an IRS Form 8854 Expatriation Information Statement.

Taxpayers who are subject to the exit tax are entitled to make an irrevocable election to defer the tax until actually selling the property. This election allows people to leave the United States and to expatriate without triggering immediate tax. To qualify, a covered expatriate must provide a bond or other adequate security for the tax liability.

## Conclusion

It is unlikely that anyone relishes the prospect of doing paperwork. There is no question that U.S. tax compliance can be daunting. Indeed, most people with their feet in several countries regard the U.S. tax and reporting laws as among the more onerous worldwide.

And if the last five years of IRS, Justice Department and U.S. legislative actions have taught us anything, it is that these rules are nothing to take lightly. In the author's experience, most persons considering giving up a U.S. passport or green card are considering a variety of issues, not the least of which may be family worries. When one adds such uncertainties about family worries to what can be big dollars at stake, the decision can be daunting indeed.

Often, the person considering giving up a U.S. green card or passport is currently not compliant. That can make the decision more complex, since the best way of cutting off all liability in the future is usually to become compliant first and then to expatriate. That can seem like applying to college for the sole purpose of dropping out. Inevitably, some taxpayers who do get compliant with the IRS end up deciding not to expatriate after all.

Regardless of how grave the situation may seem, there is almost always a way to address it. That is far better than the increasingly dangerous approach of ignoring these issues. ■

1. *See Virginia Hillis & Gwendolyn Louise Deegan v. Attorney Gen. of Can.*, Case No. F1736-14, Federal Court of Vancouver.

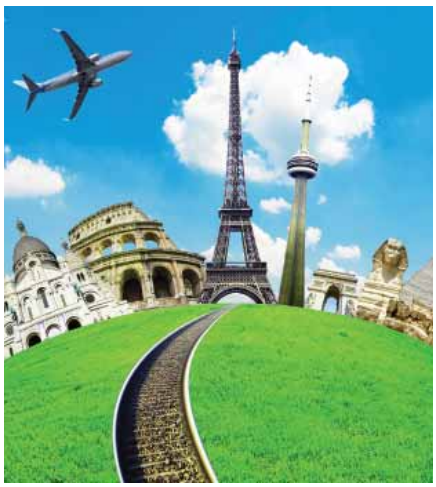
2. *See* 2014 OVDP FAQ#31, http://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers-2012-Revised.

3. *See* 2014 OVDP FAQ#45.

4. *See* Transitional FAQ#5 and #9, http://www.irs.gov/Individuals/International-Taxpayers/Transition-Rules-Frequently-Asked-Questions-FAQs.

5. *See* IRS Delinquent International Information Return Submission Procedures (updated Oct. 9, 2014), http://www.irs.gov/Individuals/International-Taxpayers/Delinquent-International-Information-Return-Submission-Procedures.

BY THOMAS A. DICKERSON



**Justice Thomas A. Dickerson** has been writing about travel law for 39 years. His works include his annually updated law books, *Travel Law,* Law Journal Press (2015) and *Litigating International Torts in U.S. Courts*, Thomson Reuters WestLaw (2015), as well as more than 350 legal articles, many of which are available at www.nycourts.gov/courts/9jd/taxcertatd.shtml. 

# When Does "Free of Charge" Become "Pay What You Wish But You Must Pay Something"?

The New York City (the City) Metropolitan Museum of Art (the Met) is one of the world's great art museums. Located on the Upper East Side of Manhattan, the Met's collection boasts 1.5 million objects representing five millennia of world history. About 6.2 million people visit the Met each year, including more than 100,000 New York City schoolchildren, who visit the museum for free. About 20% of visitors live in the City, with similar percentages visiting from the tri-state area and the rest of the United States. The other 40% of visitors come from around the world. Under the "pay-what-you-wish" admission policy, the average contribution is about $10. However, museum costs run about $50 per visitor. "According to its most recent financial statement, the museum's annual revenues are $345 million – 10 percent from 'pay-as-you-like' admissions, 10 percent from membership fees, 7.5 percent from city subsidies and 25 percent from profits generated by its $2.5 billion endowment. The rest come from charitable donations."[1]

This article discusses the consolidated cases of *Grunewald v. Metropolitan Museum of Art* and *Saska v. Metropolitan Museum of Art*[2] and addresses the question of what should be the admission charge to enter the Met, if any. Should it be "free of charge" as originally intended when the Met began operations in the 1870s or "pay what you wish but you must pay something"?[3] The first admission charge was authorized in the 1970s, 100 years after the Met opened.

## The Case

In the consolidated cases before New York State Supreme Court Justice Kornreich, the plaintiffs asserted, inter alia, several causes of action including (1) breach of the 1878 lease between the Met and the City (asserted as purported third-party beneficiaries) by failing to provide free admission; (2) violation of Chapter 476 of the Laws of 1893 (the 1893 Act) by charging admission; (3) violation of the N.Y. General Business Law (GBL) § 349 regarding admission costs;[4] and (4) misrepresentation regarding admission costs. In response, the Met sought to dismiss the first two causes of action based upon the 1893 Act and the 1878 lease.

## At the Creation: The Act and the Lease

As noted by the court in *Saska*,

> On July 21, 1853, Central Park was created. . . . On April 18, 1870, the New York State Legislature created the Museum "for the purpose of . . . encouraging and developing the study of the fine arts, and the application of arts to manufacture and practical life, of advancing the general knowledge of kindred subjects and, to that end, of furnishing popular instruction and recreation.". . . On April 5, 1871, the legislature authorized the Parks Department to build the Museum in Central Park. . . .[5]

In 1892 the state legislature authorized "funding of up to $70,000 *each* year for the Museum . . . provided that the Museum 'be kept open and accessible to the public hereafter free of all charge throughout the year.'" Regarding the lease, it was executed in 1878 "whereby the City granted a perpetual, rent-free lease to the Museum [providing that it] be kept open and accessible to the public free of charge from ten o'clock AM until half an hour before sunset."[6]

## The "Serious Budget Deficit"

"In 1970, to address a serious budget deficit, the Museum sought to charge an admission fee so that it could continue to provide the same level of public access in a fiscally responsible manner."[7] The City approved subject to conditions, such as that "[t]he amount of the admission fee is left entirely to the individual's discretion and that advice to that effect be conspicuously posted," and "[t]he proceeds derived from this program shall be used by the Museum for operating expenses only."[8]

## Paying Only One Cent

Since the 1970s, the Met's policy has been to post signs which read, "Pay what you wish but you must pay something." In 1975, Thomas Hoving,

then the Met's director, responded to a letter from the Commissioner of the Parks Department inquiring about the admission fee sign.

> Over the years since we instituted the discretionary admissions policy, we have from time to time had visitors who insist upon their right to pay one cent. Under the policy this is perfectly permissible, although of course it does nothing to achieve our purposes of keeping down the annual deficit in operating funds. Most of our visitors are more generous and appreciative, however, so that the average contribution from those not admitted free anyway (such as members, students, children, persons over age 65, servicemen, etc.) fluctuates between about $.85 and $.95 per person.[9]

## The Decision

> [T]he relevant inquiry is whether plaintiffs have standing to sue the Museum for its failure to admit all members "free of charge" which they argue violates the 1893 act and the . . . lease. The Museum contends that: (1) there is no private right of action under the 1893 act; and (2) defendants cannot sue for breach of the lease as third-party beneficiaries.[10]

The court agreed with the Met on both issues.

## The Reality of Modern Times

> It is clear that plaintiffs are part of the class which the 1893 act was intended to benefit. Indeed, the 1893 act was intended to benefit both plaintiffs and the Museum. Specifically, it was enacted to educate and enlighten New York City's citizenry, foster commerce and trade, and provide funding to the Museum so that it could afford to provide free access to the public. However, by 1970, inflation, legislative inaction and budgetary constraints eroded the efficacy of the 1893 act's goal. By that point, and even more so today, $70,000 was simply not enough to fund the cost of providing free access to the public while maintaining the quality and quantity of the Museum's vast art collection. . . . [T]he real question is whether the goal of the 1893 act – providing a mechanism to make access free for the public and affordable for the Museum in order to educate and foster commerce – is furthered by allowing plaintiffs to stop the Museum from charging admission, when doing so would put the Museum's ability to provide the current level of access in jeopardy. The answer is no.[11]

## Nudging Visitors to Donate

> All members of the public can afford to visit the Museum under the present scheme. For those without means, or those who do not wish to express their gratitude financially, a de minimis contribution of a penny is accepted. Admission to the Museum is de facto free for all. Actual access, provided in a way that "nudges" visitors to donate, is not incompatible with the 1893 act. Such a policy furthers the goal of the 1893 act – providing sufficient funding to ensure access to all. On the other hand, plaintiffs' lawsuit, at best, would undermine the ability of the Museum to provide free access. . . . At worst, it might well push the Museum to charge for exhibitions, which might include a substantial percentage, if not the majority, of the art on exhibit. A large part of the Museum's operating funding would be cut and the objective of educating the public and encouraging commerce undermined.[12]

1. Ben Bedell, *Met Museum's 'Pay What You Wish' Policy Is Upheld*, N.Y.L.J. (Feb. 6, 2015).
2. 42 Misc. 3d 548 (Sup. Ct., N.Y. Co. 2013), *aff'd*, 2015 WL 463764 (1st Dep't Feb. 5, 2015).
3. *See* Bedell, *supra* note 1, "Patrons now are asked to pay a 'suggested' admission price of $25 per adult."
4. For a discussion of GBL § 349, see Thomas A. Dickerson, Consumer Protection Chapter 98 in Commercial Litigation in New York State Courts: 4th ed. (Robert L. Haig ed.) West & NYCLA (2015).
5. *Saska*, 42 Misc. 3d at 551.
6. *Id.* at 552.
7. *Id.*
8. *Id.* at 552–53.
9. *Id.* at 554.
10. *Id.* at 555–56.
11. *Id.* at 557.
12. *Id.* at 557–58.

# ATTORNEY PROFESSIONALISM FORUM

## To the Forum:

My colleagues and I always try to be civil in our dealings with adversaries and judges. However, I have found that bullying typical of what I imagine occurs with kids is occurring more and more in the legal profession. I have seen this kind of behavior not only in depositions but also in court and at settlement meetings (where clients are often present). One of my colleagues (Bullied Ben) has been on the receiving end of repeated harassment by an adversary in contentious litigation in court, in settlement meetings and in all of the depositions taken in the case. I am seeing this adversary's persistent bullying beginning to take a psychological toll on this person. It is affecting his performance in the office, and I've been told his home life is a mess.

What should I tell him to do in order to help him address this situation?

Sincerely,

Friend of Bullied Ben

## Dear Friend of Bullied Ben:

Although many believe that bullying is something that happens only in the schoolyard, the sad reality is that many of us have at times experienced bullying in our practices. We have indirectly touched upon this topic in a couple of *Forums* where we addressed the issue of uncivil conduct in communications between adversaries (*see* Vincent J. Syracuse and Matthew R. Maron, *Attorney Professionalism Forum*, New York State Bar Association Journal, Jul./Aug. 2014, Vol. 86, No. 6) and in depositions (*see* Syracuse and Maron, *Attorney Professionalism Forum*, Nov./Dec. 2013, Vol. 85, No. 9). Your question causes us to drill down on the subject once more.

We suspect that bullying by lawyers is not something new and has probably occurred ever since barristers in Britain first donned wigs. Bullying can have severe consequences, affecting the mental health of all involved. It is an unfortunate statistic that lawyers are 3.6 times more likely to suffer from depression than non-lawyers. *See Why Are Lawyers Killing Themselves?*, CNN.COM, http://www.cnn.com/2014/01/19/us/lawyer-suicides/ (last visited Feb. 23, 2015). Various bar associations have responded to this serious problem by adding a "mental health" component to mandatory legal continuing education. A recent American Bar Association program brought together a panel consisting of practicing attorneys, a judge and a psychologist to discuss the growing concern over bullying in the legal profession. One of the panelists noted that bullies act to devalue and dehumanize their target for their own psychological needs, based upon their own feelings of envy, hatred and inadequacy. Peter Graham, PhD, Acumen Assessment LLC, *Bullying by and of Lawyers: Why It Happens and What to Do About It* (ABA Webinar, Sept. 16, 2014).

Dr. William Gentry, a Senior Research Scientist at the Center for Creative Leadership, has this to say about bullying:

> Bullying may be seen as an effective way to get things done if used infrequently, strategically, and for short-term improvements. But, in the long run, bullying will not pay off. Bullying is a detriment to job satisfaction, increases anxiety at work, and causes stress, which can ultimately lead to health problems. And, bullying will eventually catch up with the bully himself or herself. In fact, the research shows that one of the top reasons managers derail (get demoted, fired, or [do] not fulfill early career potential) is because they have problems with interpersonal relationships – they are cold, arrogant, aloof, dictatorial, and order people around – they are bullies.

