NOVEMBER/DECEMBER 2007
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NEW YORK STATE BAR ASSOCIATION

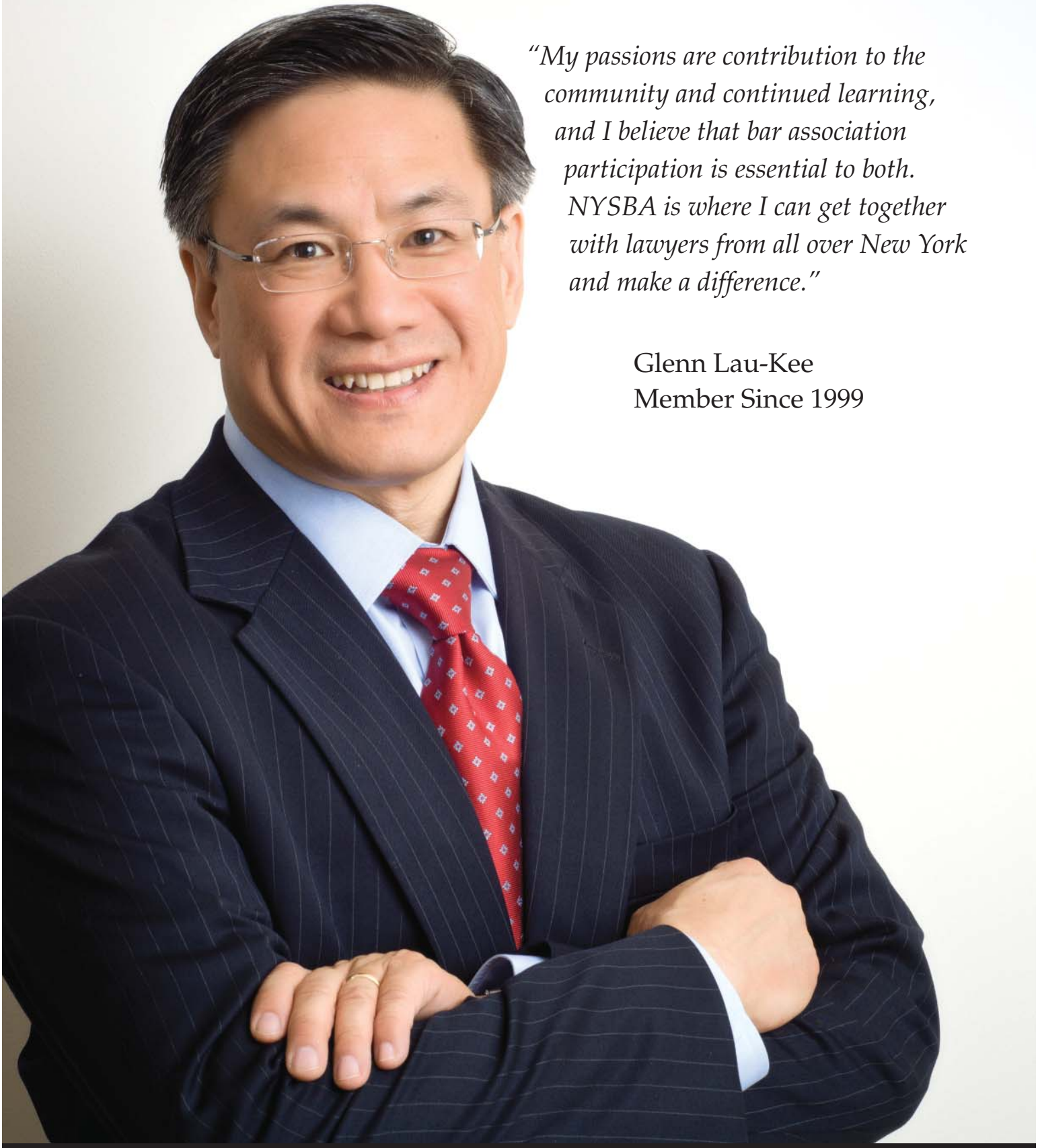
Journal

"A Just Cause for War"

How slave transit in an abolitionist state sparked New York's Dred Scott *decision.*

by William H. Manz

Also in this Issue



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December

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Journal

CONTENTS

NOVEMBER/DECEMBER 2007

"A JUST CAUSE FOR WAR": NEW YORK'S *DRED SCOTT* DECISION

BY WILLIAM H. MANZ

10

DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2007 by the New York State Bar Association. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

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KATHRYN GRANT MADIGAN

Lawyers and Aging: Reaching for the Top Rung

The recent consent decree in the Sidley Austin retirement age discrimination case, validating a signature initiative of our Immediate Past President, Mark Alcott, prompted me to devote this President's Message to an exploration of other challenges and opportunities we face with an aging lawyer population. Every day I meet lawyers who are at the "tipping point" of embracing their elder status, not as an end, but as a new beginning, what former ABA President Karen Mathis calls the "second season of service." Indeed, there are many ways to find greater joy and satisfaction professionally and personally, living longer, healthier, and more purposefully.

One must first understand the historical concepts of aging, as well as current, cross-cultural attitudes. The "Hierarchy of Needs" proposed by eminent sociologist Abraham Maslow is a good place to start. His theory was that as one goes through life you pass through each level of need before moving on to satisfy the next one. You start with biological and physical needs, such as air, food and shelter, to safety needs, belongingness and love needs (co-workers, family, relationships) to self-esteem needs (achievement, mastery, prestige and status). Ultimately one hopes to reach self-actualization, where you have realized your potential, seeking personal growth and meaning in life.

Some get stuck, or "over-realized," at the self-esteem level, never reaching out to grasp that top rung. Others reach the top and discover that their ladder was up against the wrong wall. But in the end, what distinguishes self-actualizers is that they consider the means and the ends as equally important. They focus on enjoying the journey as well as the destination.

All of the world's spiritual traditions provide models of realized or self-actualized elders. They are the *roshi* in Zen Buddhism, the *lama* in Tibetan Buddhism, the *sheikh* in Islam, and the *rebee* in Hasidic Judaism. In western and native traditions, the *sage*, the *crone*, the *priest*, and the *wise man.* Each of these traditions offers practices leading to self-knowledge and service to society.

As we age in our western culture today, we confront a lack of meaningful role models. Since the Industrial Revolution, elders have lost their esteemed place in our society. What have evolved are our current models or myths, which support a more negative perception of aging.

We need a new paradigm that rejects the notion of old age as a time of inevitable decline, chronic disease and diminished capacity, and that embraces the wisdom, serenity, balanced judgment and self-knowledge that represent the fruit of long life experience.

We also need to provide opportunities for our aging population – including older lawyers – to harvest the wisdom of their years and transmit a legacy to future generations, in whatever form is most meaningful to them – community service, pro bono work, mentoring, coaching, a work of art or literature, a song or a poem that fills the heart.

One of the great commentators on the human experience, author and anthropologist Gail Sheehy, penned her best-selling book *Passages* in the mid-1970s. She then embarked on a comprehensive study of "pathfinders," or those who successfully navigated the passages – and crises – of adulthood and found their own path to well-being or self-actualization. About 60,000 men and women, including 1,200 members of the American Bar Association, responded to her life history questionnaire, from which she developed a well-being scale. The lawyers' average age then (in 1980) was 46. Most reported that, compared with any previous stage in their lives, they were enjoying the peak of satisfaction. They also predicted that the other side of 47 would be an inevitable downward spiral.

The hard data, however, told a very different story. The lawyers who floated to the top of the well-being scale were almost all older than 47; the most contented age group were the attorneys over 65. What Sheehy and so many others since then have discovered is that aging, fortunately, is a commutable sentence. There is no fixed point where you stop being middle-aged and are condemned to being "old." Given the falling death rate among our oldest Americans, today's healthy 75-year-old is equivalent to yesterday's 60-year-old. And what many of us understand intellectually, but fail to practice in reality, is the importance of our lifestyle choices, which are far more predictive than our genetic predispositions.

KATHRYN GRANT MADIGAN can be reached on her blog at http://nysbar.com/blogs/president.

PRESIDENT'S MESSAGE

Today our seniors, including "graying" lawyers, are looking for a renewed sense of purpose. So, instead of viewing retirement as a staged reduction in work hours and responsibilities and as an end point in itself, you can reframe it and view it as an opportunity for personal growth, increased volunteerism. Making a difference. The self-actualized life.

Whether you are approaching retirement or transitioning your practice, already retired, or a Gen X or Y for whom that is a distant possibility, I encourage you to approach aging consciously, creatively, and as a new beginning. Seize every opportunity to share your wisdom and experience, leaving your legacy with the next generation.

Please join me in continuing this important conversation on the journey ahead by logging on to my blog at http://nysbar.com/blogs/president, where I will be sharing tips on work/life balance and successful aging. You can also link directly to the blog from the home page of the NYSBA Web site at www.nysba.org. ■

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(half-day program)

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November 13 Uniondale, LI

Engaging and Working With Investigative Consultants
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November 14 New York City

Real Estate Titles

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November 14 Rochester

Construction Site Accidents: The Law and the Trial

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November 15 New York City

November 16 Buffalo

Update 2007

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November 15 Tarrytown; Uniondale, LI

November 16 Canton

November 28 Poughkeepsie

November 30 Loch Sheldrake; Watertown

Dealing With Your Client's Retirement Assets
(half-day program)

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November 15 Buffalo

November 28 Syracuse

December 7 Albany

December 12 New York City

Ethics and Professionlism
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November 16 New York City

November 19 Tarrytown

November 28 Melville, LI

November 30 Albany; Syracuse

December 7 Rochester

December 12 Buffalo

Special Education Law Update 2007

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November 16 New York City

November 28 Albany

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November 16 Melville, LI

December 7 Syracuse

December 14 New York City

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November 28 Albany

December 7 New York City

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November 29 Albany

Securities Arbitration and Mediation

Fulfills NY MCLE requirement for all attorneys (7.0): 4.0 skills; 3.0 areas of professional practice

November 29 New York City

Practical Skills – Environmental Law for New Environmental Practitioners and Newly Admitted Attorneys

Fulfills NY MCLE requirements for all attorneys: (7.5): 7.5 areas of practice management

November 29 Westchester

November 30 Albany; New York City; Syracuse

Advanced Real Estate Practice

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November 30 New York City

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December 7 Uniondale, LI

December 11 New York City

December 14 Albany

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William H. Manz is Senior Research Librarian, St. John's University School of Law. He received his law degree from St. John's and his undergraduate degree from the College of the Holy Cross. Mr. Manz is the author of *Gibson's New York Legal Research Guide* (William S. Hein & Co., Inc. 2004) and *The Palsgraf Case: Courts, Law, and Society in 1920s New York* (LexisNexis Matthew Bender 2005). He wishes to thank Ralph Monaco of the New York Law Institute Library for making available the *Lemmon* volume of Charles O'Conor's *My Own Cases*.

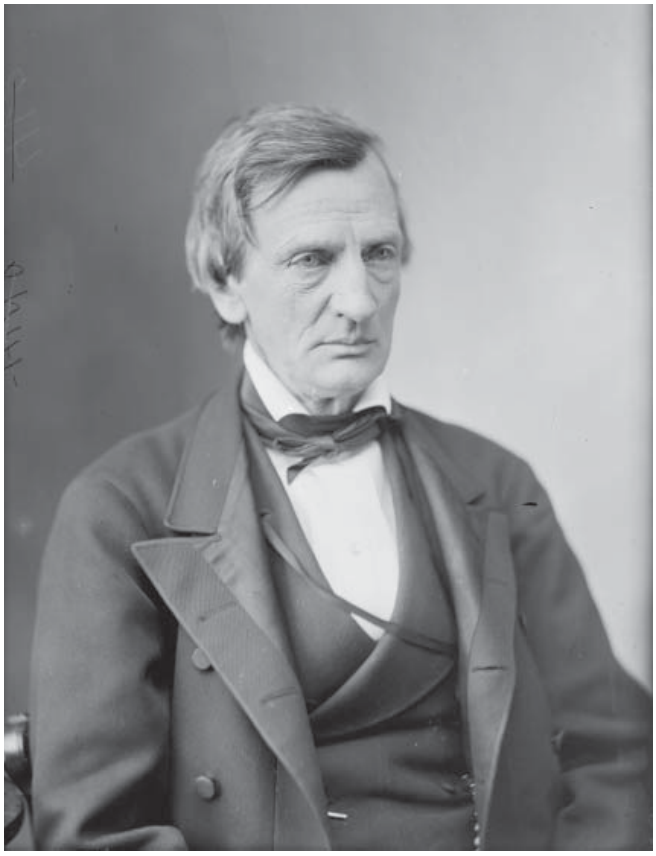
"A Jus
New Y

By William H. Manz

In his 1853 annual messag
comity . . . [that] if delibe
legislature, Governor Jose
importance it is the first magn
and thereby the value of slave
Shall we endure this wrong?"

t Cause for War": ork's *Dred Scott* Decision

e to the Georgia legislature, Governor Howell Cobb characterized a New York court decision as "a denial of rately and wantonly persisted in, would be a just cause for war."[1] In an earlier communication to the Virginia eph Johnson maintained that the decision "was . . . without a single precedent to sustain it,"[2] adding that "in nitude, and in spirit it is without parallel."[3] The *Richmond Examiner* claimed that "this decision affects the safety property throughout the entire South,"[4] while the *Charleston Mercury* fumed: "Shall we submit to this reproach? [5] The object of these outcries, *People ex rel. Napoleon v. Lemmon*,[6] freeing eight slaves in transit through New York



William M. Evarts, Library of Congress.

State, subsequently developed into a legal battle between New York and Virginia. Attracting nationwide attention, it was expected to reach the Supreme Court and equal the *Dred Scott* decision in importance.

The train of events which produced the controversial case began with the plans of Virginia farmer Jonathan Lemmon and his wife Juliet to emigrate from Bath County, a mountainous area west of Richmond, and settle in Texas with their seven children and Juliet's eight slaves, two young women, a young man, and five children. The Lemmon family and their slaves left home in October 1852; after failing to find a ship sailing directly from Richmond for New Orleans, they traveled to Norfolk where they boarded the steamer *City of Richmond*, bound for New York, intending on arrival to immediately book passage for a voyage to New Orleans.

Jonathan Lemmon would initially claim that he had no fears about bringing the slaves into New York, having allegedly been assured by the *City of Richmond*'s clerk, a Mr. Ashmead, that "he need not be uneasy about losing the slaves; that the law was in [his] favor in New York, and was bound to protect [him] in the possession and property of [his] slaves; and that the Mayor of that city would see that it was done, provided any difficulty should occur."[7] Later, he would exonerate Ashmead from all blame for the loss of the slaves, stating that he had been warned of his danger, "but rested secure in the belief that his slaves could not be induced to desert him."[8]

The city to which Lemmon was bringing the slaves had the largest free black population in the North; many had been born in the South, and some were fugitive slaves.[9] Although the best-known New York City abolitionists were prominent whites, most notably Arthur and Lewis Tappan, wealthy merchants and founders of the American and Foreign Anti-Slavery Society, there was also an active black abolitionist movement ready to assist fugitive slaves and alert them to the presence of visiting southerners and would-be slave catchers. Only a month before, the black community had enthusiastically celebrated the return of former slave James Hamlet, the well-regarded employee of New York City liquor brokers Tilton & Mahoney, who had a free wife and child. Adjudged a fugitive, he had been returned to his owner in Baltimore, but his freedom was then purchased with funds raised in a subscription drive.

When the *City of Richmond* reached New York in the late afternoon of Friday, November 5, 1852, Ashmead set off immediately to book passage for the Lemmons aboard a New Orleans-bound ship. Eventually, he returned and informed Jonathan Lemmon that he should proceed to South Street to meet a man who would provide passage on the steamer *Memphis*, which was scheduled to sail the next morning. After Lemmon paid the $161 fare, the hack drivers engaged to carry his party and their baggage from the *City of Richmond* to the *Memphis* refused to take them there, instead depositing them at No. 3 Carlisle Street, a boarding house close to the Hudson River, and just south of the Fifth Ward, home to many of the city's black population.

The next morning, the Lemmons were presented with a writ of habeas corpus obtained by Louis Napoleon, a free black varnisher/polisher from the Fifth Ward.[10] The writ stated that the slaves were in fact free persons, a claim based on the 1841 repeal of the so-called "nine-months law,"[11] a provision in the 1817 act providing for the abolition of slavery in New York by 1827.[12] The nine-months law had allowed visiting slave owners to retain their slaves while in New York if they limited their stay in the state to that time. The repeal was one of several anti-slavery laws enacted during the administration of abolitionist Whig Governor William H. Seward, and drew its strongest support from the so-called "Burned-Over District" of western New York, an area then known for fervent Protestant religious revivalism, a strong temperance movement, and ardent abolitionist sentiments.

The repeal was enacted at the end of the 1841 legislative session. After one bill was blocked in an assembly committee,[13] a new measure was introduced in the Whig-controlled senate and quickly passed, supported by all 11 Whigs present and opposed by the eight Democrats.[14] It then passed the evenly divided assembly, 57 to 49.

CONTINUED ON PAGE 14

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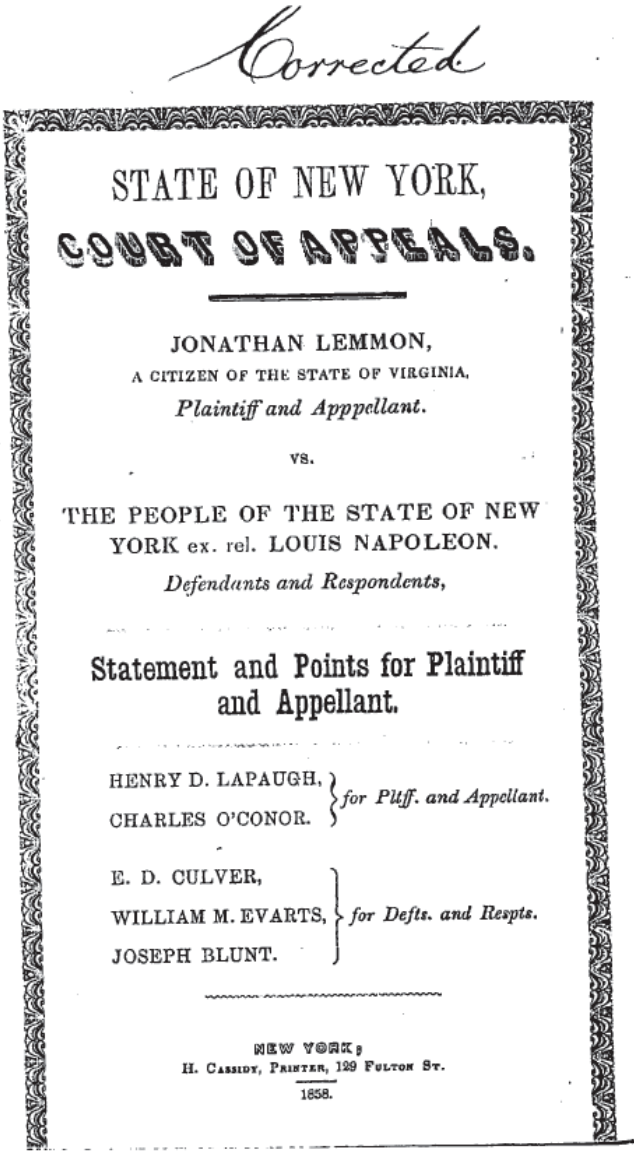

Corrected

STATE OF NEW YORK,

COURT OF APPEALS.

JONATHAN LEMMON,
A CITIZEN OF THE STATE OF VIRGINIA,
Plaintiff and Apppellant.

vs.

THE PEOPLE OF THE STATE OF NEW YORK ex. rel. LOUIS NAPOLEON.
Defendants and Respondents,

Statement and Points for Plaintiff and Appellant.

HENRY D. LAPAUGH, CHARLES O'CONOR. } *for Pltff. and Appellant.*

E. D. CULVER, WILLIAM M. EVARTS, JOSEPH BLUNT. } *for Defts. and Respts.*

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1858.

New York State Archives.

Continued from Page 12

The assembly vote on the new bill was largely along party lines, with 47 Whigs in favor and 45 Democrats opposed,[15] but critical support was provided by 10 Democrats, including four from New York City, offsetting the votes of the four Whigs who opposed the measure.[16] The bill was signed into law by Seward, and New York was now presumably free of the last vestiges of slavery.

It is not known how many southerners risked bringing slaves into New York after the repeal, but the best-documented visits involved single, highly-trusted household servants, who had no inclination to take up the often-difficult life of a free black in the North. While no cases arose involving slave transit, several decisions indicated the likely result in a proceeding involving a judge opposed to slavery. In 1848, an anti-slavery Democrat, Justice John W. Edmonds, a well-known believer in spiritualism who once felt compelled to deny rumors that he consulted with the spirits before making judicial decisions, freed George Kirk, a fugitive stowaway discovered aboard the ship *Mobile*, holding that a Georgia statute allowing anyone, including a ship's captain, to act as an agent for a slave owner, did not apply in New York.[17] When Kirk was then re-apprehended by the captain and brought before Mayor Andrew H. Mickle, Edmonds ruled that the New York statute providing for this procedure[18] was preempted by a federal law under which only the owner or his appointed agent could act in fugitive slave cases. Two years later, Edmonds freed fugitive slave Joseph Belt, who had been seized on a New York City street and held captive, because the claimant had not taken Belt before a United States magistrate as required by law.[19] Then in 1851, Judge Alfred Conkling, an upstate Whig who detested slavery, freed John Davis, a fugitive slave from Louisville, ruling that the Fugitive Slave Act, which compelled local law enforcement officials to arrest runaway slaves, did not apply since the alleged escape took place almost a month before its enactment.[20]

Superior court judge Elijah Paine, who issued the writ of habeas corpus, and who would hear the *Lemmon* case, was, like Seward and Conkling, a Whig who regarded slavery as a "gigantic evil."[21] Born in Williamstown, Mass., in 1796, he was the son and namesake of Vermont judge and U.S. senator, Elijah Paine. An 1814 Harvard College graduate who studied at the Litchfield, Conn., law school, he was the author of two editions of *Practice in Civil Actions and Proceedings in the State of New York*, compiler of *Paine's United States Circuit Court Reports*, and a collaborator with Henry Wheaton in compiling *Wheaton's Reports*, covering the United States Supreme Court from 1816 to 1827. Paine had been elected to the superior court in 1849, ousting the incumbent, Democratic Party stalwart Aaron Vanderpoel, the "Kinderhook Roarer," as part of a Whig sweep in the city election.

Representing the Lemmons were two young New York City attorneys, Henry D. Lapaugh and Henry L. Clinton. Opposing them were abolitionist lawyers Erastus D. Culver and John Jay. Jay, a Columbia College graduate who later would be one of the founders of the New York Republican Party, was the son of the well-known abolitionist, Judge William Jay. He had previously represented several fugitives, including George Kirk, the slave freed by Justice Edmonds. Culver, who had successfully argued for the writ of habeas corpus, was a member of the executive committee of the American and Foreign Anti-Slavery Society, had served in both the state assembly and Congress, and was a close friend of the father of future president Chester A. Arthur.

The legal arguments that would be employed in superior court, the General Term, and the Court of Appeals followed the same general themes.[22] The pro-slavery position maintained that slavery was constitutionally

Continued on Page 16

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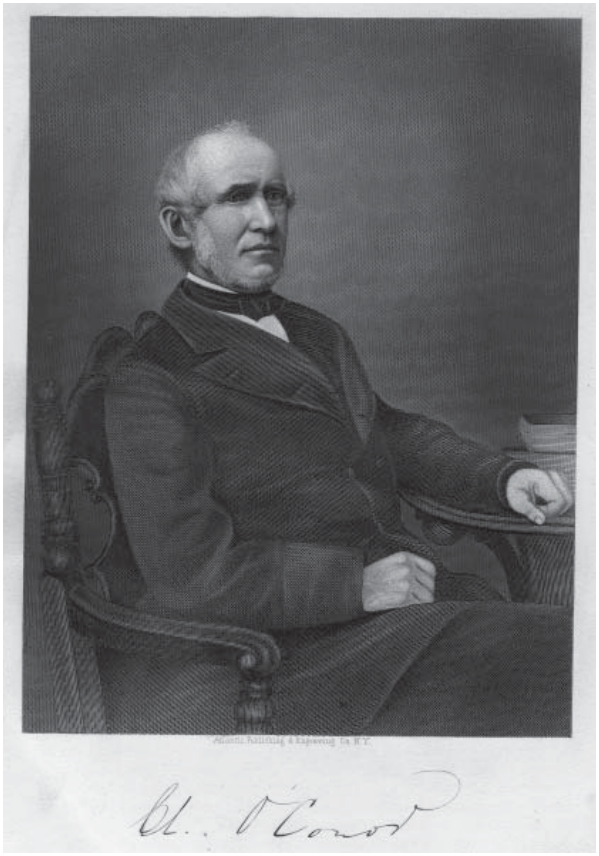
Continued from Page 14

protected, noting the Constitution's three-fifths provision regarding a state's slave population and the Fugitive Slave Clause;[23] the absence of the term "slavery" in these provisions was dismissed as an insignificant artifice. Property rights in slaves did not differ from those in any other form of property, including livestock and inanimate objects, and such property was thus protected under the Privileges and Immunities Clause.[24] By virtue of the comity existing between the states, slave owners had the right to transit free states with this "slave property." Finally, it was maintained that to prevent slave owners from passing through free states with their slaves was a violation of the Commerce Clause.



Charles O'Conor.

The absence of the term slavery in the Constitution indicated to opponents of slavery that it was not constitutionally protected. They insisted that slavery was against the law of nature, citing to Lord Mansfield's decision in the famous *Somerset* case.[25] Because the states had the unquestioned right to abolish slavery, the states alone had the right to determine the status of persons within their jurisdiction. The anti-slavery position naturally refused to view slaves as just another form of property, and argued that the Privileges and Immunities Clause granted visitors only those rights held by a state's residents. As the report on the 1841 assembly bill repealing the nine-months law stated: "It would be strange indeed, if we were bound, under this or any other clause, to vouchsafe to a citizen of another State all the peculiar and especial rights and privileges of the State, of which he is a citizen."[26] Thus, if New Yorkers could not possess slaves in New York, neither could any visitor from a slave state. As for comity, its application was discretionary, and New York's firm anti-slavery policy prevented granting it in the case of slaves and their owners in transit. Finally, the Commerce Clause was inapplicable, because local law governed a person's status after arrival in a state.

