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Searching for a Definition

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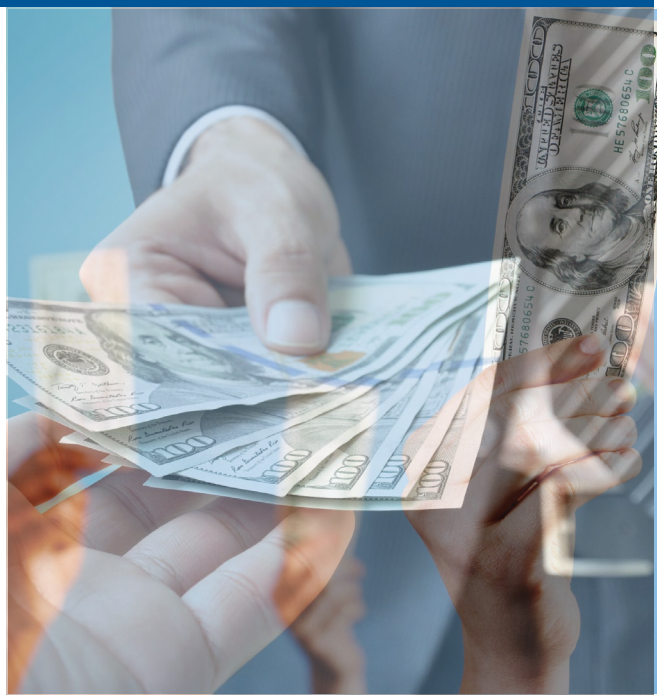

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– Eleanor Roosevelt, *This Is My Story*, 1937

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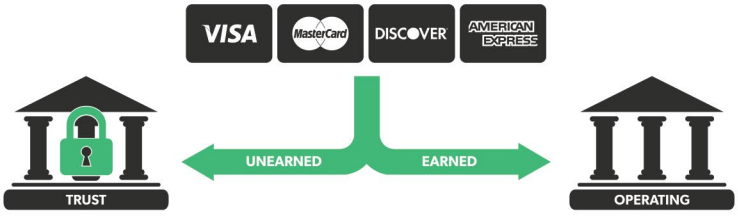

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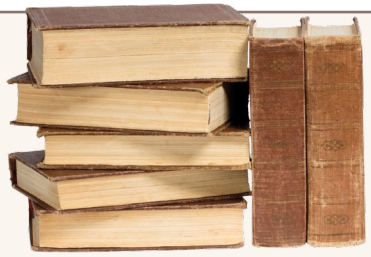
"Moments in History" is an occasional sidebar in the Journal, *which features people and events in legal history.*

Moments in History

The Insanity Defense



Throughout the 19th century, most American courts looked to Britain's M'Naghten Rule as the appropriate legal standard by which to judge criminal insanity. That rule instructed that a defendant be considered sane and therefore responsible for his actions if he was aware of the nature and consequences of his actions and understood them to be unlawful.

Four months after James Garfield became president of the United States, Charles Guiteau – erstwhile theologian, lawyer, and bill collector – shot him. Many observers might have considered Guiteau mad, but it proved impossible for him to avail himself of the defense so structured: He knew it was unlawful to shoot the president and that the likely consequences of firing his two shots would be the president's death. After a seven-week trial, the jury deliberated for just one hour. Found guilty, Guiteau was hanged to death on June 30, 1882.

After publication of the autopsy results, many in the medical community who had staunchly resisted any suggestion of Guiteau's insanity came to agree he genuinely had been deranged. Many "did not hesitate to call the trial a miscarriage of justice, disgraceful to the legal and medical professions alike," according to Historian Charles E. Rosenberg.

After John Hinckley successfully invoked the same line of defense at his trial for the attempted assassination of President Ronald Reagan in 1981, an incensed public stirred Congress to pass the Insanity Defense Reform Act of 1984, which shifted the burden of proof to the defendant and made the defense more difficult to assert.

Excerpted from *The Law Book: From Hammurabi to the International Criminal Court, 250 Milestones in the History of Law* (2015 Sterling Publishing) by Michael H. Roffer.

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Reasonable Compensation for the Individual Fiduciary

Searching for a Definition

By Ilene Sherwyn Cooper and Erin Moody

Introduction

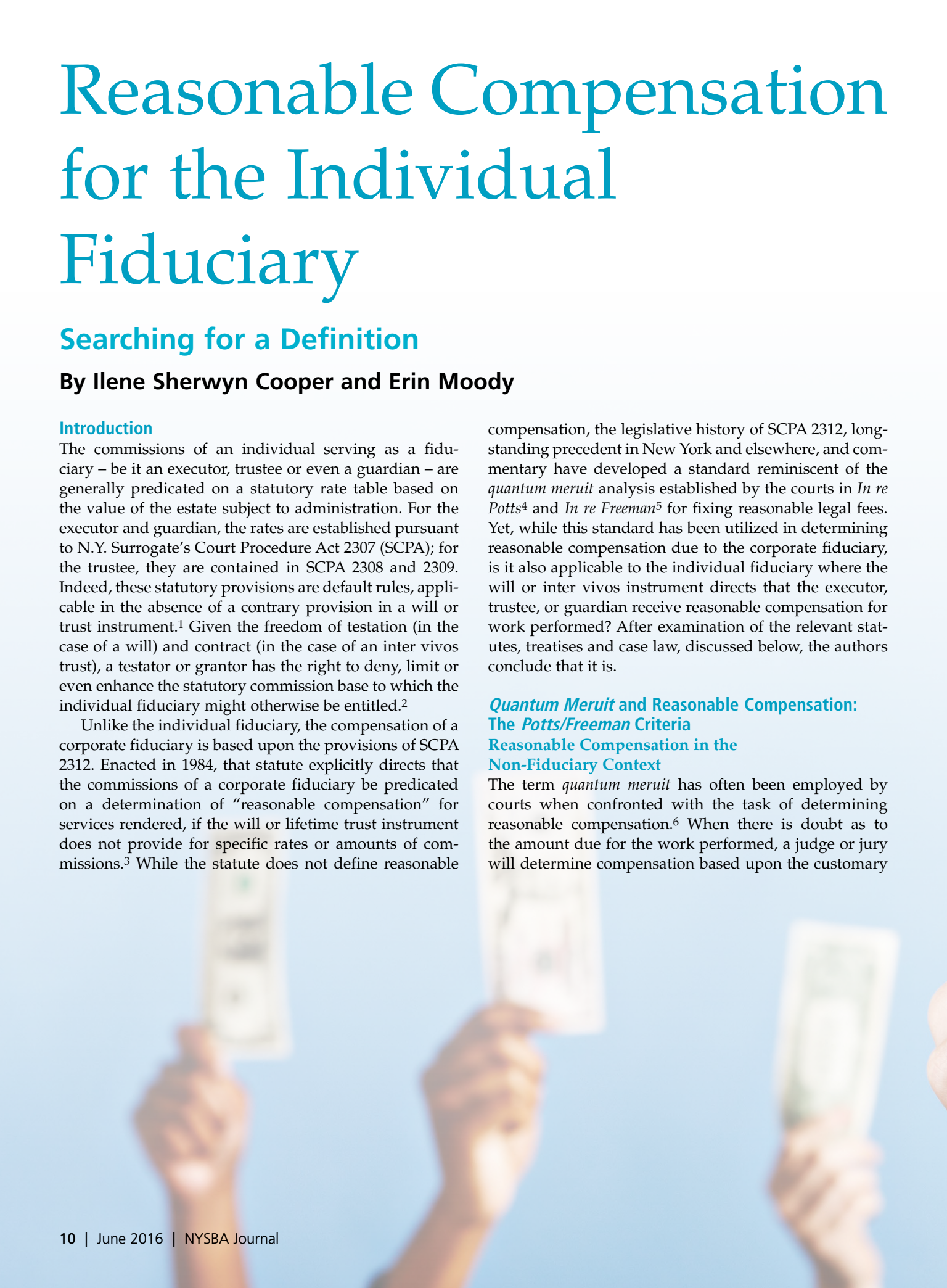
The commissions of an individual serving as a fiduciary – be it an executor, trustee or even a guardian – are generally predicated on a statutory rate table based on the value of the estate subject to administration. For the executor and guardian, the rates are established pursuant to N.Y. Surrogate's Court Procedure Act 2307 (SCPA); for the trustee, they are contained in SCPA 2308 and 2309. Indeed, these statutory provisions are default rules, applicable in the absence of a contrary provision in a will or trust instrument.[1] Given the freedom of testation (in the case of a will) and contract (in the case of an inter vivos trust), a testator or grantor has the right to deny, limit or even enhance the statutory commission base to which the individual fiduciary might otherwise be entitled.[2]

Unlike the individual fiduciary, the compensation of a corporate fiduciary is based upon the provisions of SCPA 2312. Enacted in 1984, that statute explicitly directs that the commissions of a corporate fiduciary be predicated on a determination of "reasonable compensation" for services rendered, if the will or lifetime trust instrument does not provide for specific rates or amounts of commissions.[3] While the statute does not define reasonable compensation, the legislative history of SCPA 2312, longstanding precedent in New York and elsewhere, and commentary have developed a standard reminiscent of the *quantum meruit* analysis established by the courts in *In re Potts*[4] and *In re Freeman*[5] for fixing reasonable legal fees. Yet, while this standard has been utilized in determining reasonable compensation due to the corporate fiduciary, is it also applicable to the individual fiduciary where the will or inter vivos instrument directs that the executor, trustee, or guardian receive reasonable compensation for work performed? After examination of the relevant statutes, treatises and case law, discussed below, the authors conclude that it is.

Quantum Meruit and Reasonable Compensation: The *Potts/Freeman* Criteria

Reasonable Compensation in the Non-Fiduciary Context

The term *quantum meruit* has often been employed by courts when confronted with the task of determining reasonable compensation.[6] When there is doubt as to the amount due for the work performed, a judge or jury will determine compensation based upon the customary



charge for services rendered.[7] To that extent, it appears that principles of *quantum meruit* are not simply limited to ascertaining the time value of services rendered.[8] Rather, as is typified in cases involving the fixing of legal fees, courts have routinely relied on the criteria enumerated by the courts in *Potts* and *Freeman*,[9] which require consideration of the time and labor involved; the difficulty of the questions involved; the skill required to handle the problems presented; the lawyer's experience, ability, and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved.[10] Indeed, in the context of legal fees, invoking a *quantum meruit* analysis has, for decades, required consideration of the *Potts/Freeman* criteria in order to determine the "customary charge" for services rendered.[11]

For example, in *Padilla v. Sansivieri*, the court stated that "[a]n award [of legal fees] in quantum meruit should *in all cases* reflect the court's assessment of the qualitative value of the services rendered, made after weighing all relevant factors considered in valuing legal services."[12] Notably, in reaching this result, the court explicitly stated that *quantum meruit* compensation awards are not limited to a calculation based on the number of hours worked multiplied by a reasonable hourly rate, impliedly indicating that other factors must be taken into account.[13]

Similarly, in *Biagioni v. Narrows MRI & Diagnostic Radiology, P.C.*, the court held that an award of attorney fees based on *quantum meruit*

> should not be limited to a calculation based on the number of hours worked multiplied by a reasonable hourly rate, but can also be calculated as a portion of a contingent fee . . . [i]n either case, a court must weigh the relevant factors, which include evidence of the time and skill required in that case, the complexity of the matter, the attorney's experience, ability, and reputation, the client's benefit from the services, and the fee usually charged by other attorneys for similar services.[14]

Numerous cases in New York stand for the proposition that an award of compensation based on *quantum meruit* is made by consideration of relevant factors.[15]

Therefore, as the foregoing makes clear, an award of compensation based on *quantum meruit* is not distinct from an award of compensation based on the criteria set forth in *Potts* and *Freeman* for determination of a reasonable fee.[16]

Reasonable Compensation for the Corporate Fiduciary: SCPA 2312

SCPA 2312 and Its Legislative History

Reasonable compensation has been applied in New York in the corporate trustee context pursuant to SCPA 2312. Specifically, Subsection 2 provides that for trusts having a principal value of more than $400,000, in the absence of a provision in the will or lifetime trust instrument setting a specific rate of compensation or amount of commissions,

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corporate trustees are entitled "to such commissions *as may be reasonable*, and the court . . . may review the reasonableness of the commission of such corporate trustee."[17]

Although the statute provides that corporate trustees are entitled to reasonable compensation, it does not provide a definition or standard for determining an award of commissions on this basis. However, the statute's legislative history elucidates the legislature's intent regarding the meaning of the term. The statute was enacted by Senate Bill 9572, Chapter 936 of the Laws of 1984; it was approved by the Senate and the Assembly in June 1984 and signed by the governor in August of that year.

> Unlike the individual fiduciary, the compensation of a corporate fiduciary is based upon the provisions of SCPA 2312.

In a Memorandum in Support of the bill, New York State Senator Jay P. Rolison, Jr. stated that the purpose of the bill was to change the method of compensating trustees from a statutory schedule of rates to reasonable compensation[18] (the "Rolison Memo"). Most importantly, the Rolison Memo defined reasonable compensation:

> Generally, reasonable compensation can be characterized as a method of compensating trustees based upon what is fair and equitable in view of the size of the trust, the responsibilities of the trustee, the character of the work required to be performed by the trustee, the special problems and difficulties met in doing the work, the conduct of the trustee and the knowledge, skill and judgment required of and used by the trustees and the manner and efficiency which the trust has been administered and the time and service required, together with any other circumstances which may be relevant.[19]

The Rolison Memo stated that one purpose for considering the foregoing factors was to increase competition among corporate trustees which, in turn, is thought to result in higher quality of trust administration services.[20] The Rolison Memo acknowledged that the statutory rate schedules for personal trustees are often deficient, particularly because trustees' duties have become increasingly more complex throughout the years and because the process to change the statutory rate schedule is time-consuming and difficult.[21] As such, the Rolison Memo emphasized the need for flexibility in determining a trustee's compensation and advocated for adoption of the reasonable compensation standard for corporate trustees. In doing so, the Rolison Memo noted that "[r]easonable compensation ha[d] been adopted in forty jurisdictions, including Arizona, California, Colorado, Connecticut, Florida, Illinois, Massachusetts, Pennsylvania and Texas" and that "reasonable compensation [could] be characterized as a method of compensating a trustee based upon what is fair and equitable."[22]

Compensation Under SCPA 2312: *In re McDonald* and Its Progeny

Although few New York cases have interpreted the meaning of "reasonable compensation" within the context of SCPA 2312, four opinions emanating from the Surrogate's Court, Westchester County, have served to establish the requisite guidelines.

In re McDonald was the first decision that delineated the factors for the court to consider in determining reasonable compensation for a corporate trustee under SCPA 2312.[23] *McDonald* involved a proceeding for the judicial settlement of final accounts of a trust company as a corporate trustee of testamentary trusts.[24] The court observed that while the *Potts/Freeman* standard had been established to determine the reasonableness of attorney fees, there were no New York cases at the time that established guidelines or factors for determining reasonable compensation for trustees under SCPA 2312.[25]

As such, the court considered the legislative history of SCPA 2312, specifically, the factors as set forth in the Rolison Memo, as well as case law in other states, in order to determine the factors that were relevant in assessing reasonable compensation in this context.[26] As a result of this analysis, the court developed the following criteria:

1. the size of the trust;
2. the responsibility involved;
3. the character of the work involved;
4. the results achieved;
5. the knowledge, skill and judgment required and used;
6. the time and services required;
7. the manner and promptness in performing duties and responsibilities;
8. any unusual skill or experience of the trustee;
9. the fidelity or disloyalty of the trustee;
10. the amount of risk;
11. the custom in the community for allowances to trustees; and
12. any estimate of the trustee of the value of his or her services.

The court explained that "[t]he weight to be given to any one factor and what is reasonable compensation rests in the discretion of the [trial] court . . . [t]he test of what is reasonable compensation requires a determination of the circumstances of the case and services actually rendered," and further, that "[t]he reasonableness of commissions is dependant [sic] upon the singular facts of each trust."[27]

The *McDonald* standard was subsequently followed by the same court in *In re Estate of Prankard*.[28] In *Prankard*, the primary issue was whether the corporate trustee was entitled to compensation based upon its commission rates published within the competitive marketplace, or whether its reasonable compensation should be determined only upon consideration of the factors set forth in *McDonald*.[29]

Interestingly, at a trial of the matter, the court called former Senator Rolison, Jr. – the sponsor of the bill enacting SCPA 2312 and author of the Rolison Memo – as its own witness. Senator Rolison testified that the reasonableness of compensation sought was to be left to the absolute discretion of the court to resolve based on whatever factors it deemed relevant, including, but not limited to, those enumerated in *McDonald*.[30] Ultimately, after engaging in a lengthy discussion of the history of SCPA 2312,[31] the court held that in *all* contested proceedings it would apply the *McDonald* factors, together with the corporate fiduciary's published fee schedule, when assessing reasonable compensation under SCPA 2312.[32] Notably, in rendering its opinion, the court recognized the well-settled rule in attorney fee cases, that time spent is the least important factor in determining reasonable compensation, and held that the trustee's failure to keep contemporaneous time records of its activities was of little consequence.[33]

Prankard was followed by *In re Manny*, which involved an intermediate accounting proceeding instituted by a corporate trustee in which the objectants alleged that the corporate trustee should be surcharged for, among other things, collecting commissions in excess of the minimum compensation awardable as reasonable compensation under SCPA 2312.[34] Although the court denied both the trustee's and the objectants' motions for summary judgment and scheduled a hearing to determine the reasonableness of the commissions retained by the trustee, it stated that it would consider "all applicable criteria in making its determination."[35]

Similarly, in a later, related action arising out of the same trust and trustees (*Manny II*), the court explicitly considered the 12 factors from *Prankard* (as originally set forth in *McDonald*) in *In re Manny*.[36] In *Manny II*, the evidence demonstrated that the corporate trustee was responsible for administrative matters, knowing and carrying out the terms of the trust, collecting and managing assets, retaining records, corresponding with counsel in terms of legal issues, corresponding with beneficiaries, identifying appropriate assets in the trust for sales, raising cash, ensuring that the trust generated sufficient income, and ensuring the preparation of annual fiduciary tax returns and tax letters.[37]

In applying the factors set forth in *McDonald* and *Prankard* to the evidence, the court held that the corporate trustee "offered sufficient evidence to establish that it [was] entitled to 'reasonable compensation' under SCPA 2312," because: (1) the value of the trust grew from $1 million to more than $7 million during the accounting period, (2) the trustee's responsibilities, the character of its work, the results achieved, its knowledge, skills and judgment, and the manner and promptness of performing its duties were all amply demonstrated by the record, (3) the language of the trust instrument permitted compensation in accordance with law (i.e., reasonable compensation), and (4) because the trustee served as a co-trustee from the trust's inception.[38]

Clearly, what can be gleaned from the foregoing is that reasonable compensation for the corporate fiduciary under SCPA 2312 relies upon much of the same criteria applied in *Potts* and *Freeman* in the fixing legal fees. Whether these same criteria can and should be applied to the individual fiduciary requires consideration of the view outside the state of New York, as well as some New York cases that have taken this approach.

Reasonable Compensation for Individual Fiduciaries: The National View

The Uniform Probate Code

The Rolison Memo in support of SCPA 2312 noted that of the 30 jurisdictions that had specific statutory authorization for reasonable compensation, 14 had adopted the Uniform Probate Code (UPC) provisions on reasonable compensation in some form.[39] As originally written in 1969, the UPC did not provide a definition of reasonable compensation. However, it did provide for reasonable compensation for personal representatives[40] (appointed under wills), for "any visitor, lawyer, physician, conservator or special conservator appointed in a protective proceeding,"[41] and for trustees and employees of a trust.[42]

Today, the UPC sets forth a definition of reasonable compensation, in a comment to § 5-417. That section, which provides for reasonable compensation for guardians, conservators, lawyers, and others appointed by the court in a guardianship or protective proceeding, states:

> While the size of the estate is an important factor in setting compensation, in many cases there will be no estate . . . Among the factors listed are skill, experience and time devoted to duties; the amount and character of the property; the degree of difficulty; responsibility and risk assumed; the nature and cost of services rendered by others; and the quality of the performance.[43]

The UPC also provides for reasonable compensation for "personal representatives,"[44] which are defined as fiduciaries "who shall observe the standards of care applicable to trustees" and who are "under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will."[45] As such, "personal representatives" under the UPC appear to be executors, and although the UPC does not define reasonable compensation specifically in this context, arguably, the definition previously set forth concerning reasonable compensation for guardians and conservators should be applied to the personal representative context as well.

Restatement of Trusts

In addition to case law, courts often find respected authorities, such as Restatements, highly persuasive when evaluating an issue of first impression. As such, consideration of how the Restatement of Trusts defines

reasonable compensation is worthwhile. To this extent, the Restatement, like the UPC, relies on a list of *Potts/Freeman*-type criteria for determining reasonable compensation for trustees:

1. local custom;
2. the trustee's skill, experience and facilities;
3. the time devoted to trust duties;
4. the amount and character of the trust property;
5. the degree of difficulty, responsibility, and risk assumed in administering the trust;
6. the nature and costs of services rendered by others; and
7. the quality of the trustee's performance.[46]

Additionally, the Uniform Trust Code (UTC) provides in a comment that trustees are entitled to reasonable compensation, and extracts the factors listed above from the Restatement as those relevant in determining reasonable compensation, and further, that reasonable compensation should be based on "the totality of the circumstances."[47]

Decisions from Other States

On the national front, courts have applied factors similar to those set forth in *McDonald*, the Restatement and the UPC in determining reasonable compensation for individual fiduciaries. In *Hayward v. Plant*, an early decision issued by the highest court in Connecticut, the court affirmed a determination made by the trial court as to the reasonable compensation of executors for administering what was considered a very large estate at the time.[48] Specifically, in reaching its determination, the trial court took into account the gross amount of the estate, the time and effort expended by each executor, the difficulty and complexity of the problems dealt with, the broad powers and discretion granted the executors under the will, the manner of their exercise of the same, the results obtained, and all of the other circumstances and facts disclosed by the evidence.[49]

The compensation awarded to the executors was thereafter challenged on the basis that the awards were excessive and constituted an abuse of judicial discretion.[50] In affirming the compensation awards determined by the trial court, the appellate court explicitly held that

> "reasonable" means what is fair in view of the size of the estate, the responsibilities involved, the character of the work required, the special problems and difficulties met in doing the work, the results achieved, the knowledge, skill, and judgment required of and used by the executors, the manner and promptitude in which the estate has been settled, and the time and service required, and any other circumstances which . . . are relevant.[51]

The court reasoned that consideration of such factors and awards of separate awards due to each executor, makes sense in light of the fact that "the services of the several executors differed widely."[52]

A more recent Connecticut opinion adhered to the factors listed in *Hayward* in determining reasonable compensation for an individual trustee.[53] The Connecticut Court of Probate stated that the nine *Hayward* criteria are to be analyzed one by one with regard to the trustee's performance; however, each criterion needs to be reviewed ultimately as contributing to the totality of the circumstances of the case.[54] Notably, the court stated that the "sheer size and weight [of the trust] alone compel the conclusion that the work required of its Trustees would be very substantial," and further, the court there was satisfied that the trustee "devoted sufficient time to the discharge of her fiduciary obligations" despite the fact that she did not keep time records.[55] Although the court reduced the trustee's requested compensation by approximately 30%, it seemingly did so solely because the trustee did not follow the consultative process mandated by the testator, namely, that she did not consult with her co-trustee before making decisions,[56] an issue which is likely unique to that particular case.

Florida also has a list of factors that it utilizes in determining reasonable compensation for fiduciaries that it appears to apply to both individuals and corporate fiduciaries. In *West Coast Hospital Association v. Florida National Bank of Jacksonville*,[57] the Supreme Court of Florida stated that the following factors are "influential in enabling the court to reach a conclusion as to the appropriate amount of pay which should be granted the trustee in a given case:"

> The amount of capital and income received and disbursed by the trustee; the wages or salary customarily granted to agents or servants for performing like work in the community; the success or failure of the administration of the trustee; any unusual skill or experience which the trustee in question may have brought to his work; the fidelity or disloyalty displayed by the trustee; the amount of risk and responsibility assumed; the time consumed in carrying out the trust; the custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks; the character of the work done in the course of administration, whether routine or involving skill and judgment; any estimate which the trustee has given of the value of his own services; payments made by the cestuis to the trustee and intended to be applied toward his compensation.[58]

Recently, the Florida District Court of Appeals revisited this issue in a case involving the estate of Robert Rauschenberg, who died in 2008 at his home on Captiva Island, Fla.[59] Mr. Rauschenberg devised his residuary estate to a trust, the beneficiary of which was the Robert Rauschenberg Foundation (the "Foundation"), and which had three named individual trustees.[60] The trust did not contain a provision addressing trustee compensation.[61] During several years of the trustees' management of the trust, its assets had increased in value from approximately $600 million to almost $2 billion, and as such, the trustees sought significant compensation for their services rendered to the trust.[62]

The Foundation, the primary beneficiary of the estate, advocated for a determination of reasonable trustee compensation based on the "lodestar" method, which was set forth in a 1985 Florida Supreme Court case,[63] and would determine the reasonableness of the compensation due to the trustees by multiplying the number of hours reasonably expended by a reasonable hourly rate,[64] i.e., the value of the services performed. The trustees, on the other hand, requested over $50 million in fees based on the factors set forth in *W. Coast Hosp. Ass'n*.[65] Ultimately, the court held that the lodestar method did not apply to trustee fees, and it upheld the trial court's award of $24,600,000 to the trustees based on what it deemed a proper interpretation of the factors set forth in *W. Coast Hosp. Ass'n*.[66] As a result of the opinion, factors invoking *quantum meruit* lodged in much of the same criteria established in *Potts/Freeman* are currently those considered by the courts in Florida in determining reasonable compensation for individual fiduciaries.

As evidenced in case law[67] and court rule,[68] California relies on a substantially similar list of factors as Florida in determining reasonable compensation allowable to a trustee. Moreover, California Probate Code § 15681 specifically provides that a trustee "is entitled to reasonable compensation under the circumstances" if the trust instrument is silent on the issue of compensation.

Courts in other states use similar factors in determining reasonable compensation due to fiduciaries. For example, an appellate court in Tennessee has held that:

> When a court sets a reasonable fee for a trustee, it should take into account the size of the trust, the nature and number of the assets, the income produced, the time and responsibility required, the expertise required, any management or sale of real estate and closely held business interests, any involvement in litigation to protect the trust property, and other relevant factors . . . [s]imilarly, reasonable compensation to an executor should be fixed with reference to the entire estate and services.[69]

Similarly, the Supreme Court of Alabama has held that:

> In assessing the reasonableness of an executor's compensation, Alabama courts consider the following factors: the novelty and difficulty of the administrative process, the skill requisite to perform the service, the likelihood that the acceptance of the particular employment will preclude other employment, the fee customarily charged in the locality for similar services, the amount involved and the results obtained, the requirements imposed by the circumstances and condition of the estate, the nature and length of the professional relationship with the decedent, the experience, reputation, diligence, and ability of the person performing the services, the liability, financial or otherwise, of the personal representative, or the risk and responsibility involved.[70]

North Carolina has a statutory scheme that *mandates* the court's consideration of 11 enumerated factors, similar to those considered in Alabama and Tennessee, in determining reasonableness of compensation due to a trustee.[71] Interestingly, under the statute, the court must take into consideration "[o]ther factors which the trustee or the clerk of superior court deems to be relevant" in reaching its determination, providing flexibility in determining reasonable compensation for trustees under unique circumstances.[72]

Reasonable Compensation for Individual Fiduciaries: New York Case Law

While New York courts have infrequently addressed the meaning of reasonable compensation for the individual fiduciary other than by reference to the statutory commission rates, in the few instances in which they have, reliance upon the *Potts/Freeman* criteria is apparent. Principles of reasonable compensation in the individual

fiduciary context are not foreign to New York Surrogate's Courts, which have routinely invoked the standard, albeit with little analysis, as a basis for awarding fees to a preliminary executor, the estate of a deceased fiduciary, and a resigning fiduciary.[73] Even the Court of Appeals has addressed this issue in the context of an individual trustee's request for compensation, as noted below.[74]

> The term *quantum meruit* has often been employed by courts when confronted with the task of determining reasonable compensation.

