NEW YORK STATE BAR ASSOCIATION

Journal

MARCH/APRIL 2017
VOL. 89 | NO. 3

America's Cup

The Law, the Lore and the Lure

by Joseph W. Bellacosa

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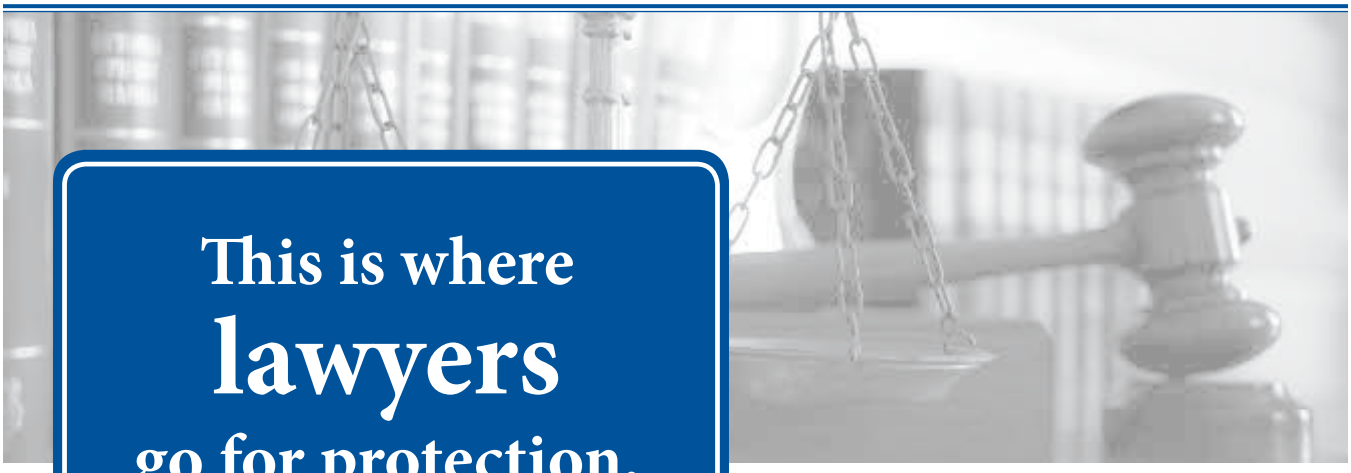

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CLAIRE P. GUTEKUNST

Illuminating and Eliminating Bias Against Women

"Never grow a wishbone, daughter, where your backbone ought to be."

Clementine Paddleford (1898–1967)

Many women attorneys (including me) have had our ideas ignored or co-opted by men in meetings. Then-Chief Judge Judith Kaye, a highly respected and powerful leader at the pinnacle of the legal profession, told me that even she still sometimes experienced that indignity. I hope that raising this issue here will make men in our Association aware of this problem and inspire them to avoid this conduct in the future. But women also need to take steps to help themselves and their sisters-in-law.

In President Obama's first administration, two-thirds of his top aides were men. The women aides either were excluded from the meetings or had their ideas co-opted by men. Their strategy? When one woman made a point, another echoed it, giving credit to the first speaker. After they deployed this tactic at a number of meetings, the President began asking the women specifically to contribute their ideas. In President Obama's second term, his top aides were equally men and women.[1] The women disrupted the bias in the President's team and gained a full seat at the table. If this is a problem in your workplace, consider joining forces with other women to stop it.

Unfortunately, bias is unconscious and pervasive – and internalized equally by men and women. Researchers sent identical resumes to scientific faculty around the country from a fictional pre-doctoral student seeking a job as a lab manager.[2] Half were from "John" and half were from "Jennifer." Male and female faculty, consistently and equally, ranked "John" higher and "Jennifer" lower.

Shouldn't just making people more aware of their biases help prevent bias? Several experiments, cited by Adam Grant and Sheryl Sandberg in a *New York Times* opinion piece, found that if people are simply told that bias against women is common, awareness doesn't interrupt bias, it reinforces the idea that bias is expected behavior.[3]

What to do? The researchers found that education about bias must be accompanied by clear communication that biases are undesirable and unacceptable. "Most people don't want to discriminate, and you shouldn't either." Or, "I know you want to overcome your biases." Having more women leaders improves performance. So support female and diverse candidates for leadership roles, and explicitly say that any gap or disparate treatment is unacceptable.

A number of our committees are working to eliminate bias in the legal profession, doing research, publishing reports and holding training programs.[4]

Our Committee on Women in the Law has worked for 30 years to advance women in the profession and all women. It fights for equal pay and paid family leave, an Association legislative priority; produces MCLE programs to help women enhance their leadership and other skills; holds an annual "Women on the Move" program; gives awards to recognize members who have advanced the concerns of women; and writes memoranda supporting initiatives to end discrimination. Stay tuned for the May *Journal*, a special issue focusing on issues affecting the lives of women – in the law, the workplace and the home – that Co-chairs Susan Harper and Ferve Ozturk are editing.

In 2005, our Committee on Diversity and Inclusion began issuing a biannual Diversity Report Card for the Association, based on diversity data gathered from leadership, Sections and committees during the previous two-year period. This helps us determine what is working, what is not and what needs to be improved in our own Association.

Last year, our CLE Committee issued a report recommending that attorneys in New York be required to take at least one CLE credit relating to diversity and inclusion and the elimination of bias in each biennial cycle. The House of Delegates approved the report in January and we submitted it to the CLE Board.

Our Association is already presenting programming in this area. For example, at the 2016 Annual Meeting,

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our Committees on Civil Rights and Diversity and Inclusion held a joint CLE program on implicit bias. This year they presented a follow-up program on bias interrupters that work, which emphasized the importance of metrics. If, for example, the data show consistent disparities in advancement among different subgroups of employees with similar accomplishments, then it's time to rethink management style – or look at other factors at play. The New York City Bar Association, which annually surveys law firms that have signed its Statement of Diversity Principles and publishes the results, says, "you can't fix what you can't measure."[5] Metrics reveal where work is needed.

Overcoming bias in the workplace and in our profession is an ongoing process that may require anything from a strong directive from the top to changing an entire workplace culture. But those efforts won't be effective if we just assume that people want to overcome their biases – we all need to express clear disapproval of any bias, take affirmative steps to address the issue and measure the results. We want to stop discrimination, and we know you do, too. ■

1. https://www.washingtonpost.com/news/powerpost/wp/2016/09/13/white-house-women-are-now-in-the-room-where-it-happens.

2. http://www.pnas.org/content/109/41/16474.full.pdf.

3. https://www.nytimes.com/2014/12/07/opinion/sunday/adam-grant-and-sheryl-sandberg-on-discrimination-at-work.html.

4. President-elect Sharon Stern Gerstman will make new committee appointments this spring, so if you want to join a committee working on these issues, or one of our other issue-oriented committees, please apply at www.nysba.org/joincommittees.

5. http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/2015-diversity-benchmarking-report.

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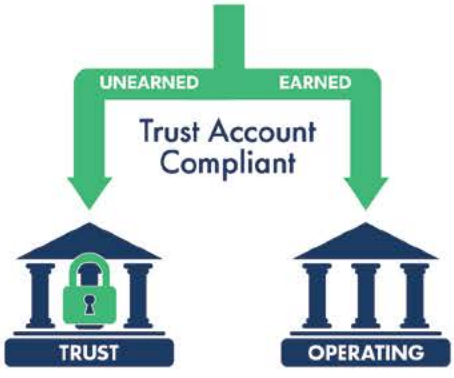

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March 17 Rochester
March 24 Albany, New York City
March 31 Long Island

13th Annual International Estate Planning Institute
March 23-24 New York City

Legal Ethics in the Digital Age
(9:00 a.m. – 1:00 p.m.)
March 30 New York City

Basic Lessons on Ethics & Civility 2017
(9:00 a.m. – 1:00 p.m.)
April 5 New York City
April 7 Albany, Rochester
April 28 Buffalo, Long Island

Securities Arbitration & Mediation 2017
(live & webcast)
April 6 New York City

Auto & Truck Claims, Accidents and Litigation
April 7
Long Island, Syracuse
April 21 Buffalo, New York City
April 28 Albany

Managing Partner Conference Series – Part 3
(8:30 a.m. – 10:00 a.m., live & webcast)
April 19 New York City

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April 27 Long Island
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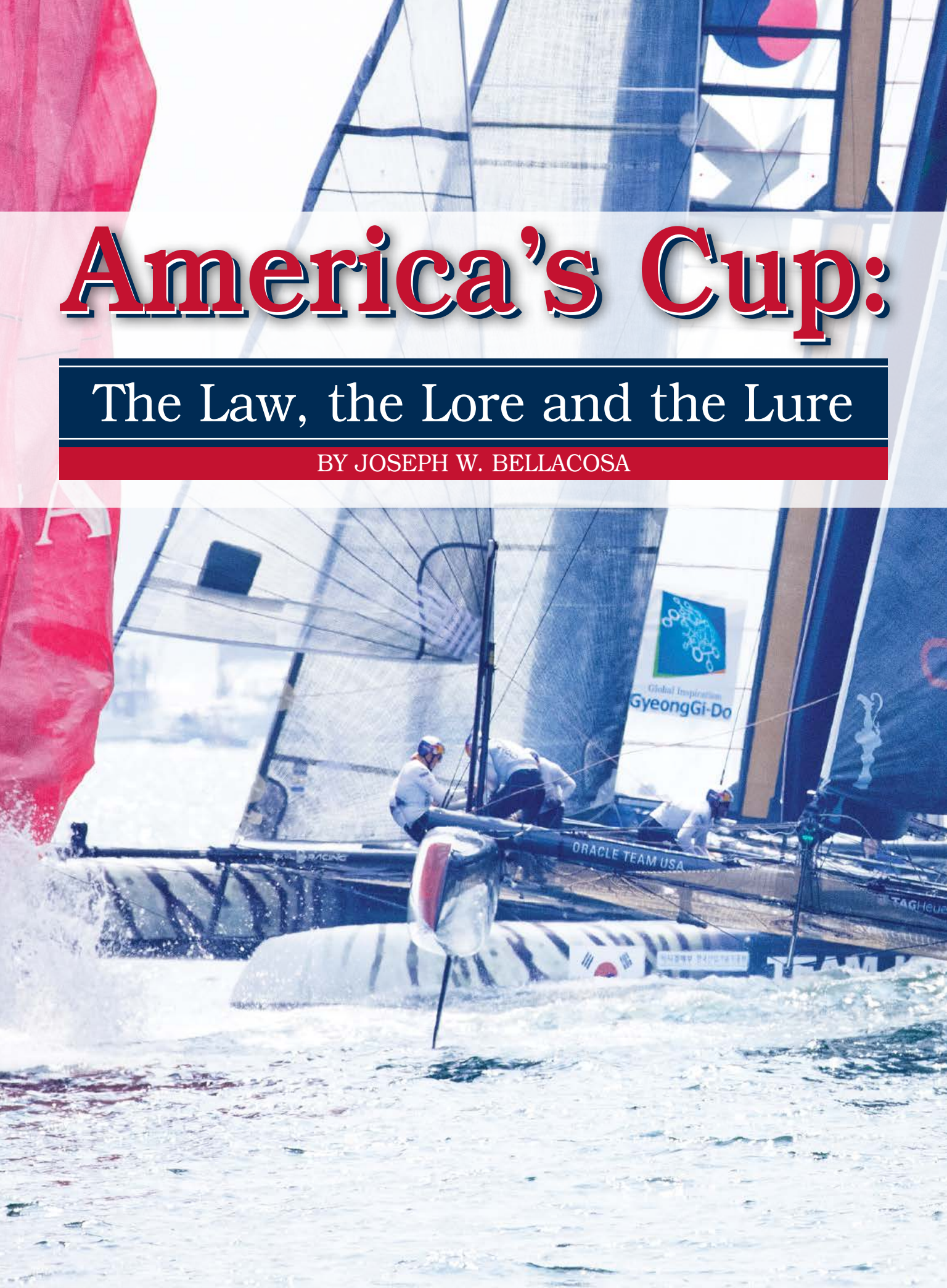

America's Cup:

The Law, the Lore and the Lure

BY JOSEPH W. BELLACOSA

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On June 17, at about 2 p.m., fair wind and weather conditions permitting, two sleek catamarans will sprint across the starting line of the 35th America's Cup Race in Bermuda's Great Sound. For the next 10 days, these twin-hulled boats will challenge each other in a best of 13 series of races, over a 10-nautical-mile course that runs from St. George on the island's eastern end to Hamilton Harbor, and finally to the Dockyards on the western tip of Bermuda's fishhook topography. The first boat to capture seven races will win the Cup – an ornate sterling silver trophy that originally cost $40 and was once dubbed the "Auld Mug," but that today is priceless in terms of sailing prestige and bragging rights.

The America's Cup race is 165 years old and the trophy – the oldest in international sports – was first awarded in 1851 to the schooner *America* after a race around England's Isle of Wright. That victory led to the competition being renamed the America's Cup, and the trophy was entrusted to the New York Yacht Club[1] under a "Deed of Gift" that prescribes the rules for a perpetual, friendly competition between nations. The challenge this spring will determine whether Oracle Team USA flying the flag of the Golden Gate Yacht Club will win for a third time, or surrender the Cup to a team that will have prevailed in a series of preliminary regattas, starting in May, involving entries from France, Japan, New Zealand, Sweden and Great Britain.[2]

This year's America's Cup will be notable for reasons other than just who wins. The competition to build ever bigger and more costly boats seems tempered, at least for the foreseeable future, for reasons linked in part to economic realities and concern over the race's image as a trophy hunt for billionaires only. Instead, by mutual agreement, the competition will be among 49-foot catamarans, capable of racing at speeds up to 55 miles per hour.

The cooperative agreement also likely avoids legal challenges to the winner on the water, as every competitor will know the rules in advance. As Larry Ellison, prime mover and financial sponsor of the Oracle organization, notes, "the teams have got together for the benefit of not only themselves but for the America's Cup. People who want to enter this race now know how much it will cost, what kind of boat they need to build and that the rules can't change on them."

Thus, this year's race will reflect the best of Cup competition – creative sailing, ingenious nautical engineering and design, moments of strategic skill and execution of maneuvers at crucial stages of the race, as well as unmatched organization and cooperative teamwork developed over many years of planning. Ironic as it may seem (except to de Tocqueville[3] in his perceptive observation in *Democracy in America* about pervasive litigation in America), it will all unfurl in contrast to the experience of recent decades when, sailing skills aside, legal strategies were deployed to determine the right to keep the Cup, and the right to compete for it, including two high-powered appeals that reached the New York Court of Appeals.

Here's some historical context:

Challenge 1: Enter the Surprise Catamaran for the First Time

For more than a century, the America's Cup had been a race between mono-hulled vessels – the gold standard for competitive boats that raced over various water courses. That changed in the 1988 America's Cup, when the San Diego Yacht Club unveiled its surprise "cat," the *Stars and Stripes*, a 60-foot catamaran that glided over the water in an easy victory against the *New Zealand*, the 123-foot mono-hulled challenger from New Zealand's Mercury Bay Yacht Club. That begat a legal challenge to determine who was entitled to the Cup – irrespective of who won the water course race in San Diego Harbor. The San Diego Yacht Club had held the Cup and, as the defender, it could choose where and under what rules the next challenge race would be held. The larger issue that loomed for the courts to resolve was whether the catamaran constituted an "unfriendly competitor" in violation of the terms of the Cup's Deed of Gift, which specifies that the race be a "friendly competition between foreign countries."

This legal skirmish came before Justice Carmen B. Ciparick at Supreme Court, New York County, and resulted in a ruling that took the Cup away from San Diego and awarded it to New Zealand's Mercury Bay. The Appellate Division, First Department, by a divided vote, reversed and upheld San Diego's victory at sea, and then granted leave to appeal to the Court of Appeals, where I happened to be a member at that time.

The clash between two elite yacht clubs over possessory entitlement to the premier Cup, and the A-list attorneys who argued the appeal, drew widespread media coverage. Retired federal judge the late Harold "Ace" Tyler of Patterson Belknap represented San Diego and Robert Fiske of Davis Polk represented Mercury Bay. The courtroom was overflowing in every public room and the surrounding streets of Albany were clogged with TV transmission trucks for the live telecast of the oral argument. As the argument wore on with typical back-and-forth advocacy concerning the original versus "modern day" intent of the settlors of the Trust as to the meaning of "friendly competition between foreign countries" when applied to mono-hulls vs. catamarans, Chief Judge Sol Wachtler leaned in from the center chair and lightheartedly sought a stipulation from the lawyers, somewhat along these lines:

"Could you stipulate at least to one incontestable fact about the settlors' so-called 'original intent,' to wit, that they surely did not intend, nor could they ever have

Joseph W. Bellacosa is a retired New York State Court of Appeals judge.

envisioned, that the America's Cup Yacht Race would be decided on dry land in a courtroom in downtown Albany years after a widely observed winner crossed the finish line?"

The spontaneous laughter in the courtroom burst the balloon of the somewhat tendentious discourse on yacht race results being umpired in courtrooms through the prism of interpretation of a sports competition Deed of Gift. (Surely, de Tocqueville might have smiled.)

A few weeks later the opinions were ready. The Court had ruled 5-2 that the Cup belonged to Skipper Dennis Connor and the San Diego Yacht Club. Judge Fritz Alexander, a Navy veteran who, at the Court's private conference, claimed tongue-in-cheek expertise about vessels (albeit not yachts), ended up with the majority opinion that found the race was not an "unfriendly competition." Judges Simons and Kaye and I agreed, as did Chief Judge Wachtler in a separate concurring opinion (he claimed no special expertise from his Korean War veteran status; instead he referenced his earlier skepticism at the oral argument about the case having not much jurisprudential or precedential value). Judge Hancock, an Annapolis graduate who had chimed in at conference lightheartedly with his naval educational expertise, authored a two-judge dissenting opinion.[4]

On the decision hand-down day about a month later, as all seven judges happened to be passing through the courthouse basement media room on the way out to dinner after that day's oral arguments, the Court's public information officer flipped on the television just as a broadcaster opened the 6 o'clock news with a lead that went something like this: "The Court of Appeals today decided that the San Diego Yacht Club has won the legal battle for the America's Cup over New Zealand. It took 79 pages in three separate judicial opinions of legal disputation to bring the flag down and declare the winner of the race and the Cup."[5]

Challenge 2: Enter the Trimaran

Nineteen years later, the Court of Appeals was again asked to decide an issue involving the America's Cup. At the time, I had been retired from the Court of Appeals for 10 years and was engaged as one of the New York consultants to assist the Golden Gate Yacht Club's legal team on its appeal to the Court. Only this time the issue wasn't about who won the race on water. It was whether the Golden Gate Yacht Club's entry, the BMW/Oracle, a 90-foot long Leviathan (I thought it looked like the *Starship Enterprise*) promoted by Larry Ellison, with a team that included Sir Russell Coutts and Skipper Jimmy Spitill, was qualified to be a challenger in the next race in 2010. The then-custodian Trustee holder of the Cup was the Swiss Societe de Geneve (SNG), sailing *Alinghi* and financed by pharmaceutical magnate Ernesto Bertarelli. As in 1990, there was the question of technology: the *Alinghi* was a catamaran; the BMW/Oracle presented a carbon composite trimaran, or three-hulled boat, with a vertical sail double the size of a 737-airliner wing.[6]

> The larger issue that loomed for the courts to resolve was whether the catamaran constituted an "unfriendly competitor" in violation of the terms of the Cup's Deed of Gift.

Unlike 1990, there was less intense media interest in the legal issue at hand, as the question of allowing multihulled vessels to compete had been settled. This time the question before the Court was whether the Deed of Gift required the challenger to hold an annual regatta of its own before issuing a Notice of Challenge. The *Alinghi* had accepted a challenge from Club Nautico Espanol de Vela, but the Golden Gate Yacht Club objected that Club Nautico had not fulfilled the regatta requirement and that GGYC was the rightful challenger.

Judge Carmen B. Ciparick, by this time a judge on the Court of Appeals [who, as a trial justice in 1990, had ruled against the San Diego Yacht Club and awarded the Cup to New Zealand], drew the assignment to author the unanimous ruling that allowed the BMW/Oracle to challenge and sail against *Alinghi*.

The Court's opinion stated:

> This appeal involves the preeminent international sailing regatta and match race, the America's Cup. We had occasion once before to examine the charitable trust that governs the competition. In *Mercury Bay Boating Club v. San Diego Yacht Club* (76 NY2d 256 (1990)) we strictly construed the provisions of the trust instrument, the Deed of Gift, to allow multihulled vessels to compete in the America's Cup race. Today, we are called upon to reexamine the Deed of Gift to determine the eligibility criteria for a Challenger of Record, specifically whether the phrase 'having for its annual regatta' requires a yacht club to hold an annual regatta on the sea prior to issuing its challenge (Deed of Gift, Oct. 24, 1887, para. 4). We conclude that it does.[7]

The BMW/Oracle won in Valencia, Spain, and, in 2013, under the name Oracle Team USA, it won again in San Francisco against a Kiwi Team from New Zealand – a race that many count as one of the most exciting and

stunning comeback victories in the history of international sailing.

Change for the Better

The starting horn or gun for this spring's races will usher in a new America's Cup class – those downsized catamarans, measuring 49 feet of wing-sailed foiling carbon fiber. While the speed and elegance and advanced nautical design differ from the mono-hulled boats of the past, at bottom (or at topsails), they will have a modern look and maneuverability that may be a notch more acceptable to enthusiasts yearning to hang on to nostalgic traditions. Much effort has gone into building a cooperative spirit of organization, agreement and rule-making, without sacrificing the intense competition in the vessels' design and competitive operability. As the renowned Oracle Skipper Jimmy Spitill observed, "[t]he established teams, ourselves included, were well down the path of designing an AC62 (a 62-footer). But there is a bigger picture to consider. We needed to bring costs down, but we had to respect the design component of the event, as that's always been one of the biggest challenges in winning the America's Cup." It is estimated that the cost of the racing boats can reach $3 million or more. Add to that the entry fee of $2 million and other expenses for staff, crew and the like, and the overall cost to put a team and boat in the water to compete could reach $30 million to $40 million or more.