Lemmon differed in several important respects from other cases involving the status of slaves brought into free states. Most important, it was a clear-cut transit case; previous cases where slaves were declared free by northern state courts involved temporary residents,[27] short-term visitors,[28] or individuals who were arguably fugitives.[29] Also, unlike previous decisions, *Lemmon* did not involve a single slave, but all of a visitor's slaves, a southerner's most desirable form of property.[30] Another factor was that it was a decision by a court in a major port city, often visited by southerners, upon which the South relied economically, a dependence causing much resentment as reflected by a New Orleans newspaper's comment that New York was "the centre of reckless speculation, unflinching fraud and downright robbery."[31]

The case of the Lemmon slaves generated great interest in New York City, particularly among the black population. Thus, when the case was argued during the week of November 7, the *New York Herald* reported that "the staircases and lobby at City Hall were crowded to excess. . . . [A]n immense crowd of colored persons was collected manifesting the utmost impatience to learn the result of the trial."[32]

When the arguments began, the abolitionist lawyer Erastus Culver maintained: "The provisions of the common law are in favor of the personal rights of liberty and freedom of every individual and unless you can overcome that presumption by some positive local statute it must prevail and give every man his freedom." He stressed that the Lemmon slaves were not fugitives, and had been brought into New York voluntarily, not because their vessel had been forced into port by bad weather. On the other side, Lapaugh and Clinton argued that the repeal of the nine-months law did not apply to slaves in transit, and that the Lemmons' slave property should be protected by the privileges and immunities granted by the federal Constitution, and by virtue of the comity existing between the states.

When Judge Paine announced his decision on Saturday, November 13, the courtroom was again filled, with many persons crowding the corridors. In an opinion that the *Herald* described as "very elaborate and careful,"[33] Paine ruled that the Lemmon slaves were free. He agreed that slavery existed only by local law, that the Privileges and Immunities Clause granted visitors only those rights accorded residents, and that the Commerce Clause was

inapplicable to laws regulating or abolishing slavery. The judge concluded: "The laws of the state of New York upon this subject appear to me to be entirely free from any uncertainty. In my opinion they not only do not uphold or legalize a property in slaves within the limits of the state, but they render it impossible that such property should exist within those limits except in the single instance of fugitives under the constitution of the United States."

Paine's decision set off considerable celebration both inside and outside the courtroom. The *New York Times* reported: "Scarcely had his Honor pronounced the concluding words, which decided the fate of the women and the children, then there arose a wild hubbub, and cries of 'good, good,' and other expressions of approbation. The crowd outside and inside the room, appeared to be intoxicated with joy, and it was some minutes before order could be restored."[34] The eight former slaves were led from the courtroom by Louis Napoleon, placed in a coach, and driven off amidst much cheering. One woman spectator was heard to remark: "Oh, thank God and good men."[35]

Obviously, such sentiments were not shared by much of the southern press. A Richmond paper complained that Lemmon had been "plundered," adding: "There can be no more reason or justice in depriving Lemmon of his slaves, than there would be in depriving Judge Paine of his riding horse, should he happen to ride to this state."[36] Another called the decision "the most complete nullification of the Constitution of the United States that has ever taken place."[37] In New York, the Democratic *Herald* characterized the decision as "a victory coerced by law, not governed by justice,"[38] while the pro-slavery *Day Book* fumed that it was "the legal sanctioning of highway robbery."[39] Reflecting the concerns of the merchant community, the *Journal of Commerce* warned: "[I]f New York plants herself on her sovereignty while robbing citizens of Virginia, we need not be surprised to hear of reprisals in Virginia upon the property of New Yorkers," adding that "[t]he practical effect of this decision on the South will be to increase the irritation already existing there, and especially to injure, to a very considerable degree, the trade of New York with that region."[40]

In 1849, the value of New York City's southern trade was $76,000,000.[41] Thus, it was hardly surprising that it was once said of the city that without slavery, "[t]he ships would rot at her docks; grass would grow in Wall Street and Broadway, and the glory of New York, like that of Babylon and Rome, would be numbered with the things of the past."[42] As a result, the merchants consistently strove to maintain good relations with the South by donating to relief funds after numerous yellow fever epidemics, and supporting other charitable causes. Most important, they advocated tolerance of slavery, although

many could hardly be described as admirers of that institution. As one merchant once told an abolitionist: "we are not such fools as not to know that slavery is a great evil, a great wrong. . . . [But] [i]t is a matter of business necessity."[43]

After the enactment of the highly controversial Fugitive Slave Act of 1850, fear of sectional strife led 100 leading New York City merchants to form the Union Safety Committee. It advocated vigorous enforcement of the Act, but attempted to defuse tensions caused by well-publicized returns of captured fugitives. In 1851, the Committee engaged noted attorney George Wood to represent the owner of fugitive Henry Long, and then unsuccessfully attempted to purchase Long's freedom after he was returned to the South. The following year, under the auspices of the *Journal of Commerce*, sufficient funds were quickly raised to purchase the freedom of James Hamlet. As previously noted, this effort was successful; Hamlet was returned to New York and welcomed by a large crowd at City Hall.

Lacking in social skills, he was sometimes so mentally preoccupied with legal matters that he ignored greetings on the street.

Similarly, the merchants moved swiftly to placate southern opinion after Judge Paine's decision. The *Journal of Commerce* announced a subscription fund to reimburse the Lemmons, and $5,290 was raised, $290 more than Lemmon claimed the slaves were worth. Some of the donors were motivated by sympathy for the Virginians, who were described as less than prosperous, and by a sense that there had "been a "meanness about [the] transaction,"[44] that Lemmon had been "robbed of his property by trickery and the forms of law,"[45] and because "a gross injury [had] been done to a fellow citizen."[46] Heading the list of donors was Judge Paine ($100) who had described his decision as a "great misfortune" for the Lemmons.[47] (It was rumored among the abolitionists that Paine's $100 donation had been given to him by the merchants.[48])

Late in November, the merchants presented the Lemmons with a sight draft for $5,000 payable on their return to Virginia, the family having abandoned its plans to settle in Texas. At the same time, the Lemmons agreed to free the slaves, but only after the completion of legal proceedings, since freeing them immediately would prevent an appeal of Judge Paine's decision. As for the eight former slaves, despite predictions by the *Day Book* that, unaccustomed to freedom, they would become as "thieves, paupers, and prostitutes,"[49] and the suggestion by a Georgia paper that they would end up in New York's notorious Five Points,[50] aided by $800 raised by the abolitionists, they were already in the Elgin Settlement, a fugitive slave community in Upper Canada.[51]

Since the Lemmons had no further personal interest in the case, and because both of their attorneys, Lapaugh and Clinton, were reportedly busy with other legal matters,[52] the case did not reach the General Term of the supreme court until 1857. By then, two of the top attorneys in New York City had been drawn into the case. The Virginia attorney-general engaged Charles O'Conor, an Irish-Catholic, well known for his pro-slavery/pro-southern views. The son of a rebel who fled Ireland after the failed 1798 uprising, O'Conor overcame a poverty-stricken youth to become an affluent and successful attorney, admired for his thorough preparation and extensive legal knowledge. He was described by his *Lemmon* opponent, William M. Evarts, as "a man without vanity . . . absolutely hostile to every form of humbug."[53] Reportedly lacking in social skills, he was sometimes so mentally preoccupied with legal matters that he ignored greetings on the street. By the 1850s, O'Conor had handled numerous high-profile cases, perhaps most notably the successful representation of the wife of noted actor Edwin Forrest in a long-running, hotly contested divorce proceeding.[54] Among his other well-known cases was *Jack v. Martin*,[55] where he successful represented the owner of a fugitive slave. Politically, O'Conor was connected to Tammany Hall and the pro-southern Hard Shell/Hunker faction of the New York Democratic Party. A strong unionist who feared that abolitionism could result in southern secession, he was as convinced as any slave owner of black inferiority and that slavery was a necessary and beneficent institution.

William M. Evarts, O'Conor's opponent, was brought into the case by Chester A. Arthur, then a junior member of the Culver law firm, to replace New York Attorney General Odgen Hoffman. Born in Boston, Evarts was a Yale graduate who had studied at the Dane Law School and the Daniel Lord firm in New York City. Described as "polished, self-possessed, [and] keen-witted,"[56] Evarts first gained a reputation in 1841 by serving as junior counsel in the unsuccessful defense of a former slave trader and notorious forger, but his later practice generally involved representing bankers, merchants, and insurance companies. His court appearances included several instances where he opposed O'Conor, including the well-publicized dispute over the will of wealthy merchant Henry Parish,[57] and *People ex rel. Wood v. Draper*, where Evarts successfully argued in the Court of Appeals for the constitutionality of a controversial act that replaced the Tammany Hall-controlled New York City police force with one controlled by the state.[58] Evarts was a former Whig, and one of the founders of the New York State Republican Party. Originally a supporter of the Fugitive Slave Act, his opposition to slavery strengthened during the 1850s, and "wandered into genuine passion."[59]

By the time *Lemmon* reached the General Term, sectional conflict over slavery had intensified. Many southerners were incensed by abolitionist activity in the North, convinced that it was part of a wider plot by the British (who had abolished slavery in their West Indian colonies) to undermine slavery in the South.[60] Meanwhile, anti-slavery northerners were outraged by the passage of the Kansas-Nebraska Act in 1854, which opened the federal territories to slavery and the subsequent efforts by pro-slavery forces to make Kansas a slave state. Many suspected that the aggressive "Slave Power" faction, not satisfied with spreading slavery to the territories, would use *Lemmon* to reestablish slavery in the free states, fulfilling the boast of Robert Toombs, a United States senator from Georgia, that he would someday call the roll of his slaves on Bunker Hill.[61]

In March 1857, opponents of slavery were further angered and alarmed by the *Dred Scott* decision, which contained the statements by former slave owner Chief Justice Roger Taney that the Constitution treated slaves as property which the government had a duty to protect,[62] and that blacks had "no rights which the white man was bound to respect."[63] The abolitionist *New York Daily Tribune* maintained that decision deserved "just so much moral weight . . . as the judgment of a minority of those congregated in any Washington bar-room."[64] In Albany, an assembly report accused the Justices of "plac[ing] themselves . . . in the front rank of pro-slavery propagandism and offensive aggression upon the rights of the free state."[65] The Legislature then passed a resolution stating "[t]hat this state will not allow slavery within her borders, in any form, or under any pretence, or for any time however short."[66]

Lemmon was scheduled for argument before the General Term in May 1857, but O'Conor and Evarts favored a postponement because they wanted time to study the as-yet-unpublished *Dred Scott* decision.[67] The oft-delayed argument finally took place in early October before five supreme court justices. William Mitchell, the presiding justice, was a graduate of Columbia College elected to the court in the same Whig sweep that put Judge Paine on the bench. Also present were Charles A. Peabody, a participant in the founding of the new Republican Party, and his fellow Republican Henry E. Davies, the former corporation counsel of Buffalo. The two remaining justices, Thomas W. Clerke and James J. Roosevelt, were Democrats. The Irish-born Clerke, a member of the Hard Shell faction, had visited New York in 1823 after studying law in London, and decided to stay. The Tammany-connected Roosevelt (Theodore Roosevelt's great-uncle), derided by conservative Whig diarist Philip Hone as a "foolish piece of vanity,"[68] would later demonstrate his attitude toward slavery when as a United States district attorney he dropped slave-trading charges against the crew of the ship *Orion*, and conducted a less-than-vigorous prosecution of accused slave-ship captain Nathaniel Gordon.[69]

During the three-day General Term oral argument, O'Conor maintained that slavery was permitted under the common law, and that judges had no right to declare it to be contrary to the "unconstitutional and imaginary" law of nature.[70] He argued that New York's ban on slave transit violated the principles of comity, the Privileges and Immunities Clause, and the Commerce Clause. Finally, he claimed that "the general doctrines in Dred Scott's case must be maintained, their alleged novelty notwithstanding."[71] Evarts and his co-counsel, abolitionist attorney and prominent Republican Joseph Blunt, argued that neither comity nor the Privileges and Immunities and Commerce clauses required New York to permit slave transit. Instead, it was maintained that New York "has the right to reiterate the law of nature – to purge herself of an evil that exists only in violation of natural right."[72]

The relative merits of these arguments were essentially in the eye of the beholder. The *Day Book* approvingly published O'Conor's pro-slavery remarks,[73] while the *Tribune* maintained that O'Conor's argument "from beginning to end smacked of the lash," and claimed that Evarts and Blunt "spoke like lawyers, the representatives of a learned and humane profession."[74] The opinion that mattered, that of Justice Mitchell, handed down in December, affirmed Judge Paine (who had died in 1853), agreeing on all points with Evarts and Blunt. Tammany Democrat Roosevelt alone dissented, but published no opinion.

Presumably because of the Court of Appeals's rapidly expanding caseload,[75] *Lemmon* was not argued there until January 1860. The Court then consisted of four judges elected statewide, and four supreme court justices assigned for one-year terms. The chief judge was Democrat George F. Comstock of Syracuse, elected to the Court in 1855 as the candidate of the anti-immigrant/anti-Catholic Know-Nothing Party. Two judges, Democrat Thomas Clerke, and Republican Henry E. Davies, had concurred with Justice Mitchell when they heard the case while serving on the General Term. Clerke was serving as a temporary judge, while Davies had been elected as a regular judge in 1859 after winning the Republican nomination because of his anti-slavery credentials.

Other Democrats on the Court were Samuel L. Selden, a Hard Shell adherent from Rochester, who was elected in 1855, and Hiram Denio of Utica. First elected to the court in 1853, Denio was renominated in 1857 over the objections of New York City Mayor Fernando Wood and Tammany Hall (who were infuriated by the judge's decision in the police department case), and then won a three-way race against the Republican and Know-Nothing candidates. At the Republican state convention, some delegates, looking ahead to the Court's ruling on *Lemmon*, unsuccessfully backed Denio as their nominee, assuring

their colleagues that he was against slavery and favored state laws.[76] The remaining judges were Republicans: William J. Bacon of Utica who reportedly "could not tolerate the idea of human slavery";[77] William B. Wright of Monticello, who during the tenant farmers' anti-rent war of 1845–46 had held court in a courthouse filled with armed men; and Henry Welles from Penn Yan, a War of 1812 veteran and former Yates County district attorney.

Before a large audience at the Court of Appeals, O'Conor, Evarts, and Blunt made essentially the same legal arguments as in the General Term. O'Conor also expounded at length on alleged black inferiority and the benefits of slavery. His argument included an appeal to patriotism: "I see not how any honorable American can love his country or pretend to be a patriot and yet join in this crusade against negro slavery — a crusade against his country's honor, peace and prosperity."[78] Here, he referred to America's traditional enemy the British, proclaiming, "Can he be a patriotic American who joins in the cry of [the British] against his country's Constitution; who joins with a foreign adversary in denouncing it as a foul reproach to the name of humanity; as an outrage against common decency?"[79]

Evarts presented the Court with a list of dire social and legal consequences if slave transit were permitted. His approach to *Dred Scott* was to argue that the case affirmed a state's control over the condition of all persons within it, and that statements such as Chief Justice Taney's notorious remark about blacks having no rights a white man was bound to respect "are without any application to the real inquiry of this court."[80] He also included the warning that if the slave states continued their attempt to spread slavery into the federal territories and compel the free states to tolerate it, "catastrophe may happen; this catastrophe will be, not the overthrow of our common government, but the destruction of this institution, . . . which will have provoked a contest with the greatest forces of liberty and justice which it cannot maintain, and must yield in a conflict which it will, then, be too late to repress."[81]

Denio's lengthy majority opinion affirming the General Term agreed with Evarts and Blunt on most issues, except that it allowed that in certain instances the Commerce Clause might require permitting the transit of slaves through a free state. In a more strongly worded opinion, Wright, with his three fellow Republicans concurring, called slavery "repugnant to natural justice and right,"[82] and differed with Denio over the Commerce Clause, maintaining that it did not affect the power of the states over slavery. Hard Shell Democrat Clerke, whose attitude toward slavery can be discerned in his comment that only the "nervous and fastidious"[83] would see any detriment in permitting slave transit, reversed the position he had taken in the General Term. Citing *Dred Scott*, he argued that slaves were property protected by the Constitution, and accordingly, the repeal of the nine-months law was "directly opposed to the rules of comity and justice which ought to regulate intercourse between the States of this Union."[84] Democrats Selden and Comstock, in brief opinions that the *New York Times* mocked as "stump speeches,"[85] claimed that they had been unable to spend enough time studying the case to write full opinions, but that in their view, the repeal of the nine-months law was a violation of justice and comity.

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As previously noted, it was expected that the Supreme Court would have the final say in *Lemmon*. A Georgia newspaper optimistically predicted, "It is highly probable justice will be rendered by that Court, in conformity with its decision in the case of Dred Scott."[86] Conversely, the *Hartford Daily Courant* warned: "The Lemon [sic] case will now be carried to the Supreme Court in Washington, and if the Shamocracy triumph in the Presidential contest in 1860, the ruling in all probability be reversed."[87] The *Courant* editors' fears about the case in the hands of pro-slavery judges were realistic. In 1854, in *Wheeler v. Williamson*, a pro-slavery federal judge ruled that the repeal of Pennsylvania's "six-months law" did not affect the right of slave transit.[88] Four years later, pro-slavery judges on the California Supreme Court held that a temporary resident retained ownership of a slave he'd brought with him from Mississippi.[89] In fact, a modern commentator argues convincingly that Taney's Court could have ruled that New York's ban on slave transit was an "unconstitutional interference with interstate commerce [and] . . . that the statute was also an abridgement of the comity guarantees of Article IV."[90]

As it was, the onset of the Civil War ensured that Evarts and O'Conor would not argue *Lemmon* before the Supreme Court.[91] O'Conor never changed his views on slavery and, at the end of the Civil War, volunteered to

defend Jefferson Davis. During the 1870s, he participated in the reformist crusade that brought down the Tweed Ring. When he died in 1884, his funeral mass at the new St. Patrick's Cathedral was attended by many New York legal notables. Evarts's subsequent career included serving as defense counsel for Andrew Johnson during his impeachment proceedings, representing the Republican Party during the disputed Hayes–Tilden presidential election, and serving as Hayes's secretary of state and as a United States senator; he died in 1901. As for the Lemmons, whose ill-advised trip to New York produced the controversial case, they settled in Botetourt County, Virginia, and in 1860 were listed as the owners of four slaves.[92]

It has been claimed that "within the realm of state action *Lemmon* represents the final development of the law of freedom."[93] However, it has also been noted that the Court of Appeals's rejection of O'Conor's constitutional arguments for the slave owners "hardly constituted new law."[94] Furthermore, the slave transit issue did not, as Judge Clerke claimed, "consist of purely legal questions."[95] Instead, the case's outcome was determined by social and political factors existing in New York in the decade preceding the Civil War. The ultimate position of all the judges who ruled on the constitutionality of the ban on slave transit conformed to their political affiliation and/or views on slavery. Thus, what *Lemmon* does represent is the victory of a position based on morality and human rights, unlike *Dred Scott*, where the Justices in the majority were influenced by racist beliefs, and economic and political considerations. ■

1. Report of the Lemmon Slave Case Containing Points and Arguments of Counsel of Both Sides and Opinions of All the Judges 13 (1860) ("Report of the Lemmon Slave Case").
2. *Id*. at 12.
3. *Id*.
4. Untitled, Richmond Examiner, Nov. 19, 1852, at 1,
5. *The Lemmon Case*, Charleston Mercury, Dec. 16, 1852, at 1.
6. 5 Sand. 681 (N.Y. Super. Ct. 1852).
7. *The Slaves of Jonathan Lemmon*, N.Y. J. Commerce, Nov. 18, 1852, at 2.
8. *Mr. Ashmead*, Daily Dispatch (Richmond), Dec. 2, 1852, at 2.
9. Leo H. Hirsch, *The Free Negro in New York*, 16 J. Negro Hist. 415, 415 (1931).
10. 1850 United States Census, Fifth Ward 417 (copy on file with the author). In 1846, Louis Napoleon had had successfully petitioned for the freedom of alleged fugitive slave George Kirk. *See In re* Kirk, 4 N.Y. Legal Obs. 456 (Sup. Ct., N.Y. Co. 1846).
11. 1841 N.Y. Laws, ch. 247.
12. 1817 N.Y. Laws, ch. 137.
13. Journal of the Assembly of the State of New York at the Sixty-Fourth Session 1013 (1841).
14. Journal of the Senate of the State of New York at the Sixty-Fourth Session 490 (1841).
15. For a list identifying all the Whig members of the legislature, see *Address of Whig Members of the Legislature*, Albany J., May 31, 1841, at 3. For a list of all the sixty-fourth session members, see Franklin B. Hough, The New-York Civil List 136, 248-50 (1855).
16. Journal of the Assembly, *supra* note 13, at 1381–82.
17. *Kirk*, 4 N.Y. Legal Obs. 456.
18. 1 R.S. 659, § 15.
19. *In re Belt*, 1 Parker Crim. Rep. 169 (Sup. Ct., N.Y. Co. 1848).
20. *Ex parte Davis*, 7 F. Cas. 45 (N.D. N.Y. 1851) (No. 3613). Conkling also fined the would-be slave-catcher $50 for assault, the maximum the law allowed. *The Buffalo Slave Case*, Brooklyn Daily Eagle, Aug. 22, 1851, at 2.
21. Martyn Paine, *Biographical Sketch of Hon. Elijah Paine*, 2 Reports of Cases Argued and Determined in the Circuit Court of the United States for the Second Circuit (Thomas W. Waterman ed., 1860).
22. For a thorough discussion of the pro-slavery view on slave transit through free states, see Thomas R.R. Cobb, *An Inquiry Into the Law of Negro Slavery in the United States* 209–20 (1858). Cobb was a leading Georgia attorney who helped write the Confederate Constitution, and who later was killed at the Battle of Fredericksburg.
23. U.S. Const. art. I, § 2, cl. 3 ("three-fifths" law), art. IV, § 2, cl. 3 (fugitive slave law).
24. U.S. Const. art. IV, § 2.
25. *Somerset v. Stuart*, (1772) 98 Eng. Rep. 499 (K.B.) (involving a slave belonging to a slave owner temporarily living in England). There is some dispute over what Mansfield actually said in his opinion. *See* Jerome Nadelhaft, *The Somersett Case and Slavery; Myth, Reality, and Repercussions*, 51 J. Negro Hist. 193 (1966) (maintaining that the often-cited version given in *Lofft's Reports*, and reprinted in the *English Reports*, is unreliable); William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. Chi. L. Rev. 86 (1974) (arguing for reliance on the *Lofft's Reports* version); Steven M. Wise, Though the Heavens May Fall 185-91 (2005) (discussing seven different versions of the opinion).
26. Report of the Judiciary Committee, on the Petitions of Numerous Citizens of this State, Relating to Slavery, Assembly Doc. No. 239 (Mar. 30, 1841).
27. *See Commonwealth v. Aves*, 18 Pick. 193 (Mass. 1836); *Jackson v. Bulloch*, 12 Day 38 (Conn. 1837).
28. *See In re Lewis Pierce*, 1 W. Legal Obs. 14 (Pa. Ct. Common Pleas 1848) (master and slave visiting Philadelphia); Maria v. Kirby, 12 B. Mon. 542 (Ky. 1851) (Kentucky court refused to recognize local Pennsylvania decision declaring free a slave who had visited Washington County for four days).
29. *See Kauffman v. Oliver*, 10 Pa. St. 514 (1849) (slaves who had transited Pennsylvania en route from Arkansas to Maryland escaped back into Pennsylvania).
30. For a discussion of the value of slaves to a southerner, see Cobb, *supra* note 22, at ccxvii.
31. Philip S. Foner, Business and Slavery: The New York Merchants & the Irrepressible Conflict 12 (1941) (citing N.Y. Herald, Dec. 14, 1857 (quoting the New Orleans Crescent)).

32. *Important Slave Case*, N.Y. Herald, Nov. 10, 1852, at 1.

33. *The Slave Case – Manumission of Eight Slaves*, N.Y. Herald, Nov. 14, 1852, at 2.

34. *The Slave Case*, N.Y. Daily Times, Nov. 15, 1852, at 6.

35. *Slaves Free – Important Decision*, N.Y. Daily Trib., Nov. 15, 1852, at 6.

36. *The Slave Case in New York*, Daily Dispatch (Richmond), Nov. 16, 1852, at 2.

37. *Decision of Judge Payne of New York*, Georgia Telegraph (Macon), Nov. 23, 1852, at 2, *reprinted from* the Richmond Examiner.

38. *The Slave Case – Manumission of Eight Slaves*, *supra* note 33.

39. *A Higher Law Triumph – Legal Sanction of Highway Robbery – The Humanity of the Abolitionists Satisfied*, N.Y. Day Book, Nov. 15, 1852, at 2.

40. *The Slave Case*, N.Y. J. Commerce, Nov. 11, 1852, at 3.

41. Foner, *supra* note 31, at 4 (citing N.Y. J. Commerce, Dec. 12, 1849; Oct. 25, 1850). By 1862, the value of goods sold to southern customers had risen to $131,000,000. *Id*. (citing Stephen Colwell, The Five Cotton States and New York or, Remarks upon the Social and Economical Aspects of the Southern Political Crisis 23–24 (1861)).

42. *Id*. at 4 (citing 39 DeBow's Review 318 (1860)).

43. Samuel J. May, Some Recollections of the Anti-Slavery Conflict 127 (1869).

44. *The Lemmon Indemnity Fund*, N.Y. J. Commerce, Nov. 20, 1852, at 2 (letter from Jonathan Sturges).

45. *Id*. (letter from Stewart, Greer & Co.).

46. *Id*. (letter from Henry Le Roy Newbold).

47. *The Fruits of Prejudice Against Slavery*, N.Y. Day Book, Nov. 15, 1852, at 2. According to the *Journal of Commerce*, Paine's $100 was later returned to him because the fund had been oversubscribed by $290. *The Lemmon Indemnity*, N.Y. J. Commerce, Nov. 27, 1852, at 3.

48. Thirteenth Annual Report of the American & Foreign Anti-Slavery Society 34 (1853).

49. *Abolitionists Satisfied*, N.Y. Day Book, Nov. 15, 1852, at 2.

50. *Decision of Judge Payne of New York*, *supra* note 37.

51. Lewis Tappan, *Correspondence of Lewis Tappan and Others with the British and Foreign Anti-Slavery Society* [pt. 11], 12 J. Negro Hist. 487, 494, 496 (1927) (letter of Dec. 10, 1852).

52. Henry Lauren Clinton, Extraordinary Cases 181 (1896).

53. Chester L. Barrows, William M. Evarts: Lawyer, Diplomat, Statesman 204 (1941).

54. *Forrest v. Forrest*, 10 Barb. 46 (Sup. Ct., N.Y. Co. 1850); *Forrest v. Forrest*, 2 Edm. Sel. Cases 180 (Sup. Ct., N.Y. Co. 1850); *Forrest v. Forrest*, 3 Bosw. 661 (N.Y. Sup. Ct. 1859).

55. 14 Wend. 507 (N.Y. 1835) (declaring the Fugitive Slave Act of 1793 unconstitutional, but remanding the slave to the owner because of an obligation to enforce the Fugitive Slave Clause of the Constitution).

56. 1 History of the Bench and Bar of New York 149 (David McAdam et al. eds., 1897).

57. *Delafield v. Parish*, 1 Redf. 1 (N.Y. Surr. 1857, *aff'd*, *Parish v. Parish*, 42 Barb. 274 (Sup. Ct., N.Y. Co. 1858); *In re Parish's Estate*, 29 Barb. 627 (Sup. Ct. Gen. Term 1859).

58. 15 N.Y. 532 (1857).

59. A. Oakley Hall, *William M. Evarts*, 7 Green Bag 93 (1896).

60. *See* David Brion Davis, Inhuman Bondage: The Rise and Fall of Slavery in the New World 281, 385 (2006).