More specifically, SCPA 1412(7) provides that if a will is denied probate or a preliminary executor's letters are revoked for any reason during the pendency of the probate proceeding, the preliminary executor is entitled to "receive only such compensation, if any, as the court shall determine to be reasonable and just for the services rendered by him to the estate"; however, not to exceed the commissions to which an executor would be entitled. Thus, in *In re Bernstein*,[75] a guardian ad litem appointed to represent the interests of secondary income beneficiaries contended that the deceased preliminary executor should receive only a modest compensation for her services since she received preliminary letters only 13 days before her death. The court disagreed and awarded the preliminary executor's estate $10,000 in commissions, after finding that she unofficially served the estate for approximately four-and-a-half months after the decedent's death, in locating, inventorying and preserving the estate assets.[76]

Similarly, a deceased fiduciary's estate is entitled to reasonable compensation measured by the value of the services rendered.[77] The fixation of such reasonable compensation rests in the sound discretion of the court but may not exceed the amount of commissions as fixed by statute.[78] Although in practice Surrogate's Courts frequently defer to the rate tables governing commissions due under SCPA 2307, 2308, and 2309,[79] courts have acknowledged that such rate tables "have little relationship to the length of service of the fiduciary or the value of his services."[80] Similarly, appellate courts have indicated that such determination should in fact be based on *quantum meruit* considerations.[81]

The foregoing principles have also been applied when a fiduciary resigns from office. *In re Smith*[82] is a case in point. There, a general guardian sought leave to resign. The court held that the guardian had forfeited her right to receive statutory compensation but that she would be reasonably compensated for services properly performed. Notably, after referring to the usual rules for computing, receiving and paying out commissions pursuant to statutory rates, the Surrogate's Court held that it had to further consider the amount involved, the time the fiduciary served, the nature of her duties, and her performance in discharging them.

Significantly, separate and apart from the foregoing circumstances, in *In re Schell* the Court of Appeals indicated a willingness to look beyond the statutory rate tables in determining the compensation of the fiduciary where the testator's will contained a provision directing that he be allowed "reasonable compensation" for his services.[83] To this extent, the Court opined that the testator must have intended that reference be made "to the special circumstances of his estate and the services which he has required [him] to perform," and noted that "the duties of the trustee were onerous, and involved more than the mere receipt and disbursement of money."[84] Accordingly, the Court remanded the case to the lower court for a determination of whether the sum claimed by the trustee was or was not reasonable in light of such circumstances.[85]

Since *Schell*, there has been one other case that indicated that the approach in *Schell* would be followed in similar cases. In *In re Sprague*, the Surrogate's Court, Erie County stated that where a will "provides that a reasonable compensation shall be given to an executor, beyond the commissions, and without fixing the amount, the court will allow a fair amount *according to the services rendered.*"[86]

Although such language seemingly would involve consideration of multiple factors in determining the nature and value of the services rendered, the court did not elaborate on how it would reach such a determination.[87] As such, although the court in this case impliedly indicated that the approach taken in *Schell* should be followed, there have been no cases since *Schell* that explicitly hold that the unique circumstances of an estate will be considered in determining reasonable compensation due to an individual fiduciary under a will or trust instrument.

Conclusion

While reasonable compensation for the individual fiduciary has yet to be well defined in New York, when addressing the issue of reasonable compensation for the corporate fiduciary, and, in the several instances involving the preliminary executor, deceased fiduciary or resigning fiduciary, New York Surrogate's Courts have considered more than just the time value of the services performed, and relied, instead, on the criteria established by the court in *Potts*[88] and *Freeman*[89] for the determination of an appropriate award. The authors agree with this approach, which finds support not only with the N.Y. Court of Appeals, but also on the national stage in the UPC, Restatement and case law, all of which are of the view that a multitude of factors impact the assessment of a reasonable fee in this context. Indeed, this analysis provides the fair and equitable result that most testators and grantors, as well as the judiciary, seek to accomplish when reasonable compensation is at issue. Nevertheless, whether New York courts firmly adopt this approach for the individual fiduciary remains to be seen. In the

interim, wills or inter vivos trust instruments with little more than a direction that reasonable compensation be paid to the individual fiduciary may well be the subject of litigation as to the meaning of the term. Perhaps, in order to mitigate disputes regarding this issue, practitioners may wish to include in the instrument a list of factors to be considered in making this determination.

1. *See Will of Grant*, 155 Misc. 2d 819, 820 (Sur. Ct., N.Y. Co. 1993).
2. *Id.*
3. SCPA 2312.
4. *See In re Potts*, 123 Misc. 346 (Sur. Ct., Columbia Co. 1924), *aff'd*, 213 A.D. 59 (4th Dep't 1925), *aff'd*, 241 N.Y. 593 (1925).
5. *See In re Freeman*, 34 N.Y.2d 1 (1974).
6. *See, e.g.*, *John Anthony Rubino & Co. v. Swartz*, 84 A.D.3d 599, 599 (1st Dep't 2011).
7. *Quantum Meruit Definition*, Dictionary.law.com, http://dictionary.law.com/Default.aspx?selected=1692; *see also De Graff, Foy, Conway and Holt-Harris v. McKesson & Robbins, Inc.*, 31 N.Y.2d 862, 873 (1972).
8. *See Ruggiero v. Gross Plumbing & Heating, Inc.*, 226 A.D.2d 984, 986 (3d Dep't 1996).
9. 34 N.Y.2d at 9.
10. *See Freeman*, 34 N.Y.2d at 9; *Potts*, 123 Misc. at 348–49; *see also* N.Y. Ct. R. § 207.45.
11. *See Freeman*, 34 N.Y.2d at 9; *Potts*, 123 Misc. at 348–49.
12. 31 A.D.3d 64, 65 (2d Dep't 2006) (emphasis added).
13. *See id.* at 67–68.
14. 127 A.D.3d 800, 801 (2d Dep't 2015) (internal quotations omitted).
15. *See id.*; *see also DeGregorio v. Bender*, 52 A.D.3d 645, 646 (2d Dep't 2008) ("An award in quantum meruit should be made after weighing all the relevant factors"); *Ogletree, Deakins, Nash, Smoak & Stewart, P.C. v. Albany Steel, Inc.*, 243 A.D.2d 877, 879 (3d Dep't 1997) ("The amount of compensation to be fixed under the theory of quantum meruit depends on the court's interpretation of various factors in its determination of the reasonable value of the services rendered" (internal quotations omitted)).
16. *See generally Evans-Freke v. Showcase Contracting Corp.*, 85 A.D.3d 961, 963 (2d Dep't 2011), where the court considered relevant factors such as previously agreed upon hourly labor rates, industry standard, rates charged by contractor's replacement, and invoices admitted at trial, in determining compensation due to contracting company for renovation services rendered, under theory of *quantum meruit*.
17. SCPA 2312(2) (emphasis added).
18. Sen. Jay P. Rolison, Jr., Memorandum in Support of S. B. 9572, p. 1 (N.Y. 1984).
19. *Id.* at p. 9.
20. *Id.* at p. 6.
21. *Id.* at p. 9–10 (emphasis added).
22. *Id.* at p. 6.
23. 138 Misc. 2d 577, 577 (Sur. Ct., Westchester Co. 1988).
24. *Id.*
25. *See id.* at 579.
26. *See id.* at 579, 580.
27. *See id.* at 581, 583.
28. 187 Misc. 2d 566, 566 (Sur. Ct., Westchester Co. 2000).
29. *Id.*
30. *See id.* at 571.
31. *See id.* at 573–74.
32. *Id.* at 578–79.
33. *See id.* at 580.
34. N.Y.L.J., June 10, 2002, p. 35, col. 4 (Sur. Ct., Westchester Co.).
35. *Id.*, (citing *In re Prankard*, 187 Misc. 2d 566, 566 (Sur. Ct., Westchester Co. 2000)).
36. N.Y.L.J., June 4, 2010, p. 31, col. 3 (Sur. Ct., Westchester Co.).
37. *Id.*
38. *Id.*
39. Today, that number has increased to 17, and includes Massachusetts, New Jersey, and South Carolina, with an even greater number of states, although declining to adopt the UPC in full, modeling their state-specific statutes off of UPC provisions, including New York and California. *See* Uniform Probate Code (UPC) Adoption by the States, AmericanBar.org, http://www.americanbar.org/content/dam/aba/publications/litigation_committees/trust/50-state-probate-code-survey.authcheckdam.pdf.
40. Uniform Probate Code § 3-719 (1969) (UPC).
41. UPC § 5-417 (1973).
42. UPC § 7-205 (1973).
43. UPC § 5-417, comment (2010).
44. UPC § 3-719 (2010).
45. UPC § 3-703 (2010).
46. Restatement (Third) of Trusts § 38 (2012).
47. UPC § 708, comment (2010).
48. 119 A. 341, 98 Conn. 374 (1923).
49. *Id.* at 341.
50. *Id.* at 344.
51. *Id.* at 345.
52. *Id.* at 346.
53. *Trust Under The Will of Thomas E. Moran*, 17 Quinnipiac Prob. L.J. 28, May 9, 2002, p. *28 (Ct. of Prob., Dist. of Darien).
54. *Id.* at *41.
55. *Id.* at *41, *42–43.
56. *See id.* at *46.
57. 100 So. 2d 807, 811 (Fla. 1958).
58. *Id.*
59. Michael Kimmelman, *Robert Rauschenberg, American Artist, Dies at 82*, The New York Times (May 14, 2008), www.nytimes.com/2008/05/14/arts/design/14rauschenberg.html?_r=0.
60. *Robert Rauschenberg Found. v. Grutman*, Case No. 2D14-3794, 2016 Fla. App. LEXIS 181, at *1 (Fla. Dist. Ct. App. 2d Dist. Jan. 6, 2016).
61. *See id.* at *2.
62. *Id.*
63. *See Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1151 (Fla. 1985).
64. *See Rauschenberg*, 2016 Fla. App. LEXIS 181 at *2, *3–4 (citing *Florida Patient's Compensation Fund*, 472 So. 2d at 1151).
65. *See id.* at *2.
66. *See id.* at *6.
67. *See In re McLaughlin's Estate*, 43 Cal. 2d 462, 468 (Cal. 1954).
68. Cal. Rules of Court, Rule 7.776.
69. *In re Estate of Wakefield*, M1998-00921-COA-R3-CV, 2001 Tenn. App. LEXIS 905, *61 (Tenn. Ct. App., Dec. 10, 2001) (internal citations omitted).
70. *Ruttenberg v. Friedman*, 97 So. 3d 114, 129–30 (Ala. 2012).
71. N.C. Gen. Stat. § 32-54(b) (in subsection (a), the statute also provides that a trustee is explicitly entitled to reasonable compensation where the trust instrument is silent on the issue).
72. *Id.*
73. *See generally*, 8-103 Warren's Heaton on Surrogate's Court Practice, § 103.02.
74. *See In re Schell*, 53 N.Y. 263 (1873).
75. 94 Misc. 2d 898, 900 (Sur. Ct., N.Y. Co. 1978).
76. *Id.*
77. *In re Monell*, N.Y.L.J., Oct. 10, 2003, p. 27, col. 3 (Sur. Ct., Suffolk Co.).
78. *Id.*; *see also In re Bushe*, 227 N.Y. 85, 93 (1919).
79. *See In re McGrath's Estate*, 74 Misc. 2d 92, 96 (Sur. Ct., Kings Co. 1973).
80. *See id.* at 99.
81. *See In re Mittman*, 145 A.D.2d 635, 636 (2d Dep't 1988).
82. N.Y.L.J., June 19, 1980, p. 15 (Sur. Ct., Bronx Co.).
83. 53 N.Y. 263 (1873).
84. *Id.* at 266–67.
85. *Id.* at 267.
86. 46 Misc. 216, 218 (Sur. Ct., Erie Co. 1905) (emphasis added).
87. *See id.*
88. 123 Misc. at 348–49.
89. 34 N.Y.2d at 9.

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"Oops, My Bad!"

Introduction

One of my colleagues, a paralegal, when confronted with one of her very rare mistakes, will immediately respond with "oops, my bad." This clever response acknowledges responsibility in a manner so disarming that dropping the issue and simply moving on is the only available course.

I was reminded of that phrase when reading *Pouncey v. New York City Transit Auth.*,[1] a recent decision from the Second Department. The question in *Pouncey*? By submitting a police accident report in support of a motion for summary judgment, did the plaintiff, the moving party, waive any objection to the use by the party opposing the motion of "self serving statements not in admissible form" contained therein? The answer? Yes, any objection was waived.

Pouncey

In *Pouncey*, the Second Department held that the trial court erred in granting summary judgment to the plaintiff because the plaintiff's own submissions in support of the motion demonstrated a question of fact on the central issue in the case:

> "[T]o prevail on a motion for summary judgment on the issue of liability, a plaintiff has the burden of establishing, prima facie, not only that the defendant was negligent, but that the plaintiff was free from comparative fault" (citations omitted). If the plaintiff's motion papers indicate that there are triable issues of fact, the motion should be denied (citations omitted).
>
> In the instant case, the police report submitted by the plaintiff in support of her motion indicated that both the plaintiff and the bus driver claimed that the other "ran the light." Therefore, the plaintiff's submissions failed to eliminate all triable issues of fact as to whether the plaintiff was at comparative fault in the happening of the accident.[2]

The court reasoned that by introducing the accident report as part of the motion in chief, the movant waived *any* objection:

> Although the police report contained self-serving statements not in admissible form, since the plaintiff submitted the police report in support of her motion, she waived any objection to its admissibility, and the defendant could rely upon it in opposition to her motion (citations omitted).[3]

Clearly, any probative value the police report had in establishing *prima facie* entitlement to summary judgment was demolished by the introduction of otherwise inadmissible proof.

Other Inadmissible Proof Admitted by *Pouncey*-Type Waiver

Cases cited by the *Pouncey* Court give other examples of otherwise inadmissible evidence properly considered in opposition to a summary judgment motion. In *Field v. Waldbaum*,[4] unnotarized statements of nonparty witnesses were considered on the motion because the defendant had submitted them in support of its motion for summary judgment. In *Pech v. Yael Taxi Corp.*,[5] an "unsworn medical report of one of the physicians and the MRI reports were initially relied upon by the defendants, and were therefore properly before the court (citation omitted)." And in *Raso v. Statewide Auto Auction*,[6] the court again considered an unsworn medical report in denying the motion for summary judgment:

> With respect to whether Raso sustained a serious injury within the meaning of Insurance Law § 5102 (d), we note that the unsworn report of his treating physician was relied upon by the appellant, and therefore was properly before the court (citation omitted). In the report, the treating physician objectively quantified restrictions in the range of motion of Raso's foot. Thus, the appellant failed to establish its entitlement to judgment as a matter of law (citations omitted).[7]

Prevailing on summary judgment can be a steep climb. Keeping *Pouncey* in the back of your mind at all times may help prevent making the summary judgment summit insurmountable.

A Different Waiver Issue to Be Argued Before Court of Appeals

In a case awaiting argument before the Court of Appeals, *Rivera v. Montefiore Med. Ctr.*,[8] the First Department affirmed a trial court's denial of the plaintiff's *in limine* motion as untimely, to preclude the defendant's expert due to claimed defects in the CPLR 3101(d)(1)(i) exchange identifying the expert:

> CPLR 3101 (d) (1) requires expert disclosure, "in reasonable detail," of "the substance of the facts and opinions on which each expert is expected to testify," in order to provide the plaintiff with the defendant's theories of the case in advance of trial (citation omitted). Here, upon receipt of this 3101 (d) statement, the only objection that plaintiff voiced was that the expert's qualifications failed to include the dates of his residency, which deficiency defendant then cured. Plaintiff neither rejected the document nor made any objection to the lack of specificity regarding the cause of death.

Rivera was the subject of the January 2015 edition of this column, which highlighted the danger of the waiver issue for practitioners, and pointed out that no authority was cited by the First Department for either proposition.

Rivera was considered by some to be an outlier. However, in March of this year, the First Department held a trial court improperly granted the defendant's motion *in limine* to bar the plaintiff's medical expert in *Dedona v. DiRaimo*.[9] The court described the case and the timing of the motion *in limine*:

> Plaintiff Susan Dedona's husband, then 31 years old, was involved in a motorcycle accident and sustained injuries to his femur, which led to five surgeries and his ultimate death. Plaintiff commenced this action against, among others, defendant Dr. DiRaimo, a vascular surgeon who attempted to restore circulation in decedent's leg.
>
> After jury selection, but before opening statements, defendants moved, in limine, to preclude plaintiffs from presenting evidence or expert testimony on plaintiffs' theory that Dr. DiRaimo departed from care and caused or contributed to decedent's death by failing to ligate (tie off) decedent's superficial femoral artery.[10]

"Less is more" in establishing *prima facie* entitlement to summary judgment.

The court then discussed the adequacy of the exchange, the timing of the service of the expert disclosure, and concluded with its finding that objection to the expert was waived:

> The trial court improvidently exercised its discretion in granting the motion and in dismissing the complaint based on the preclusion of evidence. Defendants' argument that they had no notice of plaintiffs' theory and were unfairly surprised is unavailing. The theory concerning vascularization of decedent's left leg was adequately disclosed in plaintiff's original and supplemental bills of particulars. Further, while CPLR 3101(d)(1)(i) does not require a party to retain an expert at any particular time (citation omitted), here plaintiff served the CPLR 3101(d) expert disclosure notice about eight months before trial, which was sufficient notice (citation omitted). Furthermore, during that period, defense counsel were present at several pretrial conferences and raised no objections to the expert disclosure, nor did they reject the notice (citation omitted).[11]

The authority cited in *Dedona* for the waiver holding? *Rivera*.

Forewarned is forearmed. At least in the First Department, counsel would be wise to immediately reject, where warranted, an expert exchange, and specify its objections to the rejected exchange in an accompanying letter or notice of rejection.

Conclusion

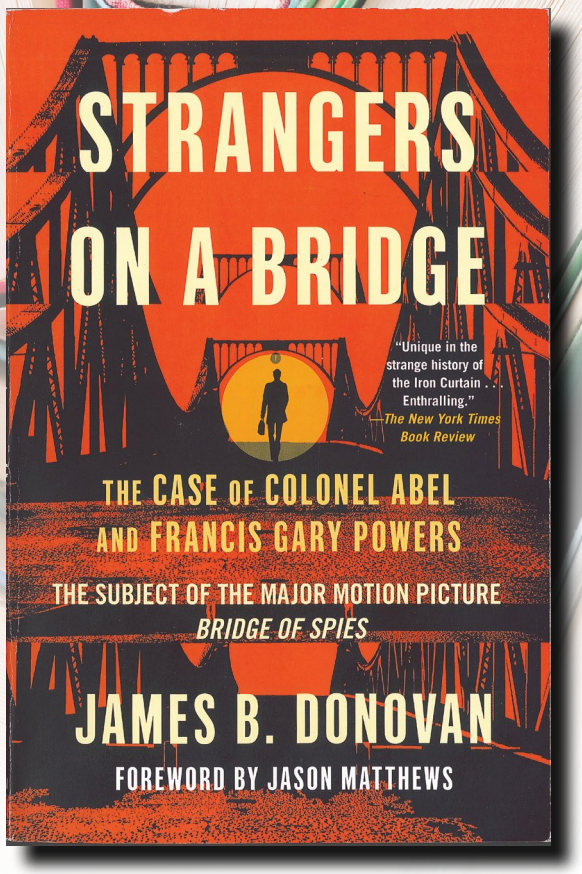
While it is tempting to incorporate as much proof as possible to demonstrate *prima facie* entitlement to summary judgment, every affidavit, deposition transcript, or record submitted in support of the motion must be carefully scrutinized to determine if there is anything contained therein that controverts the position of the moving party, thereby creating a question of fact sufficient to deny the motion.

The waiver of any objection caused by the movant's submission of the proof may result in proof that the opposing party could not otherwise submit in opposition to the motion, resulting in a denial of the motion.

Many practitioners follow the "less is more" approach in establishing *prima facie* entitlement to summary judgment. What is required in order to shift the burden to the moving party to come forward with its own proof in opposition to the motion is not overwhelming proof, or conclusive proof, but *prima facie* proof.[12] Additional proof may, of course, be submitted by the moving party in reply to rebut issues raised in the opposing papers, so be careful when tempted to gild the lily.

As for the *Rivera*/*Dedona* waiver issue, stay tuned for the decision of the Court of Appeals. At least I know I have at least one more future column topic at the ready. ■

1. 135 A.D.3d 728 (2d Dep't 2016).
2. *Id.* at 730.
3. *Id.*
4. 35 A.D.3d 652 (2d Dep't 2006).
5. 303 A.D.2d 733, 733 (2d Dep't 2003).
6. 262 A.D.2d 387 (2d Dep't 1999).
7. *Id.* at 387–88.
8. 123 A.D.3d 424, 425–26 (1st Dep't 2014), *motion denied*, 25 N.Y.3d 1187 (2015).
9. 137 A.D.3d 548 (1st Dep't 2016).
10. *Id.* at 548.
11. *Id.* at 548–49.
12. *Prima facie* means "sufficient to establish a fact or raise a presumption unless disproved or rebutted." (Black's Law Dictionary).



Bridge of Justice

How a Brooklyn lawyer and a Soviet spy put American jurisprudence on trial

Excerpts from *Strangers on a Bridge* by James B. Donovan

Introduction

In 1964, James B. Donovan's book *Strangers on a Bridge* became an instant bestseller – largely because of its appeal as a "spy thriller." It's a riveting tale of Donovan's dual role as defense counsel for a Soviet spy named Rudolf Abel, a KGB Colonel, and later as a broker between the U.S. and Soviet Union in trading Abel for American U2 pilot Francis Gary Powers. Now, more than a half century later, the book has become a bestseller again, largely because of the success of *Bridge of Spies*, the motion picture based on Donovan's book. Yet *Strangers on a Bridge* is more than just a thrilling tale of espionage. It is also a story about American justice and due process and attorneys like James Donovan, who labor against critics, including some of their fellow attorneys, to give despised clients the best defense possible under American law. As one colleague observed, "American justice, along with the Soviet Colonel," was on trial.

The following excerpts from *Strangers on a Bridge* make clear that the courtroom drama was as riveting as the prisoner exchange itself:

1957

Monday, August 19

"Jim, that Russian spy the FBI just caught. The Bar Association wants you to defend him. What do you think?"

It was Ed Gross of our law firm, calling from New York.

It was 9:30 in the morning and we were unpacking at our summer cottage in Lake Placid, New York, deep in the Adirondack Mountains. This was to be the start of a two-week vacation, delayed by a case before the Supreme Court of Wisconsin.

Ed Gross said the Brooklyn Bar Association had decided that I should defend the accused spy, Col. Rudolf

Ivanovich Abel. He said Lynn Goodnough, a Brooklyn neighbor, was the chairman of the selection committee. Over ten years ago Goodnough had heard a talk I gave on the Nuremberg Trials before a conservative group of Brooklyn lawyers, including some prominent German-Americans. The discussion became heated, Lynn told Ed, and he thought I stood up for what I believed.

I had read newspaper accounts of the indictment of Abel by a Brooklyn grand jury nearly two weeks before. The stories described Abel in a sinister way as a "master spy" heading all illegal Soviet espionage in the United States.

I left our Lake Placid cottage for a walk. After a while I had a cup of coffee with a fellow vacationing lawyer, Ed Hanrahan, former chairman of the Securities and Exchange Commission, whose judgment I value. We talked it out.

"As a friend, Jim, I strongly advise you against accepting the assignment," he said. "It's bound to take a lot out of you before it's over. You've done more than your share of Bar Association work; let them find a criminal lawyer to handle the defense. But only you can make the decision."

There was another opinion I got that morning, which probably would have been that of the average layman. I walked over to the golf course for a lesson. Between shots on the practice tee, I mentioned the proffered assignment to the club professional, Jim Searle, an old friend as well as golf tutor.

"Why in hell," he asked, "would anyone want to defend that no-good bum?"

I reminded him that under our Constitution every man, however despised, is entitled to counsel and a fair trial. So, I said, the next step is simple: Who will defend him? Jim agreed with my theory, but as I walked away from the practice tee I could sense that he was certain my egghead thinking was one of the reasons for my miserable golf swing.

Just before noon, still undecided, I called Lynn Goodnough in Brooklyn. He became quite emotional in his quiet way and said, "Jim, our committee feels very strongly that American justice, along with the Soviet Colonel, will be on trial."

A Night Trip

I caught the old North Country sleeper train for New York. I tried to read for a while but my thoughts kept drifting to what I could see as a fascinating legal assignment, however unpopular or hopeless. Before the train reached Utica, about one o'clock in the morning, I decided to undertake the defense of Colonel Abel.

Tuesday, August 20

That morning I kept my appointment in Federal Court, Brooklyn, with Judge Abruzzo. Although he had been on the bench many years, I had never met him.

The defendant, said the judge, was considered by our government to be the most important Soviet agent ever captured in the United States. He said the trial was certain to receive international publicity and this fact was undoubtedly the reason some twenty lawyers had called or appeared in person to solicit the assignment.

"However," Judge Abruzzo added dryly, "I was not entirely satisfied with either their professional qualifications or motives."

Judge Abruzzo told me Abel had $22,886.22 in cash and bank deposits when arrested, and that while I should discuss fees with my new client, the court would approve at least a fee of $10,000, plus out-of-pocket expenses, for the trial. I told him while I would accept any such fee, I had already determined I would donate it to charity. This, he replied, was my own business, but he seemed surprised.

Wednesday, August 21

I was to meet my new client, Col. Rudolf Ivanovich Abel, for the first time.

"These are my credentials," I said, handing him a copy of the detailed press release issued by the Bar Association, announcing my selection. "I'd like you to read this carefully, to see whether there is anything here which you believe should bar me from acting as your defense counsel."

He put on rimless spectacles.

When he finished reading he looked up and said, "None of these things influence my judgment. I am prepared to accept you as my attorney." The words were spoken in perfect English, with the accent of an upper-class Britisher who had lived in Brooklyn for some years.

With such formalities out of the way, we sat down and he asked me what I thought of his situation. With a wry smile he said, "I guess they caught me with my pants down."

I laughed. The remark was made even funnier by the fact that when the FBI had pushed into his hotel room early one June morning, Abel was sleeping in the raw. The arresting officers had found complete spy paraphernalia in his Manhattan hotel room and his artist's studio in Brooklyn.

"I'm afraid, Colonel, I'm inclined to agree with you," I said and explained that from the news stories I had seen, plus a quick look at the official files in the court clerk's office, the evidence of his espionage mission appeared to be overwhelming. "Frankly, with the new penalty of capital punishment for espionage, and present cold-war relations between your country and mine, it will be a miracle if I can save your life."

There was no question in my mind that Abel was exactly what the government claimed, and that he had decided it would be futile to argue otherwise.

He then told me that under no circumstances would he cooperate with the United States government, or do

anything else that would embarrass his country, in order to save his own life. I said that as an American I regretted this decision. Moreover, I told him, if he were convicted I would argue that it would be in the national interest to spare his life, since after some years in jail he might change his mind.

I also said he should regard living as desirable, since political events might change and there could be an improvement in United States-Soviet relations, to his benefit; or his American equivalent might fall into Russian hands and there would be the opportunity for an exchange of prisoners; or some other eventuality could occur. I was thinking that his family might die and any compulsion to remain silent for that reason would be relieved.

As for the defense, I said I'd do my best for him and see that he received due process of law each step of the way.

Abel expressed complete acceptance of this approach. He said quietly, "I want you to do nothing that will lower the dignity of someone honorably serving a great nation." Quite a guy, I thought to myself.

