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Highlights from Today's Game:
Trademark Coverage on the Offensive

By Christopher Psihoules and Jennette Wiser

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EUGENE C. GERHART
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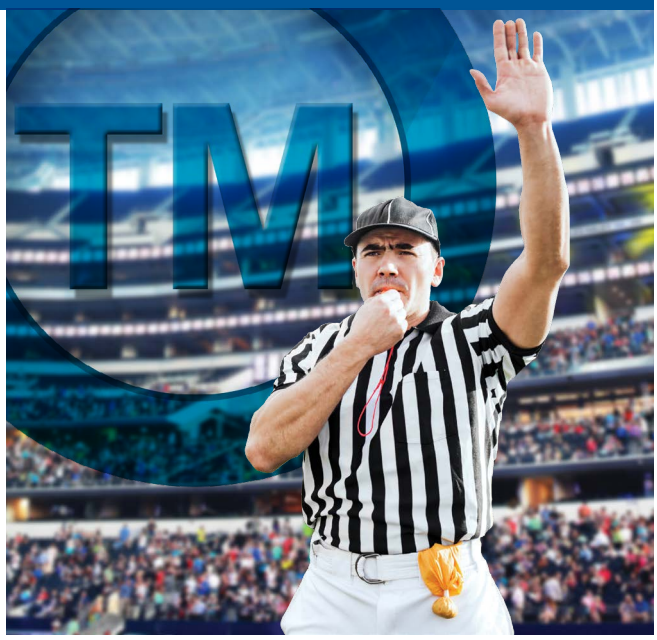

DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media.

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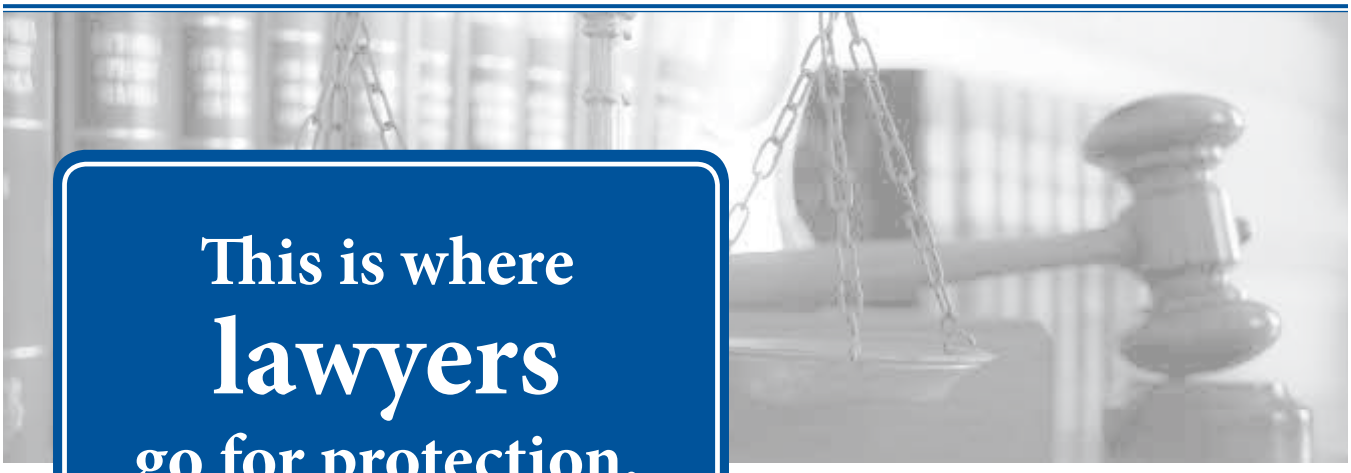

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CLAIRE P. GUTEKUNST

Diversity and Inclusion Are Everyone's Business

"We have no hope of solving our problems without harnessing the diversity, the energy, and the creativity of all our people."

– Roger Wilkins (civil rights leader, history professor and journalist)

Why should *every* bar association and *every* attorney care about and work to increase diversity and inclusion in the legal profession? In our increasingly diverse nation and interconnected world, diverse lawyers and judges enhance public confidence in the fairness of our legal system and the rule of law. People of diverse backgrounds bring unique perspectives and experiences to bear on legal and societal issues, enriching the discussion for everyone. Recent research[1] confirms that having a diverse group improves the way everyone in the group thinks – by disrupting conformity and enhancing deliberations – resulting in objectively better decisions. So increasing diversity and inclusion is not only the right thing to do, it is the smart thing to do.

NYSBA has made strides in increasing both diversity and inclusion. We have adopted a diversity policy; established seats for racially and ethnically diverse attorneys on our governing House of Delegates and our Executive Committee; created Committees on Diversity and Inclusion and LGBT People and the Law to complement our longstanding Committees on Women in the Law, Civil Rights and Disability Rights, which sponsor programs and awards targeting professionals in diverse groups; conducted and published studies on diversity in the legal profession in New York and in our Association; increased the number of diverse leaders and members throughout our Association; sponsored an annual Celebrating Diversity in the Profession Reception and Diversity Trailblazer Award; submitted amicus briefs to the U.S. Supreme Court supporting diversity in college admissions to increase diversity in law schools; and instituted pipeline projects and internships to encourage minority middle and high school students to aspire to a legal career and to assist minority law school students to succeed in the profession.

But we can and must do more. I have created a Subcommittee on Diversity and Inclusion in our Membership Committee, to help ensure that our recruitment and retention efforts focus on diverse attorneys. Our Committees on CLE and Diversity and Inclusion are collaborating to develop lists of diverse attorneys in various practice areas, as a resource to ensure diverse speakers and authors are included in all NYSBA programs and publications. We will be collaborating with and supporting women's and minority bar associations around the state. To foster camaraderie and collaboration among women leaders of our Association and women's, minority and local bar associations as well as women judges, in the last year I have hosted gatherings of women leaders at my home and in Rochester and Albany and plan to do so again this year.

Please help make our Association more diverse and inclusive by seeking out and welcoming diverse law students, attorneys and judges – at every meeting and bar event you attend – to join our Association and participate fully in our activities. If each member invites even one diverse person to participate, we will make measurable progress and we all will benefit.

Diversity and inclusion are essential to our profession as well as to our Association. The number of minorities and women in many legal workplaces in New York, including the bench, has grown. Encouraged by corporations' increasing demands that diverse attorneys handle their work, law firms hire women and minority attorneys in significant numbers. But challenges remain. The number of minority attorneys and women leaving law firms remains disturbingly high and the percentages achieving equity partnership and leadership roles in firms and

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corporate law departments remain disturbingly low.

A principal reason for these leaks in the pipeline to leadership is the too-frequent failure of individual members of the dominant group within most law firms – white men – *personally* to address the challenges of retaining and promoting diverse attorneys, by mentoring and supporting them, including them in informal networks and assisting them in developing business. Although sympathetic to the cause of diversity, too many within large firms rely on a diversity director and formal diversity programs; too many in firms of all sizes do not *personally* take the important day-to-day actions needed to combat unconscious bias and make their firms truly inclusive.

I challenge *you* to renew your personal commitment to hire and support diverse attorneys in your own workplace, every day. We all benefit by making diversity and inclusion – in our Association and in the profession – everyone's business. ■

1. http://www.nytimes.com/2015/12/09/opinion/diversity-makes-you-brighter.html?_r=0.

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(1:00 p.m. – 4:00 p.m., live & webcast)
July 12 New York City

U.S. Supreme Court & N.Y. Court of Appeals Round Up 2016
(12:00 p.m. – 2:30 p.m., live & webcast)
July 20 Albany

Bridging the Gap – Summer 2016
August 9–10 Albany, Buffalo, Washington (video conference)
New York City (live)

Legal Ethics in the Digital Age
(9:00 a.m. – 1:00 p.m., live & webcast)
September 29 New York City

Henry Miller – The Trial
October 5 Long Island
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November 29 New York City

Abstracts and Title Issues
(9:00 a.m. – 1 p.m., live & webcast)
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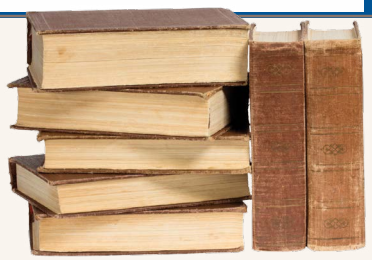

"Moments in History" is an occasional sidebar in the Journal, *which features people and events in legal history.*

Moments in History

The Irish Copyright War

King Diarmait mac Gerbaill of Tara issued the first known ruling of what today we call copyright infringement. The dispute arose after Colm Cille, an Irish monk later known as St. Columba, surreptitiously copied a psalter, or book of psalms, while visiting Abbot Finnian of Moville. Columba was widely respected as a missionary, collector of manuscripts, and prolific scribe who often copied the works of scholars he visited. When Finnian learned what he had done, he demanded the copy, insisting it belonged to him as much as the original. Columba refused.

The argument went before the king, who ruled for Finnian. Diarmait's decision is best known for the aphorism it coined: "To every cow her calf, so to every book its copy." But the ruling also presaged modern copyright laws and the limits on copying original works.

The ruling stunned and angered Columba, who left Tara and enlisted the aid of his clan. They returned with him in 561 to launch the Battle of Cul Dreimhne, also known as the Battle of the Book, which deposed the king and left 3,000 dead.

The Royal Irish Academy in Dublin holds what is believed to be Columba's copy of the psalter. The academy describes the book's 58 leaves, covering psalms 31 to 106, as "the oldest extant Irish manuscript of the Psalter and the earliest example of Irish writing."

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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Highlights from Today's Game:

Trademark Coverage on the Offensive

By Christopher Psihoules and Jennette Wiser

This article is adapted from one that appeared in the Spring/Summer 2016 edition of Inside, *a publication of the Corporate Counsel Section of the New York State Bar Association. To join the Corporate Counsel Section, visit www.nysba.org/Sections/Corporate_Counsel/Corporate_Counsel_Section.html.*

Pre-Game Warm-ups

Over time, many sports teams and franchises have developed distinctive brands, logos, slogans and other trademarks identifiable to fans around the globe. This article examines the lengths sports teams have gone to protect their right to the exclusive use of those marks. The ability of a sports team to prevent someone else from using a similar or identical logo or slogan is largely dependent on the reputation and goodwill connected to the mark. As such, teams began to treat their marks as property rights, and now often require licensing agreements for their marks to be used. In 2014, according to the International Licensing Industry Merchandisers' Association,[1] the sports and collegiate licensing category of the number of registered trademarks grew for the fourth consecutive year with $907 million in royalty revenue on retail sales of $16.6 billion.[2]

A trademark or service mark includes any word, name, symbol or device, or any combination thereof,

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used by a person, or which a person has a bona fide intention to use, in commerce to identify and distinguish his or her goods from others and to indicate the source of such goods.[3] In the United States, trademark protection afforded to sports teams can include anything from logos and slogans, to mascots and colors, and even sounds.[4] In order to gain protection as a trademark, a mark must be distinctive and capable of identifying the source of a particular good. Arbitrary or fanciful marks and suggestive marks are considered inherently distinctive and are given a high degree of protection.[5] Descriptive marks require "secondary meaning" for protection, which is acquired when consumers primarily associate the mark with a particular source, rather than the underlying product or service.[6] Generic marks (marks that describe the general category to which the underlying product or service belongs) are not protected under trademark law.[7] Registered ownership of valid trademarks gives sports teams the ability to police and enforce such marks and sue for trademark infringement.[8] The standard for trademark infringement is "likelihood of confusion," i.e., the use of a trademark in connection with the sale of a good or service constitutes infringement, if it is likely to cause consumer confusion as to the source of those goods or services or as to the sponsorship or approval of such goods or services.[9]

Registered ownership of valid trademarks gives sports teams the ability to police and enforce such marks and sue for trademark infringement.

The Lineup

Trademark protection was not a part of the sports world until 1975, when the Fifth Circuit Court of Appeals discussed protection of professional hockey teams' symbols or logos in *Boston Prof'l Hockey Ass'n v. Dall. Cap & Emblem Mfg., Inc*.[10] In *Boston Prof'l Hockey Ass'n*, Plaintiffs brought an action to enjoin defendant from manufacturing and selling embroidered emblems that depicted their teams' symbols.[11] Plaintiffs asserted a cause of action for common law unfair competition and sought relief under 15 U.S.C.S. §§ 1114 and 1125 of the Lanham Act.[12] The district court denied Lanham Act relief and granted limited relief for unfair competition, requiring only that defendant place on the emblems or the packaging a notice that they were not authorized by plaintiffs.[13] The issue on appeal was whether the unauthorized, intentional duplication of a professional hockey team's symbol on an embroidered emblem, to be sold to the public as a patch for attachment to clothing, violated any legal right of the team to the exclusive use of that symbol.[14] The court reversed and remanded the district court's decision, holding that the likelihood of confusion requirement was met when a manufacturer other than the team used the mark because the public was likely to identify the mark as being associated with the team.[15]

Since *Boston Prof'l Hockey Ass'n*, other courts have considered the protection of various types of trademarks for sports teams. This article discusses some of these cases and comments on the importance and benefits of trademark protection in the sports industry.

The Game

First Quarter – Slogans, Cheers and Chants

As discussed, *Boston Prof'l Hockey Ass'n* established trademark protection in team logos and symbols. Since that case, teams have broadened the protection and enforcement of their trademark rights to include slogans and cheers or chants distinctly recognizable with the team. One widely talked about dispute involved the protection of the New Orleans Saints ("Saints") "Who Dat?" cheer. "Who dat say dey gonna beat dem Saints?" generally shortened to "Who Dat?" has been a traditional chant at the Saints' Superdome since the 1980s. The National Football League (NFL) alleged that the sale of unlicensed shirts featuring the cheer by local T-shirt vendors led fans to believe that the Saints endorsed the products. The origin of the chant is unclear, with some suggesting that it has been around for over 150 years, appearing first in minstrel and vaudeville shows and later performed in a Marx Brothers number and a 1938 MGM cartoon called "Swing Wedding."[16] Spectators believed that the saying belongs to the city and the people of New Orleans and public officials proclaimed that "Who Dat?" is in the public domain.[17] The T-shirt vendors ultimately settled with the NFL, but the dispute raised a question of how far sports teams will go to protect and enforce their trademark rights.[18]

More recently, Texas A&M University ("Texas A&M") sued the Indianapolis Colts ("Colts") for trademark infringement over the "12th Man" slogan.[19] The "12th Man" refers to the fans at a football game as the league allows only 11 players (per team) on the field at one time. The slogan suggests that the fans are a part of and contribute to the game. Texas A&M alleged in its complaint that it has used the mark "12th Man" since 1922 and has "expended considerable effort and resources in offering a wide range of quality products and services under the [mark]."[20] In furtherance of its efforts, Texas A&M filed for and obtained U.S. trademark registrations in the

mark, i.e., U.S. Trademark Registration Nos. 1,612,053; 1,948,306; and 3,354,769.[21]

According to the complaint, the Colts began using the "12th Man" mark in 2006 but stopped its use in 2008 after receiving a cease and desist letter from and engaging in communications with Texas A&M.[22] However, in 2012, Texas A&M became aware that the Colts had started using the mark again.[23] Subsequently, Texas A&M sent another cease and desist letter to which the Colts never responded.[24] The Colts continued to use the mark in 2015 in connection with the advertising and promotion of single-game tickets, as well as merchandise made available through the Colts' website and authorized licensees.[25]

This is not the first time that Texas A&M has asserted its rights to the "12th Man" against another sports team. In 2006, as a result of a dispute, Texas A&M granted a license to Football Northwest, LLC for the Seattle Seahawks ("Seahawks") use of the mark.[26] It is worth noting that the Seahawks have registered a number of variations of the mark "12th Man," including but not limited to "12," "The 12's" and "Bring on the 12," and recently brought a lawsuit against an apparel company for infringement.[27]

Apart from team emblems and logos, slogans and cheers have become synonymous with certain sports teams. Actions like *Texas A&M University* are likely to continue as teams realize the potential benefits and profits to be gained by protecting and enforcing such slogans and cheers or chants.

Second Quarter – Mascots

Courts have also held team mascots protectable under trademark law. In *Univ. of Ga. Ath. Ass'n v. Laite*,[28] the Court affirmed the district court's finding of a likelihood of confusion between the University of Georgia Bulldog ("Georgia Bulldog") and the portrayal of an English bulldog wearing a red sweater emblazoned with a black "G" on a red-and-black can of beer called "Battlin' Bulldog."[29] The University of Georgia Athletic Association ("UGAA") brought an action for the unauthorized use of the Georgia Bulldog against the beer wholesaler, Bill Laite Distributing Co. ("Laite"), for trademark infringement and false designation of origin under the Lanham Act and other related state law claims.[30] The district court ruled in favor of UGAA granting a permanent injunction against the beer distributor.[31] Laite argued on appeal that the Georgia Bulldog is not a valid trademark or service mark because it is a descriptive mark and lacks secondary meaning.[32] The Appellate Court found that the Georgia Bulldog was not a descriptive mark and was, at best, suggestive, if not arbitrary and therefore, UGAA was not required to prove secondary meaning.[33] Further, the Appellate Court found that the sale of products depicting the "Battlin' Bulldog" created a likelihood of confusion.[34] The combination of similar design elements on the "Battlin' Bulldog," such as the colors and the monogram on the sweater, led the Appellate Court to find the marks to be alike.[35] The Eleventh Circuit concluded that while "Laite devised a clever entrepreneurial 'game plan,' [it] failed to take into account the strength of UGAA's mark and the tenacity with which UGAA was willing to defend that mark. Like the University of Georgia's famed 'Junkyard Dog' defense, UGAA was able to hold its opponent to little or no gain."[36]

In a similar case also involving a Bulldog mascot, Corporation of Gonzaga University ("Gonzaga") brought an action against Pendleton Enterprises, LLC ("Pendleton") alleging trademark infringement and unfair competition under the Lanham Act,[37] in connection with its Bulldog mascot wearing a Gonzaga jersey and spike collar used in conjunction with the identification of Pendleton's radio station and bar services.[38] In its decision, the Court discussed Gonzaga's well-known basketball team, noting that "[i]n producing and promoting the sport of NCAA basketball, Gonzaga adopted and widely publicized [its name and nickname] and team symbol, Spike, a bulldog who wears a Gonzaga jersey."[39] Gonzaga argued that Pendleton's use of its marks (including its mascot) in connection with its business and services was intended to cause the consuming public to recognize the marks as symbols of Gonzaga and even cited to specific instances of actual consumer confusion.[40] The Court agreed with Gonzaga and held that a rational

factfinder could conclude that Pendleton's use of the Gonzaga mascot, along with the other Gonzaga marks, is likely to cause confusion, mistake or to deceive as to the affiliation or association of Gonzaga with Pendleton's business.[41]

As demonstrated in *Univ. of Ga. Ath. Ass'n* and *Corp. of Gonzaga Univ.*, while mascots are not traditionally thought of as trademarks, in some instances their association with a team and distinctiveness will afford them trademark protection.

the apparel and the universities and thus created a likelihood of confusion.[52]

Bd. of Supervisors for La. State Univ. set a precedent, which supports a team's exclusive right to license its distinct and respective colors for the production and sale of merchandise. As a result, teams and schools have taken steps to protect their associated colors. For example, Boise State University registered the color blue as applied to artificial turf in a stadium with the U.S. Trademark Office.[53]

Sports teams and franchises have taken, and continue to take, aggressive measures to insure their marks are protected.

Third Quarter – Colors

Perhaps as unconventional is when a distinct set of colors is associated with a team and afforded protection by the courts.[42] In *Bd. of Supervisors for La. State Univ. v. Smack Apparel Co.*,[43] the Fifth Circuit upheld the district court's finding that a T-shirt maker who used school color schemes in combination with specific facts and indicia about the school infringed on the schools' trademark rights to those color schemes, even if neither the school logo nor other marks appeared on the T-shirt.[44] *Smack Apparel Co.* marked the first time a court had analyzed the trademark rights of a color scheme separate and apart from an accompanying word mark or logo.

In *Smack Apparel Co.*, Louisiana State University, the University of Oklahoma, Ohio State University, the University of Southern California, and the schools' licensing agent brought a trademark infringement action against Smack Apparel Company ("Smack").[45] The suit alleged that Smack's T-shirts, bearing the distinctive color schemes of various universities and professional sports teams together with sarcastic phrases related to the team, created a likelihood of confusion among customers.[46] All of Smack's products were unlicensed.[47]

Plaintiffs alleged that Smack's products were identical to, and competed directly with, Plaintiffs' officially licensed products. The Eastern District of Louisiana agreed, granting summary judgment to the Plaintiffs.[48] On appeal, the Fifth Circuit noted that for an unregistered mark to obtain protectability, the mark must be "capable of distinguishing the applicant's goods from those of others."[49] The Court applied the multi-factor test set forth in *Pebble Beach Co. Tour 18 I Ltd*.[50] to determine that the combination of color scheme and school indicia had developed a secondary meaning.[51] Having found secondary meaning, the Court turned to the likelihood of confusion analysis, and held that the Smack products essentially created a link in the consumer's mind between

Fourth Quarter – Sounds

Even sounds, like the NBC chimes, the MGM roaring lion, and the Harlem Globetrotter's "Sweet Georgia Brown" can be afforded trademark protection.[54] Registration of a sound mark is rare and requires a high level of distinction and recognition with its source. The Trademark Trial and Appeal Board has commented that

> a sound mark depends upon aural perception of the listener which may be as fleeting as the sound itself unless, of course, the sound is so inherently different or distinctive that it attaches to the subliminal mind of the listener to be awakened when heard and to be associated with the source or event with which it is struck. Thus, a distinction must be made between unique, different, or distinctive sounds and those that resemble or imitate "commonplace" sounds or those to which listeners have been exposed under different circumstances.[55]

University of Arkansas successfully registered a sound mark for the "Hog Call" Razorback chant in connection with "providing collegiate athletic and sporting events."[56] Arkansas described its mark as "a collegiate cheer which consists of the following words: Wooooooooo. Pig. Sooie! Wooooooooo. Pig. Sooie! Wooooooooo. Pig. Sooie! Razorbacks!"[57] While the registrations of sound marks remain uncommon, Arkansas' success may lead to other universities and teams seeking protection for, and enforcing, their sensory marks.