So how does one respond to bullying? Certainly, responding in kind is not the answer. What you should do will, of course, depend on the given situation. But, our basic suggestions are that you do not take the bait by engaging in similar conduct, that you stay as calm as possible, that you ignore their tactics, and you resist the opportunity to yell back. We also suggest that you draw lines you believe should not be crossed, outline the consequences and be prepared to act on the consequences. Maria G. Enriquez, BatesCarey LLP, *Bullying by and of Lawyers: Why It Happens and What to Do About It* (ABA Webinar, Sept. 16, 2014). Enriquez further suggested that one subjected to bullying (particularly at a deposition) should always keep a record, create a paper trail, work to control the environment, file motions, consider requesting sanctions, etc.

If bullying occurs in the settlement meeting context, where all parties are often present, Enriquez suggests that the lawyer pull opposing counsel aside, explain to counsel that the client is very uncomfortable with his or her demeanor and let counsel know that, although the client really wants to settle, you and your client will terminate the meeting if counsel doesn't stop. And, if he or she doesn't stop,

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.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

then recommend to your client that you leave. *Id.*

It is also important to remind Ben that his client's interests are the real issue, rather than whatever the bully may be saying. Ben would be advised to keep in mind that bullying is often a reflection of the actor's own internal insecurity, and to recognize that while a bully's attack may be personal, Ben would be stronger if he disregarded it and remained in his professional role as representative of a client. *See Editorial: Confronting Bullying Within the Legal Profession*, Ct. L. Trib., http://www.ctlawtribune.com/id=1202668248833/Editorial-Confronting-Bullying-Within-the-Legal-Profession?slreturn=20150121100044 (last visited Feb. 23, 2015).

If you see that Ben's well-being has not improved even after giving him this advice, then you might suggest that he seek professional help through one of the lawyer assistance programs available at both the state and local bar levels in New York. If Ben chooses to go this route, he should be aware that information he gives to a member or agent of a lawyer assistance committee is confidential by statute. *See* Judiciary Law § 499.

Turning to the applicable ethical rules and guidelines, an attorney who subjects another attorney to bullying almost certainly violates the Standards of Civility (the Standards) (*see* 22 N.Y.C.R.R. § 1200, App. A), but may not necessarily violate the Rules of Professional Conduct (the RPC); and the conduct may not serve as a basis for a disciplinary complaint. That being said, Ben's adversary clearly has acted in contravention of the recommended behavior under the Standards.

The Standards were first proposed in a report issued by the NYSBA's Commercial and Federal Litigation Section, and were then adopted by the House of Delegates. The Standards act as "a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course." Although the Standards serve as a model for appropriate behavior, they were "not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Code of Professional Responsibility and its Disciplinary Rules [the predecessor to the RPC], or any other applicable rule or requirement governing conduct." *See* Syracuse and Maron, *Attorney Professionalism Forum*, Nov./Dec. 2013, *supra*.

Part I of the Standards provides that "[l]awyers should be courteous and civil in all professional dealings with other persons." Part I also offers a series of guidelines that are meant to encourage lawyers to maintain a level of courteousness and civility when dealing with anyone they might come across in a professional setting. These include:

> A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.
>
> B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.
>
> *See* Standards (I).

The Standards have been in place since 1997 and, fortunately, most lawyers follow them. They realize that, totally apart from the risks that bad behavior creates, the practice of law should not be a battlefield that brings out the worst in us. Effective lawyers realize that uncivil conduct is not effective advocacy and does not advance the interests of our clients. More important, identifying uncivil conduct as bullying can help in recognizing and understanding it when it occurs. *See Editorial: Confronting Bullying Within the Legal Profession*, *supra*.

As stated in other *Forums*, while the RPC does not directly address civility, several rules deal with "overly aggressive behavior" or "harassing behavior" by attorneys, including Rule 3.1 ("Nonmeritorious Claims and Contentions"), 3.2 ("Delay of Litigation"), 3.3 ("Conduct Before a Tribunal"), 3.4 ("Fairness to Opposing Party and Counsel"), and 8.4(d) ("engage in conduct that is prejudicial to the administration of justice")." *See* Anthony E. Davis, *Replacing Zealousness With Civility*, N.Y.L.J., Sept. 4, 2012, p. 3, col. 1.; Syracuse and Maron, *Attorney Professionalism Forum*, Nov./Dec. 2013, *supra*; *see also* Syracuse and Maron, *Attorney Professionalism Forum*, Jul./Aug. 2014, *supra*.

It could be argued that the bullying conduct exhibited by Ben's adversary may be considered "conduct that is prejudicial to the administration of justice." *See* Rule 8.4(d). However, Comment [3] states that the Rule "is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in *substantial harm to the justice system comparable to those caused by obstruction of justice. . . .*" (emphasis added). Although Ben's adversary's conduct is a prime example of uncivil conduct, it is not (as we have pointed out in the past) behavior that parallels the more egregious conduct that could be deemed a violation of Rule 8.4(d). Examples of conduct subject to discipline include "advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding . . ." and the like. *See id.* Comment [3]. *See also* Syracuse and Maron, *Attorney Professionalism Forum*, Nov./Dec. 2013, *supra*.

In the deposition context, see Part 221 of the Uniform Rules for the New York State Trial Courts, the Uniform Rules for the Conduct of Depositions (22 N.Y.C.R.R. pt. 221). The 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, http://www.nycourts.gov/ip/judiciaryslegislative/CivilPractice_06.pdf; Syracuse and

Maron, *Attorney Professionalism Forum*, Nov./Dec. 2013, *supra*.

The pressures of legal practice are enough to deal with without having to face off with someone whose bad behavior should never have left the schoolyard. As we noted here and in prior *Forums*, the best thing to do when confronted with someone acting inappropriately is to take the high road and not engage in behavior similar to that of the offending person. It is what we believe to be the best and only responsive tactic.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Matthew R. Maron, Esq.
(maron@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I work as an assistant general counsel for MegaCorp, the largest manufacturer of widgets in the United States. We began growing concerned that our competitors are slowly chipping away at our market share, which may cause MegaCorp to lose its place as the largest manufacturer in the widget industry. Therefore, the company's executives decided to purchase the fourth and fifth largest widget manufacturers, thereby eliminating its top competitors. Because of these potential acquisitions, MegaCorp has begun to face scrutiny from antitrust regulators. In addition, the company has been advised that the due diligence reviews of the company's records by these antitrust regulators have uncovered a potential issue concerning improper waste disposal at one of the company's manufacturing facilities, which has been referred for further investigation by the Environmental Protection Agency. I, of course, have been tasked by the company's general counsel to handle MegaCorp's compliance with federal and state environmental laws and regulations.

What are my ethical obligations pertaining to this particular situation? Specifically, if federal regulators attempt to interview me as part of their investigation concerning the waste disposal matter, do I have to comply with their interview request? And if I do submit to an interview, what can I disclose? Finally, if the company is ever sued by the government as a result of the investigation, and I am subpoenaed to testify at trial, what am I allowed to disclose?

Sincerely,
Quentin Questioned

# NEW MEMBERS WELCOMED

**FIRST DISTRICT**

Francis John Acott
Kyndra Jamison Adair
Adrienne Adkins
Pamela Michele Albanese
Jordan Elizabeth Alexander
Shane Paul Alexander
Gabriel Altman
Angeline Wilson Andersen
Jacques Tiffany Anderson
Yacoba Elsie Annobil
Justin Scott Anslow
Rachel Marie Arnett
Jordan Asch
Kyle J. Auteri
Evan Dryden Babcock
Gillian A. Bader
Daniela Veronica Badiola
Matthew Russell Baker
Zara Bari
Jennifer Rebecca Basch
Hayat Bearat
Luwan Teklegiorgis Berhane
Rebecca Sarah Blake
Courtney C. Brown
Thomas Austin Brown
Kerry Brownlee
Samuel Brylski
Le-anh Bui
Emily Maria Burgess
Sijia Cai
Sara Elizabeth Campbell
Lachlan Schuyler Campbell-Verduyn
Colton Michael Carothers
Samantha Lynne Chassin
Si Chen
Tri Duc Chiem
Tiffany Chiu
Jung Eun Choi
Ali Rasheed Chughtai
Helim Chun
Hyun Gyo Chung
Shlomit Ruth Cohen
Caitlin Christine Colesanti
Mary Margaret Thompson Colleary
Anthony Ray Collins
Eugene M. Cronin
Ashley Cross
Caroline Elise Dalla Betta
Gordon Jay Danning
Grant Ryan Darwin
Elizabeth Mary David-Dembrowsky
Brooke Dearborn Dawson
Justine Alyssa Di Giovanni
Djami Diallo
Daniel Diamond
Jacqueline Grace Diaz
Kelly Ngoc-nhu Diep
Jesse Chaim Dinner
Daniel Glenn Dobies
William John Dockery
Timothy S Doherty
Lauren Dolecki
Ryan Scott Duerring
Craig William Durrant
Lowell Kevin Dyer
Jenny M Edelman
Catherine Nicole Eisenhut
Amanda J Fachler
Hua Fan
Catherine Elizabeth Fata
Eric David Felcher
Daniel Feldman
Jack Granwehr Ferreri
George Bradley Fleming
Katherine Elizabeth Fletcher
Matthew Brandon Fox
John Andrew Fraser
Sharon Freiman Bardor
Abigail Friedman
Max Benjamin Friedman
Joseph Garmon
Wade Michael German
Corey Matthew Gerson
Amanda Jean Mae Gill
Simcha Gitelis
Emily Damsgaard Gladden
Emma B. Glazer
Jordan Lee Goldman
Julie Laura Goldman
Laura Elizabeth Goldsmith
Alejandra Maria Gonzalez-Martinez
Matthew G. Goodwin
Stacy Goto Grant
Eric Greenwald
Pierre Marc Griffith
Lynndon Keith Groff
Michal Gross
Edward James Guadiana
Jamie Rachel Haar
Katherine Stancell Haigwood
Xiao Han
Nicole Christine Hanson
Clancy Anne Harris
Jordana L Haviv
Tiana Miyoko Hertel
Virginia Ruth Hildreth
Melissa Erin Hindman
Christopher Thomas Hinman
Ya-hsiun Ho
Patrick Horan
Jeffrey Horowitz
Andrew Hoskinson
Hyatt Marcel Howard
Serena Hsieh
Jason Hsu
Tammy Chen Hsu
Martin Sui-ming Hui
Yashreeka Zehra Huq
Peter Hur
Robert William Hyberg
Elliott Hyungjin Im
Andrew S. Janet
Leslie Jaw
Zimeng Jia
Matthew Joseph Jones
Yi Kang
Jonathan William Kaplan
Natalie Karam
Madeleine Claire Karel
Michael M Kayam
Kristin Ann Keehan
Mark Christopher Kehoe
Alison Jeanne Kelly
Kathleen Anne Kelly
Kevin Charles Kelly
Christopher Kim
Hyun-joong Kim
Ji Eun Kim
Kyungchun Kim
Sae Rho Mee Kim
Azeemah Kola
Vanessa Kong
Jamin Koo
Michelle L. Kornblit
Larissa Tatiana Kravanja
Abhrjit Kurup
Saeyun Angela Kwon
Amber Hy Ling Lam
Cristina Ann Laramee
Joanne Lau
Bahiya Amira Lawrence
Heather Lawson
Zachary Ryan Lazar
Michael William Lebron
Angela Lee
Muhyung Lee
Michael Skoy Legge
Joanna Kathleen Lehmann
Matthew Leighton
Richard Leishman
Kevin Eric Levenberg
Ashlee Lamar Lewis
Jasmine Li
Andrew James Ligotti
Evelyn Lin
Chuyang Liu
Claire Elizabeth Logan
Lauren Kayla Lubelsky
John M. Lyons
Degang Ma
Samantha Marie Macina
Devon Lynne MacLaughlin
Madeleine Patricia MacNeil
Omar Karim Madhany
Elizabeth Marie Mak
Kevin Lai Mallen
Luke Richard Marcoux
John James McDonnell
Tara Brigit McGrath
Alexander Joseph McHugh
Jason Evan Meade
Harini Mekala
Alisa Melekhina
Jason Scott Mencher
Sarah Ann Merry
Lin Miao
Margaret Catherine Miceli
Hani Shahir Migally
Charles Edouard Moulins
Christopher Daniel Nason
David Timothy Newman
Devin Scott Newman
Chris Kaithayil Ninan
Renagh Emiko O'Leary
Lily Anne Ockert
Jonathan Orlinsky
Wilson Rafael Osorio Sierra
Ava Christine Page
Raymond Palmer
Puja Virendra Parikh
Joongwon Park
Christopher Whiton Pendleton
Kimberly Shannon Phillips
Alaina Foster Pirraglia
Chase Alexander Mooty Proctor
Emmanueler Ewurabena Quaye
Cristina Quinones-Betancourt
Ravi Ramanathan
Matthew Lee Rappoport
Amanda B. Ravich
Courtney A Razner
Emily S. Redmerski
Raphaella S Ricciardi
Catherine Virginia Riley
Jennifer Michelle Riso
Jackie Marquis Robinson
Danielle Nicole Rosato
Alexander Scott Rosen
Daniel Robert Rubin
Thomas Patrick Ryan
Moni Sarmadi
Rebekah Tobison Scherr
John Rigby Schinasi
Jessica R. Schissel
Terence Michael Schroeder
Christopher F Schweitzer
Kara Jennifer Sharkey
Thomas G Sharkey
Adam Brad Sherman
Julia Florence Siegel
Ellen H. Sise
Alana Sivin
Matthew John Smallcomb
Tamara Simone Smallman
Rebecca Lili Smock
Jared Mitchell Snyder
Naomi Solomon
Elizabeth Song
Rebekah Lee Soule
Sean Andre Spence
Amy Beth Stein
Gretchen O'Grady Stertz
Aviva Simone Surugeon
Derrick Sutter
Ariel B. Tacher
Kimberly Lynn Thibault
Yuen Tin
Matthew Paul Tosto
Laura Tucker
Monica Kay Tulchinsky
Alisha Jannel Turak
Sarah E Turney
Karla Yahaira Valenzuela
Leonides Ramon Viajar
Lyndsey Ann Waddington
Conor J. Walline
Thabisa Rose Walwema
Charles Clark Warthen
Lauren Rebecca Weinberg
Dashika R. Wellington
Shaun Werbelow
Emmeline Widjaja
Erin Eddy Wilk
Erin Wilkd
Sarah Kathryn Wilson
Sara Klinger Winik
Patrick Nelson Winter
Heejeong Won
Jonathan Michael Wu
Matthew Peter Wynne
Daniel Yao
Bernice Bai Yu
Honghui Sofia Yu
Girmay Zahilay
Oleg Zakatov
Brittany S. Zimmer