Thursday, August 22

By my invitation, I met for lunch United States Attorney Moore and Assistant Attorney General Tompkins.

I hopefully mentioned to them the Nuremberg Trials procedure requiring pretrial disclosure of evidence, under which nothing could be introduced by the prosecution which had not been previously reviewed by the defense.

This rule was adopted from European court procedures, and we agreed to its use in Nuremberg because we were seeking to have the international military trials accepted all over the world – and especially in Germany – as giving a fair hearing to the accused.

"I believe," Mr. Moore said, "that so general a pretrial disclosure would be an unfortunate precedent for criminal prosecutions in this country."

"Perhaps in the ordinary case," I said. "But in the Abel trial, as at Nuremberg, there are international interests at stake. We want all other countries to recognize that there is no higher justice than that found in American courts."

I would get exactly what they must give me under the Federal Rules of Criminal Procedure – and nothing more.

Reading the Mail

Back in the office, I found that the mail was heavy. The letters were mostly sympathetic.

Quite a few of them read like this: "I am not quite certain whether to offer congratulations or condolences." There were many which struck this note: "Defense of an unpopular cause is one of the things that make our profession a calling."

> The defendant is a man named Abel. It is most important that you keep that fact uppermost in your mind throughout the days ahead. This is not a case against communism. It is not a case against Soviet Russia.

Sunday, September 1

From the first day of the Abel assignment, I had to put up regularly with everything from open hostility to so-called banter, some good-natured and the rest not so well-intentioned. One lower-court judge, with uncertain motivation, introduced me to strangers at a cocktail party as the "last of the Commie millionaires." I told him this was about as sound as his legal opinions. Another alleged wit joshed me for half an hour one night because I had ordered Russian dressing for my salad.

Then there were the crackpot letters and phone calls. The letters were mostly emotional denunciations, only a couple threatening reprisals if I "went too far" in defending the Russian spy.

Monday, September 9

I found my associates waiting for me and both were greatly excited. They were like two prosecutors who had just uncovered a cache of heroin or an eyewitness to a murder. They spoke at the same time, saying the same thing: The seizure of Abel and all his effects at the Hotel Latham unquestionably violated the United States Constitution.

If we were right, no evidence seized in the Hotel Latham or in the Fulton Street studio could be used in any criminal prosecution. Moreover, since a substantial part of this evidence had been placed before the grand jury, the indictment would have to be thrown out as based on "tainted evidence." In short, the Government's case against Abel would collapse.

Tuesday, September 10

I was up very early to rework a draft of an affadavit by Abel telling the detailed story of his arrest. This affidavit would be the basis of our motion to suppress all evidence seized from the Colonel.

The fact that government agents had seized in his home a person and all his property, without a criminal warrant of arrest or a public search warrant; secretly transported him to an alien detention camp in Texas and held him forty-seven days, the first five incommunicado – these facts appeared to be a classic example of the kind of thing the Fourth Amendment to the Constitution was designed to end in America.

The Fourth Amendment is the constitutional definition of a man's home as "his castle." It provides:

> The right of the people to be secure in their person, 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.

If there were substantial grounds to believe that Abel, an alien illegally in the country, was an important Soviet spy, it would not disturb me if he were picked up on a deportation warrant; were kept incommunicado for a proper time; and if he then refused to "cooperate," were kicked across the Mexican border. However, having gone down the secret counterintelligence road without public arrest or search warrants, on the deliberate gamble that Abel would eventually "cooperate," the Government could not, after its gamble failed, ignore everything that had gone before and attempt to convict Abel of a capital crime in open court in the United States. This would be paying only lip service to our "due process of law."

Monday, October 14

Looking clean-shaven and fresh in his banker's suit, Abel was led in and took his place behind us at the defense table. The jury was next, and finally, with the stage set, Judge Byers, the whitehaired old campaigner, appeared. All rose at the stentorian call of the clerk, and the judge slipped quietly into his high-backed leather throne. Twenty-eight years before, President Hoover had appointed Mortimer Byers to the Federal bench and it had become his lifetime dedication.

The judge peered over his glasses. "Both sides ready?"

"Government ready," Assistant Attorney General Tompkins said.

"Defense is ready, Your Honor."

Quietly the drama had begun.

The question on everyone's mind was "Can Abel receive a fair trial?"

My opening for the defense ran some nine hundred words and was planned for delivery in twenty minutes.

"This case is not only extraordinary; it is unique. For the first time in American history a man is being threatened with death as a sentence on the charge that he acted as a spy for a foreign nation with which we are legally at peace.

"The defendant is a man named Abel. It is most important that you keep that fact uppermost in your mind throughout the days ahead. This is not a case against communism. It is not a case against Soviet Russia. Our grievances against Russia have been voiced and are being voiced every day in the United Nations and in various other forums. But the sole issues in this case, on which you are going to render the verdict, deal with whether or not this man Abel has been proved guilty beyond a reasonable doubt of the specific crimes with which he is now charged."

Thursday, October 24

The courtroom was crowded and it was a hot day. I was pleased in this case that under the rules I would sum up first. My appeal now would be solely to the jury, so I moved up close before them.

"When you and I commenced this case, certainly we expected evidence that this man would be shown to have stolen great military secrets, secrets of atomic energy, and so on. I ask you, looking back over the past couple of weeks, what evidence of such information was ever produced before you?

"The only reason why this particular conspiracy is punishable by death, if the Court so decided, is because it is a conspiracy to *transmit* military information or information affecting the national defense. This is what has

been charged here. I am simply asking you to keep in mind what evidence of that has ever been produced in this case."

Friday, October 25

Waiting for a jury is like keeping a death watch, and this was the worst watch I ever kept.

A door slammed somewhere and then I heard someone call out, "Here they come." It was 4:50 P.M., and they had been out three and a half hours, with another hour for their lunch.

The clerk, John Scott, was standing. For this moment, he was the central figure. "In the case of the United States of America against Rudolf I. Abel," he asked the jury, "how do you find the defendant, guilty or not guilty, on Count One?"

"Guilty."

Three times the clerk called for an answer and three times jury foreman Dublynn pronounced Abel "guilty."

At my request, the jury then was polled individually, and twelve more times the word "guilty" filled the courtroom. It was like an echo: guilty, guilty, guilty.

Friday, November 15

At 10:30 A.M. the courtroom was filled and we were all ready, waiting to get on with the sentencing procedure.

I began the proceedings by reading in open court, and for the record, the letter I had addressed to Judge Byers, which first stated that my plea assumed the correctness of the jury's verdict under our law:

> It is my contention that the interest of justice and the national interests of the United States dictate that the death penalty should not be considered, because…
> It is possible that in the foreseeable future an American of equivalent rank will be captured by Soviet Russia or an ally; at such time an exchange of prisoners through diplomatic channels could be considered to be in the best interest of the United States.

[Most of the newspapers made mention of this last point, but several ignored it. Undoubtedly, they felt it could never happen; it was just a defense attorney covering all contingencies.]

A Life Sentence

The judge recited the legal liturgy, sentencing Abel to thirty, ten and five years and imposing fines of $2,000 and $1,000. The sentences were to run concurrently; the fines were consecutive. This meant his total fine was $3,000 and his prison term was thirty years, less time off for good behavior.

The sentencing had taken just sixteen minutes.

1958

Saturday, February 15

This was the day we filed our appeal with the United States Court of Appeals for the Second Circuit. We based the appeal on four contentions, with principal emphasis on the search-and-seizure issue. The remaining points dealt with the conduct of the trial, including the prosecution's continually leading its witnesses, the trial judge's overruling almost all defense objections, etc.

I frankly told Abel, however, that in my opinion our best chance for a reversal on constitutional grounds would come if we could obtain a final review by the Supreme Court of the United States.

Friday, July 11

Abel's conviction and thirty-year sentence were on this day unanimous]y upheld by the Court of Appeals.

The Court declared that while there was an occasional error by the District judge, "the alleged errors were not so prejudicial as to require a new trial in this case, where the record fairly shrieks the guilt of the accused. . . ."

As to the principal issue, the search and seizure of Abel and his possessions, the judges held there was no basis for distinguishing between a lawful arrest for a crime and a deportation proceeding. If a search was legal in the first case when incidental to the arrest, then it must be legal in the second instance.

Monday, October 13

The telegram was judiciously and sparsely worded, but its impact nonetheless powerful: PETITION FOR CERTIORARI ABEL AGAINST UNITED STATES GRANTED TODAY. LETTER FOLLOWS.

In agreeing to review our case, the Supreme Court limited its review to two specific questions dealing with the constitutional prohibition against illegal search and seizure:

"l) Is search without a search warrant permissible in connection with arrests involving immigration law, as distinguished from criminal law? 2) May seized items be admitted as evidence when they are unrelated to the Immigration Service writ or warrant of arrest?"

These questions went to the very heart of our case.

1959

Wednesday, February 25

To argue before the Supreme Court of the United States is, each time, an exhilarating experience for any lawyer. The building is magnificent; the dignity of the courtroom is powerfully impressive; the justices are astute and a formidable challenge.

My argument, which I presented wearing the traditional morning dress, was before Chief Justice Warren and Associate Justices Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker and the newly appointed Stewart. The very able Solicitor General of the United States, J. Lee Rankin, was my adversary. So I began:

> Since the issues before the Court have been thoroughly briefed, it appears that it might be most helpful to the Court if I commence my argument by explaining briefly what the case does not involve.

> In the first place, the issues before the Court render quite irrelevant whether or not petitioner Abel is a Soviet spy.
>
> This is an entirely separate question from whether he was proven guilty beyond a reasonable doubt of the specific crimes charged in the indictment and upon competent evidence. In short, the question is whether or not petitioner Abel has received due process of law.

I then launched into my thesis as to how in mid-June of 1957 the Justice Department had been on the horns of a dilemma: arrest Abel and charge him with foreign espionage in the manner prescribed by Federal statutes; or apprehend him secretly and try to induce him to come over to our side:

> A choice had to be made and it was made. Accordingly, I contend that even if the Department of Justice had this extraordinary authority to conduct illegal searches and seizures, they cannot go down that road of secret, star chamber proceedings—take their gamble, and lose when Abel refused to cooperate—and then seek to come back to the other road of normal law enforcement and attempt to pay lip service to due process of law.

In my argument and reply to the Government's argument, I spoke for an hour and a half. The last statement was the one point on which the press saw fit to quote me:

> Rather than any of the foregoing, our argument rests on the simple and clear test of the Fourth Amendment to the Constitution, part of the Bill of Rights, enacted at the specific demand of state after state fearful of too strong a centralized government and which withheld ratification of the Constitution until such safeguards were incorporated in it.
>
> The conviction of this man of a capital crime, on evidence so obtained, need only be set against the simple but binding admonition of the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ."

From the outset, the Government maintained the arrest on the morning of June 21 was legal and therefore the search was legal, saying, "There is no rational basis for distinguishing between arrests for deportation and arrests for crimes . . . some authority to search must exist in connection with an arrest on an Immigration warrant." So argued Solicitor General Rankin.

In my argument I told the Court how the FBI had pushed into his room, addressed him as "Colonel" and tried to get his "cooperation." I explained that if he had agreed to "cooperate" with them, there would have been no arrest and the Immigration officers would still be out in the hall waiting, while Abel was happily working for the United States government.

Justice Frankfurter at this point asked me if I did not think it the duty of every citizen, as well as Abel, to cooperate with law enforcement officers, such as the FBI. "What would you have done?" he asked.

"Mr. Justice," I said, "if someone pushed into my home without a warrant at seven o'clock on a hot summer's morning, when I had been sleeping naked on top of the bed, I don't know what would happen, but let me put it this way: they would know they had been in a scrap."

Many people never think about rights and privileges until they personally feel the need of them. Otherwise they denounce lawyers and judges for finding "loopholes" or "technicalities" in the law.

Observed Frankfurter dryly, "I am sure of that."

This drew a laugh up and down the bench and out in the spectators' rows.

At the close of the arguments, the Court took the appeal under advisement.

Monday, March 23

Today my wait was over. The Supreme Court, I learned by Lawyers Club teletype, had just ordered the case re-argued on October 12, seven months away. The Solicitor General and I had already argued before the Court for three hours; now they were calling for two additional hours. To say the least, this was highly unusual.

The Court again specified we should take up the questions of the constitutionality and validity of the Immigration warrant, the arrest under the warrant, and the question whether the warrant provided grounds for the searches and seizures of Abel's person, luggage and hotel room.

Monday, November 9

"The case of Rudolf Abel," said the Washington paper, "is providing a rare spectacle of the protection afforded a defendant, whatever his crime, by the American Bill of Rights. . . ."

Many people never think about rights and privileges until they personally feel the need of them. Otherwise they denounce lawyers and judges for finding "loopholes" or "technicalities" in the law.

When the Department of Justice arrested Abel with their alien detention writ, and later convicted him on evidence so obtained, they had violated his rights under our Constitution, I still thought – and think. Similar writs, called writs of assistance, were used by the British to harass the Americans in the 1770s. Significantly, John Adams said that when the great Boston lawyer, James Otis, denounced these writs in open court, "American independence was then and there born."

Standing before the Supreme Court on this day, I again argued that the administrative warrant (returnable to themselves and held secret), used to take Abel into custody, was a subterfuge to permit the Immigration and FBI agents to seek his cooperation and obtain evidence of espionage.

"For the Court to uphold the conviction," I said, "would be to let government officials ignore the requirement for search warrants in any criminal case also involving deportation charges."

When two hours had run their course, the Court took the case under advisement a second time.

1960

Monday, March 28

JUDGMENT UNITED STATES AGAINST ABEL AFFIRMED TODAY.

The telegram, received in New York at 3:59 P.M. and relayed by phone to my office, was signed by Chief Clerk James R. Browning of the Supreme Court of the United States. The message was passed to me on the back of an envelope while I was speaking on nuclear energy insurance problems before the executive committee of the National Board of Fire Underwriters. (The vote was 5-4.)

In his majority opinion, Justice Frankfurter said there were safeguards against indiscriminate use of the Immigration Service's detention writ.

Justice Douglas saw it differently: "With due deference to the two lower courts, I think the record plainly shows that FBI agents were the moving force behind this arrest and search. . . . Thus the FBI used an administrative warrant to make an arrest for criminal investigation both in violation of the Immigration and Nationality Act and in violation of the Bill of Rights. . . ."

Justice Brennan wrote, "[l]ike most of the Bill of Rights, it [the Fourth Amendment] was not designed to be a shelter for criminals, but a basic protection for everyone; to be sure, it must be upheld when asserted by criminals, in order that it may be at all effective, but it 'reaches all alike, whether accused of crime or not."

Needless to say, I agreed with the dissenters on the proper rule of law, while understanding the reluctance of a court to free the defendant. However, I refused to be drawn into public criticism of the Court's decision, reiterating my statement that Abel had received due process of law even though we had lost our case.

Tuesday, March 29

From all across the country, the editorials came. Most of them completely missed the point we – and the four minority justices – had striven so hard to make.

The Fourth Amendment was the very heart of the search-andseizure question and there never was any doubt that the constitutional protection applied to aliens, as well as every citizen. Despite this, we had editorials declaring:

> It is a national disgrace that four members of the Supreme Court wanted to free this man . . . These four judges would confer on a Communist spy the special protection the Constitution gives to United States citizens . . .

Finally, there was the sober comment by the Worcester, Massachusetts, *Telegram*:

> There is a special significance in this case of Colonel Abel. The Fourth Amendment, under which his appeal was made, stands at the opposite extreme of the police state philosophy to which the Soviet Union subscribes . . . Although our courts may not always speak in unison on this issue, or with perfect wisdom, the fact that they may deliberate on it, openly and in freedom, is not to be lightly dismissed. When even a Soviet spy can, on constitutional grounds, command a sober review by the highest court in the land, it testifies to the underlying strength and integrity of our democratic foundations.

Tuesday, April 5

The Colonel looked gaunt and beat; his clothes hung loose. There were dark circles under his deep-set eyes.

It was on both our minds, so I asked, "What did you think of the decision?"

He hesitated, smiled wanly and said, "I was not surprised. I did not believe the case would be decided purely on the law. I regard it as a political decision because, quite frankly, I think that your arguments on the law were irrefutable."

"Do you think your government will take steps to bring about your release, now that all hope of legal procedure is exhausted?"

"I simply don't know," he replied. "I think my biggest problem is that there is no American of sufficient importance in jail in Russia."

Conclusion

On May 1, Francis Gary Powers was shot down over Soviet territory and was quickly imprisoned in Moscow. Suddenly, there was an American of importance in a Russian jail – and the process of a prisoner swap began. Just as Donovan had foreseen, Abel's release came not on the merits of his court case but on his value as a Cold War bargaining chip. Yet even though Donovan and his team lost at every turn in the courts, they never wavered in their belief that even a Russian spy was entitled to the protections of the Fourth Amendment. Their efforts did not go unappreciated. As a memorandum on behalf of the Supreme Court, signed by Chief Justice Warren, observed:

> I think I can say that on my time on this Court no man has undertaken a more arduous, more self-sacrificing task. We feel indebted to you and your associate counsel. It gives us great comfort to know that members of our bar associations are willing to undertake this sort of public service in this type of case, which normally would be offensive to them. ■

Are Rules Allowing Arbitral Sanctions a Mirage?

by Paul Bennett Marrow

It's not news that human beings can be difficult. Judges at all levels have had to deal with the obstreperous forever. Arbitrators have also had their share of difficult participants to deal with. Unfortunately, the options for an arbitrator for dealing with disruptive behavior are quite limited. Arbitration being a creature of contract it's up to the parties to decide how far an arbitrator can go to rein in a difficult participant. Go too far and the arbitrator risks vacatur on grounds that the powers vested have been exceeded. It's easier when parties agree to the application of the laws of a certain jurisdiction, in which case arbitrators can operate to enforce those laws without serious concerns for vacatur. But sometimes even designated laws don't address a specific need. To fortify the authority of the arbitrator some administrators such as the American Arbitration Association (AAA), JAMS, the International Institute for Conflict Prevention & Resolution (CPR) and the Financial Industry Regulatory Authority (FINRA) have adopted rules that allow an arbitrator to impose "sanctions" to control a participant who refuses to respect that institution's processes.

This article examines the impact permissive procedures have on an arbitrator's ability to maintain order. The suggestion made is that the new rules offer nothing that isn't already available by judicial decree. While the effort to assist the arbitrator is laudable, no administrator can go further than the limitations mandated by 9 U.S.C. §§ 1–16, the Federal Arbitration Act (FAA), as interpreted by courts. Anyone who does so faces vacatur and in extreme cases a finding that the action is "misconduct" under FAA § 10(a)(3). Given this structure, both the administrators and arbitrators face a simple choice: (1) Go no further than what courts have already deemed acceptable or (2) undertake to fashion a new untested "sanction" and hope that a court will support the effort. If the first alternative is favored, administrator rules allow what courts have already approved. If the second alternative is favored, administrator rules serve no purpose other than to empower an arbitrator to take a serious risk. A recent case[1] seems to suggest that any arbitrator who attempts to venture beyond the constraints courts have already put in place does so at great risk to his or her reputation and good standing in the arbitration community. If this analysis is correct, then the new rules are a mirage.

For Purposes of Arbitration, What Is a Sanction?

According to *Black's Law Dictionary* (2014) a sanction is: "A provision that gives force to a legal imperative by either rewarding obedience or punishing disobedience." Within the context of arbitration there are punitive sanctions, justice sanctions, discovery sanctions and terminating sanctions. Authority of arbitral sanctions is recognized by courts even though the text of the FAA makes no mention of them. Before any of the rules of the administrators of arbitration were amended to allow for sanctions, courts allowed an arbitrator to take actions that, although not defined as a sanction, operated to serve that purpose. Arbitrators have always had authority to allocate fees and expenses and with that authority came the power to allocate taking into account a party's misbehavior.[2] And courts have recognized that parties may provide an arbitrator with the authority to impose a specific sanction if the need should arise.

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Some Background

No matter the definition, there are limits on what an arbitrator can do to control the behavior of a party. An arbitrator can't impose a penalty that offends public policy and can't create a condition that denies any party a fundamentally fair and unbiased hearing. While at times there may be tension between the need to maintain order and the need to assure a fair and unbiased hearing,[3] an agreement to arbitrate generally includes submission to the procedural rules of the arbitrator.[4]

What used to be an efficient and expeditious process has morphed into one that is no longer first and foremost efficient, comparatively less expensive as well as generally less contentious than a lawsuit in a courthouse. Lawyers now play a prominent role. Parties are no longer willing to appear at a hearing without first having had a chance at extensive discovery. Dispositive motions, once discouraged because they interfered with the ability of a party to vent the details of a grievance, are now allowable as a function of arbitral discretion. Perhaps most important, the nature of the disputes now resolved in arbitration have changed dramatically. The "bet the entire company dispute," once a rarity, is becoming more commonplace. And with these and many other changes, the emotional climate has heated up, civility has declined and the demands on the arbitrator to control things have increased exponentially.

To address the need, parties have first turned to the courts for assistance. These demands have been met with some resistance. Courts evidence a reluctance to supervise.[5] Courts shy away from "undue intrusion upon the arbitral process."[6] Once an arbitration gets under way, the arbitrator gets to call all the shots and courts almost always only review the resulting award.[7] Evidencing how committed courts are to a hands-off approach, it is next to impossible to have an arbitrator disqualified while an arbitration is under way.[8]

While courts may be reluctant to supervise an ongoing arbitration, the FAA mandates that they review awards with the power to either confirm or vacate.[9] This can leave the arbitrator in an awkward position. Anyone who ventures off into unchartered territory by attempting to impose a novel sanction risks being vacated and, in the extreme case, found guilty of misconduct.[10] Thanks to some adventurous souls who have been willing to run this gauntlet, courts have provided some useful guidance. For instance, most courts recognize arbitral authority to draw a negative inference from a refusal of a participant to comply with an arbitral directive even though nothing in the FAA speaks to such authority.[11] The power to draw a negative inference is not something to be trifled with given the reality that (1) courts will not interfere or second-guess an arbitrator's decision to make such an inference,[12] (2) there are no merit-based appeals and (3) vacatur isn't easily won.

Some courts have shown a willingness to allow actions described as a sanction. In *Polin v. Kellwood Co.*,[13] a panel was permitted to issue a final award entitling defendant to one half of its expenses, including legal fees, as a sanction. In *Konkar Maritime Enterprises, S.A. v. Compagnie Belge D'Affretement*,[14] a panel was empowered to assess 85% of the costs against a party that ignored an escrow order previously issued by the panel. Some courts have gone so far as to allow for punitive damages as a sanction for outrageous behavior.[15] Other courts have denied such authority on grounds that punitive damages amount to fines for civil contempt and are in violation of public policy.[16]

Rules of the Administrators That Empower

Incidental Sanctions

As has already been noted, many courts endorse measures that aren't called sanctions but nevertheless punish disobedience ("incidental sanctions"). An example is an inherent arbitral authority to take negative inferences from a refusal of a party to comply with an arbitrator's order. Similarly, the rules of just about every institution that administrates arbitration allow an arbitrator broad discretion when allocating the obligations of parties to pay the expenses of the arbitration (administrative fees, witness fees, arbitrator(s) fees).[17] Usually just the threat to take a negative inference or punitively allocate fees and expenses will eliminate unacceptable behavior or blatant non-cooperation.

Rules Affirmatively Authorizing Sanctions

All of the administrators mentioned in this article now have rules that allow an arbitrator to impose a "sanction." These rules differ dramatically and the arbitrator and draftsman must be aware of the differences. The AAA rules[18] permit an arbitrator to order a sanction but only if a party first makes a request. The arbitrator isn't authorized to act on his or her own initiative no matter how extreme the need. While the rule fails to define what a sanction is, it makes clear that a default award is not within the authority being granted. (Commercial Rule 23[19] and Construction Rules 25, "Enforcement Powers of the Arbitrator," list measures normally thought of as sanctions. However, neither Commercial Rule 58 nor Construction Rule 60 mention Commercial Rule 23 or Construction Rule 25. Presumably the rules authorizing sanctions should allow for measures that go beyond those listed in Commercial Rule 23 and Construction Rule 25.) The Non-Administered and Administered CPR rules[20] allow an arbitrator to fashion whatever sanction the arbitrator "deems just" and specifically allows an arbitrator to act unilaterally. The arbitrator can enter a default as a sanction. The arbitrator can order a sanction on his or her own initiative. The JAMS Comprehensive Arbitration Rules[21] and JAMS Construction and Employment rules authorize sanctions including, but not limited to, the assessment of arbitration fees and arbitrator compensa-

tion and expenses; assessment of any other costs occasioned by the offending conduct including "reasonable attorneys' fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply." FINRA Rule 12212[22] is the most comprehensive rule. It allows an arbitrator to assess a monetary sanction, preclude a party from offering evidence, take an adverse or negative inference, and assess fees for unnecessary postponements as well as forum fees and award attorney fees, costs and expenses. Noticeably absent is authority to enter a default award.

Do these rules describe anything that is new and not already allowed by judicial decree? While the rules are well intended, in the final analysis they don't provide a new set of tools. FINRA's rule allowing the assessment of a monetary sanction is perhaps a new tool. However, it is not clear if this rule violates public policy.[23] All actions of an arbitrator are measured against Section 10 of the FAA. The FAA does not mention sanctions. So perhaps it's no accident that the rules of these administrators either fail to define what a "sanction" is or list measures already available by judicial decree.

The AAA rules "empower" an arbitrator to enter a sanction that "limits any party's participation or results in an adverse determination of an issue or issues." Exactly how this is accomplished is left to the discretion of the arbitrator who must take into account the fact that courts consistently hold the denial of a party's participation suggestive of partiality and a limitation on the principles of fundamental fairness.[24] The rules of CPR allow an arbitrator to "impose a remedy [it] deems just" but again, exercising that authority is subject to the FAA as interpreted by courts. The JAMS rules list possibilities, but the items on this list all have been previously approved by courts and therefore exist even without the JAMS rules.

The "sanctioning" rules of these three administrators impose restrictions that even the courts haven't found necessary. For example, the AAA rule prescribes a protocol that must be executed before the arbitrator can issue a "sanction." But if the "sanction" being considered by the arbitrator has already been approved by a court, there would be no reason for the arbitrator to need or want to describe an action as a "sanction" and trigger the requirements of the protocol. Consider this scenario: An arbitrator is confronted by an attorney who refuses to allow his or her client to comply with an arbitrator's order to provide a document for inspection. The arbitrator could advise the attorney that failing to comply will trigger the sanction of taking a negative inference from the offending behavior. Under the AAA rule the arbitrator would have to allow the offender to justify his or her actions and thereafter require issuance of a written opinion. However, since courts already approve arbitrators taking a negative inference without having to comply with any protocols, the arbitrator could simply warn of the possibility of a negative inference without invoking the AAA sanctioning rule.

Good Reason to Judiciously and Reluctantly Order a Sanction

While the rules of the four administrators mentioned in this article authorize arbitral sanctioning, the decision in a recent case, *Attia v. Audionamix, Inc.*,[25] suggests that arbitrators should proceed with extreme caution. The *Attia* court found an arbitrator "guilty of misconduct"[26] for coupling a refusal to receive and consider evidence with a terminating sanction.