Post-Game Report

As evidenced by the above cases, sports teams and franchises have taken, and continue to take, aggressive measures to insure their marks are protected. Teams have capitalized on their trademarks by charging considerable fees to use such marks. Licensing revenue, income earned by a company for allowing its intellectual property to be used by another company, is a significant source of revenue for many sports teams, as teams grant permis-

sion to third parties to use their marks on things such as apparel, bags, accessories, video games and a number of other products. Even though the sports licensing business is a $16-plus billion industry, many believe the business has been mature for quite some time.[58] As is the case with sports business in today's world, evolution is inevitable. One such transformation came in 2015, when the NFL made a seven-figure equity investment in Outerstuff, one of its largest apparel licensees, creating one of the first vertical business models for the league.[59]

Whether the future of sports licensing lies in leagues making direct investments into the companies that license their marks, or the next revenue-generating idea, it is evident that licensing will continue to progress. "The industry is changing and leagues are looking for new ways to do business," said Outerstuff CEO Sol Werdiger.[60] As the licensing market continues to find ways to expand, so too will teams continue to look for further legal protection in their marks from the courts. ■

1. The Int'l Licensing Indus. Merchandisers' Ass'n, www.licensing.org.
2. Darren Heitner, *Sports Licensing Soars to $698 Million in Royalty Revenue*, Forbes (June 17, 2014), http://www.forbes.com/sites/darrenheitner/2014/06/17/sports-licensing-soars-to-698-million-in-royalty-revenue/#67d66ece41b7.
3. 15 U.S.C. § 1127 (2006).
4. *See* Sport and Branding, World Intellectual Prop. Org., http://www.wipo.int/ip-sport/en/branding.html.
5. *See Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 791 (5th Cir. 1983).
6. *Id*. at 790–91.
7. *Id*.
8. *See* 15 U.S.C. §§ 1114–1125 (2005).
9. *See 1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400, 406–07 (2d Cir. 2005).
10. 510 F.2d 1004 (5th Cir. 1975).
11. *Boston Prof'l Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004, 1008 (5th Cir. 1975).
12. *Id*. at 1009.
13. *Id*.
14. *Id*. at 1008.
15. *Id*. at 1012.
16. *NFL Claims Trademark Infringement*, Associated Press (Jan. 30, 2010), http://espn.go.com/nfl/playoffs/2009/news/story?id=4871697.
17. *Id*.
18. *Deals resolve 'Who Dat?' battle*, Associated Press (Oct. 29, 2012), http://espn.go.com/nfl/story/_/id/8569838/who-dat-trademark-claims-settled-louisiana; *see also Who Dat Yat Chat, LLC v. Who Dat, Inc.*, Civ. A. Nos. 10–1333, 10–2296, 2012 U.S. Dist. LEXIS 46733, at *2-3 (E.D. La. 2012) ("The [ ] lawsuit primarily concerns the claim of trademark rights in the phrase 'Who Dat.' The phrase is in popular usage in Louisiana as an expression of community pride, sports enthusiasm, and other notions of social significance. The subject of this lawsuit is well-known. In early 2010, in conjunction with New Orleans Saints Superbowl mania, sales of merchandise with the phrase 'Who Dat' exploded in Louisiana. Big business took notice. The NFL sent cease-and-desist letters to local retailers, although it eventually backed off its position. However, the NFL has settled, leaving the case in a somewhat uncertain procedural posture that merits a brief review before turning to the merits.")
19. *Texas A&M Univ. v. Indianapolis Colts Inc.*, case no. 4:15-cv-03331, Dkt. 1 (S.D. Texas 2015).
20. *Id*. at ¶¶ 7–8.
21. *Id*. at ¶ 10.
22. *Id*. at ¶¶ 13–14.
23. *Id*. at ¶ 15.
24. *Id*.
25. *Id*. at ¶¶ 16–17.
26. *Id*. at ¶ 9.
27. *See NFL Properties LLC, et al v. Ace Lineup Athletics, LLC*, Opposition No. 91222972 (TTAB 2015).
28. 756 F.2d 1535, 1536 (11th Cir. 1985).
29. *Univ. of Ga. Ath. Ass'n v. Laite*, 756 F.2d 1535, 1536 (11th Cir. 1985).
30. *Id*. at 1538.
31. *Id*. at 1539.
32. *Id*. at 1540.
33. *Id*. at 1541.
34. *Id*. at 1544.
35. *Id*.
36. *Id*. at 1547.
37. *Corp. of Gonzaga Univ. v. Pendleton Enters., LLC*, 55 F. Supp. 3d 1319, 1321 (E.D. Wash. 2014).
38. *Id*. at 1322–23.
39. *Id*. at 1323.
40. *Id*. at 1323–24.
41. *Id*. at 1330.
42. *See Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 161, 163, 165 (1995) (holding that color alone may be protected as a trademark, "when that color has attained secondary meaning and therefore identifies and distinguishes a particular brand (and thus indicates its 'source')," and that a color may not be protected when it is functional).
43. 550 F.3d 465 (5th Cir. 2008).
44. *Bd. of Supervisors for La. State Univ. v. Smack Apparel Co.*, 550 F.3d 465 (5th Cir. 2008).
45. *Id*. at 473.
46. *Id*.
47. *Id*.
48. *Id*.
49. *Id*. at 475.
50. 115 F.3d 525, 541 (5th Cir. 1998).
51. *Bd. of Supervisors for La. State Univ.*, 550 F.3d at 476–77.
52. *Id*. at 483–84.
53. *See* U.S. Trademark Registration No. 3,707,623.
54. Trademark "Sound Mark" Examples, United States Patent and Trademark Office, http://www.uspto.gov/trademark/soundmarks/trademark-sound-mark-examples; *see generally Oliveira v. Frito-Lay, et al.*, 251 F.3d 56, 61 (2d Cir. 2001) ("For many decades it has been commonplace for merchandising companies to adopt songs, tunes and ditties as marks for their goods or services . . .").
55. *Ride the Ducks, LLC v. Duck Boat Tours, Inc.*, Civ. A. No. 04-CV-5595, 2005 U.S. Dist. LEXIS 4422, at *21 (E.D. Pa. Mar. 21, 2005) (quoting *In re General Electric Broadcasting Company, Inc.*, 199 U.S.P.Q. 560, 563 (Tr. Tr. & App. Bd., Apr. 12, 1978)).
56. *See* SENSORY MARK, Registration No. 4,558,864.
57. *Id*.
58. Darren Heitner, *Sports Licensing Soars to $698 Million in Royalty Revenue*, Forbes (June 17, 2014), http://www.forbes.com/sites/darrenheitner/2014/06/17/sports-licensing-soars-to-698-million-in-royalty-revenue/#67d66ece41b7.
59. Terry Lefton and Daniel Kaplan, *NFL invests in licensed apparel firm*, Sports Business Journal (Feb. 16, 2015), http://www.sportsbusinessdaily.com/Journal/Issues/2015/02/16/Marketing-and-Sponsorship/NFL-Outerstuff.aspx.
60. *Id*.

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On the Audit Trail

Introduction

How many of you have some nagging (or major league) uncertainty about metadata, notwithstanding the fact that you bandy it about in conversation, or even refer to it in court proceedings? With whatever level of understanding of metadata you may have, is it clear to you what metadata contains, or how it can be used in litigation? Well, relief is at hand, in the form of a decision by Justice Daniel J. Doyle of Supreme Court, Monroe County, *Gilbert v. Highland Hosp.*,[1] where disclosure of a medical record's "audit trail" was the subject of motion practice.

Gilbert

In *Gilbert*, plaintiff sought recovery for the wrongful death of Cynthia Gilbert, allegedly as the result of medical malpractice:

> [I]t is alleged that the Defendant hospital was negligent in failing to properly diagnose Cynthia Gilbert and that medical condition subsequently resulted in her death. As alleged in the Complaint, the Plaintiff alleges on November 26, 2013, the decedent presented at the hospital with severe abdominal pain, nausea, and vomiting, and articulated a prior history of bowel obstructions. The decedent was at the hospital for approximately 5 to 6 hours before being discharged with a diagnosis of constipation and without being seen or evaluated by a medical doctor. The next day, the Plaintiff collapsed and died and a subsequent autopsy determined the cause of death was "an intestinal volvulus, which led to a small bowel infarction and perforation of her small intestine," (citation omitted), and that this intestinal volvulus was undiagnosed by the Defendant's agents and employees. As part of the Plaintiff's allegations of negligence, it is alleged that, "Defendant was negligent in failing to have protocols and procedures in place to mandate that a patient presenting to the Emergency Department in the condition that the decedent was in be evaluated by a medical doctor before being discharged."[2]

Plaintiff alleged, *inter alia*, that "the decedent was not seen or evaluated by a medical doctor prior to her discharge."[3] In connection with this claim, Plaintiff sought disclosure of records to establish whether the "Emergency Department Attending Physician ever reviewed the Plaintiff's medical records and plan of care prior to her discharge,"[4] and sought the metadata contained in the patient's electronic medical record when the records produced up to that point in the litigation did not provide relevant information. Specifically, plaintiff sought production of "the audit trail of the decedent's medical records; an audit trail [is] a form of metadata created as a function of the medical provider's computerization of medical records."[5]

The defendant opposed the motion, arguing lack of relevancy, materiality, and necessity, that the request was a "fishing expedition," and that "because the Plaintiff is not arguing that the medical records that have been produced are not authentic, the Plaintiff is not entitled to the audit trail."[6]

Metadata in electronic medical records is not a maybe; it is required by both federal and state law.[7]

Metadata Defined

Justice Doyle explained that "Metadata is, 'secondary information,' not apparent on the face of the document 'that describes an electronic document's characteristics, origins, and usage,'"[8] citing a 2010 Fourth Department decision, *Irwin v. Onondoga County Resource Recovery Agency*.[9]

Irwin was an Article 78 proceeding arising from the partial denial of a FOIA request for certain photographs and any "associated metadata" with respect to those photo-

graphs. Ultimately concluding that some of the withheld photographs were properly subject to disclosure, the Fourth Department ordered the release of the metadata associated with the exchanged photographs, cautioning that the decision was limited to the facts of the case before it, and citing as "informative" a 2009 decision of the Arizona Supreme Court.[10]

Having advised at the outset that "[w]e will provide an extensive definition of the term metadata later in this opinion,"[11] the *Irwin* Court proceeded to do just that:

> Nearly "every electronic document contains metadata" (citation omitted). As earlier referenced, we now set forth a detailed definition of the term metadata for those lacking familiarity with the term. Metadata is "secondary information" not apparent on the face of the document "that describes an electronic document's characteristics, origins, and usage" (citation omitted).
>
> "Some examples of metadata for electronic documents include: a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it). Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Most metadata is generally not visible when a document is printed or when the document is converted to an image file. Metadata can be altered intentionally or inadvertently and can be extracted when native files are converted to image files. Sometimes the metadata can be inaccurate, as when a form document reflects the author as the person who created the template but who did not draft the document. In addition, metadata can come from a variety of sources; it can be created automatically by a computer, supplied by a user, or inferred through a relationship to another document" (citation omitted).
>
> There are three types of metadata, each of which is of a different nature and is described as follows:
>
> "Substantive Metadata
>
> "Substantive metadata, or application metadata, is information created by the software used to create the document, reflecting editing changes or comments, and instructions concerning fonts and spacing. 'Substantive metadata is embedded in the document it describes and remains with the document when it is moved or copied.' Such information is useful in showing the genesis of a particular document and the history of proposed revisions or changes . . .
>
> "System Metadata
>
> "System metadata reflects automatically generated information about the creation or revision of a document, such as the document's author, or the date and time of its creation or modification. System metadata is not necessarily embedded in the document, but can be obtained from the operating system or information management system on which the document was created … [S]ystem metadata is most relevant if a document's authenticity is at issue, or there are questions as to who received a document or when it was received.
>
> "Embedded Metadata
>
> "Embedded metadata is data that is inputted into a file by its creators or users, but that cannot be seen in the document's display. Common types of embedded metadata include the formulas used to create spreadsheets, hidden columns, references, fields, or internally or externally linked files. Embedded metadata is often critical to understanding complex spreadsheets which lack an explanation of the formulas underlying the output in each cell.
>
> "The two most common ways of producing metadata for ESI [electronically stored information] are to produce documents (i) in a TIFF or pdf format with an accompanying 'load file' or (ii) in 'native format'" (citation omitted).
>
> The production of a hard copy of a document (i.e., one in paper form) or the production of a document electronically but in what is basically a "picture" or "static" form, such as a portable document file (pdf) or tagged image file format (tiff), limits the information provided "to the actual text or superficial content of the document" (citations omitted). Only when an electronic document is produced in its "native" form can metadata be disclosed.[12]

The *Irwin* Court ordered the disclosure of metadata, but cautioned that its holding was limited:

> The metadata at issue in this case includes file names and extensions, sizes, creation dates and latest modification dates of digitally-stored photographs, and thus it appears to be of the "system" variety. Records stored in an electronic format are subject to FOIL (citation omitted). We are therefore constrained to conclude that the subject "system" metadata, which is at its core the electronic equivalent of notes on a file folder indicating when the documents stored therein were created or filed, constitutes a "record" subject to disclosure under FOIL (citation omitted). We do not, however, reach the issue whether metadata of any other nature, including "substantive" and "embedded" metadata, is subject to disclosure under FOIL. Moreover, we do not address the issue concerning whether and when metadata of any nature is subject to disclosure under the CPLR.[13]

Gilbert's Holding

Noting that the scope of disclosure is to be liberally construed, and that evidence is relevant "if it has *any tendency in reason* to prove the existence of any material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence (emphasis in original) (citation omitted),"[14] defendant's argument that the audit trail was not material and necessary was rejected:

> The Defendant argues that the audit trail is not "material and necessary" because it would not demonstrate all of the efforts of the Emergency Department Attending Physician, only those efforts that bore a relation on accessing the decedent's electronic records. While it true that the audit trail will not account for the Attending Physician's actions, which did not relate to accessing and viewing the decedents electronic records, the audit trail *will* account for the Attending Physician's accessing and viewing the decedent's electronic records, a topic the Plaintiff may wish to explore further during a deposition or on cross-examination. The Fourth Department has held that if, "there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination," it should be considered evidence material and necessary.[15]

The court easily dispensed with the argument that the request was a fishing expedition:

> The Defendant argues that the Plaintiff's request for the audit trail is a "fishing expedition." To the contrary, the Plaintiff has not offered "a litany of theoretical questions followed by hypothetical speculations calculated to justify a fishing expedition" (citation omitted). Rather, the Plaintiff requested the decedent's audit trail, a document the Plaintiff knows must exist because it is mandated by Federal and New York law, for the specific reason of quantifying the level of involvement of the Emergency Department Attending Physician with the decedent's care while she was in the Emergency Department.[16]

Addressing the defendant's final argument that metadata was only subject to disclosure when the authenticity of the records already produced was questioned, the court, citing a 2008 Southern District decision,[17] noted that "system metadata is not typically disclosed,"[18] but was subject to disclosure in two circumstances:

> In discussing system metadata, the *Aguilar* court noted system metadata is typically not relevant and, therefore, not disclosed, but noted that, "[s]ystem metadata is relevant, however, if the authenticity of a document is questioned *or if establishing who received what information and when is important to the claims or defenses of a party.*"[19]

Noting the plaintiff made a proper request for the audit trail, the court ordered it produced.

Conclusion

Metadata, including audit trail matter, will not be relevant in the vast majority of cases in which electronic data is exchanged, and its production should not be routinely requested in disclosure. However, as illustrated by *Gilbert*, where relevant in a particular case, it should be demanded and, where the demand is objected to, the necessary motion should be made. Have a wonderful summer. ■

1. 2016 N.Y. Slip Op. 26147.
2. *Id.* at *1–2 (citation omitted).
3. *Id.* at *3.
4. *Id.* at *2.
5. *Id.*
6. *Id.*
7. *Id.* ("Both Federal and New York require that any medical provider who maintains electronic records must also maintain an audit trail (see 45 C.F.R. § 164.312; 10 NYCRR 405.10)").
8. *Id.* at *2.
9. 72 A.D.3d 314, 895 N.Y.S.2d 262 (4th Dep't 2010).
10. *Lake v. City of Phoenix*, 222 Ariz. 547, 218 P.3d 1004 (2009).
11. *Irwin*, 72 A.D.3d at 315.
12. *Id.* at 320–22.
13. *Id.* at 322.
14. *Gilbert*, 2016 N.Y. Slip Op. 26147 at *2–3.
15. *Id.* at *3 (citation omitted).
16. *Id.*
17. *Aguilar v. Immigration & Customs Enf't Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 354 (S.D.N.Y. 2008).
18. *Gilbert*, 2016 N.Y. Slip Op. 26147 at *3.
19. *Id.* (emphasis in original) (citation omitted).

Exclusive Use and Domestic Violence

The Pendente Lite Dilemma for Matrimonial Trial Judges

By Hon. Richard A. Dollinger and Colleen Moonan

This article is adapted from one that appeared in the Spring/Summer 2016 issue of the Family Law Review, *a publication of the Family Law Section of the New York State Bar Association. To join the Family Law Section, visit www.nysba.org/Sections/Family/Why_Join_the_Family_Law_Section_.html.*

It is one of the most contentious decisions a matrimonial trial judge may need to make: when to remove a spouse from his or her house?

Even as I review the precedents and pen this article, I am still unsure.

The collision of emotionally-laden factors – the nature and extent of marital discord, the impact on children, the risk of escalating domestic violence, the financial consequences of dislocation, the temporary divestiture of a spouse from marital property – militates against any easy answers to the question. But, if New York is committed to a zero-tolerance policy on domestic violence it should be manifest in judicial decisions involving couples living under one roof while enduring a contentious divorce.

Legislative History and Judicial Frustration

The often cited statutory source for the authority to award temporary "exclusive use and possession" provides little guidance on balancing these weighty competing and critically important variables for families. Domestic Relations Law § 234 (DRL) permits a court to make "such direction between the parties, concerning the possession of property, as in the court's discretion

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justice requires having regard to the circumstances of the case and of the respective parties." The statute's second sentence expressly permits a court to make these "directions . . . from time to time before or subsequent to final judgment."[1]

But a plea for legislative guidance on this complicated issue arose even before the enactment of DRL § 234. Section 1164-a of the now-defunct Civil Practice Act, enacted in 1953, applied only to separation actions and was designed to "prevent any injustice which might arise as a result of a spouse's continued rights as a tenant by the entirety notwithstanding a judicial decree of separation."[2] Section 1164-a was seldom cited in pendente lite matters before *Kahn v. Kahn*.[3] In 1960, a trial court judge who later ascended to the Court of Appeals, Bernard S. Meyer, analyzed § 1164-a of the then Civil Practice Act seeking guidance on whether to exclude a husband who threw his glasses at his wife, chased her down their street in the middle of the night and later assaulted her. Borrowing from an American Law Reports annotation, Justice Meyer in *Mayeri v. Mayeri*[4] concluded that a party could be excluded from the marital domicile if there was "an immediate necessity to protect the safety of persons or property." He fortified that conclusion by citing *Smith v. Smith*,[5] a California case which, under a temporary injunction statute, held that a spouse could be excluded from a marital residence for discharging a weapon. Justice Meyer suggested that New York's temporary injunction statute gave trial judges the same power to exclude a belligerent spouse during the pendency of a divorce action.[6]

Within two years, the legislature, perhaps reading of Justice Meyer's frustration with a lack of legislative guidance, enacted DRL § 234 in 1962. The new statute gave courts the discretion to "direct" a spouse's possession of his or her residence during a divorce, but no "direction" on how to do it or what factors to consider. The statutory history casts no more illumination on the legislative intent. Even after § 234 was enacted, there was a conflict over the extent of judicial authority to exclude any tenant by the entirety from property during a matrimonial matter. In 1971, the Second Department adopted Justice Meyer's formulation from *Meyeri v. Meyeri*, holding that any party seeking such "direction" from a court needed to prove such possession was necessary "to protect the safety of persons and property."[7] By 1978, the Second Department held that sworn factual allegations of prior incidents of violence and abuse, combined with a protective order from the Family Court, justified an exclusive use order.[8]

After the enactment of the Equitable Distribution Law in 1980, the Second Department latched onto another standard, holding that if one spouse had an alternative residence, then the standard was somewhat less onerous to a litigant, only requiring proof of the "existence of an acrimonious relationship between the parties, and the potential turmoil which might result from the husband's return to the marital home."[9] Subsequent cases, enlarging the concept, described the precondition for "exclusive use" as "domestic strife."[10] But the requirement that the offending spouse has established "alternative residence" was a prerequisite to applying the lesser "the existence of an acrimonious relationship between the parties, and the potential turmoil which might result from the plaintiff's return to the marital home" standard, to justify exclusive use during the pendency.[11] The First Department approached the "exclusive use" test in a more generic fashion in *Delli Venneri v. Delli Venneri*,[12] wherein the court held domestic "strife" was a recognized standard for an award of temporary exclusive possession. But that case involved unique facts: the litigant refused to leave the residence, and attested that if permitted to re-enter, he intended to occupy the marital bedroom, a circumstance which, the Court acknowledged, "all other considerations aside, is rife with the potential for strife and turmoil."[13] The decision in that case hinged, in part, on proof that the excluded party has access to an "alternative residence." The court added that it "rejected any rule which would ignore other salient facts and limit the award of temporary exclusive possession to only those instances where, based on past experience, there is a verifiable danger to the safety of one of the spouses." The First Department later accepted the two-prong test – available alternative residence and avoiding domestic strife – in *Fleming v. Fleming*[14] (declining to grant exclusive possession because the offending parties actions were no more than "petty harassments"), and in *Kenner v. Kenner*.[15] The Third Department in *Grogg v. Grogg* expanded the notion, concluding that "marital strife" – as exemplified by a litigant breaking into the house to recover personal items – and allegations of "serious marital discord" were sufficient to justify exclusive possession pendente lite.[16]

> Studies have found that aggression against either parent has unique effects for children's emotional security.

The Trial Court View

The lower courts have generally required more evidence of "strife" than the "petty harassments such as the hostility and contempt admittedly demonstrated herein that are routinely part and parcel of an action for divorce."[17]

In 2002's *Estis v. Estis*,[18] a wife and husband obtained mutual orders of protection but still endured police visits and the children's treating therapist concluded the shared living arrangement was harmful to the children. Yet, the orders of protection had never been forced and the accused argued there was no evidence of any verbal attacks upon the spouse. The wife argued that the best interests of the children required the husband's removal under DRL § 234. The court noted:

> The statute does not delineate any factors that the Court must assess, analyze and weigh. The invocation of words such as "domestic strife" and an amorphous often times subjective standard such as "the best interest of child" as a predicate for such applications is a concept that may ultimately lead a Court into awarding exclusive occupancy in every litigated matter and will provide little guidance to counsel in advising clients. It could also be said that the parties are adversarial, uncivil and less than cordial to [ ] each other in many cases that reach the point requiring Court intervention, regretfully often in the presence of their children.[19]

The court then ventured outside the record into a discussion of how divorce impacts children.

> It has been postulated that the whole trajectory of a child's life is altered by the divorce experience. (Wallerstein, Judith, The Unexpected Legacy of Divorce. Hyperion, 2000). The same author states that children who grow up in wretched families with parents that [avoid] divorce, who stay together "because of the children," grow to be the most unhappy adults of all. Other studies and our Courts have found that a child who loses contact with a parent due to divorce is much more at risk than a child whose both parents remain actively involved as a resource to the child, even throughout the divorce process, and that they fare as well as a child in an intact family.[20]

The court provided no source for the "other studies" and citations to "our courts" and their conclusions regarding the impact of divorce and accompanying domestic violence on children. The court held that the allegations did not exceed "petty harassments such as the hostility and contempt admittedly demonstrated herein that are routinely part and parcel of an action for divorce."[21]

Estis also reflects an outdated view of the use of mutual orders of protection, pendente lite. New York's Family Court Act, amended in 1997, reflects a legislative disposition *against* mutual orders of protection (even on consent) unless justified by separate pleading and a finding of facts.[22] The federal Violence Against Women Act (VAWA) makes mutual orders of protection unenforceable in other states unless they meet that exacting standard.[23]

VAWA is designed to discourage judges from issuing mutual orders against domestic violence victims who have not committed acts of abuse, or who acted in self-defense, by making such orders unenforceable across state lines.[24] In addition, the notion that mutual orders will somehow quell incipient domestic violence has been roundly debunked as being based on misconceptions of domestic violence, sending the wrong message ("trivializing abuse"), and endangering and confusing to children as well as, ultimately, to the police.[25] In short, the judicial impulse to "calm the roiling waters" by issuing mutual orders of protection as an alternative to granting exclusive use and possession, even if upon consent, may create more problems than it cures.

Whether *Estis* would be similarly decided in the second decade of this century and stand up in the face of new research on the extent and impact of domestic violations may be debatable, but it does reflect the judicial hesitancy to grant exclusive use pendente lite.

One court recently acknowledged that reluctance:

> The courts are generally reluctant to deprive one spouse of equal access to a marital residence prior to trial and recognize the unfairness that could result from forcibly evicting a spouse from his or her home on the basis of untested allegations in conflicting affidavits. The party seeking exclusive occupancy must present specific, detailed factual allegations as to incidents of violence or abuse, of police intervention or severe family strife (McKinneys DRL §234, Practice Commentaries, Alan D. Sheinkman, p.464 f.). The fact that violence or abusive conduct occurred does not, standing alone, mandate that the court grant a motion for temporary exclusive occupancy. The court must consider, among other things, the financial circumstances of the parties, whether one spouse or the other has available alternate residences, whether one spouse or the other has a particular need to reside in the marital residence for employment, business, geographic or other reasons, and whether there are children and, if so, what custody or visitation arrangements are required.[26]

In that case, the court noted there was a confrontation between the wife and her daughter ("reactive striking" as described by the Court), a no-violence order of protection, and there was a "disruptive and tense environment" that was "detrimental to the children," one child was suffering from "extreme depression" and was forced to live with her grandparents and yet the court did not grant exclusive use and possession. More recent cases reflect a further judicial reluctance to grant pendente lite exclusive use and possession.[27]

In fact, recent case law suggests that fewer spouses may be applying for exclusive use in divorce cases, which may be attributable, in part, to the use of orders of protection, often granted ex parte, pursuant to DRL § 252 or under Article 8 of the Family Court Act. But, given all the pertinent variables in this complex calculation, what seems to be missing from judicial consideration of applications for "exclusive use and possession" is a detailed

recognition of undisputed social science research that documents the extent of domestic violence and especially its impact on children living a besieged household.