With such huge cost factors, the Cup's image as an event only for the very wealthy has also brought changes for 2017 and the future of the pre-eminent race. As Franck Cammas, the skipper of Team France, says, "To be a global success, the America's Cup needs to be accessible to the best teams, not just the biggest and wealthiest."

This year's race should be exciting and competitive as the exquisitely designed vessels glide through Bermuda's beautiful Great Sound. Neither legal sandbars nor "Bermuda Triangulated courtrooms" need be feared this time around. The winner will be decided on the water. Yet, the race that builds on the storied tales of exhilarating sailing exploits cannot and should not lose sight of the prowess of lawyers and judges, and even the judicial process itself, as part of that estimable legacy and history. ■

1. The club is housed in an architecturally renowned building at 37 West 44th Street in Manhattan, directly across from the equally prestigious New York City Bar Association building.

2. Stu Woo and Aaron Kuriloff, *The British Want Their Cup Back,* Wall Street Journal, Dec. 2, 2016, p. A-12. Reporting that Sir Ben Ainslie, the most decorated sailor in modern yachting history and the leader of the British team, is hoping to bring the Cup "home" to Queen Elizabeth II to make up for the Royal Squadron's loss in the maiden race a century-and-a-half ago before Queen Victoria.

3. Alexis de Tocqueville, *Democracy in America*, Library of America, 2004.

4. *Mercury Bay Boating Club v. San Diego Yacht Club*, 76 N.Y.2d 256 (1990).

5. While the author enjoyed sharing this legal saga of the America's Cup races, he urges that readers think a bit about an additional perspective and challenge of our times. On the day after Yacht Clubs battled in the Court of Appeals courtroom in 1990 over a $40 silver cup with the intense glare of media, no reporter – and no one other than the Court personnel required to be present that day – was in the courthouse to cover the Court's consideration of a more consequential appeal, dealing with the availability – or not – of some $100 million in state Aid to Dependent Families and Children. *In re Jiggetts v. Grinker*, 75 N.Y.2d 411. Please ponder that unsettling contrast for just a moment.

6. Christopher Clarey, *How to Rule the Water: Stay Off It*, New York Times, Nov. 25, 2016, p. B-6.

7. *Golden Gate Yacht Club v. Societe Nautique de Geneve*, 12 N.Y.3d 248 (2009).

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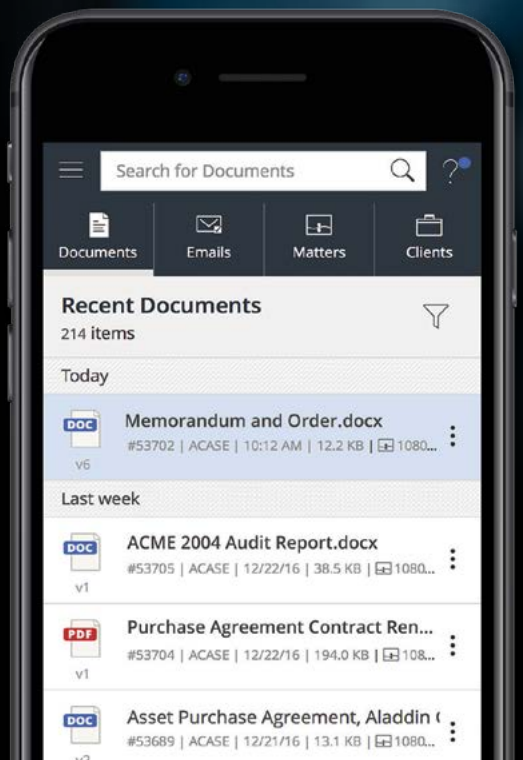

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BY DAVID PAUL HOROWITZ

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It Depends on What Your Definition of "or" Is (Part I)

Introduction

Valentine's Day, for all its happy Hallmark advertising, causes a great deal of angst, generates resentment, and creates many memories, some good, many bad. For me, Valentine's Day 2017 will be remembered not for strawberries dipped in chocolate or heart-shaped balloons, but as the day the Court of Appeals decided *Artibee v. Home Place Corp.*,[1] a 4-2 decision,[2] with the majority decision by Judge Stein and dissent by Judge Abdus-Salaam.

Artibee was an appeal, *via* leave granted by the Third Department, from its reversal of a Supreme Court decision denying a defendant's request to permit a jury to apportion liability on the verdict sheet in a personal injury action against a non-party, the State of New York. At issue was the interpretation of CPLR 1601.

Artibee is a CPLR geek's dream case, as it tackles principles of statutory construction, legislative intent, the meaning of jurisdiction, and the interplay of CPLR 1601 and the sovereign immunity of the state. Ultimately, resolution of the case centered on the meaning of the lowly conjunction "or."

On a practical level, *Artibee* is the answer to a litigator's dilemma because, whether you agree with the reasoning of the majority or the dissent, there is now a set landscape to navigate when separate actions are brought to recover on the same claim concurrently in Supreme Court and in the Court of Claims.

Artibee's Path to the Court of Appeals

Plaintiff Carol Artibee and her husband were traveling in their Jeep on a state highway when a large branch on a tree bordering the highway, on property owned by the private defendant, fell on the car and through the roof of the Jeep, striking Carol in the head. The Artibees commenced an action in Supreme Court against the landowner, alleging he "was negligent in failing to inspect, trim and remove the dead or diseased tree," and against the state, in the Court of Claims, alleging that the Department of Transportation was "negligent in failing to monitor open and obvious hazards along the state highway, properly maintain the trees, or warn drivers of the hazard."

Separate actions were required because the State of New York can only be sued in the Court of Claims pursuant to Article VI, § 9 of the New York State Constitution: the Court of Claims "shall have jurisdiction to hear and determine claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide," and the Supreme Court has no jurisdiction over those claims:

> [T]he jurisdiction of Supreme Court is limited elsewhere in the New York Constitution. For example, in preserving the State's historical sovereign immunity from suit, Supreme Court cannot exercise jurisdiction over claims for money damages brought against the State, which must be initiated and tried in the Court of Claims.[3]

Thus, two separate actions had to be maintained.

Is there an avenue for the defendant in the Supreme Court action to obtain contribution from the state? Yes, a claim for contribution may be brought by the Supreme Court defendant against the state in the Court of Claims.[4]

At trial in the Supreme Court, the defendant "moved for permission to introduce evidence at trial of the State's negligence and for a jury charge directing the apportionment of liability for plaintiff's injuries between defendant and the State."[5] Plaintiff did not object to the admission of defendant's culpability, but objected to allowing the jury to apportion fault against the state.

The trial court ruled that evidence with regard to the state's liability for plaintiff's alleged damages would be admissible at trial, but denied the defendant's request for an apportionment charge and apportionment on the verdict sheet:

> The court concluded, based on the language of CPLR 1601, that the issue before it was "whether the plaintiff's inability to join the State in the Supreme Court action, because of the doctrine of sovereign immunity, equates to the plaintiff's inability to obtain *jurisdiction* over a non-party thereby limiting the applicability of CPLR [a]rticle 16 apportionment." The court determined that the language of the statute and equitable considerations required denial of defendant's request for a jury instruction regarding apportionment.

Commendably, the trial court then adjourned the trial and permitted the parties time to appeal, "reasoning that it had essentially granted summary judgment dismissing defendant's claim for apportionment."[6]

Third Department, by a 3-1 vote, reversed the trial court's determination, holding Supreme Court properly allowed the defendant to put evidence before the jury with regard to the state's culpability, but incorrectly denied the defendant an apportionment charge and placement of the state on the verdict sheet so the jury could apportion liability.

The Third Department reasoned:

> Under CPLR article 16, a joint tortfeasor whose culpability is 50% or less is not jointly liable for all of [a] plaintiff's noneconomic damages, but severally liable for its proportionate share" (citations omitted). The provision was promulgated as a modification of the common-law theory of joint and several liability, the purpose of which was to "remedy the inequities created by joint and several liability on low-fault, 'deep pocket' defendants" (citations omitted). However, where potential tortfeasors are not joined in an action, the culpability of a nonparty tortfeasor may be imposed upon the named defendant if the plaintiff can show that he or she is unable to obtain jurisdiction over the nonparty tortfeasor (citation omitted). Here, plaintiffs do not face a jurisdictional limitation in impleading the State as a codefendant, but instead cannot do so due to the doctrine of sovereign immunity (citation omitted). Plaintiffs' only recourse against the State is to pursue an action in the Court of Claims (citation omitted). Likewise, if defendant is found liable in Supreme Court, it could seek indemnification from the State relative to its share of actual culpability as an additional claimant in the subsequent Court of Claims action (citations omitted).
>
> CPLR 1601 (1) is silent in regard to whether the State's proportionate share of liability should be considered in calculating a defendant's culpability in an action like the one at bar, and we have never decided the issue. In an analogous context, however, where a nonparty tortfeasor has declared bankruptcy and cannot be joined as a defendant (citation omitted), the liability of the bankrupt tortfeasor is apportioned with that of the named defendants because the plaintiff has failed to demonstrate that it cannot obtain personal jurisdiction over the nonparty tortfeasor, and equity requires that the named defendants receive the benefit of CPLR article 16 (citations omitted). Likewise, in cases where a joint tortfeasor enters a settlement agreement for its share of liability, nonsettling defendants are permitted to offset the greater share of the settlement amount or the released tortfeasor's equitable share of the damages against the amount of the verdict (citations omitted) based on the premise that nonsettling defendants "should not bear more than their fair share of a plaintiff's loss" (citation omitted). Further, the prevailing view is that apportionment against the State is an appropriate consideration in determining the fault of a joint tortfeasor in Supreme Court (citations omitted). Legislative history supports this view, as consideration of the State's fault would prevent a jury from imposing full liability on a defendant in the absence of the option to apportion culpability between the two entities (citations omitted). Moreover, as a policy matter, prohibiting a jury from apportioning fault would seem to penalize a defendant for failing to implead a party that, as a matter of law, it cannot implead (citations omitted).[7]

The majority recognized their holding was no panacea:

> Although we recognize the possibility of inconsistent verdicts as to the apportionment of fault in Supreme Court and in the Court of Claims, we note that this risk arises regardless of whether or not the jury is entitled to apportion liability between defendant and the State (citation omitted). Given the statutory purpose of CPLR 1601 (1) to "limit[ ] a joint tortfeasor's liability for noneconomic losses to its proportionate share, provided that it is 50% or less at fault" (citation omitted), we find that juries in this scenario should be given the option to, if appropriate, apportion fault between defendant and the State.[8]

Justice Egan, concurring in part and dissenting, believing "that Supreme Court fashioned a reasonable solution to a difficult problem and, as such, I respectfully dissent as to the apportionment charge issue and would affirm Supreme Court's order in its entirety."

His opinion highlighted the inherent problems in maintaining two separate actions:

> This case illustrates an archaic aspect of our state court system and is fodder for those who advocate for a single, Supreme Court level trial court. Here, plaintiffs claim that two negligent parties are responsible for their injuries. But, because one of those parties is the State, plaintiffs are forced to sue one alleged wrongdoer, i.e, defendant, in Supreme Court and the other alleged wrongdoer, i.e.,

the State, in the Court of Claims. It is bad enough that plaintiffs will have to try their case twice, but defendant also is placed at a disadvantage by virtue of (presumably) wishing to point the finger of blame at a party who is not—and cannot—be present in the courtroom. Viewed in this context, defendant's request for an apportionment charge was not unreasonable, but nonetheless posed a dilemma for Supreme Court.

Our adversarial, trial-by-jury system is based upon a full airing of the underlying facts and is best served by affording each litigant—represented by able counsel—an opportunity to present a spirited presentation or defense of its case. My fear here is that if we permit the requested charge and ask a jury (in the context of the Supreme Court action) to apportion fault (if any) between defendant, which will be present in the courtroom and which no doubt will present a vigorous defense, and the State, which, as the "constitutionally mandated empty chair" in the courtroom, can neither appear nor offer any defense, an unfair—or, at the very least, skewed—result will occur.[9]

Decision of the Court (a Teaser, Really)

Judge Stein's opinion set forth its decision in the opening paragraph:

> This appeal presents us with the question of whether the factfinder in Supreme Court may apportion fault to the State under CPLR 1601 (1) when a plaintiff claims that both the State and a private party are liable for noneconomic losses in a personal injury action. We conclude that such apportionment is not permitted and, therefore, reverse.[10]

The Court's decisions will be discussed in next month's column.

Conclusion

For those of you who are concerned that I am shirking responsibilities on the home front, rest assured, Susan and I had a lovely dinner at one of our favorite restaurants on Valentine's Day.

For my fellow CPLR Geeks, the truth is, I couldn't stop thinking about *Artibee*. ■

1. 2017 N.Y. Slip Op. 01145.
2. Judge Wilson took no part.
3. *People v. Correa*, 15 N.Y.3d 213, 227–28 (2010).
4. *See, e.g.*, *Bay Ridge Air Rights, Inc. v. State*, 44 N.Y.2d 49 (1978). *Bay Ridge* involved the date of accrual of a claim against the State for contribution. The case history is notable for the fact that the Court of Claims dismissed the claim as untimely, whereas, on appeal, the Appellate Division modified the dismissal to be without prejudice since it concluded the action for contribution was premature. The Court of Appeals agreed that the action was premature because a claim for contribution accrued on the date payment is made.
5. *Artibee*, 2017 N.Y. Slip Op. 01145 at *1.
6. *Id.* at *2.
7. *Artibee v. Home Place Corp.*, 132 A.D.3d 96, 100 (3d Dep't 2015).
8. *Id.*
9. *Id.*
10. 2017 N.Y. Slip Op. 01145 at *1.

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

Moments in History

The Measure of Contract Damages

The foreseeability rule, a near-universal principle of contract law relating to the measure of damages, owes its existance to a broken crank in a steam engine belonging to Joseph and Jonah Hadley, brothers and owners of a flour mill in Glouchester, England.

In May of 1853, a fracture in the gear shaft crank caused the steam engine that ran the corn grinding machinery to break down. The Hadleys sent an employee to the local carrier company, owned by Joseph Baxendale, who claimed he told the clerk at Baxendale's that the mill would sit idle until a new crank was installed, so the broken crank needed to be sent to the London engineers immediately.

The message of urgency apparently never made it to London, resulting in a length delay. The Hadley's sued Baxendale for £300 in lost proftis. Baxendale argued that he couldn't have foreseen an idle mill and therefore wasn't liable for any related loss.

The appellate court agreed and set forth what became one of the most famous rules of contract law:

> Where two parties have made a contract which one of them has broken, the damages the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach.

In this case, the evidence didn't show Baxendale was made aware of the need for expediency in delivery. In the words of legal scholar Allan Hutchinson, the case "remains the fountainhead for all common law discussion about the test for the award of damages in contract cases."

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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The Art of Direct Examination

By James A. Johnson

Jury Instructions

One of the first tasks an attorney should perform in starting or defending a case for trial is to prepare the jury instructions. This step alone should prevent a directed verdict at trial. In preparing the jury instructions you will set out the elements of your cause of action or defense. Preparation of direct examination cannot be accomplished in isolation from preparation of the other components of the trial. Now you will have the information for preparing voir dire, opening statement, direct examination, cross examination and summation. The jury instructions will have all the substantive law essential to prove or defend your case. The jury instructions or court's charge should be your bible and road map. Take my word for it, you can now focus on the details of how you are going to present your case, prepare the witnesses, depositions, exhibits and develop the best theme for your case.

The primary purpose of direct examination is to establish the essential proof of facts in support of a claim or defense. Proper execution requires detailed preparation and command of the rules of evidence, procedure and careful listening to the witness's answers. Examining witnesses is like telling a story and you want to make certain that each witness tells his or her part of the story with clarity and believability. Prepare an outline and a proof checklist, in advance, as a guide setting out the important facts that you need to elicit on direct examination.

Trials are nearly always won based on what happens during the direct examination of witnesses. Direct examination is pivotal to the outcome of your case at trial. The jurors are your audience and they are the dispensers of justice. Use ordinary, everyday language and avoid legal jargon. For example, it should be: *you stepped out of the car* and not *you exited the vehicle*. Both the attorney and the witness must be well prepared for trial. Otherwise jurors will doubt the witness's testimony. The attorney must review the contemplated testimony with the witness before trial so the examination will flow smoothly and with rhythm.

Theme

The theme of the case is a one-sentence explanation of your theory. A theory is a succinct statement as to why the plaintiff should win or why the criminal defendant is not guilty of the charged crime. Here's a sampling:

- "This is a case about a broken promise."

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- "Accidents don't just happen . . . they are caused . . . by people."
- "This is a case about risks, rules and responsibilities."
- "This is a case about a person who is less than a man and more than a man. Less than a man because . . ."
- "This is a case about defective construction work by the general contractor."

The defendant in a criminal case needs a good theme, just as much as, if not more than, the plaintiff in a civil case. For example: "This is a case of self-defense." "This is not a case about justice . . . . This is a case about injustice. Only you, through your verdict, can do justice."

The theme should flow logically from the facts and relate to the jurors' life experiences. Keep in mind that you have already given the jury your theme in opening statement. The theme of the case is the basic underlying idea which explains both the legal theory and factual background of the case. It ties these three parts together as a coherent and believable whole. Each witness's testimony must be assessed against the theme of the case. Decide which part of the story can best be told by each witness. The theme also dictates what witnesses to call and their order. The theme should be evaluated, honed and changed throughout your preparation, until you have the best one. A careful and planned order of witnesses is vital to a coherent presentation of the case. Direct examination questions should be styled to emphasize the theme.

A good theme should be brief. It should be interesting, obvious and easy to remember. It is crucial that the theme be stated in just a few words or in short sentences. The essence of a good theme is that it is catchy and quick and can immediately and easily be understood by the jurors.

The purpose of the theme is to grab the attention of the jurors. You want to captivate their interest and understanding all the way to the jury deliberation room. Now, you can discern that direct examination, opening statement and closing argument are not separate and distinct, but work in tandem.

The best themes are not always catchy phrases. Using a visual aid to convey a theme is just as powerful as a catchy phrase. Better still, use both a catchy phrase in opening statement and a visual aid on direct examination to tell a compelling story.

Evidentiary Foundations

An important procedural rule is that the proponent of an item of evidence must lay a foundation or predicate before formally offering the item into evidence. For example, the proponent of a letter or photo must present proof of its *authenticity* as a condition to its admission. The proponent must present proof that the article is what the proponent claims that it is. Federal Rule of Evidence 901(a) states: "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." The foundation is very simple when you elicit from the witness that he or she *recognizes* the author's handwriting on the letter, that he or she is *familiar* with the author's handwriting and has *a sufficient basis for familiarity.* Rule 901(b)(2) recognizes this authentication technique. This is only one way of authentication. Another method is the reply letter doctrine. Space constraints preclude me from setting them all out. Failure to clear foundation hurdles means that the item of evidence will be inadmissible.[1]

Authentication of Computer Records

The proponent of computer-generated evidence can authenticate a computer record containing data by proving the reliability of the particular computer used. If the readout uses symbols and technical terminology, the proponent, after introducing the record, may need an expert witness to explain the record. The elements of the foundation are as follows:

1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.
4. The procedure has built-in safeguards to ensure accuracy and identify errors.
5. The business keeps the computer in a good state of repair.
6. The witness had the computer read out certain data.
7. The witness used the proper procedures to obtain the readout.
8. The computer was in working order at the time the witness obtained the readout.
9. The witness recognizes the exhibit as the readout.
10. The witness explains how he or she recognizes the readout.
11. The witness explains the terms or symbols.[2]

Authentication of Business Records

One of the most significant exceptions to the hearsay rule is the business record exception. Business entries have a high degree of trustworthiness because the entry is routine and that helps ensure the reliability of the report. Federal Rule of Evidence 803(6), Records of a Regularly Conducted Activity, states:

> A record of an act, event, condition, opinion, or diagnosis if:
>
> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony

of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
(E) neither the source of information nor the method or circumstances of preparation indicates a lack of trustworthiness.

The elements of the foundation for the business entry hearsay exception are:

1. The report was prepared by a business employee.
2. The employee had a business duty to report the information.
3. The employee had personal knowledge of the facts or events reported.
4. The written report was prepared contemporaneously with the facts or events.
5. It was a routine practice of the business to prepare such reports.
6. The written report was made in the regular course of business.

The witness laying the foundation for admission of business records is usually the custodian of business records. But any person who is familiar with the business's recordkeeping can qualify. The witness need not have personal knowledge of the entry's preparation. The testifying witness need only to explain his or her connection with the business and then describe the habitual method with which the business prepares and maintains its reports.

Also note that many jurisdictions have a form affidavit for execution by the custodian of records that eliminates the personal appearance at trial for the admission of business records.[3]

In many jurisdictions, the technical evidentiary rules do not apply to foundational questions. Federal Rule of Evidence 104(a) provides: "Preliminary Questions: The court must decide any preliminary question about whether a witness is qualified . . . or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege." However, you want to reduce the risk that the opponent will interrupt your foundation with an objection so that your direct examination will flow smoothly and without interruption. Therefore, it is best to comply with the technical evidentiary rules.

Leading Questions

Leading questions are not ordinarily permitted on direct examination and are objectionable. A leading question is one that suggests the answer to the witness. Federal Rule of Evidence 611(c) provides: "Leading questions *should not* be used on direct examination except as necessary to develop the witness's testimony." Rule 611(c) is a rule of guidance and not prohibition. There are exceptions to this rule. There is no prohibition against using leading questions on *preliminary matters and on undisputed facts.* The use of leading questions on direct examination is left to the sound discretion of the trial judge.[4] For example: *Your name is John Robinson?*; *You work at CVS pharmacy?*; *The accident occurred on Main Street in front of the CVS Pharmacy?* These leading questions are undisputed facts.

Leading questions may be used on *voir dire* of a witness on direct examination.