**SECOND DISTRICT**

Yaakov U. Adler
Veronica Jane Aksu
Ryan John Amato
James L Ansorge
Benjamin Preisendanz Argyle
Tasiana Auguste
Sammuel Benjamin Auld
Nealraj Saddival Bhushan
Andrea Lynn Bible
Owanaemi Abiye Briggs
Julia Italia Catania
Conor Joseph Colasurdo
Alison Therese Conn
Abigail Flynn Coster
Maria Fernanda Decastro
Michael Lewis Digiulio
Lindsay R. Edelstein
Kaitlyn Elizabeth Fallon
Melissa Friedman
Aaron J. Garcia
Joan Marie Gioberti
Levi Y. Glick
Stuart Gold
Lizzie Gomez
Mark Lyle Greenfogel
Menachem M. Hecht
Benjamin Joseph Herold
Brendan Michael Horan
Thomas Francis Howley
Byron M. Huang
Marina Indenbaum
Chantal Victoria Johnson
Jellisa M. Joseph
Lindsey Breton Kaley
Rachel Jillian Katz
Jason Neil Kestecher
Alexander Peter Kommatas
Joshua D. Lee
Xiaoyue Li
Jennifer Jiachen Liu
Ryan Glen Marcus
Nicole Marie Marimon
Philip Scott May
Anny Mok
Tatenda Aloy Musewe
Emily Elizabeth Ponder
Samantha M. Rubin
Abbi Laurel Schenkel
Tyrone Kenneth Scott
Terell Simpson
Michael Charles Telis
Alaina Evelyn Varvaloucas
Crystal V. Venning
Anthony Rosario Vento
Tanika Paz Suggs Vigil
Kiel Steven Walker
Simon P. Wercberger
John Stephen Williams

Nicholas Ryan Williams
Eleanor Anderson Winn
Geoffrey Thomas Witherspoon
Yiyi Zhang
David Zhu

**THIRD DISTRICT**
Gina Angrisano
Mary Armistead
Anna Besson
Benjamin Michael Botelho
Caryn Irene Bower
Whitney Erin Braunlin
Thomas Buchan
Jaclyn Abbie Bunce
Alexandra Burstein
Dylan Scott Cerbini
Brielle J. Christian
Edward Hyde Clarke
Serena Mae Compitello
Tracy L. Connolly
Jessica R. Coombs
Nicholas Stephen Cortese
Keith Patrick Cronin
James Michael Cunningham
Samantha Marie Delia
Courtney Ellis Denette
Antony Eminowicz
Maxwell Derouen Tolbert Faubion
Nicholas G. Ference
David Galin
Sean Glendening
Veronika Grochowalski
Hillary Anne Gunther
Katherine Hart
Sarah M. Harvey
Asher Hawkins
Kelly Hendricken
Lisa Herman
Taalib T. Horton
Victor Ivanoff
David Iversen
Cheyenne James
Amina Karic
Chelsea Elizabeth Keenan
Daniel A. Koskinen
Sarah Krebser
Grace Eunmee Lee
Ronnie Lindberg
Michael D. Lostritto
Michael Dominic Lostritto
Di Ma
Amanda Marie McHenry
David Mushett
Kelly A. Nadeau
Katharine Jane Neer
Shain M. Neumeier
Julie Nociolo
Edward J. Ohanian
Darrel John Laureta Pae
Dorothy F. Powell
Damian J. Privitera
Brittiny Razzano
Abigail Walsh Rehfuss
Owen Reilly
David Edward Restrepo
Paulene Maye Ricci
Aubrey Ann Roman
Aubrey Romas
Tracie Rozhon
Alexander Leo Scher
Madeline Faye Schiesser
Michael Schoenberger
Christopher Rodney Scoville
George C. Selby
Megan Nicole Sherman
Amanda Jayne Smith
Robert S. Smith
Felicia Valle
Brittany Van Scooter
Jamie L. VanDenburgh
James S. Villanueva
Kimberley Francine Wallace
Michael White
Brett Williams
John F. Wirenius
Matthew Zapala

**FOURTH DISTRICT**
Alexandra Nina Susan Mathilde Besso
David D. Bobick
Michael August Brandi
Alexandra Blaire Burstein
Michelle Chester
Mary A. Cipriano-Walter
Nicole C. Fish
Donald E. Gogerty
Mackensie Elizabeth Greene
Heath A. Hardman
Thomas D. Pickering
Margaret D. Place
Daniel Charles Ramsey
Stephen Douglas Rosemarino
Hannah A. Scoville
Elijah Summersell
Eteena J. Tadjiogueu
Keri Vanderwarker
Thomas H. Webb
Michael Louis White

**FIFTH DISTRICT**
Sachpreet Singh Bains
Angel L. Baker
Joshua Michael Beardall
Katherine A. Buckley
Justin Fraser Burgess
Daniel Harris Butler
Alyssa Nicole Campbell
John Patrick Coghlan
Rachael Ann Flach
Linda Gehron
Zheng Chao Gou
Ross Michael Greenky
Sarah Catherine Hughes
Nicholas Patrick Jacobson
Michael T. Johnson
David Kailer
Kacie M. Kalil
Rebecca G. Kelleher
Paul Stephen Kelly
Riane F. Lafferty
Anthony Vasko Mangovski
Alicia Marie Massi
Shekeba Morrad
Briton Nelson
Thomas F. O'Brien
Erin Lowery O'Connor
Olga Fedorovna Peshko
Ryan Patrick Pezzulo
John Phelan
Scott Francis Regan
Samantha Cati Robbins
Michaela Anna Sarofeen
Nicole Scialabba
Hannah Stewart
Madeeha Sajjad Syed
Edward John Thater
Corey James Vincent
James Ronald Voyles
Erin Marie Welch
Derek Benjamin Wheeler
Lana Abbas Yaghi
James E. Zino

**SIXTH DISTRICT**
Raoul A. Atadero
John Christopher Clark
Cameron Burgin Daniels
Christopher James Di Donna
Amanda Giannone
Donna Harris
Dylan Harris
Elizabeth Ann Monachino
Laura Parker
Rosemarie Pope
Brian Restauro
Olivia Scheuer
Elizabeth Silverberg
Danielle Nicole Singer
Elizabeth M. Stapleton

**SEVENTH DISTRICT**
Mario R. Arena
Kathryn Elizabeth Assini
Brian James Ayers
Katherine Eileen Bagley
Matthew G. Bedford
Lucy Anderson Brado
Rufus Earl Burgess
Stephen Philip Burke
Willard R. Burns
Katelyn Anne Welty Cannella
Amy Amanda Jennifer Chadwick
Peter Redfield Chandler
Timothy Chapman
Alexandra Lee Condon
Moira Helene Cooper
Joseph Ambrose D'Angelo
Anthony Joseph Dellefave
Gregory Marc Dickinson
Joseph James Doran
Charlotte Drew
Tyler David Evans
Ryan Andrew Scott Fagen
Kristin Elizabeth Forshee
Joseph Vincent Frateschi
Jeffery Richard Friesen
Kelly Rose Gusmano
Nicole Habek
Brittany Ann Jones
Joshua Paul Keefe
Raymond John Kelsey
Nicole Christine Kolczynski
Nolan James Lafler
Christopher James Larrabee
Alexandra Elizabeth Lugo
Kaivan Paul Mangouri
Christopher Paul McClary
Robert Christopher McIver
Jeremy Ray McLean
Paul Andrew Meabon
Sean Michael Meritt
Andrew Gagnier Morabito
Abigail Marie Norris
Kelly Lynn O'Donovan
Elizabeth Oklevitch
Steven M. Palmer
Aleksandra Krasimirova Petrova
Sara Frances Pupparo
Colleen M. Raimond
Michael Joseph Rooney
Glenn Schieck
Brendan Patrick Smith
Andrew M. Soler
Christine Anna Szpet
Matthew J. Turetsky
Caitlin Leigh Weinstock
Maureen K. Wenzel
Maureen Lois Werner
Sean Williams
Franz Wright
Emma Araz Yedgarian
Michael John Yetter
Jason A. Zirbel

**EIGHTH DISTRICT**
Samuel A. Alba
Justin John Andreozzi
Amber Angielczyk
Amy Nicole Arnoldo
Sarah Beth Balogh
Kurt Albert Baumgaertner
Erik David Bentley
Carey Castiglione Beyer
Lani Brandon
Adam Michael Brasky
Christopher Harold Brown
Peter D. Cantone
Earl Kenneth Cantwell
Stephen M. Carden
Kenton Grant Cardon
Kristen Nola Carothers
Annmarie R. Cellino
Ethan William Collins
Kellen Patrick Coppola
Nicholas D'ambrosio
Tricia Marie Defilipps
Gregory Thomas Della Posta
Nicholas Paul Demarco
Gabrielle Lucia Dibella
Emily Ann Dinsmore
Andrew David Drilling
Stephen C. Earnhart
Shayna Deborah Eichen
Karoline Faltas
Mark T.R. Fanton
Michelle Marie Fecio
Sarah Elizabeth Fenster
Eliza Friedman
Lauren Fritz
Megan Furrer
Vanessa Christine Gabriele
Nathan John Geary
Logan C. Geen
Vanessa Anne Glushefski
Grace E. Golando
Erin M. Gormley
Taylor Alyssa Grogan
Cody James Jacobs
Theodore Arthur Joerg
Luisa Dupuy Johnson
Alyssa Lee Jordan
Chelsey Noelle Kelso
Michael James Kozlowski
Brian Kraemer
Stephen Lapp
Chelsea Nicole Latta
Ryan Ledebur
Elizabeth Ann Lee
Graham Stoddard Leonard
Andrew Zachary Lepore
Alexander Halpern Levy
James Dominic Macri
Daniel Ryan Maguire
David J. Marello
Christopher Paul Maugans
Marjorie Aguiar McAllister
Brooke Mildred Meckler
Timothy P. Moriarty
Ryan Marc Mura
Mellissa Ann Murphy
Alex Michael Neurohr
Joseph Lucian Nicastro
Valeriya Nitko
Jessica Lynn Noto
Jennifer Rae Nunnery
Christine Marie O'Connell
Serena Rhianne O'Dierno
Jay Adam Organek
Norvella Christina Pendergrass
Aaron Nicholas Pontikos
Michael Christopher Pretsch
Nicholas Brendan Robinson
Haley Elizabeth Ruh
Matthew Ryan Scherer
Rebecca Lynn Schnirel
Jonathan Jeffery Schutrum
Tessa Rae Scott
Nicholas James Shemik
Lauren Anna Skompinski
Emily Ann Sobilo
Jacob Steffan Sonner
Valerie L. Stanek
Sarah Ellie Tanbakuchi
Tyler James Threehouse
Alice Alberta Troy
Marten Rose Violante
Michael Nicholas Vranjes
Amanda Webster
Jake Whiting
Courtney Williams
David John Wolff
Jennifer Lynn Yates
Jordan Lee Zeranti
Henry Anthony Zomerfeld