Behavioral Research Studies

The recent research indicates that domestic violence comes in many packages and "petty harassments," and when aggregated during the time a divorcing couple share a residence it can easily compound into what experts would clearly characterize as a form of violence. Experts define "domestic violence" to include name-calling and verbal "put downs," isolating a partner from family and friends, withholding money and preventing a partner from being alone with his or her children. The New York Office for Prevention of Domestic Violence describes "coercive control" – including intentional control tactics by a spouse – as a form of domestic violence. These behaviors include restricting daily activities, manipulating or destroying family relationships, stifling a party's independence, controlling access to information and services, extreme jealousy, excessive punishments for violations of rules, and other inter-personal conduct.[28]

These executive initiatives are grounded in decades-old but nonetheless almost incontrovertible social science research. The Centers for Disease Control and Prevention describes a child's exposure to intra-family violent and abusive behavior as a life-threatening crisis of nearly historic proportions:

> Recent research by Kaiser Permanente and the Centers for Disease Control and Prevention (CDC) strongly implicates childhood traumas, or "adverse childhood experiences" (ACEs), in the ten leading causes of death in the United States. ACEs include physical violence and neglect, sexual abuse, and emotional and psychological trauma. ACEs are associated with a staggering number of adult health risk behaviors, psychosocial and substance abuse problems, and diseases. History may well show that the discovery of the impact of ACEs on noninfectious causes of death was as powerful and revolutionary an insight as Louis Pasteur's once controversial theory that germs cause infectious disease.[29]

Other studies have found that aggression against either parent has unique effects for children's emotional security, and aggression – verbal and physical – against both mothers and fathers was related to increased levels of emotional insecurity in children (i.e., higher negative emotional reactivity, behavioral dysregulation, negative cognitive representations of the family). In turn, higher levels of emotional insecurity were related to higher levels of internalizing problems, symptoms of PTSD, and externalizing problems.[30] Numerous studies conducted during the past three decades have shown that children with divorced parents have an elevated risk of a variety of problems, including conduct disorders, emotional disturbances, difficulties with social relationships and academic failure, and exposure to chronic, unresolved conflict between parents increases the risk of comparable problems for children.[31]

Expanding Recognition of the Impact of Domestic Violence/Differing Standards of Proof

The New York Legislature has already embraced the expansive notion of domestic violence as it impacts children, albeit not in the text of DRL § 234. In the legislative findings accompanying the enactment of § 252, the legislature noted there are

> few more prevalent or more serious problems confronting the families and households of New York than domestic violence. It is a crime which destroys the household as a place of safety, sanctuary, freedom and nurturing for all household members. We also know that this violence results in tremendous costs to our social services, legal, medical and criminal justice systems, as they are all confronted with its tragic aftermath.
>
> Domestic violence affects people from every race, religion, ethnic, educational and socio-economic group. It is the single major cause of injury to women. More women are hurt from being beaten than are injured in auto accidents, muggings and rapes combined.
>
> The corrosive effect of domestic violence is far reaching. The batterer's violence injures children both directly and indirectly. Abuse of a parent is detrimental to children whether or not they are physically abused themselves. Children who witness domestic violence are more likely to experience delayed development, feelings of fear, depression and helplessness and are more likely to become batterers themselves.[32]

Domestic Relations Law § 240(1)(a) requires a court to consider domestic violence in all matters related to the best interests of the children. The recent amendments to the temporary and permanent maintenance guidelines both suggest domestic violence should be a factor in evaluating support awards.[33] Domestic Relations Law § 240(1)(a) requires that for domestic violence to be considered by the court as a mandatory factor in its determination of custody, two elements must be met: (1) the allegation must be contained in a sworn pleading; and (2) the allegations must be proven by a preponderance of the evidence.[34]

The broad statutory command to "consider" domestic violence in matrimonial matters contrasts with a more demanding standard of proof involving Family Court decisions regarding neglect. In the family courts, domestic violence in a child's presence can justify a finding of neglect but only if the child's mental or emotional health is impaired or placed in imminent danger.[35] By placing this qualifier on the finding of neglect, the legislature, according to the Court of Appeals, recognized that the consequences of domestic violence relating to emotional or mental impairment to a child – unlike physical injury

– may be murky, and that it is unjust to fault a parent too readily.[36] In the latter case, the Court of Appeals suggested – more than a decade ago – that mental or emotional impairment of a child's health might exist when children were exposed to regular and continuous extremely violent conduct between their parents, several times requiring official intervention, and where caseworkers testified to the fear and distress the children were experiencing as a result of their long exposure to the violence. But, courts have held that an incident of domestic violence witnessed by a child is not enough to establish neglect.[37] In *Matter of M.S. (B.J.)*,[38] the Court noted that a child's crying during a parents' fight does not support a finding of "substantially diminished psychological or intellectual functioning" as described in the statute. The Court highlighted cases in which something more substantial is required.[39]

> violence on children exposed to it has also been established. There is overwhelming authority that a child living in a home where there has been abuse between the adults becomes a secondary victim and is likely to suffer psychological injury.
>
> Moreover, that child learns a dangerous and morally depraved lesson that abusive behavior is not only acceptable, but may even be rewarded.[40]

Domestic violence comes in many packages and when aggregated during the time a divorcing couple share a residence it can easily compound into what experts would clearly characterize as a form of violence.

However, the neglect standard involving the impact of domestic violence on children, borrowed from the Family Court Act, seems inappropriate in the setting of pendente lite choices regarding exclusive use of a marital residence. First, the legislature, in amending DRL § 240(1)(a) in the 1990s, did not require that proof of mental or emotional harm be offered before a court could consider the impact of domestic violence in divorce disputes. Because the legislature declined to include that language in the statute, the New York courts should shy away from appending such rigorous proof requirements to judicial decision-making when pendente lite choices arise involving disputatious and stressful home environments. In addition, the lesser demanding standard can be justified because the neglect finding carries substantial collateral consequences to a parent, whereas the temporary relocation, mandated by a finding of exclusive use of a residence, does not impair a parent's access to children or foreclose further litigation over the aggressor in such cases or the exact nature of the domestic violence.

Public Policy Considerations and the Trial Court's Practical Challenges

The New York courts have long been on the forefront of detecting domestic violence and enforcing the strong public policy to protect children from exposure to domestic violence. The Second Department, more than a decade ago, recognized:

> The devastating consequences of domestic violence have been recognized by our courts, by law enforcement, and by society as a whole. The effect of such

But, in almost all of these cases, the considerations of domestic violence occur *after* a trial or hearing and perhaps well after the commencement of the action and years after abuse begins, when a trial has produced substantial evidence of the conduct and its harm and a final custody/residence determination is made. Children, trapped in a hostile environment during their parents' divorce, may not be able to wait that long for relief.

Now, New York's courts need to incorporate the expert language of professionals on domestic violence and its broad articulation in the Domestic Relations Law when evaluating applications for exclusive use and possession during the pendency of a divorce.

First, it is readily apparent that most couples do not seek judicial intervention until their relationship has reached a boiling point. Verbal abuse, put-downs, name calling and humiliation between spouses often may have reached the point of constituting domestic violence before a complaint is filed. Children, exposed to this pre-complaint rage, may already be experiencing the consequence of observed and lived-through abuse and violence. By the time any matter gets before the court on a temporary motion, the violence may be well-established and even tolerated by a spouse, despite its impact on the children. Worse yet, by the time the action is resolved – perhaps a year later – the abusive environment may be second nature to all of its participants and the emotional damage – documented in countless studies – will have taken firm root, especially in the younger children.

Second, a court must deal with the reality of readily available orders of protection, often routinely granted on an ex parte basis based on sworn statements.[41] In this court's experience, the race to obtain an ex parte order of protection, which can include "stay away" from the home provisions, often moots the application for exclusive use and possession. But even the winner of the race to the courthouse and a successful applicant for a protection order needs to provide, in short notice, sworn facts that support the commission of domestic violence, sufficient

to justify exclusion of an owner from the residence. As a consequence, the matrimonial trial court must be prepared to evaluate the continuing viability of such orders of protection, even at the preliminary conference stage.

Third, the court needs to determine, usually on relatively short notice, the critical differentiation between what courts have previously referred to as "petty harassments" or "marital strife" and acknowledged forms of domestic violence. It is easy to characterize this difference as one "in the eyes of the beholder" but, given the well-established progression of domestic violence – from simple verbal comments to more serious depression and anxiety-producing turmoil – a court needs to carefully sift through the allegations and, if necessary, require an immediate hearing at the time of the application for exclusive use and possession.

Fourth, it seems that while the standard for determining the extent of domestic violence necessary to justify exclusive use should be a uniform one, the impact of easily perceived intra-family verbal assaults, foul language and other demeaning behavior on children would appear to require more discerning criteria. Mild marital strife – caustic verbal exchanges, vulgarity, put-downs – may be tolerable between two hardened adults, but corrosive when overheard by children and directed against a parent they love. Waiting for the parents' conduct to escalate into the crime of harassment or worse before granting exclusive use may be self-defeating: the children will have already endured – and learned – the demeaning and destructive conduct of their parents. The presence of any forms of domestic violence, even what may appear to be the lesser no-physical-contact form, could seem to justify granting exclusive use when children are involved.

Fifth, the court must contemplate whether expert witnesses – or, at least third-party witnesses (or affidavits) – are essential in establishing a hostile environment in the home. New York courts have concluded that expert testimony is not required to establish the harmful emotional impact on children who witness such abuse.[42] While non-party affidavits or expert testimony would be helpful to courts, practical factors – the lack of therapeutic intervention prior to commencement, the length of time needed for expert assessment of the family environment – suggest that when considering a request for exclusive use, courts will be relying often on accounts from the parties alone and may need to rely on credibility evaluations of the parties to temporarily resolve such applications. Importantly, courts need to consider that even involving experts – appointing a psychological evaluator, for example – or requiring parental attendance at "parenting classes" will delay any decision regarding intra-family violence by weeks or months and leave children exposed to accelerating steps of violence in the home.

In that regard, in considering domestic violence as a basis for granting exclusive use, courts may be caught between competing versions of facts: couples often have widely varied views of the same incident and its origin. In some instances, the instigator may not be the actual perpetrator, as the level of agitation may have caused an outburst. However, regardless of the fault, the consequence – verbal and physical violence directed against a parent and observed by the child – erodes the child's sense of home life. In this regard, doing nothing – sending the parties back to the neutral corner, so to speak, in the home – may send a deleterious message to the parents and the child. The parents assume that their behavior is permissible to the court: the children assume that such behavior is acceptable within a family. Neither conclusion is in the best interests of the family unit.

Nesting arrangements are a stopgap measure and require that the parents have an alternative residence "outside the nest."

Sixth, courts, in contemplating a request for "exclusive use," may not expect parental cooperation or even appreciation from a child. The notion of "exclusive use" of a marital residence runs contrary to the usual advice given to divorcing couples by their counsel. Attorneys often caution a spouse that leaving the home can be interpreted as relinquishing the title of primary residential parent or conceding residence or custody to the other spouse. In that regard, a voluntarily departing spouse should not have the inclination to avoid family conflict in front of the children – regardless of who is at fault – held against them by the courts in subsequent primary residence, custody or visitation decisions. Conversely, even if a parent is excluded temporarily by a court order in an abundance of caution, the court may need to carefully consider proof at a hearing before drawing any final conclusions.

Seventh, some courts, as an alternative to granting exclusive use, have considered "nesting" arrangements, which recognize that the children "possess" the marital residence and the parents alternate entering the residence. Under the typical "bird-nesting" arrangement, the parents alternate living in the house and the children remain in their own bedrooms. Under this alternative, the parents' inter-personal conflict in the presence of the children may be substantially reduced and the children

have the security of remaining in their own rooms and share the same routines. While almost never mentioned in New York cases, the concept has been entertained, pendente lite, in other states and judicial comment seems divided.[43] [44] In one of these cases, *In re Marriage of Levinson*,[45] the father articulated the rationale for the bird-nesting arrangement:

> Well, the children have the continuity of their home, what's clearly their home. And it's a very comfortable home for them. And it's the only home they've ever known. They were brought from the hospital, each of them, to this home. And they each have their own bedrooms, their playroom, their kitchen. And the nesting arrangement allows for the children to have that stability of the home. And the only difference is, which they understand, is that mommy and daddy take turns in being with them when in the home. So they're not subjected at this point to the disruption of having to pack up and move out for periods of time and to go to an inferior environment, by every measure, size, quality, just in every way. It's a small apartment compared to a large, luxurious home. So my belief is that it is best for the children to have the stability and this continuity and to minimize the disruption and the impact of our divorce. And I believe that the nesting arrangement allows for that. It also allows for the stability of the children to have substantial amounts of time with each parent and to enjoy the bond and the love that they receive from each parent. So it's my belief that it is the best – excuse me, that it is the best of the alternatives that we have available.[46]

Notably, the court-appointed evaluator in that instance also testified to benefits of the nesting arrangement – "they're in one location, not packing a little bag, going back and forth. From their perspective life is consistent" – but concluded that the separate residences, ultimately, were in the children's best interests.[47]

The only New York mention of the nesting approach, pendente lite or otherwise, is found in *A.L. v. R.D.*[48] Whatever its merits, nesting arrangements are a stopgap measure and require that the parents have an alternative residence "outside the nest." But, in high-conflict divorces, the lack of daily personal contact between the litigants while the children have continued parental contact with both litigants separately in the marital residence may defuse the potential for violence between the parents. Any court considering this option should be mindful that violent tendencies not be displaced from the now-absent spouse to the children.

Lastly, practical financial considerations no doubt impact any decision on "exclusive use." Seldom can a parent immediately leave a home. Finding close-by accommodations, to facilitate any visitation, can be a substantial challenge. Suitable accommodations of sufficient size, to accommodate overnight visitation with children, can be tough to attain in short order. A couple's ability to finance two households – the marital residence and the new off-site lodging for the departed spouse – may make the transition virtually impossible. A court will need to investigate resources – borrowing from retirement accounts, cashing stocks, withdrawing funds from a home equity line of credit, or preliminary orders for equitable distribution of marital assets – to finance these new accommodations and the court will need to permit such actions as exceptions to the automatic orders in divorce matters.

In addition, any court, calculating the consequences of granting exclusive use, must acknowledge that the temporary decision – resulting in the eviction of one parent from the family home – could easily make matters worse. By siding with one party based on less than a full airing of proof, any judge could easily err. But in considering the possibility, a court should err on the side of reducing the family's exposure to violence, regardless of whether it has properly and justifiably pinpointed the perpetrator. If the violence subsides, even for the few months that the divorce progresses, the litigants and the children will have a sense that a lack of violence should be norm in their lives, regardless of whether they ultimately live with their mother or father. A final factor should make a grant of exclusive use more appealing: when the divorce is over, the households will be divided and the husband and wife separated. While accelerating that division through the grant of exclusive use is difficult, nonetheless the separation of parents involved in all forms of domestic violence as soon as practically possible must be considered beneficial to the children.

A Zero-Tolerance Approach

In the face of all of these complications, New York's judicial decision-making on applications for exclusive use during the pendency of an action should still reflect the state's "zero-tolerance" policy on domestic violence. If there is evidence of domestic violence – of any variety – in a home with children, there should be a presumption that a non-offending parent should be granted exclusive use and possession pendente lite.[49] The current standard – safety of persons or property – is cast in the language and images of the 1970s and even unfortunately implies that "persons" and "property" have equivalent weight in any "exclusive use" determination. The use of the word "necessary to protect" the safety of a person suggests that physical harm – an advanced form of domestic violence – is somehow a prerequisite to granting exclusive use and ignores the impact of abusive – but not physically threatening – behavior on children. The mere suggestion that "exclusive use" should hinge, in any fashion, on the "voluntary establishment of an alternative residence" suggests that preventing domestic violence may depend, in part, on the untenable notion that the convenience of one party's ability to secure short-term housing away from the home is somehow decisive for a court or the litigants. The preliminary conference forms for matrimo-

nial matters should contain an attestation by clients, confirmed by counsel, that the parties have been informed of the range of conduct constituting domestic violence and affirm that is does not exist and, if it does, what steps are being taken to prevent it in the future. Finally, matrimonial court calendars should recognize a preference for hearings on "exclusive use" applications and some standard – perhaps hearings within 10 days of application or a temporary grant of exclusive use – should be implemented.

Recognizing that all forms of domestic violence should trigger consideration of a grant of exclusive use during the pendency of an action presents an enormous challenge to New York's judges and the entire matrimonial litigation system. Expedited hearings, decisions based on disputed affidavits, wading through the inevitable finger-pointing between the couple, discerning the impact of abusive behavior on children, evaluating orders of protection, finding resources to create alternative accommodations: the challenges to the judiciary can be, simultaneously, immediate and endless as well as costly in time and effort.

But if New York is a "zero tolerance" zone for domestic violence, these challenges must be overcome and the new language, incorporating the notions of domestic violence to insulate families from destructive abuse during the pendency of an action, must become a part of judicial decision-making. ■

1. *See Leibowits v. Leibowits*, 93 A.D.2d 535, 550 (2d Dep't 1983) (discussing the legislative intent of DRL § 234).

2. *Kahn v. Kahn*, 43 N.Y.2d 203, 208 (1977).

3. *Id. See, e.g., Rowley v. Rowley*, 6 A.D.2d 1049 (2d Dep't 1958) (declining to award exclusive possession without a hearing).

4. 26 Misc. 2d 6, 8 (Sup. Ct., Nassau Co. 1960).

5. 122 P.2d 346 (Ct. App. 1st Dist. Cal. 1942).

6. Civil Practice Act § 848 (1960).

7. *Scampoli v. Scampoli*, 37 A.D.2d 614 (2d Dep't 1971).

8. *Minnus v. Minnus*, 63 A.D.2d 966 (2d Dep't 1978).

9. *Kristiansen v. Kristiansen*, 144 A.D.2d 441 (2d Dep't 1988).

10. *J.L. v. A.L.*, 28 Misc. 3d 1239(A) (Sup. Ct., Nassau Co. 2010).

11. *See, e.g., Amato v. Amato*, 133 A.D.3d 695 (2d Dep't 2015).

12. 120 A.D.2d 238 (1st Dep't 1986).

13. *Id.* at 241.

14. 154 A.D.2d 250 (1st Dep't 1989).

15. 13 A.D.3d 52 (1st Dep't 2004).

16. 152 A.D.2d 802 (3d Dep't 1989) (presence of marital strife can be a recognized standard for an award of exclusive possession).

17. *See Dachille v. Dachille*, 43 Misc. 3d 241, 249 (Sup. Ct., Monroe Co. 2014).

18. N.Y.L.J. October 4, 2002 (Sup. Ct., Nassau Co., LaMarca, J.).

19. *Id.* at 6.

20. *Id.* at 6–7.

21. *Id.* at 8.

22. N.Y. Family Ct. Act § 154-c(3).

23. 18 U.S.C. § 2265.

24. Feder, *Women and Domestic Violence: An Interdisciplinary Approach*, Routledge, 1999.

25. Zora, *What Is Wrong with Mutual Orders of Protection?* Domestic Violence Rept 4(5), 67-8 (June/July 1999).

26. *T.D.F. v. T.F.*, 32 Misc. 3d 1205(A) (Sup. Ct., Nassau Co. 2011).

27. *See Gutherz v. Gutherz*, 43 Misc. 3d 1225(A) (Sup. Ct., Kings Co. 2014) (although some discord, absence of children militated against granting the relief).

28. *See* New York State Office for Prevention of Domestic Violence website, http://www.opdv.ny.gov/whatisdv/about_dv/index.html; United States Department of Justice, Office on Violence Against Women, http://www.justice.gov/ovw/domestic-violence; *see* National Center on Domestic and Sexual Violence, *Wheel of Power & Control, Domestic Abuse Intervention Project*, Duluth, Minn, http://www.ncdsv.org/images/powercontrolwheelnoshading.pdf.

29. Larkin & Records, *Adverse Childhood Experiences: Overview, Response Strategies and Integral Theory*, Journal of Integral Theory and Practice, Fall 2007, Vol. 2, No. 3, p. 1.

30. Cummings, et al., *Children and Violence: The Role of Children's Regulation in the Marital Aggression–Child Adjustment Link*, Clin. Child Fam. Psychol Rev. 2009 Mar; 12(1): 3–15.

31. Amato & Cheadle, *Parental Divorce, Marital Conflict and Children's Behavior Problems: A Comparison of Adopted and Biological Children*, Faculty Publications, University of Nebraska, Sociology Department, Faculty Publications. Paper 91; http://digitalcommons. unl.edu/sociologyfacpub/91 (2008).

32. Legislative History, Laws 1994, ch. 222, §§ 1, 2, *eff.* Jan 1, 1995.

33. DRL § 236(5)-a(e)(1)(h); DRL § 236(6)(e)(1)(g).

34. *Joanne M. v. Carlos M.*, N.Y.L.J., April 28, 2006 (Sup. Ct., Suffolk Co., Farnetti, J.); *Matter of Aleksander K. v. Elena K.*, 2 Misc. 3d 1005(A) (Fam. Ct., Richmond Co. 2004).

35. FCA § 1012(f); *Matter of M.S. et al.*, 49 Misc. 3d 1214 (Fam. Ct., Kings Co. 2015) (an incident of domestic violence witnessed by a child is not enough to establish neglect because harm or danger to the child's mental or emotional condition must be shown to establish neglect).

36. *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 370 (2004).

37. *Matter of Theresa CC.*, 178 A.D.2d 687, 689 (3d Dep't 1991); *Matter of Hannah L. (Dwayne L.)*, 113 A.D.3d 1137 (4th Dep't 2014) (evidence shows that [the oldest girl] suffers from extreme distress, the source of which is her home environment, and neglect found).

38. 49 Misc. 3d 1214 (Fam. Ct., Kings Co. 2015).

39. *In re Lonell J.*, 242 A.D.2d 58 (1st Dep't 1998) (repeated vomiting, soiled bedding, poor health, eating problems); *In re Theresa "CC,"* 178 A.D.2d 687 (3d Dep't 1991) (behavioral problems, anxiety, bed-wetting, rebellion, withdrawal); *but see Matter of Madison M. (Nathan M.)*, 123 A.D.3d 616 (1st Dep't 2014) (police observations that the children were crying sufficient).

40. *Wissink v. Wissink*, 301 A.D.2d 36, 40 (2d Dep't 2002); *see also Matter of Jacobson v. Wilkinson*, 128 A.D.3d 1335 (2d Dep't 2015).

41. DRL § 252.

42. *See Matter of Shanayane C.*, 2 Misc. 3d 887 (Fam. Ct., Kings Co. 2003) (reasonable inferences and common sense dictate that all three children are at risk for protracted impairment of emotional health, by virtue of witnessing the domestic violence); *see also Justin R. v. Niang*, 2010 U.S. Dist. LEXIS 143991 (S.D.N.Y. 2010) (expert testimony is not necessary to establish emotional harm to children as a result of domestic violence).

43. *Carmen v. Carmen*, 2014 Pa. Super. Unpub. LEXIS 2716 (Sup. Ct., Pa. 2014) (court cited with approval a two-year post-separation nesting arrangement); *Grass v. Grass*, 2014 Ohio Misc. LEXIS 3154 (Ct. Com. Pleas Union Cty 2014) (court rejecting a plan for nesting was unsupported by proof in the record); *Key v. Key*, 2012 Conn. Super. LEXIS 2347 (Sup. Ct., New London, Conn. 2012) (court, after a hearing, rejected plan for continued "nesting arrangement" in favor of permanent parenting plan, holding the nesting plan was "not working well"); *In re Marriage of Levinson*, 975 N.E.2d 270 (App. Ct. Ill. 2012) (appeals court upholds denial of exclusive use and possession under Illinois statute and approves interim "bird-nesting arrangement" in the absence of jeopardy to physical or mental well-being of parent or child as required by statute); *Wilson v. Wilson*, 2011 Mich. App. LEXIS 1118 (Ct. App. Mich 2011) (until the marital home was sold, the court concluded that the children should remain in the home during that rotating schedule, with each par-

ent moving in and out as scheduled); *Londergan v. Carrillo*, 2009 Mass. App. Unpub. LEXIS 662 (Ct. App., Mass. 2009) (finding the bird-nesting schedule was in the best interests of the children); *In re Graham*, 2007 Cal. App. Unpub. LEXIS 3242 (Ct. App., Cal. 2007) (citing with apparent approval a nesting arrangement based on a week-in, week-out plan); *Fiddelman v. Redmon*, 656 A.2d 234 (App. Ct., Conn. 1994) (affirming decision that trial court, in essence, awarded possession of the marital home to the children, giving each parent during his and her time of legal custody the right to occupy the house with the children exclusive of the other parent until the house is sold).

44. *See also* Flannery, *Is "Bird Nesting" in the Best Interest of Children?* 57 SMU L. Rev. 295 (2004) (claims bird nesting is inappropriate, ineffective and unnecessary because joint custody is "sufficient to promote positive developmental adjustment" and explains residential insecurity is only one factor affecting children and bird nesting is appropriate only when parents are not remarried, have no previous or subsequent children, can communicate about child's needs and where it is economically feasible, and concludes that such situations are rare and "bird nesting only tends to magnify the pre-separation conflict between parents").

45. 975 N.E.2d 270 (App. Ct., Ill. 2012).

46. *Id.* at 280.

47. *Id.* at 277–78.

48. 46 Misc. 3d 1221(A) (Sup. Ct., N.Y. Co. 2015) (noting that prior court order required each of the parties spend alternating weeks in a continued nesting arrangement in the marital apartment).

49. *See Wissink v. Wissink*, 301 A.D.2d 36, 40 (discussing that other states have a rebuttable presumption that an abuser cannot be eligible for custody).

Health Care Proxies – Ten Difficult Issues

By Robert N. Swidler

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Health care proxies have proven valuable and popular among New Yorkers because they enable a person to appoint a trusted family member or friend to make health care decisions for the person if he or she loses the capacity to make those decisions personally.[1] Health care providers like proxies as well, because they clarify who has the legal authority to act for an incapable patient,[2] and often provide guidance about the patient's wishes regarding end of life care. Each day, in hospitals, nursing homes and other care settings across New York State, providers seek and accept decisions from health care agents on behalf of incapable patients, with few or no problems.

But difficult problems and questions can still arise. This article addresses 10 difficult issues in connection with the creation and use of health care proxies, through FAQs and brief answers. Elder Law attorneys may find it useful to consider these issues and anticipate these problems. Again, these are difficult issues, and not all attorneys will agree with the conclusions below.