Attia involved a seasoned and respected arbitrator who was hearing a claim that an employment agreement had been breached. Respondents asserted a counterclaim. The arbitration was conducted under the then (2012) applicable Employment Rules of the AAA. Those rules did not specifically authorize arbitral sanctions. However, the rules allowed an arbitrator to apportion fees and expenses and gave the arbitrator broad discretion to interpret and apply the rules concerning an arbitrator's powers and authority. Commercial Rule 25[27] was in effect listing a number of measures normally thought of as sanctions, but not described as such. On the list was authority to exclude evidence and other submissions.[28] At the time the Circuit Court of Appeals for the Second Circuit had recognized the authority of an arbitrator to order a sanction even though nothing in the FAA spoke about such authority.[29] During the discovery process, the arbitrator was confronted by allegations that Claimant had destroyed important evidence and a demand by Respondent for "terminating sanctions." In opposition to the motion for sanctions, the Claimant submitted his own affidavit claiming to be an expert on spoliation. He claimed that technically spoliation wasn't possible. The arbitrator rejected the affidavit on grounds that as a matter of law expert testimony and/or evidence must come from someone qualified as an expert who isn't a party to the proceeding. In addition, the arbitrator opined that the Claimant's explanations concerning the alleged spoliation had been "disingenuous at best, and is emblematic of his conduct throughout the discovery process, which has been far from exhibiting good faith." Having refused the affidavit, the arbitrator granted the motion for terminating sanctions and entered a default judgment on the counterclaim for $9,371,378.72.[30] The "default" award was challenged before the District Court for the Southern District of New York. In a lengthy opinion, Judge Richard Berman vacated the award and found the arbitrator's actions misconduct within the meaning of FAA § 10(a)(3).

The Court began by finding that, as a matter of law, the arbitrator's ruling that a party can't act as an expert in that party's case was in error on the law.[31] The Court noted that without the affidavit, the record before the arbitrator contained only unchallenged evidence about the spoliation allegations submitted by Respondents. "The Court finds that the testimony included in Attia's

Affidavit was 'evidence pertinent and material to the controversy.' (see F.A.A. § 10(a)(3))." The Court found the arbitrator's

> *decision to strike the Affidavit was fundamentally unfair and in violation of F.A.A. §10(a)(3) and Attia obviously was prejudiced as a result. See Tempo Shain Corp. v. Berek, Inc.*, 120 F 3d 16, 20 (2d Cir 1997). . . . Attia was prejudiced by [the Arbitrator's] decision to strike his Affidavit. It resulted in a $9,051,916.81 award against him.

No mention was made of Commercial Rule 25(d).

The Court could have vacated the award on grounds that the arbitrator had exceeded the powers granted.[32] Instead, it elected to vacate the award and punish the arbitrator. Besides finding that the arbitrator's actions had prejudiced the rights of a party and constituted "misconduct" within the meaning of FAA § 10(a)(3), *in the published opinion the arbitrator was named 38 times.* Naming an arbitrator in a vacatur decision even once is a rare event.

The Court acknowledged that the arbitrator knew that the governing Employment Rules empowered an arbitrator to interpret the rules as they applied to arbitral authority.[33] And presumably the arbitrator knew that the Court of Appeals for the Second Circuit had already found that the silence of the FAA notwithstanding, an arbitrator has the power to fashion measures needed to maintain discipline and order. Also, the arbitrator presumably knew about the provisions of Commercial Rule 25(d).

Nothing in the *Attia* opinion suggests that the arbitrator held any animus toward the Claimant or that the arbitrator was acting in bad faith. A fair reading suggests that the arbitrator's priority at the time wasn't just resolving the question of spoliation. Also addressed was an ongoing pattern of misbehavior. The Court held that the arbitrator had gone too far by ordering the sanction because the Claimant's right to a fair hearing trumped trying to rein in the misbehavior of the Claimant.

The *Attia* decision isn't about the authority of an arbitrator to order a terminating sanction. It's about the existence of circumstances allowing an arbitrator to order as a sanction the refusal to hear or receive pertinent and material evidence provided by a disruptive party. In the opinion of the *Attia* court the answer is the rules of those administrating arbitration can't provide a basis for a sanction that in any way interferes with a disruptive party's right to a fair hearing no matter how extreme the disruptive behavior. In the court's view, what counts is "that arbitrators comply with the requirements of the statute at issue."[34]

A blanket ruling of this nature fails to recognize that an arbitrator's refusal to hear or accept evidence is essentially no different from the arbitrator taking a negative inference, a sanction that is permissible. Either way the impact of the evidence involved is degraded to a point of being useless. Either way, the sanction is punitive, and that shouldn't be a surprise. Sanctions are by definition punitive. If a sanction is anything less it is useless.

Even though the FAA may appear to unequivocally mandate vacatur if an arbitrator refuses to receive or hear evidence pertinent and material to the controversy, courts recognized the need for modifiers that consider the circumstances of each individual case. They require a showing the refusal leads to a fundamentally unfair result for the party offering the evidence.[35] The *Attia* court refused to look any further. Where else could it have looked? What other factor could it have considered?

One possibility is recognizing as a matter of law the fundamentally unfair impact that results from severe disruption to the other parties involved in an arbitration. Does there not come a point where disruptive behavior must not be allowed to degrade and compromise the arbitration process itself? A rule that would allow an arbitrator to weigh the fundamentally unfair condition created by refusal to receive or hear evidence against the impact that disruption has on other parties only makes good sense. An arbitrator should have the authority to deem severe disruption a waiver of the right to a fundamentally fair hearing if the disturbance acts to deny others their right to a fundamentally fair hearing. Arbitral rulings would still be subject to review by courts and, if necessary the basis for vacatur on grounds that the arbitrator's exercise of authority was imperfectly executed within the meaning of FAA § 10(a)(4). The AAA rules that controlled in *Attia* allowed the arbitrator broad discretion for interpreting arbitral authority. It is not a stretch to say these rules were broad enough to allow the arbitrator to consider the competing rights of all parties to a fundamentally fair hearing. The *Attia* decision is an example of a lost opportunity. The Court either ignored or didn't perceive the flexibility of the AAA rules and in the process traded civility and order for a strict interpretation of the FAA.

Judge Berman vacated the award and remanded the matter to the AAA for further proceedings before another arbitrator. By this writing it isn't known if further proceedings before another arbitrator have or are taking place. It also isn't clear if Respondents are appealing to the Second Circuit Court of Appeals. Assuming an appeal isn't in the offing, Judge Berman's decision stands as good law. Absent an appeal and reversal, it is hoped that other courts will see beyond its rigidity and fashion rules that are more user friendly and fairer to all.

Conclusion

Arbitrators aren't judges but arbitrators do many of the things that judges do. Most noticeable is conducting a hearing that must be civil, efficient and respectful of the rights of all involved. Maintaining control and assuring the rights of all parties is anything but simple, especially when the arbitrator must deal with disruptive behavior. The FAA, and § 10(a)(3) in particular, was written when the reach of arbitration was far more limited than it is today. Recognizing the evolution of the process courts have developed a wide-ranging body of jurisprudence designed to bring the

FAA current. Included are explanations and interpretations defining the limitations on arbitral attempts at imposing sanctions. Courts realize that a respect for the arbitration process is greatly important and it is the arbitrator who must have the authority to take reasonable measures to maintain civility and efficiency. The four administrators mentioned in this article have all adopted rules allowing for arbitral authority to order sanctions. For whatever reasons, these rules either fail to define what the arbitrator can or can't do or limit the definition to include only those measures previously approved by the judiciary. These rules offer nothing that is new and serve no useful purpose. They are truly a mirage. Setting aside the recognition that these rules are essentially meaningless, the administrative issues confronting the arbitrator haven't changed, i.e., disruptive behavior is still something the arbitrator must contend with. The complete rules of all four administrators discussed in this article have provisions that grant the arbitrator broad discretion concerning the scope and extent of arbitral powers.[36] Occasionally unusual circumstances arise requiring an arbitrator to be creative and to fashion a sanction of first impression as far as the judiciary is concerned. When evaluating such a sanction against the text of the FAA, courts should consider the impact the denial of such a sanction will have on all parties involved, not just the party upon whom the sanction is imposed.

Regarding FAA § 10(a)(3), at least one Federal District Court has held that the need to assure fundamentally fair hearings trumps the needs of an arbitrator to control the proceedings and rein in disruptive behavior. Hopefully its decision will with time be seen as an outlier. This ruling unfortunately ignores the rights of all parties involved to a process that is not only impartial and efficient, but civil in tone and free from disruption and disorder. There is room for a rule allowing an arbitrator to weigh the rights of a disruptive party to a fundamentally fair hearing against the impact of disruption on all others participating in the proceedings before the arbitrator. ■

1. *Attia v. Audionamix, Inc*, No. 14 Civ. 706, 2015 WL 5580501 (S.D.N.Y. Sept. 21, 2015).

2. *See* Commercial Rule R-47, American Arbitration Association (AAA), CPR Administered Arbitration Rule 19, JAMS Comprehensive Arbitration Rule 24 (e), (f), and (g), and FINRA Rule 12212.

3. *Kaplan v. Alfred Dunhill of London, Inc.*, No. 96 Civ. 0258, 1996 WL 640901 at 7 (S.D.N.Y., Nov. 4, 1996) ("The deference due an arbitrator does not extend so far as to require a district court to countenance, much less confirm, an award obtained without the requires of fairness or due process.").

4. *See Ruggiero v. Richert*, No. 10-23539-Civ., 2011 WL 2910066 at 8–9 (S.D. Florida 2011); *Alabama Ed. Ass'n v. Alabama Prof'l Staff Org.*, 655 F.2d 607, 608 (5th Cir. 1981) ("[procedural] questions should be left to the arbitrator").

5. *Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979). *See also Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) ("Federal courts do not superintend arbitration proceedings. Our review is restricted to determining whether the procedure was fundamentally unfair."); *Teamsters, Chauffeurs, etc., Local Union 657 v. Stanley Structures, Inc.*, 735 F.2d 903, 906 (5th Cir. 1984) (citing *Mason & Hanger-Silas Mason Co. v. Metal Trades Council of Amarillo*, 726 F.2d 166, 167 (5th Cir. 1984) ("The parties bargained for the arbitrator's decision and agreed to be bound by it. That decision derives its essence from the agreement, which is all that is required. We do not even 'parse the reasoning of the arbitrator,' for 'that is not within our authority' so long as his decision 'was . . . based upon the provisions of the collective bargaining agreement'.")).

6. *Southern Seas Navigation, Ltd. v. Petroles Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985).

7. *See* FAA § 10(a)(1)–(4).

8. *Gulf Guaranty Life Ins. Co. v. Connecticut Life Ins. Co.*, 304 F.3d 476, 490 (5th Cir. 2002); *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 2007); *Certain Underwriters at Lloyd's, of London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 936 (N.D. Cal. 2003) ("Disqualifying an arbitrator can be highly disruptive to the expeditious arbitration process fostered by the FAA.").

9. *See* FAA §§ 9 and 10.

10. *See* FAA § 10 (a)(2) and (3).

11. *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 217 (2d Cir. 2008) ("An arbitrator can enforce his or her discovery order through, among other things, drawing a negative inference from a party's refusal to produce, see *Nat'l Cas. Co. v. First State Ins. Group*, 430 F.3d 492, 498 (1st Cir. 2005), and, ultimately, through rendering a judgment enforceable in federal court, see 9 U.S.C. § 9."); *Hoxie v. DEA*, 419 F.3d 477 (6th Cir. 2005) ("[A] negative inference can be drawn from a failure to testify in civil proceedings.").

12. "Nor does drawing such an inference approach in gravity the type of error that justifies vacating an arbitration award for misconduct." *Howard Univ. v. Metro. Campus Police Officer's Union*, 512 F.3d 716, 723 (D.C. Cir. 2008). "As to all remedies other than those authorized by subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding." Section 21(c), Uniform Arbitration Act (2000).

13. 103 F. Supp. 2d 238 (S.D.N.Y.), *reconsideration denied*, 132 F. Supp. 2d 126 (S.D.N.Y. 2000).

14. 668 F. Supp. 267, 274 (S.D.N.Y. 1987).

15. *See Willoughby Roofing & Supply Co. v. Kajima International, Inc.*, 598 F. Supp. 353, 361–62 (1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985):

> This Court agrees that there is no public policy bar which prevents arbitrators from considering claims for punitive damages. . . . The remedy of punitive damages is one to which a plaintiff is traditionally entitled under Alabama Law "when the fraud is malicious, oppressive or gross and the misrepresentation is made with knowledge of its falsity and with the purpose of injuring him." *Boulevard Chrysler-Plymouth v. Richardson*, 374 So.2d 857 (Ala. 1979). That is precisely what the arbitrators found in this case.

The court went on to note:

> Where the arbitrators are concededly vested with the authority to hear and resolve the plaintiff's claim of fraud, it would be anomalous indeed to deny them remedial power commensurate with that authority . . . To deny arbitrators the full range of remedial tools generally available under the law would be to hamstring arbitrators and to lessen the value and efficiency of arbitration as an alternative method of dispute resolution. *See* Note, *Arbitration: The Award of Punitive Damages as a Public Policy Question*, 43 Brooklyn L. Rev. 546, 551 (1976). *Compare United Steelworkers v. American Mfg. Co.*, 363 U.S. at 567, 80 S. Ct. at 1346. This would not sit well with the strong federal policy favoring arbitration.

16. *See Garrity v. Lyle Stuart, Inc.*, 40 N.Y. 2d 354 (1976); *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 519 (2d Cir.), *cert. denied*, 502 U.S. 942 (1991).

17. AAA Commercial and Construction Rules 47, 53, 54 and 55. CPR Non-Administered and Administered Rules 14.11, 17, 18 and 19. JAMS Comprehensive Arbitration Rules 24 (e), (f) and (g), FINRA Rule 12212.

18. AAA Commercial R-58 and Construction R-60, Sanctions:

> (a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.
>
> (b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

19. The text of the two rules are essentially identical save for one very minor item. Commercial Rule 23 provides:

> The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:
>
> (a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality; (b) imposing reasonable search parameters for electronic and other documents if the parties are unable to agree; (c) allocating costs of producing documentation, including electronically stored documentation; (d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and (e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.

20. CPR Non-Administered Arbitration and Administered Rule 16, Failure to Comply with Rules:

> Whenever a party fails to comply with these Rules, or any order of the Tribunal pursuant to these Rules, in a manner deemed material by the Tribunal, the Tribunal, if appropriate, shall fix a reasonable period of time for compliance and, if the party does not comply within said period, the Tribunal may impose a remedy it deems just, including an award on default. Prior to entering an award on default, the Tribunal shall require the non-defaulting party to produce evidence and legal argument in support of its contentions as the Tribunal may deem appropriate. The Tribunal may receive such evidence and argument without the defaulting party's presence or participation.

21. JAMS Rules for Commercial, Construction and Employment Rule 29, Sanctions:

> The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys' fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

22. FINRA Rule 12212, Sanctions:

> (a) The panel may sanction a party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel.
>
> Unless prohibited by applicable law, sanctions may include, but are not limited to:
>
> - Assessing monetary penalties payable to one or more parties;
> - Precluding a party from presenting evidence;
> - Making an adverse inference against a party;
> - Assessing postponement and/or forum fees; and
> - Assessing attorneys' fees, costs and expenses.
>
> (b) The panel may initiate a disciplinary referral at the conclusion of an arbitration.
>
> (c) The panel may dismiss a claim, defense or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.

FINRA Rule 12212 must be read together with Rule 12511, Discovery Sanctions:

> (a) Failure to cooperate in the exchange of documents and information as required under the Code may result in sanctions. The panel may issue sanctions against any party in accordance with Rule 12212(a) for:
>
> - Failing to comply with the discovery provisions of the Code, unless the panel determines that there is substantial justification for the failure to comply; or
> - Frivolously objecting to the production of requested documents or information.
>
> (b) The panel may dismiss a claim, defense or proceeding with prejudice in accordance with Rule 12212(c) for intentional and material failure to comply with a discovery order of the panel if prior warnings or sanctions have proven ineffective.

23. *See Schiavo & Son's Steel Corp. v. Acworth*, 139 Misc. 2d 356 (Sup. Ct., Suffolk Co. 1987); *Publishers' Ass'n of N.Y. City v. Newspaper & Mail Deliverer's Union*, 280 A.D. 500 (1st Dep't 1952).

24. *See Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1023 (9th Cir. 1991) ("Arbitrators have no power to enforce their decisions. Only courts have that power."); *Kaplan v. Alfred Dunhill of London, Inc.*, *supra* note 3, at 7:

> Manifestly, "principles of fundamental fairness required that [Defendant] be given a full opportunity to present its case to the arbitrator for consideration." . . . The deference due an arbitrator does not extend so far as to require a district court to countenance, much less confirm, an award obtained without the requisites of fairness and due process.

25. *Supra* note 1.

26. FAA § 10(a)(3).

27. *See* note 7, *supra*, and accompanying text.

28. Commercial Rule 25(d).

29. *See Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, *supra* note 11.

30. *Attia*, *supra* note 1, at 10–12, 15.

31. The ruling to vacate didn't turn on this issue. Courts aren't authorized to vacate awards citing arbitral error in interpreting and/or apply law. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584–85; *Wilko v. Swann*, 346 U.S. 427, 436–37 (1953). *See also In re Silverman (Benmor Coats)*, 61 N.Y.2d 299, 308 (1984).

32. FAA § 10(a)(4); *Century Indem. Co v. AXA Belgium*, 2012 WL 4354816, 31–32 (Sep. 24, 2012), No. 11 Civ. 7263 (JMF); *Interchem Asia 2000 PTE, Ltd. v. Oceana Petrochemicals AG*, 373 F. Supp. 2d 340 (S.D.N.Y. 2005). *See Seagate Tech., LLC v. W. Digital Corp. et al.*, 854 N.W. 2d 750 (Minn. Sup. Ct. 2014); *First Pres. Capital Inc. v. Smith Barney*, 939 F. Supp. 1559 (S.D. Florida 1996). *Compare Americredit Financial Services, Inc. v. Oxford Mgmt. Servs.*, 627 F. Supp. 2d 85 (E.D.N.Y. 2008) *with David v. Abergel*, 46 Cal. App. 4th 1281 (Ct. of App., 2d Dist. 1996).

33. *Attia*, *supra* note 1, at 1, n.1 ("The dispute 'will be submitted to the American Arbitration Association for binding arbitration . . . before a single arbitrator in accordance with the then applicable Employment Arbitration Rules of the AAA.'").

34. *Attia*, *supra* note 1, at 7.

35. *Tempo Shain Corp. v. Bertek, Inc.*, *supra* note 5 ("Courts have interpreted Section 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review.") At the time of the writing of this article, the Second Circuit has reversed an order by Judge Berman vacating an award on grounds involving § 10(a)(3). *National Football League Management Council et ano v. Tom Brady*, 2016 U.S. App. LEXIS 7404. *Brady* involved spoliation of evidence, the taking of a negative inference and the exclusion of testimony. With respect to the issue of spoliation, and in the context of arbitral discipline for party misbehavior, the Second Circuit ruled: "It is well established that the law permits a trier of fact to infer that a party who deliberately destroys relevant evidence the party had an obligation to produce did so in order to conceal damaging information from the adjudicator." *Id* at 37 (citations omitted). With respect to the exclusion of testimony, the Second Circuit ruled:

> However, a narrow exception exists under the Federal Arbitration Act (FAA), which provides that an award may be vacated where "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3). We have held that vacatur is warranted in such a circumstance only if "fundamental fairness is violated." *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997). There is little question that the exclusion of the testimony was consistent with the Commissioner's broad authority to regulate procedural matters and comported with the CBA. Thus, the Commissioner's ruling can be revisited in court only if it violated fundamental fairness, and we see no such violation. (*Id*. at 40–41).

Judge Berman issued the order in the *Brady* case on September 3, 2015. He issued the order in the *Attia* case on September 21, 2015.

36. *See* AAA Rule 48; CPR Administered Rule 24, Non-Administered Rule 22; JAMS Rule 11 and FINRA Rules 12409–12410.

Proper Use of the Estate Tax Marital Deduction

By Jonathan P. McSherry

The following article is adapted from a chapter in the forthcoming 2016 update to *Estate Planning and Will Drafting in New York* (NYSBA). Expected publication date fall of 2016.

Much of the planning for larger estates deals with controlling, reducing or eliminating the impact of estate taxes on the passage of property. No single approach can be used to address estate tax reduction. Gathering complete information about clients and their assets has always been necessary, but it is even more important today given that an appropriate plan for one client might cause substantial additional tax for another. The first line of defense against estate taxes is the proper use of the marital deduction and the credit shelter/estate tax exemption. How these are structured and how the property passes will depend on both the client's nontax and tax objectives. This article addresses how to qualify for the estate tax marital deduction.

In 2016, federal law exempts from estate or gift tax up to $5,450,000 for each individual[1] and also allows a surviving spouse to use the deceased spouse's unused exemption (more commonly referred to as "portability").[2] As a result, married couples can protect up to $10,900,000 of combined assets. While use of the marital deduction will likely be necessary for decedents who left a surviving spouse and a taxable estate that is greater than the federal estate tax exemption, in New York many taxable estates that are below the federal estate tax exemption will also find it advisable to use the marital deduction. This is because New York currently has an estate tax exemption that protects only $4,187,500[3] and it does not allow portability.[4] Further, in New York, the applicable credit amount is phased out for taxable estates equal to an amount which is between 100% and 105% of the New York exemption amount and, for those greater than or equal to 105% of the exemption amount, no applicable credit amount is allowed.[5] This is significant because, if an estate becomes taxable in New York, it will be subject to rates that result in the same tax being due that would have been due under the prior law when the exemption equivalent was only $1 million. Therefore, without proper planning for married couples, including use of the marital deduction, it is possible for taxable estates that are less than the federal exemption amount to be subject to a large New York estate tax on the first spouse's death.

History of the Marital Deduction

The estate tax marital deduction is at the crux of every estate plan developed for married people. Originally included in tax legislation enacted in 1948 as a method of equalizing the estate tax treatment of married people in community and noncommunity property states,[6] the marital deduction is the basis of many estate planning tools. Currently codified in Internal Revenue Code § 2056 (I.R.C.), the unlimited estate tax marital deduction[7] is

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more complex than it appears. Understanding the application of the deduction and how it relates to other sections of the Internal Revenue Code is a prerequisite to formulating an effective estate plan.

The marital deduction has seen many changes since its inception. The original deduction was limited to the lesser of one-half of the decedent's gross estate or the amount actually passing to the surviving spouse.[8] The Economic Recovery Tax Act of 1981[9] introduced the current unlimited marital deduction,[10] which is a full deduction for all qualifying dispositions of property to or for the benefit of the decedent's surviving spouse. It is loosely based on the principle that the husband and wife should be "treated as one economic unit for purposes of estate and gift taxes, as they generally are for income tax purposes."[11] In addition, although not specifically stated in the Senate Committee Report, creation of the unlimited deduction undoubtedly was spurred by the thought that property would eventually be taxed in the estate of the surviving spouse. And, in fact, the conditions for taking the marital deduction reflect this intention.

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Requirements to Qualify for the Marital Deduction

The marital deduction is mandatory and must be taken in full.[12] Although the deduction appears simple in its application, several requirements must be met to reap its benefit. These requirements are often the subject of litigation. The policy behind the deduction is deferral of tax and not exclusion from tax. As a result, the conditions that must be satisfied prior to allowance of the deduction can be stringent. These requirements are discussed below.

Taxpayers Must Be Married

As the name suggests, the *marital* deduction is available only to married people. Marital status is determined at the time of the decedent's death and according to the law of the decedent's domicile. The treatment of common-law marriage will depend on state law. Same-sex marriages are both legal in New York[13] and recognized by federal law.[14] As a result, a same-sex spouse is allowed a marital deduction for New York and federal estate tax purposes.

Spouse Must Survive

The spouse must survive the decedent.[15] If the decedent and spouse die in a common accident and the order of deaths cannot be established by medical proof, a presumption of survivorship will be sufficient.[16] Such presumption will be determined by statute or by the decedent's will. Absent a specific direction in the will, the disposition of property in the case of simultaneous death is determined by statute.[17]

In New York, the statutory presumption is that the decedent survived the spouse, even where the spouse actually survives the decedent for a period less than 120 hours.[18] Therefore, when preparing wills for a married couple, the practitioner should address the possibility of simultaneous death and carefully draft the presumption that would result in the lowest overall estate tax. If one spouse owns more property than the other, a common approach is to provide that the less wealthy spouse survives. If the wills contain bypass and marital deduction dispositive provisions, this presumption would maximize the funding of those shares in both estates. The marital deduction would be allowed in the wealthier spouse's estate, and the overall estate tax would be less in the two estates.

While portability could be helpful in avoiding a waste of the federal exemption for married individuals, it is important to remember that New York does not allow portability.

Spouse Must Be a U.S. Citizen

The unlimited marital deduction is generally only available for property that passes to a surviving spouse who is a U.S. citizen.[19] Citizenship is a relatively simple, but often neglected, topic in the initial meeting with the clients. The estate practitioner must determine his or her clients' citizenship status, because that fact alone could greatly change the overall estate plan.

The Technical and Miscellaneous Revenue Act of 1988 addressed the tax treatment of dispositions of property passing to noncitizen spouses. It was under that legislation that the qualified domestic trust (QDOT) was created.[20]

The QDOT is the only method of preserving the marital deduction for property passing to a noncitizen spouse. Property that passes to the QDOT for the benefit of the noncitizen spouse will qualify for the marital deduction. The requirements for establishing and administering a QDOT are strict.[21] Therefore, the practitioner who plans to use a QDOT for marital deduction purposes must do so with extreme care.

However, currently in New York, if a federal estate tax return is not required for federal estate tax purposes, an estate will not be required to set up a QDOT in order to take a marital deduction for a disposition to a noncitizen

surviving spouse as long as the disposition would have qualified for the federal estate tax marital deduction if the spouse had been a U.S. citizen. This rule, which expires on July 1, 2016, applies to estates of individuals dying on or after January 1, 2010 and prior to July 1, 2016.[22]

> Control is a common reason for the use of trusts in distributing the marital share.

Property Must Be Included in Decedent's Estate

The reasoning may be obvious, but the marital deduction is allowable only for property included in the decedent's gross estate for estate tax purposes.[23] A marital deduction is not available for property that is not included in the decedent's estate for estate tax purposes, even if the property satisfies the other requirements for the deduction.

Property Must Pass to Surviving Spouse

The marital deduction can be taken only for property that actually passes to the surviving spouse as the beneficial owner.[24] Nearly every transfer to the spouse will qualify for the deduction. The corresponding Treasury Regulations list allowable transfers, which include the following:

- An interest that is bequeathed or devised under a will; inherited by the laws of intestacy, dower or curtesy;[25] or transferred by the decedent to the spouse during life but included in the decedent's estate for estate tax purposes at death.
- Those that pass by joint tenancy with rights of survivorship, by exercise of a power of appointment in favor of the surviving spouse, by operation of a beneficiary designation, such as life insurance and retirement funds, or as the result of a qualified disclaimer.
- Property transferred into certain qualifying marital trusts.[26]

Terminable Interest Property

Marital Deduction Generally Unavailable

Although virtually every transfer of property to the surviving spouse seemingly will qualify for the marital deduction, no deduction is allowed for an interest in property passing to the spouse that terminates or fails upon the lapse of time or upon the occurrence or nonoccurrence of an event or contingency.[27] Such property is often called *terminable interest property*. Examples include a life estate, term of years, patent, copyright or conditional gift. However, in some circumstances, terminable interests may be eligible for the marital deduction.

Terminable interests do not qualify for the marital deduction, without qualifying for an exception, if:

- Another interest in the same property passed from the decedent to a third party for less than an adequate and full consideration in money or money's worth and the third party would possess or enjoy the property after the expiration of the spouse's interest (e.g., property in which the spouse is given a life estate with the remainder interest passing to another person); or
- The decedent has directed his or her executor or a trustee to acquire a terminable interest for the surviving spouse (e.g., an annuity purchased by the executor at the decedent's direction for the surviving spouse's life benefit with the remainder to the children would not qualify for the deduction).

Terminable interests are more common than believed and, therefore, the practitioner should be mindful of unintentionally creating terminable interests at the drafting stage.

Exceptions to Terminable Interest Rule

Survivorship

Although conditional transfers are generally considered terminable, a transfer conditioned on survivorship of six months or less is an exception to the terminable interest rule – as long as the condition is met.[28] In other words, a bequest to a surviving spouse conditioned on the spouse surviving the decedent by six months will qualify for the marital deduction as long as the spouse actually survives the six-month period. A clause in the will requiring more than six months of survivorship will taint the transfer as a nondeductible terminable interest.