**NINTH DISTRICT**
Christopher James Berlingieri
Shouvik Bhattacharya
Daniel S. Chilewich
Max Patrick Clarke
Christopher Ryan Confrey
Colleen Kelly Faherty
Nicholas Victor Ferrara
David Frazer
Jaclyn Lanni Greenwald
Pamela Danielle List
Kempshall C. McAndrew
Mary Elizabeth McMahon
Robert Alexander McManus
John William Mitchell
Patricia M. O'Connell
Danielle Okst
Melissa Alexis Rodriguez
Samantha Min Simchowitz
Christopher Frederick Stahlmann
Hilary Weiss

**TENTH DISTRICT**
Justin Elyahoo Amirian
Susan Mary Bacigalupo
Samantha Lauren Baer
Richard Bahrenburg
Peter Barbieri
Nicholas John Bebirian
Joshua Nathan Bergman
Richard Berrios
Francesca Marie Brancato
Alexys Marie Carter
Mayra Alicia Cataldo
Ryan Conor Cleary
Kristy Marie D'Ambrosio
Mariel Alejandra Dumas-Wenckebach
Joshua Erenfrid
Keith J. Feinberg
Megan Feinberg
Sarah Freeman
James Kyle Froehlich
Darwin Goh
Emily Grossman
Michael Gucker
Matthew Brian Guerra
Regine Gustave
Sonia Agnieszka Kaczmarzyk
Kenneth Sean Kast
Cristina A Knorr
Anastasia Victoria Larios
Marion Diane Livermore
Kimberly Ann Mangels
Sharon B. Montazeri
Christine Teresa Mulvey
Sakine Oezcan
Michal Ovadia
Sophia Ashley Perna
Meaghan Lynn Powers
Jennifer Rose Roeske
Jacqueline Yeong Ryu
Jeremy Thomas Saks
Barbara Sheryl Schwartz
Sarah Joy Shubert
Corey Lee Shulman
Madeline Singas
Annmarie Sitar
Nicholas Anthony Spratt
Alana Maureen Sullivan
Reema Sultan
Jeremy Weicha Teng
Angelie Thomas
Andrew John Vacca
Christine Marie Verbitsky
Joshua P. Weiss
Christine Rosalie Zaffarano
Eric S. Zember

**ELEVENTH DISTRICT**
Eleni Antonakis Aristodemou
Larry Saul Bachner
Anna Bangiyev
Jessica Leigh Bettencourt
Sevan Rb Biramian
Bryan Chaim Meir Bryks
Vanessa N. Caicedo
Tesla Carrasquillo
Ashley Marie Castro
Robert M. Cernat
Michael Chao
Alexander Walker Cogbill
John Ivey Eagles
Joseph Michael Eckstein
Michael Ehrenreich
Alina Gavrilov
Christopher Gee
Montgomery Boguang Gim
Enkelena Gjuka
Glenn Greenberg
Joshua L. Greenfield
Justine Mina Haimi
Agnes Isabel Heine
David Neil Heitner
Yusha D. Hiraman
Richard A. Hochhauser
David J. Hommel
Diana Horhogea
Michael Antonio James
Xiaochun Jiang
Neha Kala
Stephanie Kelly
Tanya Wahid Khan
Christopher James Kochman
Lisa Marie Landers
Dana Yoorim Lee
Lydia Joo Lee
Jim Liou
Haifeng Liu
Jessica Anita Musumeci
Peter Oliveri
Frank Samuel Restagno
Charles E. Roberts
Adriana Nicole Segarra
Ashley Serrano
Stacey Ann Silliman
Amandeep Singh
Evgenia P. Soldatos
John Jian Song
Jennifer L. Steinbuch
Nathaniel Ramseys Torres
Michael Anthony Trajbar
Michael Ivan Villacres
Jonathan Kangwoo Yi

**TWELFTH DISTRICT**
Michelle Colleen Born
Michael John Derienzo
Josephine Duah
Lenora Michelle Easter
Russell Scott Yavner

**THIRTEENTH DISTRICT**
Garen Scott Marshall
Thomas J. Schiro

**OUT OF STATE**
Bettina Aciman
Marquita Denise Acron
Vindhya Adapa
Thomas Ahmadifar
Katherine Marie Aizpuru
Saif Alaqili
Jessy R. Albaz
John Moriel Aldrich
LaToya Alexander
Stephen J. Alexander
Ellina Aleynikova
Mary C. Ambacher
Vitali Anfimov
Nisha Nicole Arekapudi
Laura Aronsson
Jelani Asante
Anne-marie Asare
Jordan Asch
Mavis Asiedu-Frimpong
Ines Claire Audran
John David Avila
Asloli Avrelie
Narini Badalian
Kelly Bahlke
Shifali Baliga
Robert Cody Bannon
Nickolas Barber
Sarah Bartels
Galen Bundy Bascom
Edwin Batista
Ligia M. Bernardo
Frank J. Bewkes
Robert Bewkes
Ashley Binetti
Dmytro Biryuk
Sarah M. Block
Lisa Blumenthal
Lindsey Bohl
Ernest Bonaparte
Christine Bonomo
Samantha K. Boos
James Russell Booth
Lindsay Borgeson
Daniel Bousquet
Beril Boz
Victoria Braga
Lucas Braun
Jenna Paige Brofsky
Crinesha Trenell Brooks
Angela Bunnell
Jerusha K. Burnett
Max Lloyd Burwick
Alison Busco
Brittany AK Buxton
Kristen Alexandra Margaret Byrd
Jill Ann Caffrey
Liang Cai
Michael Cain
Nicole Alice Callan
Luis Andres Camacho
Peter Timothy Carey
Brian W. Carroll
Gregory Caso
Karen Jacquelyn Cassetta
Jonathan David Castellanos
Simon Cataldo
Christina Cerutti
Jung Hee Cha
Samuel Jack Chaffin
Choyshin Chan
So Ting Brenda Chan
Albert Douglas Chang
William J. Chang
Katherine Cheng
Gug H. Cho
Sung Kon Cho
Gyoung-gyu Choi
Ke Jia Chong
Gabriel J. Chorno
Bryan Christenson
Neal Bruce Christiansen
Hwee Ping Chua
Changkun Chun
Nathan Chun
Ondrej Chvosta
Katelyn Elizabeth Ciolino
Caitlin Marie Cipicchio
Vincent Cirilli
Michael Anthony Civitello
Morwenna Claire
Brian Clement
Jonathan D. Cocks
Kieran M. Coe
Johnmack Cohen
Kylie Cohen
Madeline Cohen
Michael Cohen
Julian Wendell Cokic
Steven Jonathan Colby
Miguel Perez Colebrook
Anne Kathleen Collesano
Patricia Marie Comblo
Christopher Conway
Julia Cook
Spencer Jordan Coopchik
Casey Jo Cooper
Jesus Miguel Corral
Bianca Costa
Jared Bishop Crittenden
Mulan Cui
Elizabeth Cuttner
Shlomo Z. Cytryn
Julie Dabrowski
Tihitina Dagnew
Lorin Renee Dale-Pierce
Sharmistha Das
Thomas Wolf Davis
Michael David Deloreto
James Paul Depaoli
Donald DePass
Patrick Devine
John Togbi-tsikpo Dey
Carl Jarrett Dieterle
Jessica DiPietro
Jessica Rose Dipietro
Gital Dodelson
Kelly Donnelly
Diane Mounir Doumit
William Jacob Downes
Dwight Draughon
Andrea Culebras Drumm
Laura S. Duncan
Alexandra Eber
Joshua T. Eberle
Daniel Echavarria
Vincent Robert Eisinger
Meera R. El-Farhan
Adam Eldean
Aaron Ellias
Daniel Patrick Lee Elliott
Joanna Dawn Enns
Paige Espy
Obiageli P. Ezenduka
Jonah Gray Fabricant
Jason Facci
Yuan Fang
Janet E. Faulkner
Allison H. Federoff
Daniel Lawrence Feldman
Yanhong Feng
Jamie Fertig
Monika Diana Fidler
Jacob Fields
Brett Fischer
Michael Lee Fitzgerald
Elizabeth Fitzpatrick
Devorah Flax-Davidson
Lauren Felicia Formica
Brian Patrick Fox
David C. Frankenfield
Rachel Lauren Fried
Jordan Friedland
Elizabeth Hawkins Friedman
Laura Friend
Diane Furstenau
Daniel Gafni
Kelli Boone Ganz
Yongynan Gao
Carlos Garcia
Jose Carlos Garcia
Thomas S. Garlick
Jennifer Patrice Garner
Brian John Garrity
Kate Georgen
Christina Gergis
Christina Emily Gergis
Andrew Getsinger
Christine Gilleland
Gabrielle A. Giombetti
Christine Elizabeth Giordano
Jonathan D. Gladstone
David H. Glanton
Michael Glotobach
Nora C. Godkin
Jesse Clark Goins
Brad Goldstein
Stephanie Goldstein
Jonathan David Goldstone
Jennifer Gomez
Alexandra Goumas
Elizabeth Marie Graffeo
Tiffany Greaves
Jessica Erwin Greenwood
Amy Christine Gromek
Manchilo Guadie
Rishi Gupta
Karrie Gurbacki
Stephen Guynn
Geoffrey Hainbach
Lindsay E. Hall
Richard Jonathan Halmo
Chris Han
Brandon Douglas Harper
Jessica Ekhause Harris
Daniel Walter Hartman
Stephanie Ellen Hartmann
Kerisha Hawthorne
Heather Heldman
Naida Henao
Corinne Henneberg
Matthew Henry
Amanda Hernandez
Margaret Smith Hickey
Sonya Ya-Hsiun Ho
Jordan S. Hollander
Naomi Honda
Daniel Bennett Honeycutt
Daniel Marc Horowitz
Loyal T. Horsley
Yiren Hu
Junxiao Huang
Yingjun Huang
Seung Hwan Hur
Nicole Hurley
David Huynh
Audran Ines
Shun Ishihara
Olivia Johnson Italiano
Olivia Jennifer Jahn
Bonggul Jang
Julianne Jaquith
Irene Jefferson
Hong Chen Jeffries
Anjela Nicole Jenkins
Anli Jiao