1. Can a Person Who Lacks Health Care Decision-Making Capacity Still Create a Health Care Proxy?

Yes, as long as the person is "competent." More specifically, the health care proxy statute ("the proxy statute") provides in Public Health Law § 2981.1 (PHL) that:

> (a) A competent adult may appoint a health care agent in accordance with the terms of this article.
>
> (b) For the purposes of this section, every adult shall be presumed competent to appoint a health care agent unless such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent, or unless a committee or guardian of the person has been appointed for the adult pursuant to article seventy-eight of the mental hygiene law[3] or article seventeen-A of the surrogate's court procedure act.[4]

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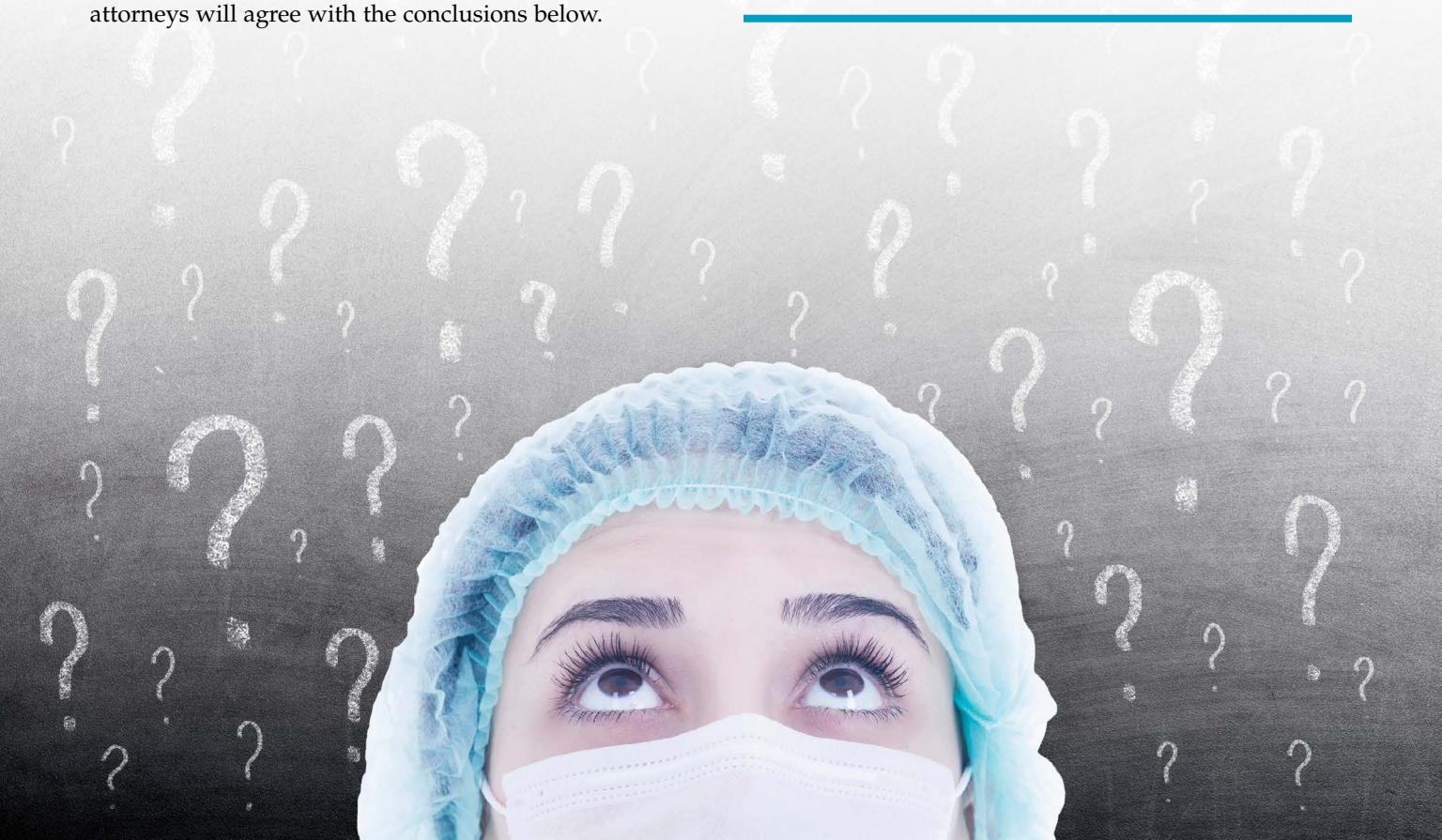

In contrast, "capacity to make health care decisions" means "the ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and to reach an informed decision."[5] A determination under the statute that a patient lacks capacity to make health care decisions triggers the authority of the agent.[6]

The difference in these standards is significant. It means that in some instances an adult who would be found to lack capacity to make health care decisions nonetheless is still competent, and therefore can still lawfully appoint a health care agent.[7]

This opportunity to allow a person who lacks health care decision-making capacity to create a health care proxy can be quite valuable in appropriate cases. For example, a patient with dementia or a developmental disability who needs surgery may not be able to make a complex health care decision, but may be able to understand that he or she is appointing a family member to make the decision for him or her. It is helpful, lawful, and ethical for such a patient to execute a health care proxy.

However, the practitioner must recognize that a determination of incapacity to make health care decisions, made at or about the time of the execution of the proxy, could be proffered to rebut the presumption of competence.[8] Accordingly, before allowing a person who lacks health care decision-making capacity to execute a proxy, it would be important to secure an evaluation by a qualified professional who can document that the person is competent to create the proxy, even though incapable to make the pending health care decision.

And obviously no one should coax a person into signing a proxy when the person does not understand what he or she is doing. That is neither helpful (because the pre-sumption of competence would be rebutted) or ethical, and could be fraudulent.

2. Can an Adult With an MHL Article 81 Guardian Still Appoint a Health Care Agent?

Sometimes. A person who has a guardian is no longer presumed competent to create a health care proxy.[9] But, as noted above, in some cases an incapacitated person will still have the ability to understand what it means to appoint someone to make health care decisions for them. The MHL Article 81 guardianship statute directs the court and the guardian to take into account the incapacitated person's wishes and preferences, and to impose the least restrictive form of intervention.[10] In an appropriate instance, a person with a guardian may be able and permitted to appoint a health care agent. But a practitioner would need to carefully review the guardianship order and secure a qualified professional's evaluation and documentation of the person's ability to understand what they are signing. If the guardian supports the appointment, that documentation should be sufficient. If the guardian opposes the appointment, a judicial determination should be sought.

3. Where There Is Both an MHL Article 81 Guardian and a Health Care Agent, Who Makes Health Care Decisions?

In general, a health care agent has priority over a guardian. The proxy statute states very clearly:

> Health care decisions by an agent on a principal's behalf pursuant to this article *shall have priority over decisions by any other person*, except as otherwise provided in the health care proxy or in subdivision five of section two thousand nine hundred eighty-three of this article.[11]

Moreover, the guardianship statute includes a consistent provision that provides that

> "No guardian may . . . 2. Revoke any appointment or delegation made by the incapacitated person pursuant to . . . [the proxy statute].[12]

However, a guardian could always commence a proceeding to try to invalidate the proxy, or remove the agent, or override an agent's decision based on specified findings.[13]

4. Can a Person Appoint Co-Agents and Provide for Decisions by Agreement or by Majority Vote of Co-Agents?

No. The statute authorizes an adult to appoint "a health care agent" and "an alternate agent" to serve if the agent is not reasonably available, willing and competent, or is disqualified, or under conditions described in the proxy.[14] This rather clearly contemplates the appointment of only a single agent.

This was intentional. While some individuals might prefer to have decisions made by co-agents, or by a majority vote of a group, those procedures can impose enormous burdens and risks on health care providers who may need a prompt, clear, authoritative decision. In any case, the adult can always direct the agent to consult with others before making a decision.

5. Does a Health Care Agent Have Any Authority While the Patient Still Has Capacity?

No. The statute is very clear that the agent's authority commences only upon a determination that the principal lacks capacity to make health care decisions.[15]

Despite that clarity, in health care settings it is very common for a family member or friend to try to make decisions for a patient who has not been found to lack capacity "because I'm my Mom's health care proxy." And indeed, in many instances health care providers accept decisions from such a person on behalf of the patient. There is no support in the statute for this practice.

To be sure, sometimes this practice causes little harm because the patient clearly lacks capacity and the absence

of a determination is just a procedural defect that can be remedied. But in other instances, the participants are contravening a fundamental ethical principle: when a patient has capacity, providers must seek a decision from the patient, not someone else.

6. Does a Health Care Agent Need a HIPAA Authorization to Get Access to Medical Records?

No. First of all, the Health Care Proxy Law itself gives the agent a limited right "to receive medical information and medical and clinical records necessary to make informed decisions regarding the principal's health care."[16] Based on that provision an agent can access records relating to pending decisions, and according to one court, records useful for ongoing care decisions.[17]

But the HIPAA privacy rule extends the agent's authority even further: it gives an individual the right to access his or her own medical record,[18] and further provides that when an individual lacks capacity, his or her HIPAA privacy rights may be exercised by a "personal representative." It defines the personal representative as a person who under applicable law has "the authority to act on behalf of an individual who is an adult or an emancipated minor in making decisions related to health care."[19] That person is the health care agent.

Accordingly, a health care agent can access some medical records pursuant to the health care proxy law, and a broader range of medical records by virtue of being the patient's legal representative under HIPAA.

7. Can the Agent Override a Decision Previously Expressed by the Patient?

In general, no. While the law empowers the agent to make "any and all [health care] decisions on the principal's behalf that the principal could make,"[20] it goes on to provide as follows:

> 2. Decision-making standard. . . . the agent shall make health care decisions: (a) in accordance with the principal's wishes, including the principal's religious and moral beliefs; or (b) if the principal's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the principal's best interests . . . .

If, for example, a patient directly tells staff, or leaves a written instruction, that he or she consents to a do-not-resuscitate (DNR) order, and then loses capacity, the agent is obligated to honor those instructions.[21] Conversely, if a patient expresses a wish for aggressive care, the agent is obligated to honor that wish.

To be sure, the agent may sometimes have a valid reason to override the patient's prior decision. For instance, in the DNR case described above, the agent might have information that the patient never actually agreed to the DNR order, or was pressured or coerced. The agent might have proof that the patient did not understand what he or she was agreeing to, or that the patient subsequently changed his or her mind.[22] The agent might contend that the clinical circumstances are different now and the patient would no longer want the DNR order. More generally, an agent has broad latitude to interpret the patient's wishes and apply them to actual decisions, when there is room for such interpretation.

But what the agent does not have is the authority to do is to interpose his or her own wishes and values as a basis to override the prior expressed wishes of a capable patient. That would defeat a key purpose of the statute: to ensure that such wishes would be respected in the event of a loss of capacity. Put differently, the agent cannot simply say, "I don't care what mom told you, I'm telling you this."

Conflicts such as this also raise procedural issues: can a provider simply disregard the instructions of an agent who appears to be acting contrary the patient's wishes? For one thing, in the example above where the agent opposes a DNR order, the practitioner needs to consider the applicability of PHL § 2984.5, which provides:

> 5. Notwithstanding the provisions of this section or subdivision two of section twenty-nine hundred eighty-nine of this article, if an agent directs the provision of life-sustaining treatment, the denial of which in reasonable medical judgment would be likely to result in the death of the patient, a hospital or individual health care provider that does not wish to provide such treatment shall nonetheless comply with the agent's decision pending either transfer of the patient to a willing hospital or individual health care provider, or judicial review in accordance with section twenty-nine hundred ninety-two of this article.

But this provision rather specifically applies to a disagreement between the agent *and the provider*: it refers to "a hospital or individual health care provider that does not wish to provide such treatment." In contrast, this FAQ and the example above posits a conflict between the agent *and the patient's clearly expressed prior wishes*. For that reason, in this author's view, PHL § 2984.5 is inapplicable.

No published court decision has addressed this issue. Until it is resolved, a provider and its attorney understandably will be wary about withdrawing or withholding life-sustaining treatment in defiance of an agent's instructions, and may be inclined to seek a court ruling before proceeding. But if the patient's decision is very clear, and the clinical decision cannot wait for judicial review, legal and ethical principles support honoring the patient's decision.

8. Can a Health Care Agent Exercise Other Personal Rights on Behalf of the Patient, Such as Deciding Who Can Visit?

No. The health care proxy law gives the agent only the authority "to make health care decisions,"[23] which it defines as "any decision to consent or to refuse to consent to health care."[24] It further defines health care as any

"treatment, service or procedure to diagnose or treat an individual's physical or mental condition."[25]

In practice, providers tend to interpret "health care" broadly enough to encompass decisions closely linked to treatment, like discharge planning. But a health care proxy does give an agent authority akin to that of a guardian of the person, such as who can visit or call, or whether the patient can sign documents, etc.

However, the person who is the health care agent may have much broader authority based on other instruments (like a power of attorney) or sources (such as the Department of Health regulations regarding the "designated representative" of a nursing home resident).[26]

9. Can a Health Care Agent Remove a Patient From a Hospital Against Medical Advice (AMA)?

Yes – provided the decision is consistent with the patient's reasonably known wishes.

A discharge "Against Medical Advice," or AMA, occurs when a patient leaves the hospital before it is safe to leave, and despite being warned that leaving could jeopardize the patient's health or life.

Capable patients can and sometimes do leave the hospital AMA. As noted previously, the agent can make "any and all decisions on the principal's behalf that the principal could make."[27] As also noted previously, discharge decisions are generally regarded as health care decisions within the meaning of the statute. So it follows that a health care agent could remove an incapable patient AMA.

But the statute's decision-making standard provides for a reality check on such a decision:

> 2. Decision-making standard. . . . the agent shall make health care decisions: (a) in accordance with the principal's wishes, including the principal's religious and moral beliefs; or (b) if the principal's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the principal's best interests . . . .

Accordingly, before a hospital allows an agent to remove a patient against medical advice, it should and usually will probe the agent's rationale carefully to determine whether it is based on the patient's reasonably known wishes – because by definition it will not be in the patient's best interests.

10. Can a Health Care Agent Complete a MOLST for an Adult?

Yes, if the patient has been determined to lack capacity. A Medical Order for Life Sustaining Treatment (MOLST) is a medical order (a physician's directive to staff) regarding end-of-life decisions that includes the necessary patient, agent or surrogate consents, and that is portable – it will remain valid if the patient is transferred from one setting to another. New York state law specifically recognizes the MOLST's validity as a DNR order.[28] But if completed by a competent patient, or by a duly authorized agent or surrogate acting under the Family Health Care Decisions Act, it is valid for other end-of-life decisions as well.

And indeed, the DOH-approved MOLST form includes a signature line for the "Decision-Maker," asks below that line "Who made the decision?" and provides optional answers – including "Health Care Agent." ■

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1. N.Y. Public Health Law (PHL) Article 29-C, Health Care Agents and Proxies, 1990 N.Y. Laws, c. 752.

2. This article uses the term "patient" to describe the person for whom a health care agent is making decisions because it conveys a sense of the clinical context better than the statutory term "principal" does.

3. N.Y. Mental Hygiene Law Article 78, which was repealed in 1981, provided for a "Committee of the Incompetent or Patient" to care for the person and property of an incompetent person. It was replaced in 1981 by the current guardianship statute, Surrogate's Court Procedure Act (SCPA) Article 17-A. References to MHL Article 78 are now deemed to refer to SCPA Article 17-A. Bills that would correct this reference along with other minor corrections to surrogate decision-making laws have been introduced repeatedly since 2011, but have not been passed. *E.g.*, S.4791 (Hannon) (2015), A.6936 (Clark) (2015).

4. This article creates a guardianship for developmentally disabled persons.

5. PHL § 2980.3.

6. PHL § 2981.4.

7. *See, e.g., In re Mildred M.J.*, 43 A.D.3d 1391 (4th Dep't 2007).

8. *See, e.g., In re Rose S.*, 293 A.D.2d 619 (2d Dep't 2002); *In re Camoia*, 48 Misc. 3d 1221 (Sup. Ct., Kings Co. 2015) (Reported in Westlaw); *In re Cox*, 47 Misc. 3d 1211(A) (Sup. Ct., Kings Co. 2015) (Reported in Westlaw).

9. PHL § 2981.1.

10. SCPA art. 17-A or MHL § 81.22(a).

11. PHL § 2982. The exception, PHL § 2983.5, relates to decisions by the patient himself or herself.

12. MHL § 81.22(b).2.

13. PHL § 2992. *See e.g., In re Walter K.H.*, 31 Misc. 3d 1233 (Sup. Ct., Erie Co. 2011).

14. PHL § 2981.6.

15. PHL § 2981.4.

16. PHL § 2982.3.

17. *Mougiannis v. N. Shore – Long Isl. Jewish Health Sys., Inc.*, 25 A.D.3d 230 (2d Dep't 2005).

18. 45 CFR § 164.524.

19. 45 CFR § 164.502(g)(2).

20. PHL § 2982.1

21. In fact, where the patient previously, when capable, provided clear consent to treatment or the withdrawal of treatment, there generally is no legal requirement to secure a redundant consent from an agent or surrogate at all. The Family Health Care Decisions Act is more explicit than the Proxy Law this regard. PHL § 2994-d(3)(a)(ii). But even in such cases, for a variety of legal, ethical, risk management and professional reasons, providers often will seek a decision from the agent or surrogate as well.

22. *E.g., Univ. Hosp. of the State of N.Y. Upstate Med. Ctr.*, 194 Misc. 2d 372 (Sup. Ct., Onondaga Co. 2002).

23. PHL § 2982.

24. PHL § 2980.6.

25. PHL § 2980.4.

26. 10 N.Y.C.R.R. §§ 415.2(f); 415.3.

27. PHL § 2982.1

28. PHL § 2994-dd; 10 N.Y.C.R.R. § 400.21(e). See https://www.health.ny.gov/professionals/patients/patient_rights/molst/.

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An Analytical Approach to Litigation Strategy and Dispute Resolution

By Al Fenichel, Susan Koski-Grafer, and H. Stephen Grace, Jr., Ph.D.

Introduction

Competition in business and commerce, human judgment, economic conditions and a host of unpredictable factors regularly produce situations where disputes arise. Often situations are ambiguous and subject to varying interpretations of responsibility and whether damages have occurred. This article discusses how a systematic analytical approach can contribute to a successful outcome in disputes, claims and lawsuits, even when the circumstances are highly contentious and include "bad facts," i.e., problematic facts, on one side or the other or both.

What Are "Bad Facts"?

Bad facts are events and actions that actually did occur in a disputed matter where damages are being claimed and which appear to have a significant impact on the position you or your client are taking. They are *facts that look as though they could prevent you from winning your case.*

Examples might include circumstances where, in some way, you or your client;

- did not act in complete accordance with a contract or agreement;
- did not carry out a responsibility without making any mistakes; or
- took or failed to take an action that would expose you to criticism and a lawsuit has resulted.

Bad facts make defending a position more difficult, but addressing them with a skillful and systematic analytical process can overcome many challenges. Even if it is not possible to make bad facts "go away," there are steps you can take to address them and potentially reduce their impact.

Six Critical Process Steps in Addressing Bad Facts

1. Analyze actions and relationships of all involved parties.
2. Identify and examine the bigger picture.

3. Consider if proper actions and controls could have mitigated the alleged damages.
4. Identify what would likely have happened if the disputed actions did not occur.
5. Assess whether real damages have occurred, and if so, evaluate liability and causation therefor.
6. Produce a clear, understandable and credible report.

Step 1: Analyze actions and relationships of all involved parties

Even when a mistake or a deficiency has occurred, the faults or missteps involved are seldom completely one-sided. More typically, all or most of the opposing parties have not acted with absolute perfection and, as a result, each may have contributed in some way to the problem and loss being disputed.

In order to defend a case involving bad facts, as an early step it is necessary to perform a business analysis to understand the actions that occurred and to identify the relationships that are relevant to the matters being disputed. Later it will be necessary to compare these actions to what would be expected from all parties involved under usual, customary, and reasonable business practices. But an initial step is to read and analyze documents and depositions, and identify and analyze other information that speaks to the issues of the case.

The Value of Early Analysis

Conducting a comprehensive and painstaking complete business analysis of all the facts and circumstances, individual actions and relationships can consume weeks or even months in a complex case. However, that type of analysis, whether done by yourself or with the assistance of outsiders, is not the only alternative. Either a full business analysis or a "quick view" analysis, conducted to ascertain the impact of selected key issues, can be highly significant in assessing the business merits of a claim and in supporting the development of legal arguments and settlement strategies.

In past cases, such as discussed below in Step 3, a detailed business analysis uncovered persuasive information regarding embezzlements and self-dealing transactions with related parties, arrangements concealed from business owners and partners, misleading reports, contributory failures and missteps on the part of *both* plaintiffs and defendants, and other undisclosed facts and circumstances that were not originally recognized or cited. The new information had a major impact on the outcome of each case.

Step 2: Identify and examine the bigger picture

It is necessary to identify and examine the "bigger picture" in a disputed situation – to look at the impact of external factors not under the control of any of the parties involved, and also to look at what conditions or actions have occurred in similar industries or in similar business situations.

Examples of *external factors* include general economic conditions, industry dynamics, a change in government regulation, monetary or tax policy, the impact of new technology, or any myriad other factors and risks that exist in a business environment.

Examples of *conditions or actions in similar industries or business situations* include such matters as starting or terminating business ventures, executive hiring and firing, investment decisions, oversight and corporate governance practices, and any other matters that typically occur in business endeavors.

The authors are familiar with cases where comparisons to similar industry and business situations often demonstrated that an alleged improper action was in fact a prudent business action in accordance with usual, customary, and reasonable business practices.

"Bad facts" do not have to be *"fatal flaws"* for either plaintiffs or defendants, and in many cases will not govern the outcome of a dispute when other factors are revealed.

Step 3: Consider if proper actions and controls could have mitigated the alleged damages

Faults and missteps are seldom one-sided. Typically, all or most of the opposing parties have not acted with absolute perfection and, as a result, each may have contributed in some way to the problem and loss being disputed. If a party experiencing a loss has contributed to the problem through inaction, failure to exercise appropriate and customary business judgment, or by not having reasonable and customary internal controls, this will be relevant in assessing damages, liability and causation.

It is important to *review each party's policies, systems and controls* to ascertain the extent to which the person or organization had, or should have had, operating procedures and oversight, and governance processes in place – controls which would guard against the risk of loss or would serve to identify problems and enable management to take mitigating actions.

Appropriate and reasonable internal controls are sometimes prescribed by government standards and regulation, or set forth as responsibilities listed in contracts. They may also be described in professional standards and recommendations of industry organizations. Customary and reasonable controls also rise from experiences and practices of other companies in the business environment. When a plaintiff in a lawsuit has suffered a loss, but has some responsibility for the loss that occurred because of not having adequate systems and controls, the degree to which these controls were absent or deficient will be highly relevant to the outcome of the case.

Examples of two cases that utilized the expert services of H.S. Grace & Company, Inc. (HSG), a litigation support and business consulting firm, are described below. Both of these cases went to trial, although often such cases are resolved through pretrial negotiations and settlement.

The cases involved losses arising in the failed operations of a number of real estate investment trusts, and

embezzlements that occurred in an aircraft leasing company, respectively. In each case, a bank was sued for allegedly causing the losses by failure to follow proper procedures and carry out necessary fiduciary responsibilities. And in each case, there were some "bad facts" on the defendant side, whereby some lapses in usual procedures and controls had arguably occurred in the banks involved. However, a business analysis and close examination of the processes, personnel, controls, governance structures and procedures *in the plaintiff organizations* revealed many weaknesses and missteps that ultimately were recognized as the principal causes of the losses that occurred.

The results achieved in these two cases were driven not only by an expert understanding of banks and the services they provide, but also by HSG's understanding of the operations of the multiple partnerships/LLCs in the ALG matter, and the firm's understanding of the operations of real estate investment trusts in the USA Capital matter. Very simply, in these cases, HSG's examination of the plaintiffs' claims, and business analysis and comparison of the plaintiffs' actions to what would be expected under usual, customary and reasonable business practices, showed that the plaintiffs were responsible, in large part, for the damages they were claiming.

USA Capital

In the first case, it was alleged that Wells Fargo (HSG client) aided and abetted the "looting" of a real estate investment fund which had filed bankruptcy.[1] HSG's assignment was to examine the business merits of the trustee plaintiff's case. When the HSG business analysis was carried out, it became evident that the bank had in fact interacted with the plaintiff, related individuals and related entities in a usual and normal manner, and was not part of (and would not be expected to be part of) the trust entities' oversight and control systems. The HSG analysis and report further established that the weaknesses in oversight and controls within the trust entities themselves created a high-risk environment that enabled certain key employees to operate with virtual carte blanche moving money within a web of companies and ultimately to violate both SEC and Nevada state securities requirements. When this case went to trial, because of a long-standing commitment requiring him to be out of the country, testifying expert and HSG President Stephen Grace reported as to the findings of his analysis shortly after the plaintiffs opened. The plaintiffs then completed their case, at which time the defending law firm Fulbright moved to have the case dismissed.

The presiding judge had in pre-trial hearings made clear her interest in seeing the creditors' interests protected. Following the testimony of Stephen Grace and the defense motion to dismiss, she took the matter under advisement and two weeks later recommended a dismissal to the Federal District Court. The case against the defendant was dismissed and, as a result, no payments were required of the defendant.

ALG Inc.

The second case, *ALG, Inc., Plaintiffs v. NationsBank, N.A., Midwest, et al.*, Defendants,[2] involved NationsBank and was clouded with bad facts. An employee at a large global aircraft leasing firm had been able to open a fictitious account at the bank. He (and later he and a colleague) embezzled close to a million dollars – checks, wires, etc. – using this account. The firm went bankrupt and sued for about $1 million in direct damages and $11 million in consequential damages. Interestingly, HSG found that the embezzler had used three other major banks before hitting HSG's defendant client. Further, HSG's business analysis indicated that internal controls at the bankrupt firm appeared to have been purposely set up in a very weak manner by senior executives in furtherance of their own purposes. The analysis further showed that there were a number of other unusual facts indicating lax procedures and deliberate failure to follow customary governance and division of responsibilities practices. All these failures were set out in HSG's report and testimony. In the resolution of this case, the jury threw out the $11 million of consequential damages the Plaintiff was claiming, and found that there was joint contribution on $120,000 of the $1 million of direct damages. The jury found the bank liable for 5% of the $120,000 of the direct damages and as a result the bank was required to pay only $6,000, a minuscule amount compared to the initial claims that had been made.