61. For a reference to Toomb's remark, see *The Lemmon Slave Case*, Hartford Daily Courant, June 29, 1854, at 2.

62. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857).

63. *Id*. at 407.

64. Davis, *supra* note 60, at 287 (quoting N.Y. Daily Trib., Mar. 7, 1857).

65. Report of the Joint Committee of Senate and Assembly Relative to a Certain Decision of the Supreme Court of the United States in the Case of Dred Scott, Assembly Doc. No. 201 (1857).

66. 1857 N.Y. Laws 797.

67. *The Lemmon Case*, May 7, 1857, *in* 34 My Own Cases [n.p.] [n.d.] (press clipping).

68. Nathan Miller, The Roosevelt Chronicles 123 (1979).

69. For a thorough account of the Gordon case, see Ron Soodalter, *Hanging Captain Gordon* (2006).

70. *Law Intelligence*, N.Y. Times, Oct. 2. 1857, at 3

71. *Lemmon v. The People*, 26 Barb. 270, 276 (Sup. Ct. Gen. Term 1857), *aff'd*, 20 N.Y. 562 (1860).

72. *Id*. at 284.

73. *The Lemmon Slave Case – Charles O'Conor Sustains the Doctrines of the Day Book* (undated clipping), *in* 34 My Own Cases, *supra* note 67.

74. Untitled editorial, N.Y. Daily Trib., Oct. 6, 1857, *in* 34 My Own Cases, *supra* note 67.

75. In 1853, the court decided 207 cases, but by 1862, that number had more than doubled to 497. Francis Bergan, The History of the New York Court of Appeals, 1847–1932, at 44 (1985).

76. *Meeting of the Republican Delegates to Syracuse – Judge Denio's Nomination Favored*, N.Y. Times, Sept. 18, 1857, at 1.

77. *What the People Say of Him*, Utica Herald, July 4, 1889, *reprinted in* In Memoriam: William Johnson Bacon 94 (1889).

78. Report of the Lemmon Slave Case, *supra* note 1, at 119–20 (O'Conor closing argument).

79. *Id*. at 119.

80. *Id*. at 89 (Evarts argument).

81. *Id*.

82. *Lemmon v. The People*, 20 N.Y. 562, 617 (1860).

83. *Id*. at 633.

84. *Id*. at 644.

85. *The Lemmon Slave Case*, N.Y. Times, Apr. 26, 1860, at 4.

86. *The Lemmon Case*, Macon Daily Telegraph, Feb. 1, 1860, at 2.

87. *The Lemon Slave Case*, Hartford Daily Courant, Apr. 17, 1860, at 2.

88. 28 F. Cas. 682, 692 (E.D. Pa. 1855) (No. 16,726).

89. *See In re Archy*, 9 Cal. 147 (1858)

90. Paul Finkelman, *The Nationalization of Slavery: A Counter-Factual Approach to the 1860s*, 14 Louisiana Stud. 213, 224 (1975).

91. Some sources state that *Lemmon* actually was appealed to the Supreme Court, but the Court's archivist informed the author that he was unable to find any reference to Jonathan or Juliet Lemmon in the case files.

92. Schedule 2 – Slave Inhabitants in the County of Botetourt, State of Virginia 7 (June 1860) (copy on file with the author).

93. Paul Finkelman, An Imperfect Union: Slavery, Federalism, and Comity 310 (1981)

94. Aviam Soifer, *Compromise at the Boundaries of Bondage*, 10 Revs. in Am. Hist. 185, 188 (1982) (reviewing Paul Finkelman, An Imperfect Union: Slavery, Federalism, and Comity (1981)).

95. *Lemmon v. The People*, 20 N.Y. 562, 633 (1860).

Correction:

In J. Michael Hayes's article, "Are Medicare, Medicaid, and ERISA Liens? Resolving 'Liens' in Personal Injury Settlements," September 2007 *Journal*, note 22 referenced "So What's ERISA All About? A Concise Guide for Labor and Employment Attorneys" and incorrectly attributed it to Mr. Hayes. That article, published in the October 2005 *Journal*, was written by Stephen E. Ehlers and David R. Wise.

BY DAVID PAUL HOROWITZ

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A Bronx Tale

Introduction

Attorneys practicing in the personal injury field downstate encounter within the five counties of New York City a phenomenon known as the "City Part." Justices in the City Part preside over the pre-trial proceedings in cases in which the City of New York, and related municipal entities, such as the Health & Hospitals Corporation, are parties.

The advantages of a City Part include allowing the Office of the Corporation Counsel, where it represents the City or other municipal defendant, to husband its limited attorney resources in one civil part in each county. The advantages for the court system include the ability to oversee and monitor these same cases in one civil part on one docket. It also provides the opportunity for establishing procedures that both streamline pre-trial proceedings and ensure that the cases move to a stage of trial readiness as quickly as possible. The advantage for private litigants involved in litigation with the City is, perhaps, that in each particular county there is uniformity in dealing with these cases.

On the other hand, private litigants must contend with extended waiting time on both the pre-trial and trial readiness calendars. In some counties, the initial order at the preliminary conference contains a *supersedeas* provision,[1] vacating all previously served disclosure demands, and substituting, by category of case (such as a slip and fall on City property) uniform disclosure demands. In addition, the understandable familiarity that can arise between court personnel and the assistant corporation counsel appearing everyday in the same City Part causes some grumbling.

The dockets in City Parts can be staggering. One anecdotal piece of evidence: at a bar association event several years ago I spoke with Justice Luis A. Gonzalez, then presiding over the Bronx City part and now sitting on the Appellate Division, First Department, who told me that he had approximately 3,000 cases on his docket.

Presiding over a City Part is a Sisyphean task.

Disclosure in City Parts

One complaint that private litigants have had in cases against the City is that the City does not appear to be held to the same requirements as private litigants when it comes to the timeliness and completeness of its disclosure obligations. Having provided disclosure updates for many years, I can remember reviewing the cases for a given year, and it would seem to me that, on motions for a disclosure penalty pursuant to CPLR 3126, the City had been given multiple chances to cure a disclosure default, and seemed to consistently avoid the penalty of having its answer stricken.

I have also observed that this has changed in recent years, with the appellate divisions imposing disclosure penalties when City Part trial judges do not. Two recent cases from the Second Department, and one from the First, illustrate this trend.

In *Kryzhanovskaya v. City of New York*,[2] the Second Department modified the order of the trial court, which had declined to impose a penalty against the City for failing to produce a witness. The Second Department inserted language conditionally dismissing the City's answer unless the deponent sought by the plaintiff was produced, along with certain information relating to a witness in the case. The Second Department reminded litigants, and their attorneys, that "[s]triking a pleading is appropriate where a party's conduct in resisting disclosure is shown to be willful, contumacious, or in bad faith."[3] The Second Department had no difficulty ascertaining that the City had acted in a manner warranting a severe sanction:

> In this case, the willful and contumacious character of the defendant's failure to produce a witness for deposition can be inferred from its continuing noncompliance with two orders directing the defendant's deposition, repeated adjournments of the scheduled deposition dates, and inadequate excuses for the failure to produce a witness for deposition.[4]

The First Department imposed a similar conditional order, accompanied by a $10,000 sanction payable to the plaintiff's counsel where:

> Defendant's response to the myriad discovery orders entered in this action over the course of some two years has been inexcusably lax. While discovery has trickled in with the passage of each compliance conference, the cavalier atti-

> tude of defendant, resulting as it has in substantial and gratuitous delay and expense, should not escape adverse consequence.[5]

Of course, the orders were still conditional ones.

Not so in the next Second Department decision, *Maiorino v. City of New York*.[6] Acknowledging that actions should be resolved on the merits wherever possible, the Second Department reversed the trial court and struck the answer of the City:

> Here, the defendant's willful and contumacious conduct can be inferred from its repeated failures to comply with court orders directing disclosure and the inadequate excuses offered to justify the defaults. Accord that branch of the plaintiff's subsequent motion which was to strike the answer should have been granted, and the matter is remitted to the Supreme Court, Kings County, for an inquest on the issue of damages.[7]

At the same time, the message from the Court of Appeals that disclosure orders and rules are to be obeyed[8] is having its intended effect, and the appellate courts have taken to prodding trial judges to be more proactive in overseeing disclosure.

Recently, in *Figdor v. City of New York*, the First Department went out of its way to make clear its displeasure with a trial court that allowed the defendant in an action to engage in dilatory conduct:

> We take this opportunity to encourage the IAS courts to employ a more proactive approach in such circumstances; upon learning that a party has repeatedly failed to comply with discovery orders, they have an affirmative obligation to take such additional steps as are necessary to ensure future compliance.[9]

A City Part Paradigm

For some years the City Part in Supreme Court, Bronx County, has been presided over by Justice Paul A. Victor. In a number of published opinions during his tenure in that part, Justice Victor has consistently held the City to the same disclosure standards as the private litigants appearing before him. This body of case law provides a model of evenhandedness worthy of the highest form of flattery known in our legal system – theft in the form of copying elsewhere.

For example, in *Rampersad v. New York City Dep't of Education*[10] after the defendant failed to provide disclosure in response to a Preliminary Conference Order and an order following the plaintiff's first motion to compel, the plaintiff made a second motion for the same disclosure. The motion was referred to Judicial Hearing Officer (JHO) Giamboi, who recommended that all deposition dates be rescheduled, and further recommended that, if the defendant failed to produce its witness for deposition, its answer would be stricken. Justice Giamboi's recommendations were adopted by the court, the defendant failed to produce its witness for deposition. The court held that the terms of the conditional order had become absolute, and the defendant's answer was stricken.

> The defendants have not demonstrated an entitlement to be relieved from the terms of the conditional order. To the extent there has been some degree of compliance with the terms of the conditional order, that compliance constituted only the act of waiving the deposition of the plaintiff an issue that could have been resolved prior to the making of the motion, the holding of the hearing before JHO Giamboi, and the necessity of further appearances and submissions to determine compliance with the conditional order.
>
> Moreover, there was never any issue as to the plaintiff's availability for depositions. The problem is, and was, the failure to produce the defendants' building services staff. That deposition has still not been completed, and no justifiable excuse has been advanced for the failure to provide discovery.[11]

In *Miller v. The City of New York*,[12] the plaintiff was forced to move five times for disclosure and, when the defendant failed to comply with the final order, which was a conditional order of dismissal, the defendant's answer was stricken, with the court characterizing the defendant's belated efforts to comply as "too little, too late."[13] In addition, a monetary penalty of $2,500, on top of a prior $500 penalty, was imposed to reimburse the plaintiff's counsel $500 for each motion brought to compel disclosure.

In *Santiago v. City of New York*,[14] it was the plaintiff who failed to provide disclosure despite one defendant having made four prior motions, each resulting in an order directing the plaintiff to disclose, including a final conditional order.

> Plaintiff has not only failed to comply with the preliminary conference order, and multiple interim orders, but also with the final conditional order which granted him an additional generous extension of time within which to comply. Moreover, counsel for plaintiff now presents this court with a totally frivolous and disingenuous motion which seeks an additional extension based on, among other things, a false claim that defendants' caused the delay. Since the conduct of the plaintiff herein appears to be even more egregious than that in *Figdor*, *Belton* and *Rampersad* . . . , the ultimate sanction, dismissal of the complaint is warranted.[15]

In addition to the dismissal of the plaintiff's complaint, the court imposed a $500 monetary penalty, per motion, per defendant, to reimburse the defendants for legal fees incurred in making those motions.[16]

In *Puglsey v. City of New York*,[17] a conditional order dismissing the complaint, and a $500 monetary penalty, was levied upon a plaintiff who failed to appear for a deposition pursuant to the preliminary conference order, failed to appear on the adjourned date requested by the plaintiff, and failed to

respond to the defendant's good faith letter.

Where the parties disputed who was responsible for adjourning the deposition of the defendant's witness, the court conducted a hearing, with both sides producing witnesses with knowledge of the events leading to the adjournment. At the hearing, the witness for the defendant acknowledged that the City requested the final adjournment, in violation of the court's conditional order, and the defendant was precluded from putting in any testimony on the issue of liability.[18] In addition, the court imposed a monetary penalty of $1,500 upon the defendant to reimburse the plaintiff for the additional motion practice.[19]

Where the defendant, post-note of issue and approximately seven weeks before trial, belatedly produced certain disclosure that had previously been demanded, and identified a surprise witness, the court denied the plaintiff's request to strike the defendant's answer, but precluded the use at trial, of the belatedly produced disclosure.[20] The court was not persuaded by the defendant's explanation for the late witness exchange:

> The surprise witness, Mr. Bress, appears to be both an eyewitness and a notice witness under the authorities cited above. The only excuse offered by defendant for not identifying the witness in a timely manner was that the defendant has a heavy caseload. Under the circumstances presented, this excuse is insufficient in view of the nature of the untimely disclosure, which goes to the very heart of the issues involved in this action.[21]

A final decision of Justice Victor addresses what he titled "A Recurring Problem Requiring a Proactive Solution."[22] The problem? "There appears to be an increasing 'inability' on the part of some municipal departments and agencies to locate and provide public records which are clearly discoverable."[23] The court imposed a conditional order of dismissal upon the City, with dismissal to occur unless, within 30 days, the records were turned over. So far, nothing out of the ordinary.

However, the court took the time to systematically review, and propose a method for addressing, documents that cannot be found:

> When Records Cannot Be Located:
>
> The City is cautioned that, in the event said records cannot be located, that an affidavit, which complies with the conditions set forth herein, must be served on plaintiff and filed with the court. Said affidavit must be made by the custodian of such records or by such other person duly designated by law to be a substitute custodian or person charged with the obligation to preserve, maintain, store and search for said records. At a minimum said affidavit must include the following information:
>
> (1) Official Custodian/Qualifications of Affiant. The affiant must be either the Official Custodian or otherwise qualified person that has been given the authority to conduct such search. The Official Custodian and the qualifications of the affiant (if not the official custodian) must be identified and described in detail. In addition, a copy of the law, rule or other document pursuant to which said affiant was designated and authorized to conduct said search must be appended;
>
> (2) Diligent Search Efforts.
>
> The affiant must provide a detailed description of the "diligent and reasonable efforts" made to locate and produce said reports and records

including the date, time and place for each search conducted;
(3) Reason For Absence.
The affiant must provide a meaningful explanation as to why the said reports and records are not now available; and that explanation, at a minimum, must include the information set forth, below;
(4) The Chain of Custody.
The affiant must provide the identity of the person or persons who created the said reports and records as well as all other persons in the authorized chain of custody; and if unknown an explanation must be provided;
(5) Last Known Possessor.
The affiant must provide the identity of the person last in possession of same; and if unknown, an explanation must be provided;
(6) Storage Locations.
All of the authorized locations where such reports and records are, or should have been, preserved, maintained and stored in accordance with the applicable rules and regulations must be identified;
(7) The Applicable Rules and Regulations.
All Rules and regulations relating to the preservation, maintenance and storage of reports and other records, made by an employee or other person charged with the obligation to make the said report and record, must be identified and a copy of said rules and regulations must be made available and/or appended as an exhibit.[24]

The court also specified the steps the defendant was to take when documents were located:

> When discoverable business records and reports are found they must be made available, together with a certification, which complies in all respects with CPLR Rule 3122(a) set forth above.[25]

This model is a significant contribution to the bench and bar.

Conclusion

All tales have an end, and this one is no exception. Approximately one week after writing the *Lewis* decision, Justice Victor was transferred out of the City Part. We hope the practical and fair supervision of disclosure that evolved during his tenure in the City Part will remain. ■

1. *See* LexisNexis Answerguide: New York Civil Disclosure § 1.12 (2007).
2. 31 A.D.3d 717, 818 N.Y.S.2d 469 (2d Dep't 2006).
3. *Id.* at 718.
4. *Id.* (citations omitted).
5. *Figdor v. City of New York*, 33 A.D.3d 560, 561, 823 N.Y.S.2d 385 (1st Dep't 2006) (citation omitted).
6. 39 A.D.3d 601, 834 N.Y.S.2d 272 (2d Dep't 2007).
7. *Id.* at 602 (citations omitted).
8. *See, e.g., Kihl v. Pfeffer*, 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999).
9. 33 A.D.3d at 562.
10. 10 Misc. 3d 1059(A), 809 N.Y.S.2d 483 (Sup. Ct., Bronx Co. 2005).
11. *Id.* at *3.
12. 15 Misc. 3d 1127(A), 841 N.Y.S.2d 219 (Sup. Ct., Bronx Co. 2007).
13. *Id.* at *5.
14. 15 Misc. 3d 1121(A), 839 N.Y.S.2d 436 (Sup. Ct., Bronx Co. 2007).
15. *Id.* at *4.
16. *Id.*
17. 2007 N.Y. Misc. LEXIS 2793, 237 N.Y.L.J. 72 (Sup. Ct., Bronx Co. 2007).
18. *Wilson v. City of N.Y.*, 16 Misc.3d 1101(A), 841 N.Y.S.2d 825 (Sup. Ct., Bronx Co. 2007).
19. *Id.*
20. *Crespo v. Metro. Transp. Auth.*, 15 Misc. 3d 1117(A), 839 N.Y.S.2d 432 (Sup. Ct., Bronx Co. 2007).
21. *Id.* at *4.
22. *Lewis v. City of N.Y.*, No. 23759/1997, 2007 WL 2694528 at *1 (Sup. Ct., Bronx Co. Sept. 14, 2007).
23. *Id.*
24. *Id.* at **6–7.
25. *Id.* at *7.

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New Scrutiny on Tax Deduction of Settlements

By Robert W. Wood

The Internal Revenue Service issues a dizzying array of guidance. There are various types of regulations (final, proposed, and temporary), revenue rulings, private letter rulings, field service advice, notices, actions on decision, technical advice memoranda, audit guidelines, and so on. All of these pieces of guidance are not of equal weight and some are, technically speaking, not even treated as authority. The truth is that tax practitioners read and rely on much of this guidance regardless of its denomination.

Indeed, it has been more than a quarter century since the U.S. Supreme Court cited to letter rulings.[1] There was considerable hubbub after that and the Service has taken steps to try to make it less likely that taxpayers will rely on informal guidance. Through nearly endless litigation under the Freedom of Information Act, tax analysts have done an incredible job of freeing up this information from the IRS when, at times, the IRS has shown indications it only wants to make certain guidance public.[2]

The Internet offers virtually everyone access to an incredible array of official as well as unofficial information. Today, I find that even fairly unsophisticated clients are reading IRS guidance. Not too many years ago only tax professionals had ready access to such information. As a result of this evolution of information accessibility there is a tendency to become overwhelmed and thus not to wade through certain regulation releases, proposed legislation and unofficial guidance like audit directives (*e.g.*, private letter rulings). The sheer volume of what there is to read has a chilling effect on what many of us do read. Becoming a selective reader may be a modern survival skill. Yet, with the increasing importance of making payments to the government, it would be wise to read the government's latest foray into the high-stakes topic of government settlement deductibility.

Not Freud's IDD

On May 30, 2007, the Service released an Industry Director Directive (IDD) on the tax deductibility of government settlements. The directive comes from the IRS's Large and Mid-sized Business Division (LMSB). It is labeled "Directive Number One," which, presumably, means there may be others.[3] Because it is formatted as a memorandum, the "from" line reads "John Risacher, Industry Director, Retailers, Food, Pharmaceuticals and Healthcare." The memo is directed to "Industry Directors, Director, Field Specialists, Pre-filing and Technical Guidance, Director, International Compliance Strategy and Policy, and Director of Examination, SBSE."

The IDD provides field direction as to the deductibility of settlements with a government agency. The battleground is the Maginot line between deductibility as a business expense on the one hand and a nondeductible fine or penalty treatment under 26 U.S.C. § 162(f) on the

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other. It is hardly surprising that the government would be looking at this question. After all, one cannot walk by a newsstand without the latest government settlement screaming its presence from the headlines; the government counts on an *in terrorem* effect on others in this respect.

Oddly enough, the IDD is not clear on its face. It elevates deductions claimed for False Claims Act and EPA cases to Tier I issue status. Tier I issues are of high strategic importance to LMSB and are supposed to have a significant impact on one or more industries. The fact that the IDD now treats these settlement deductions as Tier I issues is significant, and makes the IDD of greater importance.

The background of this IRS memorandum sets the stage. Settlements are enforcement tools used by governmental agencies to resolve violations of law and to punish companies short of going to court. According to the IRS, the settlement payment can include compensatory amounts, punitive payments or a combination of the two. Settlements addressed in this memorandum include those with the Department of Justice under the False Claims Act and with the Environmental Protection Agency (EPA) for supplemental or beneficial environmental projects. Yet the preamble to the IDD states that, outside the context of Department of Justice (DOJ) and EPA settlements, its principles can apply to *any* settlement between a governmental entity and a defendant under *any* law in which a penalty *can* be assessed. Note that this penalty "can" be assessed, not that it actually *will* be assessed or that it has been assessed.

Additionally, it is not surprising that the Government Accounting Office (GAO) suggests that most taxpayers deduct the *entire* civil settlement amount, despite the fact that DOJ records reveal that almost every settled case includes substantial penalties. Settlement may be all about issues of perception. Plainly, the payor and the payee settling a dispute may not agree on everything, including the degree of exposure the payor faces for potential fines and penalties.

Publicity Wars

The IDD also reveals that the government settles cases *without regard* to the tax consequences of a payment, which hardly seems a revelation. Recall the huge flap that developed over Boeing's 2006 settlement and its tax benefits. In mid-2006, Boeing settled the largest "penalty" *ever* imposed on a military contractor for weapons program improprieties.[4] As final details of the $615 million settlement were hammered out, tax issues took center stage. In July 2006, Senators Grassley, McCain, and Warner sent a letter to Attorney General Alberto Gonzales expressing outrage at the possibility that Boeing could deduct the $615 million. Allowing the Boeing settlement to be tax deductible, the senators said, would result in "leaving the American taxpayer to effectively subsidize its misconduct."[5]

The three senators made it clear they were shocked and outraged about the possibility that Boeing could legitimately whittle down the net after-tax "penalty" with a deduction that effectively is a taxpayer's expense. McCain and Grassley had raised similar concerns in 2003 about a $1.4 billion settlement with several Wall Street firms involved in allegedly biased reports issued by their research departments.[6] Some of that huge settlement was deductible. Indeed, $432.5 million of it went to finance independent research and $80 million of it was to finance investor education programs.[7]

Interestingly, a GAO study found that four large federal agencies (including the Justice Department) do not negotiate with companies over whether settlement payments are tax deductible. Instead, the GAO said, the agencies believe that is the IRS's job.[8] On July 18, 2006 Senator Grassley questioned Gonzales:

> I am very troubled that . . . DOJ was completely blind as to the real amount of the penalty, that is, the after-tax amount. To have a situation where the federal government is negotiating a settlement without understanding what the real settlement amount will be, the after-tax amount, is embarrassing. . . . It is actually worse that DOJ doesn't even know what the tax treatment is of the Boeing settlement. It tells me that DOJ lawyers gave away 35 percent of the store without

> even knowing it. And let me make sure you understand one matter, the tax law in this area is quite clear: a fine or penalty is not deductible. If the government clearly states it is a fine or penalty, it is not deductible. It is when the lawyers start getting out their sharp pencils to find the gray areas that the trouble starts.[9]

The Justice Department formally responded to Grassley, stating that the Boeing settlement had been fully signed on June 30, 2006, which was *before* Grassley waged his complaint. The Justice Department also noted that, as a matter of policy, its agreements are "tax neutral" and leave the difficult issues of deductibility to the expertise of IRS tax lawyers. In fact, the Justice Department letter to Grassley went on to state:

> It is the Department's policy and practice in settling fraud investigations to remain tax neutral and defer those issues to consideration by the IRS after settlement. The Department and the IRS agreed some time ago that this approach was both practicable and appropriate. . . . As a general matter, compensatory damages are deductible while penalties are not. The Department and the IRS have devised a system that routinely provides the IRS the information it needs to ensure that taxpayers are treating their settlement payments properly. Indeed, this information-sharing arrangement is consistent with the Government Accountability Office's recommendation that the IRS "work with federal agencies that reach large civil settlements to develop a cost effective permanent mechanism to notify [I]RS when such settlements have been completed and to provide IRS with other settlement information that it deems useful in ensuring the proper tax treatment of settlement payments."[10]

Responding to public attention, Boeing announced that it would not seek tax deductibility for the settlement – even though the bulk of the settlement is arguably deductible. Grassley responded:

> It's good Boeing won't seek a tax deduction for its $615 million settlement. That's the right decision. However, Boeing's lawyers believed the settlement was tax deductible. This tells me Department of Justice lawyers failed to take into account the settlement's tax treatment and allowed Boeing's lawyers to effectively negotiate a 35 percent discount. Any junior lawyer knows to look at a settlement's tax treatment, yet Justice lawyers were asleep at the switch. That's inexcusable. The Justice Department has to pay attention to the tax treatment in these big settlements. . . . I'm glad we have this result, but we need the right result every time. For that to happen, the Justice Department has to do a better job of paying attention to the tax consequences of settlements. In the meantime, I'll keep working to advance my legislation clarifying what is and isn't deductible in settlements.[11]

Settlements and Taxes

It is difficult to read the IRS's recent IDD without reflecting on the controversy over Boeing's 2006 settlement. Perhaps the IRS memorandum stating that the government does not pay attention to tax language is meant to be defiant. In any case, the IDD states that settlement language is typically neutral as to whether a portion of the settlement constitutes a penalty.

Interestingly, up until some point in 2005, many DOJ settlement agreements apparently included a statement that "[t]he parties agree that this agreement is not punitive in purpose or effect." As a taxpayer, that would make me think the payment is entirely compensatory. The IRS, on the other hand, suggests that this phrase relates to double jeopardy under the Constitution and has no bearing on tax issues.[12]

The memorandum notes the nature of Department of Justice and EPA settlements in cursory fashion. With respect to the EPA, the IDD notes that a portion of the civil penalty that was proposed for an environmental violation is typically reduced in exchange for the company's agreement to perform a Supplemental Environmental Project (SEP). The memorandum notes that most defendants will deduct the entire amount of the SEP as a § 162 expense or they will capitalize it and claim depreciation deductions. Evidently, treating a portion as a nondeductible penalty is rare.

Turning to the False Claims Act, the stakes are even larger. Settlements and judgments between 1987 and 2006 totaled over $18 billion, with $9 billion of this amount between 2001 and 2006 alone. Here again, the concern is what portion of these whopping payments defendants are deducting. Over 75% of the settled cases involve health care fraud. Approximately 14% of the FCA cases involve defense contractors. The remaining 11% involve a broad range of other industries.

Issue Spotting and Mandatory Audits

The memorandum states flatly that examination is mandatory for FCA settlements of $10 million or more and for SEP projects of $1 million or larger. Payments below these thresholds are not necessarily exempt. Examiners are directed to use a risk analysis process to determine if settlements and projects below these thresholds merit examination.

Sensibly, the memorandum directs that the government attorneys involved in these settlements should be key contacts in coordinating interviews and request for records relevant to the particular settling taxpayer involved. Since the identity of these companies is typically no secret (most are covered by the media), the memorandum advises consideration to pre-filing agreements with the taxpayer. The pre-filing agreement project may substantially cut back on what the Service perceives

as a trend in favor of immediate and 100% deductibility for these settlements.