Furthermore, a bequest conditioned on the spouse being alive on the date of distribution of the decedent's estate will trigger the nondeductible terminable interest rule, *even if* the date of distribution is within six months of the decedent's death. This is true because the distribution of the estate could have occurred more than six months from the date of death.[29]

Charitable Remainder Trust

The marital deduction is available for property passing to the spouse through a charitable remainder trust, as long as there are no other noncharitable beneficiaries of the trust.[30] This exception to the terminable interest rule is an important one in planning for the client who is charitably inclined.

An exception to the nondeductible terminable interest rule exists for a unitrust or annuity trust life interest to the surviving spouse created by the charitable remainder split-interest rules of I.R.C. § 664, as long as the spouse is the only beneficiary who is not a charitable beneficiary.[31] Therefore, in a qualifying charitable remainder trust, the surviving spouse's life interest will qualify for the marital deduction under I.R.C. § 2056(b)(8), and the remainder interest will qualify for the charitable deduction under

I.R.C. § 2055. Using both of these deductions, the property in the trust could pass entirely free of estate tax.[32]

Power-of-Appointment Trust

Historically, a common estate plan was to provide the surviving spouse with a life use in property and the remainder to the children. Because of the terminable interest created by this arrangement, preserving the marital deduction would prove difficult without the exception carved out in I.R.C. § 2056(b)(5). To qualify for this exception, however, certain conditions must be met:

- The surviving spouse must be entitled for life to all income from the trust, payable at least annually. The right to income must be an enforceable right given to the surviving spouse and cannot be just at the trustee's discretion.
- The trust must provide the surviving spouse with a general power of appointment, exercisable freely, alone and in all events. The power must be general and, therefore, allow for the spouse to appoint trust property in favor of the spouse or his or her estate.
- No other person can be a beneficiary of the trust during the surviving spouse's life.

No election is necessary to qualify a trust as a power-of-appointment trust under I.R.C. § 2056(b)(5).[33]

Qualified Terminable Interest Property (QTIP)

The most commonly used exception to the terminable interest rule is the QTIP exception.[34] Usually in the form of a trust, the QTIP exception allows the testator to control the ultimate disposition of assets while maintaining the marital deduction. The desire of clients to control the distribution of assets to heirs, along with the rise of second marriages, has made the QTIP trust very popular over the years. In order to qualify for QTIP treatment, three main conditions must be met:

1. All income generated by the property must be payable at least annually to the surviving spouse for life.[35] This right to income must be enforceable, similar to that under a power-of-appointment trust pursuant to I.R.C. § 2056(b)(5).
2. Distribution of any part of the property to anyone other than the surviving spouse is barred during the surviving spouse's lifetime.[36]
3. The decedent's executor must make the QTIP election on the decedent's estate tax return.[37] Once made, it is irrevocable.[38] An election may be partial. Although seemingly counterintuitive, minimizing the marital deduction may be more tax beneficial in some situations postmortem. This is true when the objective is to maximize the use of the exemption equivalent in the decedent's estate.

If structured and elected properly, the full value of the QTIP trust – not just the income interest – would be eligible for the estate tax marital deduction. This result dovetails with the common principle underlying all marital deduction transfers: the deduction is a deferral of tax and not an exclusion from tax.

Property that is the subject of a QTIP election is entitled to the marital deduction but will be subject to inclusion in the spouse's estate under I.R.C. § 2044, even though the surviving spouse has only been given a life interest in the property. The decedent's estate can then deduct the full value of the QTIP trust property because that full value will be subject to inclusion in the spouse's estate.

New York State does not allow a separate QTIP election to be made when a federal estate tax return is required to be filed.[39] If the QTIP election was made on the federal return, then it must also be made on the New York return. Conversely, if a federal return was filed or required to be filed and no QTIP election was made, then no QTIP election is allowed on the New York return. However, when a federal return is not required to be filed and is not actually filed, the executor will be allowed to make a QTIP election on the New York return.[40]

Marital Bequests – Outright vs. Trust

Many clients are comfortable with their spouses receiving an outright inheritance, as evidenced by the vast majority of "I love you" wills, in which the client leaves everything to his or her spouse in the event the client dies first. Sometimes, however, an outright marital bequest may not be appropriate or desirable.

In the case of a second marriage, for example, where the client's ultimate goal may be passing wealth to his or her children, the use of a trust to dispose of the marital share would produce a favorable result. The trust, such as a QTIP trust, would qualify for the marital deduction, provide the spouse with income for use during the spouse's life, and pass the remainder to the decedent's children. A goal of this would be to provide the client with as much control as possible over the distribution of assets that qualify for the marital deduction.

As illustrated by the previous example, control is a common reason for the use of trusts in distributing the marital share. Many clients want to control the distribution of their assets as much as possible for as long as possible. This is true even with assets that pass to the spouse. Marital trusts provide those clients with a strong level of control over their assets after they are gone while still qualifying the bequest for the marital deduction.

Another reason a client may choose to have the marital share in trust as opposed to making an outright distribution is management of assets. If the spouse is not a good money manager or may be vulnerable to swindlers and scam artists, a trust would provide a vehicle for asset protection while benefiting the spouse. Although the income from the trust, which must be payable to the spouse, may still be at risk, the trust corpus would be protected. A trust requires the appointment of a reliable trustee who understands both the needs of the spouse and the concerns of the testator.

Conclusion

The estate tax marital deduction provides greater flexibility in planning for married clients. Therefore, it is very important to review the marital deduction requirements with married clients as part of their estate planning. This will ensure that any planning techniques intended to take advantage of the estate tax marital deduction will qualify when the first spouse dies. Failure to qualify for the marital deduction could potentially result in a significant estate tax due at the death of the first spouse, which could have been deferred or possibly avoided altogether. ■

1. Basic exclusion amount is $5,450,000 for 2016 and will be adjusted for inflation in subsequent years. Internal Revenue Code § 2010(c)(3) (I.R.C.); Rev. Proc. 2015-53, 2015-44 I.R.B. 615. All I.R.C. references are to the Internal Revenue Code, as amended, and the regulations thereunder.
2. I.R.C. § 2010(c).
3. For decedents dying on or after April 1, 2017 and before January 1, 2019, the New York exemption amount (also known as the "basic exclusion amount") will be $5,250,000. For decedents dying in a calendar year beginning on or after January 1, 2019, the New York exemption amount will be equal to the federal exemption amount for such calendar year. N.Y. Tax Law § 952(c)(2).
4. TSB-M-14(6)M (N.Y. State Dep't of Taxation and Finance, August 25, 2014, www.tax.ny.gov/pdf/memos/estate_&_gift/m14_6m.pdf) and TSB-M-11(9)M (N.Y. State Dep't of Taxation and Finance, July 29, 2011, www.tax.ny.gov/pdf/memos/estate_&_gift/m11_9m.pdf).
5. N.Y. Tax Law § 952(c)(1).
6. S. Rep. No. 80-1013 (1948), as reprinted in 1948-1 C.B. 285.
7. A corresponding unlimited gift tax marital deduction is codified in I.R.C. § 2523.
8. Revenue Act of 1948, Pub. L. No. 80-471, 62 Stat. 110.
9. Pub. L. No. 97-34, 95 Stat. 172 (ERTA).
10. Before passage of ERTA, from 1977 to 1982, the marital deduction was the greater of $250,000 or one-half of the decedent's adjusted gross estate. Although this provision is no longer relevant, the practitioner should understand the law's evolution because application of the former provision may arise relative to older wills or estates.
11. S. Rep. No. 97-144, at 127 (1981).
12. The one very limited exception to this requirement is qualified terminable interest property (QTIP).
13. *See* Marriage Equality Act, 2011 N.Y. Laws 95, which was signed into law on June 24, 2011 (codified at N.Y. Domestic Relations Law §§ 10-a, 10-b, 11, 13).
14. Rev. Rul. 2013-17, 2013-38 I.R.B. 201; *see also U.S. v. Windsor*, 133 S. Ct. 2675 (2013).
15. Treas. Reg. § 20.2056(c)-2.
16. Treas. Reg. § 20.2056(c)-2(e).
17. *See* N.Y. Estates, Powers & Trusts Law § 2-1.6 (EPTL).
18. EPTL 2-1.6.
19. I.R.C. § 2056(d). For the rules pertaining to the availability of a deduction to a noncitizen spouse, see I.R.C. § 2056A and Treas. Reg. §§ 20.2056A-1–20.2056A-13.
20. This legislation is codified in I.R.C. § 2056A.
21. *See* I.R.C. § 2056A.
22. N.Y. Tax Law § 951(b); TSB-M-14(5)M (N.Y. State Dep't of Taxation and Finance, July 28, 2014, www.tax.ny.gov/pdf/memos/estate_&_gift/m14_5m.pdf).
23. Treas. Reg. § 20.2056(a)-2.
24. Treas. Reg. § 20.2056(c)-1, (c)-2.
25. A more realistic transfer would be one made by operation of the elective share under EPTL § 5-1.1-A or the family share under EPTL 5-3.1.
26. The term qualifying marital trust includes a QTIP trust under I.R.C. § 2056(b)(7), a marital power-of-appointment trust under I.R.C. § 2056(b)(5), and life insurance or annuity proceeds with a power of appointment in the surviving spouse under I.R.C. § 2056(b)(6).
27. Treas. Reg. § 20.2056(b)-1.
28. I.R.C. § 2056(b)(3); Treas. Reg. § 20.2056(b)-1(d)(1).
29. Treas. Reg. § 20.2056(b)-3(d) ex. (4).
30. I.R.C. § 2056(b)(8); Treas. Reg. § 20.2056(b)-1(d)(5) and 20.2056(b)-8.
31. I.R.C. § 2056(b)(8); Treas. Reg. § 20.2056(b)-8.
32. I.R.C. § 2056(b)(8) is an exception to the nondeductible terminable interest rule. An alternate approach would be to elect QTIP treatment over a trust providing for a life interest to the spouse and remainder to a qualified charity. Assuming compliance with the QTIP requirements, the trust corpus would qualify for marital deduction treatment. The trust value would then be included in the surviving spouse's gross estate but would qualify for a charitable deduction under I.R.C. § 2055 since the interest is deemed to pass to the charity from the surviving spouse. The result is that no estate tax is due on the transfer.
33. I.R.C. § 2056(b)(5) treatment is available for arrangements other than trusts. A marital deduction would be allowed for the value of property in which the surviving spouse is given a legal life estate (not in trust) if coupled with a general power of appointment. This is a much less common approach.
34. I.R.C. § 2056(b)(7).
35. I.R.C. § 2056(b)(7)(B)(ii)(I).
36. I.R.C. § 2056(b)(7)(B)(ii)(II).
37. I.R.C. § 2056(b)(7)(B)(v).
38. *Id*.
39. A federal estate tax return is considered "required to be filed" when a deceased individual's gross estate exceeds the federal filing threshold, and also when the federal return is the only means for claiming certain tax treatment, such as making the portability election. TSB-M-14(6)M (N.Y. State Dep't of Taxation and Finance, August 25, 2014, www.tax.ny.gov/pdf/memos/estate_&_gift/m14_6m.pdf).
40. N.Y. Tax Law § 955(c). *See also* TSB-M-11(9)M (N.Y. State Dep't of Taxation and Finance, July 29, 2011, www.tax.ny.gov/pdf/memos/estate_&_gift/m11_9m.pdf).

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Mental Hygiene Hearings in New York

By Mickey Keane and Hon. Gerald Lebovits

Introduction

People suffering from mental illness or delayed development – historically our nation's most persecuted and least understood[1] – may not be confined or forced to undergo treatment unless certain criteria are met. They have the same constitutional due-process rights as everyone else.[2] People who are ill may not, on that basis alone, be confined or treated against their will.[3] As the Supreme Court has found "[a] State cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[4]

New York's mental-hygiene system requires the courts to balance two competing interests: a patient's liberty interests, and the state's interests in protecting patients and others from harm. The courts play an important role in assuring that mentally ill and developmentally disabled patients are protected. At the same time, the courts must determine whether people can live safely in the community without being a danger to themselves or others.

To safeguard these conflicting interests, New York has established a comprehensive, multi-faceted mental-health system that serves more than 700,000 individuals each year.[5] To that end, the New York State Office of Mental Health (OMH) operates psychiatric centers and regulates, certifies, and oversees more than 4,500 programs.[6] These programs, operated by local governments and nonprofit agencies, include inpatient and outpatient programs, emergency programs, community-support programs, and residential- and family-care programs.[7] Numerous state and private hospitals also play an important role in this system.

This article summarizes how some parts of this vast mental-health system work. We examine three types of court proceedings designed to protect the rights of patients and the public: (1) release and retention; (2) treatment over objection; and (3) assisted outpatient treatment. We also discuss mental-health patient admissions to psychiatric hospitals and the patients' legal status.

Court Hearings

There are three types of hearings. The first is a civil-commitment retention hearing, at which either a patient seeks to be released from the hospital[8] or the hospital seeks a further retention order because the patient has been at the facility for the maximum time allowable under Mental Hygiene Law (MHL) Article 9.[9] The second is a treatment application hearing, at which a hospital seeks court permission to treat a patient over the patient's objection.[10] The third is an assisted outpatient treatment (AOT) hearing conducted under Kendra's Law,[11] at which a court considers whether to order a treatment plan for the patient outside the facility.[12]

Although these cases limit a person's rights and freedoms, they are not criminal cases. Mental health arises in

the criminal context in determining whether a person is competent to stand trial.[13] When a person's mental health may affect an ability to stand trial, courts are guided by Criminal Procedure Law (CPL) 730.[14] Under CPL 730, misdemeanor charges against defendants who are found incompetent are dismissed. The defendants are then remanded to the Office of Mental Health for a 72-hour observation.[15] The person can be admitted or treated by a psychiatric hospital in accordance with the Mental Hygiene Law.[16] A person charged with a felony must be committed for at least six months.[17]

Mental-hygiene hearings are presided over by Supreme Court justices. All documents used in the proceeding are sealed.[18] Depending on the county, some hearings will take place at psychiatric centers. Others are held at courthouses.

The witness the psychiatric hospital typically calls is the patient's treating psychiatrist. The treating psychiatrist testifies from personal interactions with the patient and from the patient's medical record.[19] Because treating psychiatrists are offered as experts, their testimony is given deference. On occasion, a hospital will call the patient's family and friends to establish facts outside the record.

Patients have the right to testify at this hearing, to cross-examine any hospital or government witness, and to call any witness who might support their case. Patients may represent themselves with court permission. Cases may be heard when patients choose not to attend. A private attorney, or more commonly assigned Mental Hygiene Legal Service (MHLS) attorneys – attorneys working under Appellate Division auspices who represents patients under MHL Article 47 – will advise the court that they have met with the patient and advised them of their rights but that the patient choose not to attend. Some judges will briefly adjourn the hearing to give the patient an opportunity to attend. Others will move forward immediately. Except for a patient's request for release, this holds true for all types of hearings. If a patient does not come to court when requesting release, the request to be released will be removed from the calendar most of the time.

After the hearing, which is always stenographically recorded and attended by a court clerk and court officers, the judge will render a ruling, typically orally, immediately, without greatly detailing the findings of fact, and in a way that shows compassion and hope for the patient, although some judges render detailed bench rulings. A judge who believes that the patient will receive an adverse decision poorly will excuse the patient, render a decision in the patient's absence, and ask the patient's attorney to communicate the oral decision to the patient.

A controversial part of many hearings is the admission and use of the medical record. Section 33.13(a) of the MHL requires each facility licensed or operated by the Department of Mental Hygiene's Office of Mental Health or Office of Developmental Disabilities to maintain a clinical record for each patient.[20] The record must contain information on all matters relating to the admission, legal status, care, and treatment of the patient and include all pertinent documents relating to the patient.[21] Information maintained about a patient is not a public record and may not be released to any person or agency.[22]

There are exceptions, however.[23] As a general rule, a third party seeking disclosure of a private medical record is not entitled to the medical information contained in a psychiatric hospital resident-patient's clinical record absent a showing that the patient-physician privilege has been waived and absent a finding that the interests of justice significantly outweigh the need for and the right of patient confidentiality.[24]

But the medical record is necessary for hospital use in a mental-hygiene proceeding. A treating psychiatrist will not have witnessed every patient event. The psychiatrist needs to rely on what other medical professionals and parties enter into the record. Hospitals use this information to create a diagnosis and treatment plan.

It is also unrealistic to require a hospital to call as a witness every person who has interacted with the patient. A hospital might be involved in more than 10 hearings in just one day. Although it is up to the hospital attorneys to prepare their cases properly, requiring numerous hospital employees to testify may force the hospital to interrupt operations temporarily.

Given the patient's right to privacy and the court's unwillingness to admit unreliable hearsay, two issues arise in hearings: the medical record's admission into evidence and the use of hearsay testimony from the medical record.

The first issue is the admission of the medical record into evidence. Generally, the medical record, when certified under CPLR 4518(b), is admitted over objection under the business-record exception to hearsay.[25] The argument is that the medical records and the opinions contained in them are germane to diagnosis and treatment and that it is the medical professionals' duty to diagnose and treat the patient's illness.[26] If the source of the information on the hospital's or doctor's record is unknown, that part of the record is inadmissible; that part is considered unreliable.[27] Although some attorneys argue that the medical record does not meet the requirements of CPLR 4518(a) as a business record since it contains information and reports from people who do not work at the hospital, many judges give that argument little weight.

Another issue concerns the privacy issues of admitting a medical record into evidence. Some attorneys argue that the medical record should be excluded because of privacy issues in the Health Insurance Portability and Accountability Act Privacy Rule (HIPAA).[28] A lawyer who relies on this argument might cite *In re Miguel M.*[29] In that case, a party introduced, at a hearing to compel a patient to receive AOT, the medical records it obtained

from hospitals without the patient's authorization.[30] The Court of Appeals found that those records should have been suppressed.[31] But the court did not hold that records obtained in violation of HIPAA are always inadmissible. Accordingly, it is widely believed that this decision is limited just to AOTs.[32]

Most of the time, the medical record is admitted into evidence subject to the rules of evidence and, more often, subject to redaction. Some judges will admit it for identification only.

The second issue with the medical record is the admission of third-party hearsay in a medical record. This issue deals mostly with family and law-enforcement statements in the medical record: third-party statements concerning a patient that took place before the patient was admitted to the hospital or the events that led to the patient's admission. Often only a patient's friend, family, or law enforcement witnessed an incident leading to a patient's admission. These events are generally investigated by the hospital and transcribed into the medical record. Psychiatrists use this information to treat and diagnose the patient. Relying on a patient's actions only in the structured setting of a hospital is not enough for the doctor to make a reasoned clinical decision or to offer an opinion in court. At the hearing, the hospital will want to use the information obtained from these third parties, while the patient will object to the hearsay.

A persuasive case on this issue is *In re Dolan*.[33] In 2012, the Supreme Court, Nassau County, found the third-party statements admissible because the "statements were relevant for the hospital to diagnose, treat and ultimately develop a discharge plan for the respondent."[34] Each judge handles the use of hearsay evidence differently. Some judges will reject the hearsay. Other judges will allow it for the purpose to diagnose and treat.

Retention and Release Cases

Patients may challenge their involuntary retention. Depending on the patient's admissions status, a patient from the psychiatric hospital may request to be released within 60 days of a patient's initial admission.[35] Additionally, after the first 60 days, and periodically after that, the psychiatric hospital must apply to the court to retain a patient for up to an additional six months.[36] Patients may object to continued retention by requesting their release through those applications. These are known as retention cases.

Retention cases are first heard by a Supreme Court justice. Under MHL § 9.35, patients may request a re-hearing de novo before another judge and or a jury trial when a Supreme Court justice has denied their release or when the justice granted their retention or continued retention.[37] The re-hearing allows patients to place before a jury a basic liberty issue: whether they should continue to be confined in a psychiatric facility.[38] Re-hearings are rare, partly because after MHLS or private counsel apply for a re-hearing, they sometimes negotiate a compromise with the hospital, or the hospital sometimes simply decides to release the patient.

Concern about a patient's substantial risk of decompensation outside the psychiatric hospital is sufficient to retain a patient.

The standard is the same whether the hearing is based on a patient's request to be released or on a psychiatric hospital's request for a continued retention. To retain a patient in a mental-health-care facility for involuntary psychiatric care, the hospital must establish by clear and convincing[39] admissible evidence that the patient (1) is mentally ill; (2) needs further care and psychiatric treatment at the hospital; and (3) poses a substantial threat of physical harm to self or to others.[40]

The facility seeking to retain the patient bears the burden to submit clear and convincing evidence supporting retention.[41] The key issue in a retention hearing is whether the patients pose a substantial risk of harm to themselves or others. "Harm" does not mean only physical violence. A risk of harm can result from a patient's failure to meet essential needs for food, clothing, or shelter.[42] Even if the patient is safe in the psychiatric hospital, the court may still retain a patient who is a substantial risk outside the psychiatric hospital.[43] Concern about a patient's substantial risk of decompensation outside the psychiatric hospital is sufficient to retain a patient.[44]

Treatment Applications

People have the right to control the course of their treatment and to be free from unwanted medication.[45] That includes involuntarily confined mental patients, who have a fundamental liberty interest under the United States and New York Constitutions' Due Process Clauses.[46] They also have the right to receive medication only when it is their best interest to be medicated.[47] All individuals, including those under involuntary commitment in a psychiatric hospital, have the right to determine what shall be done with their own bodies and to control the course of their medical treatment.[48] Involuntarily committed mental patients have a fundamental right to refuse electroconvulsive therapy, antipsychotic medication, and

other medications and procedures.[49] But that right is not absolute.[50] Competing state interests may outweigh that right. Courts determine the propriety of treatment over a patient's objection.[51]

The main goal of New York state psychiatric hospitals is to treat patients so that they can safely re-enter the community. To attain this goal, a psychiatric hospital must often treat mentally incapacitated people against their will. Untreated patients might not improve sufficiently to return to the community.

A detailed and comprehensive administrative process for psychiatric treatment is set forth in 14 N.Y.C.R.R. § 527.8.[52] The psychiatric patient's attending psychiatrist must evaluate the patient to determine whether the patient has or lacks the capacity to make a reasoned decision concerning treatment and whether the proposed treatment is in the patient's best interests.[53] A psychiatrist will balance the positive effect of the treatment against any potential side effects a patient might suffer. Psychiatrists will also recommend medications in the alternative to treat the patient safely and effectively. If one medication is not proving safe and effective in addressing the patient's symptoms, a psychiatrist will want court permission to administer different medications or treatment modalities based on the patient's response to the treatment.

Written notice of the attending psychiatrist's determination must be given to the patient, MHLS, and any patient representative.[54] Another psychiatrist conducts a second evaluation. MHLS attends these second opinions as a representative of the patient. The second doctor may agree or disagree with, or suggest a modification to, the proposed treatment. Then the psychiatric service's clinical director, who does not necessarily conduct a personal exam, must review both the treating psychiatrist's determinations and the second doctor's recommendations.[55] If the clinical director confirms the psychiatrists' findings, the patient must be personally informed of the determination. Written notice of the clinical director's determination is required.[56] Patients on voluntary or informal status may not be treated over objection except in emergencies. If a hospital wishes to proceed with treatment over objection, the patient must first be converted to involuntary status under MHL § 9.27.

After all these administrative procedures are completed, the psychiatric hospital's application is filed with the court and served on the patient and MHLS or the private attorney who represents the patient. Patients are presumed to have capacity to make treatment decisions, regardless of mental illness.[57] The psychiatric hospital must establish, in court, by admissible and clear and convincing evidence, (1) that the patient lacks the capacity to make a reasoned decision with respect to the proposed treatment and (2) that the proposed treatment is in the patient's best interests – meaning that the benefits outweigh the risks – and thus are narrowly tailored to give substantive effect to the patient's liberty interests.[58] Only then may the state exercise its *parens patriae* power to conduct the treatment.

One difference in treatment cases between counties and judges is that some judges will require that when a patient has a health issue in additional to the psychiatric diagnosis, the facility must call another doctor to help determine whether the medication is safe to administer. Some judges believe that the psychiatrist is qualified to testify about how the medication can affect a patient's other health issues. Others require a specialist.

The facility seeking to treat the patient bears the burden of proof to offer evidence supporting the treatment.[59] Generally, the facility will call the patient's treating psychiatrist. The psychiatrist will testify from personal interactions with the patient and by reciting the patient's medical record. The psychiatrist will note the mental illness, how the proposed medication will effectively treat the patient, and whether there are any side effects or similar risks.

Assisted Outpatient Treatment (AOT)

A psychiatric hospital's goal is to assist patients to re-enter the community safely. A common issue with patients is their failure to take medication once they return to the community, a factor that, together with substance abuse, lack of housing, and confusion with accessing medication and treatment, might lead to consecutive hospitalizations. One tool the state has to minimize that from happening is an AOT Order under Kendra's Law, named after Kendra Webdale,[60] a young woman killed by an oncoming train in New York City because a paranoid schizophrenic pushed her off a subway platform. He had stopped taking his medications, had begun to deteriorate, and was unable to get help when he attempted to, and so became further symptomatic.[61]

A judge may order an AOT for mentally ill individuals who are unlikely to survive in the community without support services[62] and who, based on their history, do not seek support services voluntarily.[63] The services may include medication; periodic blood tests or urinalysis to determine compliance with prescribed medications; individual or group therapy; day or partial-day programming activities; educational and vocational training or activities; alcohol or substance-abuse treatment and counseling; and periodic tests to ascertain the presence of alcohol or illegal drugs for those with a history of alcohol or substance abuse.[64] An AOT Order requires social workers or case-management teams to monitor and evaluate the patient.[65] An application for an AOT Order is appropriate when patients are routinely noncompliant with their treatment regimen and decompensate to such an extent that they become a danger to themselves or others, as manifested by multiple hospitalizations. In other words, it is inappropriate to put into the AOT program a patient undergoing a first hospitalization.

Under the AOT statute, a patient must meet these criteria:

1. The patient is 18 years of age or older.
2. The patient suffers from a mental illness.
3. Based on a clinical determination, the patient is unlikely to survive safely in the community without supervision.
4. The patient has a history of noncompliance with treatment that has resulted in:
   (a) at least two psychiatric hospitalizations within the last 36 months (or receipt of services in a forensic or other mental-health unit of a correctional facility or a local correctional facility); the current hospitalization may be included as one of the two hospitalizations; or that
   (b) one or more acts of serious, violent behavior toward self or others or threats of, or attempts at, serious physical harm to self or others have occurred within the last 48 months; length of hospitalizations or incarceration are excluded in calculating the 48-month look-back period.
5. As a result of a mental illness, the patient is unlikely to participate voluntarily in the recommended treatment.
6. The patient needs assisted outpatient treatment to prevent a relapse or deterioration that would likely result in serious harm to self or others.

For those patients who meet the criteria, the hospital may apply for an order mandating outpatient treatment administered by the county mental health office.[66] Before filing an application, the county Director of Community Services or the director's designee (usually the treating physician) must formulate a written treatment plan with the patient, examining physician, MHLS, and others the patient requests.[67] The county AOT Program must approve the treatment plan.[68] Every treatment plan must include case-management services or assertive community-treatment teams to provide care coordination if medication is recommended and also list the types and classes of medications and dosage ranges, the risks and benefits of the treatments, and whether the medications should be self-administered or administered by authorized personnel.[69] A patient who does not follow the court-ordered treatment plan will be transported back to the hospital to determine whether further inpatient care is necessary.[70]

AOT hearings are mostly undisputed. Most of the time, they occur only to establish that patients understand what they are agreeing to. Patients consent because they know that an AOT Order will secure their release. Patients also consent because they recognize the need for support and appreciate a place to live. The point of Kendra's Law is to protect the community and also to provide services to the chronically ill; the success rate is higher if the patient is onboard. In a number of cases, though, a patient will contest an AOT application. If this happens, the psychiatric hospital must establish each element of the AOT statute, and the court will decide whether to grant the application over the patient's objection.