> In business disputes and claims, it is important to know not only *"what was actually done"* but also, *"what typically occurs in similar situations."*

Step 4: Identify what would likely have happened if the disputed actions did not occur

After developing an understanding of the processes, controls and governance of both the plaintiff and defendant or other opposing parties in a dispute, the next step is to answer the question *"If the disputed action had not occurred, what would likely have happened"*? Was there really a loss when compared to what would have happened or what the aggrieved party would have done or expe-

rienced in other likely outcomes? How did that party's selected business processes and typical operations, and also external economic conditions, affect the choices that would have been available to that party if the disputed action did not happen?

In business disputes and claims, it is important to know not only "what was actually done" but also "what typically occurs in similar transactions" and "what would a prudent person, manager, executive, business partner, director or board of directors member customarily have been expected to do in this situation"? This involves conducting a scenario analysis of potential outcomes that could reasonably be expected to occur in light of the facts and circumstances and industry operating environments involved. This is challenging when a disputed situation is complex. Having experience in the business transaction or judgment at hand, and/or familiarity with the environment and customary and reasonable practices of the industry involved, aids in recognizing when the "facts don't add up" or that "key information one would expect to be present is missing."

Analyses and testimony in the two example cases pointed out that the damages claimed by the Plaintiffs would have occurred in the absence of the alleged missteps of the defendants. Therefore, the alleged defendant missteps were not the *cause* of the damages claimed.

Step 5: Assess whether real damages have occurred, and if so, evaluate liability and causation therefor

This step answers the questions that quantify losses and damages, evaluates the cause of these losses, and determines whether there is liability on the part of the party or firm being challenged. When the results of the analyses are combined with the calculations utilizing statistical and operational models, and market and pricing assumptions, it is possible to determine estimates of the actual financial impact of the disputed matters.

It is also necessary to evaluate the assumptions and calculations in any damage model submitted by the opposing party. For example, were the assumptions that were made logical and reasonable under the business conditions involved? Were the calculations reasonable when compared to other relevant information? Were the damages caused by the actions of one party or by the actions of several parties? Were the damages caused, in whole or in part, by external forces not under the control of any of the parties involved?

Upon completion of Step 5, it is important to ask the question: *Was there really a loss when compared to what would have happened or what the aggrieved party would have experienced in other likely outcomes?*

In business disputes and claims, it is important to know not only *"what was actually done"* but also, *"what typically occurs in similar situations."* It is critical to be able to answer the question, *"What would a prudent person, manager, executive, business partner or board of directors member have been expected to do in this situation?"* This is challenging and requires extensive knowledge of business conduct and customary and reasonable practices and conditions in the industry involved. Without such knowledge, one may not be aware that some "facts don't add up" or that "key information one would expect to be present is missing."

Answering business conduct and economic questions and assessing damages requires a comprehensive set of knowledge, skills and experience.

With enough time, research and personal effort, any party in a disputed matter can carry out some form of analysis using the steps outlined in this article.

A party to a dispute may choose to hire one or more experts to analyze and opine on some or all of the issues involved. Considerations when deciding whether to carry out a needed analysis alone or to seek outside assistance include such matters as:

1. Knowledge and skill sets needed. Business today involves a very wide range of endeavors, transactions, industries and operating conditions and regulatory environments.
2. Credibility and persuasiveness of a self-interested party providing a report or testimony to a judge, jury or others versus having this information come from a professional third party who is an independent expert on such matters. If it is a self-interested party presenting the information, a judge or jury or mediator may tend to discount some or all of the information as "just that party's argument to defend their own position."
3. Time deadlines and resources. Individuals and groups that are experts on a given subject or in overall business analysis and litigation support can often produce useful information quickly, effectively and economically. Persons who have had direct experience in similar cases are able to quickly identify key factors that support investigation and strategy for settlement negotiations or litigation in court.

The affordability of experts selected depends upon the value they bring to the case for the cost involved. In an ideal situation, an expert firm provides reliable upfront estimates of the cost of its services in steps and increments, is able to do its work quickly and effectively, and is able to uncover facts and arguments that are highly relevant and persuasive in the dispute.

Step 6: Produce a clear, understandable and credible report

When all the information available about the dispute or claim has been assembled and considered, the *final step* is to produce a clear and credible factual report, one that will be readily understandable when presented to litigants, judges, juries, and any other interested parties. Such a report should be more than a mere recitation of facts and statistics and detailed findings – rather, it should be an explanation that fully communicates what has happened in the disputed matter.

In addition to format and content that may be dictated by a legal or claims process, a good report will contain an overall summary in layman's language, along with examples and illustrations of key findings and explanations of the reasons for judgments made. The index or table of contents of a report, if well-designed, can also provide a good "at a glance" outline of the analysis performed and the conclusions reached.

Whatever the prescribed form or content of the report may be, the report will be most beneficial if it is written up in clear, direct, and readily understandable language.

Conclusion

A comprehensive and systematic analytical process is a valuable approach in dealing with disputes, claims and lawsuits, even when the positions of the opposing parties involve a number of "bad facts," that is, problematical facts that can potentially undermine claims and allegations and defenses. "*Bad facts*" do not have to be "*fatal flaws*" and in many cases will not govern the outcome of a dispute when other factors are revealed. Even when a party has made an apparent misstep in a transaction or process, that action or inaction may not be the cause of the damages involved, or may only be partially the cause. In a complex situation with damages, accurately identifying causation and liability are critical issues in determining the outcome. ■

1. *USA Capital Diversified Trust Deed Fund, LLC, Plaintiff v. Wells Fargo Bank, N.A., Defendant*, Case No. BK-S-06-10725-LBR Chapter 11, District of Nevada.

2. Case No 97C15260 Court No. 4, District Court of Johnson County, KS Civil Court Department.

New York, New York, USA – December 21, 2013: Surrogate's Courthouse in New York City located at Chambers Street. Showing pedestrians and traffic.

What's in a Name? That Which We Call Surrogate's Court

The Historical Origins of a Uniquely New York Term of Art

By Dennis Wiley

For many trusts and estates attorneys, particularly those who work or practice in the New York State Surrogate's Court, the term "Surrogate" is so ingrained in our area of law that few, if any, see anything unusual about the word. Like many busy professionals, we simply accept things for what they are, file our papers and conference our cases, and move on with our business. For the uninitiated, however, "Surrogate" may seem like an odd name for a court or a judge, particularly one charged with the probate of Last Wills and Testaments and all other "matters relating to estates and the affairs of decedents . . . ."[1]

Which it is, quite frankly. Google "Surrogate" or "Surrogate's Court" and the uniqueness of these terms becomes readily apparent. Outside of New York State, Surrogates are practically unheard of. Most jurisdictions have "probate" judges, and "probate" or "orphan"

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courts. In fact, according to this author's research, of all the various probate systems throughout the United States, only two states – New York and New Jersey – have ever used the word "Surrogate," and it appears that only one foreign jurisdiction (the Canadian province of Ontario) had ever formally adopted it in connection with its own probate courts.

Perhaps even more surprising, "Surrogate" is entirely absent from the modern vernacular of English jurisprudence. If the country from which we borrowed so much of our own legal system doesn't use the term, then why do we? How did the word "Surrogate" become synonymous with probate judges? Surprisingly, the answers to these questions pack a lot of historical punch that is uniquely New York.

Probate in Medieval England

The origin of the term Surrogate, and how it came to signify the trier of last wills and testaments, covers a fascinating period of history, and the forces that shaped its modern use can be traced back to the Norman conquest of England in 1066. Primitive testamentary instruments were already in existence throughout Anglo-Saxon England, but after William the Conqueror's coronation as the new King, existing governing systems – including the law of succession – underwent tremendous change.[2] The Crown was very suspicious of religious authorities, particularly with respect to dying persons (English historians Sirs Frederic Pollock and Fredric Maitland remarked that the Crown felt that "a boundary must be maintained against ecclesiastical greed"[3]), and consequently directed the removal of clergy from common court proceedings, while also establishing the law of primogeniture, the right of the firstborn son to inherit the family estate, for the succession of land (but not for personal property).[4] These suspicions were not entirely unfounded. The Roman Catholic Church had long maintained a strong interest in the afterlife and the last wills of its followers, on the ground that "the 'last will' of a dead man was . . . intimately connected with his last confession,"[5] providing opportunity for some clergy to unjustly enrich themselves at the expense of their followers.

The Crown's efforts to minimize the Church's role upon its subjects had limited effect, however. While primogeniture arguably "saved" English real estate from the influence of local clergymen, deathbed gifts of personal property to the Church remained common in the Middle Ages. Gradually, over the course of the 12th and 13th centuries, the Church, through its own judiciary (known as the ecclesiastical courts), increasingly asserted jurisdiction over the probate of decedents' wills,[6] eventually – with the blessing of the English monarchy – becoming *the* probate courts in feudal England.[7] Church authority eventually pervaded the administration of all decedents' estates, including those who died without wills, with the local bishop often personally supervising the distribution of estate assets to ensure that the prevailing custom of splitting the estate into thirds was maintained. That custom provided one share of the estate to the decedent's spouse, one share to his children, and the last to the Church.[8]

The function of the ecclesiastical courts was more than ministerial. Just like in modern times, wills in feudal England had to be validated, or "proved," in order to take effect. This was generally done before the bishop in whose diocese the decedent's personal property was located, with the archbishop retaining jurisdiction in cases where the testator had a sizable estate in two or more dioceses.[9] Bishops, however, were very busy people, so they often delegated certain duties and responsibilities to so-called "professionals" trained in canon (church) law, or who were at least somewhat familiar with it.[10]

The Church's firm grip over probate in England remained largely unchallenged through the 14th century. With the rise of the Tudor dynasty in the 1400s, and the resulting Reformation in the 16th century, however, attempts were made to reform the laws of succession and to rein in the power of the ecclesiastical courts, particularly during the rule of King Henry VIII (he of the beheadings fame). Money, of course, was a primary driver of such change, as the Crown became increasingly desperate to refill its coffers (Henry VIII, unlike his father, Henry VII, had a proclivity of finding things on which the Crown could spend its treasure),[11] and certain Church assets – including the "business" of probate – seemed ripe for the picking. But reform proved hard in an agrarian society rife with special interests.[12] With respect to bills that came up for vote in Parliament seeking to clamp down on the Church's monopoly on probate,

> [t]he House of Lords, where the bishops and abbots still had more votes than the lay peers, agreed to the Bills reforming sanctuaries and abolishing mortuary fees, which affected the lower clergy only, but when the Probate Bill came up to the Lords the Archbishop of Canterbury "in especial" and all the other bishops in general, both frowned and grunted.[13]

Despite vigorous opposition, the ecclesiastical courts ultimately could not escape unscathed. Under Henry VIII, the Church of England affirmatively split from the Roman Catholic Church in 1533, and the Crown assumed the role as the supreme head of the Church of England.

So, you may ask, what does all of this have to do with the use of "Surrogate" to describe probate courts? With its new authority, the Crown seized control of the Church and imposed administrative regulations and restrictions that, over many years, culminated in the promulgation of the Canons of 1603. Adopted by the Crown as the law of the land, subordinate only to common and statute law,[14] the Canons expressly preserved the Church's domain over English probate and estate administration, specifically authorizing, under Canon 127, each ecclesiastical judge – typically the presiding bishop – to continue

the practice of appointing a so-called "professional," or deputy, to keep court upon his absence. But the Canons went one step further, and formally bestowed the title "Surrogate" (derived from Latin, it means "substitute") upon such deputies.[15] Thus, "Surrogates," when properly appointed by the presiding bishop, had the power to prove wills, among other things.

Probate in Colonial New York

During this time, "Surrogates" and ecclesiastical justice were nonexistent in the New World. In 1624, the Dutch settled the colony of New Amsterdam in what is now known as New York City, and they brought with them their own laws and customs in connection with probate and estate administration.[16] Little changed in this regard following the Dutch surrender to the English in 1664, at least initially.

The colony's new English owner, James, the Duke of York (his brother was Charles II, the King of England), never visited his new kingdom, as doing so was out of the question for English royalty. (Surprisingly, it would take almost another 300 years for the first English King to visit the United States.) To rule his lands from afar, the Duke decided to appoint a governor to oversee the colony, who, like the hereditary nobleman in the "counties palatine" governance system used in England, had autonomous legal authority to adjudicate crimes and civil matters.[17]

After the Dutch turned over the colony to him in 1664, the Duke commissioned a stalwart Royalist, Colonel Richard Nicolls, as his first governor of New York.[18] Among the first acts of the new governor upon arriving in the New World was to implement its first body of laws, known as the "Duke's Laws."[19] These laws evolved over time, and were revised periodically to incorporate the latest principles of English common law and, of course, the occasional written instructions received from the Duke himself.[20] With respect to decedents' estates, the Duke's Laws vested probate authority in three tribunals, the Court of Assizes (which later became the highest court of the land at the time) and the lower Court of Sessions, and, in New York City, a reconstituted Dutch court which the English renamed the "Mayor's Court." Responsibility for intestate estates was assigned to local justices of the peace.[21]

As the colony expanded over the next 30 years (both in terms of land area and population), however, more formal governing structures were established. The Province of New York was divided into three administrative jurisdictions, called "ridings," and in each was a Court of Sessions, composed of resident justices of the peace, which handled all probate, guardianship and estate accounting matters. Within the city of New York, the Mayor's Court continued to handle probate. Proofs and proceedings were had before the court in the first instance, with the governor – like the bishops in the English ecclesiastical courts – retaining final say over the granting of letters to fiduciaries.[22]

In February 1685, the Duke ascended to the Crown as King James II, and subsequently his title to New York merged into the royal kingdom. Seeking a more formal and structured implementation of English law upon his new royal province, James II sent a secret letter of instruction, dated May 29, 1686, to then-Governor Thomas Dongan, formally delegating "ecclesiastical" authority of the province to the governor's office, including the power to probate wills.[23]

> The origin of the term Surrogate, and how it came to signify the trier of last wills and testaments, can be traced back to the Norman conquest of England in 1066.

Three years later, in 1689, the newest heir to the English throne, King William III, further expanded the governor's probate authority by permitting the governor's commander-in-chief to also take proofs of wills.[24]

This expansion of executive power was quickly affirmed by the governor's office, and later, by the provincial legislature. Following Governor Sloughter's death in 1691, his successor, Lieutenant Governor Richard Ingoldsby, began inserting a clause in all letters testamentary and letters of administration, expressly stating that the final decision to grant letters belonged solely to the governor and not to any inferior court. In addition, the governor's office began annexing certificates to wills proved before the governor's secretary, as evidence of his authority to do so as the governor's delegate.[25]

Approximately one year later, on November 11, 1692, the New York provincial legislature required all wills in the province to be proved in New York City before the governor *or his delegate*. A distinct office blossomed in the governor's office to handle probate, called the Prerogative Office, which was shortly renamed the Prerogative Court.[26] In more remote counties, the Court of Common Pleas (one in each county) took proof and transmitted papers to the Prerogative Court in New York City for probate.

Remarkably, by 1700, the New York provincial probate system had the look and feel of the English ecclesiastical probate courts, although there was still no mention of "Surrogates" in New York, or in any other colony in the New World. That soon changed.

John Bridges, LL.D.

In 1701, Edward Hyde, who also went by the more exotic name, Viscount Cornbury, was appointed governor of New York. A relative of her royal highness Queen Anne, Governor Cornbury arrived in New York on May 3, 1702, accompanied by his friend, a Cambridge-trained barrister, John Bridges, LL.D.[27] Not much seems to be known about Dr. Bridges, but the little that is known indicates that by the time he arrived in the New World, he was a highly educated and well-connected young man. His law library was considered extensive, and its size and breadth quickly became renowned throughout the colony.[28]

Dr. Bridges's career rose quickly. A month after arriving in New York, the Queen appointed him Second Justice of the Supreme Court of Judicature and then, a month after that, Chief Justice of New York. In September 1702 – only four months after arriving in New York – Dr. Bridges was appointed as the governor's delegate in the Prerogative Court, a position he held for less than a year. As delegate, Dr. Bridges began adding the title "Surrogate" after his signature to all probate documents,[29] the first, it is believed, to do so, presumably borrowing the term from the ecclesiastical courts of England, which, under the Canons of 1603, had officially promulgated its use.

From New York, the use of "Surrogate" quickly spread to New Jersey. Governor Cornbury was likely the catalyst, having been appointed as the executive head of that province on December 5, 1702. As in New York, the governor's office proceeded to expressly reserve all New Jersey probate matters to itself, with Governor Cornbury personally taking proofs of wills and granting letters proved elsewhere in the province.[30] The governor later commissioned Thomas Revell as his New Jersey "Surrogate."[31] From that point forward, the term became imbedded in New Jersey probate, as evidenced by, among other things, Governor Cornbury's terse response, by letter dated May 12, 1707, to the New Jersey Assembly's request for the creation of an office for probate of wills in every county ("[C]onsidering the remoteness of Cape May County and the County of Salem, I did appoint a Surrogate at Burlington before whome any of the inhabitants of Either Division might have their Wills proved . . . .").[32]

With Dr. Bridges having planted the "Surrogate" seed, the rest, as they say, is history. Dr. Bridges died on July 6, 1704, only two years after arriving in the New World, likely having no idea of his lasting impact upon the New York judiciary. The Prerogative Court continued to handle probate in provincial New York for the next several decades, but its power remained more ministerial than judicial, as the final disposition of any estate matter remained with the governor and his delegate. As the colony grew, local delegates were appointed to assist with the administration of estates, and they eventually assumed the title of "Surrogates."[33] These delegates were little more than notaries who received evidence concerning the validity of a will, which was forwarded onto the governor's deputy's office for final approval.

In New York, the word "Surrogate" has been permanently ensconced in our body of laws, by virtue of its place in Article VI, § 12 of our state Constitution.

Following the creation of the state of New York in 1776, provincial governing structures and systems largely remained in place, although they became increasingly cumbersome for the growing populace to utilize.[34] In response, the New York State Legislature created the Court of Probates in 1778, which replaced and assumed the role of the Prerogatives Court, except with respect to the appointment of the local county Surrogates. Ten years later, the legislature created a Surrogate's Court in each county and, following the abolishment of the Court of Probates in 1823, the Surrogate's Court slowly grew in power and responsibility, eventually evolving into courts of record in the process.[35]

Notably, as the term Surrogate slowly rooted itself into New York jurisprudence in the 18th and 19th centuries, the opposite occurred in England. As the power of the English state grew, the power of the ecclesiastical courts (and their bishop-appointed Surrogates) diminished, until, in 1857, the courts were abolished in their entirety, and replaced by the newly created civil Court of Probate.[36] And just like that, Surrogates were no more in England.

Here in New York, the word "Surrogate" has been permanently ensconced in our body of laws, by virtue of its place in Article VI, § 12 of our state Constitution. It is a historically rich, and uniquely New York, term of art, with a backstory that is much more interesting than its name may suggest. ■

1. N.Y. Surrogate's Court Procedure Act 201(3) (SCPA).

2. *See* 2 Sir Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 330, 332-336, 339 (2d ed.) (1898).

3. *Id*. at 344 ("In the interest of honesty, in the interest of the lay state, a boundary must be maintained against ecclesiastical greed and the other-worldliness of dying men.").

4. *See id*. at 279–80, 330.

5. 1 Sir Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 136 (2d ed. 1898).

6. *See Manning v. Anderson Galleries, Inc.*, 130 Misc. 131 (Sup. Ct. Albany Co. 1927) ("A will of land probated in an ecclesiastical court did not become a part of the record there, because that court had no jurisdiction to render judgment upon a will of land . . . .").

7. See 2 Pollock & Maitland, *supra* note 2, at 345, 348. For an excellent overview of the history of the law of succession governing real property in England and America, see Francisco Augspach's article, *The Executor and the Real Property*, in N.Y. Real Property Law Journal, Spring 2012, Vol. 49, no. 2, p. 17–30.

8. 2 Pollock & Maitland, *supra* note 2, at 345, 348, 373, 376–79.

9. *Id*. at 377.

10. 1 Pollock & Maitland, *supra* note 5, at 220.

11. "Why did Italians enjoy the revenues of English bishoprics? Why were the clergy demanding fees for probate on wills and gifts on the death of every parishioner? The King would ask his learned Commons to propose reforms." 2 Winston S. Churchill, A History of the English Speaking People: The New World 53 (1956).

12. *See* Blackwell, A Companion to Tudor Britain 89–90 (Robert Tittler and Norman Jones eds., 2004).

13. *Id*. at 54.

14. Rev. C. H. Davis, M.A., The English Canons of 1604 1-8 (1869).

15. Specifically, Canon 127, "Judges Ecclesiastical and their Surrogates." *See* Davis, *supra* note 14, at 109–11. Canon 128, "The Quality of Surrogates," delineated the qualifications necessary to serve as an appointee.

16. *See Runk v. Thomas*, 200 N.Y. 447, 452–53 (1911).

17. Robert Ludlow Fowler, Introduction to Decedent Estate Law of the State of New York 33 (1911).

18. Alden Chester, 1 Courts and Lawyers of New York: A History 1609-1925, 290–91 (1925).

19. *In re Brick's Estate*, 15 Abb. Pr. 12 (Sur. Ct., N.Y. Co. 1862) (Daly, J., Acting Surrogate); 1 Chester, *supra* note 18, at 302–05. Images of the Duke's Laws may be found at www.nycourts.gov/history/legal-history-new-york/documents/Publications_1665-Dukes-Law.pdf.

20. *See Brick's*, *supra* note 19.

21. *See* Clark Bell, LL.D., Esq., *The Supreme Court of New York*, Medico-Legal Journal, Vol. XX – No. 1, at 484–85 (1902); *Brick's*, *supra* note 19; 1 Chester, *supra* note 18, at 317–31. Although the Duke's Laws were the law of the land, the Dutchmen in the colony were permitted, under the Articles of Capitulation of 1664, which governed the terms of their surrender to the English, to administer their estates in accordance with Dutch law. Fowler, *supra* note 17, at 33.

22. *See Brick's*, *supra* note 19.

23. *See* Fowler, *supra* note 17, at 33–34; II Ecclesiastical Records State of New York 915-916 (1901) (published under supervision of Hugh Hastings, State Historian).

24. John Romeyn Brodhead, Esq., III Documents Relative to the Colonial History of the State of New York 688 (1853).

25. *See Brick's*, *supra* note 19; 1 Chester, *supra* note 18, p. 424–425, at footnote 27.

26. *See* Fowler, *supra* note 17, at 34; *Brick's*, *supra* note 19; 1 Chester, *supra* note 18, p. 425, at footnote 27. *See also* Historical Society of the New York Courts, at www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-prerogative.html.

27. Princess Anne became Queen following the death of William III on March 8, 1702.

28. *See* D.T. Valentine, Manual of the Corporation of the City of New York 568 (1864); Historical Society of the New York Courts, at www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-bridges.html.

29. *See Brick's*, *supra* note 19.

30. William Nelson, The Law and the Practice of New Jersey, From the Earliest Times 45–48 (1909).

31. *See id*. at 47–48.

32. *See id*. at 50.

33. *See Runk*, *supra* note 16, at 453; Historical Society of the New York Courts, at www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-prerogative.html.

34. *See Runk*, *supra* note 16, at 453-54.

35. *See Brick's*, *supra* note 19; Fowler, *supra* note 17, at 36–37; *Runk*, *supra* note 16, at 452-53.

36. *See* Probate Act, 20 & 21 Vict., c. 77 (1857) (Eng.).

BY PETER SIVIGLIA

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Effective Contract Drafting – Part 5.1

Part 5 of *The Legal Writer*, which appeared in the June 2016 issue of the NYSBA *Journal*, emphasized – quite correctly – the importance of writing unambiguous contracts. Ambiguity in a contract is an error that creates a playground for litigators, while the job of transactional attorneys, those who write contracts, is to place commercial litigators on the endangered species list.

The article provides many valuable techniques to avoid creating those playgrounds. This article complements the June article, offering a perhaps unique perspective on the contract and a few observations and additional techniques learned in a lifetime of contract preparation.

A. What Is a Contract?

Initially, it is essential to appreciate what is a contract: *A contract is simply a set of instructions*. It is no different from the plans and specifications to construct a bridge or a computer program to operate a system. If there are errors in those plans or specifications or in the computer program, the bridge might collapse or the system might crash. Likewise, ambiguities or errors in a contract are combat zones for litigators, jeopardizing the transaction, with clients paying the battle costs.

B. The Prime Directive

So, realizing that a contract is no more than a set of instructions, the *prime directive* in contract preparation is *accuracy stated as simply as possible*. "Clarity" is not part of the prime directive because an instruction can be clear but it can also be wrong. For example:

- "Excuse me, can you tell me where the ladies' room is?"
- "Sure. Straight down this hall, first door on your right."

Clear? Yes. But unfortunately wrong, for the first door on the right is the men's room. Accuracy and simplicity are, therefore, the goals; in combination, they will produce clarity.