Nondeductible Fines and Penalties

The memorandum reviews the language of §162(f) and its regulations. Section 162(f) states succinctly that "no deduction shall be allowed . . . for any fine or similar penalty paid to a government for the violation of any law." The regulations define fines and penalties as amounts

> paid pursuant to a conviction or a plea of guilty (or nolo contender) for a crime (either felony or misdemeanor) in a criminal proceeding; paid as a civil penalty imposed by federal, state or local law; paid in settlement of the taxpayer's actual or potential liability for a fine or penalty (again, civil or criminal).[13]

Significantly, legal fees are exempt from this strict regimen. Legal fees, related expenses paid, or those incurred in defending a prosecution or civil action arising from a violation of the law imposing the fine or civil penalty are deductible.[14]

Whether a payment constitutes a nondeductible fine or penalty depends on the purpose the specific payment was meant to serve. That, of course, is a tall order where payments are made in a negotiated settlement. Yet, the IDD mentions several technical advice memoranda (TAMs), including 200502041.[15] That TAM allocates a False Claims Act settlement between a portion treated as nondeductible under § 162(f), and a portion deductible as compensatory damages.

In another TAM (No. 200629030),[16] the Service concluded that a portion of the costs incurred for the performance of an environmental project was comparable to a nondeductible fine or similar penalty under § 162(f). That meant this portion of the cost of performing the environmental project could not be included in the basis of the assets produced in the project (under 26 U.S.C. § 263A or 1012).

Although the IDD cites these TAMs, perhaps as evidence that such nitty-gritty allocation issues can be solved, the line between compensatory and noncompensatory fines can be difficult to discern. Predictably, the taxpayer has the burden of establishing the deductibility of any payment.

Motive of Payments

Proving motive is tough but relevant here. It may be difficult for the taxpayer to show that a fine is imposed with a compensatory motive. Indeed, how does one find out the motive of the government on any subject? How high the stakes are, of course, depends on the size of the fine and the degree to which it is likely to be recurrent.

Several cases are particularly important in exploring the purpose of a payment. The IDD mentions *Talley Industries, Inc. v. Commissioner*,[17] and it is worthy of note. There, a company and several executives were indicted

Proving motive
is tough but relevant here.

for filing false claims for payment with the federal government. The Navy contracts in question allegedly resulted in a loss to the Navy of approximately $1.56 million. However, because of various potential liabilities, the settlement between Talley and the Justice Department was $2.5 million. When the company deducted that amount, the IRS asserted that the settlement was a nondeductible fine or penalty.

The Tax Court granted summary judgment for Talley, holding that the settlement payment was not a fine or penalty, except for a very small amount ($1,885) that was deemed restitution. The Tax Court found the government had never suggested that it was attempting to exact a civil penalty. Noting that $2.5 million was less than double the alleged $1.56 million loss, the court inferred that the settlement was not intended to be penal or punitive, but rather to be compensatory.

Unfortunately for the taxpayer, the Ninth Circuit then reversed and remanded the case, concluding that there was a material issue of fact and that the matter was not ripe for summary judgment. It is useful to review the instruction the Ninth Circuit gave to the court on remand:

> If the $940,000 represents compensation to the government for its losses, the sum is deductible. If, however, the $940,000 represents a payment of double damages [under the False Claims Act], it may not be deductible. If the $940,000 represents a payment of double damages, a further genuine issue of fact exists as to whether the parties intended payment to compensate the government for its losses (deductible) or to punish or deter Talley and Stencel (nondeductible).[18]

On remand, the *Talley* case is extraordinarily detailed, referring to extremely specific findings of fact about many of the developments occurring during the settlement of the case. The Tax Court resolved the question of whether the parties intended the settlement to include double damages under the False Claims Act. Even though the settlement agreement was silent on that point, the Tax Court concluded that reflected the parties' intent.

Then, the Tax Court turned to the question of whether the $940,000 double damage payment was intended to compensate the government for its losses, to deter or to punish. The taxpayer and the government were polarized, the taxpayer arguing that *no* portion of the $940,000 could be considered a penalty and the government arguing that the *entire* amount was a penalty. The issue was whether the amount was intended to reimburse the government for losses. The taxpayer noted that the government's actual losses exceeded $2.5 million, so the $940,000 was merely a portion thereof and had to be regarded as a reimbursement.

Nevertheless, the Tax Court was not persuaded by the wholesale nature of the payment; it noted that the settlement was a compromise of numerous issues. There was correspondence about the settlement offers, and the taxpayer had attempted to state in the settlement agreement that the amounts would be treated as restitution. That the government rejected this proposal led the Tax Court to conclude that the taxpayer failed to carry its burden of showing an intent to remediate.

For a second time, the *Talley* case went to the Ninth Circuit. There, in a brief opinion, the Ninth Circuit reviewed *de novo* the Tax Court's conclusions of law and its factual findings for clear error. Finding no error in the Tax Court's ruling, the Ninth Circuit again held that Talley failed to establish the compensatory nature of the disputed settlement.[19]

Nondeductibility was also the order of the day in *Allied-Signal*.[20] As the IDD notes, taxpayers make every attempt to avoid penalty characterization and to emphasize the remedial effects (or intent) of the payments.[21] In addition to other payments, Allied-Signal made an $8 million payment into a nonprofit environmental fund. The Tax Court determined that the entire payment to the endowment fund was nondeductible because the payment was made with the virtual guarantee that the sentencing judge would reduce the criminal fine by at least that amount. The Tax Court rejected the company's argument that the payment was not a fine or penalty because it did not serve to punish or deter, concluding that the payment served a law enforcement purpose, not a compensatory one.

Warning Signal

It is not surprising that the government victory in *Allied-Signal* features prominently in the IDD. The court's understanding in *Allied-Signal* that the proposed $13 million criminal fine would be reduced by the $8 million contribution led the Tax Court to famously hold that the $8 million payment was *in substance* a fine or similar penalty that was nondeductible under § 162(f). In our current era of increased focus on substance over form, and given the anti-tax shelter rhetoric that often now permeates tax cases, *Allied-Signal* was ahead of its time.

In fact, the IDD quotes *Allied-Signal*. The court sounded prophetic in stating that "while the form of the payment does not necessarily fit within the letter of Section 162(f), in substance petitioner paid a criminal fine." Allowing the taxpayer a deduction, the *Allied-Signal* court went on to say, "would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose."[22]

Audit Techniques

The audit techniques discussion in the text of the IDD is fairly breezy, noting that the facts and circumstances need to be developed and determined. But, the IDD includes audit guidelines as attachments, one set of guidelines regarding False Claims Act settlements, and another for EPA cases.

False Claims Act Settlements

The audit guidelines begin with the premise that almost every taxpayer deducts the entire amount of each False Claims Act settlement. Yet, the guidelines assert that a portion generally represents a penalty. To determine if a penalty has been imposed and to what degree, the guidelines require two primary questions to be answered: (1) Is a portion of the settlement payment a penalty, and therefore not deductible? (2) What amount is the penalty?

With these obvious questions, the guidelines exhort the examiner that the taxpayer must bear the burden of proving that it is entitled to deduct *any* portion of the settlement amount.

With these obvious questions, the guidelines exhort the examiner that the taxpayer must bear the burden of proving that it is entitled to deduct *any* portion of the settlement amount. Examiners are told that DOJ press releases are issued on practically every case and are available on the DOJ Web site. Additionally, national and local newspapers are helpful. The organization "Taxpayers Against Fraud" gets an indirect plug because examiners are told that the Taxpayers Against Fraud Web site touts every settlement.

Once the case is identified, the procedure is for the Service to contact the DOJ and the examining IRS employee then acts as liaison to the DOJ attorney who handled the case. Interviews, requests for records, and other protocols follow. Although the guidelines say that no two cases are identical, the template for document requests implies that all communications between DOJ, the defendant, and its representatives and employees (letters, memos, e-mail, etc.) are needed.

Significantly, the guidelines state that initial letters often formalize the position of the DOJ that "multiples" will be included in any settlement reached. The critical documents also include all computations and settlement proposals made by either side, in addition to everything that led up to the resulting settlements. As to the meaning

of "multiple," the guidelines make clear that DOJ uses this term when it means "penalty."

Predictably, any correspondence which addresses tax consequences is critical. The guidelines note that "it is rare for this subject to be addressed, however, the request for this type of correspondence needs to be made." Interestingly, discussions between the DOJ and the relator in the False Claims Act case (and the relator's attorney) are also likely to be requested. It is hard to see how the interaction with the relator is relevant, but perhaps the Service is looking for a reference to "multiples" or other buzzwords.

Although audit guidelines need not contain taxpayer arguments, it is noteworthy that these guidelines indicate that taxpayers frequently argue that a total settlement was to compensate the government for losses such as over-billing. If the settlement is (as almost always occurs) less than the initially publicized amount of the government losses, taxpayers (predictably) argue that since the settlement is less than the losses DOJ reported, all of the settlement must be "singles" and thus compensatory and deductible.

In response, the audit guidelines state: "This argument has no real merit as it is not factually based and it is not representative of the final settlement agreement."[23] It is at this point in the audit guidelines that they reference the ostensibly red herring phrase included in most DOJ settlement agreements written prior to June, 2005. The offending (now deleted) phrase is: "The parties agree that this agreement is not punitive in purpose or effect." Taxpayers understandably argue that this sentence means what it says, but the IRS audit guidelines state that DOJ had included this phrase relating only to double-jeopardy under the Constitution, and that it has no meaning for tax purposes.[24]

EPA

The audit guidelines for environmental violation enforcement settlements begin with a description of the EPA penalty framework. EPA settlements are far more likely to expressly address tax issues than False Claims Act cases. Indeed, there is often a consent decree lodged in federal court that expressly includes three major components: (1) a civil penalty amount that is separately stated and typically designated as nondeductible for income tax purposes; (2) injunctive relief that covers compliance projects; and (3) Supplemental Environmental Projects that are voluntary projects incorporated into a consent decree in order to negotiate a significant reduction in proposed penalties.

According to the audit guidelines, only a portion of the SEP will typically be used to reduce the penalty amount. Thus, the actual amount paid for an SEP and a reduced penalty may total to a figure greater than paying the original proposed civil penalty. The big question for the auditor in these cases becomes how to determine the penalty amount that is mitigated (or forgiven) as a result of the taxpayer agreeing to perform an SEP.

The audit guidelines assert that sometimes this amount can be readily ascertained in the body of the consent decree. Other times, extensive factual development of negotiation history must be conducted. The audit guidelines suggest that the examiner should contact the Environmental Technical Advisor once it is clear the taxpayer has agreed to perform an SEP. At this point, complete copies of files, correspondence, and accompanying documents are solicited from the taxpayer, the EPA, DOJ, and other parties in the matter. Any penalty exposure computations prepared by the EPA, the taxpayer or the taxpayer's representative are solicited.

Using *Allied-Signal* as a springboard, the memorandum concludes with the IRS's summary position that: (1) the taxpayer may not deduct the portion of costs incurred in performing an SEP that is "an amount analogous to a nondeductible fine or similar penalty" under § 162(f); (2) the taxpayer may not include in the basis of assets it produces the portion of the SEP cost that is "an amount analogous to a fine or similar penalty"; and (3) for FCA cases, the question is whether the settlement includes a nondeductible penalty, and that determination can only be developed through communication, coordination and cooperation between the IRS and the DOJ.

Conclusions

These summary conclusions in the IDD are ultimately not very helpful, but they are just snippets. The big question for EPA cases becomes just what *is* an amount "analogous" to a fine or similar penalty. With slightly different verbiage, the same question applies to FCA cases. Despite Senator Grassley's exhortations, if the Justice Department (and the EPA) does not attempt to address the pertinent tax questions, then these issues are probably not going to be any easier to resolve.

The audit guidelines, and the intense focus on factual development, suggest there will be a greater emphasis on the legal background and dynamic of the dispute than ever before. What does seem clear is that the IDD's focus on getting information from the Justice Department or an EPA lawyer suggests after-the-fact, interagency powwows are occurring. Indeed, it may mean that the IRS has a chance to help mold the tax position in arrears and to help frame what the intent of the settlement might have been.

I am not suggesting this is improper, but it is a little troubling to think that, although Senator Grassley's exhortations cannot compel DOJ personnel to consider tax issues in framing settlements, the IRS can help DOJ (and EPA) do so later. Couple this with the obvious fact (oft-repeated in the IDD) that the burden is on the taxpayer to establish deductibility, then the resulting mix

foreshadows a more subtle assault on the deductibility of government settlements.

It is unknown whether the IDD is a direct response to the widely publicized discussions about the lack of cooperation between the IRS and DOJ, and the criticism leveled at government lawyers that they (inappropriately) failed to take tax considerations into account in reaching settlements.[25] Still, it is hard not to connect the dots. It does not seem an unfair reading of the IDD to suggest that, rather than an up-front tax discussion at settlement time, the IRS gets to divine intent after the fact.

Then, the IRS can rely on the systematic advantage represented by the rule that the taxpayer must carry the burden of proving that *any* portion of the settlement is deductible. In any event, the IDD may portend increased scrutiny on settlements and on deductibility in the future. ■

1. *See Rowan Cos. v. United States*, 452 U.S. 247 (1981).
2. *See Tax Analysts v. IRS*, 416 F. Supp. 2d 119 (D.D.C. 2006); *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997); *Tax Analysts v. IRS*, 214 F.3d 179 (D.C. Cir. 2000).
3. *See* Memorandum from the I.R.S. on Government Settlements, LMSB-04-0507-042 (May 30, 2007).
4. *See* Andy Pasztor, *Boeing to Settle Federal Probes for $615 Million*, Wall St. J., May 15, 2006, p. A1.
5. *See* Leslie Wayne, *3 Senators Protest Possible Tax Deduction For Boeing in Settling US Case*, N.Y. Times, July 7, 2006, p. C3.
6. *Id.*
7. *Id.*
8. *Id.*
9. Doc 2006-13587, 2006 TNT 138-17.
10. Letter from Assistant Attorney General William Moshella to Sen. Charles Grassley (quoting GAO, Tax Administration: Systematic Information Sharing Would Help IRS Determine the Deductibility of Civil Settlement Payments, GAO-05-747, p. 26) (July 14, 2006).
11. U.S. Senate Committee on Finance Memorandum to Reporters and Editors, from Jill Gerber for Grassley, regarding Boeing's government settlement, potential deductibility (July 26, 2006).
12. LMSB-04-0507-042, Attachment I.
13. Treas. Reg. § 1.162-21(b)(1).
14. Treas. Reg. § 1.162-21(b)(2).
15. LMSB-04-0507-042.
16. *Id.*
17. 1994 WL 695434 (U.S. Tax Ct. Dec. 13, 1994), *rev'd*, *remanded*, 116 F.3d 382 (9th Cir. 1997).
18. *Talley Indus.*, 116 F.3d at 387.
19. *See Talley Indus., Inc. v. Comm'r*, 2001 WL 1085039 (9th Cir. Sept. 17, 2001), *aff'g* 1999 WL 407454 (U.S. Tax Ct. June 13, 1999).
20. *Allied-Signal, Inc. v. C.I.R.*, 1992 WL 67399 (U.S. Tax Ct. Apr. 6, 1992), *aff'd*, 54 F.3d 767 (3d Cir. 1995); William L. Raby, *When Will Public Policy Bar Tax Deductions for Payments to Government?*, Tax Notes, Mar. 27, 1995, p. 1995.
21. *See* William L. Raby, *Two Wrongs Make a Right: The IRS View of Environmental Cleanup Costs*, Tax Notes, May 24, 1993, p. 1091; Raby, *supra* note 20.
22. *Allied-Signal*, 1992 WL 67399 .
23. LMSB-04-0507-042, Attachment I.
24. *Id.*
25. See text accompanying notes 6–12, *supra*.

How Not to Govern: Lessons From the Report to the Board of Regents of the Smithsonian Institution

By Lesley Friedman Rosenthal

What does a nonprofit cultural institution owe to the general public and its funders by way of good governance? What does the institution's board owe to the institution by way of vision and oversight? What does senior management owe to the board by way of accountability? What systems should be in place to assure adequate checks and balances, and what happens when these systems are not in place or not enforced?

An independent review committee recently delivered a thoroughgoing and scathing critique of governance and management practices at the Smithsonian Institution. Questions surrounding the compensation and business conduct of Lawrence M. Small, the Secretary (as the Institution's Chief Executive is called), cropped up in press and other accounts as early as 2001, just one year into the Secretary's tenure, and persisted and became more pervasive over time. By early 2007, Senator Charles Grassley (R-Iowa), the Ranking Minority Member of the Senate Finance Committee, put questions and document requests to the Institution. The U.S. Senate froze a $17 million appropriations increase for the Smithsonian, citing Small's compensation as excessive. On March

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26, Small resigned from his position.[1] Ultimately the Chairman of the Board's Executive Committee appointed the Independent Review Committee,[2] which delivered its report on June 19, 2007.

The findings of the Independent Review Committee were stark and unflinching. Among them:

- The total compensation of the Secretary, Lawrence Small, at just under $1 million this year, was excessive compared to that of his predecessor, his peers at other institutions, and his subordinates, especially given his performance; his expenses were underdocumented, and his perks (including lavish travel expenses for himself and his wife) were disproportionate for a nonprofit organization funded primarily by taxpayer dollars. Moreover, the compensation, expenses and perks were under-disclosed to the Smithsonian Board;
- The Secretary's management of the Institution was "secretive," and his style of interacting with the Board was "imperialistic" and "insular." He, and not the Board, dominated the setting of policy and strategic direction. He actively forbade employees from sharing concerns with the Regents, even prohibited the General Counsel/Chief Ethics Officer, the Inspector General and the Chief Financial Officer from contacting the Board directly.
- Both the Secretary and the Deputy Secretary, Sheila P. Burke, were absent for substantial periods due to vacation, compensated service on corporate boards, and uncompensated service to nonprofit entities. The absences of the Smithsonian's first- and second-in-command totaled 403 and 546 days, respectively, over a six- to six-and-a-half-year period. Their outside compensation totaled close to $6 million and over $7 million, respectively, during that same period. These facts alone were sufficient to call into question where these executives placed their primary loyalties. Moreover, one or more of their board memberships, particularly with Chubb Corporation, from whom the Institution purchases insurance, created potential or actual conflicts of interest that were not properly reviewed by the Institution's General Counsel or vetted by the Board or its Audit Committee on an ongoing basis.
- Smithsonian Business Ventures, the division responsible for managing the commercial activities of the Smithsonian, was declining in revenue while salaries and expenses increased, and the division lacked adequate oversight by both senior management and the Board.

The Committee's 100-plus page report (plus some 41 exhibits) reveals a toxic combination of unchecked arrogance by the Chief Executive Officer, a relatively disengaged Board, and a dysfunctional senior staff structure, including a General Counsel, Chief Financial Officer and an Acting Inspector General who allowed themselves to be marginalized by the Secretary from direct and proper reportage to the Board.

The Unchecked Excesses of the Chief Executive

The Committee reported a number of examples of the Secretary's excesses and the manner in which they went unchecked.

Salary

Mr. Small negotiated a high starting salary with just a small number of Regents, which was neither disclosed timely to nor formally approved by the Board. The handsome starting salary was further enhanced at the outset by a sizable housing allowance, ostensibly for the purpose of hosting Smithsonian business and social functions. Those functions hardly materialized, but the terms of the housing allowance were continued and even increased. Indeed, the recordkeeping requirements for eligibility for the housing allowance were later relaxed – upon Mr. Small's direction to management under his direct supervisory control and, again, without full Board review – such that no actual expenses need be incurred for the allowance to be paid. This arrangement, together with other "noncompensation" arrangements such as payments in lieu of pension equal to 17% of his annual base pay, and first-class air travel for the Secretary and his wife "when appropriate," were found by the Committee to be a mere "'packaging device' for delivering Mr. Small additional compensation in a manner that would conceal the true size of his pay."[3] His true total compensation far exceeded that of his predecessor and that of an appropriate peer group of comparitors.[4]

The Committee also noted the highhanded manner in which these compensation excesses were carried out. Mr. Small secured for himself a 45% increase in base salary in one year, between 2001 and 2002, by ordering and then manipulating a compensation study by an outside consultant. He went so far as to dictate the comparables for the outside consultant to use and the percentile that was to be referenced. The resulting recommended increase was passed through the Executive Committee but not the full Board, contrary to the Smithsonian's governing documents.[5]

Similar activities occurred in 2002, 2004 and 2006. The pattern continued: an outside compensation firm was retained by management, not the Board or its Compensation Committee; and the peer group was determined by management, with no input from the Regents or from the consultants, who were merely to "crunch the numbers."[6] Indeed, the consultants never met with the Smithsonian's Compensation Committee without Mr. Small and Ms. Burke present. Ultimately, Mr. Small's total compensation package jumped from $536,100 in 2000 to $915,698 in 2007.

Nothing in Mr. Small's performance was found to justify these figures. Indeed, according to the Committee, private contributions to the Smithsonian declined during the Small administration. Business revenue, including from Smithsonian Business Ventures (SBV), dropped by 10% over the same period. Both of these declines meant the institution would rely even more heavily on the federal government for funds. Certain business deals that SBV did enter into, such as a semi-exclusive television contract with Showtime Networks Inc. for 30 years, were criticized as being unfair to researchers and scholars.

Excessive Absences and Outside Compensation

Mr. Small took off 403 days in six years, of which 339 were vacation days and 64 were work days missed for non-Smithsonian obligations, such as attending Chubb and Marriott board meetings. His Deputy, Ms. Burke, took off 546 days in six and a half years, including 130 vacation days and 416 work days missed for non-Smithsonian obligations. Ms. Burke served on the boards of Chubb and Wellpoint, Inc., as well as the Kaiser Family Foundation, the ABIM Foundation, and Community Health Systems. Part of her outside hours also included unpaid service to a number of nonprofit organizations such as teaching at Harvard University's Kennedy School of Government in Cambridge, Massachusetts, and several other institutions of higher learning, and service on other advisory boards or committees in the health policy field.[7]

The Committee expressed deep concern about the executives' ability to devote due energies and loyalty to their primary employer, the Smithsonian, under these circumstances. Also of concern was that there was no policy in place limiting leave, and the Board was evidently unaware of both the lack of a leave policy and these frequent absences.

Mr. Small's outside compensation during his six-year tenure at the Smithsonian totaled nearly $6 million, essentially from service on the boards of Chubb and Marriott. Ms. Burke's outside compensation for her board service, including options, was estimated to be worth about $7.2 million from 2000 through 2007. The size of these figures, particularly when compared to these executives' salaries for their purportedly full-time work at the Smithsonian, again calls into question where their loyalties were likely to lie.

Other Matters

The Institution has been subject to criticism throughout the Small administration on arguably overly restrictive conditions set by donors on certain gifts, and the scope and content of some shows and displays.[8] In response, the Regents revised grant approval processes to include Board approval in certain instances, but there was no general overhaul of the Board's oversight role on program, policy and long-range planning until the 2007 crisis that led to the resignation of the Secretary, the Senate Finance Committee inquiry, and the formation of a governance committee and the Independent Review Committee.

An Antiquated Board Structure and Disengaged Members

The Independent Review Committee characterized the Smithsonian Board structure as "antiquated and in need of reform."[9] The Board of Regents is composed of just 17 persons: the Vice President of the United States, the Chief Justice of the United States, three Members of the Senate, three Members of the House of Representatives, and nine other persons selected by joint resolution of Congress.[10] By tradition, the Chief Justice serves as Chancellor.

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This structure assures quite a distinguished Board to carry out the noble mission of the Institute;[11] but given the heavy public responsibilities of the many public officials on the Board towards other primary constituents and stakeholders, it is almost by definition not a terribly engaged body. Moreover, of the nine public members, only two of them may be local residents of Washington D.C.; the other seven must be from other states, virtually assuring at least some degree of geographic distance from the Institution's central locus of activity. Thus, while the prestige of the organization attracts extremely distinguished figures from the for-profit, nonprofit and government sectors to serve on the Board, it is structurally not well suited to act in accordance with modern expectations of oversight.

Thus, it is no surprise that the Committee found "[h]istorically the Smithsonian Board of Regents appears not to have taken on a strong oversight role."[12] The Committee concluded that roles of the public officials should be clarified, and perhaps the number of "lay" leaders expanded, so that the Board may properly discharge its fiduciary function.

Moreover, the Smithsonian is a complex institution including some of the nation's leading museums, research centers, a zoo, retail shops, restaurants and buildings. In order for the Board to provide proper oversight and strategic guidance, the Committee concluded that future Board candidates should possess expertise in financial management, investment strategies, audit functions, governance, compensation and facilities management, as well as an interest in and a devotion to the arts and sciences.[13]

Ultimately, concurrent with the appointment of the Independent Review Committee, the Board created a standing Regents' Governance Committee with a mandate to swiftly and comprehensively review Smithsonian policies and practices as well as determine how the Board could better oversee the Institution. The Governance Committee has now made recommendations to strengthen the Regents' leadership and governance of the Institution.[14] The recommendations of the Governance Committee parallel many of the conclusions reached by the Independent Review Committee:

> Despite regular attendance by most Regents and active participation in meetings, in the end the Regents did not provide the level of leadership and oversight that they had intended. Contributing to the situation was an agenda and information flow tightly controlled by the Office of the Secretary. Information leading to difficult and critical decisions was at times prepared and presented in a summary fashion that did not encourage full and complete discussion. As a result, the Regents were at times unable to thoroughly consider the major and strategic issues facing the Institution.[15]

Lessons Learned From the Smithsonian Example: How Not to Govern

Trustees, senior executives, academics and others interested in the not-for-profit sector may take away some lessons from the Smithsonian's experience. Key lessons for attentive students of the sector include:

1. Properly run organizations have an active governing board with a vision and strategy for carrying out the mission of the institution, and a Chair and other Board-level leaders who can provide the time properly to oversee the carrying out of the mission. As remarkable an opportunity though it may be to have individuals of singular prominence and importance serve in leadership roles on the Board (such as, here, the Vice President and the Chief Justice), the interests of the organization are better served by governing board members and a Chair with the time and attention necessary to devote to the fiduciary responsibilities of overseeing operations and management. In addition, it is important that the Board be the right size and possess the time, expertise and independence necessary to discharge its duties. Active committees should include Audit and Review, Governance and Compensation, and Human Resources, and these should include, if necessary, non-Board members with special expertise. Committees that include non-Board members may be constituted as committees of the corporation rather than as committees of the Board.
2. Prominent persons – donors, artists, scientists, public officials and others – with an interest in the organization's program but lacking the time, availability or expertise to provide meaningful oversight may serve the organization in a non-fiduciary capacity, such as on an honorary or advisory board or on professional councils.
3. The Board should meet regularly – the Committee recommends no less than once every other month, although reasonable practices differ – and/or there should be a robust Executive Committee that is empowered, within legal limits, to discharge the duties of the Board between meetings. Where there is such an Executive Committee, its deliberations and actions should be promptly reported out to the full Board for review. The minute-taking function is not merely a ministerial or "housekeeping" matter, but a substantive responsibility that must be discharged assiduously.
4. The Board must not permit a single executive to run and dominate Board meetings, set agendas, or determine what information would be provided to Board members. At meetings of the Board, there must be adequate opportunity for members to receive and discuss reports from not only the Chief Executive, but also, as appropriate, directly from program executives, other in-house and outside professionals, and independent consultants if necessary. Time should be reserved for executive sessions, from which management should be excluded so that its performance may be fully and freely discussed.
5. Compensation and expenses of senior management, outside professional involvements, and transactions with interested parties should all be regularly reviewed by an Audit Committee and reported to the Board. Discussions of such matters should be documented for future and ongoing reference. Gatekeepers of the organization – general counsel and corporate secretary, chief financial officer, outside auditors, inspector general or the functional equivalent – *e.g.*, an internal auditor – must be assured independence and regular and direct access to the Audit Committee and Board in order to properly carry out these functions.
6. Executives' service on outside boards, particularly for-profit boards, and other outside activities should be carefully and continuously monitored by an Audit Committee or similar committee, because of (a) the time commitments that may be involved;

(b) the impact of compensated service, particularly where such compensation may be sizable relative to the employee's compensation at the nonprofit institution; and (c) business relationships between the outside organization and the institution that may be, or appear to be, a conflict of interest.