There is some opposition to Kendra's Law. Some critics argue that it is coercive, that it is improper to have a form of involuntary outpatient treatment, and that it is ineffective in securing better services or in improving public safety.[71] But the state legislature has continued to renew the law.[72] The law's supporters point to studies that show that the law has resulted in patients' being less likely to return to psychiatric hospitals and arrested less often.[73]

Admissions and a Patient's Legal Status

When a person is admitted to a psychiatric hospital, that person loses certain rights. Accordingly, New York State has created legal statuses under MHL Article 9. A patient's legal status will determine what action a psychiatric hospital or a court may take. These Article 9 statuses create the legal standards the state or private psychiatric hospital must meet to limit a patient's exposure to confinement and unnecessary or unsafe treatment.

There are six statuses: (1) voluntary admission;[74] (2) informal admission;[75] (3) involuntary admission on certificate of a director of community services or the designee;[76] (4) emergency admissions for immediate observation, care, and treatment;[77] (5) involuntary admission on medical certification;[78] and (6) emergency observation, care, and treatment in comprehensive psychiatric-emergency programs.[79] Patients are admitted under different circumstances. Once they enter a psychiatric hospital a legal status must be given.

A person may be admitted voluntarily to a hospital under MHL § 9.13. This is called a "voluntary admission." Statutory requirements must be met for these admissions.[80] Not anyone may simply ask to be admitted to a psychiatric hospital.[81] The hospital director or another assigned person must find that the person has a mental illness for which care and treatment in a psychiatric hospital is appropriate.[82] Only then is someone eligible for voluntary admission under MHL § 9.13.

There are requirements: Even patients admitted as a voluntary admission lose rights and freedoms. They may not leave on their own; the psychiatric hospital must approve any release. When a patient designated as a voluntary admission seeks to leave, the psychiatric hospital has two options.[83] It may approve the release[84] or retain the patient and apply for court authorization to continue the admission involuntarily.[85] The application to the court must be filed before the expiration of 72 hours from the time the psychiatric hospital receives a written request for release.[86] This application will lead to a retention hearing.

A person may further be admitted into a psychiatric hospital as an informal admission under MHL § 9.15. This is the least regulated admission. Psychiatric patients admitted informally retain most of their rights. There is

no formal or written application, and the patient is free to leave the hospital at any time without approval or court intervention.[87]

There is also an involuntary admission based on the recommendation of a Director of Community Services (DCS).[88] The standard for this admission is higher than for voluntary and informal admissions. A person may be admitted to a psychiatric hospital providing care and treatment upon the certificate of the DCS or designee accompanied by an application for admission of the person if DCS or a physician designated by DCS determines that (1) the person with a mental illness immediately needs inpatient care and that treatment in a psychiatric hospital is appropriate and that (2) the mental illness is likely to result in serious harm to the person or others.[89]

> A psychiatric hospital's goal is to assist patients to re-enter the community safely.

A person may be admitted to a psychiatric hospital, moreover, as an emergency admission under MHL § 9.39. Those admitted under § 9.39 must have a mental illness for which immediate observation, care, and treatment in a hospital is appropriate and which is likely to lead to serious harm to self or others.[90] A likelihood of resulting in serious harm has the same meaning in this section as it does in § 9.37, which covers involuntary admissions based on a DCS recommendation.[91]

Another way a patient may be involuntarily admitted to a psychiatric hospital is as an involuntary admission under MHL § 9.27. This status requires a written application within 10 days before the admission stating facts of mental illness and the need for involuntary care and treatment in a hospital.[92] Two doctors must approve the application.[93] Those listed in MHL § 9.27(b) may sign the application.[94] An involuntary admission may continue for up to 60 days.[95] This admission standard is lower than for an admission under MHL § 9.39 but higher than for a voluntary admission.

All that MHL § 9.27 requires is that a person be mentally ill and "in need of involuntary care and treatment."[96] Article 9 of the MHL defines the phrase "in need of involuntary care and treatment" to refer to "a person [who] has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgment is so impaired that he is unable to understand the need for such care and treatment."[97] This is a lower standard than the "serious harm" § 9.39 standard, and it explains why many patients are transferred to § 9.27 status.

Involuntary admission is the most common legal status. Patients admitted as one of the other statuses described in Article 9 are frequently transferred to this status. The vast majority of patients who go to court are admitted under this status.

A catch-all provision is MHL § 9.40. This is referred to as Emergency Observation, Care, and Treatment in Comprehensive Psychiatric Emergency Programs.[98] A Comprehensive Psychiatric Emergency Program (CPEP) director may receive and retain for up to 72 hours any person alleged to have a mental illness for which immediate observation, care, and treatment are appropriate and which, if left untreated, is likely to result in serious harm to the person or others.[99] If a psychiatric hospital determines, within that 72-hour period, that the patient requires further observation, care, or treatment in a hospital, the patient may be admitted as an emergency admission under MHL § 9.39.

Conclusion

Mentally ill and developmentally disabled patients' liberty interests must be balanced with public safety. Those suffering from a mental illness may not be confined or forced to take medication unnecessarily. In contrast, psychiatric hospitals and the state must make sure that people who are mentally ill pose no substantial risk to others or themselves. Ultimately, it is the court's obligation to determine whether a person can live safely in the community without being a danger to self or others or whether a hospital can confine or treat patients against their will. ■

1. Michael L. Perlin, *"Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. Contemp. Legal Issues 3, 4–6 (1999); Marcy H. Speiser, *Indigents and the Denial of Due Process at Involuntary Treatment Hearings: The Need for Independent Psychiatric Assistance*, 8 Touro L. Rev. 141, 157 (1991); *see generally The New York Mental Health Information Service: A New Approach to Hospitalization of the Mentally Ill*, 67 Colum. L. Rev. 672 (1967).
2. *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975).
3. *In re Carl C.*, 126 A.D.2d 640, 640, 511 N.Y.S.2d 144 (2d Dep't 1987).
4. *O'Connor*, 422 U.S. at 576.
5. Office of Mental Health Website, *About OMH*, https://www.omh.ny.gov/omhweb/about/ (last visited Apr. 1, 2016).
6. *Id.*
7. *Id.*
8. MHL § 9.31.
9. *Id.* § 9.33.
10. *Rivers v. Katz*, 67 N.Y.2d 485, 496–97, 504 N.Y.S.2d 74 (1986).
11. MHL § 9.60(a)(1).
12. *Id.*
13. Stephen H. Behnke, Michael L. Perlin & Marvin Bernstein, The Essentials of New York Mental Health Law: A Straightforward Guide for Clinicians of All Disciplines 111–12 (2003).
14. In a CPL Article 730 proceeding, a court orders that two psychiatric examiners examine the defendant. *See People v. Allen*, 224 A.D.2d 1027, 1027, 638 N.Y.S.2d 266 (4th Dep't 1996). The psychiatric examiners must submit an examination report that sets out their opinion whether the defendant is incapacitated. CPL § 730.10(8).
15. Behnke et al., *supra* note 13, at 112–13.
16. *Id.*
17. *Id.* at 113

18. MHL § 9.31.

19. Psychiatrists base their diagnosis off the Diagnostic and Statistical Manual of Mental Disorders, the standard classification of mental disorders used by mental-health professionals in the United States. *See* Am. Psychiatric Ass'n, Office of Mental Health Website, *Diagnostic and Statistical Manual of Mental Disorders (DSM)*, https://www.psychiatry.org/psychiatrists/practice/dsm.

20. MHL § 33.13(a).

21. *Id*.

22. *Id.* § 33.13(c), (e).

23. *Id*.

24. *Szmania v. State of N.Y.*, 82 A.D.3d 1688, 1690, 919 N.Y.S.2d 669 (4th Dep't 2011).

25. CPLR 4518(a).

26. *Ginsberg v. North Shore Hosp.*, 213 A.D.2d 592, 592, 624 N.Y.S.2d 257 (2d Dep't 1995); *Wilson v. Bodian*, 130 A.D.2d 221, 231–32, 519 N.Y.S.2d 126 (2d Dep't 1987).

27. *Ginsberg*, 213 A.D.2d at 592.

28. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164).

29. *In re Miguel M.*, 17 N.Y.3d 37, 926 N.Y.S.2d 371 (2011).

30. *Id.* at 40.

31. *Id.*

32. Jennifer Clark, *HIPAA as an Evidentiary Rule? An Analysis of Miguel M. and Its Impact*, 26 J.L. & Health 1, 23 (2013).

33. *In re Dolan (Joan W.)*, 35 Misc. 3d 781, 943 N.Y.S.2d 737 (Sup. Ct., Nassau Co. 2012).

34. *Id.* at 785.

35. MHL § 9.31.

36. *Id.* § 9.33.

37. *Id.* § 9.35.

38. *Id.*; *In re Cindy R.*, 41 Misc. 3d 171, 172, 970 N.Y.S.2d 853 (Sup. Ct., Queens Co. 2012).

39. "Clear and convincing" is the minimal constitutional standard of proof for any civil-commitment case. *Addington v. Texas*, 441 U.S. 418, 433 (1979). The states may require a higher standard, but New York has not imposed one.

40. *In re Robert K.*, 43 A.D.3d 922, 923, 842 N.Y.S.2d 42 (2d Dep't 2007); *In re Dionne D.*, 5 A.D.3d 766, 767, 774 N.Y.S.2d 167 (2d Dep't 2004).

41. *In re Thomas S.*, 58 A.D.3d 1063, 1065, 871 N.Y.S.2d 770 (3d Dep't 2009).

42. *Ford v. Daniel R.*, 215 A.D.2d 294, 295–96, 626 N.Y.S.2d 784 (1st Dep't 1995); *In re Harry M.*, 96 A.D.2d 201, 204, 468 N.Y.S.2d 359 (2d Dep't 1983).

43. *N.Y.C. Health & Hosp. Corp. v. Brian H.*, 51 A.D.3d 412, 416, 857 N.Y.S.2d 530 (1st Dep't 2008) (finding clear and convincing evidence of need for involuntary hospitalization based on patient's history of bipolar disorder, failure to seek immediate medical treatment for serious injury, and medical records documenting that patient's immediate well-being depended on being retained in hospital).

44. *Anonymous v. Carmichael*, 284 A.D.2d 182, 184, 727 N.Y.S.2d 408 (1st Dep't 2001) (finding clear and convincing evidence of need for involuntary hospitalization given patient's medical history, noncompliance with treatment plan leading to psychotic decompensations marked by personal neglect, and dangerous and aggressive behavior).

45. *In re Gertrude K.*, 177 Misc. 2d 25, 27, 675 N.Y.S.2d 790 (Sup. Ct., Rockland Co. 1998).

46. *Id.*

47. *Id.*

48. *Cohen v. State of N.Y.*, 17 Misc. 3d 843, 847, 843 N.Y.S.2d 810 (Ct. Cl., N.Y. Co. 2007).

49. *In re Kordylewska*, 12 Misc. 3d 1069, 1070, 816 N.Y.S.2d 892 (Sup. Ct., Oneida Co. 2006).

50. *Fisk v. Letterman*, 501 F. Supp. 2d 505, 524 (S.D.N.Y. 2007).

51. *Gertrude K.*, 177 Misc. 2d at 28–29.

52. Treatment of minors is governed by 14 N.Y.C.R.R. 527(c)(2), which allows treatment administered over the minor's objection upon the minors' parents' consent unless the minors have the authority to consent on his or her own. Under MHL § 33.21, minors over 16 may consent to voluntary admission to a hospital and to the administration of psychotropic medication under certain circumstances.

53. 14 N.Y.C.R.R. 527.8(C)(4).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Rivers*, 67 N.Y.2d at 493–95.

58. *In re Sawyer (R.G.)*, 68 A.D.3d 1734, 1735, 891 N.Y.S.2d 813 (4th Dep't 2009); *In re Harvey S.*, 38 A.D.3d 906, 906–07, 837 N.Y.S.2d 155 (2d Dep't 2007); *In re William S.*, 31 A.D.3d 567, 568, 817 N.Y.S.2d 674 (2d Dep't 2006); *In re Joseph O.*, 245 A.D.2d 856, 857, 666 N.Y.S.2d 322 (3d Dep't 1997).

59. *Thomas S.*, 58 A.D.3d at 1065.

60. Martin Schoenfeld, *Assisted Outpatient Treatment: May the Sun Continue to Shine on Kendra's Law*, 82 N.Y. St. B.J. 28, 28–29 (June 2010).

61. *Id.*

62. MHL § 9.60(a)(1).

63. *Id.*

64. *In re William C.*, 64 A.D.3d 277, 284, 880 N.Y.S.2d 317 (2d Dep't 2009).

65. MHL § 9.60(i)(1).

66. *Id.* § 9.60.

67. *See id.*

68. *See id.*

69. *See id.*

70. *Id.*

71. Margo Flug, *No Commitment: Kendra's Law Makes No Promise of Adequate Mental Health Treatment*, 10 Geo. J. Poverty L. & Pol'y 105, 105 (2003).

72. Schoenfeld, *supra* note 60, at 28.

73. Pam Belluck, *Program Compelling Outpatient Treatment for Mental Illness Is Working, Study Says*, N.Y. Times, July 30, 2013, at A13.

74. MHL § 9.13.

75. *Id.* § 9.15.

76. *Id.* § 9.37.

77. *Id.* § 9.39.

78. *Id.* § 9.27.

79. *Id.* § 9.40.

80. *See id.*

81. *Id.* § 913.

82. *Id.*

83. *See id.* § 9.13.

84. *See id.*

85. *See id.*

86. *Id.*

87. *See id.*

88. *Id.* § 9.37.

89. *Id.*

90. *Id.* § 9.39.

91. *See id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* § 9.27.

97. *Id.*

98. *Id.*

99. *Id.* § 9.40.

BY PETER SIVIGLIA

Peter Siviglia has practiced law in New York for more than 50 years, representing clients both domestic and foreign, public and private. He has served as special counsel to other firms on contract matters and negotiating. Peter is the author of *Commercial Agreements – A Lawyer's Guide to Drafting and Negotiating*, Thomson Reuters, supplemented annually; *Writing Contracts, a Distinct Discipline*, Carolina Academic Press; and numerous articles on writing contracts and other legal topics, many of which have appeared in this *Journal*.

General Contractors: Beyond the Box

A general contractor or "GC" assumes responsibility for construction of the entire project. The GC will subcontract to others those portions of the work that the GC is not equipped to perform as, for example, HVAC (heating, ventilation, air conditioning), plumbing, electrical work, and fire protection. This subcontracting arrangement creates three risks for the owner:

1. removal of the owner from the process of selecting the subcontractors,
2. mechanic's liens against the property because of the GC's failure to pay subcontractors, and
3. work stoppages because of the GC's failure to pay subcontractors.

The form of contract produced by the American Institute of Architects [for example, A101-2007 and A201-2007 (general conditions)] does not address risks 2 and 3. So below are some adaptable suggestions on how to treat them, plus provisions for an early completion bonus to the GC and a late completion credit to the owner.

A bond covering performance of the contract by the GC and payment of its obligations will reduce the risk of the GC's failure to pay its subcontractors. But in the absence of a bond, the owner must make a thorough check of the GC's credit worthiness and performance record, and should inquire of bonding companies whether they would issue a payment and performance bond for the GC and the cost thereof. Also, the owner should consider a shareholder guarantee.

With regard to the suggestions under items (A) and (B) below (selection of subcontractors and owner's right to pay subcontractors), GCs under a fixed-price contract may be reluctant to disclose their fee arrangements with the subcontractors. That reluctance, though, should easily be overcome by the fact that the owner has agreed to – and is satisfied with – the price it will pay the GC for the entire job, and so the owner is not concerned with the GC's profit: The owner's only concern is the reasonable protection of its interests.

A. Selection of Subcontractors[1]

NOTE: The models below should be assessed in context of the transaction and the GC's practices and timing in obtaining bids from subcontractors. Model 2 is cost neutral to the GC and cost blind to the owner.

Model 1

For portions of the work that Contractor will subcontract for *[specify trades, for example: Masonry, Electrical, Plumbing, HVAC, Fire Protection, Finished Cabinetry, etc.]*, Contractor will, in addition to its own selections, obtain bids from subcontractors that Owner requests. Contractor will consult with Owner on which bid to select for each of those trades, but Contractor will, in its sole and absolute discretion, determine the subcontractor that it will engage.

Model 2

For portions of the work that Contractor will contract for *[specify trades, for example: Masonry, Electrical, Plumbing, HVAC, Fire Protection, Finished Cabinetry, etc.]*, Contractor will, in addition to its own selections, obtain bids from subcontractors that Owner requests. Contractor will contract with the subcontractor that both Contractor and Owner approve. But without limiting the foregoing requirement that both Contractor and Owner must approve the subcontractor, if Contractor contracts with a subcontractor that Owner prefers but which is not the subcontractor that Contractor, in good faith, would have selected, then Contractor will furnish Owner with the final bid of the subcontractor that Contractor would have selected; and Contractor's fee will be (i) increased by the amount by which the bid of the subcontractor selected exceeds the bid of the subcontractor that Contractor would have selected, or, as the case may be, (ii) decreased by the amount by which the bid of the subcontractor that Contractor would have selected exceeds the bid of the subcontractor selected.

B. Owner's Right to Pay Subcontractors

In the event of a claim by a subcontractor that it has not been paid in respect of a progress payment that Owner has made to Contractor, the amount

approved in that progress payment for that subcontractor, Owner may elect – and Contractor will honor that election – to pay all subcontractors directly against an authorization and certification from Contractor of the amount to be paid to each. In the case of any such election, Contractor will furnish Owner with copies of the subcontracts with all subcontractors.

C. Continuation of Work Notwithstanding a Dispute

In the event of any dispute involving payment or any other matter under any of the Contract Documents, Contractor will, without prejudice to the rights and obligations of Contractor and Owner, continue to perform the Work diligently in accordance with the Contract Documents. Time is of the essence.

Each subcontract will contain a clause to the following effect: "In the event of any dispute involving payment or any other matter under this subcontract, the trade contractor will, without prejudice to the rights and obligations of the trade contractor and general contractor, continue to perform its work diligently in accordance with the Contract Documents. Time is of the essence. The Owner is a third-party beneficiary of the foregoing commitment.

D. Bonus/Credit: Early and Late Completion

NOTE: The dates in the model below are solely for purposes of example, and there are 15 days of grace between the expiration of the bonus period and the beginning of the credit period.

> If Substantial Completion of the Work (as defined in Section ___), as confirmed by issuance of a Certificate of Occupancy, is achieved on or before April 17, 2017 *[a Monday]*, Contractor will receive an incentive payment in the amount of $_X_. If, however, Substantial Completion of the Work, as confirmed by issuance of a Certificate of Occupancy, is not achieved on or before April 17, 2017 *[Monday]* but is achieved on or before April 28, 2017 *[a Friday]*, Contractor will receive an incentive payment equal to $_X_ less $_Y_ *[10% of X]* for each business day after April 16, 2017 that such substantial completion is not achieved.
>
> If Substantial Completion of the Work (as defined in Section ___), as confirmed by issuance of a Certificate of Occupancy, is achieved on or after May 15, 2017 *[a Monday]*, Contractor will pay Owner for late completion the product of (A) $_Y_, and (B) one (1) plus the number of business days after May 15, 2017 that such substantial completion is not achieved; but the amount of the late completion payment will not exceed $_X_. The payment under this paragraph will be credited against amounts owing by Owner to Contractor to the extent of those amounts.
>
> The dates of April 16, 2017, April 17, 2017, April 28, 2017, and May 15, 2017 in the preceding two paragraphs are not subject to change, but if the Scheduled Completion Date of the Work (as specified in Section ___) is postponed due to *force majeure*, or changes in the Work, or any other cause specified in the Contract Documents postponing the Scheduled Completion Date of the Work, then Contractor may terminate the foregoing provisions for an incentive payment and late completion payment by giving Owner written notice of such termination within seven (7) business days after the length of the postponement has been determined as provided in the Contract Documents. ■

1. *Cf.* section 5 of A201-2007.

MEET YOUR NEW OFFICERS

President
Claire P. Gutekunst

Claire P. Gutekunst took office June 1 as president of the 74,000-member New York State Bar Association.

Gutekunst is an independent arbitrator and mediator. She established her practice in 2012, and helps companies, other organizations and individuals resolve their disputes.

In 2012, Gutekunst was appointed as special master for the New York City Asbestos Litigation, where she served a 15-month term. Prior to that, she was a partner in the Litigation Department at Proskauer Rose LLP in New York City. During her nearly 30 years at Proskauer, she handled complex commercial disputes in the courts and in mediations and arbitrations.

Active in the State Bar for 29 years, Gutekunst served as treasurer from 2011–2013 and is currently a member of the Commercial and Federal Litigation Section's Executive Committee, the Legislative Policy Committee and the Membership Committee. She previously served on the Executive Committee as vice president for the First Judicial District and as a member-at-large. Gutekunst chaired the Membership Committee, Committee on Women in the Law and Strategic Planning Advisory Committee. She was vice chair of the Dispute Resolution Section and co-chaired the President's Committee on Access to Justice. She also was a longtime member of the Committee on Diversity and Inclusion.

Gutekunst is a Maryann Saccomando Freedman Fellow of The New York Bar Foundation. She serves on the House of Delegates of the American Bar Association. Gutekunst is a member of the Advisory Council, the National Task Force on Diversity in ADR and the Arbitration Committee of the International Institute for Conflict Prevention and Resolution. From 2004 to 2015, she chaired the Advisory Council of the YWCA-NYC's Academy of Women Leaders. Between 1997 and 2005, Gutekunst served on the Governor's Temporary Judicial Screening Committee, the New York State Judicial Screening Committee and the First Department Judicial Screening Committee.

A resident of Yonkers, Gutekunst received her undergraduate and master's degrees from Brown University and her law degree from Yale Law School.

President-elect
Sharon Stern Gerstman

Sharon Stern Gerstman, of Buffalo, New York, took office June 1 as president-elect of the 74,000-member New York State Bar Association.

Gerstman is of counsel to Magavern Magavern Grimm in Buffalo. She concentrates her practice in the areas of mediation and arbitration, and appellate practice.

A 34-year member of the State Bar, Gerstman previously served on the Executive Committee as an Eighth Judicial District vice-president. She is a member of the House of Delegates, Finance Committee, CPLR Committee, Dispute Resolution Section, and Torts, Insurance and Compensation Law Section.

She was chair of the Committee on Civil Practice Law and Rules and the Special Committee on Lawyer Advertising and Lawyer Referral Services. She previously co-chaired the Task Force on E-Filing and the Special Committees on Lawyer Advertising and Strategic Planning. She also served on the American Bar Association's Board of Governors for three years and is a member of the ABA's House of Delegates.

A resident of Amherst, Gerstman graduated from Brown University and earned her law degree from the University of Pittsburgh School of Law. She received a master's degree from Yale Law School.

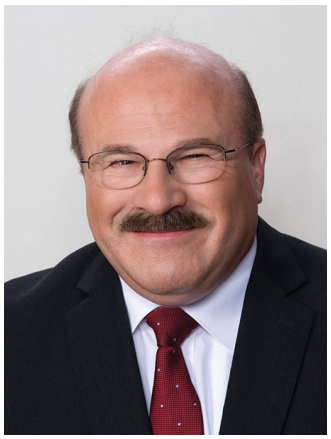
Secretary
Ellen G. Makofsky

Ellen G. Makofsky, of Garden City, New York, has been elected secretary of the New York State Bar Association for a third term.

As the founder of Makofsky & Associates, P.C., Makofsky concentrates her practice in elder law, special needs and trusts and estates.

A 29-year member of the State Bar, Makofsky is a member of the House of Delegates. She was a member-at-large on the Executive Committee for four years. She chaired the Elder Law Section and served as secretary of the Senior Lawyers Section. She is a member of the Trusts and Estates Law Section. She is the co-chair of the Women in the Law Committee and is the chair of the Publications Committee. Makofsky is a member of the Committee on Continuing Legal Education and the Membership Committee. She serves as the chair of the Task Force on Powers of Attorney. She also is a past president of the National Academy of Elder Law Attorneys, New York Chapter and the Estate Planning Council of Nassau, Inc.

A resident of Manhasset, Makofsky graduated from Boston University and earned her law degree *cum laude* from Brooklyn Law School.



Treasurer
Scott M. Karson

Scott M. Karson of Melville was elected treasurer of the 74,000-member New York State Bar Association.

Karson is a partner of Lamb & Barnosky of Melville. He concentrates his practice on trial and appellate litigation, including municipal, commercial, real property title, land use and zoning and personal injury litigation. He has argued more than 100 appeals in the state and federal appellate courts.

Karson serves as vice president of the State Bar for the Tenth Judicial District (Nassau and Suffolk Counties), is a member of the State Bar's House of Delegates and chair of the Association's Audit Committee. He is a member and former chair of the Committee on Courts of Appellate Jurisdiction, and serves as a member of the President's Committee on Access to Justice, the Committee on Leadership Development and the Committee to Review Judicial Nominations. He is a past president of the Suffolk County Bar Association and is the delegate of the Suffolk County Bar Association to the American Bar Association House of Delegates.

Karson is vice chair of the Board of Directors of Nassau Suffolk Law Services, the principal provider of civil legal services to Long Island's indigent population.

Karson graduated from the State University of New York at Stony Brook and earned his law degree *cum laude* from Syracuse University College of Law. He is a resident of Stony Brook.