C. The Writer's Disease and the Antidotes

The condition that afflicts all writers is that they will read the words that they write to mean what they intend the words to say *rather than* what the words *actually* say. Baseball Hall of Famer Ted Williams, perhaps the greatest hitter in baseball, said: "I think without question the hardest single thing to do in sport is to hit a baseball." Well, on a comparable note, I think in writing the hardest single thing to do is to write a sentence that has the same meaning to the writer and to everyone else who reads it.

There are two prescriptions to treat the affliction, and my wife, who teaches expository writing, prescribes both.

The first is to read the document aloud. Reading the words aloud requires a focus that often reveals flaws that otherwise hide in silence.

The second is to set the document aside for a period after completing and vetting the initial draft – preferably for at least a day – and then to examine it. By distancing themselves from the draft, writers will examine the draft with greater objectivity – that is, more critically; and that objectivity will aid in detecting flaws in the drafting.

As an example: Being a compulsive nerd, I write the yearly supplements for *Commercial Agreements* years in advance of their publication. Periodically, and in the year of publication, I review the supplements. Invariably, with each reading, I will make corrections. And sometimes – horrible to admit – I will come across a passage and say: "How could I have written that _____!"

D. A Frequent Flaw

One of the most common errors in writing is the misplacement of modifiers. Here's an example of such a disaster.

An employee was entitled to certain payments "on termination of her employment by the Company." The employee quit her employment and moved, claiming the payments. She read "by the Company" as modifying "employment." The Company, on the other hand, argued that the prepositional phrase modified "termination," and since the employee left voluntarily, she was not entitled to the payments. Grammatically, the employee had the better argument. An adjectival prepositional phrase generally modifies the noun to which it is closer. But the issue is not free from doubt. From the employee's point of view, the language should have read "on termination of her employment *with* the Company." From the Company's point of view, the language should have read "on *termination by* the Company of her employment."

Nitpicking? Perhaps. But one case and one party's money turned on this issue.

Sometimes the misplacement can be humorous (or perhaps even insulting), as in the following letter.

> Dear Bill,
>
> As you do not wish to exercise your options at this time, I am returning your check and the notice of exercise. I just don't feel real comfortable sitting on a check from anyone of this size.

Another example? Note the literal difference in meaning between the following two sentences, though the writer's intent in the first is clearly the statement made in the second:

> Never include a provision in a contract that you do not understand.
>
> vs.
>
> Never include in a contract a provision that you do not understand.

Reading the document aloud, and reading it after setting it aside for a while, should reveal errors like these.

E. The Passive Voice

"Don't use the passive voice" is one statement in the June article with which I disagree. In the contract, the passive voice has a special place and can play a useful role. To make the argument, though, we must first understand the difference between the active and passive voices.

In the active voice, the subject of the sentence performs the action: *John ate* the frog.

In the passive voice, the subject of the sentence is the object of the action: The *frog was eaten* by John.

The passive voice is appropriate and should be used when the result of the action is the essence of the message and the cause of the action is either unknown or unimportant or when the writer wishes to be vague.

So, in the contract, where loopholes are the enemy and the force of the statement is irrelevant, the passive voice is sometimes the shorter and safer route to comprehensiveness. For example: If you damage the equipment, you will repair it.

But someone else might damage the equipment. Therefore: If you or anyone else damages the equipment, ...

Still, lightning or falling rocks or an avalanche might damage the equipment. Thus: If you or anyone else or anything damages the equipment, ...

Yet, what if the equipment is parked on a hill and the brake slips, and the equipment rolls down the hill into a mud pond fouling all of its parts? The last version should cover the situation, but I would not want to argue the point. So: If you or anyone else or anything damages the equipment or the equipment becomes damaged in any other manner, ...

Or, more simply, use the passive voice when the result of the action is the essence of the message and how it occurs is immaterial: If the equipment is damaged, regardless of the cause, ...

Another example? The passive voice is sometimes the better choice in default clauses:

> If a petition is filed by or against you in a bankruptcy or other insolvency proceeding and, if against you, it is not dismissed within 30 days, ...
>
> vs.
>
> If you file a petition in a bankruptcy or other insolvency proceeding or if anyone files a petition against you in any such proceeding and the court does not dismiss it within 30 days, ...

[*This portion of the article was brought to you by the Passive Voice Anti-Defamation League.*][1]

F. Two Metaphors

The purpose of the first metaphor is to stimulate good writing: *Your writing is your mind walking naked across the page.*

As an added incentive, the discipline and the critical and analytical functions required to write well are exercises that will improve your mind.

The purpose of the second metaphor is to produce good writing: *What the wheel is to the world of mechanics, grammar is to the world of writing.*

A proper knowledge of grammar, which deals with sentence structure, is essential to creating unambiguous, error-free contracts. Misplaced modifiers and unclear antecedents, such as those highlighted in item D above, are dishes on which litigators dine. Even improper punctuation can serve as a main course. For example, below is a termination clause from a contract between a cable company and a telephone company. Though the entire clause is poorly written, only the second comma in the clause was at issue.

> This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated on one year prior notice in writing by either party.

The cable company argued that the contract should remain in effect for at least five years. The telephone company argued that because of the placement of the second comma, either party could terminate the contract at any time on one year's written notice to the other. The commission that decided the issue ruled in favor of the telephone company, stating, with grammatical correctness, that the second comma should have been omitted for the contract to have a minimum life of five years. That comma allowed the telephone company to terminate the contract during the initial five-year period, resulting in a savings to the telephone company of more than $2 million.

G. Two Essential Tools

The two tools that every writer should have immediately available when writing are a good dictionary and a good grammar book. Modesty precludes me from suggesting two other books that the contract writer should at all times have available.

H. Conclusion

Contracts are the highways of commerce. Let's not create potholes. ■

1. *See* § 5:7 of Siviglia, *Writing Contracts, a Distinct Discipline*, Carolina Academic Press.

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UBE-Shopping: An Unintended Consequence of Portability?

By Suzanne Darrow-Kleinhaus

Introduction

Preparing for the Uniform Bar Examination (UBE) may require more than just learning the law; it also means learning in which jurisdiction you should take it. While there is not much that is new about the UBE's individual components – the Multistate Essay Examination (MEE), the Multistate Performance Test (MPT) and the Multistate Bar Examination (MBE)[1] – what is new is that where you take the UBE may make the difference between passing and failing. This is possible because of the convergence of bar exam test practices of "portability," "relative grading," and "scaling" of scores.

By adopting the UBE, jurisdictions agree to weight the MEE at 30%, the MPT at 20%, and the MBE at 50% in determining an examinee's score. As a result, the UBE, as currently administered,

- leads to the situation where the same skill level could result in different UBE scores depending on where the candidate takes the exam;
- fails to ensure that the scores used to grant licensure in a UBE jurisdiction are sufficiently reliable for high-stakes testing when it is possible to achieve different outcomes on the same test by the same candidate if taken in different UBE jurisdictions;
- results in a "portable" score but not an "accurate" one because the written score – 50% of the total – depends on the strength of the applicant pool in the jurisdiction where the candidate wrote the exam;
- presents a candidate with the opportunity to "UBE shop" and "game the system" by taking the UBE in a jurisdiction where the same essay and MPT performance would result in a higher score and then transferring that inflated score for admission in a "harder" jurisdiction; and
- makes it possible for a candidate to file a discrimination lawsuit challenging his or her UBE results.

The Possibility That One Can "Game the Test" Makes a UBE Score Inherently Unreliable

The National Conference of Bar Examiners (NCBE), the entity that produces the MEE, MPT, MBE, and MPRE components of the bar exam, claims that the UBE provides more consistency in bar admission requirements than non-UBE jurisdictions and is, therefore, more reliable. NCBE points to the UBE's equal weighting of components and uniform scoring as opposed to differences among non-UBE jurisdictions in their grading and scoring.[2] NCBE further claims that the UBE provides the consistency essential for comparisons between jurisdictions of examinees' competency because all UBE examinees "will be taking exactly the same exam and receiving scores that will have the same meaning across the country."[3] Scores have the same meaning because the UBE is "uniformly administered, graded, and scored"[4] by the jurisdictions that adopt it. Consequently, although UBE jurisdictions may set differing cut scores for admission, what remains "consistent" is the assurance that a UBE score represents an examinee's fitness for the practice of law within the UBE roster of jurisdictions.

The question, however, is whether the scoring process followed by UBE jurisdictions achieves this level of reliability. An example shows why "uniform" scores may not "have the same meaning" and therefore may not be sufficiently reliable for high-stakes testing.

Let's begin with the mean MBE scores from the July 2015 bar exam.[5] The following are those scores that are available from jurisdictions that publish their state's mean MBE score, although not the standard deviation ("s.d."):

July 2015 MBE Mean for Selected Jurisdictions[6]

Jurisdiction	MBE Mean
California	142.4
Pennsylvania	142.2
Georgia	140.2
National	**139.9**
Tennessee	139.8

The largest difference in mean MBE score among these jurisdictions is 2.6.

Now consider NCBE's published national mean MBE scores in 2014, as well as their standard deviation:

2014 National Mean and Standard Deviation of MBE SCORES[7]

Date	MBE Nat. Mean	s.d.
July 2014	141.5	16.0
Feb. 2014	138.0	15.3

NCBE claims that its standardization process of equating makes it so that an MBE score of 140 in July has the same meaning as a 140 in February; the difference in mean from July to February is because the February candidates are weaker.[8] A July candidate who is relatively weak on the MBE but better on the written would do better by taking the bar exam in February, when his or her essay score would be even higher because of the comparative grading.

By this logic, then, the candidates in July 2015 in Tennessee (mean MBE score of 139.8) are weaker than the candidates in California (mean MBE score 142.2). But the UBE scales a written score to the candidates in the jurisdiction where the UBE was taken. So because of the way the UBE is scaled, that same July candidate in a UBE jurisdiction could now achieve a similar result by picking a jurisdiction more like the February national pool where the mean MBE score is 138 and simply transferring that score to her own preferred jurisdiction (forum shopping, rather than deferring until February). But to do that, she would have to choose wisely so that her written performance is comparatively higher enough, and we don't have the information to make that choice.[9]

Consider an example:

> Written scaled = (candidate written score s.d.) (statewide MBE s.d.) + (statewide mean MBE score)
>
> Suppose our candidate scores 124 on the MBE: she would need 156 on the written to total 280, the UBE passing score in that jurisdiction. In her home jurisdiction (like the July national mean), the MBE mean is 141.5 and the s.d. is 16, so she would need to be 0.91 s.d. above the mean in her written performance (82nd percentile).
>
> But now choose a jurisdiction where the pool looks more like a February pool, with a mean of 138 and s.d. of 15.3. Now she would need to be 1.2 s.d. above the mean (89th percentile in that weaker jurisdiction) to reach a 280.

It seems likely that our candidate's strong written performance in her jurisdiction would rank her even higher in a weaker jurisdiction, so it would work to forum shop, but once again, we do not have the necessary statistics to test the hypothesis. Testing requires knowing the MBE mean and the standard deviation from that mean for that jurisdiction because the essays and performance test raw scores are scaled using that number.

Nonetheless, it can be inferred that achieving a different numerical score for the exact same performance is possible depending on where the candidate wrote the exam because of "relative grading." Relative grading or "rank-ordering" occurs when graders make grading distinctions among papers where the "top grade does not necessarily indicate an excellent paper; it just indicates a paper that is better than the other papers."[10] For the UBE,

this means that the examinee's written portion – the MEE and MPT – is scored "relative" to the other examinees' answers in that jurisdiction. These "ranked" scores are then scaled to the MBE.[11]

Returning to our example, if we apply this process to scoring our candidate's written bar exam components, she can "appear" better and therefore be "ranked" higher when in the company of one group as opposed to another. *NCBE has acknowledged this situation: it has been shown that "an essay of average proficiency will be graded lower if it appears in a pool of excellent essays than if it appears in a pool of poor essays. Context matters."*[12] Finally, when this "ranked" score is then scaled to the MBE score for that group, she may end up with a higher UBE score than she would otherwise receive. Thus, while the score is "portable," it is not accurate because the written score – 50% of the total – depends on the strength of the applicant pool in the jurisdiction where she wrote the exam.

The size of the applicant pool would also play a role, especially if that affects the standard deviation of the MBE distribution in that jurisdiction.[13] This requires understanding how essay scores are scaled to the MBE. According to Dr. Susan Case, former director of testing for the National Conference of Bar Examiners, scaling the essays to the MBE is essential to ensure that scores have a consistent meaning over time.[14] Essentially, essay graders engage in relative grading so that the top performers in a group get the same top scores as those in a prior group, regardless of whether the pool is less competent than a prior pool.

With the UBE, however, essays are not scaled to a national distribution that has been scaled across time, but are instead scaled to that jurisdiction's MBE distribution by forcing them to have the mean and standard deviation as that of the MBE distribution for that jurisdiction. In other words, the same skill level on the essays and MPT would get a different score in different jurisdictions, depending not only on the relative written skill of the jurisdiction's candidates, but also the relative MBE skill. This can have a significant impact on individual scores, especially in smaller jurisdictions.

Using the NCBE's method of scaling,[15] let's see what would happen with a hypothetical candidate. Let's assume we have a candidate who scores 125 on the MBE when the national mean is 140 and the standard deviation is 15 (so this candidate is 1 s.d. below the national mean because the MBE is her relative weakness). However, our candidate is good at essays and the MPT so her written score is 1 s.d. above the mean for her jurisdiction. According to the methodology that NCBE uses in scaling MBE scores, our candidate's essay score will be computed to be 140 + 15 = 155 because the jurisdiction's MBE mean is 140 and its s.d. is 15. That would give our candidate a total UBE score of 155 + 125 = 280, which is high enough for admittance in several jurisdictions, including New Mexico, Idaho, Washington and New York.[16]

Now let's consider what happens if the jurisdiction's MBE mean is down at 135, with a standard deviation still at 15. If our candidate

> scores 1 s.d. above the mean on the written, then her written score will be standardized to 135 + 15 = 150. That means that her total UBE score would be 150 + 125 = 275. She would no longer be eligible in Idaho (where the minimum required is 280) simply because of the slightly lower mean but same variance in MBE scores in her jurisdiction. Her skill level did not change: that of the pool of candidates did. Is this what we want to mean when we tout the "portability" of the UBE?[17]

Now consider that the jurisdiction's MBE mean is at 140[18] but the standard deviation is not as large – make it 12 rather than 15. The MBE score is still 125 but now our candidate's written score that is 1 s.d. above the mean in her jurisdiction gets scaled to 140 + 12 = 152. Her total score on the UBE is then 152 + 125 = 277 and again she would not be able to transport that score to Idaho for admission.

But those are pretty simplistic examples. If our candidate is really that good at the written component (in the 84th percentile in her jurisdiction if she is 1 s.d. above the mean) and she chooses a jurisdiction where the applicant pool is, for whatever reason, weaker in written performance, then her performance will be more than 1 s.d. higher in that jurisdiction. It can get a bit complicated to estimate this, but just say that the MBE mean is down at 135 as in the second example, and relative to the weaker pool her written score winds up being 2.5 s.d. above the mean. Then her written score would scale to 135 + 22.5 = 157.5 and that elevates her total UBE score to 125 + 157.5 = 282.5. This would give her entry into just about any UBE jurisdiction.[19]

It would seem likely that with smaller sample sizes, it would be more likely to see variations from the normal distribution. However, it is not possible to determine how seriously that would distort the standardization because so little information about the national sample and the individual jurisdictions is available. Nonetheless, it is possible to see that the more you "work the numbers" the way the NCBE does,[20] the more you see that the same skill level could result in different UBE scores, depending on where the candidate takes the exam and what that jurisdiction's applicant pool does on that particular exam, in terms of both skill level and also the range or spread of scores.

"UBE Shopping" May Make a UBE Score "Fair" for the Examinee

"Forum shopping," however, may level the playing field for the individual in a way that the current scoring and weighting of the bar exam components does not. While relative grading may make a UBE score "unreliable" as to the "receiving" jurisdiction, it may make the UBE "fair"

to the individual. By having a choice among UBE jurisdictions as to where to take the exam, an examinee who performs better on the written component can compensate for a weaker MBE score by having that written score ranked and scaled in a "weaker" jurisdiction.

On the other hand, how "fair" is it to the other examinees in the UBE jurisdiction to which the score is transported? While essay grading by rank-ordering is considered a "grading fundamental"[21] and practiced within non-UBE jurisdictions as well as UBE jurisdictions, it has different implications in a UBE setting. Even assuming that, in both a non-UBE jurisdiction and a UBE jurisdiction, an examinee's raw scores on the written portion are added up and scaled to the MBE mean and standard deviation for that jurisdiction, the difference is that the non-UBE earned score remains in that jurisdiction. It is not transferred for admission to practice law in another jurisdiction where a completely different group of candidates sat for the bar exam. The examinee with the "portable score" was not "ranked" against these examinees to achieve his or her score.

NCBE Claims That the UBE's Consistency Will Make the Bar Admission Process More Comprehensible to the Public

NCBE's claim that the UBE's consistency will make the bar admission process more understandable to the public is insupportable when much of that process remains hidden from public scrutiny. NCBE is not making the bar admission process more comprehensible to the public when it speaks in hypotheticals, even as it purports to "unlock" the mysteries of scaling essay scores to the MBE.

While NCBE releases the national MBE mean following each administration of the bar exam and some jurisdictions release their individual MBE mean, there is a general absence of information regarding the mean and standard deviation for the MBE and the written component used to determine bar scores in jurisdictions. Without this information, there is no way to replicate, and therefore validate, the "equating process" followed by NCBE and jurisdictions in arriving at examinee scores. Nor is there any way to assess the "validity and reliability of using only multiple choice items as anchors to equate forms of a mixed-format test."[22] Recent studies in this area indicate a cause for concern as to whether NCBE's equating method works equivalently for different subpopulations.[23]

Equally concerning is the validity and adequacy of using only multiple choice items as anchors to equate forms of a mixed-format test – one that consists of essays and performance tests as well as multiple choice questions, as does the UBE.[24] According to Dr. Johnson:

> when the correlation between multiple choice and a different format item is relatively low, significant differences in accuracy of equating are seen between men and women, and the use of multiple choice items as anchors is of questionable efficacy (Kim & Walker, 2011), presumably because the two formats are not measuring the same underlying ability. Susan Case . . . reported the correlation between MBE and MPT to be down at .38, which may be the cause for concern in many jurisdictions. Very large sample sizes do not cure the problem.[25]

However, whenever NCBE is questioned about the "reliability, validity, integrity, and fairness of the test and the processes by which it is created and scored,"[26] it appears to have but one answer: trust us because we ran the tests and we say that they are reliable. When NCBE informs the public that its test instruments are valid and reliable, we have only its word for it because NCBE does not share how it verifies its own questions – just that it does.[27]

> The size of the applicant pool would also play a role, especially if that affects the standard deviation of the MBE distribution in that jurisdiction.

And it's not like NCBE has not been asked. In response to the legal academy's questioning of the MBE in light of the decline in the mean score for the July 2014 administration of the Multistate Bar Examination, Erica Moeser, president of the National Conference of Bar Examiners, wrote that "we are confident of the correctness of the scores as reported. Because of the importance of getting things right, we engaged in more replications of our equating procedure internally – and indeed, more review of our procedures for selecting test items – than usual. Had we detected error, we would have reported and acted upon it. We found no error."[28]

Scoring Issues With UBE's "Portability" May Make Admissions Committees Vulnerable to Legal Claims

There is a difference between an exam score earned by an examinee in an individual jurisdiction scoring its own written exam and an exam score earned in one jurisdiction that is "transported" to another. Even if the UBE is uniformly administered, graded, and scored by the jurisdictions that adopt it, we have seen how it is possible that a 280 score in one jurisdiction is not the same as a 280 score in another.

Let's consider our hypothetical candidate once again. Suppose she takes the bar exam in one UBE jurisdiction and scores a 278. She understands how close she is to the magic 280 that would allow her admittance to Idaho, and

she understands that the scaling seems weird. Could she not file a discrimination suit, based on NCBE's scoring practices[29] and seek discovery to force release of information about the mean and standard deviation for the MBE and the written score in each of the two jurisdictions? How long will it be before a disappointed examinee challenges the portability of a UBE score?

Now that we know the UBE can result in a different numerical score for the exact same performance depending on where the examinee wrote the test, what we decide to do next is critical. Of course, we can ignore what we know and allow bar candidates to "UBE shop." Or we can insist that a "uniform score" be truly uniform. The

"Forum shopping," however, may level the playing field for the individual in a way that the current scoring and weighting of the bar exam components does not.

"only way for the UBE to be truly portable is to get every jurisdiction to agree to use and pay a centralized scoring service to grade it and standardize it based wholly on a national distribution. That scoring service would, of course, be NCBE."[30]

Before we proceed down that road, however, we need to ask the following questions. They are important, but the answers are even more important because they determine the future of legal education and access to the profession.

- Over what aspects of the licensing process do we want "centralized control?"
- Do we want a "central collection point" for all bar exam data for all bar candidates as NCBE has offered to become?[31] Is NCBE the right entity for this purpose? If so, what oversight shall there be and by whom?
- Is the next step a national law license?

Finally, the very question of whether the UBE achieves its primary purpose of assessing whether a candidate is competent to practice law is in doubt. As presently conceived and administered, the UBE cannot be a measure of a candidate's "minimum competency" if the same person can be found "competent" to practice law in one UBE jurisdiction and "incompetent" in another when it is the same person with the same skill level writing the same exam. ■

1. *UBE: Uniform Bar Examination*, National Conference of Bar Examiners, www.ncbex.org/exams/ube/. The National Conference of Bar Examiners (NCBE) develops and sells these three test instruments to jurisdictions. The MBE is a multiple-choice exam with 200 questions testing examinees' knowledge of Civil Procedure, Constitutional Law, Contracts and UCC Article 2, Criminal Law and Procedure, Evidence, Real Property, and Torts. The MEE includes essay questions covering these MBE subjects and five additional areas. The MPT consists of two performance tasks where examinees complete "lawyerly" assignments using the material from the provided Law Library and Client File.

2. *See* National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements 40 (2016), (Chart 9: Grading and Scoring. While the UBE weights the MBE at 50% and the written portion, MEE and MPT, at 50%, Chart 9 shows the range about jurisdictions: MBE weights range from 33 to 50%, the MEE and/or local essay exam from 25 to 60%, and the MPT or local performance test from 8.7 to 26%.) www.ncbex.org/pubs/bar-admissions-guide/2016/index.html#p=1.

3. Susan M. Case, *The Testing Column, The Uniform Bar Examination: What's In It for Me?* The Bar Examiner, Feb. 2010, at 50, 52 (Case, *What's In It For Me?*), http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2010/790110_TestingColumn.pdf. *See also UBE Score Portability*, National Conference of Bar Examiners, www.ncbex.org/exams/ube/score-portability/. NCBE advises jurisdictions that because every UBE jurisdiction uses the same essay questions, the same performance tasks, and the same grading guidelines, as long as the candidate sits for all portions of the UBE in the same UBE jurisdiction and in the same administration, a portable UBE score is earned that can then be transferred to other states that have joined the UBE network.

4. *Jurisdictions That Have Adopted the UBE*, National Conference of Bar Examiners, www.ncbex.org/exams/ube/.

5. Email from Nancy E. Johnson to Suzanne Darrow-Kleinhaus, Professor of Law and Director of Academic Development and Bar Programs, Touro Law Center (Feb. 15, 2016, 2:49 p.m. EST) (on file with author).

6. The information in the table entitled *July 2015 MBE Mean for Selected Jurisdictions* was collected from multiple websites. *See* Derek T. Muller, *California Bar Exam Takers Are Far More Able Than Others Nationwide But Fail at Much Higher Rates*, Excess of Democracy, http://excessofdemocracy.com/blog/2015/11/california-bar-exam-takers-are-far-more-able-than-others-nationwide-but-fail-at-much-higher-rates (California Mean of 142.4); *July 2015 Pennsylvania Bar Examination Statistics*, Pennsylvania Board of Law Examiners, www.pabarexam.org/pdf/statistics/july/j2015.pdf (Pennsylvania Mean of 142.4); *Georgia Bar Examination Statistics*, Supreme Court of Georgia Office of Bar Admissions, https://www.gabaradmissions.org/georgia-bar-examination-statistics#0715 (Georgia Mean of 140.2); National Conference of Bar Examiners, *2015 Statistics*, The Bar Examiner, Mar. 2016, at 14, 44 (Table entitled: 2015 MPRE National Summary Statistics Based on Scaled Scores) www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Fissues%2FBE-March2016-Abridged.pdf; *Statistics of the Tennessee Bar Exam 2013, 2014 and 2015*, Tennessee Bar Exam (Oct. 25, 2015), http://tennesseebarexam.blogspot.com/ (Tennessee Mean of 139.8).

7. National Conference of Bar Examiners, *2014 Statistics*, The Bar Examiner, Mar. 2015, at 8, 34, (Table entitled: 2014 MBE National Summary Statistics based on Scaled Scores) www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F164.

8. Susan M. Case, *The Testing Column, Demystifying Scaling to the MBE: How'd You Do That?*, The Bar Examiner, May 2005, at 46 (Case, *Demystifying Scaling to the MBE*).