Additional Observations About the Committee Report

The Smithsonian Institution and its Board have shown admirable courage in undergoing a detailed and unflinching self-examination in such a public manner. The Committee's affection for the Smithsonian is evident. And, as noted above, the sector as a whole may benefit from the insights of the Independent Review Committee and the Governance Committee.

Readers should be cautioned, however, not to overgeneralize from the findings and recommendations of the Committee. The Smithsonian is a particularly visible nonprofit institution, but its governance failures should not be taken as endemic to the sector as a whole. The sector is considered by many to be reasonably regulated by a combination of voluntary measures, state and local law, industry self-regulatory bodies, watchdog reporting groups such as the Better Business Bureau and Guidestar, and federal disclosure and accountability measures such as the Internal Revenue Service Form 990 and rules against excess benefit transactions.[16]

Indeed, the Smithsonian itself was already subject to external rules and internal procedures that could have avoided many of the circumstances documented in the report, if they had just been properly deployed. Expenses were already required to be documented. Senior officials and employees with contracting authority were already required to complete conflict of interest forms every year.[17] Outside auditors and consultants were regularly brought in to review the books and expenses as well as conduct regular executive compensation reviews. The Institution and its executives were already subject to internal rules, such as bylaws, and external rules, such as Treasury Department regulations, regarding excess benefit transactions. Evidently the internal gatekeepers as well as the external regulators were equally stymied by those inclined to exploit weaknesses in the system.

The biggest problem at the Smithsonian may not have been a lack of rules and procedures, but a lack of enforcement and a lack of real Board oversight. Accordingly, the Committee's final recommendation – that "achieving effective oversight and governance at nonprofit organizations may ultimately require legislative action"[18] – may be an overreaction to one, admittedly spectacular, failure. Are new laws required or simply better enforcement of the existing ones, and a greater attentiveness by a more reasonably constituted Board?

The biggest problem at the Smithsonian may not have been a lack of rules and procedures, but a lack of enforcement.

Similarly, with respect to executive compensation, readers should be wary of substituting their own judgment for the judgments of persons with deep institutional knowledge of the subject organization and its leadership needs. It is not necessarily realistic to assume that an institution, even one of our nation's most august and respected nonprofits, will be able to attract top senior management talent just by the prestige of the organization alone. While the Committee would have expected to see a substantially lower CEO salary because "serving as Secretary is an honor" and that "compensation levels should reflect this,"[19] it is also clear from the report that the job of Secretary is enormously complex. Certainly salaries in the nonprofit sector, even for demanding, complex and highly visible jobs such as senior executives of a major museum, university, hospital or cultural complex, are nowhere near compensation levels for senior executives in positions of like responsibility in the Fortune 500. Nor should they be: most organizations' budgets, donors and the general public – who subsidizes these organizations directly through public grants and indirectly through the tax subsidy – will not permit it.

But trustee members of the organization's compensation committee, as informed by compensation consultants reporting directly to them, are much better situated to assess the particulars of what they need to pay to attract and retain suitable executives than anyone else. While there are certain professions, particularly in the program areas – curatorial and programming functions, certain academic fields, fundraising and the like – where the nonprofit world presents the only or most obviously viable career path, there are many other fields – legal, financial, investment, HR and labor relations, facilities management, marketing, and PR, just to name a few – where there is considerable competition from the for-profit labor markets that must be reckoned with. The need to attract business-savvy executives to the nonprofit world only becomes more compelling as more and more nonprofits enter an entrepreneurial mode, growing their commercial activities to improve their earned income streams in light of government funding cutbacks.[20]

As a point of comparison, outside service providers such as law firms, auditing firms, investment firms, search firms, construction contractors and consulting firms, are able to command full or close to full fees from nonprofits, with some notable and much appreciated pro bono exceptions.[21] These outside service professionals are not expected to perform their services primarily for the "honor" of it, even though they, too, may benefit psycho-

logically or reputationally from being associated with a prestigious and beloved client organization.

The Committee's concerns about outside activities are also noted, but the lessons should not be taken too far. While the Secretary's and Deputy Secretary's vacations and absences as documented by the committee are of genuine concern to the Smithsonian, it would not be sound for other institutions reflexively to discourage service to outside companies or organizations as a result. Outside board service, whether for-profit or not-for-profit, as the Committee notes, *may* indirectly benefit the primary institution in meaningful ways: by providing access to prospective donors and corporate sponsors, fresh perspectives and exposure to the ideas of leaders in other fields. Moreover, particularly regarding outside nonprofit activities, perhaps the question should be analyzed more broadly – for example, whether service to a professional association or other nonprofit entity benefits the entire sector, and accordingly may also benefit the institution itself. There should be reasonable limits to the number of outside boards an executive serves on, both in terms of outside compensation and in terms of time,[22] but those limits very much depend on the person, the outside entity and the nature of the involvement.

The lessons of the Smithsonian should be noted well, even by nonprofit organizations that have not experienced similar failures of governance and the attendant public criticism. In this post-Sarbanes Oxley era, standards of good governance in the nonprofit sector are rapidly evolving. The Smithsonian report both incorporates those lessons and makes a significant contribution to that continuing discussion. ■

1. In June 2007, the Deputy Secretary of the Institution and the President of Smithsonian Business Ventures, its for-profit arm, also announced their resignations.

2. The Committee was chaired by Charles A. Bowsher, former Comptroller General of the United States, and also included Stephen D. Potts of the Ethics Resource Center and A.W. "Pete" Smith. The full report is available at http://smithsonianirc.org/images/FINAL_IRC_REPORT.pdf ("Report").

3. Report at 4.

4. Section 4958 of the Internal Revenue Code (Intermediate Sanctions) imposes a tax on excess benefits for tax-exempt nonprofits. Excess compensation (including bonuses, benefits and deferred compensation) may lead to excise taxes on the disqualified person (up to 25% of the excess benefit amount), as well as on organization managers who knowingly participate in the transaction (including individual board of compensation committee members who approve the payment), up to 10% of the excess benefit amount. Treas. Reg. § 53.4958-1 *et seq*.

5. According to the Committee, while it is generally a good idea to obtain and provide to Trustees comprehensive information on management compensation, the process here was subverted by management itself and "was not used by the Regents for a thorough discussion of compensation strategy or what would constitute reasonable compensation for these individuals." Report at 47.

6. Report at 50.

7. Ms. Burke's attorneys argued in a letter to the Committee that her outside board service, teaching and other non-Smithsonian activities were properly disclosed by her and known to the Board. Letter of Gibson Dunn & Crutcher LLP, to Charles A. Bowsher, dated June 7, 2007, annexed to Report as Exh. 35.

8. For example, in May 2001, Mr. Small negotiated a gift of $39 million from the Catherine B. Reynolds Foundation to finance a permanent exhibition at the National Museum of American History to commemorate the achievements of prominent Americans. The gift was criticized by Smithsonian curators and scholars who questioned the degree of control Ms. Reynolds would have over the project. Report at 69 (citing Jacqueline Trescott, *Smithsonian Gifts with Strings Alarm Some Scholars; Secretary's Dealings with Big Donors Questioned by Staff*, Wash. Post, May 26, 2001 at C1).

9. Report at 2.

10. 20 U.S.C. § 42.

11. The Smithsonian is a trust instrumentality that was established by Congress in 1846 to hold in trust property donated by James Smithson and to carry out the provisions of his will for the "increase and diffusion of knowledge." The Smithsonian Act of August 10, 1846, as amended and codified, 20 U.S.C. §§ 41–67.

12. Report at 3.

13. Report at 20.

14. Report of the Governance Committee, dated June 14, 2007, *available at* http://newsdesk.si.edu/releases/Governance_Committee_Report.pdf.

15. *Id.* at 5.

16. In the years following adoption of Sarbanes Oxley corporate governance mandates for publicly listed companies in the for-profit sector, there was a great deal of discussion about adoption of SOX principles by state legislatures for nonprofits. While many nonprofits adopted such measures voluntarily, such as updating Audit Committee charters and conflict of interest policies and instituting whistleblower policies, to date only one state – California – has actually passed additional regulation.

17. Conflict of interest questionnaires were to be collected and reviewed by the Smithsonian's General Counsel, who also carried the title Chief Ethics Officer. However, in some years the questionnaires of the Secretary and other senior officials were not submitted to the Chief Ethics Officer, but rather kept within the Secretary's immediate area. There was a duly constituted Audit and Review Committee that was charged with reviewing the disclosure forms each year, although evidently no one questioned the absence of questionnaires from the Secretary or the lack of disclosure of certain relationships that were clearly disclosable.

18. Report at 107–08.

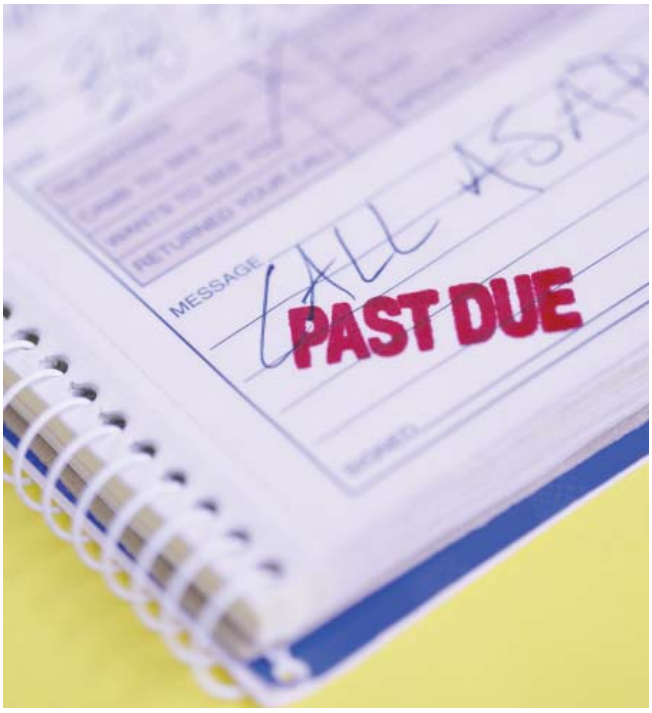
19. Report at 14.

20. *See generally Nonprofit Law, Economic Challenges, and the Future of Charities*, ___ Fordham L. Rev. ___ (forthcoming 2007).

21. Lincoln Center for the Performing Arts in New York City has harnessed the expertise of major law firms and in-house counsel departments, which provide strategic and legal advice on a pro bono basis. L.F. Rosenthal, *'Redeveloping' Corporate Governance Structures: Not-for-Profit Governance During Major Capital Projects, A Case Study at Lincoln Center for the Performing Arts*, ___ Fordham L. Rev. ___ (forthcoming 2007).

22. The National Association of Corporate Directors estimates that typical directors devote 250 hours a year to board-related work.

"Oh great Oz, you're being sued for posing as a Wizard."



10 Practical Questions as a Client Faces Loan Default

By Chester B. Salomon

Word of an existing client's impending loan default may come in a variety of ways. With a client in denial, the attorney may have heard of the client's troubles from another source. The loan may have been called or a lawsuit may have been commenced or threatened. Even the client's lateness in payment of legal bills may suggest other delinquencies, including the loan.

However the client may learn of the possible default, several important business questions should be asked by effective counsel. These questions go beyond examining the loan documents and conducting searches for UCC, tax, and suits/judgments filings. They relate to the big picture: liquidity, competition in the market, management and short-term and long-term fixes. Some of these questions are sensitive for both the lawyer and the client because they touch upon management's competency, responsibility and capacity to work out of the problem. While the client may appreciate sympathy and the promise of steadfast support, it really needs direction.

To give valuable service to a client, counsel must be prepared to provide clear analysis of the issues and solid advice about professionals who can assist.

Below are 10 practical questions that should be asked in these circumstances. More questions will follow from the client's answers. But these questions will help the client and counsel to focus and identify the best available solutions to the problems at hand.

1. What's the Company's Big Picture?

This question temporarily puts to the side the narrow legal issues. We are talking big picture – operationally and financially. Often it is helpful to both client and lawyer to have the client prepare an outline of the problems and how they arose. While other professionals (such as turnaround consultants, crisis managers and accountants) are skilled in digging into the problems, a lawyer should ask the big questions about the client's business and management's forthrightness, ability and desire to resolve the issues. The president, CEO, CFO, controller and a top sales manager will have insights. Communications with them normally will be protected under the attorney-client and the work-product privileges.[1]

2. Where Has the Cash Gone?

A loan default signals a liquidity crisis. How did the company get there? Did an unsuccessful new line of business or a big litigation drain resources from an otherwise profitable company? Did a customer delay payment, default on a large receivable or enter an insolvency proceeding? Has competition or new technology affected the sale or pricing of the company's products? Have key employees left or gone into competition? Are there money-losing contracts, environmental problems or legacy liabilities to unions, pensions or retirees? The answers will affect your advice to the client on the workout of the loan.

3. Is the Business Worth Saving?

While management, ownership and other professionals must weigh in on this cosmic issue, the answer will affect planning and discussions with the lender and trade credi-

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tors. If the probable answer is that the company cannot operate at a profit in the foreseeable future, still there may be options for the company – such as a sale of assets.

4. What's Management's Capacity to Address the Company's Problems?

Though it may have built and run a successful enterprise over decades, management may not be flexible or knowledgeable in talking with the lender and creditors about the company's problems and the impending loan default. Default is not a one-dimensional issue. In addition to its lender, the company sooner or later will face problems with suppliers, equipment lessors, customers or landlords. Management may have to dismiss long-time employees or openly admit failure of a business plan. Such challenges to management can be overwhelming. Signs of management's lack of capacity may be denial, a disposition to put off creditors, unrealistic promises to creditors, and obsession with personal issues (bonus payments, personal guaranties, etc.) instead of focusing on the big picture.

5. Is Management Conflicted?

Potential conflicts are common. For example, management may have lent money to the company and may be inclined to favor repayment of its loans over bank or trade debt. While equity in the company is under water, management may be tempted to bet for a home run with the company's diminished assets. Management may have signed personal guaranties of the problem loan or other company debt. In New York, the 10 largest shareholders of a private corporation are liable for unpaid wages (which include vacation and severance pay owed to employees).[2] Members of management may be "responsible persons" who are liable for federal and state income, FICA or sales taxes withheld by the company but not paid over to the government.[3]

Whether or not a palpable conflict exists, management must be counseled on its fiduciary duties. It's black letter law that officers and directors of a solvent public or non-public company owe fiduciary duties of loyalty, care and good faith to the company and its shareholders. In New York courts have broadened their fiduciary duties to creditors once the company becomes insolvent.[4]

Two variations on the same theme are that upon insolvency the directors (a) become trustees for creditors or (b) may continue to manage under the business judgment rule, which enables directors and officers to make good faith judgments about risks they face. The two standards for determining insolvency include the "balance sheet" test (fair value of assets less total of probable liabilities), similar to N.Y. Debtor & Creditor Law § 270, or the "equity" test (inability to meet obligations as they become due in the ordinary course of business).

Some courts have held that a company need not be insolvent to trigger officer and director responsibility to creditors and derivative liability – the company need only be in the undefined "zone of insolvency."[5] A recent Delaware Supreme Court decision held that creditors of an insolvent Delaware corporation may recover from directors for breach of fiduciary duty only if they can meet the strict requirements of derivative suits, including the requirement that a plaintiff must hold a stake in the corporation at the time of the directors' alleged wrongdoing. The decision states that a cause of action will not lie if the solvent corporation is in the "zone of insolvency."[6] The law varies by state, so officers and directors need to seek counsel and exercise caution in the "zone of insolvency."

6. Has Ownership/Management Put Itself in Jeopardy?

If shareholders or management are unresponsive to creditors' requests for accurate disclosure or have acted in their self-interest to the prejudice of creditors, to save the company the lawyer may urge the engagement of a crisis manager having credibility with the lender and trade creditors. Unless a lender is holding substantial cash collateral provided by the company or guarantors, the lender generally wants to work with the company in reaching (a) a temporary solution to stabilize the company and (b) a long-term solution to rehabilitate or sell the company and get paid.

Similarly, trade creditors do not want to lose suppliers or customers and equipment vendors are not eager to take back their property. Landlords of above-market leases will want to work with the company while landlords of below-market leases may prefer to relet their property on better terms. If management has misled creditors or lost their confidence, the buffer role served by an independent crisis manager will aid management in making accurate and timely disclosure to creditors and negotiating a workout.

7. How to Fix the Problems?

How to fix a company's problems depends on the business circumstances and generally is beyond the role of the lawyer. But as a leader of the rescue team the lawyer should aid management and other professionals to achieve a workout.

Short-Term and Long-Term Fixes

Short-term fixes include communication with creditors, finding ways to staunch bleeding and improve liquidity, selecting and assisting a crisis manager, assuring critical vendors of the company's viability and continuing payments, completing important projects, and obtaining new credit from the lender, shareholders, customers, suppliers or others. Long-term fixes include restructuring or selling

the company. Restructuring may include taking in a new equity partner who will infuse the needed cash.

Operational and Financial Fixes
Operational fixes generally relate to sales, purchases, plant, labor and related matters both in the near term and the long term. Financial fixes may entail adjustment of debt, "terming out" of short-term debt, conversion of debt to equity and restructuring the balance sheet.

Crisis Manager and Chief Restructuring Officer
Hiring a crisis manager or chief restructuring officer will enable competent management to devote time to the business and avoid some of the distraction of the crisis. In instances of management conflict, credibility problems, or management difficulty in recognizing the problems or implementing the solutions, the crisis manager plays an important role. Some crisis managers are affiliated with major accounting firms and others are boutiques. A retired business executive can be effective. Often the company engages an executive of the crisis manager to serve as chief restructuring officer. Experience and credibility with creditors are essential prerequisites in selecting a crisis manager and CRO.

8. What Are Sources of Short-Term Funding?

As noted above, several sources are usually available for short-term funding in a liquidity crisis, including the lender, the shareholders and sometimes vendors and customers. Other sources include hedge funds, private equity funds, "mezzanine" lenders (unsecured loans junior to senior secured debt) and "second lien" lenders (secured debt subordinate to senior secured debt). Recent reversals in the debt markets will have the effect of limiting funding sources.

9. Has the Company Dealt Forthrightly With Its Lenders and Creditors?

The answer has both objective and subjective aspects. Perception of the creditors may control whether the company must engage a crisis manager. Justly or unjustly, if important creditors do not trust management, an intermediary may be necessary to open a successful dialogue with the lender and creditors. Even before talking with creditors, the lawyer should look for signs of strained credibility, including whether the company has been party to significant litigation with creditors in the past and whether it is current on its tax debts and its financial reporting. Past litigation suggests to creditors that management is unable or unwilling to resolve its differences by negotiation. Unpaid taxes suggest that management has impermissibly "borrowed" from the government. If management does not have credibility, a crisis manager may be necessary.

10. Can the Company Avoid Chapter 11?

If a lender has called the loan, a creditor has obtained judgment and is poised to enforce it, or multiple creditors are all threatening action, there may be little alternative to filing a Chapter 11 petition to take advantage of the automatic stay under § 362 of the Bankruptcy Code. But filing isn't solace to a company with a loan secured by accounts receivable and cash collateral. To use cash collateral after filing a Chapter 11 petition, a debtor must obtain an order of the Bankruptcy Court granting the lender "adequate protection" (defined under § 361) for the use of its collateral. Adequate protection usually entails paying down debt and giving the lender replacement liens on receivables and property generated by the debtor after filing. A cash collateral stipulation and order, or debtor-in-possession (DIP) financing orders, require significant professional services for the debtor and the lender. In Chapter 11 the lenders' and creditors' committee professionals commonly are paid by the borrower. Management is under constant scrutiny by the court, the United States Trustee, and the Creditors' Committee.

Transactions with insiders taking place years before filing may be investigated. Virtually all non-ordinary course of business sales and other transactions require court approval, and a trustee may take over if management impropriety is shown. Because of the many disclosures, rules, pitfalls and possible adverse publicity of Chapter 11, a company should file only as a last resort. Yet it is important to prepare for Chapter 11 in case negotiations fail. If a restructuring is not achievable, the parties may want to provide for sale of the company's assets, including the lender's collateral. Quite often the most advantageous sale is through § 363 of the Bankruptcy Code, which provides for asset sales free and clear of claims, liens and encumbrances.

Conclusion

Notice of an impending loan default should be taken seriously. Management will be looking to the experience and judgment of its trusted advisors and usually will not know the right questions to ask. By asking the "10 Practical Questions" counsel can begin to fulfill its duty to its client to provide sound legal advice and put the client on course toward a successful resolution. ■

1. Fed. R. Evid. 501; CPLR 3101(c) (attorney work-product); CPLR 4503(a) (attorney-client privilege).

2. N.Y. Business Corporation Law § 630.

3. 26 U.S.C. § 6672(a) (Internal Revenue Code); N.Y. Tax Law § 1133(a).

4. *Clarkson Co. v. Shaheen*, 660 F.2d 506, 512-13 (2d Cir. 1981), *cert. denied*, 455 U.S. 990 (1982).

5. *See Geyer v. Ingersoll Publ'ns Co.*, 621 A.2d 784 (Del. Ch. 1992); *Pereira v. Cogan*, 294 B.R. 449, 519–20 (S.D.N.Y. 2003), *vacated sub nom. Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2286 (2006).

6. *N. Am. Catholic Educ. Programming Found. v. Clearwire Holdings, Inc.*, 2007 WL 1453705 (May 18, 2007).

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Update: Did the Appellate Odds Change in 2006?

Statistics in State and Federal Courts

By Bentley Kassal

How many times have you heard a client ask, "What are our chances on appeal?" One's bravado[1] or ego may trigger a quick favorable response but there are indeed annual official court reports which, although in technical and numeric rhetoric, do provide answers – but only if certain irrelevant statistics are omitted and we use a calculator to translate them into percentages. This article has been prepared to help simplify answering this question and doing so on a fair, pragmatic, and accurate basis.

Presented herein are the year 2006 data for civil and criminal appeals for these New York state courts:

1. Court of Appeals, including: avenues to the New York Court of Appeals and general comments.
2. The Four Departments of the Appellate Division of the Supreme Court and general comments;
3. Appellate Terms of the Supreme Court for the First and Second Departments of the Appellate Division (the only two in New York State).

In addition, there are civil statistics for two United States Courts of Appeals, the Second Circuit and the District of Columbia, with general comments.

For the first time, some pertinent statistics for the New York Court of Claims are also set forth, although it is not an appellate court.

We are generally covering herein the five-year period of 2006, 2005, 2004, 2003 and 2002. In the statistics presented, those for 2006 are at the left; those presented to the right, in parentheses, are in the same yearly descending order.

Again, a significant change – in order to present more pragmatic and accurate figures, the reported and official

categories of "other" and "dismissal" are excluded for our purposes, because they are not actually dispositions on the merits, after argument or submission. Thus, they are not factored into or included in these statistics.[2] In addition, dispositions of criminal cases are being included for the state appellate courts only, but not for the two U.S. Circuit Courts of Appeals.

New York Court of Appeals[3]

The percentages for appellate statistics for the 5-year period ending 2006 are:

Civil Cases					
	2006	2005	2004	2003	2002
Affirmed	66	55	58	51	47
Reversed	25	35	37	39	44
Modified	9	10	5	10	9

Criminal Cases					
	2006	2005	2004	2003	2002
Affirmed	71	70	81	70	70
Reversed	17	25	15	21	28
Modified	12	5	4	9	2

Comments

The affirmance rate for civil cases spiked in 2006 to 66%, although it remained about the same for criminal cases.

Avenues to the Court of Appeals in 2006 (2005), (2004)[4]

Civil Appeals	
Dissents in Appellate Division	19 (17) (31)
Permission of Court of Appeals	54 (69) (70)
Permission of Appellate Division	27 (27) (13)
Constitutional Question	11 (8) (6)
Stipulation for Judgment Absolute	0 (1) (0)

Criminal Appeals	
Permission of Court of Appeals Judges	53 (50) (32)
Permission of Appellate Division Justices	9 (8) (14)

Significant Other Statistics

1. The Court's 2006 Docket: 293 (284) (296) Notices of Appeal and orders granting leave were filed in 2006 (2005) (2004).
2. Appeals and Writings
   (a) In 2006, the Court decided a total of 189 appeals (127 civil and 62 criminal) of which 150 were decided without dissent. In 2005, there was a total of 196 decisions, with 142 being unanimous.
   (b) Promptness for Deciding Appeals
   (c) In 2006, the average length of time from the filing of a notice of appeal until the release of the decision was much shorter, 225 (257) (284) days.
3. Time for Deciding Appeals[5]
   (a) The average time from argument or submission to disposition in normal course was 35 (36) (46) days;
   (b) The average time from filing a notice of appeal to calendaring for oral argument was 6 (5.7) (6.2) months;
   (c) The average time from readiness (all papers served and filed) to calendaring for oral argument was 1.7 (1.3) (1.5) months;
   (d) The average time from filing of notice to appeal to the public release of decision was 225 (257) (284) days.
4. Filings
   In 2006, there were 293 (284) (296) notices of appeal and, of that total, 226 (213) (235) were civil matters.
5. Dispositions
   (a) 189 (196) (185) appeals were decided, including 127 (137) (136) civil and 62 (59) (49) criminal.
   (b) 1,397 (1,289) (1,222) motions were decided and the average time from return date to disposition was 62 (58) (56) days for civil.
   (c) Motions for leave to appeal, civil cases – there were 1,017 (961) (901) applications and 6% (6.4%) (8.3%) granted.
   (d) In 2006, in comparison with 2005 and 2004 respectively, the average time period in the normal course from argument or submission to the public release of the decision was 35 (36) (46) days and, for all appeals, 30 (32) (39) days.
6. Motions
   In 2006, the Court decided 1,397 motions. The average time from return date to decision in 2006 for civil motions was 62 days and 51 days for all motions.
7. Review of State Commission on Judicial Conduct Determinations
   Two determinations were reviewed in 2006, with both recommendations being accepted (one of removal and one of censure). In 2005 there was one recommendation of removal accepted; and in 2004, the Court accepted two recommendations of removal.
8. Rules 500.27 Certifications: Discretionary jurisdiction to review questions from certain federal courts and other courts of last resort. In 2006, the Court accepted eight cases, with three being decided in 2006 and five pending.