New York, along with a few other states, has not codified its law of evidence. Cross examination in New York trial courts is limited to matters covered on direct examination, inferences drawn therefrom and the credibility of the witness. However, the use of leading questions on direct examination is in the sound discretion of the trial court and will not be disturbed absent a clear demonstration of an abuse of discretion. Also, under New York case law and Rule 611(c)(2) leading questions are allowed on direct examination when a party calls a hostile witness, an adverse witness, or a witness identified with an adverse party.[5]

There is another situation when cross-examination is permissible on direct examination. Leading questions may be used on *voir dire* of a witness on direct examination. When a preliminary fact is conditioned upon a finding by the court under Rule 104(b) the judge rules on the evidence's admissibility or the expert's qualifications under Federal Rule of Evidence 104(a). Before the judge rules the opponent may interrupt the direct examination by requesting the judge's permission to take the witness on voir dire.

Voir dire is functionally a cross-examination during the proponent's direct examination. The opponent conducting the voir dire may use leading questions. However, voir dire's limited purpose is to test the competency of the witness or evidence. Keep in mind voir dire has a limited scope and the opponent may not conduct a general cross-examination on the merits of the case under the guise of voir dire.

Sample Request to Take a Witness on Voir Dire

The fact situation is a murder prosecution. The prosecution witness is the bouncer in a nightclub. The prosecutor intends to elicit the bouncer's testimony that he heard the decedent identify the defendant as the person who shot him. The prosecutor believes that the decedent's statement falls within the dying declaration exception to the hearsay rule. The proponent is the prosecutor.

P: What is your occupation?
B: I am the bouncer at the ABC Nightclub.
P: What were you doing on the night of Feb 8, 2015?
B: I was on duty as the bouncer at the ABC Nightclub.
P: What happened that night?
B: A fight broke out and Mr. Smith was shot.
P: What was his condition?
B: It was serious and he lost a lot of blood.
P: What, if anything, did he talk about?
B: He talked about who shot him.
P: Who did he say shot him?
O: Your honor, I object to that question on hearsay grounds. I request permission to take the witness on voir dire.
O: Isn't it true that before he died, Mr. Smith said he was going to get the person who shot him?
B: Yes.
O: Isn't it a fact that he said he wanted to go to the hospital as soon as possible so he could be in condition to get the person who shot him?
B: Yes.
O: Your honor, the witness's testimony shows that the decedent, Mr. Smith, did not believe that his death was imminent. The declarant had not abandoned all hope of recovery. The dying declaration exception is not applicable. I renew my objection.
Judge: *Objection sustained.*

Expert Witnesses

Expert opinion testimony is governed by Federal Rule of Evidence 702: "If scientific, technical, or other specialized knowledge *will assist the trier of fact* to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise" (emphasis added). If the proposed expert testimony will not assist the trier of fact or is unreliable (*Daubert*) you can keep the expert from testifying at trial.

The point of calling an expert witness is not to put a hired gun on the stand. The consummate trial lawyer will put a *teacher* on the stand. For example, after you qualify your expert: *Dr. Smith: We need you to teach us about the location and function of the prostate gland in men. Could you tell us what is meant by the symbols BPH? Or, tell us, Dr. Smith, why are you here today?* Use headlines or transition phrases in guiding the witness's testimony. The *engaging expert* should act as a guide that can lead the fact finder through the technical, confusing or unclear elements of the case. Choose an expert who is able to explain and convey information in a way that a lay person can understand. Moreover, the advocate should have the expert repeat the attorney's theory of the case in his testimony. *Permit the judge and jury to hear your story in another voice.* By reiterating this story through a different voice, you have reinforced your theory and persuaded the jury to accept your version and the correct verdict. Trust me, careful preparation and choice of words used by the expert on direct examination will pay dividends.

Offer of Proof

If the judge sustains an objection during direct examination precluding a material line of inquiry, you should make an offer of proof.[6] An offer of proof states what the witness would have testified to and why the proponent wanted to elicit that testimony. And, get a definitive ruling on your offer of proof. Otherwise renew your offer of proof.[7] Depending on the jurisdiction, the offer of proof can be made, on the record, in question and answer form by the witness or in narrative form. The purpose of the offer of proof, on the record, is twofold. If there is an appeal the appellate court can evaluate whether the omission-error was prejudicial and whether the appropriate disposition is to remand or enter judgment for a party. The second reason is that the trial judge may reconsider and change the ruling. If the proponent anticipates an unfavorable ruling in the planning of direct examination, prepare a written offer of proof for insertion in the record.

Federal Rule of Evidence 103(a)(2), Rulings on Evidence, provides: "if the ruling excludes evidence, a party informs the court of its substance by an offer of proof unless the substance was apparent from the context."

The elements of an offer of proof are as follows:

1. The proponent asks for permission to approach the bench or for an out-of-court hearing.
2. The proponent states that he or she intends to make an offer of proof.
3. The proponent states what the witness would have testified to if the judge had permitted the proponent to pursue the line of inquiry.
4. The proponent states the purpose for which he or she wanted to offer the testimony and explains its logical relevance.
5. The proponent explains why the evidence is admissible.

Motion in Limine

A motion in limine is a pre-trial procedural tool that can affect direct examination. This motion can be used *to offer or exclude evidence at trial*. But such motions are more frequently used to suppress evidence. A motion in limine is filed by a party to a lawsuit that asks the court for an advance ruling limiting or preventing certain evidence from being presented by the other side at the trial of the case. Its purpose is to prevent highly prejudicial information from being introduced to the jury. For example, a party may use the motion to prevent any mention in a civil case of a party's automobile liability insurance, worker's compensation insurance, or that recovery by the plaintiff would or would not be subject to taxation. This also applies in a criminal case to a defendant's prior convictions. For example, if the prior conviction is identical to the charged crime, the prior conviction has tremendous potential for prejudice. If the judge grants a pre-trial motion in limine to exclude the conviction, the defense attorney can confidently place the defendant on

the stand. These are just four of a plethora of evidentiary matters that can be raised in a motion in limine. Moreover, this motion can also be used *to offer evidence at trial* where a party anticipates an evidentiary issue arising at trial. An advance ruling permits an attorney to make strategy decisions on direct examination.

There is no specific provision in the New York Civil Practice Law and Rules for motions in limine. New York state and federal courts entertain motions in limine under the courts' inherent power to manage the course of trials.[8]

Conclusion

During direct examination you have the opportunity to shape your case to tell an interesting and compelling story. You want the jury to see the facts from your client's point of view. If possible, find out the customary courtroom practices of the judge before whom the case will be tried. Effective direct examination begins long before you go into the courtroom. Prepare the jury instructions or court's charge early and let it be your road map throughout the trial. The jury instructions will be your guide while working on voir dire, drafting the opening statement, closing argument and in planning direct examination and cross. Success or failure at trial rests in the manner in which you prepare and present your witnesses. It is best to have a final witness whose strong testimony can provide a natural lead-in to the closing argument.

The advocate should weave the theme throughout the trial. Determine a theme that will predominate and resonate with the jurors. Using good storytelling techniques, demonstrative evidence and visual aids as suggested in this article will make your direct examination come alive, interesting and compelling. If you can construct a story that the jurors can see themselves without improperly telling them to put themselves in the shoes of your client, you have made great strides in winning your case. Moreover, if you can develop and deliver the right theme, as a model for understanding the evidence on direct examination and throughout the trial, one or more of the jurors will be arguing your case in the jury deliberation room. "That is not what this case is about. – *This case is about a broken promise.*"

But for those of you who can't follow the guidelines and suggestions set out in this article, I paraphrase actress Bette Davis, in *All About Eve* – "Fasten your seat belts. It is going to be a bumpy ride." ■

1. *Rainbow v. Albert Elia Bldg Co.*, 79 A.D.2d 287 (1981).
2. Edward J. Imwinkelried, Evidentiary Foundations, Authentication; *see also* Hon. Edward M. Davidowitz, Robert L. Dreher, Esq., Foundation Evidence, Questions and Courtroom Protocols, 5th ed. 2014, New York State Bar Association.
3. *See also* CPLR 4518 (Business Records).
4. *Sanders v. NYC Human Resources Admin.*, 361 F.3d 749, 757 (2004); Imwinkelried, *Evidentiary Distinctions* (1993) p. 101.
5. *People v. Rozanski*, 209 A.D.2d 1018, 1018–19 (4th Dep't 1994); *see Ostrander v. Ostrander*, 280 A.D.2d 793, 793 (3d Dep't 2001), *citing Becker v. Koch*, 104 N.Y. 394, 401–02; *see* Prince, Richardson on Evidence § 6-223 (Farrell 11th ed. 1995); John Durst, *New York Courtroom Evidence*, 4th ed. (2013).
6. *People v. Williams*, 81 N.Y.2d 303 (1993); *People v. Mejia*, 221 A.D.2d 182, 183 (1st Dep't 1995), *app. denied*, 87 N.Y.2d 975 (1996).
7. *See* Federal Rule of Evidence 103(b).
8. *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984); *Davis v. City of Stamford*, 216 F.3d 1071 (2d Cir. 2000).

Modern Variations on an Ancient Theme: Fundamental Changes in Trust Law – Part II

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This article was prepared in connection with the Mortimer H. Hess Memorial Lecture at the New York City Bar Association, which Mr. Halperin delivered on May 23, 2016, and is printed with the permission of the New York City Bar Association.

This is part two of a two-part article on fundamental changes in trust law. The first part appeared in the February issue of the NYSBA Journal.

III. Changes in the Importance of Settlor's Intent in Interpreting and Administering a Trust: Decanting and Reformation or Modification

The settlor's intent has traditionally been of paramount importance, and perhaps the single most significant factor, in interpreting and administering a trust.[1] However, two recent developments – the rise of decanting and the increasingly permissive attitude toward reformation and modification – risk potential deviation from the settlor's intent, absent adequate safeguards.

A. Decanting

The concept of decanting has been the subject of a large body of literature and extensive legislative consideration, particularly in New York. Accordingly, this section will only briefly highlight the issues relevant to the theme of this article. Including New York, 23 states had some form of decanting statute as of January 2016.[2] In addition, certain states permit decanting under common law.[3] Decanting provisions are not included in the Uniform Trust Code (UTC); the Uniform Law Commission has promulgated a Uniform Trust Decanting Act, though it has not been the subject of scholarly inquiry in the manner of the UTC.

Decanting signifies the "pouring over" of trust assets to a new trust. The rationale behind permitting decanting is that if a trustee has discretion to distribute trust property to or for the benefit of a beneficiary, the trustee in effect has a limited power of appointment in favor of the beneficiary and thereby can appoint the property to a new or existing trust for the benefit of that beneficiary.[4] However, while decanting is often used to alter the administrative provisions of a trust, such as the trust's governing law and trustee succession provisions, decanting is increasingly used to alter the substantive provisions of a trust.

When used to effectuate significant substantive changes, decanting may be seen as undermining the importance of the settlor's intent in trust interpretation and administration. Decanting may permit a trustee to, for example, extend the term of a trust or exclude a particular beneficiary from a trust. In these examples, the settlor simply did not elect to establish a longer-term trust and presumably deliberately included the beneficiary whom the trustees opt to exclude. On the other hand, decanting may serve to effectuate the settlor's intent in that, had the settlor known of circumstances that arose during the period of trust administration, he or she may have condoned these substantial changes. For instance, if the settlor had known that a beneficiary would get divorced and, accordingly, assets passing outright to the beneficiary at a certain age might be divided between the beneficiary and his or her ex-spouse, or that the beneficiary would experience substance abuse or creditor issues that would hinder the beneficiary's ability to use trust funds for productive purposes, the settlor may have been perfectly content to extend the trust term, or exclude that beneficiary from the trust. Admittedly, though, the plain language of the trust agreement is often the best evidence we have of the settlor's intent in creating that trust, and these substance-oriented changes patently contravene the plain language of the trust agreement.

The New York decanting statute includes safeguards to protect against potential abuses of decanting. For instance, a trustee "has a fiduciary duty to exercise the [decanting] power in the best interests of one or more" of the beneficiaries and may not decant "if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the [decanting]."[5] A trustee may not decant trust property to a trust with entirely new beneficiaries.[6] The receptacle trust must contain the same standard of distribution as the initial trust.[7] And a trustee may not exercise the power to decant "[t]o decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence and prudence."[8] These safeguards may help to ensure that the settlor's intent remains paramount while acknowledging that, during the trust term, circumstances may arise that the settlor did not or could not foresee but that nonetheless may affect trust administration in significant ways.[9]

B. Reformation and Modification

Trust reformation and modification, two related but distinct concepts, represent another area in which recent developments may serve to undercut – or, depending on one's perspective, buttress – the historical importance of the settlor's intent in interpreting and administering a trust. Reformation "concerns an action to remove, or to add language to a trust, due to error or mistake, in order to conform the instrument to the settlor's intention."[10] Modification, by contrast, refers to "alter[ing] trust terms that the creator intended to be part of the trust but which no longer serve the trust purpose because of a change in circumstances" arising after the trust is established but during the trust term.[11] In other words, reformation involves altering trust provisions because of a mistake that existed at the time the trust was created, while modification denotes changing trust provisions because circumstances subsequent to the trust's creation necessitate such changes.

While New York has no statute on point, New York courts have historically been reluctant to permit either reformation or modification because of the belief that the settlor's intent is best expressed through the plain language of the trust instrument.[12] However, in recent years New York courts have been more open to both

doctrines.[13] For instance, in the reformation-related case of *In re Snide*, a wife mistakenly signed her husband's will and her husband mistakenly signed her will; as the wills were identical, the Court of Appeals permitted reformation of the will that the husband had signed (and that the wife submitted for probate) such that the husband was deemed to leave his property to his wife rather than to himself.[14] In the modification-related case of *In re Carniol,* the beneficiary of a trust holding a co-operative apartment could not pay for the apartment's upkeep but withheld consent to the sale of the apartment, without which the trustees could not sell the apartment; the court permitted modification to allow the trustees to sell the apartment without the beneficiary's approval so that the trust could provide the beneficiary with a place to live, which the court determined was the primary purpose of the trust.[15]

To a degree, reformation and modification actually serve to cement the importance of the settlor's intent in trust interpretation and administration.

The UTC sets a high bar for permitting trust reformation, presumably in deference to the settlor's intent as evidenced by the language of the trust agreement. Section 415 provides that a court "may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law . . . ."[16] The comment to this section emphasizes the importance of the settlor's intent in its analysis of the clear and convincing evidence standard: "To guard against the possibility of unreliable or contrived evidence . . . the higher standard of clear and convincing proof is required."[17] Apparently, the drafters of the UTC determined that reformation should be permitted primarily out of concern for the settlor's intent, acknowledging that mistakes can occur in the preparation of a trust agreement.

The UTC provisions on modification show similar deference to the settlor's intent, but also suggest that other considerations should play a role in permitting modification. For example, Section 412(a) permits trust modification if, "because of circumstances not anticipated by the settlor, modification … will further the purpose of the trust. *To the extent practicable*, the modification must be made in accordance with the settlor's probable intention."[18] Modification is also permitted in situations including when a court "determines that the value of the trust property is insufficient to justify the cost of administration";[19] to achieve tax objectives, which modification must be made "*in a manner that is not contrary to the settlor's probable intention*";[20] and by consent, under certain circumstances.[21] The italicized language in particular indicates that, as far as the drafters of the UTC are concerned, the settlor's intent in creating a trust, while still an important factor, is not an absolute guidepost.[22] With respect to achieving tax objectives, for instance, the proponents of modification need only show that the settlor likely would not have disapproved of the modification, not that the settlor would have approved it – a subtle but illuminating distinction.

The views of the New York Uniform Trust Legislative Advisory Group, as of the time of this writing, are in some ways more and some ways less deferential to the settlor's intent than are the views reflected in the UTC. For example, an internal memorandum of the committee suggests that the committee is substantially more comfortable with modification of administrative provisions than with modification of substantive provisions.[23] However, that same memorandum suggests that modification should be permitted not only to further the purpose of the trust but also "for any other compelling reason."[24] Presumably, the committee is working to balance pragmatic considerations with the traditional importance of the settlor's intention.

To a degree, reformation and modification actually serve to cement the importance of the settlor's intent in trust interpretation and administration. Like decanting, reformation and modification attempt to realize the settlor's intent in the face of mistakes or changed circumstances. Certain UTC requirements, such as the "clear and convincing evidence" standard, demonstrate the continued importance of the settlor's intent. However, other UTC developments, such as permitting modification for tax reasons as long as the modification does not contravene the settlor's intention, indicate the degree to which we may shift the focus from the settlor's original intent to address changed circumstances or complex tax laws.

Furthermore, even if these doctrines are primarily intended to safeguard and promote the settlor's intent, it may be a difficult task to ascertain the settlor's intent in establishing the trust. Perhaps the settlor aimed to achieve multiple objectives, which may be inconsistent with one another in the face of changed circumstances. A court may be able to infer the grantor's primary purpose, and perhaps even the relative importance of various

objectives, from the trust terms, but these determinations are, at best, educated guesses.

IV. Changes in the Relationships Among Beneficiary, Trustee and Settlor: Quiet Trusts and Self-Settled Asset Protection Trusts

Traditionally, the beneficiary, trustee and settlor have had defined and distinct roles and responsibilities. The settlor transfers property to the trustee, who holds that property for the benefit of the beneficiary. All parties are apprised of their rights and the arrangement is intended to benefit distinct individuals. Two relatively recent developments in the trust form – quiet trusts and domestic self-settled asset protection trusts – call into question these traditional aspects of the trust.

A. Quiet Trusts

As a general rule, trustees owe a duty to inform beneficiaries of the existence of trusts created for their benefit and the identities of the trustees and to permit beneficiaries to review trust records.[25] Under a quiet trust arrangement, however, the beneficiary may not even be apprised of the fact that a trust exists for his or her benefit, let alone the nature and value of trust assets. Perhaps the most common rationale behind quiet trusts is that a wealthy settlor, often a parent, may not want a beneficiary, often his or her child, to know of the extent or existence of the beneficiary's wealth because of the beneficiary's lack of fiscal responsibility or knowledge about financial affairs, out of concern for the effect the knowledge might have on the beneficiary's work ethic or as a precaution against third parties taking advantage of the beneficiary.[26] From a theoretical perspective, the rationale behind permitting quiet trusts represents an espousal of the contractarian view of trusts – that a settlor should be able to structure a trust he or she creates with terms that he or she selects.

The validity of quiet trusts varies by state. Even among states that permit quiet trusts, quiet trust statutes can differ considerably. According to one commentator:

> Alaska, Delaware, New Hampshire, Ohio, South Dakota, Tennessee and Wyoming have some of the better beneficiary quiet trust statutes. Those statutes generally provide for 1) a grantor to waive the trustee's duty to inform in the trust document, and/or 2) a trust advisor or trust protector to expand or modify the rights of beneficiaries to information relating to the trust.[27]

Presumably, in this commentator's view, a "better" statute is one that is more permissive of quiet trusts. However, quiet trusts also have their detractors.

A quiet trust eliminates the beneficiary's ability to ensure that the trustee complies with his or her obligations under the trust agreement and applicable law. Because the trustee "is accountable to its beneficiaries, who are the ones with standing to assert a claim for breach of trust or demand that the trustee file a judicial accounting proceeding," if the beneficiaries are unaware of their interests in a trust, a trustee's obligations may not be "enforceable as a practical matter."[28] One commentator identifies the relationship between the beneficiary and trustee as "right-duty tension," which requires that beneficiaries know of their trust interests "so that they have the right, and the trustees have the correlative duty, to make the trustees account for their conduct in relation to the trust property."[29] In other words, if a trust beneficiary is unaware of his or her interests, no check exists to ensure that the trustee acts as required. Certain quiet trust statutes respond to this issue by permitting someone other than a beneficiary to be (or requiring that someone be) apprised of trust developments in order to adequately represent the beneficiary's interests.[30]

Quiet trusts represent a fundamental break with historical trust doctrine. A trustee's duty to tell a beneficiary that, at the least, the beneficiary has interests in a particular trust "has been a fixture in Anglo-American law for almost two centuries,"[31] and the trustee's "[a]ccountability to beneficiaries is at the heart of the trust as the core obligation . . . ."[32] One commentator questions whether a quiet trust is truly a trust: "If the settlor directs the trustee not to provide any information to the beneficiary about the trust, including its existence, the question of whether a trust has in fact been created is raised" because the beneficiary "will not be able to protect" his or her interest.[33]

The UTC contains provisions requiring certain beneficiaries who are at least 25 years old to be notified of their interests in trusts,[34] with an accompanying comment that the "duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee" and that beneficiaries must have certain information about the trust so they can "protect their interests effectively."[35] Given the proliferation of quiet trust statutes, it is unsurprising that these provisions "have been among the UTC's most controversial and heavily criticized."[36] Perhaps as a response, the UTC made optional the provisions under Section 105 that a trust instrument could not override the requirement that beneficiaries be informed of the existence of their trust, the identity of the trustee and their right to request trustee reports.[37]

Adoption of the UTC would represent a significant change for New York law in this area. New York currently has no statute on quiet trusts, though the Surrogate's Court Procedure Act (SCPA) requires that a trustee provide certain information to the beneficiary, including financial statements, when the beneficiary so requests in order for the trustee to receive statutory commissions.[38] However, the SCPA does not prevent a settlor from eliminating this requirement in the trust instrument, an omission that gives at least a theoretical nod to quiet trusts.[39]

On the one hand, the proliferation of quiet trusts (and legislation authorizing them) may be a sign of eroding fiduciary duties. On the other hand, the rise in quiet

trusts may be viewed in the context of fulfilling the settlor's intent, another fundamental attribute of the trust form. Accordingly, New York may be required to weigh the relative importance of these two seminal aspects of the trust in deciding whether to adopt the UTC provisions on quiet trusts. As noted earlier, however, the need to establish a hierarchy of fundamental trust attributes is in itself new, arising out of potential conflicts among these attributes in the context of modern developments in trust doctrine.