Kieran Johal
Ryan Johnsen
David Christopher Johnson
Andrew Walter William Johnston
Andrew Jordan
Paulette Jung
Benjamin Kachuriner
Milica Kakarla
Cirong Kang
Farihah Qamrun Karim
Gillian Kassner
Kyosuke Katahira
Alex Katsaros
Brian William Kaufman
Shimpei Kawasaki
John Michael Keller
William M. Kelly
Celia Burns Keniry
David Joseph Kete
Sarah Khalil
Mariam Khokhar
Hyung Won Kim
Jee Young Kim
Jongwook P. Kim
Leonard Kim
Min Suk Kim
Min Shik Kim
Minsoo Kim
Yina Kim
Yoojin Kim
Joshua Kleinman
Joseph Klinger
Sarah Knapp
Emilie B. Kokmanian
Sara Koleilat
Jin Yeol Koo
Harrison Alan Korn
Nina Kovalenko
Stephanie Dawn Kozikowski
Amanda J. Krause
Jason J. Krisza
David Kronig
Dane Kulpa
Nikhil Kumar
Julia Ann Lacovara
Sarah LaFreniere
Candice Y. Lanez
Carlos Miguel Langa Isaac
Paul William Lanza
Gabriel A. Latner
Camille Lautier
Curran Lee
Ji-Hyun Lee
Joongmin Lee
Steven Lee
Jason Lefkowitz
Alessandra Lehmen
Zhen Lei
Ryan Leske
Suzanne L. Levy
Christopher James Lewis
Lillian Li
Xiangen Li
Han Liang
Leo M. Lichtman
Daniel Matthew Liebowitz
Yung-Sheng Lin
Bethany Lipman
Calvin K. Liu
Lupeng Liu
Zhuoshi Liu
Lindsey Livingston
Elizabeth C. Lockwood
Alexandra Dawne Lohman
Breanne Katherine Long
Johnathan Douglas Lott
Matthew James Low
Geneve Lung
Nicole Magill
Daniel Saul Magy
Caroline Malapero
David Maldonado
Kathleen Mallon
Kohei Mano
Abbey Jayne Marr
Jessica Marsden
Daniel Joseph Martin
Melissa Lynn Martin
Molly Anne Masterton
William F. Mastrianna
Makoto Matada
Elizabeth A. Matecki
Imad Sayed Matini
Christopher Lee Maubach
Major C. McCargo
Jacob John McDonald
Melody Lynn McGowin
Megan McLaurin
Mark Kenneth McMahon
Daniel McMann
Ana L. McMonigle
Katie M. Mendez
Amy Mersol-Barg
Christine Mertens
Christine Lind Mertens
Tabitha Messick
Jami Lisa Mevorah
Thibault Meynier
Yoshie Midorikawa
David Miller
Kristina Marie Miller
Matthew G. Miller
Alexander J. Misa
Alexander James Mise
Drew Mitnick
Seth Mohney
Colleen A. Monroe
Mitchell David Moranis
Jaclyn Morgese
Gregory Stephen Morrison
Andrew Thomas Mount
Nathiya Nagendra
Steven E. Nagengast
Evan Nahins
Kohei Nakajima
Joseph R. Neely
Adrienne Maree Neff
Alison Leslie Nemeth
Michael Nesse
Wingyan Ng
Davy Ngueyn
Nisha Arekapudi
Zunma Olayemi Nwosu
Mark O'Horo
Kelley O'Mara
Sarah Ashley Oliai
Joshua Oliff
Bianca Olivadoti
Nicholas James Olson
Caitlin Olwell
Nicole Onni
Fowosimiloluwa Opayemi
Anthony M. Osbourne
Sheri Ostrowitz
Elizabeth Owerbach
Gizem Ozkoseoglu
Heather Christine Pals
Krupa Parikh
Andrew I. Park
Han Park
Kwon Park
Lydia J. Park
Samuel Shinnam Park
Jay S. Patel
Lisa M. Perri
Jorge Pesok-Pichardo
Temitayo Peters
Temitayo Opeoluwa Peters
Liliya Petrus
Ashwin Pradyumna Phatak
Amber V. Phillips
Collin Todd Phillips
Scott Phillips
Pounnaphone Phomtalikhith
Lorin D. Pierce
Amy Pont
Magdalena Porrata
Colin Matthew Proksel
Michael Puppelo
Jing Qiao
Michael D. Quill
Michelle E. Rakebrand
Adrian Ramos
Jeremy I. Reich
Mitchell Pearsall Reich
Michael Dominick Ricchiuto
Deanna Richards
Rebecca Scout Richters
Daniel William Riley
Stephanie Irene Gianni Robins
Noelle Genene Robinson
Noelle Robsinson
Irina Rodina
Christopher Michael Rogers
Kristin Ann Rogers
Dragos Ioan Roman
Kurt Brian Rose
Joshua Roselman
Rachel F. Rosenfeld
Yonit Rosengarten
Alexander Harold Rosenthal
Joshua David Rothman
Wiliam Rothschild
Daniel Robert Rubin
Zachary Ian Ruby
Teisha Ruggiero
Kerrilyn Sue Russ
Dana Sabghir
Andres F. Saenz
Melissa Salsano
Thomas Edward Santoro
Jodie Sau
Samuel Edmund Saunders
Aridanna Scavetti
Marc Schauer
Margaret Schmidt
Valerie Scott
Chen Xi Chere See
Stephen Gregory Sepaniak
Roseanne Sessa
Poonam Sethi
Tanya Y. Shah
Evgeniya Shakina
Sweekrutha Shankar
Matthew Abraham Shapiro
Sarah Amanda Shelton
Ximeng Shen
Mary Shields
Marina Shub
Steven Shur
Gyoochan Sim
Kendal Sim
Gyoochan Sims
Jennifer Singh
Katherine Sloss
Christopher Smith
Kelly Leigh Smith
Jennifer Solomon
Matthew A. Sorenson
Olivier Pierre Christian Souleres
Andrea Spector
Nicholas St. John
Jane Stack
Trevor Ahbleza Crazy Horse Stanley
Nicole A. Starman
Corey Stein
Derek Nathan Steingarten
Gedalia Moshe Stern
Jason L. Stern
Jenna Stern
Tarley Stevenson
James Stewart
Sarah Jacqueline Stillman
Jared Michael Stipelman
Brett J. Stone
Daniel Evan Strollo
Eric Struening
Thomas Strumpf
Ryan Jason Sugg
Eric Ryan Suggs
Yanting Sun
Anju Suresh
Asafu Suzuki
Yukihiro Takemoto
Kyoko Tamura
Miho Tanaka
Nga Kit Tang
Ariel Tazkargy
Stefanie Tedesco
Gillian Thompson
Margaret Thompson
Margaret Obianuju Thompson
Terry E. Thornton
Michael Tighe
Giang Truong Tonthat
Carlos Torrejon
Zeina Traboulsi
Lindsey M. Tremaine
Kenta Tsuda
Daniel Patrick Tyrrell
Nico Bautista Valderrama
Elizabeth Van Blarcom
William Vandelinder
Thomas Joseph Vargo
Rebecca Stephanie Vasluianu
Clemence Sophie Viaud
Emily Elizabeth Von Werlhof
Emily Von Werlhog
Thomas Walser
Kevin R. Walsh
Yifan Wang
Max Jason Warren
Aaron Karon Washington
Lisa J. Waters
Livingston Matthew Bruce Watrous
Yuting Wei
David E. Weinstein
John Weldon
Bo Wen
Zachary Martin Wender
Matthew Bryant Weprin
Hayter L. Whitman
Alan Joseph Wilson
Jordan Michael Hackmyer Wish
David Sean Wolberg
Kristen Woychowski
Ali Wright
Changi Wu
Ruby Wu
Jie Xie
Catherine Yang
Alexander Chihun Yi
Dafan Zhang
Shuhao Zhang
Xiaoyu Zhang
Xu Zhao
Marissa Zielinski
Susan Zucco

## *In Memoriam*

Jules Allen
*Naples, FL*

Robert Y. Chung
*New York, NY*

Herald P. Fahringer
*New York, NY*

Elia M. Larocca
*Columbus, OH*

Edwin Miller
*Smithtown, NY*

Douglas K. Moore
*Leonia, NJ*

Leslie N. Reizes
*Highland Beach, FL*

Matthew Aaron Sacharoff
*Tavernier, FL*

Robert H. Spergel
*Oceanside, NY*

Lesley R. Weber
*Sterling Heights, MI*

Edward S. Weltman
*Los Angeles, CA*

Continued from Page 64

- preclude an expert's testimony, whom your adversary untimely or improperly identified;[18]
- limit the scope of an expert witness' testimony;[19]
- require your adversary to show that its expert's opinion is recognized as generally accepted in the scientific community — the *Frye* test;[20] and
- determine that your expert's testimony is admissible.[21]

**Federal Law or Regulation.** Move to exclude evidence preempted by federal statute or regulation.[22]

**Other Complaints or Lawsuits.** Move to exclude your adversary from introducing into evidence

- other complaints or lawsuits that your client — the plaintiff — initiated;[23] and
- other complaints or lawsuits "on the grounds of lack of similarity, hearsay, or waste of time on collateral issues."[24]

Include in your motion that you're seeking to prohibit your adversary from mentioning these complaints or lawsuits during the trial.

**Demonstrative Evidence.** Move to exclude evidence of "experiments, tests or demonstrations, not similar to [the] circumstances of [your] case."[25]

**Administrative Bodies.** Move to exclude findings by administrative agencies, especially "when all parties were not present or did not have motivation to thoroughly litigate." Move to exclude an administrative body's report that will mislead or confuse the trier of fact.[26]

**Hearsay.** Move to exclude hearsay conversations, including statements in newspaper articles or other publications. Move to exclude "[r]eports by investigating authorities containing hearsay, particularly those recorded in witness statements."[27]

**Irrelevant or Prejudicial Evidence.** Move in limine to exclude

- entries in medical records that aren't relevant to medical treatment;[28]
- evidence that's already been decided on a summary-judgment motion;[29] and
- evidence of criminal convictions or personal history if the prejudicial value substantially outweighs the probative value.[30]

In a negligence case, move to exclude evidence of "[s]ubsequent remedial measures, repairs or improvements."[31] In a negligent-design-products-liability case, move in limine to exclude subsequent design changes to the product.[32] On a lack-of-informed-consent claim, move in limine to "preclud[e] plaintiff from introducing evidence that defendant did[n't] have the proper credentials to perform a medical procedure."[33]

**Legal Doctrines, Law, and Rules.** Move in limine to

- exclude evidence "of benefits excludable under the collateral source rule";[34]
- exclude evidence under the best evidence rule;[35]
- exclude evidence under the Dead Man's Statute;[36] and
- refrain your adversary from referring to the party who bears the burden of proof.[37]

**Evidence Not Provided in Disclosure.** In your in limine motion, ask the court to preclude your adversary from introducing evidence you requested in disclosure or which the court ordered your adversary to produce, and which your adversary failed to produce.[38] Move in limine to preclude a witness's testimony if your adversary didn't give you adequate information identifying the witness, such as the witness's address.[39]

**Stricken Pleadings.** If the court struck the defendant's answer, move in limine to preclude your adversary, the defendant, from introducing evidence that may not be introduced: "As a result of a defendant's answer having been stricken, defendant[] w[as] deemed to have admitted all allegations in the complaint that [defendant] could have denied, including those relating to liability and causation as well as negligence."[40]

**Witnesses.** Move in limine to

- exclude evidence of consistent statements meant to bolster a witness's testimony;[41]
- exclude evidence of "enhanced recollections";[42]
- prevent your adversary from referring to missing witnesses who aren't in your control to produce;[43]
- prevent your adversary from improperly using testimony from examinations before trial (EBTs);[44]
- exclude persons from the courtroom;[45] and
- address "[m]atters of the appearance of opposing counsel or witnesses."[46]

**High-Low Agreements.** Move in limine to determine "whether and to what extent the jury [sh]ould be informed" of high-low agreements in multi-defendant litigation.[47]

**Procedure: Moving in Limine.** Some judges have their own rules on motions in limine. Check the judge's rules.

It's best to move in limine before trial. Doing so means that you've foreseen possible trial issues and anticipated your adversary's trial tactics.[48] If your adversary during voir dire or opening statement brings up something you believe is improper, move in limine as soon as possible.[49] If your adversary's statement is so "blatantly improper that you should not have had to anticipate it, move to strike the statement and if appropriate, for a mistrial."[50]

If your motion in limine is oral, make a record by ensuring that a court reporter transcribes what you say. Even if the discussion is in a judge's chambers, consider making a record of your discussion by having a court reporter present.

You may prepare a written motion. Preparing a written motion in limine will give the court time to consider your motion, "rather than having [the court] . . . render a decision on the fly to avoid delaying the trial."[51]

Consult CPLR 2214 before preparing, filing, and serving your motion papers.[52] You may submit an affirmation or affidavit, or both, in support of your motion in limine. You may also prepare a memorandum of law. In your memorandum of law, explain

your legal position and provide copies of relevant statutes and caselaw. Your adversary may submit opposition papers to your motion.

You may move in limine by order to show cause or by notice of motion. Move by order to show cause if the trial is imminent.

Mark for identification as a court exhibit your moving papers and your adversary's opposition papers to ensure that the papers are "made part of the record."[53]

**The Court's Ruling on Your Motion in Limine.** The court may grant, conditionally grant, or deny your motion in limine. The court may also reserve decision or ask you to make your motion in limine later. The court's ruling on a motion in limine "is merely 'advisory,' . . . if the effect of the ruling in question is contingent upon the state of the record when the evidence is offered."[54]

If the court grants your motion in limine, you need do nothing further. If your adversary seeks to revisit at trial something the court already decided, be prepared to remind the court of its ruling.

The court may conditionally grant your motion in limine. The court might, for example, grant your motion on the condition that you lay a foundation for the evidence that's the basis for your motion in limine.

If the court denies your motion in limine, consider moving to renew or reargue, or both, "at the appropriate time."[55] You might want to move to renew, reargue, or both right away. Or you might want to wait until the appropriate time during trial; the court might change its mind at trial. If the court hasn't changed its mind at trial, "be sure to note an objection when the evidence is offered [by your adversary] and state your reasons, based upon what has transpired at trial."[56]

The court may reserve its decision. That means that the court won't immediately issue its decision; it will think about the issues and issue its decision later.