9. Email from Nancy E. Johnson to Suzanne Darrow-Kleinhaus, Professor of Law and Director of Academic Development and Bar Programs, Touro Law Center (Feb. 15, 2016, 2:49 p.m. EST) (on file with author).

10. Susan M. Case, *The Testing Column, Quality Control for Developing and Grading Written Bar Exam Components*, The Bar Examiner, June 2013, at 34, 36, www.ncbex.org/assets/media_files/Bar-Examiner/articles/2013/820213Testing-Column.pdf.

11. Judith A. Gundersen, *The Testing Column, Essay Grading Fundamentals*, The Bar Examiner, March 2015, at 54, www.ncbex.org/assets/media_files/Bar-Examiner/articles/2015/840115-abridged.pdf. In rank-ordering, some papers "should get high scores, some average scores, and some lower scores, regardless of what score scale a jurisdiction uses (1–5, 1–6, 1–10, etc.), and regardless of whether, taken as a whole, papers are strong or

weak. What matters is rank-ordering among papers – relative grading." For example, assuming a jurisdiction uses a 1 – 6 scale, a "1" paper is a very poor answer relative to the other answers in the jurisdiction and a "6" paper is an excellent answer relative to the other answers in the jurisdiction. However, this does not necessarily indicate that the top grade – the "6" paper – is an excellent paper; "it just indicates a paper that is better than the other papers."

12. Susan M. Case, *The Testing Column, Frequently Asked Questions About Scaling Written Test Scores to the MBE*, The Bar Examiner, Nov. 2006, at 43.

13. Email from Nancy E. Johnson to Suzanne Darrow-Kleinhaus, Professor of Law and Director of Academic Development and Bar Programs, Touro Law Center (Feb.14, 2016, 11:26 a.m. EST) (on file with author).

14. Case, *Demystifying Scaling to the MBE*, *supra* note 8, at 46. Dr. Case was the director of testing until Nov. 1, 2013.

15. *Id.* at 46, Table 1. The table entitled, "Sample Essay Data Shown for Each Examinee" contains data for 15 examinees.

16. Email from Nancy E. Johnson to Suzanne Darrow-Kleinhaus, Professor of Law and Director of Academic Development and Bar Programs, Touro Law Center (Feb. 14, 2016, 11:26 a.m. EST) (on file with author).

17. *Id.*

18. Case, *Demystifying Scaling to the MBE*, *supra* note 8, at 46, Table 1.

19. Email from Nancy E. Johnson to Suzanne Darrow-Kleinhaus, Professor of Law and Director of Academic Development and Bar Programs, Touro Law Center (Feb. 14, 2016, 11:26 a.m. EST) (on file with author).

20. Case, *Demystifying Scaling to the MBE*, *supra* note 8, at 46, Table 1.

21. Gundersen, *supra* note 11, at 54.

22. Posting of Nancy E. Johnson to asp-1@chicagokent.kentlaw.edu (Apr.17, 2015, 1:44:50 p.m. EST) (The subject heading of this email is [ASP-L:5369] *Re: NCBE Responses RE July 2014 MBE Nationwide Decline*) (on file with author).

23. *Id.*

24. N.E. Johnson, Comment to *No the MBE was not "harder" than usual*, Excess of Democracy (Sept. 28, 2015), http://excessofdemocracy.com/blog/2015/9/no-the-mbe-was-not-harder-than-usual.

25. *Id. See also* Susan M. Case, *The Testing Column, Relationships Among Bar Examination Component Scores: Do They Measure Anything Different?*, The Bar Examiner, Aug. 2008, at 31, www.ncbex.org/assets/media_files/Bar-Examiner/articles/2008/770308_testing.pdf. With respect to the correlation between MBE and MPT scores for the data set, Dr. Case wrote that "the correlation with the MBE is 0.55 for the local essay questions, 0.58 for the MEE, and 0.38 for the MPT. This shows a moderate correlation for both the locally developed essay questions and the MEE, but a weaker correlation for the MPT, indicating that the MPT is measuring different skills than the MBE, and that the MPT skills are less like those measured by the MBE than are the skills measured by the MEE and local essay questions." If the correlation between MBE and MPT scores is so low, then how can scaling the MPT to the MBE be a reliable measure of anything, let alone an examinee's skills?

26. Erica M. Moeser, *President's Page*, The Bar Examiner, Mar. 2015 at 4, www.ncbex.org/assets/media_files/Bar-Examiner/articles/2015/840115-abridged.pdf.

27. Erica M. Moeser, *President's Page*, The Bar Examiner, Dec. 2015 at 4, www.ncbex.org/assets/media_files/Bar-Examiner/issues/2015-December/BE-Dec2015-PresidentPage.pdf.

28. Erica M. Moeser, *President's Page*, The Bar Examiner, June 2015, at 4, www.ncbex.org/assets/media_files/Bar-Examiner/articles/2015/840215-PresidentsPage.pdf.

29. Case, *Demystifying Scaling to the MBE*, *supra* note 8.

30. Email from Nancy E. Johnson to Suzanne Darrow-Kleinhaus, Professor of Law and Director of Academic Development and Bar Programs, Touro Law Center (Feb. 14, 2016, 3:24 p.m. EST) (on file with author).

31. Erica Moeser, *President's Page*, The Bar Examiner, Nov. 2009 at 5, www.ncbex.org/assets/media_files/Bar-Examiner/articles/2009/780409_PresidentsPage.pdf.

NEW MEMBERS WELCOMED

First District
Ahmad Qays Al Kushaly
Nida Sayeed Alam
Nora Yussuf Sultan Ali
Fayola Naila Alibey
Nassim Ameli
Adam Amir
Monika Amirian
Darya Dmitrievna Anichkova
Nicole Anne Annunziato
Zachary William Antilety
Mary Gabrielle Apollon-Richardson
Christopher Andrew Arkin
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Brian Matthew Blood
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Aaron Seth Davidowitz
Christopher Albert Degennaro
Tomas Esteban Di Cio
Kara Michelle Diamond
Christian Diaz Ordonez
Katherine Elizabeth Disalvo
Diana I. Doss
Marc Philip Epstein
Alejandro Espitia Castro
Helen Mcintyre Ethridge
Kathleen Erinn Farley
Deirdre Feerick
Laura Anne Ferro
Katina Natasha Fortunato
Peter Hall Fountain
Jessica Rachel Friedrich
Jerome Carlos Frierson
Joel Robert Garcia
John Joseph Gauthier
Dora Paula Georgescu
Michael Jonathan Gil
Jeffrey Ross Goldfine
Jennifer Aimee Gong
Wendy Louise Green
Jocelyn Edith Greer
Leopoldo Guerra
Francisco Guzman
Rachel Feinberg Harrison
Erin Grace Harvey
Leesa Nicole Haspel
Umberto Hassan
Julia Emmet Heald
Theodore L. Hecht
David William Heck
Laurie Giselle Helfenbein
Steven Eugene Heller
Roshni Kishore Hemlani
Kelsey Jade Hogan
Abigail Rickman Hone
Angelica Huacuja Garcia
Lily Shiran Huang
Nicholas Alexander Ickovic
Irina Stepanovna Ilyuk
Lauren Elizabeth James
Molly Montgomery Jamison
Bryan Geoffrey Jones
Claire Michelle Jordan
Veronica Rose Claire Jordan-Davis
Andrew C. Jorges
Maryanne K. Kaishian
Grace Yu-hsuan Kao
Rafeeq Tariq Ziyad Khazin
Anna Jane Kieburtz
Hanah Kim
Soobin Kim
Lindsey Gardner Kister
Matthew Louis Klegon
Ana Sofia Kowalenko
Anthony John Kuhn
Elizabeth Renwick Langton
Kathryn Rachel Lanier
David Andrew Laufer
Morgan Linda Lee
Gabriel Wofford Lezra
Irena Libov
Emily Lodore Lichtenheld
Ping-hui Lin
Yang Liu
Zhengyi Liu
Marc Lyle Lomasky
Cybele Sabine Louis
Ona Lu
Daniel Ryan Luedtke
Sarah Catherine Lynagh
Ashleigh Jessica Framm Lynn
Perrine Macorigh
Andrew Sellani Mainardi
Andrei Fedorovich Malikov
Meghan E. Marchetti
Adam Gordon Massey
Evan Matthew Mateer
Brian David Matty
Alicia Evelyn McBride
Bridget Springer Merritt McCabe
Ryan Andrew Mccarthy
Claire Elizabeth Melvin
Lev Menand
Peter Leonard Menchini
Michael Anthony Milano
Youju Min
Kathleen Ellen Mollison
Clinton Allen Monteith
Zachary Adam Morgenstern
Yuliya Neverova
Alison Lizette Nixon
Gregory Terence Norman
Christina Obiajulu
Amy Michelle Oden
Christopher Nwanna Okonkwo-attiah
Vincent Salvatore Onorato
Shai Y. Ornan
Dennis Michael Owrutsky
Maxwell William Palmer
Michelle Park
Jack Andrew Paterson
Collin Sullivan Peck
Alyssa Marie Pompei
Valerie Ann Redmond
Aisha Lauren Rich
Christian Clark Richter
Daniela C. M. L. Ritter
Karen Donna Ritter
Elizabeth Anne Robertson
Edward Charles Robinson
Jessica Lauren Rogers
Jessie Sarah Rosenberg
Hyungjin Sally Ryu
Michael E. Sacks
Keith Leonard Savino
Michael O'Hearn Schaeppi
Ethan Harris Schlussel
Nina Schuman
Kelsey Ann Scribner
Adam R. Seiden
Martine Seiden
Ruchi Dhiru Shah
Zahra Shahlapour
Rishi Nand Sharma
Daniel James Shea
Morton F. Silver
Anusha Arun Simha
Jeffrey Cline Skinner
Jessica Eve Soultanian-Braunstein
Michael Peter Soumas
Melanie Nicole Ward Spector
Theodore Robert Stotzer
Qian Su
Steven Succop
Kara Barbara Suddock
James Paul Sullivan
Sarah Ashley Summit
Angela Sun
Talitha Renee Lopez Tan
Vanessa Airiel Tarpos
Winston Nigel Thompson-Steckel
Sam N. Thypin-Bermeo
Matthew Victor Tippett
Joseph Schwemm Tuck
Allyson Grossman Tufo
Sean Ubias
Elizabeth Martha Unterman
Taylor Wesley Vance
Michael Paul Vandenberg
Margaret Nicole Vasu
Steven Marc Wasserman
Clara Kang Wee
Jacob Samuel Weiner
Matthew B. Weingast
Joshua D. Weiss
Katherine Elizabeth White
Sarah Elizabeth Wilensky
Cameron Bruce Williamson
Max Andrew Winograd
Rachel Wisotsky
Jasmine Briana Woodard
Samuel S. Wright
Zaneta Wykowska
Virginia Patrice Wylly
Logan Addison Wyman
Christopher Yeager
Yi Zhu

Second District
Nicole K. Abene
Anca Cristina Adams
Gena Lissette Alvarez
Donny Ariel
Adi Atlas
Ryan Neri Baebler
Brian Matthew Benvenisty
Benjamin Andrew Berkman
Meghan Boland
Moshe Ovadya Boroosan
Sarah E. Briglia
Daniel Robert Bunge
Erica Denise Carter
Ellen Kathleen Connell
Nathaniel Joseph Costa
Jessica Lauren Dwinell
Ella Esha
Joshua Allen Feit
Alex Fermoso
Kate Monroe Fitzgerald
Joseph William Gracely
Nikki Danielle Herst-Cook
Ishandev Prabhudev Hiremath
Whitney Kelly Hosten
Martha Alicia Hurtado Oliveros
Salim Katach
Stephanie King
Susan Kinlan
Julie Elizabeth Krosnicki
Cristina Walton Liebolt
Tianyin Luo
Benjamin Phillip Mark
Delaney Nicole Marsco
Justin David Martin
Christy Alan Mason
Michael John McCarthy
Kevin Leonard McRoskey
McKenzie Louise Morris
Emily C. Nagle
Andrea Luz Nieves
Kevin Duy Pham
Yevgeniy Pilman
Minji Reem
Katherine Yuko Riley
Arlene Marie Rivera
David Sandyk
Aaron Tyler Savella
Rachna Shah
Zachary Saul Sinemus
Thomas Henry Sosnowski
Eric C. Strain
Brianna Joan Strange
Colin Ritchey Stroud
Jesse Scott Weinstein
Michelle Aleena Williams
Derrick Yang

Third District
Anthony Freund Baer
Michael Ross Lieberman
Andrew Jason Weissenberg

Fourth District
Kerry Mierzwa
John D. Moran
Richard M. Rowley

Fifth District
Matthew Lee Peabody

Sixth District
Hermione Mengyin Krumm

Ninth District
Danilo Bandovic
Patrick Randolph Bell
Gregory Morton Davis
Josep De Puig Mateu
Michael John Dicato
James Walsh Dick
Marie Frances Figueiredo
Joan C. Foley
Jacob Dylan Gash
Stanislav Gomberg
Moe Thi Han
Shaun Adam Hiller
Roberte M.d. Makowski
Erin Marie Ross
Daniel Robert Rudewicz
Jay L. Silverberg
Johannes Lucien Vermandel

Tenth District
Matthew Accardi
Anna Avruchevsky
Lauren Patricia Berglin
Lisa Anne Biondo
Shiying Cai
Mubeen Chughtai
Issac Cwibeker
Jennifer Susan DeSena
Taylor Digiuseppe
Jenna Lyn Fierstein
Andrew I. Garbacz
Jonathan Adam Goldsmith
Kimberly Rose Kaufmann
Harsahib Kaur
Sheldon Kleeger
Kevin Scott Klein
David Robert Koch
Angeliki Kokkosis
Aristidis Kourkoumelis

Nicholas Lastella
Kelsey Patricia Lorer
Nina Marie Marinaro
Kara Ann Matejov
David N. Miller
Jenny Eunkyung Min
Daniel Ontiveros
Sufian Pervez
Christina Pingaro
Daniel Karl Reichelscheimer
Sachin Sharma
Simranjit Singh
Jillian Alexandria Smith
Ryan William Sweeney
Yasmean Tamoor
Jordan David Weiss

Eleventh District

Mara Kathryn Alioto
Darryl Barney
Brittany Nicole Benavidez
Stephanie Paola Chery
Kavita Merry Devaney
Emily R. Farrell
Jack Grossman
Meng Yu Guo
Shun Hirota
Ya-han Hu
Nida Jafrani
Joseph Karume Samuel James
James P. Kelly
James O'Donoghue Larusso
Thomas Minhyeok Lee
Daniel Alvino Louro
Sobia Mahmood
Sarah Kennedy Mannix
Egle Meigyte
Benjamin Peter Domingo Mejia
Mark Sherif Meleka
Anna Nubaryan
Winter Pascual
Susan Reyes
Shu Sasaki
Benjamin A. Schoener
Bianca Victoria Scott
Joo Young Seo
Serena Yangqing Shi
Michael Adam Simon
Lars Christoffer Stromstedt
Stephen Richard Strother
Hannah Margaret Thibideau
Shiyu Wang
Adi Akil Williams

Twelfth District

Thomas Benson Decina
Rachel Lee Johnston
Matthew Jason Schwartz

Thirteenth District

Arielle Rachel D'auguste
Katrina Marie Fama
Yevgeniy Krivulets
Inna Shapovalova

Out of State

Eve Aline Chantal Ahmed Mohamed
Michael John Aiello
Asami Aizawa
Khawla Alatiyat
Catherine Nicole Aponte
Naomi Anastasia Augustine-walker
Chloe Anna Bachelez
Gladys Sarah Roque Bagasin
Aseel Barghuthi
Darina Bashilova
Solongoo Bayarsaikhan
Robert Mackenzie Belden
Kathleen Leslie Benner
Jessica Bisignano
Gabrielle Tidaback Bohon
Max Frederick Brauer
David James Brevda
Michal April Brown
Michelle Lynn Browne
Ethan Reeves Buttner
Mengni Cao
Kristine Lynn Capell
Alan Chen
Xinxing Chen
Jason Michael Chin
Scott David Clements
Daniel James Cogan
David Aaron Cohen
Randolph Douglas Colton
Renisha Chelsea Conway
Colleen Marion Corriston
Isabelle Posey Cutting
Christopher D'Agostino
Brian Joseph D'Amico
Matthew Joseph D'orsi
Manoela Darcy De Oliveira Miranda
Ian James Darrow
D'lesli Munn Davis
William Patrick Decotiis
Yann Dehaudt-delville
Archa Dutta
Michael Ebner
Hakim Asuquo Effiom-dauw
Andrew Robert Egan
Ekaterine Egutia
Gulsah Ekiz
Alexandra Elizabeth El-bayeh
Paul B. Epner
Tina Marie Evangelista
Stephanie Paula Favotto
Rachel Raphaela Feingold
Mary De Castro Foden
Jason Howard Friedman
Alberto Nicolas Gabrielli
Graham Maxwell Gering
Karim Ghodbane
Robert McLaughlin Gore
Amelia Blaire Green
Loreta Gruselionyte
Janine Ann Guillen
Emily Clara Haigh
Jiaxing Hao
Antti Johannes Harmanmaa
Rachel Katrina Markman Hasegawa
Masahiro Heike
Elizabeth Hempowicz
Brendan John Hennessey
Andrew Michael Herman
Danielle Marie Hites
Jeffrey Peter Hoffmann
Eric Holmes
Jiabin Hong
Ting Hu
Achika Iwanaga
Samuel Randolph Jackson
Ali Deifalla Jaloudi
Xinghui Jin
Serah Oyindamola Joshua
Francis Dominic Joyner
Daniel Thomas Kane
Hancheol Kang
Jeffrey Randall Katz
Brandon Michael Kenney
So Jin Kim
James King
Tricia Lynn Kingsley
Kerrie C. Kline
Russell Edmund Kooistra
Willi Sebastian Kunzli
Yena Priscilla Kwon
Michael Charles Landman
Margaret Patricia Langan
Karen Jennae Lapekas
Chun Ip Lau
Esther Suhyoung Lee
Andrew Joseph Leeds
Joshua Simon Levy
Christine Leah Lewert
Luyang Li
Shu Li
Ruth I-sing Liang
Adrienne Janine Lighten
Peter William Link
Maria Litsakis
Nicholas Logothetis
Bei Lu
Yuanmei Lu
Hao Lyu
Cannelle Nina Zoe Magdane
Mario Maier
Ronald Wanendeya Makawa
Vinay Kumar Malik
Sean Patrick Maloney
Harrison Douglas Marks
Michael Eugene Marks
Andrew Doyle Mason
Rumbidzai Maweni
Emma N. McGovern
Elsa Mehdizadeh Ashrafi
Jason Jacob Mendro
Ramsey Merhi
Marvalyn Yvonne Miles
Guy Milhalter
Danielle Marie Miranda
Sean Alexander Mirski
Sekandar Daoud Mokhtarzada
Jung Woo Moon
Wambui Mungai
Yoshimune Muraji
Hugh Francis Murray
Richard F. Nelson
Jacqueline Assoh Niba
Amy Carmel O'Callaghan
Kazuki Okubo
Yuji Okubo
Thereza Valerie Osias
Lenore Miriam Palladino
Maria Ioanna Pantelaki
Audrey Marie Xiaoxiang Paquet
Siddharth Ashok Paranjpe
Robert Carter Paret
Stephen Patrick Pate
Frederic Jean-marc Marie Paul-reynaud De La Roziere
Matthew Alexander Pellegrine
Stephanie M. Platt
Jasmine Elizabeth Plummer
Anna Maria Pollak
Anushka Niwusha Rahman
Renuka Rajan
Nina Ramesh
Daniel Gerard Randolph
Julia Razdolski
Jill S. Riola
Chandel Maureen Rispin
Emily Jane Rodriguez
Jeremy Michael Roe
Amit Sachdeva
Eric Wayne Sanders
Wincen Adiputra Santoso
Adam Evan Schmelkin
Margaret-ann Scotti
Danielle Scalione Sharp
Rebecca Fae Sherman Sheff
Eva Grace Stieglitz Shell
Peter Sebastian Siemons
James Anthony Graham Simpson
Sarah Ann Spanarkel
Ariella Nicole Sparr
Sarah Aleksandra Sraders
Giancarlo Mercer Stanton
Craig L. Steinfeld
Johann Strauss
Nicole Elizabeth Stuver
Connor Steadman Sullivan
Ryan D. Sullivan
Elena Suraeva
Shen Jong Tao
Rebecca Elizabeth Taylor
Anthony John Tedeschi
Mia Teitelbaum
Evan Thomas
Leslie Ann Thomas-Riggs
Adrian Patrick Torres
Alycia Nicole Torres
Kin Sum Kevin Tso
Yasuo Tsukitome
Elliott Tubbs
Idongesit Thompson Umo
Joshua Robert Venne
Michael Alessio Verde
Stephan Edouard Viollier
Leigh R. Walters
Yichun Wang
Justin Lee Watkins
Christine Kimberly Wilson
Philip R. Winegarner
Joshua Scott Wirtshafter
Daehyun Won
Sarah Won
Thomas Richard Worger
Daniel Gary Worley
Sunny Wu
Amy Xu
Zhuoran Xu
Takashi Yamaguchi
Limeng Yang
Zeynep Asli Yilmaz
Siyu You
Ye Yu
Chengcheng Zhang
Jingdi Cynthea Zhou
Yinglu Zhou

In Memoriam

William J. Giordano
Brooklyn, NY

Raymond W. Hackbarth
Syracuse, NY

David M. Lascell
Rochester, NY

Harry F. Mooney
Buffalo, NY

Donald Paragon
New Rochelle, NY

Alan N. Waxman
New York, NY

ATTORNEY PROFESSIONALISM FORUM

To the 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 longstanding 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

Dear Distressed Mentor:

Every young attorney will make a mistake at some point in his or her early career that, at the time, can seem devastating. Some mistakes will have more severe ramifications than others. When dealing with such a situation as a mentor, it is important to use the mistake as a learning opportunity and lead by example.

The Associate

The associate may feel as if she was treated unfairly, but she is not completely without blame. While she has a reasonable excuse for her failure to timely appear for oral argument, attorneys making court appearances in 2016 should be able to communicate by cellphone to an adversary, the court, or, at a bare minimum, their own office. We have all had to deal with unexpected traffic, subway delays, and family emergencies on the morning of a court appearance. These situations are common enough that a professional making court appearances – where numerous people are waiting for both parties to be present – should have a cellphone to communicate if delays arise. We understand that some technophobes might reject the notion, but the American Bar Association and many states across the country now require attorneys to remain current with technology. Although the New York State Rules of Professional Conduct (RPC) do not currently contain such a requirement (at least not yet), New York State Bar Association Comment 8(ii) to Rule 1.1 of the RPC suggests that "[t]o maintain the requisite knowledge and skill, a lawyer should . . . keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information."

We have addressed this issue in prior Forums, which have stated that attorneys should be familiar with the usage of common and current technologies such as cellphones, email and social media to fulfill their obligations of providing competent representation

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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to clients. *See, e.g.*, Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., June 2014, Vol. 86, No. 5 (understanding technology to establish and implement appropriate data security policies); Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., January 2014, Vol. 86, No. 1 (email as basic method for everyday communication); Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., June 2013, Vol. 85, No. 5 (usage of social media to conduct research); Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., May 2013, Vol. 85, No. 4 (mobile devices).

In your associate's case, it is less likely that she did not have a cellphone than that she simply chose, for whatever reason, not to use it. The expectation of many members of the Bar is that the ability to communicate with adversaries and the court is easy enough. After your associate was safe, and finished handling the fender bender, she could have made a phone call or sent an email or text message to try to avoid the exact scenario that ultimately played out. We note that opposing counsel also could have and probably should have reached out to your associate or your office to find out why someone from your office was not present; in fact, there are many judges who would require it. That being said, as already mentioned above, we believe she had a reasonable excuse for her tardiness, and it is important to note that even great attorneys make a mistake from time to time. Your associate needs to know that. She should accept the mistake, learn from it, and move on.

As a mentor and her supervising attorney, RPC 5.1 requires you to teach your associate to follow the Rules of Professional Conduct and to take reasonable efforts to ensure that she follows the RPC. Based on the facts provided, the associate appears to have acted appropriately when she appeared before the court on the motion to vacate and in her interaction with opposing counsel even though she felt they had treated her unfairly and inappropriately.

The associate's recent statement, however, that "nobody will ever get a pass with me again" raises a concern that you should address as her mentor so that she can avoid future rule violations. It is incumbent on you to remind her that reputation is everything and vital to a successful legal career; she does not want her reputation tarnished for potentially gaining a small advantage here and there. The losses down the road could overshadow any minor wins she gains from sharp practice. You may also want to discuss the dangers of uncivil conduct in interactions and communications between adversaries, an issue we have also addressed in prior Forums. *See* Vincent J. Syracuse, Maryann C. Stallone, & Hannah Furst, *Attorney Professionalism Forum*, N.Y. St. B.J., March/April 2016, Vol. 88, No. 3; Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., March/April 2015, Vol. 87, No. 3; Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., July 2014, Vol. 86, No. 6. As we have previously remarked, uncivil conduct is not effective advocacy and does not advance the interests of our clients, and therefore should be avoided.