B. Self-Settled Asset Protection Trusts

The self-settled asset protection trust permits a settlor to place property in trust for his or her own benefit in order to avoid the claims of future creditors. These trusts are creations of state law and have no antecedent in historical trust doctrine. As is the case with quiet trusts, even those states that permit self-settled asset protection trusts have varying requirements,[40] many designed to surmount the concern that self-settled asset protection trusts may run afoul of fraudulent transfer doctrine.[41]

The self-settled asset protection trust is controversial in several respects, but this article will focus on one: the trust's spendthrift protection.[42] In the context of a self-settled trust, the historical rationale behind spendthrift protection may no longer apply. As one commentator posits, "[i]t is illogical to … imagine that if the settlor himself is the spendthrift that he may place restrictions against his access to his own money, and still be able to successfully shield his assets from his creditors by reason of those restrictions" because spendthrift protection "is designed as a protective measure to limit a spendthrift's access" to trust assets and "[s]pendthrift provisions, in general, are deemed legitimate based on the theory that the owner of assets may dispose of his assets in any manner he deems appropriate, including protecting the assets from a [distinct] beneficiary's creditors."[43] If the spendthrift is also the settlor, the roles required to complete the historical paradigm collapse.

The concern about fraudulent conveyances is more than theoretical. "[S]everal states have pruned" their fraudulent conveyance statutes to permit self-settled asset protection trusts to exist without conflict.[44] By way of example:

> In Alaska and Nevada, a transfer into an asset protection trust can only be challenged for actual fraud, not constructive fraud. In Nevada as well, the statute of limitations for challenging the transfer halves the usual period specified under the Uniform Fraudulent Transfer Act. In Delaware and South Dakota, creditors face a more stringent burden of proof.[45]

And while federal bankruptcy law is beyond the scope of this article, it is worth noting that a "functional bankruptcy exemption" applies to asset protection trusts.[46] These legislative changes necessitated by the drive to enable self-settled asset protection trusts are concerning, particularly if a state's true aim in legislating in favor of asset protection trusts is not to perfect the trust form and secure the interests of all parties involved, but instead to increase states' trust business.[47]

In this area, the UTC's provisions hew closely to tradition. Section 505(a)(2) provides, "With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit."[48] The comment to Section 505 emphasizes the UTC's position against self-settled asset protection trusts, noting that Section 505 "follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors. . . . Consequently, the drafters rejected the approach taken in States like Alaska and Delaware," which permit self-settled asset protection trusts.[49] If New York – which currently does not permit self-settled asset protection trusts[50] – adopts these UTC provisions, it will affirm its embrace of the historically grounded separation of rights and roles among the parties involved in trust administration.

V. Conclusion

The developments reviewed in this article represent only a few of the recent significant changes in the concept and form of the trust. Before the last quarter-century, the trust form changed little in the modern era, but recent and

intense activity in this area of the law has fundamentally altered the nature of the trust. These new changes may represent the natural evolution of trust doctrine against the backdrop of related legal and social changes: longer-term (and potentially perpetual) trusts, increasingly complex tax rules, modern family arrangements, an increasingly peripatetic American population and a growing plaintiff's bar.

In considering whether to adopt the UTC provisions relevant to the areas discussed in this article, New York has an opportunity to engage in and shape the national conversation about the degree to which fundamental attributes of the trust should remain consistent or whether there are sound policy reasons to depart from them. While certain provisions of the UTC closely follow traditional trust doctrine or attempt to reconcile instances in which standard principles of trust law may conflict against the backdrop of new developments, other provisions depart from the historical guideposts of trust law. The New York bar has a weighty task at hand that could ultimately modernize in significant ways this ancient body of law.

The debate over these issues is not merely academic. Even absent action by the New York bar, the considerations raised in this article suggest that trusts and estates attorneys should consider the extent to which they discuss these issues with their clients to appropriately realize their intentions and secure the appropriate fiduciary duties. ■

1. *See* Alan S. Halperin and Zoey F. Orol, *Modern Variations on an Ancient Theme: Fundamental Changes in Trust Law*, N.Y. St. B.J. (February 2017), p. 40, § I.B.

2. Steve Oshins, 3rd Annual Trust Decanting State Rankings Chart, available at http://www.oshins.com/images/Decanting_Rankings.pdf.

3. *See, e.g.*, *Morse v. Kraft*, 466 Mass. 92 (2013); *Phipps v. Palm Beach Trust Co.*, 142 Fla. 782 (1940).

4. *See, e.g.*, William R. Culp, Jr. & Briani Bennet Mellen, Tax Mgmt. Est. Gifts & Tr. J. (BNA) No. 871.

5. N.Y. Est. Powers & Trusts Law 10-6.6(h) (EPTL).

6. EPTL 10-6.6(b).

7. EPTL 10-6.6(c)(1).

8. EPTL 10-6.6(n)(2).

9. Of course, state decanting statutes provide only default rules. A trust agreement may include decanting provisions – with or without safeguards akin to those included in the New York statute – regardless of the existence of a state law on the topic.

10. C. Raymond Radigan and Jennifer F. Hillman, *The Evolution of Trust Reformation and Modification Under New York Law,* N.Y.L.J., July 2012 ("Historically, courts regarded the settlor's intent as the guide to trust administration.").

11. "Reformation and Supplemental Needs Trusts," memorandum of New York Uniform Trust Legislative Advisory Group. Regardless of a state's permission to reform or modify a trust, if the change was made to achieve certain federal tax law objectives, the IRS may not always comply. *See, e.g.*, Howard M. Zaritsky, *Trust Reformation Is Not Always a Good Solution*, 40 Est. Plan. 47, 47, Jan. 2013 ("Unfortunately, the IRS does not always recognize the retroactivity of state law reformations for federal tax purposes, as demonstrated in Ltr. Rul. 2012243001.").

12. *See, e.g.*, Radigan and Hillman, *supra* note 10; "Reformation and Supplemental Needs Trusts," *supra* note 11.

13. One commentator suggests that more practical considerations may play a role. *See* John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 9 (2012) ("The spread of malpractice liability for professional negligence in trust and probate matters is a background factor that may have contributed to the greater willingness of the courts to remedy mistakes."). The Jersey case of *In re Hastings-Bass* is both a cautionary tale about granting unsophisticated trustees a modification power and an example of the salutary effect of a court's ability to modify trust provisions. In that case, the trustees of a trust were granted discretion to modify certain trust provisions; they exercised their powers without fully understanding the repercussions, leading to adverse tax consequences to the trust. The court permitted the trustees to reverse their actions and therefore both escape liability for their modifications and relieve the trust of the negative tax results. In *In re Hastings-Bass*, [1975] Ch. 25

> To sum up the preceding observations, in our judgment, where by the terms of a trust (as under section 32) a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.

Note that the so-called "Hastings-Bass" principle has been somewhat limited in recent cases. *See, e.g.*, Bethan Boscher and Simon A. Hurry, *Jersey: Clarity on the Rules of Hastings-Bass and Mistake – The Supreme Court Rules on* Pitt v. Holt *and* Futter v. Futter, Mondaq, Jun. 2013.

14. *In re Snide*, 52 N.Y.2d 193 (1981).

15. *In re Carniol*, 20 Misc. 3d 887 (Sur. Ct., Nassau Co. 2008) (using the term "reformation" to mean "modification" as defined in this article). Note, however, that with respect to both doctrines, courts have continued to adhere primarily to evidence of the testator's intention in deciding whether to permit a proposed modification or reformation. *See, e.g.*, *Estate of Charles Sukenik*, N.Y.L.J., July 6, 2016 (denying a request to modify or reform a trust "to remedy 'inefficient estate and income tax planning' which, absent the requested reformation," would "result in . . . an income tax liability of approximately $1.6 million" because the requested reformation was "prompted neither by a drafting error nor a subsequent change in law"); *In re Dickinson*, 273 A.D.2d 89 (1st Dep't 2000) (declining to permit reformation to include adopted children in class of "issue" where "issue" was explicitly defined to include "only children 'of the blood' "); *In re Dunlop*, 162 Misc. 2d 329 (Sur. Ct., Hamilton Co. 1994) (denying a petition to modify a Will to take advantage of the testator's GST tax exemption where the Will was executed after the GST tax was enacted and where the testator expressed no specific intent to capitalize on his GST tax exemption). *But see In re Kaskel*, 146 Misc. 2d 278 (Sur. Ct., N.Y. Co. 1989) (permitting modification of a Will to capitalize on the testator's GST tax exemption where the Will was executed before the GST tax was enacted and where the court could infer testator's intention to minimize taxes); *In re Choate*, 141 Misc. 2d 489 (Sur. Ct., N.Y. Co. 1988) (same).

16. UTC § 415.

17. UTC § 415 cmt.

18. UTC § 412(a) (emphasis added).

19. UTC § 414(a).

20. UTC § 416 (emphasis added).

21. UTC § 411.

22. This contrast is particularly evident when comparing the UTC provisions to the historical doctrine of equitable deviation. *See* Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 Akron L. Rev. 649, 663–64 (2005) ("Under the traditional equitable deviation doctrine, if circumstances unanticipated by the settlor occur, the court may modify the administrative terms of the trust, but only to prevent the unanticipated circumstances from defeating or substantially impairing the accomplishment of the purposes of the trust. The UTC counterpart . . . does not include that limitation.").

23. "Modification," memorandum of New York Uniform Trust Legislative Advisory Group (noting that "as the [relevant] section appears in the Interim Report, only administrative terms may be modified").

24. *Id*.

25. *See, e.g.*, Restatement (Second) of Trusts, § 173.

26. In fact, U.S. Trust has noted that "only a little more than a third of wealthy parents have disclosed their wealth to their children, while just under half have disclosed only a little." U.S. Trust, *U.S. Trust Insights on Wealth and Worth*, 11 (2015).

27. Al W. King III, *Should You Keep a Trust Quiet (Silent) From Beneficiaries?*,

Tr. & Est., Mar. 25, 2015, *available at* www.wealthmanagement.com/estate-planning/should-you-keep-trust-quiet-silent-beneficiaries.

28. Jonathan J. Rikoon and Louise Ding Yang, *Quiet Trusts and Great Expectations*, N.Y.L.J. Special Rep. Newsl., Sept. 17, 2012.

29. David Hayton, *Exploiting the Inherent Flexibility of Trusts*, in Modern International Developments in Tr. Law 319, 325 (1999).

30. *See, e.g.*, 12 Del. C. § 3303(d) ("During any period of time that a governing instrument restricts or eliminates the right of a beneficiary to be informed of the beneficiary's interest in a trust . . . any designated representative . . . then serving shall represent and bind such beneficiary for purposes of any judicial proceeding . . . .").

31. Rikoon and Yang, *supra* note 28.

32. Hayton, *supra* note 29, at 319 n. 1.

33. Newman, *supra* note 22, at 678.

34. Uniform Tr. Code § 813.

35. *Id*. at § 813 cmt.

36. Newman, *supra* note 22, at 676.

37. Uniform Tr. Code § 105(b)(8)–(9) & cmt ("Sections 105(b)(8) and 105(b)(9) address the extent to which a settlor may waive trustee notices and other disclosures to beneficiaries that would otherwise be required under the Code. These subsections have generated more discussion in jurisdictions considering enactment of the UTC than have any other provisions of the Code.").

38. N.Y. Sur. Ct. Proc. Act § 2309(4).

39. The manifest uncertainty under New York law as to the permissibility of quiet trusts suggests that there exists a significant gap that the legislature should fill.

40. *See, e.g.*, David G. Shaftel, ed., *ACTEC Comparison of the Domestic Asset Protection Trust Statutes* (2015), available at www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf.

41. The law of fraudulent transfer is centuries old. *See, e.g.*, Jay Adkisson, *The Uniform Voidable Transactions Act – What's With the Name Change?*, Forbes, Jul. 2014 (discussing Roman antecedents of fraudulent conveyance law and the Fraudulent Conveyances Act of 1571, also known as the Statute of 13 Elizabeth).

42. More basically, the advent of the self-settled asset protection trust represents a significant change in the historical separation of roles and responsibilities between the settlor and the beneficiary of a trust. Trust law historically did not envision the settlor also serving as the beneficiary; as the brief history of the trust form in the introduction to Part I of this two-part series indicates, the trust originated as a device for passing property to a third party when there was no traditional legal mechanism to do so. *See, e.g.*, Richard C. Ausness, *The Role of Trust Protectors in American Law*, 45 Real Prop. Tr. & Est. L.J. 319, 320 (2010) ("A trust is an arrangement whereby one person (the trustor) transfers property to another person or entity (the trustee) and directs the trustee to hold the property for the benefit of another person (the beneficiary).") (internal citations omitted).

43. Phyllis C. Smith, *The Estate and Gift Tax Implications of Self-Settled Domestic Asset Protection Trusts: Can You Really Have Your Cake and Eat It Too?*, 44 New Eng. L. Rev. 25, 29 (2009).

44. Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 Cardozo L. Rev. 2685, 2690 (2006).

45. *Id*. at 2690–91.

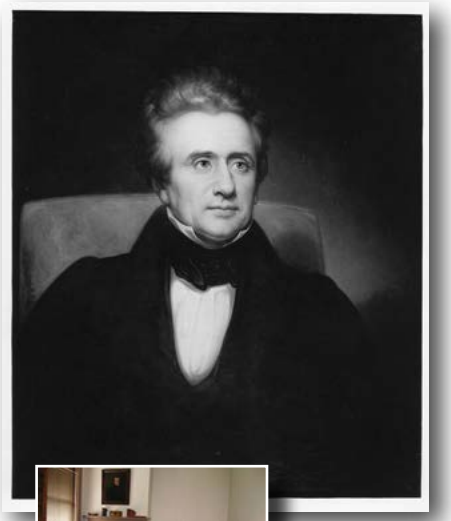
46. *Id*. at 2703.

47. *Id*. at 2687 ("The state legislature of Delaware has been quite candid (even brazen) about its intentions, which are 'to maintain Delaware's role as the most favored domestic jurisdiction for the establishment of trusts.' Local banks and trust companies comprise the true beneficiaries.") (internal citations omitted).

48. Uniform Tr. Code § 505(a)(2).

49. *Id*. at § 505 cmt. The UTC drafters have not indicated why, in their view, this "traditional doctrine reflects sound policy." *Id*.

50. *See, e.g.*, N.Y. Est. Powers & Trusts Law 7-3.1(a) ("A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.").



Judge Walworth's chambers at the Saratoga Springs History Museum.

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Out of the Ashes

How a failed Supreme Court nomination led to the establishment of the Court of Appeals

By Penelope D. Clute

When it came to getting his Supreme Court nominees approved by the Senate, President John Tyler was the biggest loser of them all. While many Presidents (including, most recently, Barack Obama) saw their Supreme Court choices go down in defeat, Tyler had the worst record – eight rejections of four nominees in 13 months. One of those nominees happened to be New York State's highest judge, Chancellor Reuben H. Walworth of the Court of Chancery, who was three times nominated – and withdrawn – in one year by Tyler. But the Walworth nomination is notable for much more than just being one of Tyler's losing causes. As it turned out, the defeat of Reuben Walworth led to a sea change in New York's judicial system.

The Walworth nomination is chronicled in a series of letters on file at the Historical Society of Saratoga Springs. The letters detail the twists and turns of the era's politics and the long, frustrating wait Walworth had to endure, but they do not reveal the exact reason why the judge's nomination failed. The aftermath, however, can be put squarely on an "obnoxious" Judge Walworth and his extremely dysfunctional and expensive court, resulting in its abolition.

According to some press reports, Judge Walworth was a "querulous, disagreeable unpopular chancellor" and many "distinguished members of the bar" of New York supported his nomination to the Supreme Court not because they viewed him as a sterling candidate but only because they had hoped to "promote" him to Washington and get him out of New York.

It appears that Judge Walworth and the Court of Chancery were also extremely unpopular with the ordinary people, who found themselves unable to get justice through the courts, and were often financially ruined trying to do so. One of the delegates to the 1846 constitutional convention called the Court of Chancery "a compound of aristocracy and despotism. It had its origin from behind the throne of kings – it had been insidiously grasping power and usurping authority unknown to any other legal tribunal, until millions of property and the rights and happiness of thousands of our citizens depended on the *dicta* of this one man power."[1]

The delegate said he had submitted a resolution to "inquire into the expediency of so amending the constitution as to dispense with this court" in the 1842 legislature, which was "rejected by the Assembly without ceremony, and sneeringly hooted out of the house by members of the legal profession. There was but one appeal taken – only one appeal – and that was from the legislature and lawyers to the people."[2] Four years later, and just one year after Walworth's chance for the Supreme Court vanished, the result was this constitutional convention with judicial reform paramount. In its most significant reform, the new constitution entirely eliminated the Court of Chancery and merged equity jurisdiction with the law in a newly designed Supreme Court. It also abolished the Court of Correction of Errors and created a new high court – the Court of Appeals.

Letters found in a manila folder labeled "other Walworth file" at the Historical Society of Saratoga Springs bring the bare facts to life. There were 18 letters written to Walworth, and two from him, during the pendency of his nominations. They give us a flavor of what concerned the President, the Senators, and Walworth himself during the 11 months he waited expectantly at home in Pine Grove at Saratoga Springs. There were partisan politics, of course, which were magnified by attitudes toward slavery, the annexation of the Republic of Texas, and philosophies of constitutional interpretation, as well as dislike of President Tyler, who had vetoed much of the agenda put forth by the Whig Party, which had supported him for vice president in 1840 on the ticket with William Henry Harrison.

From all appearances, Judge Walworth was enjoying a great deal of support (albeit tainted with an ulterior motive, it seems) for his dream of being appointed to the U.S. Supreme Court. His advocate had the ear of President Tyler. However, Tyler was a Whig and a Southerner, who was not naturally inclined to the Northern Democrat Walworth and needed persuasion.

Walworth believed that a seat on the U.S. Supreme Court should be his. He earned it. He deserved it. Becoming an attorney in 1809, he began his law practice in Plattsburgh in 1810, and was appointed a Common Pleas Judge in 1811. An adjutant-general in the state militia, he was an aide to Major-General Benjamin Mooers in the Battle of Plattsburgh in September 1814, during the War of 1812.

He was a Democratic-Republican Member of Congress from 1821–23. Thereafter, he was appointed a Circuit Judge for the Fourth Judicial District, holding court throughout the rural North Country. Within only five years, at the age of 38, he was named the state's top judge, the Chancellor of New York.

For reasons not entirely known, Walworth's appointment as Chancellor came only after every state Supreme Court judge declined it. He felt honored, but certainly knew that he was not qualified, and acknowledged this in his acceptance speech to the Bar. He was very proud of the appointment, however, and ensured that the speech was published in the official Paige's Chancery reports, even though Aaron Burr advised him against doing so. Burr asserted that "if the people read this they will exclaim, 'Then if you knew that you were not qualified, why the devil did you take the office?'"

As Chancellor of New York, Walworth not only presided over equity cases in the Court Chancery but he also sat with members of the New York State Senate on appeals heard by the Court for Correction of Errors. In that capacity, he wrote a decision in the 1835 fugitive slave case of *Jack v. Martin*.[3] This opinion haunted his efforts to reach the U.S. Supreme Court.

Walworth agreed with the other members of the court that the slave Jack must be returned to his owner, Mary Martin, in Louisiana, because Jack acknowledged that he was Mary Martin's slave. Walworth went beyond this ruling, though, and wrote a separate opinion questioning the authority of the federal Congress to makes laws forcing a state to return fugitive slaves. In particular, he asserted the unconstitutionality of the Act of 1793, commonly called the Fugitive Slave Law.

Before his Supreme Court nomination, his friend Jeremiah E. Cary, a New York attorney and member of the House of Representatives, wrote on February 14, 1844 that President Tyler had asked for the *Jack v. Martin* decision, and said "he was very sorry to see" it. Cary wrote that the

> case had been raked up against you – but leaving that for the present and knowing what the peculiar notions & apprehensions of the President were – I said to him that on the question of abolitionism I was sure the Chancellor held opinions which the President would approve as correct
>
> . . . .
>
> Measures have been taken to explain the case of Jack v Martin on which he seems, very unnecessarily to have stumbled and I understand upon more critical examination some of his Southern friends – who thought at first they saw a ghost in that – are now satisfied there is nothing so alarming after all –
>
> Satisfied as I am that nothing but this morbid sensibility and unfounded apprehension on the subject of Slavery has, can or will prevent your nomination, I have & shall continue to do all in my power to quiet his fears on that head.
>
> P.S. I have some reason to believe that the nomination will be made soon and if we can depend on any thing under this vacillating and unstable administration the prospect for you is now very favorable.

Walworth wrote letters to advance his nomination. He contacted all of his supporters, all of the New York lawyers. It was difficult being so far from Washington, where Cary said "there were very active agencies at work trying to poison . . . the mind of the Pres. against you. . . ." But he worked to overcome these obstacles.

On March 13, 1844, Congressman Lemuel Stetson of Clinton County wrote Walworth from the House floor:

> I am happy at last to be able to assure you that your nomination is quite beyond doubt – though not yet formally announced in the Senate it soon will be as Robert Tyler just now called at my seat and said he had brought it along this morning –
>
> For some time past I have almost despaired of this result. At my last interview with the President, (4 days ago) he said he believed he should not offer the place again to NY, having had one rejected [John C. Spencer], from that state, and another [William Wright] having rejected the place . . . .
>
> . . . .
>
> The truth is, the head of this administration is so capricious and unstable; and acts from such a variety of inconsistent impulses, that I have often felt puzzled to know how to act & some times have thought that we were liable to do you injury by over action, as we are known to be, & you were believed to be friendly to Mr. V. Buren.

The nomination was in fact made on March 13, 1844, and Samuel Curtis wrote, "Some of the most distinguished members of the Bar of this City have addressed the President in your favor, although they are not of your politics."

Two days later, the news was not so good. Lemuel Stetson wrote on March 15:

> About one hour since (it is now 2. o'clock PM) the Law Librarian came to my seat to say Judge Berrien of the Senate, Chair of the Judiciary Com, wanted the

> 14 Wendell immediately. I knew very well what this meant & sent for it [the Jack v Martin case]. I then went to the Senate & told Mr. Wright who said he had just received a communication from the President stating that your nomination would be violently opposed as he heard this . . . . This letter may alarm you some, still I thought it proper for you to know the progress of the question and believe, myself that this opposition will not succeed.