The court might also suggest that it "revisit[] [the motion] at a particular point in the trial, e.g., when a certain witness is on the stand, or some evidence is about to be offered."[57]

**Appellate Review.** If you've lost a motion in limine, the court's order isn't "ordinarily immediately reviewable."[58]

You may take an interlocutory appeal to the appellate division "as of right . . . [i]f the order on a pretrial motion 'involves some part of the merits' . . . or 'affects a substantial right.'"[59] Also appealable is "[a]n order which limits the scope of issues to be tried."[60]

Because the "effect of the ruling is contingent on the state of the record when the material in question is offered into evidence at trial," some scholars recommend deferring appellate review until after the trial is over.[61] After trial, an appellate court can assess "the propriety of the challenged ruling . . . , not speculatively, but in the context of its application to a concrete factual controversy."[62]

## Trial Motions

**Motion to Dismiss.** At trial, you may move to dismiss the action under CPLR 3211(a), namely, 3211(a)(2) for lack of subject-matter jurisdiction, CPLR 3211(a)(7) for failure to state a cause of action, and CPLR 3211(a)(10) for failure to join a party. You may move at any time under CPLR 3211 subdivisions (a)(2), (a)(7), and (a)(10). Although "technically permissible, a party's withholding a CPLR 3211(a) dismissal motion until the trial is not likely to get a warm reception."[63] One scholar has noted that "[p]ostponement until the trial of a motion that could have avoided a trial shows laches . . . . It would also be a violation of the spirit, if not the letter, of the certificate of readiness rule."[64]

**Motion for Judgment Based on Admissions.** You may move at any time for a judgment based on an admission.[65] Practitioners use this motion during a plaintiff's opening statement if the plaintiff "ma[kes] some fatal admission during it [the opening statement]."[66] A court will grant a motion for judgment based on admissions "only when counsel 'deliberately and intentionally states or admits some fact that in any view of the case is fatal to the action.'"[67] The admissions this motion contemplates are the "virtual equivalent of a pleading rather than some mere evidentiary statement that the party is not precluded from contradicting with other evidence."[68] A court won't dismiss a complaint if the admission in the opening statement "amounts to nothing more than an immaterial variance from the complaint or bill of particulars, or even from a deposition."[69] Also, a court won't dismiss a complaint during an opening statement "unless it plainly appears that there is really no issue of fact the plaintiff alleges and resolving in the plaintiff's favor every fact the defendant disputes, the plaintiff still has no case."[70]

Most judges avoid granting a motion for judgment based on admissions. Dismissing a case during the plaintiff's opening is "reserved for a most unique case."[71] Judges will find

You may move for a mistrial if a person engages in misconduct during trial (inside or outside the courtroom), including a misconduct of a party, a party's attorney, a judge, a juror, a witness, and court staff.

"no harm in waiting until the plaintiff has called witnesses and put [on] [its] case."[72]

Admissions by a party during a party's testimony may "justify[] a directed verdict."[73]

**Motion for a Mistrial.** Any party may move for a new trial at any time during a trial.[74] A court may grant your motion in the interest of justice on such terms as may be just.[75]

A motion for a mistrial "is a device to cancel or discontinue a trial in order to start it afresh before a new jury or continue it at a later time before the same one."[76] Although practitioners call it a motion for a mistrial, the CPLR doesn't use that terminology.

Most practitioners move for a mistrial orally. They move for a mistrial on "the spur of the moment."[77]

Move for a mistrial promptly, or at the very least "before the jury returns its verdict."[78] If you wait to move for a mistrial until after the jury returns a verdict, a court will find that you waived your objection.[79]

CPLR 4402 provides that only a party may move for a mistrial; thus, a mistrial "may not be granted by the court sua sponte."[80] But "instances exist . . . in which the court has [declared a mistrial sua sponte]."[81] An appellate court might criticize a trial court for not sua sponte declaring a mistrial.[82] If a court is inclined to declare a mistrial, it might "advise the presumably prejudiced party of the court's willingness to entertain a mistrial motion."[83] A party who "fail[s] to respond to that invitation may be held to have waived a mistrial."[84]

In a civil case, a "trial court has wide discretion to declare a mistrial, but such discretion is not absolute."[85]

You may move for a mistrial if a person engages in misconduct during trial (inside or outside the courtroom), including a misconduct of a party, a party's attorney, a judge, a juror, a witness, and court staff: "Whatever the source of the prejudicial conduct, if it deprives an innocent party of a fair trial the court can make it the basis of a mistrial."[86] The misconduct might include your adversary's or a witness's "inflammatory or prejudicial comments" to the jury.[87] The basis for your motion for a mistrial might also be your adversary's improper questioning of a witness or your adversary discussing or introducing inadmissible evidence.[88] You may move for a mistrial if "[e]vents or circumstances have so tainted the proceedings that the trial should not go forward."[89]

Move for a mistrial if a witness, such as a witness who lies about its expert qualifications, perpetuates fraud during trial.[90]

Move for a mistrial if "critical witnesses are unavailable."[91] A court might decline to declare a mistrial when it finds no possibility of prejudice to the defendant, such as when a plaintiff dies after testifying and being cross-examined, and the court had "polled the jurors individually."[92]

Move for a mistrial if a person who is an "indispensable part of the trial," such as a party, the judge, or a party's attorney, becomes unavailable.[93]

Adverse publicity a juror sees outside the courtroom might be a ground for your mistrial motion.[94]

Unfair surprise and prejudice are also grounds for a mistrial.[95]

Move for a mistrial if a party puts into evidence a theory that wasn't alleged in its pleadings or bill of particulars.[96]

Move for a mistrial if "one or more jurors are unable to continue with the trial, and there are insufficient alternate jurors."[97]

Move for a mistrial if the jury in your case isn't able to reach a verdict.[98] The court may declare a mistrial sua sponte on this ground.[99]

Move for a mistrial if "a major change [in] evidentiary law occurs" during trial.[100]

If the event underlying your mistrial motion occurs in the court's presence, written motion papers aren't necessary.[101] If the event occurs outside the court's presence, you might need to prepare a written motion supported with evidence; you may submit a memorandum of law.[102] Your adversary may oppose your motion by submitting opposition papers and a memorandum of law.[103]

If you move for a mistrial orally, the best practice is to do so outside the jury's presence.[104]

In the next issue of the *Journal*, the *Legal Writer* will continue with motions for a mistrial and then discuss other trial and post-trial motions. ■

**Gerald Lebovits** (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct professor of law at Columbia, Fordham, NYU, and New York Law School.
He thanks court attorney Alexandra Standish for her research.

1. 1 Edward L. Birnbaum, Carl T. Grasso, & Justice Ariel E. Belen, New York Trial Notebook, § 13:01, at 13-3 (2010).
2. *Id.*
3. *Id.* at 13-3.
4. *Id.* (quoting *State v. Metz*, 241 A.D.2d 192, 198, 671 N.Y.S.2d 79, 83 (1st Dep't 1998)).
5. *Id.* § 13:05, at 13-4.
6. *Id.* § 13:01, at 13-3.
7. *Id.* § 13:02, at 13-3.
8. *Id.*
9. *Id.*
10. *Id.* § 13:03, at 13-3.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* § 13:06, at 13-4.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* § 13:07, at 13-10.
19. *Id.*
20. *Id.* (citing *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)); *Pullman v. Silverman*, 125 A.D.3d 562, 562, 2015 N.Y. Slip Op. 01707, at *1 (1st Dep't 2015) ("New York courts permit expert testimony based on scientific principles, procedures or theories only after they have gained general acceptance in the relevant scientific field. Under the *Frye* test, the burden of proving general acceptance rests upon the party offering the disputed expert testimony.") (citations omitted). New York still uses the *Frye* test, not the test in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).
21. *Id.* (citing *Ferrara v. Kearney*, 285 A.D.2d 890, 890, 727 N.Y.S.2d 358, 359 (3d Dep't 2001)).
22. *Id.* § 13:06, at 13-5 (citing *Doomes v. Warrick Indus., Inc.*, 17 N.Y.3d 594, 594, 935 N.Y.S.2d 268, 268, 958 N.E.2d 1183, 1183 (2011)).
23. *Id.* § 13:06, at 13-5.

24. *Id.*

25. *Id.*

26. *Id.* § 13:06, at 13-6 (citing *Kinsella v. Berley Realty Corp.*, 240 A.D.2d 374, 374, 657 N.Y.S.2d 771, 772 (2d Dep't 1997) ("At trial, the Supreme Court excluded from evidence a certified report of the New York State Department of Labor. We find that the court acted properly since the certified report would have misled and confused the jury.") (citations omitted)).

27. *Id.* § 13:06, at 13-6.

28. *Id.*

29. *Id.*

30. *Id.* (citing *Sansevere v. United Parcel Serv., Inc.*, 181 A.D.2d 521, 522–23, 581 N.Y.S.2d 315, 316 (1st Dep't 1992) ("A civil litigant is granted broad authority to use the criminal convictions of an adverse witness to impeach the credibility of that witness.") (internal quotations omitted)).

31. *Id.* (citing *McGarvin v. J.M. Weller Assocs., Inc.*, 273 A.D.2d 623, 625, 710 N.Y.S.2d 143, 145 (3d Dep't 2000)).

32. *Id.* § 13:06, at 13-6, 13-7 (noting that "[s]ubsequent design changes may be admissible in a strict products liability case involving manufacturing flaws . . . . [and] [s]ubsequent recalls or technical bulletins may be admissible on a failure to warn theory").

33. *Id.* § 13:06, at 13-7.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* § 13:06, at 13-11.

38. *Id.* § 13:06, at 13-8.

39. *Id.* § 13:06, at 13-8.

40. *Id.* § 13:06, at 13-9.

41. *Id.* § 13:06, at 13-10.

42. *Id.* (citing *Bennett v. Saeger Hotels, Inc.*, 209 A.D.2d 946, 947, 619 N.Y.S.2d 424, 425 (4th Dep't 1994)).

43. *Id.* § 13:07, at 13-10.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* § 13:08, at 13-11 (citing *In re Eighth Jud. Dist. Asbestos Litig. v. Amchem Prods. Inc.*, 8 N.Y.3d 717, 721, 840 N.Y.S.2d 546, 549, 872 N.E.2d 232, 235 (2007) ("A high-low agreement is a tool commonly used in litigation that guarantees the plaintiff a minimal recovery while concomitantly capping a defendant's potential exposure.")).

48. *Id.* § 13:20, at 13-11.

49. *Id.* § 13:21, at 13-12.

50. *Id.*

51. *Id.* § 13:22, at 13-12.

52. *Id.*

53. *Id.*

54. *Id.* § 13:23, at 13-13 (quoting *Hargrave v. Presher*, 221 A.D.2d 677, 678, 632 N.Y.S.2d 886, 887 (3d Dep't 1995)).

55. *Id.* § 13:22, at 13-12.

56. *Id.* § 13:23, at 13-13.

57. *Id.* § 13:23, at 13-12.

58. *Id.* § 13:30, at 13-13.

59. *Id.* § 13:31, at 13-14 (quoting CPLR 5701 (a)(2)(iv) & (a)(2)(v)).

60. *Id.* (quoting *Rondout Elec., Inc. v. Dover Union Free Sch. Dist.*, 304 A.D.2d 808, 810, 758 N.Y.S.2d 394, 397 (2d Dep't 2003) (citing *Hargrave*, 221 A.D.2d at 678, 632 N.Y.S.2d at 887); *Barksdale v. New York City Transit Auth.*, 294 A.D.2d 210, 210, 741 N.Y.S.2d 697, 698 (1st Dep't 2002)); *but see Rivera v. New York Health & Hosp. Corp.*, 38 A.D.3d 476, 476, 832 N.Y.S.2d 563, 564 (1st Dep't 2007); *Rodriguez v. Ford Motor Co.*, 17 A.D.3d 159, 160, 792 N.Y.S.2d 468, 470 (1st Dep't 2005).

61. *Id.* § 13:30, at 13-13.

62. *Id.*

63. David D. Siegel, New York Practice § 402, at 702 (5th ed. 2011).

64. *Id.*

65. *Id.* § 402, at 703.

66. *Id.*

67. *Id.* (quoting *Hoffman House v. Foote*, 172 N.Y. 348, 351, 65 N.E.169, 169 (1902)).

68. *Id.* § 402, at 703.

69. *Id.*

70. *Id.*

71. *Id.* § 402, at 704.

72. *Id.* § 402, at 703.

73. 2 Edward L. Birnbaum, Carl T. Grasso, & Justice Ariel E. Belen, New York Trial Notebook, § 35:30, at 35-11 (2010).

74. Aaron J. Broder, Trial Handbook for New York Lawyers § 2.4, at 28 (3d ed. 1996).

75. CPLR 4402.

76. Siegel, *supra* note 63, § 403, at 706.

77. 2 Birnbaum § 36:11, at 36-4.

78. Broder, *supra* note 74, § 27.2, at 511.

79. 2 Birnbaum § 36:12, at 36-4.

80. Siegel, *supra* note 63, § 403, at 707.

81. *Id.* (citing *Jaworski v. New Cassel Fuel Corp.*, 21 A.D.2d 753, 753, 251 N.Y.S.2d 929, 930 (2d Dep't 1964)).

82. 2 Birnbaum § 36:10, at 36-4 (citing *In re Brigham Park Coop. Apts., Inc. v. Fin. Adm'r of City of N.Y.*, 83 A.D.2d 551, 552, 441 N.Y.S.2d 102, 104 (2d Dep't 1981)).

83. Siegel, *supra* note 63, § 403, at 707.

84. *Id.*

85. Broder, *supra* note 74, § 2.4, at 28.

86. Siegel, *supra* note 63, § 403, at 706.

87. 2 Birnbaum § 36:20, at 36-5.

88. *Id.* § 36:22, at 36-6, § 36:23, at 36-6.

89. *Id.* § 36:01, at 36-3.

90. *Id.* § 36:25, at 36-7.

91. *Id.* § 36:01, at 36-3.