NEW MEMBERS WELCOMED

FIRST DISTRICT
Alan Louis Aberg
Anil K. Abraham
Kraig Ahalt
Katy Akopjan
Shaheen Mohammed Ali
Syed Zain Ali
Kathlyn Cynthia Anandajayasekeram
Casey Joseph Anis
Michael John Antonucci
Fabricio De Moraes Archanjo
Amanda B. Asaro
Christopher G. Asberry
Stephen Christopher Asoli
Jessica Ann Asrat
Adi Esther Assouline
Devon C. Avallone
Alejandra Avila
Kyra Maria Ayo Caros
Mohammed Amir Badat
Maxwell Ball
Evan Fischer Bane
Lakendra Scott Barajas
Stephanie N. Baran
Alexander White Barlow
Shira Pickard Baron
Rachel Bayefsky
Christopher Kotrla Benedik
David B. Berman
Abigail Bertumen
Brian Scott Bienenfeld
William B. Bierce
Elena Bombis
Adam Brett Borenstein
Max M. Borg
Elisa Botero Duque
David Zachary Braun
Chelsea Breakstone
Michael Andrew Brenner
Andres Brown Perez
Richard Frederick Brueckner
Elizabeth Irene Buechner
Brittany Elyssa Buhler
Mahalia Burford
Brett Aaron Burka
Emma Louise Burrows
Peter William Buse
John Carr Clarke Byrne
Kibum Byun
Caitlyn Babington Carpenter
Kelsey Marie Castleberry
Matthew Paul Celano
Daniel Ryan Cellucci
Bassam Chain Tobia
Michelle Grace Chan
Kara Eileen Cheever
Jessie Chen
Ruobing Chen
James Cheng
Lisa S. Chodosh
Ellen Enho Choi
Jeremy Hillel Chubak
Mary Rebecca Clancy
Benjamin Ryan Cohen
Brittany Rachel Cohen
David Jonathan Cohen
Alexander Orestes Condon
Janet Maria Contreras
Max Isaac Corey
Hamilton Reid Craig
Elizabeth Denise Crowther
Kathryn Redpath Crumbaugh
Yago Cuesta Civis
Michaela Margaret Culver
Phillip Evans Cushing
Rebecca Lee Cushing
Michael James D'Angelo
Charlie Daitz
Monica Anne Debosscher
Stephanie S. Delponte
Nathaniel David Derose
Daniel Steven Desatnik
Rachel Leah Deutsch
Claudia Di Martino
Rafael Diefenthaeler
Justin Michael Digennaro
Douglas Peter Dimedio
Eric Dimuzio
Adam Giovanni Disimine
Nicholas William Dowd
Matthew Alan Ducharme
Bridgette Leigh Dussman
Zachary Harrison Dworken
Danielle Alexandra Efros
Kristen Lee Ekey
Adham Mohamed Elsayed
Yasmin Emrani
Nairi Natalie Esayan
Philip Joseph Feffer
Lane Elizabeth Feler
Michael T. Ferruggia
Alyssa Beth Figueroa
Ashley Martha Fillmore
Matthew Eric Finkelstein
Gregg Adam Fish
Erin Fitzgerald
Scott M. Flanz
Brooke Alexandra-bodoki Fodor
Daniel Goodman Forman
Ariel Mestel Fox
Marissa Amanda Fox
Anna Franzen
Samantha Lynn Frenchman
Michael Frenkel
Allison C. Gallagher
Kelly Dodge Garcia
Jennifer Garrett
Albina Gasanbekova
Rodrigo Gastalver Trujillo
Martin Gelter
Dawit Getachew
David Scott Ginensky
Jessica Marian Ginzburg
Claire Renee Glasspiegel
Sean Michael Gleason
Christina Rose Glover
Edy Glozman
Zachary Robert Goldberg
Anna Serra Goldenhersh
Michelle Alison Goldring
Daniel Adam Goldstein
Karla Gomez
Tamar Gongadze
Nicholas Alexander Gonski
Surya Gopalan
Chelsea Lynn Goulet
Stephen Gregory Grace
Zachary Samuel Green
Charles Pettengill Griffin
Ari Reuben Grun
Meghan Renee Guarino
Monica Guimaraes Homrich
Claire Gunner
Jeffery Allen Habenicht
Leyla Hadi
Daniel Hamburg
Justin E. Han
Ryan James Hays
Alexandra Gillian Hess
Sarah Beth Hoefle
Samantha Ellen Holt
Slki Hong
Michael Fagan Houlihan
Margaret T. Hsieh
Steve Aaron Hsieh
Ashleigh Piknam Patricia Hunt
Asad Jawed Hussain
Colin Stephen Huston-liter
Eugene Jinray Hwang
Satoshi Inami
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Sara Jacqueline Isaacson
Bianca Chloe Isaias
Stephen Isa Iya
Jordan Florence Jackson
Hale Louise Jacob
Leslie Marie Jacomino
Lindsay Brandt Jakubowitz
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Brice Gilbert Jastrow
Erik Paul Jerrard
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Crystal Marissa Johnson
Matthew Kenneth Johnson
Se Jin Joo
Grace Jun
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Tyson Dean Kennedy
Ashley A. Kerr
Boris Kessler
Jacob Barret Kider
Thomas Francis Killeen
Hyun Kim
Joyce Yoon Kim
Allison Rebecca Klein
Devon Alexandra Klein
Jordan Alexander Kobb
Diana Michelle Kovacs
Erik Alexander Kreutzer
Arthur Kutoroff
David Seungmin Lee
Jennifer Danielle Lee
Nara Lee
Kristin Marie Leighton
Rita Marie Lenane
Ryan James Levan
Benjamin Levine
Michael George Lewis
Peiyu Liao
Greg Brian Lichtenstein
Douglas Edward Lieb
Jordan Alexander Lieber
Young Suk Lim
Stephanie Juwita Liman
Wyatt Alexander Littles
Joshua Samuel Loigman
Rebecca H. Lomazow
Jenna Wrae Long
Loren N. Lostritto
Meng Lu
Sarah Charlotte Lucas
Madeline Anne Lurio
Ariela Pari Mabourakh
Allyson Eve Mackavage
William Andrew Magioncalda
Kaela Ann Mahon
Sophia Morris Mancall-Bitel
Fernando Mancias
Fernando Julian Mancias
Marina Gemain Mansour
Ann Marie Marcellino
Joseph Eugene Masiello
Dean Michael Masuda
Christina Crane Matthias
Veronica Mazzoleni
Alyssa Dorothy McAnney
Kenneth Murray McBrady
Patrick David McCamy
Daniel Patrick McCarty
Monica Ann McKinnon
Kevin Christopher McNiff
Chase Henry Mechanick
Alan Marc Mendelsohn
Julia Christine Merrill
Matthew Griffin Merson
Eric Graham Messinger
Leah Rachael Milbauer
Andrew Ryan Modell
Ademisope Mojiminiyi
Jordana Clara Moldauer
Rachel Elizabeth Moody
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Justin Allen Morgan
Timothy Joel Morgan
Chad Drexler Morin
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Kristen L. Murray
Bryan Kenneth Nance
Kathleen Ann Negri
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Thien Pham Nguyen
Corinne Nhaissi
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Connor Gerard O'Shea
Shigeki Obi
Udoka Alaribe Odoemene
Doruk Onvural
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Kristen Michelle Peters
Aleksandra Petkovic
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Zachary Lawrence Profant
Thomas Prommer
Ryan Patrick Python
Rachael Aryn Racine
Kevin Robert Reardon
Abigail Irene Reich
Arielle Ivy Reid
Norman Albert Reilly
Claudia Joya Ricciardi
Pablo Martin Richards
Melissa E. Rifai
Talisha Riggs
Alexander Robbins
Amber Nicole Roberts
Alexandria Leigh Robertson
Daniel Adam Rockower
Maria M. Rodriguez
Joseph Francis Rosati
Arthur Herbert Rosenbloom
Gil Rosenblum
Christopher Shawn Ross
Kathryn Marina Roulett
Stephanie Leigh Rowan
Niyati Roy
Daphne Amalia Rubin-Vega Pena
Cody Alexander Ruegger
Carl Anthony Ruggiero
Brian Joseph Russell
Emily Rose Rutcofsky
Molly Catherine Ryan
Sehar Fatima Sabir
Alexandra Paige Sadinsky
Jake Samuel Saifman
Jasmine Saleem
Emily Currier Sanders
David Benjamin Sarfati
Ari Michael Sarna
Kelly Marie Scavone
Matthew Lynn Schafer
Margaret Mary Schierberl
Rachel Amie Schneidman
Matthew C. Schoenfeld
Emily Jean Schultz
Garrett James Schuman
Shaina Leigh Schwartz
Kendall Selkirk Scott
Alexander Jordan Selarnick
Gidon Michael Shamir
Kathy Yan Shao
Ashley Jill Shapero
Seth Matthew Shapiro
Max Shapnik
Christopher Kelley Shields
Christine Jey Shim
Sayuri Alexandra Shimoda
Jack Randall Shirley
Anna Bianca Shwedel
Carly Anne Siegel
Rebekah Suzanne Sills
Cristina Silva Hoyos
Elan Wyatt Silver
Lena Elinor Smith
Luke Alexander Smith

Sophia Jane Solomon
Youngbin Son
Matthew Halen Specht
Jason David St. John
Brett Michael Stack
John Eric Starcher
Ian Steinberg
Caelyn Elizabeth Stephens
Mark Robert Stokely
Divya Varuni Subrahmanyam
Kim Susser
Bastiaan Gillis Suurmond
Kevin Swartz
Melanie Eileen Szwajkowski
Deborah Sanam Taeid
Luisa Patricia Tamez
Philip Cheng Yew Tan
Benjamin Luke Taylor
Danielle Elizabeth Tepper
Yu Tian
Sarah Catherine Curley Tishler
Muneshrie Tiwari
Alison Liu Tong
Kourtney Alyssa Traina
Sean Gregory Traynor
Elina Troshina
Serrin Turner
Masaru Umeda
Maria Teresa Vanikiotis
Laurance Browning Vanmeter
David George Varghese
Randi Lynn Veenstra
Nicholas Grant Olear Veliky
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Benjamin A. Vitcov
Cecilia Elisa Vogel
Max Jacob Vogel
Danielle Jasmine Volpe
Lauren Michelle Wagner
Madison Lichliter Walsh
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Xin Wang
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Valdemar Luther Washington
Kimbrilee Marie Weber
Aaron Louis Webman
Isabelle D. Wedemeyer
Samantha Anne Weinberg
Sarabeth Miriam Weisel
Patrick Marren Whelan
Richard James Widmann
Michelle Hannah Wilensky
Emilie Margarette Williams
Tana Wilner
Nneka Witter
Jeffery Peyton Worley
Hanyu Xie
Sholom Pesach Yaffa
Yordanosse Idris Yenenh
Jacqueline Jichen Yuan
Joshua Ryan Zalasky
Pao San Zhang
Chang Zhou
Michael Barrett Zimmerman
Evan Russell Zinaman

SECOND DISTRICT
Daniel Jason Ain
Nicholas Ajello
Adebola Oluwafolabomi Akisanya
Rosmil Almonte
Ameya Sita Ananth
Sarah Beth Baldwin
Brett M. Barocas
Harold James Bernard
Christopher J. Bosch
Nicholas Grayson Brockmeier
Johanathan De'andre Brooks
Gregory David Brown
Joseph Schotland Brown
Shera Lee Bucchianeri
Gregory R. Capobianco
Nicole Carmen Cata
Leah Elena Stephenson Cobean
Seth Cotler
Debasha Tabreeze Cox
Yaakov Yitzhak Dachs
Duncan Brewster Delano
Thomas William Dollar
Alexander Joseph Eleftherakis
Tristan Myles Ellis
Alfred Joseph Falzone
Yuliya Feldman
Goldy Gluzman
Desiree Jeane Gustafson
Omar Travis Harding
Alex Jeffrey Hartzband
Javeria Hashmi
Gregory Martin Juell
Bryson Kern
Danbee Kim
Tamari Juri Lagvilava
Larissa Elese Lalor
Alexander Augustus LaSala
Christopher K. Lee
Kevin Li
Christina Jasmine Llewellyn
Jared Hale Louzon
Catherine Susan Lyster
Margaret Kate Marron
Swapna Maruri
Raymond Arthur Mensah
Maeghan Owen Mikorski
Sara Molinaro
Michael Joseph Morillo
Ariella Ohabi
Daniel Harrison Owsley
Taier Perlman
Justin Llewellyn Peters
Charlotte Simonson Phelps
Devon Lee Pope
Diwaagar Radhakrishnan Sitaraman
Max Ephraim Rodriguez
Kathleen Bassi Rubenstein
Sanford A. Rubenstein
Angelique M. Sabia
Waseem Salahi
Lisa Sangoi
Isaac Steve Sasson
Katsiaryna Stserynzat
Andrew Coleman Sweeney
Sofia Grace Syed
Shushana Tracey
Wendy Wai Yu Tsang
Christopher Alan Urruela Stauss
Brittany Cooke Ursini
Gregory Evan Van Houten
Jessica Ann Vosgerchian
Caroline Elizabeth Whitney
Britney Renee Wilson
Sharon Hui Wu
Steven Andrew Zuckerman

THIRD DISTRICT
Brian Joseph Godard
Courtney Elizabeth Heinel
Shaniqua Jackson
Lindsay Heather Kaplan
Kristin Lynnea Kopach
Aliza Ann Reed
Deborah Lynn Robbins
Nancy S. Williamson
Tyler Wolcott
Andrew P. Zweben

FOURTH DISTRICT
Kelly Gene Poupore

FIFTH DISTRICT
Melanie Lea Francis
Brian Daniel Howe

SIXTH DISTRICT
Ryan Francis Conway
Jennifer Ann De Souza
Sidi Han
Brian Yoon Kim
Madeline Eileen Weiss

SEVENTH DISTRICT
Kevin Grant Corliss
Brian Kevin Donovan
Stephanie L. Rowe

EIGHTH DISTRICT
Maria Jeanette Andrews
Alexander C. Teschemacher

NINTH DISTRICT
Sheba R. Abraham
Dennis Carey Abrams
Jean Robert B Auguste
Devorah Darlene Frances Beck
Robert Charles Bunker
Leon Phillips Cameron
Alexander Paul Cousins
Samantha Rae Fabricant
Kevin Gomez
William H. Hargett
Manfred Bernhard Jaeckel
Rebecca Catherine Johnson
Jesse Morris Kantor
Samantha Leigh Kopf
Brian Gerald Kurpis
Sheralyn Pulver
Christopher Wayne Ryder
Carol E. Thorne
Candice Imani Walker
Adam Joshua Weinstein
Leora Tamar Wexler

TENTH DISTRICT
Jeremy Mark Ancelson
Dina Marwan Awad
Joshua S. Bass
Lindsey Taylor Brown
Nicholas Frank Chionchio
Colin Coburn
Bridget Elizabeth Croutier
Gregory Michael Cuneo
Ryan Michael Eden
George Joseph Embriano
Zachary Isaac Gold
Kenneth Tolentino Hagan
Stephen Lewis Ham Iv
Ryan James Hart
Jordan Spencer Hoch
Harshal Y. Jani
Thomas Carl Katsiotas
Chantal Khalil
James Y. Kim
Youna Nicole Kim
Jenna Akemi Kon
Mary Wachowicz Kulhanek
Stephen Christopher Lanzone
Matthew William Loeser
Ross W. Martin
Anna Marie Miranda
Eric J. Richardson
Robert Dwain Rose
Sonali Setia
Orly Taber
Vincent Paul Valente
Thomas Anthony Warns

ELEVENTH DISTRICT
Abirami Ananthasingam
Alexandria Theresa Awad
Cynthia Stephanie Caballero
Ashley Charen
Catherine Yiren Chen
Stephanie Chopurian
Nicole Marie Clark
Johnpaul Joseph Collorafi
Gabriel Colon
Roger Colvin Deming
Una Chiao-yi Fan
Ashley Fernandez
Jonathan Craig Frankel
Chelsea Lynn Guffy
Mohammad Muneeb Haque
Chelsea Brooke Hollingsworth
Tonya Lena-anne Husbands
Georgino Emmanuel Hyppolite
Keith Alan James
Jane S. Jeong
Evan Thomas King
Amanda L. Kurtti
Andrew Joseph Lauria
Scott William Lipschitz
Christopher J. Long
Elie Margulies
Balqees Ali Mihirig
Genesis Adriana Miranda
Jerika Hope Morris
Kathryn Elizabeth Mullen
Matthew Steven Mutino
Adeyemi Olusola Ojudun
Alexander Sutherland Oveis
Erica Marie Penn
Simmi Prasad
Tamanna Rubya
Yijie Song
Jingchen Xu
Michael Zigismund

TWELFTH DISTRICT
Michael Sean Armstrong
Kenneth Daniel Berman
Egbiri Ifegwu Egbiri
Christine Marie Feimer
Asia Ebony Hester
Edward Raymond Johannes
Ryan Patrick Mansell
Joanna Elizabeth Menillo
Raul Quezada

THIRTEENTH DISTRICT
Cheng Chen Shu

OUT-OF-STATE
Randy Abreu
Samy Anthony Akli
Huma Ali
Gary David Altman
Joseph Michael Amico
Christopher Stanley Ashiotes
Matthew James Aulds
Said Bakir
Yesenia Judith Barberena
Jeanette Marie Bayoumi
Ashley Lauren Behre
William Schaffner Bennett
Luis Bergolla
Mark Bongiovanni
Kara Jane Britton
James Edward Brownstein
Jessica Marie Buckelew
Emily Kate Burke
John Chesley Burruss
Elizabeth Burstein
Kevin Michael Casey
Aubrey Rancourt Chamberlin
Hovhannes Onno Chekemian
Ding Chen
Rushi Chen
Xin Chen
Tianyang Chu
Kevin Chung
Alyson Anne Cohen
David Michael Coriell
Luis Cortes Panameno
Nichole Renee Davis
Stanislas De Villoutreys
Phillip Vincent Defedele
Alice Denis
Christopher Joseph Depizzo
Christopher Louis Desimone
Valerio Di Mascio

In Memoriam

Henry L. Diamond
Washington, DC

Edward J. Regan
South Setauket, NY

Karmena Jasmond Diggs
Nelson Dijoux Coquillas
Hengyang Ding
Peter James Dinunzio
Kathryn Erin Easterling
Chand Warren Edwards-Balfour
Wolfgang J.C. Ettengruber
James J. Farrell
Molly Louise Feiden
Kevin Michael Fenstemaker
Benjamin Andrew Field
Justin Walker Flavelle
Caitlin Mary Flood
Shamala Shamica Florant
Christopher Benjamin Franks
Aaron G. Freeman
Christopher Joel Fromme
Sandra Marie Fusco
Angela Maria Garcia Medina
Michael Angel Garza
Alexis Anne Geeza
Melissa Gelbart
Rebecca Bosworth Gerome
Sara Jessica Ginsberg
Jeremy Ross Girton
Emily Adams Given
Catherine Benedict Glazer
James Randolph Goodloe
Sanessa Shantae Griffiths
Cun Gu
Basil Mumen Hadidi
Philipp Hagenbuch
Jessica M. Hale
Osamu Hamada
Christopher Michael Hammer
Sungyeon Han
Brittany Jo Harrison
Ning He
Alexandra Henrietta Hiatt
Marissa Joy Huber
Ryan Hale Hutzler
Yukitaka Iwata
Jonathan Daniel Jacobson
Eung Kyu Jeon
Alyssa Martin Johnson
Paras Kadakia
Sabina Klaudia Kania
Michael Benjamin Kaplan
Matthew Aaron Karmel
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Douglas Ronald Keeton
John Anthony Kerrigan
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Jeonggyun Kim
Mee Rina Kim
Min Gyo Kim
Daniel Dongmin Koh
Slavena Iulianova Konstantinova
Trenton Tyler Kool
Min Ji Ku
Gina Maria Lagreca
Alexandra Lynn Larkin
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Jeong Hyo Lee
Jimin Lee
Kyuseob Lee
Young Min Lee
Marina Lemos Pires
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Yijie Liang
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Craig A. Long
Hannah Michelle Lonky
Thomas Charles Mack
Stephen Magee
Nicholas Peter Makarov
Maxwell Alexander Malvin
Elli Marcus
Nisim Matari
Charles Dwight Maurer
Thomas Perry McCall
Tara Eileen McCormack
Emily Elizabeth Metz Meredith
Kristen Paige Miller
Lara Alexandra Miller
Ashley Brooke Monteiro
Tamara Andrea Morgenthau
Michael Daniel Muldoon
Amanda Leslie Nagrotsky
Jeongho Nam
Candice Mai Khanh Nguyen
Michelle Kathryn Nicotera
Michael T. Nolan
Elizabeth B. O'Brien
Steven Ort
Olufunmilayo Atinuke Ofure Oyeneyin
Julia Emmons Parnell
Reshma Kirit Patel
Angelica Krystal Pedraza
Yesenia Marie Perez
Clara Anne Justine Perrard
Daniel A. Platt
Margaux Lynn Rosa Poueymirou
Crystal Marie Prais
Alison Marie Pringle
Gabrielle Ellisa Pritsker
Shu Jie Qu
David Harris Rabinowitz
Ebony Felicia Ray
Celeste Richard
Laura Mae Richardson
Alexander James Roney
Robert Payton Ross
Andrew D. Rothstein
Jenya Rozenfeld
Yelena Rudenko
Peter Richard Salerno
Simone Salloum
Zachary David Sandman
Amanda Cecilia Savage
Marisa Caitlin Schnaith
Scott Avi Sears
Benjamin Michael Seel
Milin Y. Shah
Shivani Piyush Shah
Brian J. Shemesh
Yuan Qing Shen
Iegor Andriyovich Shtokalov
Kamila Sielski
Tzipporah Esther Silberstein
Alexander Monroe Smith
James Emerson Smith
Byungki So
Jessica Starck
Jase Steinberg
Nicole Marie Stolba
Merve Stolzman
Waleska Suero Garcia
James William Sukharev
Laura Elizabeth Sullivan
Lucy Sun
Steven Roman Szaro
Shin Tada
Eiji Takao
Tomoyuki Tanamura
Mun Bbill Tang
Bray Taylor
Masatoshi Terasawa
Siyi Tian
Yuxi Tian
Melvin Ricardo Tjon Akon
Chihiro Tomioka
Allison Marie Torline
Tsung-yu Joy Tsai
Emmanuel Luc Verraes
Megumi Wada
Prince Neto D. C. B. Waite
Jiayao Wang
Qiang Wang
Xiaoshu Wang
Christopher Kimm Warren
Matthew Landon Weber
Antwuan Nigel Williamson
Christina A. Winslow
Mingli Wu
Shiyi Wu
Wenjie Xu
Mary Catherine Yanik
Anita Yee
Meghan Elizabeth Zeigler
Huanhuan Zhang
Feida Zhao
Xi Zhao
Timothy Paul Zintak

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I represent the plaintiff in a breach of fiduciary duty suit. My client has a very good claim, but the defense counsel is stalling the case at every turn. For example, on a motion to dismiss boilerplate affirmative defenses and counterclaims, which were completely unsupported by facts, defendant's counsel e-filed opposition just before midnight the day before oral argument. Due to the late filing, I didn't even realize there was opposition to the motion until I got to court. I did not have a chance to read the opposition or the cases cited before the argument and defendant's counsel handed up a copy of the opposition to the judge at the oral argument. Even though I objected to the late submission of opposition, the court was reluctant to decide the motion without considering the opposition. The matter was adjourned for yet another appearance.

After my successful motion to dismiss, defense counsel was not responding to routine discovery demands. When I tried to address it at a court conference, a *per diem* attorney appeared for the defendant with no knowledge of the case. He said he would pass the message on to counsel and the conference was a complete waste of time. At another conference, I waited for over two hours before the defense counsel appeared, told the law clerk that he would respond to my demands, and then didn't produce anything.

Eventually I had to make a discovery motion. At oral argument for the motion, defendant's counsel handed me a large box of documents that were purportedly responsive to my demands. Since I didn't have a chance to review all of the documents before the argument, when the judge asked if the motion was being withdrawn in light of the production, I had to request an adjournment and make another court appearance when I discovered that the response was still not complete.

My client is getting increasingly frustrated with the rising cost of litigation because of my multiple court appearances that were adjourned without progress and my motion to obtain routine discovery. The client is especially angry because they know the defendant isn't incurring the same legal costs. Is there any recourse against a party or attorney that delays a case, and forces my client to incur legal fees, by submitting last-minute filings that delay the resolution of a motion? Is there any recourse for sending *per diem* attorneys to a conference, with no knowledge of the case, or showing up two hours late?

Sincerely,

G. U. Areslow

Dear G. U. Areslow:

Unfortunately, you are not alone in dealing with counsel whose main legal strategy is "justice delayed is justice denied." The New York Rules of Professional Conduct (NYRPC), the Rules of the Chief Administrative Judge, and the New York Civil Practice Law and Rules (CPLR) give judges the power to address such conduct. The Commercial Division of the Supreme Court of New York (Commercial Division) has additional rules to expedite litigation, including a number of new significant rule changes that specifically address attorney conduct that delays litigation. While it may be too late for this case, it may be advisable to consider requesting appointment to the Commercial Division in the future to take advantage of these rules.

Rule 3.2 of the NYRPC addresses delays and the prolonging of litigation: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." This rule does not have an equivalent precursor in New York's former Disciplinary Rules and its application has not been cited in many published decisions. In *In re Gluck*, the Eastern District of New York referenced a Rule 3.2 violation for an attorney's failure to prosecute multiple actions. (*See In re Gluck*, 114 F. Supp. 3d 57 (E.D.N.Y. 2015)). However, this was one of a number of violations in an attorney disciplinary action including the disregard of 25 court orders in 11 separate actions (*id.*). Rule 3.2 is also cross-referenced in the definition of "frivolous" conduct found in Rule 3.1(b)(2) of the NYRPC: "A lawyer's conduct is 'frivolous' for purposes of this Rule if . . . the conduct has no reasonable purpose other than to delay the resolution of litigation in violation of Rule 3.2, or serves merely to harass or maliciously injure another."

Rule 130 of the Chief Administrative Judge similarly addresses frivolous conduct taken primarily to delay the resolution of litigation. Under 22 N.Y.C.R.R. § 130-1.1(c)(2), "conduct is frivolous if . . . it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." But the rub is that getting sanctions is not an easy matter. An earlier *Forum* discussed the limitations of § 130-1 in a case where an adversary did not inform counsel of information that resulted in additional litigation costs. (*See* Vincent J. Syracuse

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 email to journal@nysba.org.**

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& Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., July/August 2013, p. 47–49).

We believe that there is a strong argument under Rules 3.1(b)(2), 3.2, and 130-1.1(c)(2) that a late night e-filing opposition on the eve of oral argument, and a document dump at the return date for oral argument, without warning, were done for no other purpose than to delay resolution of the motions. While this is frivolous conduct, the paucity of cases involving Rule 3.2 suggests that courts are generally loathe to grant sanctions except when faced with egregious circumstances. Therefore, whether you are able to obtain relief for your adversary's conduct here will depend to a certain degree on the judge's discretion and the record you have established before the court.

The Chief Administrative Judge's Rules include provisions regarding the failure to comply with discovery orders and the failure of counsel with knowledge of the case to appear. Under 22 N.Y.C.R.R. § 130-2.1(a),

> the court, in its discretion, may impose financial sanctions or, in addition to or in lieu of imposing sanctions, may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, upon any attorney who, without good cause, fails to appear at a time and place scheduled for an action or proceeding to be heard before a designated court.

One of the criteria that judges are to consider in determining whether the failure to appear is without good cause, and whether sanctions should be applied, is "whether substitute counsel appeared in court at the time previously scheduled to proffer an explanation of the attorney's nonappearance and whether such substitute counsel was prepared to go forward with the case" (22 N.Y.C.R.R. § 130-2.1(b)(4)). In *Alveranga-Duran v. New Whitehall Apartments, LLC*, 40 A.D.3d 287 (1st Dep't 2007), although the Appellate Division, First Department, reversed the lower court's dismissal of the action, it held that sanctions, to be determined by the lower court, were appropriate pursuant to 22 N.Y.C.R.R. § 130-2 where, among other violations, a *per diem* attorney, with no connection to the plaintiff's counsel's firm, appeared at a conference for the plaintiff without authority to act on behalf of the firm.

While certain actions over a short period may be egregious enough to warrant severe monetary sanctions (*see, e.g.*, *Freidman v. Fayenson*, 41 Misc. 3d 1236(A) (Sup. Ct., N.Y. Co. 2013), *aff'd*, 2016 N.Y. Slip Op. 02944 (1st Dep't 2016)), as a practical matter it is our experience that courts typically follow a "one bite" rule and will not award sanctions for a first time dilatory offense. Courts tend to look at the "broad pattern" of conduct by counsel in determining whether sanctions are appropriate (*see Levy v. Carol Mgt. Corp.*, 260 A.D.2d 27, 33 (1st Dep't 1999); 4A N.Y. Prac. Com. Litig. in New York State Courts § 55:3 (4th ed.)). So our advice is to be smart. Experience teaches that a court may be more inclined to consider sanctioning opposing counsel's dilatory tactics if you can establish a record of a repeated pattern of such tactics. Therefore, if defendant's counsel appears by *per diem* counsel, who has no knowledge of the case or the authority to act, and the court is not inclined to sanction your adversary at that point, you may consider requesting that the judge order defendant's counsel of record to appear at future appearances with the failure to do so resulting in the striking of the answer (*see* 22 N.Y.C.R.R. § 202.27) or monetary sanctions (*see* 22 N.Y.C.R.R. § 130-2.1). At that point if your adversary fails to comply, he has not only violated the Rules of Professional Conduct but a court order and has notice about the consequences of his behavior.

Unless good cause is shown, CPLR 2214(c) prohibits a court from considering motion papers that are not timely filed. However, judges are often reluctant to hold a party in default on a motion where counsel makes last minute submissions and provides explanations along the lines of, "the discovery was voluminous," "my client just got me the documents," or "we had a hard time finding some of the requested documents." However, if you expect a last-minute document dump at oral argument based on your prior experience with counsel's dilatory behavior, you may consider emailing opposing counsel a few days in advance of the oral argument noting that opposition is past due, offer a very brief adjournment if there is a reasonable explanation for the delay, and indicate that you will request sanctions if there is a last-minute submission resulting in an adjournment. In other words, create a record to demonstrate the extent of the problem to the court. If there is no response, this email at oral argument would certainly support your argument that the court should award sanctions under Rule 130-1.1.