> nominate no man, whose opinions did not correspond with his own in relation to Slavery, the Bank and the strict construction of the Constitution. After this quite public announcement he tendered the nomination for several days to Mr. Wright, whose position as a lawyer certainly rendered the offer pregnant evidence of the proposition of a bargain. Having thus awakened every distrust of himself & his nominees whoever they might be he tardily sends in your name. It was considered as

The defeat of Reuben Walworth led to a sea change in New York's judicial system.

He waited. He wrote more letters. There was no movement on the nomination. A letter marked "Private" dated April 8, 1844, from P. Sims showed how other political issues were delaying action on his nomination.

> The question of your confirmation is still an open one & will not be acted on this month. . . . One consideration may operate to produce a suspension . . . . it is impossible to calculate where we will any of us stand two months hence, politically. Texas may revolutionize our politics, just now. It depends on the course of Clay & V. B. If they come out against Texas, the whole South & Southwest, & two at least of the western states, will wheel in solid column in favor of Tyler!
>
> . . . .
>
> The decision of either for Texas defeats Tyler's aspirations founded on that issue – he is forestalled by their position in the field. But if either of his competitors hesitate seriously, they are gone. . . . C & V.B. have both been called upon for opinions – & anxiety is great among the politicians. . . .
>
> . . . . If the treaty be rejected as is probable, then it is very likely an attempt will be made (to make the issue deeper & more unquestionable & absorbing) to pass a law of Congress admitting Texas as a territory in her passing a law of cession & surrendering her jurisdiction – & to authorize the Presd. to extend a territorial government over the territory in a prescribe way. Something of this nature is brewing. . . . I will advise you of prospects . . . .

Walworth had no control over these events. He wrote even more letters, and waited anxiously to hear from his friends. Some letters were concerning, as that of Daniel Lord Jr. on April 17, 1844, an immediate response to Walworth's letter of April 15. His outrage at the President is clear.

> I think if the nomination had been made immediately after Mr. Spencer's rejection, it would have been favourably disposed of. But the President acted very vilely in the matter. He at first gave out that he would not nominate you, because of your opinion in Martin v Jack . . . . He then gave out publicly, that he would nominate no man, whose opinions did not correspond with his own in relation to Slavery, the Bank and the strict construction of the Constitution. After this quite public announcement he tendered the nomination for several days to Mr. Wright, whose position as a lawyer certainly rendered the offer pregnant evidence of the proposition of a bargain. Having thus awakened every distrust of himself & his nominees whoever they might be he tardily sends in your name. It was considered as a proof that you had conferred with him, according to his declaration, or that it was part of some political bargain.
>
> . . .
>
> I am sure that my further interference at Washington would do you no service for I learn from letters received here from Senators that my course this winter has been rather severely remarked on, and you know well enough how a political friend may be anything else than a true well wisher
>
> . . . .
>
> My opinion from all I heard, saw and did during the winter is, that the nomination will not be acted on until the Conventions are over at Baltimore, when it is possible yours may be taken up. I cannot think it will be rejected. But it may be deferred until after the Presidential elections.

Walworth immediately wrote back, expressing concern that Lord had been "injured" as the result of supporting his nomination. He also interpreted Lord's comments as meaning that "there is no probability of confirmation." Lord quickly responded on April 22 to correct those impressions. He also informed Walworth that there was now a second Supreme Court vacancy, as Justice Henry Baldwin had died. He concluded, "[Y]our prospect is very different from what you think and I hope that the disappointment you are feeling by anticipation may yet be disappointed." Two months later, on June 17, 1844, President Tyler withdrew Walworth's nomination, but renominated him again the same day, after first nominating and withdrawing Spencer for a second time.

Reprimanding himself for not doing so earlier, Walworth wrote his appreciation to President Tyler on September 26, 1844:

> Dear Sir – Soon after I was apprised of my nomination last spring I wrote to my friend Wm. Ellis . . . to tender my grateful acknowledgement to you for the confidence reposed in me in furthering my name to the senate. But in conversing with him on this subject a few days since he is under the impression that he

> forgot to deliver my message. Permit me therefore to assure you I shall always feel grateful to you for this mark of confidence, as well as to my numerous friends in this state & elsewhere who, as I learn, have unsolicited by me interested themselves in my name for your favorable consideration; whatever may be the result of the action of the senate upon the nomination.

No reaction. Much was going on without him, in both Washington and New York. By confidential letter dated November 23, 1844, from Joseph L. White, a New York City attorney who had recently served in Congress, Walworth learned that there was an effort among Whigs to defeat his nomination. White said that he and J.N. Reynolds would "freely & willingly write to, or go on to Washington to see our Whig friends in the Senate to urge your confirmation, if you feel any apprehension as to the result." Walworth immediately responded by confidential letter dated November 25:

> I am very much obliged to you for the friendly suggestions contained in yours of the 23rd instant. . . . I was aware that there were other persons of my own political friends that would be pleased with this appointment (which is a high object for judicial ambition) & thought it not improbable that intrigues would be set a foot to induce the president to substitute some other name, if my nomination was not acted upon without delay.
>
> If you can by writing to any of your friends in the senate procure such a result I shall be under great obligation to you . . . . In the meantime if you could give me an indication as to who the aspirants are, & who they are attempting to influence, it might enable my friends to counteract their exertions.
>
> Permit me to say that it may be adviseable that your communications to your political friends in the senate should be confidential. B'cause the knowledge that so ouvert & inflexible a friend of W.C. had taken strong interest in my favour might create a jealousy in another favorite which it is important to me should not be created.

To William Ellis, credited as being the hardest working supporter in Washington, Walworth sent a confidential letter on November 29 discussing strategy and seeking to smooth over a misunderstanding:

> I have just received a very full letter from one of my friends in the senate detailing what had been done by him & the advice under which he had acted & I think you have mistaken his calculating coolness for indifference. . . . You are misinformed in supposing the recommendations which were in the hands of the president were not laid before the committee . . . . It is safe to confer with those who are cool & calculating, although you may not always think it best to follow their advice. I am too much indebted to you for what your friendship has accomplished to allow you to say or do anything on this subject which may be of any injury to yourself politically or otherwise. Be careful therefore not to do anything for which your political friends would think wrong or which might be perverted to your injury thereafter. . . . And even if you entertain suspicions of the good faith of any of your colleagues, endeavour to banish it from your mind . . . it is better to suffer wrong than to have a suspicion entertained that I am doing wrong. . . .

All of the effort paid off, as Tyler renominated Walworth at the beginning of the 29th Congress on December 10, 1844. J.L. White wrote an intriguing letter from New York on December 17, 1844:

> Dear Sir
>
> I do not know what information you have now from Washington, & this communication may, therefore, be useful to you.
>
> After the receipt of your letter I wrote to Crittenden, Phelps, Huntington &c, &c, and their replies are of such a character, that I am enabled to say that if your (democratic) friends or any respectable portion of them, are true to your interests, there is not a remaining doubt of your confirmation. Indeed I believe that the hesitation of the Whig Senators to act at once & favorably, proceeded from a belief (how imposed upon them I know not), that you had pledged yourself to the "captain," to sustain upon the bench, certain constitutional notions of his.
>
> The major part of the opposition to you, especially since the election of Polk! (curse the catastrophe!) may be attributed to members of your party in this city. Who they are I am not at liberty to name, because this communication was made to me by one of them & in a manner, which implied a confidence in me that it would be dishonorable to betray.
>
> It is sufficient to say that all are men of influence, & some of them occupy high places of honor & profit. Had they not imagined that I possessed some influence with Whig Senators, which I might be induced to wield to your disadvantage, I should, perhaps have never been the recipient of this confidence on their plans.
>
> Convinced as I am of your ultimate success, permit me in advance to congratulate you upon it.

On January 29, 1845, James L. Graham wrote a confidential letter describing a conversation that he and William Ellis had with President Tyler about Walworth's nomination.

> He was very free & open with us in expressing his dissatisfaction at the want of action upon it by the Senate. He expressed his surprise and, at the same time, his gratification at the extraordinary unanimity of our Legislature in favour of your confirmation; that it would give him the truest pleasure to have you confirmed; that he had been, again & again, solicited to withdraw your name, on the ground the Senate would not act upon it, and that he had been asked, that some may, if, in the event of the Senate's refusal to confirm you, or act upon your nomination, he would not send

in the name of a particular individual for the office; that his reply was, that he could not for a moment, entertain such a proposition;

. . . . After leaving the President Wm Ellis and myself, on comparing notes together, made up our minds, that the President was . . . anxious to have the office filled before he went out of power; and, altho' he did not say so in terms, still if he found the Senate was determined not to act upon your nomination, he would, in such case, withdraw your name & present that of some other person.

The loss of the U.S. Supreme Court seat was soon followed by the end of Walworth's judicial career.

His fears were borne out. Six days later, by letter dated February 4, 1845, Graham wrote

> My dear Friend / I am deeply pained to inform you that between 1. & 2. o'clock today, at the very moment I was looking for the favourable action of the Senate upon your nomination, the President withdrew your name. I confess I have not yet recovered from the surprise with what I was thrown by this extraordinary act of the President. . . . I know, if he had not taken this cruel step you would have been most assuredly confirmed.
>
> . . . . Our friend Ellis feels so completely broken down by the unexpected recall, that he says he has no heart to write you . . . .
>
> The President has written a letter to Wm. Ellis, attempting to justify his conduct for the course he has taken, which the latter does not consider satisfactory. It is the opinion of Wm. Ellis that the conduct of the P. is imputable altogether to his son Robert.

The loss of the U.S. Supreme Court seat was soon followed by the end of Walworth's judicial career, when some began to say that the reason many "distinguished members of the bar" of New York had supported his nomination was "because they were anxious to get rid of a querulous, disagreeable unpopular chancellor."[4]

The Proceedings of the 1846 Constitutional Convention note that "one of the great objects the people had in calling for a new constitution was judicial reform. During the debate on the Judiciary Committee's recommendation to abolish the Court of Chancery, there were many examples given of its serious problems. These included "the delay and expense of litigation in the Court of Chancery," the "frequent appeals now allowed by law in that and other courts," "the great quantity of business in that court," and "the inconvenient and ill-advised mode of taking testimony before an examiner, in writing out of court."[5]

It was evident that the delays could last years, due to the "complex, tedious, prolix procedure in chancery." It was apparently quite common for the lawyer and case to be sent from Supreme Court to Chancery, or the reverse, each court saying it did not have jurisdiction. This could go back and forth within the same case, i.e., both saying it should be the other, so that valid claims were never heard.

The costs in Chancery could be much more than the value of the claim because of the requirement that testimony not be given in court, but out of court before an examiner, imposing folio costs plus examiner's fees. Said one convention delegate, "a more ruinously expensive, a more dilatory and a more inefficient and imperfect mode of taking testimony could scarcely be devised." Another commented, "We laymen know very well how this is done. Testimony is taken to the chancellor by the basketful, and he never reads it, nor can he."[6]

Others declared that the Walworth court "was unpopular to the last degree, and the personality of Walworth was the most unpopular element . . . ."[7] "Vain, conceited, loquacious, irascible, always overbearing, often grossly partial, and sometimes outrageously unjust, he finally became so unpopular that for a long while it was one of the standing arguments in favor of framing a new Constitution that in that mode the people could get rid of an obnoxious Chancellor by blotting his court out of existence."[8] ■

1. Debates and Proceedings of the New York State Convention for the Revision of the Constitution, at p. 878, available at babel.hathitrust.org.
2. *Id.*
3. 14 Wendell 507.
4. Alden Chester, *Courts and Lawyers of New York – A History 1609-1925*, Vol. III (1925), p. 1371.
5. Debates and Proceedings, p. 371.
6. *Id.* at pp. 450–51, 485–86.
7. Irving Browne, *Reuben Hyde Walworth,* The Green Bag, Vol. VII, No. 6, June 1895, p. 261.
8. *More Iconoclasm – Chancellor Reuben H. Walworth Reviewed,* New York Sun, published in the Brooklyn Eagle, July 5, 1873, p. 2.

Vulnerable Veterans Left in the Lurch: The Continued Harm of "Don't Ask, Don't Tell"

By Aaron Kurtzer and Jordan Lipschik with Professor Deirdre Lok and Malya Kurzweil Levin

This article originally appeared in the Winter 2017 issue of the Elder Law and Special Needs Journal, *published by the Elder Law and Special Needs Section of the New York State Bar Association. For information or to join the Section, visit www.nysba.org/Elderlaw.*

I. Introduction

The U.S. military has historically had, at best, a weak relationship with the concept of equality. One of the clearest examples from modern history is the military's implementation and repeal of "Don't Ask, Don't Tell." Despite the military's current, more progressive, stance on this issue, elder veterans are still fighting to receive well-deserved benefits denied to them as a result of "Don't Ask, Don't Tell."

This article will begin by introducing "Don't Ask, Don't Tell" and examining its historical origins. Part II will explore the history of "Don't Ask, Don't Tell" and examine the history of discrimination against the LGBT community in the American military. Part III will look at the legal challenges waged against "Don't Ask, Don't Tell" and its eventual repeal. Part IV will talk about legislation that has been introduced, both in New York and federally, to restore benefits to those who may have been stripped of them due to dismissal from the military under the "Don't Ask, Don't Tell" regime, and will describe the particularly deleterious impact these policies have on older veterans. Finally, Part V will sum up this article and explain how more still needs to be done to correct our prior mistakes.

II. Clinton and the History of "Don't Ask, Don't Tell"

Seven months into his first term as President of the United States, Bill Clinton ascended the stage at Washington D.C.'s National Defense University. He stood on the stage and began a speech extolling the service of the United States Armed Forces, commending the military as one of the country's "finest accomplishments and greatest assets."[1]

He described the plan he was announcing as a "sensible balance between the rights of the individual and the needs of our military to remain the world's number one fighting force."[2] He reminded the public of alleged reports that the Department of Defense spent $500 million in the 1980s to separate and replace an approximated 17,000 homosexual people from military service. He invoked studies that showed that homosexual service members performed no less admirably or honorably than their heterosexual peers.[3]

Yet minutes after President Clinton's apparent condemnation of the military's policy of discrimination against homosexuals, he announced his new policy of how to best address the issue of homosexual individuals in the military:

> One, servicemen and women will be judged based on their conduct, not their sexual orientation.
>
> Two, therefore, the practice, now six months old, of not asking about sexual orientation in the enlistment procedure will continue.
>
> Three, an open statement by a service member that he or she is a homosexual will create a rebuttable presumption that he or she intends to engage in prohibited conduct, but the service member will be given an opportunity to refute that presumption; in other words, to demonstrate that he or she intends to live by the rules of conduct that apply in the military service.
>
> And four, all provisions of the Uniform Code of Military Justice will be enforced in an even-handed manner as regards both heterosexuals and homosexuals. And, thanks to the policy provisions agreed by the Joint Chiefs, there will be a decent regard to the legitimate privacy and associational rights of all service members.[4]

And with that speech, the policy that would become known as "Don't Ask, Don't Tell, Don't Pursue" – the policy termed a "compromise" by *The New York Times*[5] – became the official policy of the United States government. Being openly homosexual now carried a presumption that you were a rule-breaker – that you were less admirable than your peers. It carried the presumption that, in spite of the oath that a soldier swears when he or she first enlisted with the army to defend the Constitution and to obey the President, the immutable characteristic of his or her sexual orientation allows the government to presume him or her guilty of misconduct.

It was a "federal law that required the entire military establishment to discriminate," according to Aaron Tax, the Director of Federal Government Relations for the Services & Advocacy for Gay, Lesbian, Bisexual & Transgender Elders (SAGE).[6] SAGE has spent a significant amount of time assisting older veterans and their

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families who were deprived of military benefits due to the destructive "Don't Ask, Don't Tell" policy.[7] Mr. Tax has also spent a large part of his career fighting against "Don't Ask, Don't Tell," in part by providing counsel to those who were impacted by the policy.[8]

Perhaps at the time, some progressives felt this policy was a good stopgap measure—a way to reverse over two centuries of outright refusal to tolerate homosexuality in the military that began with the dishonorable discharge of Lt. Frederick Gotthold Enslin in 1778.[9]

And perhaps this was a step forward. It had been 43 years since President Truman signed the Uniform Code of Military Justice, which set up discharge rules for homosexual service members, and only 11 years since President Reagan made his now famous defense directive that "homosexuality is incompatible with military service."[10]

Many Americans may have shared President Reagan's sentiments. Many may have shared the sentiment of President Clinton, who claimed to disagree with the policy he put forward, but, nonetheless, put it forward as a compromise. Yet many Americans – some say as many as 13,000 – found themselves at the mercy of this program. An estimated 114,000 United States service members have been discharged less than honorably due to their sexual orientation since 1942.[11]

According to Mr. Tax:

> "Don't Ask, Don't Tell" targeted three types of things that were considered "homosexual conduct." The first one is touching, so touching anybody of the same sex for sexual gratification, which can include dancing, handholding, kissing, or everything else. Number two would be saying to anybody in your life, ever, that you're gay, or words to that effect. So that can be coming out to your parents when you're ten years old, coming out to your boyfriend or girlfriend, coming out on Facebook. If any of those people told the military, or the military found out about it, or if anyone showed the information…that could mean they could kick you out. And [three], marriage, or attempted marriage to the same sex.[12]

The first prong, according to Mr. Tax, could result in expulsion from the military for anybody who may have romantically experimented with somebody of the same sex in college. A soldier could also deny having a consensual sexual tryst with a member of the same sex, accusing the other person of sexually assaulting him or her in order to avoid expulsion from the military.[13]

While people were under no duty to report homosexual activities, homosexual soldiers faced the constant threat of being exposed by their peers or their commanding officers. At any point in a long military career, someone from the past, such as a previous commanding officer, could emerge to report a soldier's prior actions. This could lead to an investigation and, ultimately, a discharge because of "Don't Ask, Don't Tell."

III. Challenges to "Don't Ask, Don't Tell," Its Consequences, and Repeal

The policy faced numerous court challenges, and, on September 9, 2010, Judge Virginia Phillips of the Ninth Circuit Court of Appeals gave opponents of "Don't Ask, Don't Tell" a huge victory. In *Log Cabin Republicans v. United States*[14] she issued a decision permanently enjoining the United States "from enforcing or applying the 'Don't Ask, Don't Tell' Act and implementing regulations against any person under their jurisdiction or command."[15]

The nonprofit group of Republicans who support gay rights had mounted an attack on the "Don't Ask, Don't Tell" policy as facially unconstitutional by violating the Due Process and Equal Protection Clauses of the Fifth Amendment and the First Amendment right to freedom of speech. At the heart of their petition was a simple argument: "Don't Ask, Don't Tell" caused 13,000 service members to be deprived of benefits that had been guaranteed to them by the U.S. government.

Many of those veterans received "Other Than Honorable" discharges, prohibiting them from receiving federal military benefits. The paperwork of some gay veterans who were discharged honorably still may include narrative notes such as "homosexual conduct," which could affect the veterans' chance for obtaining benefits. Additionally, they may receive a negative reenlistment code, which could bar them from being able to re-enlist. In New York alone, this meant that there was a possible deprivation of "over 50 state programs, benefits, and tax breaks for military veterans that are directly contingent upon the veteran's discharge status."[16]

Judge Phillips' ruling tracked the shifting political views at the time. In 1993, only 44 percent of Americans approved of service by openly homosexual service members; by 2008, the percentage had risen to 75 percent. Conversely, support for "Don't Ask, Don't Tell" fell from nearly 40 percent approval in 1993, to 22 percent by 2008.[17]

Furthermore, according to a Gallup poll taken in early December 2010, the repeal of "Don't Ask, Don't Tell" had bipartisan support from most average Americans. Americans who identified as Liberal Democrats (86% for repeal, 11% against); Conservative/Moderate Democrats (79% for repeal, 11% against); and Moderate/Liberal Republicans (69% for repeal, 11% against) all favored repeal. The only group not in favor of repeal were Conservative Republicans (39% for repeal, 57% against).[18]

Decades of public support combined with a negative court ruling is sometimes the perfect formula to spur Congress into action, and shortly after Judge Phillips' ruling, Congress committed to the "'Don't Ask, Don't Tell' Repeal of 2010," which was fully implemented by 2011. Unfortunately, this implementation did little to address the status of service members who had previ-

ously been discharged – they needed to individually apply to the Department of Defense if they wanted to attempt to have their discharge status changed to "honorable."

Unfortunately for these veterans, the government continues to address the status of such wronged service members via a gradual piecemeal process, partly because "Don't Ask, Don't Tell" was just part of the larger conservative legislative effort of the day to promote "family values." Shortly after "Don't Ask, Don't Tell" was implemented, service members were prevented from receiving certain benefits under a different law, the Defense of Marriage Act (DOMA), which was passed one Congressional session after "Don't Ask, Don't Tell."[19]

Among other things, DOMA limited the definition marriage to the union of one man and one woman for purposes of federal law and for federal benefits. This affected certain dependent-related benefits for same-sex service members including, but not limited to, Basic Allowance for Housing (BAH), medical benefits through the Military Health Care System (TRICARE), and family separation allowances.[20]

DOMA came before the Supreme Court in 2013. Writing for a 5-4 majority, Justice Anthony Kennedy described the section legitimizing only heterosexual marriage in the eyes of the law as an unconstitutional deprivation of the liberties guaranteed by the Fifth Amendment, and that it served no compelling state interest.[21]

For the moment, the Supreme Court appears to have adopted the view of lower courts and of the public, that the benefits granted to a veteran service member or his or her family should not be conditioned on his or her conformity to a specific sexual orientation. It appears that such restrictions would simply not survive a Supreme Court challenge on due process grounds.