The Four Departments of the Appellate Division of the Supreme Court of the State of New York

Civil Statistics for 2006 (2005, 2004 2003, and 2002 in parentheses):				
	First	Second	Third	Fourth
Affirmed	64 (66) (66) (69) (68)	59 (61) (62) (59) (62)	80 (81) (78) (79) (78)	70 (70) (70) (66) (63)
Reversed	23 (21) (21) (18) (18)	29 (27) (28) (29) (28)	10 (10) (11) (11) (11)	14 (13)(12) (19) (17)
Modified	13 (13) (13) (13) (14)	12 (12) (10) (12) (10)	10 (9) (11) (10) (11)	16 (17)(18)(15) (20)

Criminal Statistics for 2006 (2005, 2004, 2003 and 2002 in parentheses):				
	First	Second	Third	Fourth
Affirmed	89 (88) (93) (93) (93)	88 (90) (90) (90) (88)	85 (87) (87) (86) (85)	87 (89) (87) (88) (87)
Reversed	3 (3) (2) (2) (3)	5 (5) (6) (6) (7)	6 (7) (6) (8) (6)	5 (3) (4) (3) (5)
Modified	8 (9) (5) (5) (4)	7 (5) (4) (4) (5)	9 (6) (7) (6) (9)	8 (8) (9) (9) (8)

Comments

Affirmance Rates: For 2006, overall the civil affirmance percentages for the First and Second Departments were slightly lower than the previous four years and fairly constant in the Third and Fourth Departments.

As to criminal affirmance statistics, all of the Departments, except for the First, appear to be basically unchanged. The First Department for the second year had a significantly reduced percentage of 89% compared to the 2002–2004 period of 93%.

Total Appellate Dispositions: Again, in 2006, the Second Department had the highest total disposition rates for civil and criminal cases, which was 11,301 (10,746) (11,088). This is in sharp contrast to the First Department, with 2,878 (2,981) (3,005).

As to the total civil motions decided, the Second had 10,722, almost twice the total dispositions of the First, which had 5,698.

As explained previously, the Third Department's much higher civil case affirmance rate results from the high number of CPLR Article 78 Administrative Appeals from the determinations of state agencies, with the applicable "substantial evidence" standard.[6]

The Appellate Terms of the First and Second Departments

Appellate Term Statistics are presented for the second time in this format, divided into "civil" and "criminal" for comparison with prior years:

Civil Statistics for 2006 (2005, 2004, 2003 and 2002 are in parentheses):		
	First Department	Second Department
Affirmed	65 (62) (73) (67) (59)	61 (52) (57) (62) (51)
Reversed	23 (25) (17) (24) (26)	27 (35) (34) (34) (38)
Modified	12 (13) (10) (9) (15)	12 (13) (9) (4) (11)

Criminal Statistics for 2006 (2005, 2004, 2003 and 2002 are in parentheses):		
	First Department	Second Department
Affirmed	69 (72) (80) (80) (73)	64 (70) (57) (62) (51)
Reversed	29 (23) (16) (12) (22)	32 (25) (34) (34) (38)
Modified	2 (5) (4) (8) (5)	4 (5) (9) (4) (11)

Comments

Although the Second Department in 2006 had a total of 1,472 dispositions, both civil and criminal, which was more than two-and-a-half times greater than the total of 547 in the First, the Second had only 345 oral arguments, almost the same as the First's total of 350. In 2005, the Second had a total of 1,616 dispositions and the First had 443, almost three and a half to one.

The First Department's 65% affirmance rate for civil cases is not too different from the previous four years, with similar observations about its basic reversal and modification statistics. Similarly, the 61% rate of the Second Department and other statistics do not significantly deviate from the usual range.

Regarding criminal statistics, there is a significant decrease in affirmances in both courts. The First had a five-year low of 69% (down from a high of 80% within the last five years) and the Second, similarly, is 64% (down from a high of 70% in the last 2005).

New York Court of Claims

Although, as noted, the New York Court of Claims is not an appellate court, nevertheless, these statistics may be of value to practitioners in this court. Presented for the first time, the significant statistics for 2006 are:

1. A total of 1,811 claims were disposed of, with 1,724 dismissals and 87 awards. Thus, of all filed, only 4.8% resulted in awards.
2. 4,395 claims were pending on January 1, 2006; 1,482 were filed in 2006 and on December 31, 2006, the pending claims numbered 4,066.
3. The total amounts originally claimed in the 87 awards was approximately $117,000,000 with actual awards of $18,472,000 or 17% of the original claims.

U.S. Circuit Courts of Appeals for the Second Circuit and the District of Columbia

This year, for the first time, appellate statistics for civil cases in percentages are being presented herein in the same manner as they are specifically set forth in the official report, namely, as "other U.S. Civil" and "other private civil," and not lumped together, as in previous articles. Additionally, statistics for administrative appeals are also set forth. The Court of Appeals for the Federal Circuit is not included with the other two since it has "[n]ationwide jurisdiction to hear appeals in specific cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal claims" and not general appeals like the other circuits.

Second Circuit			Administrative Appeals	
	Other U.S. Civil	Other Private Civil		
Affirmed	67	71	Affirmed	70
Dismissed	24	18	Dismissed	13
Reversed	9	11	Reversed	7

District of Columbia[7]			Administrative Appeals	
	Other U.S. Civil	Other Private Civil		
Affirmed	83	80	Affirmed	67
Dismissed	3	2	Dismissed	16.5
Reversed	4	18	Reversed	16.5

Comments

As noted last year, in comparing these Circuit Court statistics with those for the New York Court of Appeals, generally, there is a higher percentage of affirmances in both the Second Circuit and the District of Columbia Circuit than in the New York Court of Appeals as well as the First and Second Departments of the Appellate Division.[8] ■

1. "Bravado – the quality or state of being foolhardy," *Merriam Webster's Collegiate Dictionary*, Tenth Edition.

2. As defined in the Court of Appeals Annual Report, "other" includes anomalies which did not result in an affirmance, reversal, or modification ("other" included judicial suspensions, acceptance of a case for review pursuant to Court Rule 500.17). "Dismissal" also includes non-appealable orders, as well as stipulations or settlements after the filing of records on appeal.

3. From the Annual Report of the Clerk of the Court of Appeals for 2006.

4. In 2006 numbers, with only 2005 and 2004 figures in parentheses and excluding the category "other."

5. Excluding Constitutional questions, stipulations for judgment absolute and "other."

6. Author's note: These figures alone again clearly support the long-time need for a fifth department. Additionally, the population within the Second Department constitutes almost one half of the state.

7. The high affirmance rate is attributed to the fact that most of their cases involve review of decisions of federal administrative agencies with a different standard of review.

8. The reports containing the above statistics are directly available. For the New York state courts, the information may be obtained at the Web site <www.nycourts.gov> ("Courts," "Court Administration" and "reports"). For the United States Circuit Courts, contact the Administrative Office of the United States Courts, One Columbus Circle N.E., Washington, D.C. 20544 or search its Web site, <www.uscourts.gov.secondcircuit>.

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Imposition of Litigation Costs and Fees in Oil Spill Cases

The general American rule regarding the costs of litigation holds each party responsible for the fees and costs of litigation, regardless of the outcome. The victor in a tort case will not generally have the right to impose those necessary expenses upon other litigants in the absence of special circumstances.[1] The heightened public policy concerns associated with oil product spills create just such a limited circumstance, and the New York State Legislature has seen fit to alter these normal and expected rules in Article 12 of the New York Navigation Law, commonly known as the "Oil Spill Act" (or the "Act").[2]

Under the Oil Spill Act, any injured party may bring a private action directly against a discharger. Recent appellate authority further emphasizes the broad scope of direct and indirect damages that are available to plaintiffs through this statute. Indeed, the costs of litigation may be recovered without regard for whether cleanup or removal costs were incurred. The cases thus appear to treat the Act as a litigation incentive statute, virtually guaranteeing the award of fees to prevailing plaintiffs irrespective of the degree of culpable conduct or adequacy of the response and remediation undertaken by the defendant who is responsible for the discharge of an oil product.

Broad Scope of Remedies

The Oil Spill Act is concerned with health and safety issues,[3] and its purpose is to require the prompt cleanup and removal of oil and fuel discharge to minimize damage to the environment, to restore the environment to its pre-spill condition, and to compensate those damaged by such discharge.[4] Part Three of the Act establishes the "New York Environmental Protection and Spill Compensation Fund" ("Oil Spill Fund" or the "Fund").[5] The objective of the Oil Spill Fund is to foster quick and efficient cleanup of spills while providing a mechanism whereby cleanup will not be delayed. The Fund steps in and undertakes the necessary remediation when the discharger is unknown, unwilling or unable to pay these costs, thereby giving rise to a civil action against the responsible party for recovery of all direct and indirect costs associated with the spill.[6]

Along with provisions for administration of the Fund and oversight of oil spill cleanup operations, the Act also provides valuable assistance to those who sustain damages as a result of an oil spill. So powerful is the Act's reach that it has been held to extend to discharges that occurred before its enactment.[7] Additionally, the provisions of the Act are construed liberally to effect their legislative purpose.[8] The courts have expansively interpreted the Act to impose costs for preventive measures taken to avoid pollution damages, even in the absence of proof of actual impact.[9]

To accomplish these tasks, a number of tools are written into the statute. Under the Oil Spill Act, a discharger is strictly liable in damages to those harmed by its improper handling of petroleum products. Indeed, according to the statute, "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained."[10] A "discharge" is defined as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into" state waters.[11] Furthermore, § 190 of the Act explicitly provides that "any claim for damages by any injured person . . . may be brought directly against . . . the insurer." Courts that have dealt with claims against insurers under § 190 have allowed such claims to stand without requiring a viable claim against the insured discharger under § 181 if the spill is covered by the policy.[12]

In order to further ensure economic accountability, the discharger is responsible for payment of the cleanup costs either to the Oil Spill Fund or directly to parties who suffer financial injury resulting from a spill. The Legislature amended the definition of "claim" in 1991 to make clear that a party bringing suit against a private party need not first seek recovery from the Fund.[13] For persons harmed by such spills, the Oil Spill Act provides for a private right of recovery through civil litigation, while stating:

> Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person

who has discharged the petroleum, provided, however, that damages recoverable . . . shall be limited to the damages authorized by this section.[14]

Courts have pointed out that this statute is "remedial" in nature and simply extends the common-law right to recover damages that previously existed in favor of any party injured as a result of oil discharge.[15] The Oil Spill Act expands these rights and was not intended to replace or diminish a claimant's right to recourse under the common law.[16] The Act's strict liability claims may be brought along with common-law causes of actions such as negligence or nuisance.[17]

The statute also generously allows for the costs of restoring, repairing or replacing any real or personal property damage caused by a discharge, along with recovery of income lost and compensation for any resulting reduction in property value.[18] These broad categories of recoverable direct and indirect costs are designed to cover the technically complex and expensive processes associated with identification, remediation and monitoring of above- and below-ground oil spills. Direct damages, including the cost of contamination containment, soil cleaning and removal are all obvious consequences contemplated by the Oil Spill Act.[19] The less apparent, but equally important, diminution in the value of property, caused by a discharge, is also recognized as an appropriate basis for recovery.[20] Lost profits[21] and devaluation of property resulting from the "stigma" of a prior oil spill are also recoverable.[22] Although neither personal injury compensation[23] nor nominal damages[24] are awardable under the Act, the recovery of attorney expenses is a recognized indirect damage.[25]

Recovery of Litigation Costs as Indirect Damages

Section 181(5) of the Act authorizes private actions in order to alleviate the strain on the Fund of paying out claims in the first instance by encouraging injured parties to bring their actions directly against the discharger. The costs associated with this complex litigation are substantial since this type of case will often lead to protracted discovery[26] and field testing with intensive data analysis, thereby giving rise to the need for statutory means of recovery.

Although recovery of litigation costs is not directly addressed in the Oil Spill Act, courts have held that the list of damages is explicitly non-inclusive,[27] and such indirect damages are recoverable according to the appellate authority. To the extent that plaintiffs are able to establish that they incurred liability for counsel fees as a result of the discharge, such fees may be recovered as "indirect damage" under § 181(1) and (5) of the Act.[28] Thus, where a party is responsible for unreasonable delay in the investigation and remediation of environmental problems, it has been held that damages were properly awarded for the costs incurred while retaining legal assistance for the cleanup process.[29] Furthermore, where litigation and resulting costs were necessitated by the defendant's extended delay in cleaning the contamination, along with its recalcitrance in committing to a plan of action which would restore the plaintiffs' property to its pre-spill condition while maintaining a minimum disruption of the plaintiffs' business, the plaintiffs were held entitled to recover these fees.[30] The Act has further been interpreted to provide a private right of action against a discharger to recover direct and indirect damages, including attorney fees, regardless of whether the plaintiff has paid cleanup or removal costs or has been held liable to the state for cleanup and removal costs.[31]

Claims under the Oil Spill Act are not without bounds,[32] however, and the private right of recovery is strictly limited to provide compensation only to parties who did not cause or contribute to the discharge.[33] For a party who qualifies, the expanded rights of recovery provide strong litigation incentive indeed. The courts do not engage in an analysis of motive or intent and, furthermore, even without evidence that a discharger sought to avoid remediation, the general rule that each party should bear its own litigation costs[34] will not prevail where the Oil Spill Act applies.

Conclusion

The Oil Spill Act provides numerous tools, including strict liability and broad categories of recoverable direct and indirect damages that may be imposed against those who are responsible for a petroleum product spill. In this manner, the statute seeks to ensure prompt and thorough remediation while imposing the costs on those responsible for any resulting damage. The appellate authority makes it clear that the statute was implemented to alleviate the strain on public cleanup funds and limit the consequential losses that may result to owners of damaged property while providing incentive through recovery of indirect damages, including attorney fees, to those who seek compensation for their losses. Under this interpretation, courts have held that these costs and fees are recoverable even without any showing that the plaintiff paid either cleanup or removal costs. This broad and inclusive allowance for indirect damages in favor of those who successfully bring suit against a discharger must be viewed as an extension of the strong public policy and environmental protection concerns that form the foundation for the Oil Spill Act. ■

1. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *In re A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1, 5, 511 N.Y.S.2d 216 (1986).

2. N.Y. Navigation Law art. 12, §§ 170–197 ("Nav. Law"), Oil Spill Prevention, Control, and Compensation; *State v. Green*, 96 N.Y.2d 403, 406, 729 N.Y.S.2d 420 (2001).

3. *Wever Petroleum, Inc. v. Gord's Ltd.*, 225 A.D.2d 27, 30, 649 N.Y.S.2d 726 (3d Dep't 1996) (citing Nav. Law § 195).

4. Nav. Law §§ 170, 171; 6 N.Y.C.R.R. § 611.6; *State v. Speonk Fuel, Inc.*, 3 N.Y.3d 720, 723, 786 N.Y.S.2d 375 (2004); *AMCO Int'l, Inc. v. Long Island RR Co.*, 302 A.D.2d 338, 340, 754 N.Y.S.2d 655 (2d Dep't 2003); *Turnbull v. MTA N.Y. City Transit*, 28 A.D.3d 647, 649, 814 N.Y.S.2d 191 (2d Dep't 2006);

Matera v. Mystic Transp., Inc., 308 A.D.2d 514, 518, 764 N.Y.S.2d 458 (2d Dep't 2003); *Lambrinos v. Exxon Mobil Corp.*, 1:00-CV-1734, 2006 WL 2238977 (N.D.N.Y. Aug. 4, 2006).

5. N.Y. Navigation Law Article 12, Oil Spill Prevention, Control, and Compensation; Part Three, New York Environmental Protection and Spill Compensation Fund §§ 179–190.

6. *Green*, 96 N.Y.2d at 406.

7. *Leone v. Leewood Serv. Station, Inc.*, 212 A.D.2d 669, 671, 624 N.Y.S.2d 610 (2d Dep't 1995); *State v. Cities Serv. Co.*, 180 A.D.2d 940, 941, 580 N.Y.S.2d 512 (3d Dep't 1992); *Snyder v. Newcomb Oil Co.*, 194 A.D.2d 53, 60–61, 603 N.Y.S.2d 1010 (4th Dep't 1993); *Mendler v. Fed. Ins. Co.*, 159 Misc. 2d 1099, 1103, 607 N.Y.S.2d 1000 (Sup. Ct., N.Y. Co. 1993); *Bologna v. Kerr-McGee Corp.*, 95 F. Supp. 2d 197, 202 (S.D.N.Y. 2000).

8. *Speonk Fuel, Inc.*, 3 N.Y.3d at 723; *145 Kisco Ave. Corp. v. Dufner Enters., Inc.*, 198 A.D.2d 482, 483, 604 N.Y.S.2d 963 (2d Dep't 1993); *State v. Joseph*, 29 A.D.3d 1233, 1235, 816 N.Y.S.2d 214 (3d Dep't 2006); *Bologna*, 95 F. Supp. 2d at 202.

9. *Plainview Water Dist. v. Exxon Mobil Corp.*, N.Y.L.J., Dec. 8, 2006, p. 21, col. 3 (Sup. Ct., Nassau Co.).

10. Nav. Law § 181(1); *Green*, 96 N.Y.2d at 406; *Fuchs & Bergh, Inc. v. Lance Enters., Inc.*, 22 A.D.3d 715, 716, 802 N.Y.S.2d 749 (2d Dep't 2005); *Matera v. Mystic Transp., Inc.*, 308 A.D.2d 514, 518, 764 N.Y.S.2d 458 (2d Dep't 2003); *see State v. Dennin*, 17 A.D.3d 744, 745, 792 N.Y.S.2d 682 (3d Dep't 2005); *Bologna*, 95 F. Supp. 2d at 203.

11. Nav. Law § 172(8); *White v. Long*, 85 N.Y.2d 564, 568, 626 N.Y.S.2d 989 (1995); *Fuchs & Bergh, Inc.*, 22 A.D.3d at 717; *Joseph*, 29 A.D.3d at 1235; *see Niagara Mohawk Power Corp. v. Jones Chem., Inc.*, 315 F.3d 171, 175 (2d Cir. 2003).

12. *Snyder*, 194 A.D.2d at 58; *State v. Am. Nat'l Fire Ins. Co.*, 193 A.D.2d 996, 997, 598 N.Y.S. 2d 339 (3d Dep't 1993); *State v. Travelers Indem. Co.*, 120 A.D.2d 251, 508 N.Y.S.2d 698 (3d Dep't 1986), *appeal dismissed*, 70 N.Y.2d 669, 518 N.Y.S.2d 962 (1987); *State of N.Y. v. INA Underwriters Ins. Co.*, 133 Misc. 2d 430, 432, 507 N.Y.S.2d 112 (Sup. Ct., Albany Co. 1986).

13. *White v. Long*, 85 N.Y.2d 564, 569, 626 N.Y.S.2d 989 (1995) (citing Nav. Law § 172(3)).

14. Nav. Law § 181(5); *White*, 85 N.Y.2d at 567–68; *Hjerpe v. Globerman*, 280 A.D.2d 646, 647, 721 N.Y.S.2d 367 (2d Dep't 2001); *see Bologna*, 95 F. Supp. 2d at 203.

15. *Leone v. Leewood Serv. Station Inc.*, 212 A.D.2d 669, 671, 624 N.Y.S.2d 610 (2d Dep't 1995).

16. *Calabro v. Sun Oil Co.*, 276 A.D.2d 858, 859, 714 N.Y.S.2d 781 (3d Dep't 2000).

17. *Wever Petroleum, Inc. v. Gord's Ltd.*, 225 A.D.2d 27, 31, 649 N.Y.S.2d 726 (3d Dep't 1996).

18. Nav. Law § 181(2)(a); *Putnam v. State*, 223 A.D.2d 872, 873, 636 N.Y.S.2d 473 (3d Dep't 1996).

19. Nav. Law § 181(1)(a); *Putnam*, 223 A.D.2d 872.

20. Nav. Law § 181(2); *Putnam*, 223 A.D.2d 872; *Turnbull v. MTA N.Y. City Transit*, 28 A.D.3d 647, 649, 814 N.Y.S.2d 191 (2d Dep't 2006).

21. *AMCO v. Long Island RR Co.*, 302 A.D.2d 338, 340, 754 N.Y.S.2d 655 (2d Dep't 2003).

22. *Turnbull*, 28 A.D.3d at 649.

23. *Wever Petroleum*, 225 A.D.2d at 28; *Strand v. Neglia*, 232 A.D.2d 907, 909, 649 N.Y.S.2d 729 (3d Dep't 1996), *appeal dismissed*, 89 N.Y.2d 1086, 659 N.Y.S.2d 859 (1997).

24. *Kara Holding Corp. v. Getty Petroleum Mktg., Inc.*, 99 Civ. 0275 (RWS), 2004 WL 1811427 (S.D.N.Y, Aug. 12, 2004).

25. *Strand*, 232 A.D.2d at 909.

26. *Kara Holding Corp.*, 2004 WL 1811427.

27. *Wever Petroleum*, 225 A.D.2d at 30.

28. *Strand*, 232 A.D.2d at 908–09; *State v. Tartan Oil Corp.*, 219 A.D.2d 111, 115–16, 638 N.Y.S.2d 989 (3d Dep't 1996). *See also Kara Holding Corp.*, 2004 WL 1811427.

29. *Gettner v. Getty Oil Co.*, 266 A.D.2d 342, 701 N.Y.S.2d 64 (2d Dep't 1999).

30. *AMCO Int'l, Inc.*, 302 A.D.2d 338, 341, 754 N.Y.S.2d 655 (2d Dep't 2003).

31. *Starnella v. Heat*, 14 A.D.3d 694, 789 N.Y.S.2d 227 (2d Dep't 2005); *Patel v. Exxon Corp.*, 11 A.D.3d 916, 917, 782 N.Y.S.2d 328 (4th Dep't 2004).

32. *Putnam v. State*, 223 A.D.2d 872, 873, 636 N.Y.S.2d 473 (3d Dep't 1996).

33. *White v. Long*, 85 N.Y.2d 564, 568–69, 626 N.Y.S.2d 989 (1995); *Union Tpk. Assoc. v. Getty Realty Corp.*, 27 A.D.3d 725, 727, 812 N.Y.S.2d 628 (2d Dep't 2006); *Fuchs & Bergh, Inc. v. Lance Enters., Inc.*, 22 A.D.3d 715, 717, 802 N.Y.S.2d 749 (2d Dep't 2005); *Hjerpe v Globerman*, 280 A.D.2d 646, 647, 721 N.Y.S.2d 367 (2d Dep't 2001); *Popolizio v. City of Schenectady*, 269 A.D.2d 670, 671, 701 N.Y.S.2d 755 (3d Dep't 2000); *Bologna v. Kerr-McGee Corp.*, 95 F. Supp. 2d 197, 203 (S.D.N.Y. 2000).

34. See *supra* note 1.

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Tax Assessment Proceedings and the Role of the Board of Assessment Review

Recently, many municipalities across New York State have decided to assess properties at full value. A direct result of this decision has been an increase in property tax assessment complaints filed by commercial and residential property owners who claim that their assessments are excessive, unequal or unlawful, or misclassified.[1] These property owners frequently retain counsel, many of whom are unfamiliar with tax assessment matters and the powerful role of the Board of Assessment Review (BAR). This article will address the initial stages of a typical tax assessment proceeding before a BAR, and will highlight the potential pitfalls for the inexperienced practitioner when filing the tax assessment complaint and dealing with the BAR.[2]

Submission of the Complaint

By May 1 in many jurisdictions, the assessor has prepared a tentative assessment roll, which includes the uniform percentage of value for each assessing unit and designates the value of the land without improvements, the total assessed valuation, and the full value of the parcel.[3] If a property owner believes that his or her assessment is incorrect, the property owner must file an administrative complaint with the assessor on or before the established "grievance date."[4] The complaint must specify in what manner the assessment is incorrect and the property owner will be limited in any subsequent proceedings to the grounds pleaded in the complaint.[5] If the property owner fails to file the complaint with the assessor on or before the established grievance date, the court has no jurisdiction to review the property owner's complaint as a result of an unfavorable decision by the BAR.[6]

The BAR's Review

The BAR is granted specific powers when reviewing the assessment complaint. If the BAR is not satisfied that it can make a reasonable determination by simply reviewing the complaint, the BAR is empowered to require the property owner to appear before it and to "produce any papers relating to such assessment."[7] The BAR determines "what information is material to the proceeding" and the "boundaries of [its] inquiry are broad."[8] Accordingly, if the property owner

> shall *willfully neglect or refuse* to attend and be so examined, or to answer any question put to him or her relevant to the complaint or assessment, such person shall *not* be entitled to any reduction of the assessment subject to the complaint.[9]

Willful Neglect and Subsequent Dismissal of the Complaint

The property owner's failure to provide information requested by the BAR may be considered willful neglect and result in the BAR's dismissal of the assessment complaint.[10] The BAR's *dismissal* of the property owner's complaint, in contrast to a mere *denial* of the relief sought in the

complaint, precludes any reduction in the property owner's assessment and may be upheld by courts in any subsequent RPTL Article 7 proceeding[11] or review of a Small Claims Assessment Review (SCAR) proceeding.[12] In addition, the BAR's dismissal amounts to a frustration of the administrative review process and constitutes a failure to exhaust one's administrative remedies.[13] Recently, the Appellate Division, Fourth Department upheld a BAR's decisions to dismiss the property owners' complaints in RPTL Article 7 proceedings and an Article 78 proceeding reviewing a hearing officer's determinations at SCAR proceedings, because the property owners did not provide the information the BAR requested, did not contend that the information requested was irrelevant, and did not seek an extension of time to submit the information.[14]

Overreaching BARs and Improper Dismissal of the Complaint

Conversely, courts refuse to uphold BAR dismissals "absent proof that noncompliance was occasioned by a desire to frustrate administrative review."[15] Where the property owner does not engage in conduct proscribed by RPTL § 525(2)(a), his or her assessment complaint and subsequent judicial proceeding should not be dismissed.[16] Accordingly, where the property owner's objections to the BAR's requests are reasonable, and the property owner does not provide the information requested by the BAR, courts have found that such conduct does not "rise to the level of willful noncompliance intended to frustrate administrative review."[17]

The property owner's refusal to provide information will not be considered willful neglect where: the documents requested by the BAR consist of trade secrets, and the BAR refuses to enter into an appropriate confidentiality agreement;[18] there was no proof that the property owner's failure to appear at the BAR hearing or submit information was willful;[19] the property owner had previously provided the information to the BAR; the information was unavailable; the requested information consisted of material prepared for litigation.[20]

Conclusion

With the recent municipal trend toward assessing property at full value, an increased number of tax assessment complaints will be filed each year. The cautious practitioner must follow the timing and complaint procedures outlined in the RPTL and either fully respond to the BAR's requests or establish objective reasons why a full response is not possible. This practice should avoid the detrimental consequences that result from a BAR dismissal. ■

"Have fun at work, dad. Remember to swing for the fences."