92. Broder, *supra* note 74, § 2.4, at 28.

93. *Id.* § 36:80, §36:81, at 36-13; Broder, *supra* note 74, § 2.4, at 28.

94. 2 Birnbaum § 36:61, at 36-12.

95. *Id.* § 36:70, at 36-12.

96. *Id.* § 36:71, at 36-13.

97. *Id.* § 36:82, at 36-14.

98. *Id.* § 36:01, at 36-3.

99. *Id.* § 36:90, at 36-14 (citing CPLR 4404(a); CPLR 4113).

100. Broder, *supra* note 74, § 27.3, at 512.

101. 2 Birnbaum § 36:11, at 36-4.

102. *Id.*

103. *Id.*

104. *Id.*


"Of course I'm an excellent lawyer. It says so right on my website."

# CLASSIFIED NOTICES

**RESPOND TO NOTICES AT:**
New York State Bar Association
One Elk Street
Albany, NY 12207
Attn: Daniel McMahon

**DEADLINE FOR SUBMISSIONS:**
Six weeks prior to the first day of the month of publication.

**NONMEMBERS:**
$175 for 50 words or less; plus $1 for each additional word. Boxholder No. assigned—$75 per insertion.

**MEMBERS:**
$135 for 50 words and $1 for each additional word. Payment must accompany insertion orders.

**SEND INSERTION ORDERS WITH PAYMENT TO:**
Fox Associates Inc.
116 West Kinzie St., Chicago, IL 60654
312-644-3888
FAX: 312-644-8718
Email: adinfo.nyb@foxrep.com

**SEND AD COPY AND ARTWORK TO:**
Email: nysba-foxadvertising@nysba.org

## INDEX TO ADVERTISERS



## LABOR AND EMPLOYMENT ATTORNEY.

Downs Rachlin Martin PLLC, a regional law firm with 60 lawyers in offices in Vermont and New Hampshire, is looking for a senior associate or of-counsel attorney to join its team of nine attorneys in a sophisticated, nationwide labor and employment practice. The ideal candidate will have both labor and employment experience, including litigation and counseling work. We offer a competitive salary and comprehensive benefits package. Great lifestyle included! Please apply in writing, with resume to: Hiring Coordinator, Downs Rachlin Martin PLLC, PO Box 190, Burlington VT 05402-0190 or online to iweisburgh@drm.com.

## LEGAL OFFICE SPACE – LAWSUITES

• 305 Broadway (Federal Plaza)
• 26 Broadway (The Bull)

Block from courts, perfect for Lawyers:
Plug and work; Office solutions for every budget; micro offices from $850; larger offices from $1,300; workstations from $450; Virtual packages from $125; Mail Plans from $50; Meeting Space; War Rooms; Deposition Rooms; 212 numbers; Call Answering. Admin Support. Brokers protected.
www.lawsuites.net – 212.822.1475 – info@lawsuites.net

## PROBATE & ESTATE MEDIATION

PROBATE & ESTATE MEDIATION - We have experience in dispute resolution through facilitative mediation, enhanced by 30+ years of experience in estate planning and estate administration.
Leslie J. Wilsher, Esq.
Wilsher Mediation
305 Broadway, 14th Floor
New York, NY 10007
(212) 323-7472
leslie@wilshermediation
www.wilshermediation.com



## MEMBERSHIP TOTALS

| | |
|---|---|
| **New Regular Members 1/1/15 - 2/25/15** | **1,436** |
| **New Law Student Members 1/1/15 - 2/25/15** | **218** |
| **Total Regular Members as of 2/25/15** | **73,230** |
| **Total Law Student Members as of 2/25/15** | **2,597** |
| **Total Membership as of 2/25/15** | **75,827** |

# HEADQUARTERS STAFF EMAIL ADDRESSES

### Executive
**David R. Watson**
*Executive Director*
dwatson@nysba.org

**Elizabeth Derrico**
*Associate Executive Director of Strategic Member Services*
ederrico@nysba.org

### Executive Services
Kevin Getnick, *Executive Services Counsel*
kgetnick@nysba.org

Robyn Ryan, *Executive Services Counsel*
rryan@nysba.org

Mark Wilson, *Manager, Bar Services*
mwilson@nysba.org

### Media Services and Public Affairs
Lise Bang-Jensen, *Director*
lbang-jensen@nysba.org

Patricia Sears Doherty, *Editor, State Bar News*
psearsdoherty@nysba.org

Christina Couto, *Senior Media Writer*
ccouto@nysba.org

### Meetings
Kathleen M. Heider, *Director*
kheider@nysba.org

### MIS & Content Management
David Adkins, *Chief Technology Officer & Director of Content Management*
dadkins@nysba.org

Paul Wos, *Director of Management Information Services*
pwos@nysba.org

Jeffrey Ordon, *Network Support Specialist*
jordon@nysba.org

Lucian Uveges, *Database Administrator*
luveges@nysba.org

### Web Site
Brandon Vogel, *Social Media and Web Content Manager*
bvogel@nysba.org

### CLE Publications
Daniel J. McMahon, *Director*
dmcmahon@nysba.org

Patricia B. Stockli, *Associate Director*
pstockli@nysba.org

Kirsten Downer, *Research Attorney*
kdowner@nysba.org

Joan Fucillo, *Publication Manager*
jfucillo@nysba.org

### Print and Facilities Operations
Gordon H. Ryan, *Senior Director*
gryan@nysba.org

### Building Maintenance
### Design Services
### Graphics
### Print Shop
Donald Gardinier, *Print Production Manager*
dgardinier@nysba.org

### Governmental Relations
Richard Rifkin, *Senior Director*
rrifkin@nysba.org

Ronald F. Kennedy, *Director*
rkennedy@nysba.org

Kevin M. Kerwin, *Associate Director*
kkerwin@nysba.org

### Continuing Legal Education
H. Douglas Guevara, *Senior Director*
dguevara@nysba.org

### CLE Programs
Jean E. Nelson II, *Associate Director*
jnelson@nysba.org

Alexandra Glick-Kutscha, *CLE Program Attorney*
aglick-kutscha@nysba.org

Mark Belkin, *CLE Program Attorney*
mbelkin@nysba.org

Cindy O'Brien, *Program Manager*
cobrien@nysba.org

### Law Practice Management
Katherine Suchocki, *Director*
ksuchocki@nysba.org

### Finance
Kristin M. O'Brien, *Senior Director*
kobrien@nysba.org

Cynthia Gaynor, *Associate Director of Finance*
cgaynor@nysba.org

### General Counsel Services
Kathleen R. Mulligan-Baxter, *General Counsel*
kbaxter@nysba.org

### Law, Youth and Citizenship Program
Martha Noordsy, *Director*
mnoordsy@nysba.org

Kimberly Francis, *LYC Program Manager*
kfrancis@nysba.org

### Lawyer Assistance Program
Patricia F. Spataro, *Director*
pspataro@nysba.org

### Lawyer Referral and Information Service
Eva Valentin-Espinal, *Coordinator*
evalentin@nysba.org

### Pro Bono Affairs
Gloria Herron Arthur, *Director*
garthur@nysba.org

### Human Resources
Paula M. Doyle, *Senior Director*
pdoyle@nysba.org

### Marketing
Grazia Yaeger, *Director of Marketing*
gyaeger@nysba.org

### Membership Services
Patricia K. Wood, *Senior Director*
pwood@nysba.org

Megan O'Toole, *Membership Services Manager*
motoole@nysba.org

Sonja Tompkins, *Service Center Manager*
stompkins@nysba.org

### Section Services
Lisa J. Bataille, *Chief Section Liaison*
lbataille@nysba.org

---

### The New York Bar Foundation
Deborah Auspelmyer, *Director of Development and Administration*
dauspelmyer@tnybf.org

# THE NEW YORK BAR FOUNDATION

### 2014-2015 OFFICERS
Cristine Cioffi, *President*
2310 Nott Street East, Niskayuna, NY 12309

Lesley Rosenthal, *Vice President*
70 Lincoln Center Plaza, 9th Floor
New York, NY 10023

David R. Watson, *Secretary*
1 Elk Street, Albany, NY 12207

Lucia B. Whisenand, *Assistant Secretary*
1 Nursery Lane, Syracuse, NY 13210

Richard Raysman, *Treasurer*
31 West 52nd Street, New York, NY 10019

### DIRECTORS
James R. Barnes, *Albany*
Honorable Ralph A. Boniello, III, *Niagara Falls*
Earamichia Brown, *New York*
Honorable Cheryl E. Chambers, *Brooklyn*
Marion Hancock Fish, *Syracuse*
Sheila A. Gaddis, *Rochester*
Sharon Stern Gerstman, *Buffalo*
Michael E. Getnick, *Utica*
John H. Gross, *Hauppauge*
Robert L. Haig, *New York*
Stephen D. Hoffman, *New York*
John R. Horan, *New York*
William J. Keniry, *Albany*
Susan B. Lindenauer, *New York*
Edwina Frances Martin, *New York*
Joseph V. McCarthy, *Buffalo*
Elizabeth J. McDonald, *Pittsford*
Martin Minkowitz, *New York*

### EX OFFICIO
Emily F. Franchina, *Garden City*
*Chair of The Fellows*

James B. Ayers, *Albany*
*Vice Chair of The Fellows*

THE NEW YORK BAR FOUNDATION

# JOURNAL BOARD MEMBERS EMERITI

**Howard Angione**
*Immediate Past Editor-in-Chief*

Rose Mary Bailly
Richard J. Bartlett
Coleman Burke
John C. Clark, III
Angelo T. Cometa
Roger C. Cramton
Willard DaSilva
Louis P. DiLorenzo
Philip H. Dixon
Maryann Saccomando Freedman
Emlyn I. Griffith
H. Glen Hall
Paul S. Hoffman
Judith S. Kaye
Charles F. Krause
Philip H. Magner, Jr.
Wallace J. McDonald
J. Edward Meyer, III
Gary A. Munneke
John B. Nesbitt
Kenneth P. Nolan
Eugene E. Peckham
Albert M. Rosenblatt
Lesley Friedman Rosenthal
Sanford J. Schlesinger
Robert J. Smith
Lawrence E. Walsh
Richard N. Winfield

# 2014-2015 OFFICERS

**Glenn Lau-Kee**
*President*
*New York*

**David P. Miranda**
*President-Elect*
*Albany*

**Sharon Stern Gerstman**
*Treasurer*
*Buffalo*

**Ellen G. Makofsky**
*Secretary*
*Garden City*

**David M. Schraver**
*Immediate Past President*
*Rochester*

## VICE-PRESIDENTS

**First District**
Catherine A. Christian, *New York*
Jay G. Safer, *New York*

**Second District**
Dominick Napoletano, *Brooklyn*

**Third District**
Hermes Fernandez, *Albany*

**Fourth District**
Rebecca A. Slezak, *Amsterdam*

**Fifth District**
Stuart J. Larose, *Syracuse*

**Sixth District**
Alyssa M. Barreiro, *Binghamton*

**Seventh District**
T. Andrew Brown, *Rochester*

**Eighth District**
Cheryl Smith Fisher, *Buffalo*

**Ninth District**
Hon. Arlene Gordon-Oliver, *White Plains*

**Tenth District**
Scott M. Karson, *Melville*

**Eleventh District**
Richard M. Gutierrez, *Forest Hills*

**Twelfth District**
Carlos M. Calderón, *Bronx*

**Thirteenth District**
Michael J. Gaffney, *Staten Island*

## MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

James R. Barnes
David Louis Cohen
Michael W. Galligan
Evan M. Goldberg
Ira S. Goldenberg
Bryan D. Hetherington
Elena DeFio Kean
Edwina Frances Martin
John S. Marwell
Bruce J. Prager
Oliver C. Young