IV. Legislation to Revive Benefits for Those Stripped of Them Through "Don't Ask, Don't Tell" Discharges

Even with the repeal of these federal laws, many states have laws that condition the receipt of state benefits on the discharge status of a retired service member, and getting that discharge status changed can be difficult. "Dozens of state benefits are directly related to discharge status, and aside from petitioning the U.S. Department of Defense to change a discharge status – there's not much else to be done," explains New York State Senator Brad Hoylman (D-NY).[22]

"On Memorial Day this year, I released a report titled *Restoration of Honor: Expanding LGBT Veterans' Access to State Veterans' Benefits*. The report identified at least 53 New York State benefits for veterans that are directly contingent upon the discharge status of the veteran," Sen. Hoylman explained.[23]

Some of the 53 benefits that Senator Hoylman spoke about are: general eligibility for local programs and services offered by state and local veterans agencies; health screening services for those veterans who may be experiencing health problems; eligibility to gain status as a service-disabled veteran-owned business; lower barriers to obtaining street vending licenses; eligibility to benefit from provisions of the Veterans Employment Act; additional points on civil service exams; job protections if their civil service position is abolished; access to SUNY scholarships; the ability to get a high school diploma, if they do not already have one; pension and retirement benefits; eligibility for $2,500 toward burial costs reimbursed through New York State Veteran Burial Fund; eligibility for burial in a veterans cemetery or in the veterans section of a regular cemetery; identification of veteran status on driver's licenses; distinctive license plates commemorating service in war; eligibility for various tax exemptions; various appointment opportunities; entitlement to an annuity paid to veterans; eligibility to apply for the issuance or renewal of a gun license; exemption from age restriction for the issuance of a gun license; eligibility to receive the Conspicuous Service Cross award from the Governor; paid leave for public employees on holidays commemorating their service.[24]

Individuals who were discharged as a result of "Don't Ask, Don't Tell" could easily be stripped of benefits totaling hundreds of thousands of dollars.

"The laws we identified touch virtually every aspect of veterans' lives, from scholarships to job opportunities to health screenings to reimbursement for burial costs," the Senator said.[25]

When the amount of all of these various benefits is combined, individuals who were discharged as a result of "Don't Ask, Don't Tell" could easily be stripped of benefits totaling hundreds of thousands of dollars, and the older the veteran, the greater the chance that he or she has benefited from one of these programs or relies on one of them.

However, organizations such as SAGE note that some people were discharged from the military because they were not good soldiers, not because of their sexual orientation. "You can be kicked out, despite 'Don't Ask, Don't Tell,' legitimately," noted Mr. Tax, "not because of 'Don't

Ask, Don't Tell,' but because you are a lousy service member. Step A is that they are discharging you. Step B is what discharge characterization are they giving you."[26]

That's why Senator Hoylman introduced the Restoration of Honor Act on Veterans Day in 2011. He lamented the fact that the 2010 repeal of "Don't Ask, Don't Tell" did not include language to retroactively support the 14,000 service members who lost benefits under the law. Senator Hoylman's Act would

> make clear that LGBT veterans are not to be considered ineligible to access state programs, services, or benefits due to a less than honorable discharge based solely on their sexual orientation or gender identity. It would establish a streamlined certification process within the State Division of Veterans' Affairs for LGBT veterans to clarify their discharge status for the purposes of accessing state programs, services, or benefits. Finally, it would place the burden on the state to prove that a veteran who has been discharged from the military because of their sexual orientation or gender identity is not otherwise eligible to receive state programs, services, or benefits . . . . The experience of LGBT service members in the United States military was one of repression, deception, and fear for over two centuries. For the vast majority of our nation's history, men and women willing to risk their lives in service of their country faced unceremonious discharges or even criminal penalties solely due to their sexual orientation or gender identity.[27]

Senator Hoylman's legislation tracks the federal "Restore Honor to Service Members Act," introduced in the United States House of Representatives in July 2013 by Charles Rangel of New York and Mark Pocan of Wisconsin, and in the Senate by Kirsten Gillibrand of New York and Brian Schatz of Hawaii.

The four Congresspeople wrote in an op-ed published in November 2015:

> The Department of Defense has already begun working to give service members who were discharged solely because of their sexual orientation the chance to restore their records to reflect their honorable military service. However, that process remains onerous for many service members, often requiring them to retain legal counsel to navigate red tape and produce paperwork that they may not have. Moreover, there is no legal requirement that the appeals process always remain available to gay, lesbian and bisexual veterans seeking corrective action.
>
> Our bill . . . would simplify the paperwork requirement necessary for service members to initiate a review, making it clear that the lack of documentation cannot be used as the basis for denying a review. Finally, it would require the historians of each military service to review cases where service members were discharged for their sexual orientation before the repeal of "Don't Ask, Don't Tell." This would improve the historical record that the Defense Department can use to help gay, lesbian and bisexual veterans correct their records.[28]

The Restore Honor to Service Members Act is crucial for the many former servicemen and women living in poverty. It is estimated that 1.4 million veterans live below the poverty line and that over 57,000 veterans are homeless on any given night. Elder veterans have higher poverty rates compared to any class of veterans younger than them.[29] Furthermore, over 900,000 veterans live in households that receive food stamps and another 3.5 million veterans receive disability benefits. Additionally, more than 350,000 survivors of veterans receive death benefits.[30]

The Restore Honor to Service Members Act is crucial for the many former servicemen and women living in poverty.

However, veterans who were discharged less than honorably could potentially have trouble receiving these benefits, which could total up to about $17,000 per year based on a multitude of eligibility factors such as: income, marital status, spouse's veteran status, whether the veteran has any children, and number of children, among many other factors.[31]

Furthermore, many of these policies will have a particularly acute effect on older veterans. Furthermore, as these veterans age, and are less likely to be able to work, this potential income becomes more and more critical.

Across the country, many municipalities allow veterans to apply the time they spent in the military toward their pension, to varying degrees. However, an "Other Than Honorable" discharge mandated by "Don't Ask, Don't Tell" prevents many veterans from being able to apply their service time toward their pensions. While this would affect anybody who received "Other Than Honorable" discharges, it would disproportionately

affect older veterans who are nearing retirement age. It would especially affect those who may be suffering the long-term physical effects which commonly manifest themselves in older veterans who served tours of duty.

Furthermore, these restoration laws are also necessary for older veterans who were discharged because of "Don't Ask, Don't Tell" because they may not receive the same death benefits that many of the heterosexual people they served alongside will surely receive, such as burial cost reimbursement.[32] Given the prevalence of poverty in the veteran community, especially the older adult veteran community, this category of benefit goes a long way toward ensuring that people received the honorable burial they have earned by putting their life on the line for the United States of America.[33]

While the passage of the Restore Honor to Service Members Act is far from guaranteed, it does not appear that current service members who identify as part of the LGBT community will be effectively pushed back into the closet due to any new federal enactments prohibiting them from serving in the military. Mr. Tax agrees that

> it would be hard to put the genie back into the bottle. Even logistically, if you think about how hard it would be if they wanted to go back to "Don't Ask, Don't Tell" . . . what would you do with everybody who came out? Would you kick every gay person out? And then in Congress, if they thought that they could get them to pass a law like that, administratively, they would be hard pressed to come up with the regime that would pass constitutional law…could they try? Well yeah. But I don't think that it would get very far.[34]

V. Conclusion

The political landscape has shifted significantly for LGBT service members over the last 20 years. While the big victories in Congress and the courts are hugely significant, there are still many obstacles facing LGBT veterans. New York is in the minority of states with this type of legislation pending, and federal legislation has stalled in Congress.

While Congress and the courts have announced that veterans discharged under "Don't Ask, Don't Tell" will have their records restored, the process is slow. The Uniform Code of Military Justice still prohibits and criminalizes sodomy.

Younger veterans are more easily able to supplement their income with other work as they wait for their "Other Than Honorable" discharges to be reversed, but many older veterans do not have the same options or the same time frame. These people who struggled on the battlefield in service to their country are still struggling to convince their government that they deserve equal veteran benefits. ■

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CJEU Clarifies Hyperlinking Copyright Infringement

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I. Introduction: The Rise of Hyperlinking

As online communication and the use of social media platforms such as Twitter, Facebook, and LinkedIn by both businesses and individuals have increased, so too has the practice of using hyperlinks to allow users to share and comment upon digital content. A large proportion of blog and social media posts involve directing others to external material such as news stories, pictures, videos, and sound files.

For the "posters," the use of hyperlinks can allow greater flexibility and freedom of expression. And for copyright owners who have placed their work on the Internet in order to exploit it commercially, hyperlinks to their content on sites such as Twitter and LinkedIn can significantly increase website traffic, potentially leading to higher advertising revenue. However, where content such as leaked celebrity photographs or film clips has been released onto the Internet without authorization of the copyright owner, the ease with which other Internet users may hyperlink to, and therefore further publicize, the unauthorized material can cause serious harm.

In the recent case of *GS Media v. Sanoma*,[1] the Court of Justice of the European Union (CJEU) attempted to balance the right to freedom of expression and freedom of information on the Internet with the legitimate interests of copyright owners in protecting their rights.

II. The Legal Landscape

The legal basis for challenging those who hyperlink to copyright-protected material in the EU is the "communication to the public" right contained in Article 3(1) of the EU Copyright Directive, which provides copyright owners with the exclusive right to authorize or prohibit any communication to the public of their works. A series of high-profile cases that have recently come before the CJEU have helped to define the scope of what is meant by "communication to the public" in the context of hyperlinking. The most recent of these was *GS Media*, in which photographs of Dutch TV presenter Britt Dekker that were due to be published in *Playboy Magazine* in December 2011 were illegally leaked online prior to their official publication. GS Media operated a website that included hyperlinks directing users to websites where these photos could be found before they had been officially released. The publisher of *Playboy* claimed that by posting such hyperlinks, GS Media had infringed the photographer's copyright.

In a landmark decision issued on September 8, 2016, the CJEU ruled that the posting of a hyperlink to works protected by copyright and published without the author's consent does *not* necessarily constitute a "communication to the public," subject to certain conditions being fulfilled. The CJEU made the following key findings:

1. If the content is freely accessible and has been posted with the consent of the author, linking to this content will not in itself be an infringement.
2. If the content is only available to a limited audience, such as paying subscribers, then posting a hyperlink that circumvents a paywall or other restriction *can* amount to an infringement. The rationale behind this is that the content is being made available to a "new public" that would not otherwise have had free access to the material.
3. If there is no profit-making activity associated with posting a hyperlink, liability will be established only if the poster knew, or ought to have known, that the content being linked to was published illegally (for example owing to a notice received from the copyright owner).
4. If a hyperlink is posted "for profit":

a. The poster will be expected to carry out "necessary checks" to ensure that the content being linked to has not been illegally published; and

b. If the content being linked to was published without the owner's consent, there is a presumption that the poster had knowledge of the protected nature of the work and lack of consent. Unless this presumption is rebutted, the linking will be copyright infringement.

The court held that GS Media was liable because it had been notified

by *Playboy* that the photographs it was providing links to had been published online illegally. This knowledge brought GS Media's hyperlinking within the meaning of a "communication to the public."

III. Practical Implications

The practical implications of *GS Media* for companies with an online presence, particularly those that profit from sharing links to digital content, could be significant. So far, the ruling has divided opinion, since while the court undoubtedly sought to strike a fair balance between protecting the interests of rights holders and preserving freedom of expression, there are uncertainties as to how this will work in practice.

Pending further guidance and clarification from the courts on the meaning of posting "for profit" and the "necessary checks" required to avoid liability, businesses that may be particularly vulnerable to being affected by this precedent should consider the following practical advice:

- Ensure that any hyperlinks posted do not provide access to material that would not otherwise be freely available (such as circumventing a paywall).
- Consider carefully the websites you are linking to. If a site obviously contains infringing material, such as a film or song leaked prior to its official release, there is a risk of infringement even if there is no financial motive to share a hyperlink to this material.
- Respond promptly to takedown requests from rights holders. Once notice has been given and knowledge of the protected nature of the work and lack of consent is established, if you continue to link to the content, you run a high risk of liability for copyright infringement.
- Consider contacting rights holders directly to seek authorization before linking to their content.

While *GS Media* may inevitably cause concern for businesses that use hyperlinks on a daily basis, copyright owners that invest time and resources in producing high-quality copyrighted works will no doubt welcome this clarification of their rights. In the UK, copyright vests automatically upon the creation of certain original works including music, videos, photographs, and even databases, without the need for registration. Technology companies developing innovative products and ideas therefore will have a wealth of material that may attract copyright protection, such as video footage or photographs of new products, product databases, design specifications, and marketing plans.

It is not uncommon for copyrighted material to be released online without the consent of the author, for example leaked specifications of new mobile telephone models or video footage of popular TV shows. The implication of *GS Media* is that owners of such content will not only be able to take action against those responsible for initially leaking the material but may also use a notice-and-takedown request to a business or individual linking to the material to oblige them to remove the hyperlinks or risk an infringement action. This will be particularly helpful in situations where the original poster cannot be identified or located, as is often the case online. Although the nature of the Internet is such that as soon as some objectionable hyperlinks are removed, others may pop up on other websites, the ability to better control the number of hyperlinks is bound to help reduce visitors to websites hosting illegal content and make it easier for copyright owners to police the wider dissemination, and the commercialization, of their material.

If there is certain content that businesses are particularly sensitive about protecting from dissemination over the Internet, it is advisable to implement technical measures such as paywalls or web-protecting software. Introducing clear terms and conditions on the website, including that linking is not permitted without consent, may further deter hyperlinking (although that may not be entirely desirable commercially).

> We are likely to see increased enforcement activity against entities such as GS Media that profit from directing Internet traffic to illegal sites.

IV. The Future Balance of Rights

In an increasingly connected and cyber-dependent society, the trend of hyperlinking to digital content, particularly across social media platforms, is unlikely to abate. While the CJEU in *GS Media* has, to a certain extent, clarified the rules on linking to copyright protected material, the practical steps required to comply with such rules are not entirely clear. It remains to be seen exactly how businesses profiting from hyperlinking can overcome the presumption that they were aware of the illegal publication. Further guidance from the courts will be welcome in order to determine the precise boundaries.

In the meantime, we are likely to see increased enforcement activity against entities such as GS Media that profit from directing Internet traffic to illegal sites. There is also no doubt that a more cautious approach toward hyperlinking should be taken by all businesses that make use of it. However, it would seem that the risks of becoming embroiled in copyright litigation over hyperlinking can be managed by undertaking sensible checks before linking to third-party content and

complying quickly with any takedown requests from copyright owners.

V. Update

On February 8, 2017, Advocate General (AG) Szpunar issued his opinion in the case of *Stitching Brein v. Ziggo*.[2] This concerned a reference from the Dutch court as to whether The Pirate Bay, a peer-to-peer file sharing website, "communicates" works to the public and is therefore liable for copyright infringement.

The AG answered in the affirmative, advising the CJEU that where the operator of a website makes it possible, by indexing them and providing a search engine, to find files containing works protected by copyright which are offered for sharing on a peer-to-peer network, this constitutes a "communication to the public" within the meaning of Article 3(1) of the InfoSoc Directive. However, this is subject to the website operator being aware of the fact that a work is made available on the network without the consent of the copyright holders and not taking action to prevent access to that work.

The AG's opinion will be welcomed by copyright owners. If the opinion is followed by the CJEU, the activities of website operators like The Pirate Bay, which facilitate access to protected works, such as music and films (but do not themselves either copy or transmit them), may be classed as a "communication to the public." ■

1. *GS Media BV v. Sanoma Media Netherlands BV and Others*, Case C-160/15, September 8, 2016.

2. *Stitching Brein v. Ziggo BV and another*, Case C-610/15.

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cision. Good briefs should never let two sentences pass without letting the reader know which side the lawyer represents, using emotional, policy-driven arguments without arguing emotionally. Lawyers should write directly, not indirectly. ("Justice is an important concept." *Becomes:* "This Court should reverse the conviction.") Lawyers should always mention and apply the motion standard, the burden of proof, and, on appeal, the appellate standard of review. Doing so tells the court how to evaluate the arguments.

3. Be Succinct and Concise

Lengthy briefs can be boring; judges might not read or understand them. The best lawyers keep their briefs short. They delete the obvious and don't dwell on the given. One way to ensure succinctness is to establish a theme. Themes help lawyers explain that they're right, not just because of the law, but also because if their clients lose, the bad will prosper and the good will suffer. Lawyers should include and emphasize every important and helpful authority, fact, and issue supporting their theme or which contradicts the other side's theme. They should exclude, or deemphasize, everything else. They should eliminate irrelevant dates, facts, people, places, and procedural history. They shouldn't try to fit every possible argument into their briefs. They should stick to their stronger contentions: Weaker arguments will undermine their credibility and make the lawyer seem untrustworthy. They should limit themselves to the case law that adds weight to an argument rather than to those that add bulk and impress only non-lawyers.

Lawyers should replace coordinating conjunctions with a period and start a new sentence. Doing so shortens the sentence and thus is concise, even though it might add text. Lawyers should watch out for redundancies. ("Advance planning" *becomes* "planning.") They shouldn't start a sentence with "in that." ("In that the judge's cousin was a litigant, the judge recused herself." *Becomes:* "The judge recused herself because her cousin was a litigant.") They should excise unneeded prepositions like "of" and delete the following metadiscourse, or wordy running starts: "in fact," "as a matter of fact," "the fact is that," or "given the fact that." Lawyers should forget about the wind-up and just deliver the punch.

4. Be Logical

From the presentation of facts to the argument, structure is vital. Arguments should come naturally, without interruption. Lawyers must know their goal — what their client seeks — to communicate logically. Judges should be able to travel easily from point to point to the final conclusions. Lawyers who present their arguments illogically, jumping from issue to issue, will lose the court's attention. Lawyers should start each paragraph with a topic or transition sentence. A topic sentence introduces what's going to be discussed in the paragraph. A transition sentence connects the end of one paragraph to the start of the next paragraph by linking or repeating a word or concept. The best writing doesn't rely on conjunctive adverbs like "additionally," "along the same lines," "however," or "moreover" to segue from one sentence to the next. If the logic and movement of the ideas are clear, those transitional conjunctions won't be needed. Lawyers should end their paragraphs with a thesis sentence that summarizes and answers the topic sentence. Each sentence must relate to the next, to the one before it, to the topic sentence, and to the thesis sentence. A sentence that doesn't relate that way belongs in a different paragraph or should be ruthlessly cut.

Lawyers should avoid logical fallacies. A fallacy is an invalid way of reasoning; it leads to incorrect conclusions. For example, the post hoc fallacy assumes that because one thing happens after something else, the first caused the second. *Example:* "Every time I tell my colleagues I'm going to win a trial, I lose." The fallacy is that if the person doesn't tell colleagues they're going to win the trial, they'll win. Rather, the brief should rely on syllogisms and move the reader from the general to the particular.

5. Be Precise

Lawyers should write precise arguments supported by precise citations. Correct pinpoint citations are persuasive. They build lawyers' credibility by showing the integrity of their research and analysis. They make it easy for the reader to find the point in a lengthy case or secondary authority. Not using pinpoint citations suggests that the citation might not stand for the position the lawyer is asserting. Lawyers should cite adverse case-law precedent and statutory authority. Doing so offers an opportunity to explain why the authority is unpersuasive or not on point.

Lawyers should avoid string citing; string citations aren't useful or impressive except when necessary to understand authority or a split in authority. They should limit quotations to those written better than the they could write them and use block quotations of 50 words or more only for the essential part of seminal cases, statutes, and contracts. Instead of block quoting, lawyers should summarize the law in their own words. Readers skip block quotations. If the quotations are important enough, lawyers should first explain why they're being quoted by explaining what the reader will get from reading them. They should use ellipsis and square brackets to shorten long quotations through omissions and alterations.

Lawyers shouldn't write in generalities, using cowardly words like "generally," "typically," or "usually," unless the lawyer wants the reader to reach an exception. In that case, the lawyer should give the rule first, then the exception.

Lawyers should always cite the record. Accurate and precise references to the record add credibility to the client's claims. When writing for a New York court, lawyers should follow the citation rules in the *New York Law Reports Style Manual* (Tanbook)

(available on PDF or HTML online at www.nycourts.gov/reporter/Styman_Menu.shtml). When writing for a federal court, lawyers should use the *Bluebook*, now in its 20th edition.

6. Be Simple

Simple arguments are winning arguments. Most sentences should be short and declarative. Sentences with more than 25 words are hard to digest. Each sentence should contain one thought and rarely more than 15 words, with some variety. A paragraph should rarely be longer than 250 words or two-thirds of a double-spaced page and one large thought. What's stated simply is easy to understand. Briefs are no exception to that rule. Lawyers should use plain English; no Latin or foreign words. They should replace Latin terms with English equivalents. For example, "Ergo" *becomes* "therefore." They should eliminate all legalisms. ("Enclosed herewith is my brief." *Becomes:* "Enclosed is my brief.") They should limit adverbs like "absolutely," "clearly," or "obviously." They incite people to disagree with you and suggest that those who disagree with you are stupid.

Writing shouldn't be pompous. Lawyers should prefer simple, short, Anglo-Saxon words to complex and long words: "Ameliorate" *becomes* "improve" or "get better." They should keep it simple but still formal; writing is planned, formal speech. They shouldn't use abbreviations: "i.e.," "e.g.," "re," "etc.," and "N.B." They shouldn't use contractions like "aren't," "couldn't," or "you're" in formal brief writing. (But they should use contractions in emails and State Bar Journal Legal Writer Columns.) They should define as acronyms terms and nouns they will use again. Example: Department of Housing Preservation and Development (DHPD).

Writing must be grammatical and simple. Lawyers shouldn't confound their reader by using nominalizations — converting verbs to nouns. ("They gave a description of the motion." *Becomes:* "They described the motion.") They shouldn't confuse by using the passive voice or the double passive voice. (Double passive voice: "The brief was written." Passive voice: "The brief was written by the lawyer." *Becomes:* "The lawyer wrote the brief.") They should refer to the parties by name, legal relationship, or how they were called in first instance so that the judges needn't check the title of the action or proceeding to know whom the lawyers are writing about. Subjects should go next to their predicates. ("The motion of the petitioner seeking summary judgment should be granted." *Becomes:* "This Court should grant petitioner's motion for summary judgment.") Modifiers should go next to the word or phrase they modify. ("I threw the lawyer down the stairs a motion" *Becomes:* "I threw the motion down the stairs to the lawyer.") Briefs should be easy to follow: Lawyers shouldn't write fiction novels with complicated plots or drive readers to a dictionary.