1. *See* N.Y. Real Property Tax Law § 524(2) (RPTL).

2. The tax assessment process in New York City is unique and follows the New York City Administrative Code. *See* http://www.nyc.gov/html/taxcomm/html/home/home.shtml. Similarly, there are different time constraints and considerations for cities, villages, and towns. The practitioner must check with each municipality to determine the applicable filing dates and deadlines.

3. *See* RPTL §§ 502(3), 506(1).

4. *See* RPTL § 512(1)(1-a).

5. *See* RPTL § 524(1).

6. *See Cornwell v. Town of Esperance*, 252 A.D.2d 795, 796, 676 N.Y.S.2d 258 (3d Dep't 1998).

7. *See* RPTL § 525(2)(a).

8. *Grossman v. Bd. of Trustees of Vill. of Geneseo*, 44 A.D.2d 259, 263, 354 N.Y.S.2d 188 (4th Dep't 1974).

9. RPTL § 525(2)(a) (emphasis added).

10. *See id.*

11. *See Parkway Plaza v. Assessor of City of Canandaigua*, 269 A.D.2d 811, 812, 703 N.Y.S.2d 790 (4th Dep't 2000); *Sarsfield v. Bd. of Assessors of Town of Islip*, 240 A.D.2d 506, 659 N.Y.S.2d 773 (2d Dep't 1997).

12. *See McNamara v. Bd. of Assessors of Town of Smithtown*, 272 A.D.2d 617, 618, 709 N.Y.S.2d 821 (2d Dep't 2000); *Meola v. Assessor of Town of Colonie*, 207 A.D.2d 593, 594, 615 N.Y.S.2d 506 (3d Dep't 1994), *leave denied*, 84 N.Y.2d 812, 622 N.Y.S.2d 915 (1995).

13. *See Sterling Estates, Inc. v. Bd. of Assessors of County of Nassau*, 66 N.Y.2d 122, 125, 495 N.Y.S.2d 328 (1985).

14. *See Sterben v. Bd. of Assessment Review of Town of Amherst*, 41 A.D.3d 1214, 838 N.Y.S.2d 279 (4th Dep't 2007); *Gelber Enters. v. Williams*, 41 A.D.3d 1207, 838 N.Y.S.2d 330 (4th Dep't 2007).

15. *Fifth Ave. Office Ctr. Co. v. City of Mount Vernon*, 89 N.Y.2d 735, 741–42, 658 N.Y.S.2d 217 (1997).

16. *See McCready v. Assessor of Town of Ossining*, 10 A.D.3d 452, 780 N.Y.S.2d 913 (2d Dep't 2004).

17. *Chester Mall Partners v. Vill. of Chester*, 239 A.D.2d 414, 415, 657 N.Y.S.2d 435 (2d Dep't 1997).

18. *See Curtis/Palmer Hydroelectric Co. v. Town of Corinth*, 306 A.D.2d 794, 795–96, 761 N.Y.S.2d 712 (3d Dep't 2003).

19. *See Doubleday & Co. v. Bd. of Assessors of Vill. of Garden City*, 202 A.D.2d 424, 425, 608 N.Y.S.2d 699 (2d Dep't 1994).

20. *See State of N.Y. v. Town of Northampton*, 156 A.D.2d 857, 858, 550 N.Y.S.2d 81 (3d Dep't 1989).

BY WILLARD H. DASILVA

Willard H. DaSilva, a member of DaSilva, Hilowitz & McEvily LLP, is a veteran matrimonial law practitioner with offices in Garden City and New City, New York, editor-in-chief of the ABA's *Family Advocate*; editor-in-chief of the *New York Domestic Relations Reporter*, (Matthew Bender); and author of *New York Matrimonial Practice* (West Group). He is a *magna cum laude* graduate of New York University and received his law degree at Columbia University Law School.

The Critical Net Worth Statement

In every matrimonial action where the issue of finances is raised, a "sworn statement of net worth shall be provided," unless the court has waived it for good cause.[1] Every motion for maintenance, counsel fees or child support, whether permanent or temporary, must be accompanied by a statement of the applicant's net worth in the form mandated by 22 N.Y.C.R.R. § 202.16(b) Appendix A. Failure to include the affidavit of net worth in an application for financial relief is a basis for denying that relief, regardless of what other papers have been submitted.

Yet, perhaps the most sloppily prepared document in a matrimonial case is the client's statement of net worth. It is common practice for an attorney to provide to a client the official form of net worth statement with the instructions to complete it. When the client returns the completed affidavit, it is not uncommon for the attorney merely to sign the certification pursuant to § 130-1.1a, without a careful examination of the content of the net worth statement, and then to serve it.

How often has each reader seen net worth statements prepared in the handwriting of the client, obviously not reviewed by the attorney? Such a statement is fraught with danger. It is a document with which the client must live throughout the duration of the litigation. In a case that is about to be tried, it is common for the court to require an updated financial statement of net worth. It is this statement that the attorney usually will scrutinize and prepare with care. The adverse attorney will then have the opportunity to compare the net worth statement just prepared with the net worth statement served at the outset of the case.

A comparison of the figures contained in each statement of net worth, the first one served and the later one, will undoubtedly show disparities. Those discrepancies must be explainable. If they are not readily explainable, it is then the attorney realizes that the sloppily prepared initial net worth statement contains numerous omissions and mistakes of fact. The adverse attorney can use those discrepancies

CONTINUED ON PAGE 77

INDEX TO ARTICLES 2003–2007

This index places the articles in one of the following categories. Please note that all articles from January 2000–November/December 2007 are available online, to members.

TOPIC/ARTICLE AUTHOR ISSUE/Pg.

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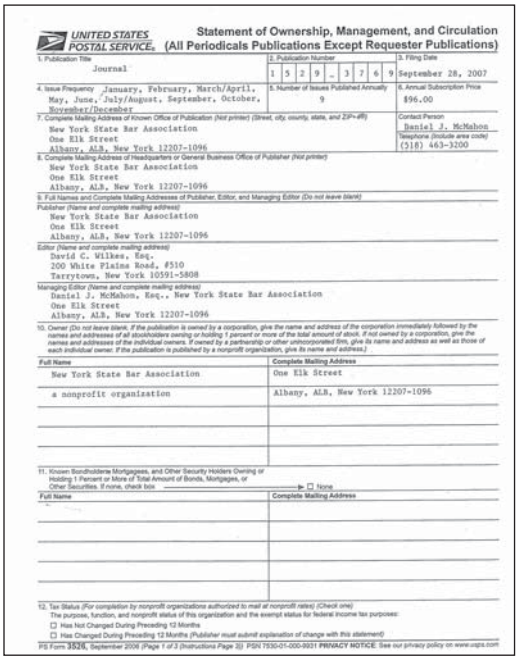

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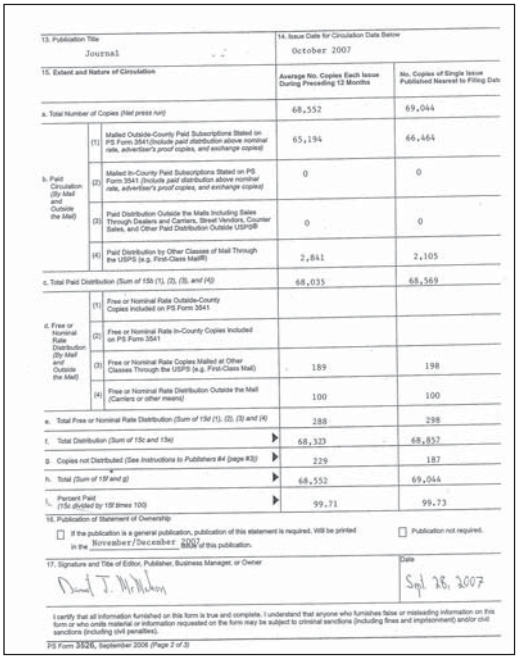

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I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

PS Form 3526, September 2006 (Page 2 of 3)

INDEX TO AUTHORS 2003–2007

The following index lists the authors of all articles that have appeared in the *Journal* since the January 2003 edition. Below each author's name is the general classification category used for the article. The headline describing the content of the article appears under that classification category in the Index to Articles that begins on page 54.

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS
1/1/05 - 9/28/07 _____ 7,275

NEW LAW STUDENT MEMBERS
1/1/05 - 9/28/07 _____ 580

TOTAL REGULAR MEMBERS
AS OF 9/28/07 _____ 68,172

TOTAL LAW STUDENT MEMBERS
AS OF 9/28/07 _____ 2,091

TOTAL MEMBERSHIP AS OF
9/28/07 _____ 70,263

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am the managing partner of a fairly large firm in New York City. As if meeting associates' sharply rising salary expectations is not enough, we have a challenging new issue facing us.

Increasingly, we are being pressured by important and longstanding clients to meet certain "diversity targets" as a condition for continuing to represent them. Clients are demanding that the racial, gender and ethnic composition of our firms' associates and partners more closely mirror the profession's diversity. Others require that our engagement teams on their matters reflect diversity in a meaningful way, with minority and women lawyers having important roles to play at all levels. We are required to fill out detailed questionnaires and disclose information that, frankly, is of a proprietary nature: where we recruit, how many white and minority candidates we interview and hire, etc.

At the same time, we are facing client pressures from another direction. At least one government official has suggested that clients exert their economic influence by pulling back their work from law firms doing pro bono work for the Guantanamo detainees.

These actual and suggested demands by our clients – to whom we owe a duty of loyalty and whose business we both want and need – about who we are and what we do apart from our representation of them, raise troubling issues that challenge our independence as professionals. What advice do you have for us?

Sincerely,

A Besieged Firm Leader

Dear Besieged Firm Leader:

Undoubtedly, as you state, the legal profession faces various pressures. At bottom, of course, attorneys are service providers. Intense competition exists among law firms and, over time, corporate buyers of legal services have become more aggressive about tying their purchasing power to the fulfillment of demands concerning fees, staffing on matters, and – as your letter highlights – social goals that can be tangential to their representation.

If it is any consolation, your firm is certainly not alone in facing demands for diversity-related information. Some corporate clients have been frustrated by the slow progress made by minorities and women in the legal profession and these corporations that value diversity have come to expect a similar commitment from outside counsel. Various high-profile companies, including General Motors, DuPont, American Airlines, Ford, Exxon Mobil, and Shell, collect diversity-related data from the law firms to which they give business. Tamara Loomis, *Corporate Counsel Push Law Firms to Diversify: Data Collected on Billable Hours for Minorities & Women*, N.Y.L.J., Oct. 25, 2000, at 8 (col. 1). Many prestigious New York firms have pledged to comply with client demands for such information. *See* Thomas Adcock, *Firms Agree to Give Clients Diversity Data on Lawyers*, N.Y.L.J., May 13, 2005, at 1 (col. 3) (discussing agreement brokered by New York County Lawyers' Association, in which more than 60 law firms agreed to report to their corporate clients the composition of assigned legal teams by race, gender, ethnicity and sexual preference).

The commendable desire by corporate counsel to have diverse legal teams representing their companies can, however, pose practical, ethical, and legal problems for law firms.

As a practical matter, law firms face real constraints in recruiting and keeping diverse talent. According to the 2000 U.S. Census, racial and ethnic minorities comprised approximately 30% of the U.S. population. *See* http://www.cdc.gov/omhd/Populations/populations.htm. Minorities comprised only 9.7% of attorneys, however. *See* Elizabeth Chambliss, *ABA Commission on Racial and Ethnic Diversity in the Legal Profession, Miles to Go: Progress of Minorities in the Legal Profession*, at 5 (2004), *available at* https://www.abanet.org/abastore/index.cfm?fm=Product.AddToCart&pid=4520014 (Executive Summary). In 2006, according to the Bureau of Labor Statistics, of the total number of employed lawyers in the United States, only 5% were black, 2.9% Asian, and 3% Hispanic. *See* http://64.233.167.104/search?q=cache:_0JxL7T75-sJ:www.bls.gov/cps/cpsaat11.pdf+bls.gov,+employed+lawyers&hl=en&ct=clnk&cd=1&gl=us. Many factors underlie these disproportionately small percentages, including the fact that the pipeline leading to minorities practicing law is severely damaged. Overall, minorities have lower high school and college graduation rates, higher law school attrition rates, and lower bar passage rates. *See* Gary Orfield et al., Civil Rights Project at Harvard Univ. et al., *Losing Our Future: How Minority Youth Are Being Left Behind by the Graduation Rate Crisis*, at 2 (2004), *available at* http://www.civilrightsproject.ucla.edu/research/dropouts/dropouts04.php#reports; Laura G. Knapp et al., Nat'l Ctr. for Educ. Statistics, *Enrollment in Postsecondary Institutions, Fall 2004; Graduation Rates, 1998 &*

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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

2001 Cohorts; and Financial Statistics, Fiscal Year 2004, at 11 (2006), *available at* http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2006155; Gita Z. Wilder, Law Sch. Admission Council, *The Road to Law School and Beyond: Examining Challenges to Racial and Ethnic Diversity in the Legal Profession*, at 23, 25 (2003), *available at* http://www.lsac-net.org/lsac/research-reports/TOC-research-reports2.htm. Thus, the pool of minority applicants available to law firms is smaller than it should be.

Moreover, whether out of choice or because of a lack of success in competing for law firm jobs, minorities begin their careers in government or public interest jobs at a higher rate than their white counterparts. *See* Chambliss, *Miles to Go*, at 15-16. In terms of competing for law firm employment, minorities are generally less likely than whites to have held judicial clerkships after law school. *See id.* at 14; NALP, *Courting Clerkships: The NALP Judicial Clerkship Study* (2000), *available at* http://www.nalp.org/content/index.php?pid=135.

Minority lawyers – especially female minorities – working at law firms also have high rates of attrition. *See* Chambliss, *Miles to Go*, at 32. Therefore, law firms not only have trouble identifying and selecting minority lawyers, but they also battle the problem of retaining minority lawyers whom they have trained. *Id.*; N.Y.C. Bar, *Law Firm Diversity Benchmarking Report: 2006 Report to Signatories of Diversity Principles*, at 15 (2006), *available at* www.abanet.org/minorities/docs/FirmBenchmarking06.pdf. Mentoring programs, targeted recruitment efforts, and a greater awareness of the issues are all positive developments that may help to ameliorate some of these obstacles. Nonetheless, the problems with the legal pipeline will not disappear quickly.

Women as a whole are less of a challenge because their representation in the profession, particularly in the law schools, is more reflective of their percentages in the overall population. *See* ABA Commission on Women in the Profession, *Charting Our Progress – The Status of Women in the Profession Today*, at 4 (2006), *available at* http://www.abanet.org/marketresearch/resource.html. However, women as a class lag considerably in attaining the upper echelons of the legal profession. *Id.* at 5; *see generally* ABA Commission on Women in the Profession, *A Current Glance at Women in the Law* (2006), *available at* http://www.abanet.org/marketresearch/resource.html. Minority women, in particular, fare poorly in ascending to the highest levels of the profession. *See Charting Our Progress*, at 6–7.

Information on lawyers with disabilities and on lesbian, gay, bisexual and transgender (LGBT) lawyers is sparser. EEOC, *Diversity in Law Firms*, at Table 9 (2003), *available at* http://www.eeoc.gov/stats/reports/diversit-law/index.html (disabled). It appears that the small number of attorneys identifying themselves as disabled, *id.*, is stagnant or even decreasing. *Law Firm Diversity Benchmarking Report: 2006 Report to Signatories of Diversity Principles*, at 6. On the other hand, the number of openly gay and lesbian attorneys practicing at New York City law firms appears to be increasing. *Law Firm Diversity Benchmarking Report*, at 6.

In light of the catalogue of challenges described above, law firms that are striving to satisfy corporations' pressure to develop more diverse firms must take care that their efforts to diversify do not run afoul of state ethics/disciplinary rules and anti-discrimination statutes that bar unlawful discrimination in hiring or promoting on the basis of, *inter alia*, race or sex.

Financial inducements to rapidly diversify can implicate a law firm's ethical obligation to ensure that its attorneys have the experience and training to competently represent client interests. *See* DR 1-101, 6-101; EC 2-30, 6-1. Because of the limited pool from which law firms can recruit diverse talent and the difficulties in retaining such talent, it has been said that law firms may be tempted to relax standards in order to achieve desirable diversity numbers. Of course, law firms must resist such temptations; a firm's compliance with its ethical obligations must take precedence over its laudable diversity goals, notwithstanding clients' demands. In any event, lowering standards would be patronizing and serve no one's long-term interests. However, this is not to say that hiring and promotion standards should not be re-examined to ensure that they accurately measure the capacity to practice law at a competent and effective level.

In addition to ethical obligations concerning competence, law firms pursuing diversity initiatives should also be aware that both the Disciplinary Rules, DR 1-102(6), and anti-discrimination statutes such as Title VII of the Civil Rights Act and the New York State Human Rights Law proscribe employment discrimination on the basis of an applicant's race, sex, or other protected characteristics. Nevertheless, having a diversity program in place – even one stating broad recruitment or hiring goals – does not support an inference of discrimination. *See Silver v. City University of New York,* 947 F.2d 1021, 1022 (2d Cir. 1991) (per curiam); *Blanke v. Rochester Telephone Corp.*, 36 F. Supp. 2d 589, 597–98 **(**W.D.N.Y. 1999). Thus, law firms can comply with clients' diversity-related demands without violating these mandates, but caution is required.

For example, the mere collection and reporting of the racial and other demographic characteristic data relating to the composition of teams assigned to clients does not run afoul of any antidiscrimination laws. See *Gustaitis v. Chao*, C.A. No. 05-1210, 2007 WL 2071901, at *11 (E.D. Pa. July 16, 2007); *Reed v. Agilent Technologies, Inc.*, 174 F. Supp. 2d 176, 185 (D. Del. 2001); *Shuford v. Alabama State Board of Education*, 897 F. Supp. 1535, 1552 (M.D. Ala. 1995). Much of the information that law firms are being asked to provide to their corporate clients (and more) is also sought by the E.E.O.C. on its EEO-1 forms. Law firms, however, should tread carefully with regard

to the gathering of data concerning disabled individuals. In contrast to the absence of prohibitions concerning the gathering of data concerning race and gender, the Americans with Disabilities Act limits inquiries into an employee's medical condition and the disclosure of such information. 42 U.S.C. § 12112(d)(3), (4).

While increasing your firm's awareness of diversity issues and providing data concerning the same does not violate any governing laws (subject to the caveat concerning disability information), to the extent a firm uses that information to make decisions concerning hiring, placement, or promotion, it has entered a danger zone. When a private employer's diversity efforts veer into the affirmative action arena, it should be prepared to point to a substantial and documented racial and demographic imbalance in a traditionally segregated employment classification that it seeks to remedy. *See Johnson v. Transportation Agency*, 480 U.S. 616, 630 (1987); *Taxman v. Board of Education of Township of Piscataway*, 91 F.3d 1547, 1557–58 (3d Cir. 1996) (barring non-remedial affirmative action plans under Title VII); *Frost v. Chrysler Motor Corp.*, 826 F. Supp. 1290, 1296 (W.D. Okla. 1993) (program held invalid in part because Chrysler failed to show such an imbalance). The "imbalance" is not measured against the general population, but against the "relevant qualified labor pool." *See* John F. Buckley IV & Michael R. Lindsay, *Reverse Discrimination Because of Affirmative Action Obligations*, 1 Defense of Equal Employment Claims, at § 3:86 (2006). Private employer affirmative action plans also must not "unnecessarily trammel[] the rights of [non-minority] employees or create[] an absolute bar to their advancement." *Johnson*, 480 U.S. at 637-38. Therefore, be sure to focus your firm's efforts on attracting candidates and staunching attrition and steer clear of making race- or gender-based decisions, unless the firm is acting pursuant to a defensible affirmative action policy.

While lawyers certainly owe their clients a duty of loyalty, the duty of loyalty does not require a law firm to turn over proprietary information to its clients that is unrelated to the firm's discharge of its professional duties (*e.g.*, the recruitment, interview, and hiring information you mention). EC 7-17. Your law firm has a choice as to whether to share such proprietary information (although it may be one that is heavily influenced by a fear of the consequence of potentially losing a valued client). At least with regard to certain information that is shared, such as the schools at which your firm targets its recruitment efforts, clients may be willing to agree to maintain the confidentiality of the information.

Finally, as to your concern about a suggestion from a government official that clients withdraw their business from law firms doing *pro bono* work for the Guantanamo detainees, that seems to have been wishful thinking on the official's part. You presumably are referring to early 2007, when a then-Pentagon official made a prediction that has not come to pass. This official publicly listed the names of law firms representing detainees and predicted that "when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001 . . . [they] are going to make those law firms choose between representing terrorists or representing reputable firms." *See* Anna Palmer, *Remarks on Detainees Cement Bond Between Firms and Corporate Clients*, Legal Times, Jan. 24, 2007, *available at* http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1169546555702 (quoting Charles "Cully" Stimson). These statements were "universally rejected" and the Pentagon official has since apologized and resigned. *Id.*; *Official Resigns Over Gitmo Lawyer Remarks*, CBS News, Feb. 7, 2007, *available at* http://www.cbsnews.com/stories/2007/02/02/terror/main2428473.shtml. In fact, rather than punish their outside counsel, companies have recognized the "great tradition[] in the American legal profession" of *pro bono* service. *See* Palmer, *Remarks on Detainees*.

Thus, while firm leaders such as yourself no doubt may feel beleaguered, that is probably inherent to the nature of a service profession catering to clients. As the Guantanamo example illustrates, knowledgeable clients recognize and value attorneys' professional independence. We believe they also will recognize your good faith efforts to enhance the diversity of the profession by engaging in focused but lawful recruitment, retention, and promotion efforts, and through support for long-range efforts to increase the flow of underrepresented demographic groups through the educational system into our profession.

The Forum, by
Kenneth G. Standard, Esq.
Esptein Becker & Green, P.C.
Carrie Corcoran, Esq.
Esptein Becker & Green, P.C.

We received the following response to this question from a reader in Jamesville:

Re: A Besieged Firm Leader, Attorney Professionalism Forum, New York State Bar Association *Journal*, September 2007

Undoubtedly filling out questionnaires is time-consuming and tiresome. And, we all prefer to conduct our professional lives with independence. (No one enjoys being told what to do, whom to hire, or what standards to use.)

Our duty to our clients goes beyond solving their specific legal problems. We.must also counsel them with regard to best conducting their work – be it in the corporate, academic, or government milieu.

The world our clients operate in is diverse, and will be increasingly multi-cultural in the coming decades. Firm partners and associates – male and female, and of all races and ethnic backgrounds – perceive and analyze jurisprudential matters through the framework of their own varied life experiences.

Your clients may be doing you a favor, helping in the education of a 21st

century attorney. Perhaps you should combine "grateful" with "besieged."

Sincerely,
Karen DeCrow, Esq.
Attorney-at-Law
Jamesville, NY

Another reader weighed in on the Forum's answer to the attorney who was contemplating representing a friend in a personal injury case, although it was not his area of practice:

Re: Attorney Professionalism Forum, *Journal*, Sept. 07, pgs. 52-3 "Buddy's Friend"

As a now retired attorney, I feel that Mr. Hayes missed the most critical issue. I was a six year member (one year chairperson) of COPS, the Committee on Professional Standards, App. Div., 3d Dept. Buddy's Friend "never handled a negligence case" and is undertaking a "slip and fall" case vs a retail store. Though I was predominantly a real property lawyer too, I (early on) took on some PI cases but learned to avoid practicing in areas outside of my competence and experience. These cases are a major breeding ground for complaints to COPS. So my advice to "Buddy's Friend" would be forget about the retainer – etc. – don't take this case – let your friend seek competent counsel, etc., etc.

Sincerely,
Theodore Drew, Esq.
Guilderland, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

The Attorney Professionalism Forum and the Committee on Attorney Professionalism is soliciting readers' views about the increase in the salaries for first-year associates at large Manhattan law firms, currently $160,000, and higher.

What does this increase mean for the legal profession in New York? What sense, if any, does such an increase make for the law firms initiating such increase? What sense, if any, does such an increase make for the law firms matching such increase? What effect does this have on the lives of lawyers – partners as well as associates – working at those firms? What effect does this have on the clients of such firms and what, if any, responses are such clients likely to make? What effect does this have on the other lawyers in New York State, who do not work at such large law firms? What cumulative effect does this have on the overall legal culture in New York? And, if you view this with concern and worry, and believe the overall effects of such an increase are negative, what antidotes would you suggest?

Send your comments to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org. Please put "Attorney Professionalism Forum" in the subject line. Comments and views will be included in the Attorney Professionalism Forum published in the January 2008 issue of the *Journal*.

INDEX TO ADVERTISERS

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: What is the meaning of the word *robust*? That word seems to be popping out in numerous sentences, where it wasn't previously used. Have you noticed this, or am I imagining it?

Answer: You are not imagining it. What you've noticed is the tendency of the media to become fascinated with a word or phrase that a prominent individual may have used in an unusual way. The media popularize the word and expand its meaning, it is adopted by the American public, and it becomes a fad word. But often its popularity then subsides (as may now be occurring with *robust*), and only the original sense may survive.

The word *robust* is derived from *robustus*, a Latin adjective meaning "strong,"which came from the Latin noun *robur* "strength" taken from *robur*, the name for "oak tree." The English adjective *robust* is therefore traditionally defined as "strong, healthy, able-bodied, athletic, hale and hearty." Antonyms are "frail, ailing, delicate, feeble, sick, and weak." (*Roget's "New Millennium" Thesaurus*, 2007).

But when Vice President Cheney used *robust* in September 2001, it was with a different meaning. Immediately after 9/11, Mr. Cheney called for "robust interrogation" (that is, "torture") to extract intelligence from captured suspects, thus "freeing President Bush to fight the war on terror." He used the adjective *robust* as a euphemism, substituting a pleasant word for a harsh one, a common practice among politicians.

Later, speaking about UN involvement in the war, President Bush commented, "I'd like to see more robust UN action." (He seemed to mean "punitive.") In 2004, Secretary of State Colin Powell commented that our soldiers and marines were providing "robust ("ample") support" to the Iraqis.

Currently, *robust* still appears frequently in radio, television, and newspapers. In a July 2007 Public Broadcasting program, commentator Mark Shields could have omitted *robust* from his string of adjectives when he said, "All of today's problems require a robust, effective, strong federal government." Gavin Fitzsimmons, a Duke University marketing professor, described recent research findings as "the most robust (did he mean "important"?) result in my career."

Thus the adjective *robust*, which was first only used to describe people who were healthy, sturdy, buxom, and strong, currently can also describe concepts and conduct as "brave, broad, courageous, powerful, and effective." These synonyms, however, may disappear when *robust* is no longer needed as a euphemism.

Government is good at euphemism, applying it widely and expertly. For example, a federal interagency committee is said to be considering doing away with the word *poverty*. One official explained, "All we are trying to do is to improve the meaning of the term. Poverty is a value-laden word and that's not the kind of word we like. We would like a less value-laden concept like 'income distribution' or 'mean' or 'median' or some other word devoid of emotional complications."

Our own City Commission wants to discard "The Public Relations Department." "The word PR to me means we're having to cover up something, we're having to hide something, we're trying to sell a bill of goods," one Commissioner said. (Thus far, however, no one has found a satisfactory substitute.)