The Judge

Despite your associate's error in not contacting her adversary or the court, some of the judge's comments were clearly unwarranted and improper. Several sections in Part 100 of the Rules of the Chief Administrative Judge are applicable to the judge's comments from the bench. Section 100.1 states "[a] judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." Section 100.2(A) states "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Section 100.3(B)(3) states that "[a] judge shall be patient, dignified and courteous to . . . lawyers." Section 100.4(B)(4) requires judges to

> perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice . . . based upon age, race, creed color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status.

The judge's comment, "You young people have no respect for anyone," is clearly improper and disrespectful to the associate. In our opinion, this is a violation of §§ 100.1, 100.2(A), and 100.3(B)(3) and suggests the appearance of an age bias in violation of § 100.4(B)(4). The judge's comment, "You have wasted enough of our time. Think of this as a valuable lesson on how to practice law," also seems excessive in light of a minor delay for a car accident and your firm's prompt motion to vacate the default containing a reasonable excuse for the default. This could certainly qualify as a § 100.4(B)(3) violation for an undignified comment and lack of courtesy to the associate. Reference to your associate as "Miss," depending on the judge's tone and inflection, also can be construed as demonstrating bias based upon sex in violation of § 100.4(B)(4).

Under § 44(1) of the N.Y. Judiciary Law (Jud. Law), you may submit a complaint to the New York State Commission on Judicial Conduct, which would conduct an investigation of the complaint. If the Commission decides to hold a hearing on the judge's conduct, it can ultimately admonish, censure, remove, or retire a judge (Jud. Law § 44(7)). The Commission has admonished judges in proceedings where they have referred to an unrepresented litigant as "nuts" (*In re Going*,

1997 WL 433228 (N.Y. State Comm'n on Jud. Conduct 1997)), made "angry," "scolding" and "sarcastic" comments in multiple proceedings (*In re Pines*, 2008 WL 4415139 (N.Y. State Comm'n on Jud. Conduct 2008)), and stipulated to an admonishment for an undignified exchange of taunts, insults and obscenities with a minor (*In re McLeod*, 2012 WL 6735978 (N.Y. State Comm'n on Jud. Conduct 2012)). You and your associate are in the best position to determine whether, after considering the totality of events and the judge's inflection, a complaint to the Commission on Judicial Conduct is warranted. Based upon the circumstances you have described, it is unlikely that the judge's comments, albeit improper, would warrant anything more severe than an admonishment.

While we do not condone the judge's comments, when making the determination whether to make a complaint against a judge, we also need to consider that even judges have bad days and make mistakes from time to time. Judges today are under extreme pressure to clear their dockets while their judicial resources and staff are being constantly slashed. Therefore, a litigant's tardiness and failure to comply with court-ordered deadlines could certainly put the judge on edge, and perhaps rightly so. In our view, isolated incidents should not be the subject of complaints to the Commission. If, on the other hand, the judge continued to make improper remarks to the associate in future appearances – or if you discovered that this judge has made similar improper comments to other attorneys appearing before him – that could be a totally different story warranting further action.

Responding to your question about removal of the judge from the case, even if the default were to be successfully vacated upon appeal, it is unlikely you would be able to have the judge disqualified. According to 20 N.Y.C.R.R. § 100.3(E)(1)(a)(i), "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party." The Court of Appeals has held that "[a]bsent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal. . . . A court's decision in this respect may not be overturned unless it was an abuse of discretion." (*People v. Moreno*, 70 N.Y.2d 403 (1987)). Judiciary Law § 14 is inapplicable in this action as it addresses situations where a judge is personally involved in the action or related to a party. Accordingly, you would need to make a motion to the judge himself and a denial would be difficult to appeal on the limited facts. If more evidence of a personal bias arises, however, a successful appeal might be more likely.

Putting the judge's improper comments aside, there is a possibility that the judge's dismissal – and refusal to vacate the dismissal – may have been proper. Under Uniform Civil Rules for the Supreme Court, 22 N.Y.C.R.R. § 202.27(b), if the defendant appears but the plaintiff does not, the judge may dismiss the action. While defaults are regularly vacated where there is a reasonable excuse for the lack of appearance, the plaintiff must also demonstrate to the court that the complaint has merit. In *Reices v. Catholic*, 306 A.D.2d 394 (2d Dep't 2003), the Appellate Division, Second Department restored an action where plaintiff's counsel was only 15 minutes late to an appearance. The court explained, however, that "[t]o be relieved of the default in appearing at the calendar call, the plaintiff was required to show both a reasonable excuse for the default and a meritorious cause of action." (*Id.*). The judge in your action appears to have found a substantive basis for denying your motion to vacate, i.e., the lack of merit to your client's pleadings. Lacking any detail as to the facts of the case or the judge's reasoning for his finding, we are unable to opine on this issue. However, what is clear is that to successfully vacate the dismissal on appeal, you will have to show that your case has merit. Therefore, before undertaking the expensive task of appealing the judge's dismissal, you should spend some time considering and discussing with your client whether the case has merit. If you determine you had a weak case to begin with, you may want to consider forgoing the appeal. Alternatively, if your client's claims have merit, the likelihood that the default will be vacated is strong in light of the fact that your associate had good cause for her tardy arrival at the hearing.

The Client

Discussing the dismissal of a case due, in part, to a law office failure with an unhappy client is not a pleasant experience. This is especially true for a really important client. However, Rule 1.4 of the RPC requires you to "keep the client reasonably informed about the status of the matter" and "reasonably consult with the client about the means by which the client's objectives are to be accomplished." RPC Rule 1.4(a)(1), (2) and (3). Indeed, this may be an appropriate time to re-examine with the client the strengths and weaknesses of your case and discuss the client's objectives in the litigation. Does the case have merit and is it likely to be reinstated on appeal? Was your associate going to court to oppose a strong motion (it is unclear whether she was opposing a motion to dismiss or for summary judgment or some other motion)? Are there other alternatives to an appeal that may assist in achieving the client's objectives, such as trying to reach a settlement with the opposing side, who may not want to incur the costs of an appeal? In the latter circumstance, you would file the notice of appeal and then reach out to opposing counsel to try to negotiate a resolution of the dispute.

If the client, however, is insistent on pursuing an appeal to have the default vacated, it would be in your firm's best interest to pursue the appeal. RPC 1.3(b) prohibits a lawyer from neglecting a legal matter entrusted to the lawyer. Since the client is likely to perceive

the dismissal as arising from a law office failure, in addition to upsetting a major client, you may not want to expose your firm to a legal malpractice claim by forgoing the appeal. If you determine that the case has merit, you may consider assigning the appeal to the young associate with your oversight. This will allow the associate to gain valuable appellate experience that may not otherwise be available to her at this stage of her career. It can also be a valuable lesson to demonstrate that attorneys can be successful through persistence and following the rules of procedure.

Whether you decide to charge the client for the appeal is a business decision that only you and the members of your firm can make. On the one hand, it was not the associate's fault that she was in a car accident, which caused her late arrival. However, under the circumstances, you may want to consider charging the client a reduced rate for the appeal or not charging the client at all.

The Adversary

One would hope for a more cordial discussion from an attorney who just learned of a car accident. That said, the perspective of opposing counsel should not be overlooked as he too has a client to whom he has to answer. His client did have to incur the cost of counsel's preparation for and appearance at the hearing. He may be under pressure from his client to keep legal fees down and, therefore, may not be in a position to freely stipulate to the vacature of default. Again, from opposing counsel's perspective, by refusing to voluntarily vacate the dismissal, there is the possibility that your client will not take any further action due to the costs associated with a motion to vacate (and possible appeal) and that he may have achieved his goal of dismissal of the complaint, which is to his client's benefit.

Although the associate may have been frustrated by opposing counsel's demand for the payment of his attorney fees in exchange for the stipulation to vacate the default, in retrospect, the request was not unreasonable for the reasons stated above and, in any event, would have been a much less expensive and time-consuming method for restoring the matter than having to brief and argue a motion to vacate the dismissal or to appeal the judge's decision. Indeed, recognizing that the lack of an appearance by counsel inflicts unnecessary costs on the opposing side, 22 N.Y.C.R.R. § 130-2.1(a) permits a court to award reasonable attorney fees where opposing counsel, without good cause, fails to appear at a scheduled proceeding. While your associate may have had a reasonable excuse for not appearing on time, had your associate accepted her mistake, or even considered the alternatives, she may have realized that agreeing to the fees may have been the better alternative and was in the best interest of her client.

Mistakes happen and their ramifications can be frustrating. Sometimes you can quickly fix the error and other times you have to accept it, learn from it, and move on while considering your client's best interests. A "take no prisoners" mentality in the face of a seemingly unjust ruling may seem warranted to a young attorney. That mentality, however, is shortsighted and can lead to a tarnished reputation. As a mentor, it is your responsibility to lead by example and demonstrate to your associate that you can continue to represent your client's interests while acting in a professional manner.

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

While clients understandably are often more emotional when involved in litigation, I have always tried to be civil and, to a certain extent, friendly with opposing counsel. I find that it often works to the clients' benefit since the lawyers are able to remain objective while looking for opportunities to resolve the litigation in a way that is favorable to the client. In recent months, however, I have been involved in very contentious litigations where my adversaries have been keen on bending, or what some might say fabricating, the facts and misstating the law. In briefs submitted to the court and even during oral argument, they have blatantly lied to the court concerning the facts of the case and made misrepresentations about relevant documents. It amazes me that they would risk doing so since your reputation and credibility before the courts is paramount in this business. These lawyers are from large, reputable law firms. Are they counting on their adversaries being poorly prepared to recognize and raise their misrepresentations to the court? How should I handle advocates who might just as well be Pinocchio? Do I run the risk of annoying the court by raising the numerous misrepresentations made by counsel? I'm concerned that some courts might turn on me and find my conduct to be unprofessional or uncivil for essentially calling my adversary out as a liar. My client is outraged and wants to move for sanctions against the lawyer and his client. I'm at a point where I believe something must be done. Your guidance is greatly appreciated.

Sincerely,

Fed Up

The fallacy: Morgan is a judge so she can't be an attorney. It's possible that Morgan is a part-time judge and a practicing attorney. A false assumption is drawn that if one clause is true, the other must be false.

4. Denying a Conjunct

A writer denies the conjunct when either the antecedent or the consequent is false but contends that the other must be true.[10]

Example: The defendant is not both guilty and innocent. The defendant is not guilty. Therefore, the defendant is innocent.

The fallacy: It's logically wrong to assume that because the defendant is not guilty, the defendant must be innocent. The defendant might be innocent, but the truth of both premises doesn't imply the defendant is innocent. Defendants found not guilty aren't necessarily innocent.

5. Commutation of Conditionals

A commutation of conditions switches the antecedent and the consequent. *Example:* If the judge isn't in the courtroom, then there's no trial. Therefore, if there's no trial, the judge isn't in the courtroom.

The fallacy: The judge is in the courtroom only if there's a trial. It's possible that the judge is in the courtroom when no trial is taking place.

6. Improper Transposition

Improper transposition negates both the antecedent and the consequent: If A, then B. Therefore, if not-A, then not-B.

Example: If there's an arsonist, there's a fire. If there's no arsonist, there's no fire."

The fallacy: Arsonists are the only cause of fires. Negating both the antecedent and the consequent leads to an improper transposition and is logically unsound.

7. The Base Rate

The base-rate fallacy occurs when a writer "ignor[es] statistical information" in making an argument. Instead of relying on statistics, the writer uses irrelevant information to suggest a conclusion.[11]

Example: Judge Smith grants five percent of the motions before him. Mr. Jones is our firm's top attorney. Therefore, Judge Smith will grant Jones's motion.

The fallacy: Based on the statistics, Judge Smith grants only five percent of his motions. That Jones is a top attorney doesn't ensure that Jones's motion will be granted.

8. The Conjunctive Fallacy

The conjunctive fallacy "indicates that the conjunction of two events is more likely than one event."[12]

Example: Ms. Anderson is a brilliant law student who's ranked number one at her law school. Ms. Anderson will be likely both a law professor and an attorney when she graduates.

The fallacy: Because Ms. Anderson is an excellent law student, it's likely she'll be both a professor and an attorney. Concluding that Ms. Anderson will be both a law professor and an attorney is unwarranted from the premise that she's a brilliant law student.

9. The Gambler's Fallacy

The gambler's fallacy makes the unwarranted assumption that "the odds for an event with a fixed probability increase or decrease depending on recent occurrences."[13] The gambler's fallacy specifically "deals with individuals' predictions concerning a *single* event."[14]

Example: Mr. Brown lost five consecutive cases this year. He's bound to win his sixth case.

The fallacy: Because Mr. Brown lost his past five cases, he'll win his next case. The outcome of the past five cases has no effect on whether he'll win his next case.

10. The "Hot Hand" Fallacy

This fallacy assumes that past successes or failures will dictate the same outcome for future events.

Example: Ms. Thompson has won his past five cases. Therefore, she has a "hot hand" and will inevitably win the next case.

The fallacy: Because Thompson has been successful in her past five cases, she'll win her next case. This fallacy is subtly different from the gambler's fallacy. The past success or failure will continue in the "hot hand" fallacy. In the gambler's fallacy, you predict that your luck will be different on the next outcome.

Familiarity with the form of syllogisms leads to strong arguments.

11. Multiple Comparisons

This fallacy arises when statistical evidence is presented to support your argument. Statistical evidence "cannot guarantee . . . the truth . . . [I]t can only provide that the answer is within a certain margin of error."[15] The more comparisons one draws between conditions, "the more likely it is that an erroneous result will occur by chance."[16]

Example: One hundred studies compared the crime rate between males and females. Eighty showed no significant difference. Ten showed that males are twice as likely to commit crimes than females. Ten showed that males are half as likely to commit crimes than females. Thus, males are more likely to commit crimes than females.

The fallacy: The result that says males are half as likely to commit crimes is ignored. From the 100 cited studies, one can't conclude that males are more likely to commit crimes than females.

12. Illicit Major

The illicit major is a "form of categorical syllogism in which the major term is distributed in the conclusion, but not in the major premise"[17]: If all X are Y and all Z are not X, then all Z are not Y.

Example: All prosecutors are lawyers. No public defenders are prosecu-

tors. Therefore, no public defenders are lawyers.[18]

The fallacy: Public defenders can't be lawyers, because public defenders aren't prosecutors. Not all lawyers are prosecutors. A public defender could be a lawyer. The fallacy of the illicit major makes the writer's argument flawed because the term "lawyers" is undistributed in the major (first) premises, but distributed in the conclusion.[19]

13. Illicit Minor

The illicit minor occurs when "the minor term is distributed in the conclusion, but not in the minor premise"[20]: If all X are Y and all Y are Z, then all Z are X.

Example: All lawyers are intelligent, and all intelligent people are professional. Therefore, all professional people are lawyers.

The fallacy: The term "professional" is undistributed. "Professional" is in the minor premise (second premise) and in the conclusion. The conclusion that all professional people are lawyers is fallacious. The conclusion doesn't follow the premises.

14. Exclusive Premises

The exclusive-premises fallacy is a syllogism that has two negative premises.

Example: No plaintiffs are defendants. No defendants are guilty. Therefore, some plaintiffs are guilty.

The fallacy: This conclusion seems logical, but no premises support this conclusion. The above example has two negative premises. A relationship between the premises can't be formed just because the premises are both negative. The exclusive-premises fallacy dictates that "two negative premises exclude the possibility of any relation between them."[21]

15. Undistributed Middle

The fallacy of the undistributed middle term occurs when the middle term isn't distributed in the other terms.

Example: "All judges wear robes. The [late] Muhammad Ali w[ore] robes. Therefore, Muhammad Ali [wa]s a judge."[22]

The fallacy: Muhammad Ali wore, and judges wear, robes, so Muhammad Ali was a judge. The fallacy in this example is that the middle term, "robes," is undistributed in the conclusion. Judges and great boxers are two examples of people who wear robes. But this isn't enough to draw a logical connection.[23]

16. Drawing an Affirmative Conclusion from a Negative Premise

This fallacy occurs in syllogisms that draw a positive conclusion from a negative premise.

Example: Criminals are not good. Ms. Williams is not a criminal. Therefore, Ms. Williams is good.

The fallacy: Because Ms. Williams isn't a criminal, she must be a good person. The conclusion in this example can't be affirmative: "If either premise is negative the conclusion must be negative."[24]

17. Drawing a Negative Conclusion from Affirmative Premises

This fallacy occurs in syllogisms that draw a negative conclusion from positive premises.

Example: All judges are lawyers. All lawyers are intelligent. Therefore, no judge is intelligent.

The fallacy: The conclusion draws a negative conclusion from a positive premise. Positive premises require positive conclusions.

18. Four-Term Fallacy

A syllogism is invalid if it has four terms rather than three. Syllogisms must have three clauses.

Example: All attorneys went to law school. All physicians went to medical school. Therefore, all attorneys went to medical school.

The fallacy: The conclusion doesn't logically follow from the premises. No relationship has been established between attorneys and physician. This fallacy can be fixed by adding a second syllogism to establish the relationship between attorneys and physician.[25]

19. Existential Fallacy

The existential fallacy occurs when a writer makes a "some" conclusion based on two "all" terms.

Example: All robbers are criminals. All criminals should be sentenced to jail. Therefore, some robbers should be sentenced to jail.

The fallacy: Some robbers should be sentenced to jail because all robbers should be jailed. There must be an "all" conclusion, because both premises have "all" terms.

20. Illicit Contraposition

An illicit contraposition occurs when a writer switches and then negates the subject and predicate terms.

Example: Some attorneys are judges. Some non-judges are non-attorneys.

The fallacy: The conclusion that some non-judges are non-attorneys might be correct, but that conclusion can't be inferred from the first premise.

21. Illicit Conversion

An illicit conversion happens when a writer switches the subject and the predicate in the conclusion.

Example: All lawyers are intelligent. Therefore, all intelligent people are lawyers.[26]

The fallacy: Most or all X are Y doesn't mean that most or all Y are X. It's impossible to conclude that all intelligent people are lawyers.

22. Unwarranted Contrast

Unwarranted contrasts occur when the writer assumes that implicature and implication are the same thing. Implicature occurs when meaning is implied beyond what's explicitly stated. Implication occurs when one states a conclusion based on facts. The fallacy is this: If some X are Y, then some X are not Y.

Example: Some lawyers are judges, so some lawyers aren't judges.

The fallacy: The statement "some lawyers aren't judges" is true, but that can't be inferred logically from the first statement. "Some" doesn't logically imply that it doesn't mean "all." The first clause is an affirmative statement.

It doesn't logically imply that not all the lawyers are judges.

23. Illicit Substitutions of Identicals (Masked-Man Fallacy)

The illicit substitutions of identicals occurs when the writer "confus[es] the knowing of a thing (*extension*) with the knowing of it under all its various names or descriptions (*intension*)."[27]

Example: A witness believes that the criminal wore a mask. The witness then testifies that she didn't believe that the defendant committed the crime. Therefore, the defendant is not the masked criminal.

The fallacy: This fallacy confuses the witness's beliefs with the overall conclusion that the defendant is not the masked criminal.

24. Argument from Fallacy

This fallacy assumes that a conclusion from an argument containing a fallacy must be false. Not all arguments based on a fallacy are fallacious.

Example: The prosecution argues that all defendants are guilty. Robinson is a defendant. Therefore, Robinson is guilty, according to the prosecution. The defense, on the other hand, argues that the prosecution is wrong. According to the defense, the prosecution committed the fallacy of affirming the consequent. Therefore, the defendant is innocent.

The fallacy: All the defense has done is expose a fallacy in the prosecution's argument. The defense is merely arguing from fallacy — using fallacious reasoning to rebut the prosecution's fallacious reasoning.

25. Fallacy of Inconsistency

This fallacy occurs when the speaker argues that opposing statements are both true.

Example: Yogi Berra used the fallacy of inconsistency when he said, "Nobody goes there anymore. It's too crowded."

The fallacy: Yogi Berra's statement is humorous but inconsistent. If the place is crowded, people must be going there. But Yogi Berra said that no one goes there.

26. Fallacy of Enthymeme

This fallacy occurs when the writer "omits either one of the premises or the conclusion. The omitted part must be clearly understood."[28]

Example: The defendant was found guilty. Therefore, he's going to jail.

The fallacy: An omitted premise suggests that the defendant was on trial. The reader can imply that a defendant found guilty must have been tried. But omitting the premise is fallacious.

27. Anecdotal Fallacy

The anecdotal fallacy occurs when the writer tries to justify a conclusion based on a personal experience or event.

Example: Ms. Smith argues that a law should be passed to fund healthier lunch options in public schools. Mr. White challenges her argument by saying that his child once contracted E. coli from lettuce. Therefore, White argues, healthier lunch options are a bad idea.

The fallacy: White's conclusion is supported only by his own personal experience. It's fallacious for him to support his conclusion based on a personal anecdote.

28. Having Your Cake Fallacy

This fallacy is committed when an argument is vague and doesn't have a clear position.

Example: Mr. Johnson is asked about whether the new Clean Water Law is environmentally friendly. He answers that the new law will clean water but might reduce job opportunities because some factories will be closed.

The fallacy: The answer gives both sides of the new law instead of choosing one of them. His position is unclear.

29. Non-Sequitur

A non-sequitur appears when the conclusion doesn't follow logically from the premises. The conclusion of a non-sequitur often isn't supported by the premises.

Example: Ms. Wilson is one of the best defense attorneys in Albany. Her record of getting clients acquitted is excellent. Therefore, she should run for Mayor of Albany.

The fallacy: Ms. Wilson might be an excellent defense attorney, but the premises don't support the conclusion that she should run for office. The conclusion is a non-sequitur.

Part 2 of this column, which will appear in the next issue of the *Journal*, will cover informal fallacies in legal argument. ■

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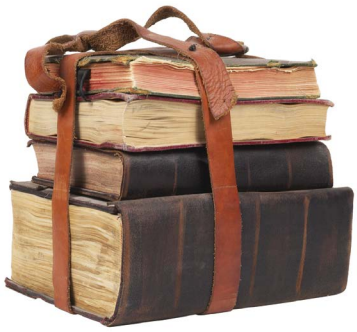

Say It Ain't So: Leading Logical Fallacies in Legal Argument – Part 1

To argue effectively, whether orally or in writing, lawyers must understand logic and how logic can be manipulated through fallacious reasoning. A logical fallacy is an invalid way to reason. Understanding fallacies will "furnish us with a means by which the logic of practical argumentation can be tested."[1] Testing your argument against the general types of fallacies exposes whether your logic is sound or unsound. Even more important, being aware of fallacies will tell you when others are using fallacious arguments against you — and how you can best respond. This article will help lawyers identify potential fallacies in arguments.

Good lawyers must craft persuasive arguments that make sense. Great lawyers use sound logic to trump the average argument. Great lawyers are well-versed in formal logic and the different ways of reasoning. That's why great lawyers use inductive and deductive reasoning in their arguments. Deductive reasoning is a form of argumentation that presumes that if the premises of the argument are true, the conclusion must also be true. Inductive reasoning is a form of argumentation in which the premises strongly support the conclusion.

A syllogism is a common form of argumentation that applies deductive reasoning. Familiarity with the form of syllogisms leads to strong arguments. A legal syllogism should have three clauses. Syllogisms start with a single general premise, called the major premise, stating the rule being applied.[2] Then a second premise, called the minor premise, asserts a fact.[3] Then a final conclusion is drawn applying the asserted fact to the general rule.[4] For the syllogism to be valid, the premises must be true, and the conclusion must follow logically. For example: "All men are mortal. Bob is a man. Therefore, Bob is mortal."

Arguments might not be valid, though, even if their premises and conclusions are true. For example: "All cats are mammals. Some mammals are excellent swimmers. Therefore, some cats are excellent swimmers."[5] It's true that all cats are mammals. It's also true that some mammals are excellent swimmers. But "the fact that cats are mammals and that some mammals are excellent swimmers doesn't prove anything about the swimming ability of cats."[6]

Two general groups of fallacies exist: Formal fallacies, which are fallacious because they're based on formal logic, and informal fallacies, which are fallacious because of their content. In this two-part column, the Legal Writer begins with formal fallacies. In the next issue of the *Journal*, we continue with informal fallacies.

Formal Fallacies

In written or oral argument, "formal fallacies are arguments that are defective because of their form, without regard to content."[7] The following is a list of formal fallacies and what makes them fallacious.

1. Affirming the Consequent

This logical fallacy occurs when the consequent is said to be true and thus that the antecedent must also be true.

Example: "If the evidence makes the jury hesitate, then the jury has reasonable doubt. The jury has reasonable doubt. Therefore, the jury hesitated."[8]

The fallacy: Just because the jury had a reasonable doubt, the jury must've hesitated. The jury could've been entirely convinced and reached a conclusion without hesitation.

> Great lawyers use sound logic to trump the average argument.

2. Denying the Antecedent

This fallacy exists in if/then statements when a writer who denies an antecedent suggests that the reader should also reject the consequent.

Example: If the subject of a contract is the transfer of an interest in land, then the contract should be in writing. The subject of this contract is not a transfer of an interest in land. Therefore, the contract shouldn't be in writing.[9]

The fallacy: A contract that doesn't transfer an interest in land doesn't need to be in writing. But other kinds of contracts should also be in writing. Simply denying the antecedent is insufficient to deny the consequent.

3. Affirming a Disjunct

This fallacy occurs when one premise is true, but the writer suggests that the other must be false: A or B. A is true. Therefore, B is false.

Example: Morgan is a judge or an attorney. Morgan is a judge. Therefore, Morgan isn't an attorney.

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