7. Be Organized

Lawyers may start the process of writing a brief by outlining their argument section using the Legal Writer's patent-pending CRARC method, an IRAC-variant that stands for Conclusion, Rule, Analysis, Rebuttal and Refutation, and Conclusion. In the first Conclusion section, lawyers should state the issue in persuasive terms. In the Rule section, they should state their points from the strongest to the weakest. After each rule, they should cite the authority from the strongest to the weakest and from the most binding down. Toward the end of the Rule section, the lawyer may include policy. In the Analysis section, lawyers should apply the law to the facts of the case. In the Rebuttal and Refutation section, they should state the other side's position honestly and refute it persuasively. Discussing the other side's factual and legal arguments builds credibility because it shows the court they're not trying to hide anything. Doing so also offers the opportunity to demolish the other side's position. In the second Conclusion section, lawyers should state the relief they seek on the issues they argued in the first Conclusion section.

CRARC allows lawyers to present their arguments in the shape of a funnel or an inverted pyramid. Arguments should go from general (the conclusion) to specific (the details). Getting to the point fast gives judges the conclusion in case they don't read further. Being organized is important in written advocacy because lawyers shouldn't repeat themselves. They should say it once, all in one place.

Lawyers should use headings and subheadings that summarize essential factual and legal argument. They should use roman numerals for their point headings (I., II., III.) and letters for subheadings (A., B., C.). Headings and subheadings should each be one sentence long. They must be concise, descriptive, and short. The point headings in a brief should answer the Questions Presented. Lawyers shouldn't use too many headings; they'll break up the text too much. But too few headings will make the document disorganized. To see whether there're enough headings, lawyers should read their table of contents, which should be composed of all the headings word-for-word from the text of their argument: The argument should reveal itself in the table of contents.

8. Presentation

Presentation always counts. Most courts have rules on how legal documents should be drafted and what they must include. Cheating on small procedural rules involving page or word limit, table of contents, fonts, paper color, or spacing makes the brief unpersuasive. It suggests that if the lawyers are willing to cheat on small rules, they might lie about the record or neglect to cite controlling authority. Lawyers should also create briefs pleasant to the eyes. They should keep plenty of readable, white space on every page. Margins should measure at least one inch, up to 1.25 inches, on the bottoms, sides, and top. All paragraphs should be indented one tab from the margin. Documents, typed in

Word, should seperate sentences with one, not two, spaces.

Unless court rules require otherwise, lawyers should choose one font — perhaps Century, 11-point type — and stick to it. They should italicize case names; italics are easier to read than underlining. Lawyers should never bold, italicize, underline, capitalize, or use exclamation points or quotation marks to emphasize or show sarcasm. They should number each page (but suppress the first page) and paragraph in an affirmation or affidavit. Lawyers should make their briefs visually appealing. For trial briefs, they should attach the leading cases they cited and highlight the relevant text in the attachment. They can also attach maps, charts, diagrams, photographs, and tables. Exhibits convey information more effectively than text.

9. Be Ethical

Lawyers win through civility and professionalism. Being ethical in written advocacy means being fair and accurate. Lawyers who engage in personal attacks distract the court from the important issues. Lawyers shouldn't use terms like "absurd," "disingenuous," or "preposterous." These words suggest a hidden weakness. They should never exaggerate or overstate. Understating shows integrity and persuades; understating stresses content, not the writing or the writer. Ethics also demands gender neutrality in writing. Non-gender-neutral writing is discrimination in print, and gender-neutral writing allows the reader to focus on content, not style, and thus doesn't distract from the message. (*Not:* "A perfectionist likes her briefs to be perfect." *Also not:* "A perfectionist likes their briefs to be perfect." *Also not:* "A perfectionist likes his or her briefs to be perfect." *Correct:* "A perfectionist likes perfect briefs." (Making the antecedent neutral.) *Also correct:* "Perfectionists like their briefs to be perfect." (Making the subject plural.))

Lawyers win by stating the facts accurately and then by providing strong explanations and evidence to prove their conclusions. Lawyers shouldn't obsess over accuracy. Obsessing leads to adding irrelevant details, brings about writer's block, and causes documents to be submitted late. Lawyers shouldn't mislead by misrepresenting legal authority, misquoting, or mischaracterizing the record. They should adopt a tone of deference and respect toward the court by using words like "should" rather than "must."

10. Review the Brief

Writing a persuasive brief takes time and effort. Lawyers shouldn't believe they're done after their first draft. Editing is essential to writing. A lawyer's work won't be taken seriously if it has grammar, punctuation, or spelling errors. Typos distract from the substance of the writing and make lawyers appear unprofessional. The solution is to proofread. Lawyers should review their arguments to make them efficient; they should take out anything unnecessary and rewrite anything unclear. Lawyers should also watch out for negatives words like "except," "hardly," "neither," "not," "never," "nor," "provided that," and "unless." For example, "Good lawyers do not write in the negative." *Becomes:* "Good lawyers write in the positive."

Lawyers should ask a competent editor unfamiliar with the case to read the brief to make sure that the brief is easily understood by the only person who counts - the reader. Lawyers can also set the brief aside for a few days, if they have time, and then reread it. That'll give them a new perspective and help them catch mistakes. Lawyers, who should start writing early but edit late, should also keep their research available and updated and throw nothing away until the case is over to avoid redoing research and wasting time. Lawyers should keep a back-up copy of their briefs to avoid the panic of losing work.

. . .

Persuading the court through writing is hard, but a well-written brief puts lawyers a step ahead of their adversary in the martial art that's persuasive brief writing. When writing a brief, lawyers should always keep their readers in mind. They should put themselves in their shoes and ask themselves what would persuade them. Never should they underestimate the importance of effective analysis — both to the client and, in our adversary system, to the administration of justice. ■

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A version of this article appeared in The Queens Bar Bulletin *in December 2008.*

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Michael Richard Staszkiw
Mohammad Ibrahim Tariq
Evan Vincent Thompson
Kelsey Marie Ellen Till
Margaret M. Underhill
Jessica L. Wagner
Trevor Neil White
Alison L. Williams
Shelbey Elizabeth Wolf
Gabriela Esther Wolfe

Eighth District

Todd James Aldinger
Mitchell L. Altman-cosgrove
Catherine Dolores Aughey
Mary Meghan Balkin
Trishe' L.a. Ball
Kaileen Marie Balzano
Danielle Antoinette Becker
Ashley Corene Blahowicz
Kevin Colin Blake
Michael Ryan Borrello
Danielle Rory Bruno
Erik A. Burrows
Jennifer Marie Cameron
Daniel Richard Carosa
Christopher R. Castro
Caitlin Christine Collins
Kevin G. Cope
Victoria Cruz-Perez
Erin Elizabeth Decker
Andrea Marie Dinatale
Nicholas R. Divirgilio
Anthony Domenico
John Ryan Ewell
Elias Abdou Farah
Kathleen M. Farrell
Shannon Fennell Fistola
Arden Leigh Florian
Bryan Richard Forbes
Erica Rose Gasiewicz
Andrea Marcelle Gervais
Michael Thomas Gioia
Aaron Charles Gorski
Gina M. Gramaglia
Brendan Patrick Green
Peiyuan Guo
Juyoun Han
Kate Lorraine Hartman
Seth Allen Hiser
Aimee Teresa Hopkins
Kathryn Dawn Horn
Madeline Nancy Joerg
Amanda Marie Karpovich
Michael Joseph Kelly
Meaghan Phelan Kelsey
Derek Charles Kettner
Samantha Nicole King
Patrick Dennis Raftery Leavy
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Kenneth Patrick Lea Lowe
Chloe Jean Macdonald
Philip Joseph Maiarana
Eric Warren Marriott
Thomas D. Migliaccio
Briana R. D. Miller
Elizabeth Anne Murphy
Ethan Brendan Murphy
Marina Ann Murray
Ryan T. Murray
Chelsea A. Nicoloff
Sarah A. O'Brien
Dustin Wayne Osborne
Daniel J. Palermo
Michael Charles Panebianco
Justina Lynn Potenzo
Jennifer M. Puglisi
Julia Helen Purdy
Jesse Colton Pyle
Michael Edward Reiser
William Rossi
Michelle Roy
Karin L. Rupp
Steven Briggs Salcedo
Michael John Schroeder
Michael P. Schug
Daniel Earl Skinner
Gregory Charles Smith
Jessica B. Smith
Mary K. Smith
Bridget Catherine Steele
Shawn Thomas Stockwell
Nara Jung Tjitradjaja
Robert L. Townsley
Joseph Greco Trapp
Gina L. Vallone-Bacon
Peter Loring Veech
Nicholas A. Vona
Nicholas Ilario Vozzo
Brian Webb
Gerald James Whalen
Joseph Nicholas Williams
Robert M. Zielinski
Cory Joseph Zorsch

Ninth District

Christopher D. Acosta
Achumboro Ataande
Zachary Richard Benoit
Colleen J. Calabro
Prashanth Chennakesavan
Robert Anthony Clark
Thomas James Cummings
Colleen Marie Decker
Anthony Joseph Faranda
Meredith Sarah Gabay
Alvin Geller
Daniel Stewart Gewanter
Michele Carmela Greco
Laith J. Hamdan
Bryan Daniel Hoben
Ashley Kersting
Lynda Sheryl Koenig
Svitlana Lazaresku
Jin Soo Lee
Anna Felice McLeod
Jacqueline Murphy
Matthew G. Palmer
Brittany Christine Patane
Daniel Joseph Patrick
Enrico Joseph Purita
Victoria Lynne Reines
Cesare Paul Ricchezza
Michael Anthony Roberts
Shannon Marie Robin
Jennifer A. Robinson
Andrew Mark Romano
Eric Santos
Dean Schlesinger
Lisa Marie Szczepanski
Kate Marie Vandendolder
Joseph Edward Veeneman
David Andrew Visco
Michael C. Viviano
Jennifer St. John Yount
Beenish Zahid

Tenth District

Eytan Agman
Laura Ann Ahearn
Michael Gerard Ahern
Giselle Alexandra Alvarado
Anthony Caspare Joseph Avitable
Brad A. Baldwin
Danielle L. Bauer
Gerard Belfort
Michael Joseph Bello
Hunter J. Book
Lenard Raymond Brumfield
Darian A. Bryan
John Paul Campana
Gregory A. Cassel
Vanessa Jeanne Cavallaro
Jessica Ann Cicale
Bryan Michael Cimala
Nicole Elise Della Ragione
Daniel James Depasquale
Robert M. Destefano
Cecilia Rose Ehresman
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Keith Forbes
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Daniel A. Gili
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Kierra Nicole Greenwood
Shane Samuel Hassin
Jacqueline Cynthia Hatherill
Ylana Xiomara Hayes
Iris Hsiao
Rocco Iervasi
Elizabeth Shanaz Jaikaran
Jaunita John
Lee Adam Koch
Mario C. Lattuga
Gabriel Adam Levy
Joe Lieberman
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Diana Marie Romanello
Rakesh Roy
Joseph G. Russo
Lauren E. Russo
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Emily Sarah Schierhorst
Daniel Thomas Schilling
Max B. Sender
Joseph Matthew Sgalardi
Katherine Shepardson
Krista Elaine Siederman
James Robert Simmons
Kyle Ronald Stefurak
Daniel Patrick Sweeney
Estefania Paulette Taranto
James Joseph Valenza
Michael E. Vandermark
Kimberly Faith Wachtler
Brian P. Walsh
Amanda Michelle Ward
Brooke Samantha Weinberg
Joshua Max Weinstock
Brent Corey Weiss
Brian Gerard White
Melisa Zukic

Eleventh District

Daniel Judah Altaras
Andrew Charles Alvarez
Sam D. Amini
Virginia Murphy Anderson
Dominique Marie Jude Anglade
Jordyn Leigh Aronowitz
Matthew Louis Barnett
Brian Louis Beckerman
Raspreet Bhatia
Michael Joseph Binko
Anthony Peter Biondo
Amanda Suzanne Borden
Wei Cai
Ryo Chikasawa
Garam Choe
Victoria Catherine Chu
Daniel Chaim Cohen
Mitchell Eric Cohen
Otis Comorau
Natasha Shantel Cooper
Robyn Courtney Coote
Jewel-ann Olimpia Cornelius
Ashraf Anthony Donn
Linhadley Eljach
Alexandra June Farkas
Megan Elizabeth Fitzgerald
Norma Angelica Freeland
Adrianna R. Grancio
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Olivia Reardon Henry
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Sharon Kim
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Mui Karen Kuo
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Nicholas Jarrett Loukides
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Elleana Maidiotis
Ashley Marie Mcdonald
Ethan Taylor Morley
Stella Marie Napolitano
Amit Farhan Noor
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Frank Anthony Paz
Laura A. Raheb
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Zachary Ryan Russell
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David Oudyk Suk
Yuqing Tian
Sean M. Topping
Lara Traum
Michael Leon Tsukerman
Yi Wang
Justin Aaron Wax Jacobs
Jie Jia Xiang

Sahil Yadav
Di Yang
Stephen Joseph Yanni
Young Sik Yoon

Twelfth District

Adriana Alvarez
Aleka Asamoah
Michael John Calabrese
Justin Guy Cunningham
Robert C. Feliu
Mairin Anne Koger Fogarty
Patrick M. Kenny
Mallory Elizabeth Mcgee
Tala Loreta Nazareno
Nicole Ann Summers
Mally J. Valentin

Thirteenth District

Nancy Marie Bello
Ashley Pomes
Volha Salavei
James Francis West

Out-of-State

Ryann M. Aaron
Francesca Acocella
Vanessa Koforowade Adegbite
Yashira M. Agosto
Andrea Aguilar
Heather Aguilar
Naomi Ibtihaj Ahsan
Afua Sarpong Akoto
Sara Aylin Aksu
Stephen Carlo Albertine
Seth Victor Alhadeff
Achille Alipour
Saba'a Esam Mohammed Alyanai
Thomas Mckee Anderson
Mackenzie Rose Angels
Vicken Antounian
Carolyn Appel
Alejandra Maria Aramayo
Katherine Marie Arango
Aaron Michael Arce Stark
Jordyn Leigh Aronowitz
Sara A. Arrow
Zoha Aseem
Scott Kelly Attaway
Elizabeth J. Austin
Tarek Julian Austin
Eda Ayrim Walker
Ashley Lynn Babrisky
Jonathan Lev Backer
Andrea Rose Baer
Kelsey A. Ball
Pedro Antonio Barcelo Lugo
Angelica Barcsansky
Kevin Barnett
Maxwell Q. Bartels
Michal Baum
Colin Pei Kai Be
Ann Marie Beaudoin
Alexander Sevan Bedrosyan
Elizabeth Ashley Beitler
Tracy Tenkoramaa Bempong
Aurelie Benucci
Pembe Tongwe Besingi
Maia Catherine Bessemer
Niccolo Bianconi
Garrett Biedermann
Garrett Matthew Biedermann
Luiz Arthur Bihari
Justin Michael Blasi
Noemi Alexandra Blasutta
David Marshall Block
Alda Enieyenna Boateng
Matthew Sinclair Boaz
Alison Elisabeth Borochoff-Porte
Anthony J. Borzano
Melinda Ann Bothe
Sarah Jessica Brafman
Jonathan R. Brigati
Anton Christopher Brown
Bryan Keith Brown
Philip Michael Brown-wilusz
Jessica Lynn Budrock
Gerhard William Buehning
Charlotte C. Buijs
Carolyn Jane Buller
Osly Jose Burgos Interiano
Chase Burrell
Christopher Campbell-Holt
Kelly G. Cannon
Katherine Marie Caola
Garrett Louis Cardillo
Tiffany Casanova
Manuel Andres Casas Martinez
David Ahn Casler
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Anna Maria Castillo
Joseph Donald Castor
Christopher Robert Castro
Silvia M. Cavalot
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Rebecca Pearl Chang
Victoire Chatelin
Pete Chattrabhuti
Gong Chen
Joyce Chen
Siyuan Chen
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Sean David Childers
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Joseph Choe
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Jacob Michael Christensen
Nicole Jean Christman
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Habin Chung
Jennifer Chung
Theresa Chung
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Jason William Cleckner
Ashley N. Cloud
Hila Cohen
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Massimo S. D'Elia
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Michael Edward Da Silva
Andi Dai
Molly Elizabeth Danahy
Niaa Cherelle Daniels
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Giovanni De Merich
William Alexander Delgado
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Annmarie Dennehy
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Jieying Ding
Brian Joseph Discount
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Jason Daniel Dominguez
Rama Steven Douglas
Addisu Dubale
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Stefan Dunkelgrun
Lynda Dunkwu
Matthew Vincent Dunn
Christopher Michael Dunomes
Adam James Dwyer
Matthew K. Edling
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Kaja Stamnes Elmer
Tarek Eltumi
Matthew Donald Emery
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Zongyuan Fan
Miranda Fansher
Steven Eric Feit
Jesse Michael Feitel
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Kristen Ferretti
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Wenting Ge
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Thomas Christopher Giordano
Charles A. Gish
Noah Shea Goldberg
Michael Isaac Goldman
Douglas Julian Goldstein
Joshua Matthew Goldstein
Victoria Leigh Gonchar
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Yuliya Goptarenko
Matthew John Gornick
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Steven Bennett Gould
Isaac Graff
Daniel Sinclair Graulich
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Zhao Guo
Anshul Gupta
Helena Gutierrez Moreno
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Charles Fitzgerald Gyer
Amanda Haasz
Mark A. Haddad
Wael Haffar
Lee Steven Hagy
Julia Haigney
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Soohuen Ham
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Brett J. Haroldson
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Arsha Hasan
Thomas S. Hastings
Christopher Stephen Havasy
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Leanne Marie Healy
Jessica Margaret Heinz
Grace Emily Heusner
Michael Reid Hilton
William P. Hodges
Helen Olivia Hohnholt
Dong Yeok Hong
Martin Horion
Li-jung Huang
Joseph A. Huckleberry
Bryan Andrew Hum
Christopher Brian Huong
Randall James Hurlburt
Kyeong Ha Hwang
Carlo Michael Ingato
Korey Robert Inglin
Jo A. Irby
Michinori Irikawa
Ethan G. Isaac
Kiran Raghunathan Iyer
Florian Jam
Marta Magdalena Janek
David Binin Jastrab
Tharuni Aparna Jayaraman
Lauren Elizabeth Johnson
Teresa Louise Johnson
Jeremiah Michael Johnston
Jennifer M. Joseph
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Minji Kang
Taejun Kang
Levin Nahne Karg
Erin Nicole Kauffman
Deborah Persis Kelly
Ann C. Kenna
Matthew Philip Kessler
Jacquelyn Leila Khanich
Reingard Friederike Kiechle
Daniel Kim
Gyuel Kim
Junwook Kim
Mooni Kim
Na Yeon Kim
Kaitlyn Ann King
Kumiko Kitaoka
Alexandra Marie Kitson
Kevin Ian Klein
Kathleen Mary Kline
Jamin Koo
Nathan Kim Koskella
Sakka Kotaki
Tamara E. Kotsev
Nicole Maria Kousmanidis
Lucas Kowalczyk
Bourke Edward Kraus
Katerina Krumwiede
Sudip Kundu
Kateryna Kuntsevich
David Michael Kupfer
Nicolaj Alexander Kuplewatzky
Tomoaki Kuragano
Hideaki Kurauchi
Kathryn B. Kushner
Peter Kye
David M. Lachance
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Andrew E. Lai
Janet Lam
Maia Leah Lamdany
Alicia Christine Langone
Laura L. Larson
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Noah Max Lebowitz
Inhwan Lee
Jeannie Park Lee
Min Ji Lee
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Si-on Lee
Yesul Lee
Nolan Cameron Leishman
Marie-Luc A. Lemay
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Natalia V. Levko
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Jing Li
Pengli Li
Sijie Li
Cathy Meng Lian
Raishay J. Lin
Yifan Lin
Heather Ilene Lipstein
Meghan Elizabeth O'Connor Liptak
Samuel A. Litz
Hanya Liu
Kangchen Liu
Linda Liu
Yaoyu Liu
Jeremiah Gregory Livesay
Gabriela Isabel Yvette Lopez Davila
Erxin Lu
Jeremy Brian Lustman
Timothy Ly
Lu Ma
Xiaoxi Ma
Christopher MacColl
Ha Yeon Maeng
Clara Maghani
Kaitlyn T. Mahoney
Christa Lee Maiorano
Pasi Veli Mantyla
Aizada Marat Kyzy

Jordan Marlene Marciello
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Chrystel Massiel Elizabeth Marincich
Megan Renee Marks
Rebecca Heidi Marlin
John Nosrat Massih
Andres Matias
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Gaelan Richard McQueen
Eilis Anne Meagher
Nicholas Stephen Medling
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Frederick T. Mendenhall
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Yangyuqian Meng
Christina Yomi Menga
Lesly J. Michelot
Eunkyoung Min
Sum Yan Mo
Sahand Moarefy
Anand Mohan
Johnathan A. Mondel
Martha Maria Monterrosa
Stanley Patrick Montfort
Austin Dow Moody
Robert Junie-taj Moore
Brandon Moss
Samuel Elias Moss
Ann Camille Motto
Nelson Kenji Murakami
Fuyuo Nagayama
Baraem Nah
Aishwarya Nair
Blake Namerow
Aaron Edgar Nathan
Andrew L. Nellis
Brent Hunter Nesbitt
Paige Suzanne Nestel
Oliver J. Newman
Satoshi Nishida
Gregg Arnold Noel
Richard Dane Norwood
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Erika B. Nyborg-Burch
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Karen M. O'Neill Ocasio
Thomas O'Neill
Esra Ogut
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Arda Ozdinc
Rachel J. Palacios
Dana Margaret Palombo
Nicholas Peter Panayotopoulos
Joonwoo Park
Leslie Suzanne Park
Esperanza Pastor Nunez De Castro
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Jacqueline Stephanie Pena
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William Tyler Perry
William Jacob Peterfriead
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Christopher Michael William Pioch
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Anahita Rafiei Roozbahani
Yu Rao
Francis Anthony Raso
Adrika Ray
Jeremy Basil Record
Natalie L. Regoli
Edward Francis Reilly
Gary John Repke
Mark Thomas Resmini
Maxwell Raymond Rich
Michael Joseph Riordan
Anthony Joseph Risalvato
Michael A. Rivkin
Julie Robinson
Julie Gabrielle Robinson
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Camila Rodriguez
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Henry Sanchez
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Ashlynn Rose Savarese
Aline Nogueira Schmiedt
Jonathan P. Schultz
Heidi Rae Schumann
Caroline L. Schurra
Brett Andrew Schwab
Simone Amanda Persaud Sebastian
Tatsiana Seliazniova
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Soelma N. Shagdarova
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Sari Regina Sharoni
Charles Shaw
Charles Wesley Emmanuel Shaw
Sierra P. Shear
David Shim
David Kwang-ho Shim
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Emily Elizabeth Shroder
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Sabrina Yujung Shyn
Rachel Rose Siegel
Jeremy Siegfried
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Alexandra Simotta
Albert Michael Singer
Timothy Patrick Singer
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Michael Benjamin Soyfer
Robert B. Spawn
Nigel Thomas-edward Stacey
John Benjamin Staherski
Thomas Stanton
Thomas Herbert Stanton
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Clare Florence Steinberg
Amanda Jenkins Sterling
Nicholas Patrick Stieber
Kate E. Stillman
Devin James Stone
Katherine E. Stuart
Hyeseung Suh
Shumei Sun
Tashi Sun
Hee Yon Sung
Kazumi Suzuki
Benjamin K. Symons
Dai Tajima
Tiffanie Kit-ying Tam
Daniel Abraham Taroli
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James Connor Tuomey
Derek Jay Turnbull
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Kevin Donald Vance
Tatiana Vargas-tietjen
Shanellah Verna
David Victorson
Peter Rosenau Viola
William A. Visone
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James Emanuel Waller
Nicholas Jay Waltman
Alice Wang
Alice Aixin Wang
Alice Zhuo Wang
Chang Wang
Da Wang
Longfei Wang
Shengzhi Wang
Yi Wang
Yiran Wang
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Jiefei Yang
Yao Yang
Jacob Allen Yaniero
Alexander George Yatron
Junhyeon Yi
Soohyuk Yim
Christine Jeanho Yoon
Keong Min Yoon
Seokwoo Yoon
Leo You
William Mark Young
Christina Yousef
Sarah Jane Youssefi
Tiandouwa Yuan
Andhari Zairina
Santiago Martin Zalazar
Agostino Zammiello
Leen Zaza
Effie H. Zhang
Xiaotong Zhang
Xueting Zhang
Xue Zhao
Hong Zhi
Hong Zhi
Jacob Henry Zoghlin

"As you know, with new product development, the litigation is baked right in."