# MEMBERS OF THE HOUSE OF DELEGATES

**First District**
Abdelhamid, Reema Salah
Abella, Zachary J.
†* Alcott, Mark H.
Alden, Steven M.
Arenson, Gregory K.
Baum, Simeon H.
Blessing, Peter H.
Burke, Kathleen M.
Chakansky, Michael I.
Chang, Vincent Ted
Christian, Catherine A.
Cilenti, Maria
Davis, Megan P.
Dean, Robert S.
Donaldson, Xavier Robert
Eng, Gordon
Feinberg, Ira M.
Finerty, Hon. Margaret J.
First, Marie-Eleana
Flynn, Erin Kathleen
* Forger, Alexander D.
Fox, Glenn G.
Freedman, Hon. Helen E.
Friedman, Richard B.
Galligan, Michael W.
Goldberg, Evan M.
Goodman, Hon. Emily J.
Green, Prof. Bruce A.
Gutekunst, Claire P.
Haig, Robert L.
Hayes, Vilia B.
Himes, Jay L.
Hollyer, A. Rene
Hoskins, Sharon T.
Jaglom, Andre R.
Kenney, John J.
Kiernan, Peter J.
Kiesel, Michael T.
* King, Henry L.
Koch, Adrienne Beth
† Lau-Kee, Glenn
Lawton-Thames, Lynnore Sharise
†* Leber, Bernice K.
Lessard, Stephen Charles
Lindenauer, Susan B.
Ling-Cohan, Hon. Doris
Maltz, Richard M.
Martin, Deborah L.
McNamara, Michael J.
Miller, Michael
Minkoff, Ronald C.
Minkowitz, Martin
Morales, Rosevelie Marquez
Moses, Prof. Barbara Carol
Nathanson, Malvina
Needham, Andrew W.
Otis, Andrew D.
* Patterson, Hon. Robert P., Jr.
Prager, Bruce J.
Pressment, Jonathan D.
Radding, Rory J.
Raskin, Debra L.
Reitzfeld, Alan D.
Richter, Hon. Rosalyn
Robb, Kathy Ellen Bouton
Rodner, Stephen B.
Rosner, Seth
Rothenberg, David S.
Rothstein, Alan
Safer, Jay G.
Samuels, William Robert
Sarkozi, Paul D.
Scanlon, Kathleen Marie
Schwartz, Jodi J.
Sen, Diana S
* Seymour, Whitney North, Jr.
Shamoon, Rona G.
Silkenat, James R.
Silverman, Paul H.
Smith, Asha Saran
Sonberg, Hon. Michael R.
Spiro, Edward M.
* Standard, Kenneth G.
Stenson Desamours, Lisa M.
Stern, Mindy H.
Swanson, Richard P.
Tesser, Lewis F.
Ugurlayan, Anahid M.
Valet, Thomas P.
Wolk, Lawrence J.
†* Younger, Stephen P.
Zuchlewski, Pearl

**Second District**
Aidala, Arthur L.
Ajaiyeoba, Abayomi O.
Chandrasekhar, Jai K.
Cohn, Steven D.
Fallek, Andrew M.
Kamins, Hon. Barry
Klass, Richard A.
Lonuzzi, John A.
Lugo, Betty
McKay, Hon. Joseph Kevin
Napoletano, Domenick
Richman, Steven H.
† Shautsova, Alena
Simmons, Karen P.
Slavin, Barton L.
Spodek, Hon. Ellen M.
Sunshine, Hon. Jeffrey S.
Woodland, Rebecca
Yeung-Ha, Pauline

**Third District**
Barnes, James R.
Bauman, Hon. Harold J.
Behe, Jana Springer
Burke, Walter T.
Calareso, JulieAnn
Collura, Thomas J.
Crummey, Hon. Peter G.
Fernandez, Hermes
Fox, William L.
Gerbini, Jean F.
Gold, Sarah E.
Greenberg, Henry M.
Higgins, John Eric
Hines, Erica M.
Hutter, Prof. Michael J., Jr.
Kean, Elena DeFio
Kretser, Hon. Rachel
Mandell, Adam Trent
Meacham, Norma G.
Meislahn, Harry P.
Meyers, David W.
† Miranda, David P.
Prudente, Stephen C.
Rivera, Sandra
Rosiny, Frank R.
Schofield, Robert T., IV
Silver, Janet
* Yanas, John J.

**Fourth District**
Coseo, Matthew R.
Cox, James S.
Hanson, Kristie Halloran
Jones, Barry J.
King, Barbara J.
Kyriakopoulos, Efstathia G.
Martin, Trinidad
Nowotny, Maria G.
Onderdonk, Marne L.
Slezak, Rebecca A.
Wildgrube, Michelle H.
Wood, Jeremiah

**Fifth District**
Connor, Mairead E.
DeMartino, Nicholas J.
Dotzler, Anne Burak
Fennell, Timothy J.
Gall, Hon. Erin P.
Gensini, Gioia A.
Gerace, Donald Richard
†* Getnick, Michael E.
LaRose, Stuart J.
Perez, Jose E.
Radick, Courtney S.
* Richardson, M. Catherine
Stanislaus, Karen
Westlake, Jean Marie
Williams, James M.

**Sixth District**
Barreiro, Alyssa M.
Denton, Christopher
Grossman, Peter G.
Hamm, Denice A.
Lanouette, Ronald Joseph, Jr.
Lewis, Richard C.
†* Madigan, Kathryn Grant
McKeegan, Bruce J.
Saleeby, Lauren Ann
Shafer, Robert M.

**Seventh District**
Baker, Bruce J.
Bleakley, Paul Wendell
Brown, T. Andrew
Buholtz, Eileen E.
†* Buzard, A. Vincent
Cecero, Diane M.
Hetherington, Bryan D.
Lawrence, C. Bruce
McCafferty, Keith
McDonald, Elizabeth J.
Modica, Steven V.
* Moore, James C.
* Palermo, Anthony Robert
Rowe, Neil J.
†* Schraver, David M.
Stankus, Amanda Marcella
Tennant, David H.
Tilton, Samuel O.
* Vigdor, Justin L.
* Witmer, G. Robert, Jr.

**Eighth District**
Bloom, Laurie Styka
Brown, Joseph Scott
* Doyle, Vincent E., III
Edmunds, David L., Jr.
Effman, Norman P.
Fisher, Cheryl Smith
* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
* Hassett, Paul Michael
Hills, Bethany
O'Donnell, Thomas M.
Ogden, Hon. E. Jeannette
Pajak, David J.
Ryan, Michael J.
Smith, Sheldon Keith
Spitler, Kevin W.
Sullivan, Kevin J.
Sweet, Kathleen Marie
Young, Oliver C.

**Ninth District**
Barrett, Maura A.
Brown, Craig S.
Burns, Stephanie L.
Epps, Jerrice Duckette
Fay, Jody
Goldenberg, Ira S.
Gordon-Oliver, Hon. Arlene
Keiser, Laurence
Kirby, Dawn
Klein, David M.
Marwell, John S.
McCarron, John R., Jr.
* Miller, Henry G.
* Ostertag, Robert L.
Owens, Jill C.
Pantaleo, Frances M.
Preston, Kevin F.
Protter, Howard
Ranni, Joseph J.
Riley, James K.
Starkman, Mark T.
Thaler, Jessica D.
Weis, Robert A.
Welch, Kelly M.

**Tenth District**
* Bracken, John P.
Calcagni, John R.
Christopher, John P.
Clarke, Christopher Justin
Cooper, Ilene S.
DeHaven, George K.
England, Donna
Ferris, William Taber, III
Fishberg, Gerard
Gann, Marc
Genoa, Marilyn
Gross, John H.
Harper, Robert Matthew
Hillman, Jennifer F.
Karson, Scott M.
Kase, Hon. John L.
Lapp, Charles E., III
Leventhal, Steven G.
†* Levin, A. Thomas
Levy, Peter H.
Makofsky, Ellen G.
McCarthy, Robert F.
* Pruzansky, Joshua M.
* Rice, Thomas O.
Tollin, Howard M.
Warshawsky, Hon. Ira B.
Weinblatt, Richard A.
Zuckerman, Richard K.

**Eleventh District**
Alomar, Karina E.
Bruno, Frank, Jr.
Cohen, David Louis
Gutierrez, Richard M.
†* James, Seymour W., Jr.
Kerson, Paul E.
Lee, Chanwoo
Samuels, Violet E.
Terranova, Arthur N.
Wimpfheimer, Steven

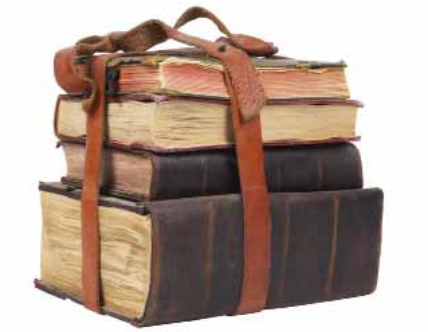
**Twelfth District**
Calderón, Carlos M.
DiLorenzo, Christopher M.
Friedberg, Alan B.
Marinaccio, Michael A.
* Pfeifer, Maxwell S.
Weinberger, Richard

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

**Out-of-State**
Jochmans, Hilary Francoise
Sheehan, John B.

† *Delegate to American Bar Association House of Delegates* * *Past President*

BY GERALD LEBOVITS



# Drafting New York Civil-Litigation Documents: Part XL — In Limine, Trial, and Post-Trial Motions

The *Legal Writer* continues its series on civil-litigation documents. In this issue, we discuss various motions in limine and the procedure for moving in limine. In this issue and the next, we'll also discuss trial motions, including motions to dismiss, motions based on admissions, motions for a mistrial, motions for a directed verdict, motions for a continuance, motions to strike testimony from the record, motions to conform the pleadings to the proof, and motions to reopen a case. We continue in the next issue with post-trial motions, including motions for a judgment notwithstanding the verdict and motions for a new trial based on the weight of the evidence.

## In Limine Motions

**General Information.** "In limine" means "at the threshold."[1] Most practitioners move in limine at the threshold of trial — before trial. But you may move in limine during trial, too, well before the evidence is offered.

Your motion in limine may be made orally or in writing.

Motions in limine are "preemptive motion[s]."[2] In limine motions are meant to prevent the trier of fact from "observing conduct or hearing testimony that is improper and prejudicial."[3] The function of an in limine motion is "'to permit a party to obtain a preliminary order before or during trial excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use. Its purpose is to prevent the introduction of such evidence to the trier of fact, in most instances a jury.'"[4] Winning an in limine motion will ensure that your adversary doesn't mention or use that evidence in its voir dire, opening statement, trial, and closing statement.

Aside from excluding evidence, the relief you're seeking from the court in your motion in limine might also include the following:[5] (1) instructing your adversary to refrain from mentioning prohibited material in your adversary's voir dire, opening statement, cross examination, or closing statement; (2) instructing your adversary not to introduce evidence in your adversary's direct case; (3) directing your adversary's witnesses and experts not to mention prohibited material when the witnesses and experts testify; and (4) ensuring that jurors don't see or hear the prohibited material.

In your motion in limine, you may also ask the court to allow you to do something, such as "allow your expert [witness] to be present [in the courtroom] during other witnesses' testimony."[6] Moving in limine to assure that you'll be allowed to mention and use that evidence later is a proactive measure.

In limine motions are advantageous. Winning a motion in limine will prevent your adversary from talking about or introducing evidence that's damaging to you.[7] Winning a motion in limine might give you leverage in settling the case.[8] Moving in limine before trial will give the judge an opportunity to consider the issues in advance, making the judge more inclined to rule for you.[9]

Some disadvantages arise in moving in limine. Motions in limine will alert your adversary to a weakness in your case (or in your adversary's case) that your adversary hadn't yet considered.[10] Losing a motion in limine will put you in a weak settlement position.[11] And you probably won't be able to appeal immediately an adverse ruling on a motion in limine.[12]

Winning an in limine motion will ensure that your adversary doesn't mention or use that evidence in its voir dire, opening statement, trial, and closing statement.

If there's a mistrial, "rulings on motions in limine are[n't] binding at the retrial."[13]

Here's a list of motions in limine.

**Expert Testimony.** Move in limine to

- exclude expert testimony of non-experts;[14]
- exclude expert testimony that's based on unreliable hearsay or on facts not in the record or personally known to the witness;[15]
- exclude expert testimony that's immaterial, irrelevant, misleading, or has no probative value;[16]
- exclude expert testimony that would be unfairly prejudicial to your client;[17]

CONTINUED ON PAGE 57

NYSBA**BOOKS**

*Winner of ACLEA's 2014 Award for Outstanding Achievement in Publications*

# New York Lawyers' Practical Skills Series . . .

## *Written by Attorneys for Attorneys.*


# Complete Set of 19

Order the entire series or individual titles.

*2014–2015 • PN: 40015PS* | List: $895 | **NYSBA Members $695**

Includes Forms on CD

**Practical Skills Series Individual Titles (With Forms on CD)**

*Arbitration and Mediation*
*Business/Corporate and Banking Law Practice*
*Criminal Law and Practice*
*Debt Collection and Judgment Enforcement*
*Elder Law, Special Needs Planning and Will Drafting*
*Guardianship*
*Limited Liability Companies*
*Matrimonial Law*
*Mechanic's Liens*
*Mortgages*
*Mortgage Foreclosures*
*Probate and Administration of Decedents' Estates*
*Real Estate Transactions-Commercial Property*
*Real Estate Transactions-Residential Property*
*Representing the Personal Injury Plaintiff in New York*
*Zoning, Land Use and Environmental Law*

**Stand-alone Titles (Without Forms on CD)**

*Labor and Workers' Compensation Law*

*New York Residential Landlord-Tenant Law and Procedure*

*Social Security Law and Practice*

Order online at **www.nysba.org/pubs** or call **1.800.582.2452**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB3009 when ordering.

NYSBA

Periodicals

**ADDRESS CHANGE – Send To:**
State Bar Service Center
New York State Bar Association
One Elk Street
Albany, NY 12207
(800) 582-2452
e-mail: SBSC@nysba.org