Commercial litigation often requires extensive discovery from an opposing party and dealing with non-responsive or tardy counsel can bring a case to a standstill. In breach of fiduciary actions such as yours, this is especially true as the allegations frequently involve concealed actions taken by the other party and you need discovery in order to establish what was hidden from your client. One of the purposes of New York's Commercial Division is to expedite the resolution of commercial matters including breach of fiduciary cases. Although the Commercial Division has had an extensive set of rules that facilitate the expedition of business actions (22 N.Y.C.R.R. § 202.70), many new rules, and changes to existing rules, were recently implemented. In 2012, former Chief Judge Jonathan Lippman created a Task Force on Commercial Litigation in the 21st Century. The Task Force issued a report with proposals to ensure that New York retains its role as the preeminent financial and commercial center of the world. As a result of the Task Force's proposals, a number of Commercial Division Rules were modified or added in order to reduce delay and eliminate unnecessary litigation costs. Some of the Commercial Division rules, includ-

ing recently enacted rules, and a rule still under consideration for approval, are applicable to your situation.

For instance, under Commercial Division Rule 12, "[t]he failure of counsel to appear for a conference may result in a sanction authorized by section 130.2.1 of the Rules of the Chief Administrator or section 202.27, including dismissal, the striking of an answer, an inquest or direction for judgment, or other appropriate sanction" (22 N.Y.C.R.R. § 202.70(g) (Rule 12)). Commercial Division Rule 1(a) requires all counsel that appear be fully familiar with the case and authorized to enter into substantive and procedural agreements on behalf of their clients. (*See* 22 N.Y.C.R.R. § 202.70(g) (Rule 1)(a)). Rule 1(a) also cross-references Rule 12 noting that the failure to appear by counsel with knowledge may be regarded as a default and therefore subject to sanction, dismissal, or striking of answer (*id.*). These rules prevent the appearance of *per diem* attorneys that do not know anything about a case and are unable to act on behalf of the party for which they are appearing. However, in the event a *per diem* attorney does appear without knowledge of the case, the Rule 1(a) violation could result in sanctions.

With respect to discovery disputes, Commercial Division Rule 14 requires counsel to submit letter applications and delineates the procedure for addressing discovery issues through a telephone conference with the court. (*See* 22 N.Y.C.R.R. § 202.70(g) (Rule 14)). This rule permits attorneys who are not satisfied with discovery to address the issue with the court without having to incur the costs of a formal motion or an additional appearance. Often the submission of the discovery letter alone, with notice to the court, will motivate opposing counsel to speed up the production or make them reconsider their reasons for withholding discovery. If the issue is not resolved through the submission of letters alone, a telephone conference with a law clerk or the judge may resolve the issue and possibly result in the judge issuing a discovery order. This can often be an opportunity to convey the dilatory tactics an opponent is using without the burden or expense of a full motion.

One of the recent changes to the Commercial Division Rules was the addition of a preamble that acknowledges the problems caused by dilatory tactics. (*See* Unified Court System Memorandum by the Commercial Division Advisory Counsel, June 27, 2014). Although this amendment did not expand the scope of sanctions already available, it does directly address many of the issues you are facing with your adversary:

> The Commercial Division understands that the businesses, individuals and attorneys who use this Court have expressed their frustration with adversaries who engage in dilatory tactics, fail to appear for hearings or depositions, unduly delay in producing relevant documents, or otherwise cause the other parties in a case to incur unnecessary costs. The Commercial Division will not tolerate such practices. The Commercial Division is mindful of the need to conserve client resources, encourage proportionality in discovery, promote efficient resolution of matters, and increase respect for the integrity of the judicial process (22 N.Y.C.R.R. § 202.70(g) (Preamble)).

The Preamble also refers to Rule 12, and Rule 13(a), regarding adherence to discovery schedules, and notes that "[t]he judges in the Commercial Division will impose appropriate sanctions and other remedies and orders as is warranted by the circumstances" (*id.*). This Preamble is a clear message to practitioners with cases assigned to the Commercial Division that its justices will not condone practices meant to impair the prompt resolution of commercial litigation.

Another recent Commercial Division rule change implemented staggered court appearances as a "mechanism to increase efficiency in the courts and to decrease lawyers' time waiting for a matter to be called by the courts" (22 N.Y.C.R.R. § 202.70(g) (Rule 24)). Pursuant to Rule 24, each oral argument for a motion will be assigned a time slot thereby preventing attorneys from having to wait for a multi-hour calendar call (*see id.*). As this is a new rule which will require the coordination of the schedules of busy judges, attorneys and part clerks, this process will likely take some time to be fully implemented. While the staggered appearances in this rule are only applicable to motions, it is possible that such a procedure could also be applied to compliance conferences in the future in order to similarly decrease waiting time for a conference calendar call and thereby increase attorney efficiency.

Finally, although it is only a proposed rule change, the Commercial Division Advisory Council has proposed a new rule that would permit parties to obtain a written memorialization of resolutions reached at compliance conferences to be presented to the judge to be so-ordered. (*See* Unified Court System Memorandum by the Commercial Division Advisory Counsel, January 14, 2016). The purpose of this proposed rule change is to increase the efficiency of resolving discovery disputes in a more informal setting, such as with a judge's law clerk (*see id.*). Such a rule would provide you with a court order at the conclusion of each compliance conference that the opposing counsel could not ignore. This should result in every appearance being more productive.

Your client's frustration with opposing counsel's dilatory tactics is regrettably all too common. While it may be difficult to convince a judge that any one of your adversaries' transgressions may be sufficient enough to warrant sanctions, the repeated conduct taken to delay the proceedings is a violation of NYRPC Rule 3.2, and may be sanctionable for frivolous conduct pursuant to 22 N.Y.C.R.R. §§ 130, *et seq*. If this case was assigned to the Commercial Division, the additional rules discussed above may further support your argument for sanctions. In the event this case is not before the Commercial Division, in future litigations that meet the criteria for admission,

you may want to consider requesting assignment to the Commercial Division in order to receive the additional discovery benefits intended to encourage the expeditious resolution of commercial actions.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am a senior partner in a small practice that regularly makes court appearances. I am mentoring a talented associate who started to appear in court for the firm, including at oral arguments. She recently was involved in a minor car accident on the way to an oral argument and, as a result, was 15 minutes late for the court appearance. She has appeared in that part before and it usually runs behind with multiple calendar calls. However, as luck would have it, on that morning her motion was the first one called, the judge held her in default, and the case was dismissed. She immediately contacted the opposing counsel who informed her he would only consent to re-calendaring the motion and vacating the default by stipulation if our client paid for his fees for the appearance. The opposing counsel told my associate, "You should have texted me after your accident" and hung up.

We made a motion to vacate the default and re-calendar the motion. At oral argument, the associate profusely apologized to the court for being late to the motion and explained that her delay was a result of the car accident. The judge proceeded to scold her and said, "You young people have no respect for anyone. You should have immediately called the court or your adversary to notify us that you were going to be late." He went on to say, "I reviewed your pleadings anyway and your case doesn't really have any merit. So, Miss, I am denying your motion to vacate the default because you have wasted enough of our time. Think of this as a valuable lesson on how to practice law."

Needless to say, this situation has put me in a difficult predicament. Our long-standing client is furious with me because of the dismissal and the associate is angry because she feels that the judge and opposing counsel were disrespectful to her and treated her unfairly and inappropriately. I think my associate acted reasonably under the circumstances and, as a mentor, I am having a hard time advising her how to get past this unfortunate result. In our discussions, she has said, "If that is what it takes to win in this business, I guess nobody will ever get a pass with me again!" I now have to deal with an expensive appeal that I can't charge to the client, and a disillusioned young attorney.

Should a judge refuse to vacate a dismissal taken where an attorney is only a few minutes late and has a legitimate excuse for his or her tardiness? If I do get the default vacated on appeal, can I move to have the judge removed from the case based on his conduct? If I can't get the judge removed from the case, is there anything I can do to make sure he does not continue to harass my associate? Is there anything I can do about an opposing counsel who is unreasonably refusing to stipulate to vacating the default?

Sincerely,

Distressed Mentor

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Break complex sentences into different sentences and tabulate them.[26] You can tabulate when a sentence has the same introductory language. *Example:* "Seller represents and warrants: (a) . . . (b) . . . (c) . . . ." When tabulating, grammar determines the punctuation. The introductory language should include all words common to each tabulated section and, when joined with the tabulated or listed sentence, must form one complete and parallel sentence.[27]

Use a font that a reader won't notice.[28] Most contracts are single spaced and in nothing smaller than size 12 font.[29] The margins should leave enough space for comments and other markings.[30] Avoid unnecessarily long paragraphs.[31] Long paragraphs not only make agreements harder for opposing parties to understand, but you'll often find yourself struggling to dissect a contract long after you drafted it.[32]

Clarity Through Sentence Structure

Simple sentences will make contracts accessible to all readers.[33] Each sentence has a subject, verb, and object that convey the sentence's essence.[34] *Example:* "The contractor shall build the house in Rochester, New York." This sentence is in the active voice: the "contractor" is the subject, "shall build" is the verb, and "house" is the object. Keep the subject, verb, and object together as closely as possible.[35] Don't cut it up, such as: "Contractor, if it gets paid by Buyer, shall build the house." Instead, write that "If Buyer pays Contractor, Contractor shall build the house."

Don't use the passive voice. Doing so "avoids directly stating who's doing what to whom."[36] Putting that sentence in the passive voice would be: "The house shall be built by Contractor." The passive voice might even drop the active voice's subject, confusing the reader about who will perform the obligation. *Example:* "The house shall be built." Unlike the passive voice, which is "weak, wordy, and often indefinite,"[37] the active voice outlines the parties' responsibilities with clarity.[38] Eliminate every sentence using passive voice. A sentence should be written in the passive voice only if there's a good reason to do so, such as if the party does not know who the actor is or will be.[39]

Ambiguities

A precise contract has no ambiguity.[40] The contract shouldn't have any provision or term that could lead different contracting parties to attach different meanings to it.[41] Your job as a contract drafter is to consider the manner in which drafted language can be ambiguous and to plug the holes.[42] One well-known example of contract ambiguity is the case *Frigaliment Importing Co. v. B.N.S International Sales Corp*.[43] In that case, the dispute arose over the term "chicken." The court found "chicken" ambiguous because the contract did not specify what type of chicken was expected.[44] Frigaliment thought that "chicken" meant a "broiler," while B.N.S. thought that "chicken" meant any type of chicken. As a result of this ambiguity, B.N.S. delivered Frigaliment stewing chickens, which are unsuited for broiling. After Frigaliment received chickens inferior to what it had expected, it sued B.N.S. for breach of contract. This entire dispute could've been avoided had the parties' lawyers included a more precise description of what was expected in the shipment.

A simple, effective way to identify any ambiguities in the contract is to read the document multiple times and consider if others would find the terms ambiguous.[45] It's helpful to have someone without any stake or experience in the matter read the contract; that reader can find ambiguities you missed.[46] A disinterested reader might spot ambiguities that eluded you after you spent so much time drafting the agreement.[47] When you can justify the time and expense, it might also help you to question multiple readers to see whether the contract conveys its intended meaning.[48] These outside readers might include other lawyers at the firm, paralegals, or even the client.

Although the general rule in legal writing is to avoid ambiguities, sometimes the lawyer might choose to use purposely vague terms.[49] Terms or phrases like "good cause," "gross negligence," and "material adverse effect" are useful because the court can interpret them in different ways.[50] This might be a helpful technique if there's a fear that an impasse will occur between the parties. If a lawyer knows that resolving ambiguities will endanger negotiation, it might be beneficial to make these terms vague and have a court decide their meaning later.[51] It's important to avoid confusing these purposely vague terms or phrases with actual ambiguities in the contract, though.[52] Ambiguity allows for a provision to be interpreted multiple ways but is usually unintentional and preventable.[53]

Don't use the passive voice.

Use general terms when the parties need flexibility. Using terms or phrases like "substantially perform" and "properly package," for example, won't create ambiguities but, rather, will provide latitude to the performing parties.

Many drafters also prefer gender-neutral language to masculine or feminine if the author intends to cover both.[54] For example, to accomplish gender neutrality, refer to the transfer of "shares" instead of "his shares" or "his or her shares."[55]

When deciding whether to use ambiguous terms, consider the parol-evidence rule, which provides that "a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing."[56] The parol-evidence rule "prevent[s] a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced to its final written form."[57] Drafters should tread carefully when choosing to write ambiguously or unambiguously. A court that deems a disputed term unambiguous

will use the parol-evidence rule and not consider extrinsic evidence in reading the contract terms.

Conversely, only if there's an ambiguous term or provision and extrinsic evidence might give insight into the drafter's intent may a court consider that extrinsic evidence through contract interpretation. There're benefits and disadvantages of ambiguity versus unambiguity. Just be sure to choose the language that'll serve your client best.

To ensure that these issues in the contract never go to court, you should practice preventive law to cover all your client's bases.[58] The lawyer can attain that goal by asking questions before the contract is signed: "(1) How can I protect my client against a later offer of parol evidence to supplement or contradict the agreement?; (2) What customs and usages of trade may be assumed to be part of the parties' agreement?"[59] It's in your client's interest to ask these questions to assure that you have a final contract that's the parties' complete agreement. When the judge finds that portions of the contract are ambiguous, evidence may be offered to supplement the contract but not contradict its terms.[60] This might or might not be a good thing for your client.

Consider the two following variations of an agreement between a lessor and lessee of a car wash: "Lessee may elect to pay for the water upon such terms and conditions as the parties may mutually agree,"[61] or "Lessee shall pay for the water weekly."[62] In the first example, the agreement is incomplete about the payment term.[63] Consequently, parol evidence may be admissible to show the parties' agreement about the payment.[64] With the second terse provision, the parties are more constrained: "[T]he lessee [can't] introduce evidence to prove that the parties agreed to monthly payments."[65] This evidence would be inadmissible under the parol-evidence rule because it contradicts the final agreement.[66]

- **And/Or Ambiguities**

Lawyers drafting contracts must often decide whether to use "and" or "or" when listing multiple entities in a statement. The first step is to understand the difference between the two words.[67] "And" refers to a set in its totality,[68] while "or" is a choice between members within a set.[69] When drafting a sentence that includes a set of entities, ask whether you intend to include all the entities or just a few from the group. Keep this in mind when determining which word to choose. Also, you might want to mean "A or B, or both." In this situation, don't fall into the lazy trap of using "and/or" in the contract. It might confuse the reader. When you want to show that "and" is several or that "or" is inclusive," don't use "and/or."[70] Consider substituting it with "any" or "one or more."

Be aware of how courts interpret contracts.

Rules of Interpretation

Be aware of how courts interpret contracts. Rules determine the parties' intent when their actual intentions are unknown or disputed.[71] A good drafter should value the rules of interpretation in mind as an important part of the legal landscape that courts and other decision makers will consider when deciding what a contract means.[72] The rules are best understood as guidelines rather than strict rules to help the writer minimize uncertainty in predicting how an agreement will be applied and interpreted.[73] This'll also be important when you're reviewing a contract written by another lawyer. For example, courts will generally construe ambiguous contract terms against the agreement drafter. This rule, known as *contra proferentum*, applies in many jurisdictions only when one contracting party is in a superior bargaining position, usually either as a result of greater experience or the assistance of counsel. When parties are in equal bargaining positions, courts will look to the parties' course of conduct during the contract negotiations and the contract term to determine intent.

Courts also look toward the structure and diction of provisions using rules known as Canons of Construction. *Ejusdem generis*, or "of the same kind," attains the meaning of a word by looking at other words used with it.[74] *Example:* "Consultant shall not operate any vehicles while on the Premises, including [without limitation] sedans, trucks, jeeps or vans."[75] In this example, the meaning of "any vehicles" will be based on what's expressly listed.[76] *Expresio unius est exclusion alterus*, or "the expression of one thing is the exclusion of the other," provides that when something is expressly stated, everything not stated is excluded.[77] *Example:* "Seller shall pay for the costs associated with the Litigation, including each of the following to the extent relating to the Litigation: the fees of Buyer's legal counsel; the costs of reproducing discovery documents; and the costs of filing court papers."[78] In this example, the seller won't have to pay for fees paid to the expert witnesses.

Other rules of interpretation include the preference for finding a right to arbitration, the preference for finding an obligation rather than a condition, and an implied covenant of good faith.[79]

Categories of Language

Each clause in a contract will fall under the following languages: performance, obligations, prohibitions, discretion, declaration, policy, and exception. Below are some tips on how to draft provisions according to the language.

- **Language of Performance**

Language of performance "deals with actions parties [take] . . . by virtue of entering into a contract."[80] Although obligations create a duty for the parties to do something, language of performance accomplishes the act itself. The simple present tense or the word "hereby" signals performance language.[81] There's no need to use "shall" in language-of-performance

provisions. Language of performance should always be in the active voice.

Take the sentence, "Licensor hereby grants to the Licensee a non-exclusive worldwide license to use the Product."[82] Without the word "hereby," the sentence is still one of performance language. This sentence gives the licensee the right to use the product because the parties entered into the contract. By contrast, take the sentence "Licensor shall grant to Licensee a non-exclusive worldwide license to use the Product."[83] This indicates that the licensor should take an action before the licensee has the right to use the product. Using a simple present verb or the word "hereby" ensures that the contract itself conveys a right.

- **Language of Obligation**

Obligations and prohibitions address what a contract party must do or is forbidden to do under the contract.[84] Use "shall" for obligations and "shall not" for prohibitions.[85] Don't use "will." "Will" conveys futurity or possibility.[86]

Save "must" for conditions. To ensure that you're using the proper word, substitute "shall" for "hereby has a duty to" and "shall not" for "hereby has a duty not to." Don't use "is entitled to."[87] This phrase is "analogous to provisions in the passive voice."[88] It can create an ambiguity about the "by-agent" and is also wordy.[89] Instead of using "is entitled to," use language indicating which party owes the duty.[90]

- **Discretionary Language**

Discretionary language deals with what a party is permitted to do under a contract.[91] It's often used to create an exception to a prohibition. *Example:* "Larry shall not go to the movies this week; except that Larry may go to the movies on Wednesday this week." The word "may" here indicates an exception to the prohibition against going to the movies this week.[92] Additionally, the word "may" can be used to convey what a party is entitled or permitted to do.[93] Generally, it's unwise to use discretionary language if the action you're permitting the other party to do isn't otherwise prohibited. This would give the opposing party a contractual right from thin air. Because "may" can be interpreted in different ways, try substituting "may" for "is permitted/entitled to," and use "except" for exceptions.

- **Language of Exception and Subordination**

Language of exception and subordination includes words or phrases like "except," "subject to," "notwithstanding," and "except as otherwise provided in."[94] These words and phrases indicate that a particular action or item isn't included in the contract. Exceptions may be localized or broad.[95] Examples of broad exceptions: "except as otherwise permitted under this agreement" and "except as the parties have otherwise agreed or might otherwise agree."[96] An example of a localized exception is "subject to this section." Take a localized approach to exceptions.[97]

- **Language of Policy**

Language of policy is necessary to define rules.[98] There're two different types of policy language.[99] The first is "language that states the rules governing a given thing, event, or circumstance."[100] *Example:* "Any attempted transfer in contravention of Section 2.1 will be void." The second is language addressing the "scope, meaning, or duration" of a contract or provision.[101] *Example:* "This agreement terminates on December 31, 2013, at 5:00 p.m. Plattsburgh, New York, time." These provisions are used to convey definitions, rules of construction, contract interpretation, and procedures for a court or an arbitrator to enforce a contract. Use the present tense for policies that apply to the effective date of the contract and "will" for policies relating to future events that might or might not take place.[102] Make sure not to use "*shall*" for rhetorical emphasis when describing the rules of the game. Never write something like "'Property Bill' shall mean the Property Bill of 1997, as amended." That would be an attempt to obligate the Property Bill to do something. A bill can't do anything. It's an inanimate object.

- **Language of Declaration**

The language of declaration is used for statements of fact, or declarations, to which the parties agree. It's akin to a stipulated fact in a lawsuit.[103] A statement like "The purchase price is $500,000" is a declaration.

The language can be divided into representations and warranties as well as acknowledgements.[104] Representations and warranties using language of declaration are assertions of truths that induce the other party to enter into a contract. Acknowledgements using language of declaration are statements that a party accepts as true. Acknowledgements align intentions and serve as an estoppel on both parties. *Example:* "ABC Co. acknowledges that XYZ Co. pays its workers in bars of chocolate rather than in generally recognized currency."

- **Conditional Language**

Conditional language modifies "language of obligation, of discretion, of prohibition, and of policy."[105] Three components make up a condition: a conditional clause, a subordinator, and a matrix clause.[106] The conditional clause expresses the direct condition.[107] The subordinator describes the relationship between the conditional and matrix clauses. The most common subordinator terms are "as long as," "until," and "unless." The matrix clause is the consequence of fulfilling the condition in the conditional clause.[108] Let's look at the following conditional sentence: "The law student shall stay at school and work this evening unless the test is not tomorrow." The conditional clause is "the test is not tomorrow," the subordinator is "unless," and the matrix clause is "the law student shall stay at school and work."

A conditional sentence controls the flow of other contract language. It's important not to use "shall" in the conditional clause; "shall" indicates an obligation, not a condition. Additionally, the word "if" is a "binary

concept, [meaning that] the language in the matrix clause will apply to its full extent if the language in the conditional clause is true."[109] On the other hand, the phrase "to the extent that" is a "sliding-scale concept, [meaning that] the language in the matrix clause will apply to varying degrees."[110] An example of what not to do: "To the extent that the Company is a public corporation, Company shall file all applicable reports required by the Securities and Exchange Commission." The phrase "provided that" should be avoided when creating a condition: It can be construed as an exception, a limitation, or a condition.[111]

To recap, here're a few quick tips to remember when drafting a contract: Unambiguous is better than ambiguous, concision is better than redundancy, predictability is better than uncertainty, plain English is better than legal jargon, precision is better than vagueness, and consistency is better than inconsistency. ■

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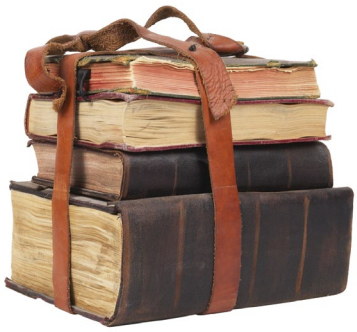

Making Offers No One Can Refuse: Effective Contract Drafting — Part 5

In the last issue of this five-part series, the *Legal Writer* discussed the different parts of the contract. In our final column on contract drafting, we discuss how to write contracts clearly and unambiguously.

Writing Contracts Clearly and Unambiguously

Aside from knowing the different parts of a contract, it's important to learn how to write contract provisions. Using plain English in contract drafting prevents future litigation. Contract provisions are made clear and unambiguous by omitting legalese, using readable and legible formatting, maintaining cogent sentence structure, avoiding ambiguous provisions, and deconstructing complex provisions.[1]

Legalese

Difficult, convoluted language will confuse non-lawyers who read the contract. Drafters sacrifice clarity if they use legalese. Legalese is arcane and formal language.[2] *Examples:* "whereas," "hereinafter," "hereby," "abovementioned," "therefore," "witnesseth."[3] Legalese is deceptive; it makes provisions look precise when they're unclear.[4] Even words like "herein" create ambiguities.[5] Writing ambiguous archaisms "into contracts is client abuse, colleague abuse, judge abuse, and bad public service."[6] Avoid legalese entirely. Contract drafting is about regulating conduct and stating facts. Avoid "words associated primarily with expository, narrative, and persuasive prose — words such as *therefore, because* . . . and *furthermore*."[7]

Using plain language is the most effective way to draft a clear contract. Plain language means language that's "clear and effective."[8] It's harder to simplify an idea than to complicate it.[9] Although time-consuming to formulate, your use of plain language will enhance all readers' comprehension.[10] Additionally, simple language reflects values of "honesty, integrity, and trustworthiness."[11] These values will help opposing parties feel comfortable negotiating with you.[12]

Some contracts use "couplets" and "triplets," which are often redundancies: "acknowledge and confess," "aid and abet," "by and between," "all and every," "convey and transfer," and "final and conclusive."[13] These should be cut down to one word, unless there're substantive differences in the two words, such as "represent and warrant."[14]

Avoid pretentious words. Replace them with ordinary words that aren't verbose.[15] "By reason of," for example, can be replaced with "because."[16] Other examples, where the first phrase is pretentious and could be replaced by a second, more appropriate word, are "effectuate" — "carry out"; "endeavor" — "try"; "consequence" — "result"; "for the duration of" — "during"; and "notwithstanding the foregoing" — "despite."[17]

Only a small part of a contract needs technical terms.[18] One way to use technical terms is through defined terms, a common drafting technique to enhance clarity. Most contracts contain provisions that define a term in the context of the contract.[19] Don't use terms of art in a contract without defining them first. Terms of art are "[a] word or phrase having specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts."[20] The parties involved and other readers of the contract might not be familiar with these terms.[21] Some examples of terms of art: "right of first refusal," "res ipsa loquitur," and "after-tax earnings." Don't assume that your reader knows what these terms mean. If additional information is required, attach it as an exhibit. Consistency is key. The words "contract" and "agreement" are interchangeable: They mean the same thing. Whichever word you choose to use, use it consistently throughout your document.[22]

Using plain language is the most effective way to draft a clear contract.

Clarity Through Format

To ensure usability and clarity, contracts require an "artist's touch."[23] Even if the substance of a contract is perfect, "[t]he formatting of a provision can influence the outcome of a dispute."[24] A clear and well-organized contract allows the parties, and a court as well, to understand the document and quickly find all relevant information. Some writing techniques help achieve contract clarity: short sentences, active voice, logical organization, consistency, legible formatting, and descriptive headers.[25]

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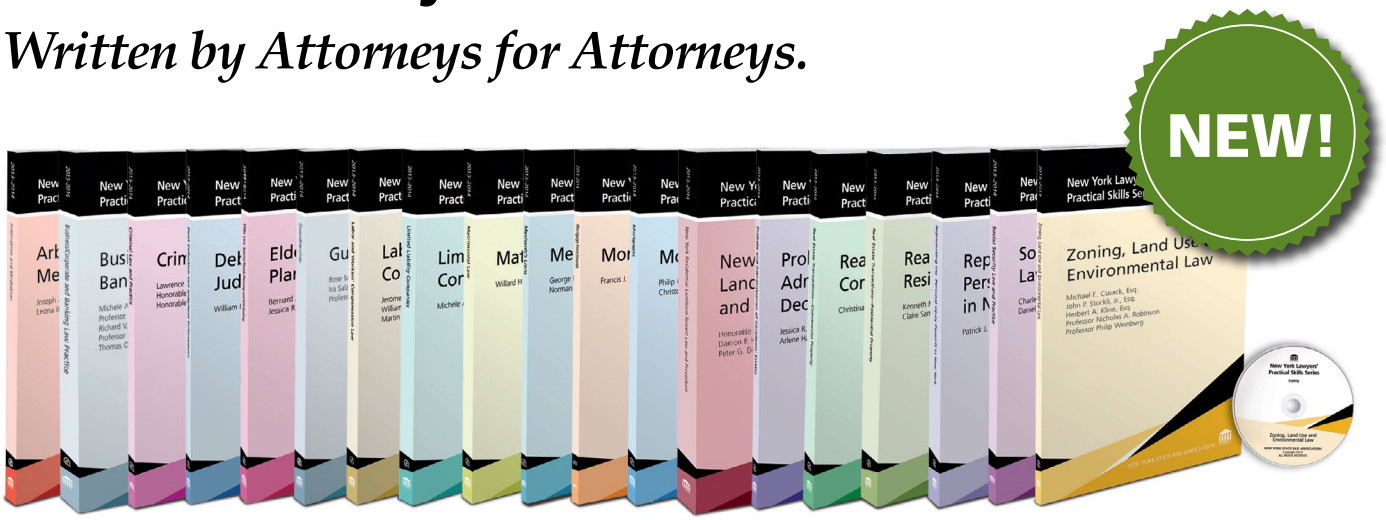

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