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a partner in a mid-size firm but have decided to set out on my own. Although I am going solo, I expect to continue working on some cases with my current firm. I intend to handle all aspects of my new practice – at least at the outset – including bookkeeping and accounting. In addition to working with my soon-to-be former firm, I also plan to work with some other firms, including some out-of-state firms, where they plan to refer work to me in return for a fee-splitting arrangement. We both will be providing services to the client on those matters. I want to avoid any ethical improprieties and I am concerned that the fee-splitting issues could be complicated.

Are there any issues with engaging in a fee-splitting arrangement with these firms? What rules should I be aware of? Can I put the split fees into a general practice bank account? Are there any types of law practices or attorneys that I am prohibited from entering into a fee-splitting arrangement with?

Any advice on how to handle split fees would be appreciated.

Sincerely,

Gon Solo

Dear Gon Solo:

Although all attorneys should be aware of the applicable Rules of Professional Conduct regarding the sharing of fees with other practitioners (or even non-lawyers) who have referred matters to attorneys, this is *especially* true for solo practitioners and small firms when handling a practice's finances.

Fee splitting between lawyers not associated in the same firm is generally governed by New York Rules of Professional Conduct (RPC) 1.5(g). But before we address that rule, as a soon to be attorney *formerly* associated with your firm, RPC 1.5(h) is highly applicable to you. It provides that "Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement."

Comment 8 to RPC 1.5 makes it clear that when you leave your firm, it may divide fees it receives from a client with you without having to comply with the requirements of RPC 1.5(g) provided that you have you arranged for a fee splitting arrangement in your separation agreement with the firm. *See* Comment 8 to RPC 1.5(h) ("Paragraph (g) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.") As Professor Roy Simon notes, however, this rule *only* applies if the attorney leaving the firm bargained for a share of the firm's fees upon leaving the firm. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 228 (2016 ed.) ("Rule 1.5(g) does apply to fee sharing with formerly associated lawyers if the division is not pursuant to a separation or retirement agreement."). Therefore, prior to leaving your firm, the fee sharing arrangement you negotiated should be covered in your separation agreement with the firm; the agreement should specifically identify each client for which you expect to receive fees after you leave the firm. Such an agreement will alleviate the need to comply with the more onerous requirements of RPC 1.5(g) discussed below.

When entering into fee-splitting agreements in your new solo practice, you will need to comply with RPC 1.5(g):

> A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:
>
> (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
>
> (3) the total fee is not excessive.

For decades, the main issue has centered around whether an attorney may share a fee with another attorney for simply referring a matter to that attorney who then does the work on the case. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 211. Although the rules have changed over the years, RPC 1.5(g)(1) currently allows a fee to be split between attorneys that is not in proportion to the work the attorneys actually do on the condition that both of the attorneys must assume "joint responsibility" for the representation. *See* RPC 1.5(g)(1); *see also* RPC 7.2(a)(2) ("a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g)"). This permits the referring attorney to receive a fee despite the fact that she may not be handling a proportional amount of the work. As Professor Simon notes, some of the policy reasons for permitting fee-splitting under those circumstances

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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is that joint responsibility encourages referrals to competent lawyers, since the "referring lawyer must assume financial responsibility for any malpractice or breaches of fiduciary duties by the other lawyer," and the referring lawyer will monitor the handling of the matter. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 212.

An interesting issue arises when the referral of a case is from an attorney disqualified due to a conflict of interest. The Nassau County Bar Association Committee on Professional Ethics addressed this issue in an ethics opinion analyzing former New York Lawyer's Code of Professional Responsibility 2-107(A) which is similar to current RPC 1.5(g). The committee opined that the incoming attorney could only divide the fees in proportion to the work done on the matter *before* the conflict was realized (or should have been realized) but could not pay the disqualified firm a referral fee because it could not consent to joint responsibility for the matter due to the conflict. *See* Bar Ass'n of Nassau County Comm. on Prof Ethics Op. 1998-7 (1998).

If an outgoing firm's conflict was *consentable*, however, and the clients give their informed consent of the conflict and its implications, a referral fee under RPC 1.5(g) appears to be permissible. *See* NYSBA Comm. on Prof'l Ethics, Op. 745 (2001) (analyzing former rule 2-107(A), the committee opined that "[a] disqualified lawyer cannot assume 'joint responsibility' for a matter and therefore, may not be paid a referral fee, unless the referring lawyer obtains client consent under the same standard that would have allowed the lawyer to accept or continue 'sole responsibility' for the matter.").

If you are acting as local counsel for an out-of-state firm, you can share the legal fees with the lead counsel. *See, e.g.,* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2015-8 (2015), *citing* NYSBA Comm. on Prof'l Ethics, Op. 864 (2011) (opining that a New York lawyer is permitted to divide legal fees with a non-New York lawyer on a personal injury case); NYSBA Comm. on Prof'l Ethics, Op. 806 (2007) (opining that a New York lawyer is permitted to divide legal fees with a foreign firm where their lawyers have professional education and training, as well as ethical standards, comparable to American lawyers). If your fees as local counsel are paid out of the lead counsel's fee, however, you must comply with RPC 1.5(g). *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2015-4 n. 4 (2015) ("Local counsel should also be mindful of how her fee will be paid. If she is being paid a share of the lead counsel's fee, she must comply with Rule 1.5(g) . . . ."); Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 211. If you want to avoid the fee-sharing obligations under RPC 1.5(g) as local counsel, you may arrange to bill the client directly for your services on the matter.

While the sharing of legal fees with attorneys is controlled by RPC 1.5(g), the sharing of legal fees with *nonlawyers* is governed by RPC 5.4(a) and New York State Judiciary Law § 491 and is generally prohibited with certain exceptions. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 210. Judiciary Law § 491 makes the splitting of fees with a nonlawyer a misdemeanor offense but does not apply to fee-splitting agreements between attorneys. *See* Judiciary Law § 491. RPC 5.4(a) prohibits sharing of legal fees with nonlawyers with certain exceptions such as the estates of deceased attorneys and compensation or retirement plans for nonlawyers based on a profit sharing arrangement. *See* RPC 5.4(a).

The New York City Bar Association (NYCBA) Committee on Professional and Judicial Ethics addressed an unusual fee-splitting dilemma involving out-of-state nonlawyers in Formal Opinion 2015-8. The question presented to the committee was whether a New York lawyer could ethically share fees with an American law firm, outside of New York, that operated in a manner that would not be permissible under the RPC because it allowed nonlawyers to have a financial interest and/or managerial authority in the firm. As discussed *supra*, RPC 1.5(g) generally does not prohibit joint representation and division of legal fees with out-of-state firms as long as the agreement otherwise complies with RPC 1.5(g). RPC 5.4(a), however, prohibits attorneys from sharing legal fees with nonlawyers and RPC 5.4(b) and (c) prohibit attorneys from forming a legal services partnership where a nonlawyer has an ownership interest or authority to control the professional judgment of the lawyer. *See* RPC 5.4(a-c); NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2015-8 (2015). But, in certain jurisdictions such as Washington D.C., nonlawyers may – contrary to the RPC – hold a financial interest or have managerial authority over a law firm. *See* D.C. Rules of Professional Conduct 5.4(b). Therefore, a New York lawyer splitting fees with a Washington D.C. firm potentially faced an ethical conflict between RPC 1.5(g) and 5.4.

The NYCBA Committee on Professional and Judicial Ethics ultimately opined that it was ethical for a New York attorney to "divide legal fees with a lawyer who practices in a law firm where nonlawyers hold a financial interest or managerial authority, provided that the law firm is based in a jurisdiction that permits arrangements with nonlawyers." NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2015-8 (2015). The committee believed that there was little risk that a nonlawyer would impair the New York attorney's independent professional judgment but noted that, under RPC 5.4(d)(3), the "New York lawyer must not allow nonlawyers in the other law firm to improperly influence their professional judgment." *Id.* The takeaway from this opinion is that you should make sure that the firms with which you are entering into fee-splitting agreements are complying with their ethical obligations and nonlawyers at that firm are not impairing your professional judgment to your client.

For bookkeeping purposes, you must be especially careful to treat funds subject to a fee-splitting agreement as funds belonging to a third person. Your ethical obligations regarding such

funds are governed by RPC 1.15. The American Bar Association Standing Committee on Ethics and Professional Responsibility recently addressed how funds subject to a fee-splitting agreement must be maintained and distributed. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 475 (2016). The committee opined that when an attorney receives fees from a client subject to a fee-splitting agreement, the other attorney should be treated as a "third person" under ABA Model Rule 1.15. *See id.* While ABA Model Rule 1.15 varies in some ways from RPC 1.15, we believe that the findings of the committee and its analysis of fee splitting funds under ABA Model Rule 1.15 are consistent with your obligations under RPC 1.15. *Compare* ABA Model Rule 1.15 and RPC 1.15. Under RPC 1.15(b)(2) and (4), the attorney receiving fee-split funds must deposit those funds in an account separate from any business or personal accounts of the lawyer or lawyer's firm. *See* RPC 1.15(b)(2) and (4). The receiving attorney must promptly notify the other attorney of receipt of the funds and deliver their portion of fees. *See* RPC 1.15 (c)(1) and (4). If a portion of the funds are due to the receiving attorney, they may be withdrawn unless there is a fee dispute with the client or the other attorney. *See* RPC 1.15 (b)(4). In the event of a fee dispute, the funds cannot be withdrawn until the dispute is resolved. *See id.* Although it should go without saying, be very careful with keeping these funds in an account that complies with RPC 1.15. The improper commingling of funds is a surefire way to end up before a grievance committee.

Managing all aspects of a solo practice will require a great deal of attention to a number of issues and fee sharing is certainly an area that needs to be dealt with correctly to avoid ethical pitfalls in the future. In your case, your first step should be to negotiate and include any future fee-sharing arrangement with your firm for work in your separation agreement to avoid the need to later obtain the clients' written consent. Next, it is imperative that you create a separate bank account in your solo practice for fees subject to split-fee agreements and that you avoid any mixing of split fees with your personal or general accounts. Finally, as you negotiate fee-sharing agreements going forward, always consider RPC 1.5(g) and evaluate whether the work to be done for that case is proportionate to the fee agreed upon or whether the lawyers need to assume joint responsibility for the representation to be provided to the client in writing.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

Although the majority of my practice is in litigation, I recently represented a longtime client in negotiating the purchase of real property with a number of environmental regulatory issues. After entering into the contract, however, a dispute arose when a third party claimed it was entitled to purchase the property. They commenced an action claiming irregularities with the contract and closing and I appeared for my client in the litigation. The plaintiff issued a subpoena to me regarding the transaction – demanding both documents and a deposition – and is moving to have me disqualified as counsel. I don't think the plaintiff's complaint has much merit and that the subpoena may be a litigation tactic to frustrate my client.

Shortly after receiving the subpoena and motion to disqualify, I also received a request to submit to a voluntary interview with an environmental agency investigating a claim alleged against my client with respect to the sale of the property. While the agency hasn't served an administrative complaint against my client yet, based upon my knowledge of the transaction and property, I think there is a strong possibility that an administrative complaint may be filed after their investigation is complete.

As an attorney in the litigation, can the other side subpoena me to testify about the transaction? Isn't my involvement in the transaction protected by an attorney-client privilege? If the court requires me to respond to the subpoena and appear at the deposition, will I also have to be disqualified as counsel? If I am disqualified, may someone from my firm step in to continue representing my client in the litigation? This client is very comfortable with our firm and we are the only attorneys they have had for many years.

If I appear for the voluntary administrative interview, will that create a basis for the agency to later seek to have me disqualified if an administrative complaint is filed?

Going forward, if I do transactional work in the future, are there any actions I should take to avoid disqualification motions and becoming a potential fact witness?

Sincerely,

Ina Jam

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Total Law Student Members as of 2/14/17	**6,881**
Total Membership as of 2/14/17	**72,340**

BY LUKAS M. HOROWITZ

Lukas M. Horowitz, Albany Law School Class of 2019, graduated from Hobart William Smith in 2014 with a B.A. in history and a minor in political science and Russian area studies. Following graduation, he worked for two years as a legal assistant at Gibson, McAskill & Crosby, LLP, in Buffalo, New York, and with the New York Academy of Trial Lawyers hosting CLE programs. Lukas can be reached at Lukas.horowitz@gmail.com.

"Oooh, I'm Going to Tell on You!"

With the spring semester in full swing, I brace myself for the storm gathering just over the horizon: Finals. While still a few months away, I am filled with dread. The situation is not unlike the scene in *Jurassic Park*: the T-Rex is on the hunt, you can hear his tremendous footsteps, but all you see are ripples in your water glass. You don't see the beast, but you know he's coming. As if that's not enough, I suddenly remember that his first victim was a lawyer.

Fortunately, all is not gloom and doom, and there are several bright spots on this semester's journey. The first is an assignment to draft a motion for summary judgment. I'm excited by the opportunity and relish being given a chance to put into practice some of what I have learned. While the feeling may fade once I am actually practicing law and churning out motions like hot cakes, for now it represents "hands on" work (and I don't have to memorize 500 rules to do the assignment well).

The most compelling aspect of this assignment is the opportunity to practice the art of persuasion. There are two things I have been told I excel at in life: procrastination and persuasion (actually, arguing). Take cleaning my bedroom as a child, a task I would put off for as long as possible. When I would finally begin, I would "discover" lost toys and begin playing with them, which did not help the situation, to say the least: procrastination. Luckily, I was almost always successful at convincing my mother to help me clean, which consisted of me "putting away" (playing with) my toys, while my mother completed the bulk of the work, bless her soul: persuasion. So, having the opportunity to insert my own voice into this motion is something I can really get on board with.

Dealing with the Family Medical Leave Act (FMLA), the question raised is whether the plaintiff improperly took FMLA leave while employed by the defendant, the company that I represent. I am just about done drafting the statement of facts and will begin to dive into the legal research aspect soon, with most of my attention focused on Second Circuit authorities. I am, of course, trying to present the facts in the light most favorable to my client, while not distorting them. Not as easy as I thought.

Another positive development is that the cases we cover in class resonate differently as I begin to think of myself as an actual lawyer representing an actual client. I read an interesting case the other day for my criminal law course, *Nix v. Whiteside*.[1] The case, under review by the U.S. Supreme Court, focused on whether the defendant had been denied his rights of effective assistance of counsel under the Sixth Amendment. The issue arose when the defendant advised his attorney that he was going to lie while testifying. The attorney told the client that if he committed perjury, than as an attorney he was obligated to advise the court of the deception and that he would have to withdraw as counsel.[2]

Invoking the *Strickland* test,[3] the Court had to determine whether there was both serious attorney error and prejudice. Where serious attorney error exists but there is no prejudice, the *Strickland* test is not met, and there is no violation of the Sixth Amendment. On these facts, the Court found that the Sixth Amendment had not been violated because, regardless of whether there was attorney error, there was no prejudice to the defendant because any conflict of interest was imposed by the client upon the attorney.

In class discussion, my professor highlighted an essential element of the relationship that I had overlooked: building and establishing trust between the attorney and client.

In class discussion, my professor highlighted an essential element of the relationship that I had overlooked: building and establishing trust between the attorney and client. My professor explained that there were alternative avenues for the attorney to take, besides saying, in essence, "I'm going to tell on you." This insight made me reconsider whether the attorney made the "best" decision. From

the attorney's perspective, I understood why he would not want his client to commit perjury in court. That part is simple. What trips me up is the manner in which one should go about trying to prevent such actions from occurring. At what point does an attorney place responsibility to the court system ahead of the trust and relationship with his client, and at what cost? Knowing that the impact of a case extends beyond the facts and legal interpretation adds an entirely new layer to what it means to be an attorney. I can only hope that if I am faced with an issue like this in practice, I will make the best possible decision for my client and myself.

I hear whispers from my contracts book in the other room, so it is time to stop procrastinating with my latest rationalization, this column. ■

1. *Nix v. Whiteside*, 475 U.S. 157 (1986).
2. After defendant testified truthfully, and was convicted, he moved for a new trial, claiming ineffective assistance of counsel.
3. *Nix*, 475 U.S. at 164–65.

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BY GERALD LEBOVITS

Write to Win in Court

Mastering the art of written advocacy is critical for lawyers. They must write to win. Written briefs are the first and best opportunity to persuade the court. Sometimes they're the only way to persuade the court. Courts often allot little or no time for oral advocacy. Even if oral argument takes place, the judge or law clerks might not recall the argument when they decide the case. But they'll have the briefs to help them.

Lawyers write persuasive briefs by making them easy to understand. They should write for the decision maker, not for their client or their adversary. They should consider the reader's needs. Judges are busy professionals: They need to be educated, they want to rule correctly, and they have no time to waste. Lawyers must make every word count by ensuring that their briefs are organized and concise. Good briefs follow the twin pillars of persuasion: They make the court want to rule in the lawyer's favor, and they make it easy for the court to do so.

Good writing enhances a lawyer's credibility. It shows that the lawyer took the case seriously, and so should the court. It helps the court trust the lawyer. A court that finds the lawyer trustworthy is more likely to rule for the client.

Poorly written briefs create bad impressions, not only about the lawyer's forensic skills, but also about the client's case. Poor writing means losing. Poorly written briefs are long and boring and lack coherence. Well-written briefs are clear, effective, and focused. Poor brief writing misses arguments and doesn't apply law to fact. Good brief writing is a martial art.

Here're ten pointers to guide lawyers in persuading the court through written advocacy.

1. Argue the Issues

For briefs to persuade, lawyers should stress issues, not citations. An issue is an independent ground on which the relief sought can be granted if the reader agrees with the argument on that issue and disagrees with everything else. Lawyers should discard trivial issues. Unless the lawyer must preserve the record for appeal, the lawyer should winnow the argument to no more than three or four issues. Otherwise, the weaker issues will dilute the stronger. Lawyers should present their issues by strength, starting with the argument most likely to succeed. If they're unsure which argument is the strongest, they should pick the argument with the biggest relief for their clients. There are two exceptions to that rule: The first is when lawyers have a dispositive threshold issue — jurisdiction or statute of limitations. The threshold issue should become the first argument. The second is that lawyers must follow the order established by a statute or the factors articulated in a leading case..

After lawyers have explained their argument, they should address the other side's position to contradict it. They should begin with their argument, though, to show that they're right because they're right, not merely because the other side is wrong. Lawyers submitting opposition or response papers shouldn't copy or mirror the way the other side ordered the issues. They should tell the court which issues they oppose but order them the way it works for their clients. Briefs should be written to persuade the court. Briefs aren't meant to be law-journal articles, which give objective, neutral, and fuzzy exposés of the law, not hard-hitting reasons why one side should win and the other should lose.

For briefs to persuade, lawyers should stress issues, not citations.

2. Be Clear

Lawyers must explain their points so that judges can understand them on their first read. Confusing briefs will frustrate judges, who might simply give up and rely on the other side's brief. To get their points across, lawyers shouldn't assume that their readers agree with them. They should assume that their readers know nothing about the case. They shouldn't write in a conclusory way. They must show; they mustn't tell. They show by describing people, places, and things. They must use concrete nouns and vigorous verbs, prefer verbs to nouns, and limit adjectives and adverbs. They don't say that the man was "very tall" but that the man was seven feet in height. Painting a picture reduces reader resistance.

Lawyers should state clearly and repeatedly what relief they seek. Clarity is more important than con-

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