The practice of changing the name of something to improve its perception is so common that the National Council of Teachers of English annually gives an award for "twisting the English language." Among its awards: To the Pentagon, an award for referring to the neutron bomb as a "radiation enhancement weapon." To the Central Intelligence Agency, a runner-up award for the name it reportedly gave its experiments in human behavior control: "The Society for the Investigation of Human Ecology."

Euphemism also pervades reports from teachers to parents about the progress of their children in elementary grades. A child who cheats "has great ingenuity, but needs direction in approved methods of succeeding." A liar "has great imagination but needs direction in distinguishing reality from fantasy." And a bully "shows great leadership but needs direction in learning consideration for others."

(Does anyone recognize a politician you know in those definitions?)

From the Mailbag:

My thanks to Baltimore attorney Anthony F. Vittoria, who noticed the coinage *to spectate* and "kind of liked it." As he pointed out, it resembles the backformations that were discussed in the July/August "Language Tips." Kobe Bryant coined a backformation in a recent interview when he commented in answer to a question, "It depends on how you interpretate it."

Potpourri:

Have you noticed the difference in the meaning of certain word-pairs? *Presume*, the verb, means something quite different from *presumptuous*, the adjective. The verb means "to assume as true in the absence of proof to the contrary." But the adjective has unfavorable connotations: "assuming unwarranted liberties." The unslanted verb *precipitate* means "to cause to happen before anticipated." But the adjective *precipitous* is pejorative. It means "abrupt and ill-considered." The verb *contemplate* means "to ponder," But the adjective *contemplative* describes the personality of the individual doing the pondering. Then there is *assign* and *assignation*. The verb *assign* means "to designate"; the noun *assignation* can mean "an appointment for a meeting of lovers, a tryst." Better not confuse those two. ■

Gertrude Block is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

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"The courtroom's acoustics (acoustical qualities) are poor." (Plural.) *Example:* "Athletics (athletic training) isn't part of law school." (Singular.) *Or:* "Athletics (sports) are popular with sports attorneys." (Plural.) *Example:* "Politics affects every aspect of our lives." (Singular.) *Or:* "His politics (opinions) aren't going to affect our decision." (Plural.)

2. Pronouns. Pronouns substitute for nouns. Some common singular pronouns: "he," "her," "hers," "him," "his," "I," "it," "me," "mine," "my," and "she." Some common plural pronouns: "its," "our," "ours," "their," "theirs," "them," "they," "us," and "we." Some pronouns stay the same whether they're singular or plural: "you," "your," and "yours."

Use reflexive and intensive pronouns only to refer back to a pronoun. Some common reflexive and intensive pronouns: "myself," "yourself," "yourselves," "ourselves," "herself," "himself," "themselves," and "itself." *Examples:* "I said that to myself." (Reflexive pronoun.) "I myself said that." (Intensive pronoun.) *Incorrect:* "The judge and me [or *myself*] went to the courtroom." It's not "me [or myself] went to the courtroom." It's "I went to the courtroom." *Therefore:* "The judge and I went to the courtroom."

Here's a tip when you write a sentence with two or more pronouns: Delete the first pronoun. Then ask whether the sentence reads with an "I," "me," "he," "him," "she," "her," "they," or "them." *Incorrect:* "She and him went to court." Delete "she." The sentence makes sense if you say "He went to court." *Therefore:* "She and he went to court." *Incorrect:* "He and them argued the motion." Delete "he." The sentence makes sense if you say "They argued the motion." *Therefore*: "He and they argued the motion." *Incorrect:* "Mary and me went to court." In this example in which "Mary" replaces a pronoun, follow the same rule: Delete "Mary." The sentence makes sense if you say "I went to court." *Therefore:* "Mary and I went to court." *Incorrect:* "The judge played softball with Henry and I." The sentence doesn't make sense if you delete "Henry and." The sentence would be, incorrectly: "The judge played softball with I." *Therefore:* "The judge played softball with Henry and me."

Never use these nonstandard reflexive and intensive pronouns: "theirself," "theirselves," "themself," and "themselfs."

Pronouns must agree with their antecedents in gender, person, and number. An antecedent is the noun to which the pronoun refers. Example of a singular antecedent with a singular pronoun: "Jane [singular antecedent] alleges that XYZ Corp. violated *her* [singular, feminine pronoun] constitutional rights." Example of a plural antecedent with a plural pronoun: "Mary and Jane [plural antecedent] allege that XYZ Corp. violated *their* [plural pronoun] rights."

> Legal writers will object to you fusing participles.

Indefinite pronouns don't refer to any specific person or thing. Here are some common indefinite pronouns: "all," "any," "anyone," "anybody," "anything," "each," "either," "everyone," "everybody," "everything," "little," "much," "neither," "nobody," "no one," "none," "nothing," "other," "one," "somebody," "someone," and "something." These indefinite pronouns are always singular. *Incorrect:* "Everyone has their price." *Becomes:* "Everyone has his price." To eliminate the sexist language, rewrite the sentence. *Correct:* "Everyone has a price." *Incorrect:* "Someone used their pen to deface the judge's bench." *Becomes:* "Someone used his pen to deface the judge's bench." To eliminate the sexist language, change to "Someone used a pen to deface the judge's bench."

The "one" exception: "Attorney Able is one of those jurists who knows what he is doing." *Becomes:* "Attorney Able is one of those jurists who know what they are doing."

The "not one" exception: If "none" means "no one" or "not one," the verb is singular. If "none" refers to more than one person or thing, the verb is plural. *Examples:* "None of us [meaning *not one of us*] knows grammar." "None of the attorneys know how to write the brief."

A "pair" of exceptions: "A pair of socks" but "three pairs of socks."

"Both," "few," "many," "others," and "several" are always plural.

"All," "any," "more," "most," "none," and "some" are singular or plural depending on the noun or pronoun to which they refer. *Incorrect:* "All the attorneys eats lunch at Forlini." *Becomes:* "All the attorneys eat lunch at Forlini." *Incorrect:* "All the pizza in the judge's chambers are gone." *Becomes:* "All the pizza in the judge's chambers is gone."

Collective nouns in American usage take a singular verb. Some common collective nouns: "appellate court," "army," "assembly," "audience," "board," "committee," "couple," "crowd," "family," "jury," "majority," "number," and "team." *Incorrect:* "The jury was right. They decided correctly." *Becomes:* "The jury was right. It decided correctly." *Or:* "The jurors were right. They decided correctly." *Incorrect:* "The family won the case. They celebrated." *Becomes:* "The family won the case. It celebrated."

"We" versus "us." To determine when to use the pronouns "we" or "us," drop the noun or noun phrase before the pronoun. *Incorrect:* "Us attorneys can no longer tolerate the firm's policies." If you drop the noun "attorneys," the sentence wouldn't make sense: "Us can no longer toler-

ate the firm's policies." *Correct:* "We attorneys can no longer tolerate the firm's policies." If you drop the noun "attorneys," the sentence makes sense: "We can no longer tolerate the firm's policies." *Incorrect:* "The firm has given we paralegals no alternative." If you drop the noun "paralegals," the sentence wouldn't make sense: "The firm has given we no alternative." *Correct:* "The firm has given us paralegals no alternative." If you drop the noun, the sentence now makes sense: "The firm has given us no alternative."

3. Fused Participles. Fused participles occur when a writer fails to use a possessive form of a noun or pronoun to introduce a gerund. Use logic to solve fused-participle problems by eliminating miscues. Ask yourself where the reference and stress should be. *Incorrect:* "The People objected to the defendant leaving the courtroom a free man." The gerund "leaving" is fused into the noun "defendant." "Leaving" is the object of the preposition "to"; "leaving" doesn't modify the noun "defendant." In this sentence, the reader might incorrectly believe that the People objected to the defendant. *Therefore:* "The People objected to the notion that the defendant would leave the courtroom a free man." Or insert an apostrophe: "The People objected to the defendant's leaving the courtroom a free man."

Fused participles affect pronouns. *Incorrect:* "Do you mind us getting all these cases?" In this example, the writer didn't mean to write "Do you mind *us*?" But that's what the reader understands. *Becomes:* "Do you mind *our* getting all these cases?" *Incorrect:* "The police objected to them possessing contraband." In this example, the writer did not mean, "The police objected to *them*." *Becomes:* "The police objected to *their* possessing contraband." *Incorrect:* "My parole officer objected to me living alone." The writer did not mean to write, "My parole officer objected to *me living*." *Becomes:* "My parole officer objected to *my* living alone." *Incorrect:* "The judge feared the Constitution becoming a shield for lawlessness." The writer did not mean to write, "The judge feared the Constitution." *Becomes:* "The judge feared that the Constitution would become a shield for lawlessness." *Or:* "The judge feared the Constitution's becoming a shield for lawlessness."

4. Verb Tenses and Moods. Verbs have six tenses: present, past, future, present perfect, past perfect, and future perfect. The last three tenses (present perfect, past perfect, and future perfect) are also known as the past participle form. The present refers to actions occurring when the writer is writing. The past refers to actions that occurred before the writer wrote. The future refers to actions that will occur after the writer writes. The present perfect refers to actions that began in the past and were completed before the present. Use the past perfect when one past action was completed before another past action began. Use the future perfect when an action that started in the past will end at a certain time in the future.

An example of the verb "talk" using the different tenses: "talk" (present); "talked" (past); "will talk" (future); "have talked" (present perfect); "had talked" (past perfect); and "will have talked" (future perfect).

Form the present perfect by using "have" or "has" before the past participle. Form the past perfect by adding "had" before the past participle. Form the future perfect by adding "will have" before the past participle.

Three moods exist in English: indicative, imperative, and subjunctive. Use the indicative for statements of facts or questions. Use the imperative for orders or commands. Use the subjunctive to express a wish, an idea contrary to fact, a requirement, or a suggestion or recommendation. *Examples of indicative mood:* "Julia researches in the library." "Sarah writes all day." *Examples of imperative mood:* "Be quiet." "Argue the motion." *Examples of subjunctive mood:* "She wishes her partner were here." "If John were more aggressive, he'd be a better attorney." "Ashley would have passed the bar exam if she had studied harder." "The suspect acted as if he were guilty." "The judge requested Mrs. Doe's presence at the hearing."

5. Irregular verbs. For most verbs, form the past tense by adding a "d" or "ed" at the end of the verb. "Talk" becomes "talked." "Play" becomes "played." Other verbs are irregular. Irregular verbs change a vowel and add "n" or "en"; change a vowel and add "d" or "t"; or don't change at all.

To form the past participle, use a helping verb: "is," "are," was," or "has been." Then add the principal part of the verb.

Examples: "Arise" (present tense) *becomes* "arose" (past tense) *becomes* "arisen" (past participle). "Bear" *becomes* "bore" *becomes* "born" or "borne." "Beat" *becomes* "beat" *becomes* "beaten." "Become" *becomes* "became" *becomes* "become." "Begin" *becomes* "began" *becomes* "begun." "Bite" *becomes* "bit" *becomes* "bitten." "Blow" *becomes* "blew" *becomes* "blown." "Break" *becomes* "broke" *becomes* "broken." "Choose" *becomes* "chose" *becomes* "chosen." "Come" *becomes* "came" *becomes* "come." "Do" *becomes* "did" *becomes* "done." "Draw" *becomes* "drew" *becomes* "drawn." "Drink" *becomes* "drank" *becomes* "drunk." "Drive" *becomes* "drove" *becomes* "driven." "Eat" *becomes* "ate" *becomes* "eaten." "Fall" *becomes* "fell" *becomes* "fallen." "Fly" *becomes* "flew" *becomes* "flown." "Forget" *becomes* "forgot" *becomes* "forgotten." "Forgive" *becomes* "forgave" *becomes* "forgiven." "Freeze" *becomes* "froze" *becomes* "frozen." "Get" *becomes* "got" *becomes* "gotten" or "got." "Give" *becomes* "gave" *becomes* "given." "Go" *becomes* "went" *becomes* "gone." "Grow" *becomes* "grew" *becomes* "grown." "Hide" *becomes* "hid" *becomes* "hidden." "Know" *becomes* "knew" *becomes* "known." "Lie" (horizontal position) *becomes* "lay" *becomes* "lain." "Ride" *becomes* "rode" *becomes* "ridden." "Ring" *becomes* "rang" *becomes* "rung." "Rise" *becomes* "rose" *becomes* "risen." "Run" *becomes* "ran" *becomes* "run." "See" *becomes* "saw" *becomes* "seen."

"Shake" *becomes* "shook" *becomes* "shaken." "Shrink" *becomes* "shrank" *becomes* "shrunk." "Sing" *becomes* "sang" *becomes* "sung." "Sink" *becomes* "sank" *becomes* "sunk." "Speak" *becomes* "spoke" *becomes* "spoken." "Spring" *becomes* "sprang" *becomes* "sprung." "Steal" *becomes* "stole" *becomes* "stolen." "Strive" *becomes* "strove" *becomes* "striven." "Swear" *becomes* "swore" *becomes* "sworn." "Swim" *becomes* "swam" *becomes* "swum." "Take" *becomes* "took" *becomes* "taken." "Tear" *becomes* "tore" *becomes* "torn." "Throw" *becomes* "threw" *becomes* "thrown." "Wake" *becomes* "woke" or "waked" *becomes* "woken" or "waked." "Wear" *becomes* "wore" *becomes* "worn." "Write" *becomes* "wrote" *becomes* "written."

> Parallel structure is both intelligent and a necessity.

Some irregular verbs stay the same in the past tense and past participle. *Examples:* "Bend" *becomes* "bent" (past) *becomes* "bent" (past participle). "Bring" *becomes* "brought" in both forms. "Catch" *becomes* "caught." "Creep" *becomes* "crept." "Dig" *becomes* "dug." "Dive" *becomes* "dived" or "dove" *becomes* "dived." "Fight" *becomes* "fought." "Hold" *becomes* "held." "Kneel" *becomes* "knelt." "Lay" *becomes* "laid." "Lead" *becomes* "led." "Lie" (falsehood) *becomes* "lied." "Lose" *becomes* "lost." "Prove" *becomes* "proved" *becomes* "proved" or "proven." "Say" *becomes* "said." "Show" *becomes* "showed" *becomes* "showed" or "shown." "Teach" *becomes* "taught."

Some irregular verbs stay the same in the present, past, and past participle: "burst" and "hurt."

The trickiest verb in English is "to be." Here are the variations in the present: "I am," "you are," "he (or *she* or *it*) is," "we are," "you are," and "they are." Here are the variations in the past: "I was," "you were," "he (or *she* or *it*) was," "we were," and "they were." The past participle: "I have been," "you have been," "he (or *she* or *it*) has been," "we have been," and "they have been."

6. Gerunds. A gerund is the subject or object of a verb, infinitive, or preposition that ends in "ing." Use gerunds to avoid nominalizations, or converting verbs to nouns. *Incorrect*: "*The* impeachment *of* his testimony will be difficult." *Becomes:* "Impeach*ing* his testimony will be difficult."

A gerund error occurs when the gerund modifies the wrong word in the sentence. Solve a gerund error in one of three ways: (1) degerundize and place the verb after the subject; (2) bifurcate the sentence; or (3) subordinate. *Incorrect:* "The court granted the motion to suppress *finding* that the police lied." This sentence suggests that the motion to suppress found that the police lied. Here's a way to correct the sentence by degerundizing the verb after the subject: "The court found that the police lied and therefore granted the motion to suppress." You may also split the sentence into two: "The court found that the police lied. It therefore granted the motion to suppress." Another way to correct the sentence is to subordinate: "After finding that the police lied, the court granted the motion to suppress."

7. Agreement. A verb must agree in numbers with its subjects. *Incorrect:* "The color of the clouds are gray." *Becomes:* "The color of the clouds is gray." (Color is gray.) *Incorrect:* "The difference between Cardozo and Holmes, and between Frankfurter and Jackson, are striking." *Becomes:* "The difference between Cardozo and Holmes, and between Frankfurter and Jackson, is striking." (Difference is striking.) *Incorrect:* "Justice Jackson, as well as the hundreds of judges who emulate his writing style, rely on plain Anglo-Saxon English." *Becomes:* "Justice Jackson, as well as the hundreds of judges who emulate his writing style, relies on plain Anglo-Saxon English." (Justice Jackson relies.) Nothing in a phrase contained in a subject affects the number of the verb that follows.

When you use "neither . . . nor," "either . . . or," or "not only . . . but also," make sure that the verb agrees with its nearest subject. When all the elements are singular, the verb should also be singular. When all the elements are plural, the verb should be plural. When the elements are different in number, the verb takes the number of the closer. *Incorrect:* "Neither the judge nor his court attorney are in chambers." *Becomes:* "Neither the judge nor his court attorney is in chambers." *Incorrect:* "Neither the judge nor his court attorneys was in chambers." *Becomes:* "Neither the judge nor his court attorneys were in chambers." *Incorrect:* "Neither the judges nor their court attorney were in chambers." *Becomes:* "Neither the judges nor their court attorney was in chambers." *Incorrect:* "Neither you nor I are in chambers." *Becomes:* "Neither you nor I am in chambers."

Multiple subjects modified by "each," "every," and "many" take a singular verb. *Correct:* "Every court attorney and every law clerk has been told to attend."

8. Parallelism. Sentences are parallel when nouns match nouns, verbs match verbs, gerunds match gerunds, and so on. *Incorrect:* "A rule that is both intelligent and a necessity." *Becomes:* "A rule both intelligent and necessary." *Incorrect:* "The rule is found in the cases, statutes, and in the contracts." *Becomes:* "The rule is found in the cases, statutes, and contracts." *Incorrect:* "No drinking, smoking or food." *Becomes:* "No drinking, smoking, or eating."

Parallelism requires that parallel coordinates form matching pairs: "although/nevertheless," "although/yet," "as/as," "both/and," "either/or," "if/then," "just as/so," "neither/nor," "not/but," "not only/but also," and "whether/or." *Incorrect:* "Not only do I like landlord-tenant practice but also family law." *Becomes:* "Not only do I like landlord-tenant practice, but I also like family law." *Or:* "I like not only landlord-tenant practice but also

family law." *Or, in the positive:* "I like landlord-tenant practice and family law."

Exceptions: Use "neither . . . or," "not . . . or," or "not . . . nor" only if the first negative doesn't carry over to the second negative or for dramatic emphasis.

9. Sentence Fragments. A sentence fragment isn't a short sentence. It's a sentence that can't stand on its own, an incomplete sentence. A sentence fragment lacks a subject or a verb. *Example:* "The attorney questioning the witness." "Questioning" is a participle modifying "attorney." To create a complete sentence, change "questioning" from a participle to a main verb or add a main verb. *Becomes:* "The attorney questioned the witness." *Or:* "The attorney was questioning the witness."

Sometimes a fragment is a subordinate clause posing as a complete sentence. If you add "although," "when," or "until" in front of a main, or independent, clause, the clause becomes a subordinate, or dependent, clause. Example of a main clause: "The attorney questions the witness." Subordinate clause: "When the attorney questions the witness." Attach subordinate clauses to main, or independent, clauses. *Example:* "When the attorney questions a witness [subordinate clause], the judge will interrupt the testimony [main clause]." Here's a list of other subordinating conjunctions: "after," "as," "as if," "as long as," "as soon as," "as though," "because," "before," "even if," "even though," "if," "if only," "in order that," "in that," "no matter how," "now that," "once," "provided," "rather than," "since," "so that," "than," "that," "though," "till," "unless," "whenever," "where," "whereas," "wherever," and "while."

Exceptions: Use sentence fragments for stylistic effect. *Examples:* "The rape victim had the courage to testify. More courage than most people would have had." "The witness's testimony was consistent. Consistently false." Use sentence fragments for commands. *Examples:* "Stop!" "Evacuate the building!" "Get out!" Use sentence fragments as a transition. *Example*: "First, the facts. Second, the law." Use sentence fragments to negate: "The witness's testimony was honest. Not." Also use sentence fragments to answer questions: "Have you told us the truth? Probably not."

10. "And" versus "To." Don't use "and" to show causality or in an infinitive phrase. Use "to." *Incorrect:* "I went to the courthouse and got the judgment." *Becomes:* I went to the courthouse to get the judgment." *Incorrect:* "Look and see whether the judge is on the bench." *Becomes:* "Look to see whether the judge is on the bench."

In the next issue, the Legal Writer will continue with a second set of 10 grammar issues. Following that column will be columns on punctuation and usage controversies. ■

CONTINUED FROM PAGE 53

to destroy the claims and, worse, the credibility of the client. Had the attorney taken the trouble and time to prepare the initial net worth affidavit with care and with proper documentation, then the disaster facing both the attorney and client at the time of trial could have been averted.

The rewards for the attorney who carefully attends to the contents of the initial statement of net worth are significant, and the attorney will know from the outset of the case that all of the financial information is "on the table" and that he or she may certify the financial statement with peace of mind.

What happens if the client admits at the outset that there is "hidden" money or assets? The answer is obvious. The attorney must explain that it is necessary to be truthful and forthright and that the issue of credibility is a primary consideration in the proper presentation of the client's case, whether it be on a motion, a conference or a trial. Amended income tax returns may have to be filed. If the client is unable or unwilling to explain the questionable assets, then the attorney has the obligation to advise the client of the consequences. If the client insists upon continuing the concealment, the attorney has no alternative other than to discontinue representation of the client.

Taking the "high road" is not only mandated, it also minimizes the risk of the attorney being censured, sanctioned, or something worse! It eliminates the horror of being confronted at the time of trial with two conflicting net worth affidavits without an adequate explanation for the differences.

Experienced matrimonial attorneys do not take the client's word but require documentation to support the figures, particularly those that appear to be out of line. Income will be approximately the same as expenses, or it may be higher or lower. If income is higher than the expenses, there should be assets to explain the accumulation of the additional funds or the expenditure for "one time" expenses, such as remodeling the house or a lavish wedding or bar mitzvah party. If the income is lower than the expenses, there should be an explanation for the source of the money used to make up the shortfall. This may appear in the form of debt (commonly credit card debt), a financial windfall, such as an inheritance or a recovery in a personal injury action or, perhaps, lottery winnings. Or, it is possible the expenses are listed inaccurately. The numbers must jive and make sense.

Consequently, extreme care, which often requires considerable time, must be taken in order to prepare the initial net worth statement so that both the client and the attorney can live with it comfortably throughout the duration of the case, even if there are changes in the client's finances during the course of the litigation. The net worth statement is frequently the most neglected document, yet it is probably the most important one in the resolution of financial issues in practically every matrimonial case. ■

1. N.Y. Domestic Relations Law § 236 Pt. B 4a.

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Do's, Don'ts, and Maybes: Legal Writing Grammar — Part I

In four of the last five columns, the Legal Writer discussed the things you should and shouldn't do in legal writing. We continue with 10 grammar issues and, in the next column, with 10 more. Studying these 20 grammar issues offers a framework to write comprehensible, intelligent documents. Good grammar is a good start, although good legal writing demands much more. Knowing grammar won't make you a good legal writer. But you're a poor legal writer if you don't know grammar.

Grammar is a system or set of rules that govern a language. English categorizes words into eight different parts of speech according to how the words function in a sentence: nouns, pronouns, verbs, adverbs, adjectives, conjunctions, interjections, and prepositions. Nouns refer to an event, idea, person, place, quality, substance, or thing. Pronouns are used in place of a noun. Verbs name an action, occurrence, or state of being. Adverbs modify verbs, adjectives, clauses, sentences, and other adverbs. Adverbs don't modify nouns. Adjectives modify nouns or pronouns. A conjunction connects two words, phrases, or clauses. An interjection shows strong emotion. A preposition links to another word in the sentence a noun or a pronoun following the preposition.

Here are the most common grammar errors — not the controversies; only the recognized, accepted errors — and how to fix them.

1. Singular and plural nouns. For most nouns, add "s" to form the plural. "Bat" *becomes* "bats." "Window" *becomes* "windows." "Book" *becomes* "books." Add "es" if the noun ends in "s," "sh," "ch," or "x." "Dress" *becomes* "dresses." "Wish" *becomes* "wishes." "Church" *becomes* "churches." "Fox" *becomes* "foxes."

If the noun ends in a "y" and a consonant precedes the "y," change the "y" to "i" and add "es." "Baby" *becomes* "babies." "Beauty" *becomes* "beauties." If the noun ends in a "y" and a vowel precedes the "y," add an "s." "Alley" *becomes* "alleys." "Attorney" *becomes* "attorneys."

Pluralize most nouns ending in "f" by adding "s." "Brief" *becomes* "briefs." "Proof" *becomes* "proofs. "Roof" *becomes* "roofs." "Dwarf" *becomes* "dwarfs." *Exception:* Change some nouns ending in "f" or "fe" to "v" and add "es." "Elf" *becomes* "elves." "Knife" *becomes* "knives." "Leaf" *becomes* "leaves." "Life" *becomes* "lives." "Wolf" *becomes* "wolves."

If a name ends in "f," add an "s" to form the plural. "Mr. and Mrs. Wolf" *becomes* "the Wolfs."

To pluralize compound words, make the main word plural. "Attorney general" *becomes* "Attorneys general." "Court-martial" *becomes* "courts-martial." "Passerby" *becomes* "passersby." "Sister-in-law" *becomes* "sisters-in law." Two exceptions: (1) if the compound word has no noun, add an "s" to the end of the word; (2) if the compound word ends in "ful," add an "s" at the end. *Examples:* "Dress-up" *becomes* "dress-ups." "Takeoff" *becomes* takeoffs." "Teaspoonful" *becomes* "teaspoonfuls." "Cupful" *becomes* "cupfuls."

Some nouns change when they become plural. "Child" *becomes* "children." "Foot" *becomes* "feet." "Goose" *becomes* "geese." "Man" *becomes* "men." "Mouse" *becomes* "mice." "Ox" *becomes* "oxen." "Person" *becomes* "people." "Tooth *becomes* "teeth." "Woman" *becomes* "women."

Some nouns stay the same whether they're singular or plural. *Example:* "deer," "fish," "moose," "Portuguese," "series," "sheep," and "species."

Some words maintain their Latin or Greek form in the plural. "Nucleus" *becomes* "nuclei"; "syllabus" *becomes* "syllabi" ("syllabuses" is acceptable); "focus" *becomes* "foci"; "fungus" *becomes* "fungi"; "cactus" *becomes* "cacti" ("cactuses" is acceptable); "thesis" *becomes* "theses"; "crisis" *becomes* "crises"; "phenomenon" *becomes* "phenomena"; "index" *becomes* "indices" ("indexes" is acceptable); "appendix" *becomes* "appendices" ("appendixes" is acceptable); "criterion" *becomes* "criteria."

> A verbs must agree with its subject.

If a noun ends in "ics" and refers to a body of knowledge, a science, or course of study, it's usually singular. *Examples:* "mathematics," "phonetics," and "semantics." If a noun ends in "ics" and refers to concrete activities, practices, or phenomena, it's usually plural. Examples: "athletics," "mechanics," and "acoustics." Sometimes whether nouns are singular or plural depends on their meaning. *Example:* "Acoustics is the study of sound." (Singular.) *Or:*

CONTINUED ON PAGE 74

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