NEW YORK STATE BAR ASSOCIATION

Journal

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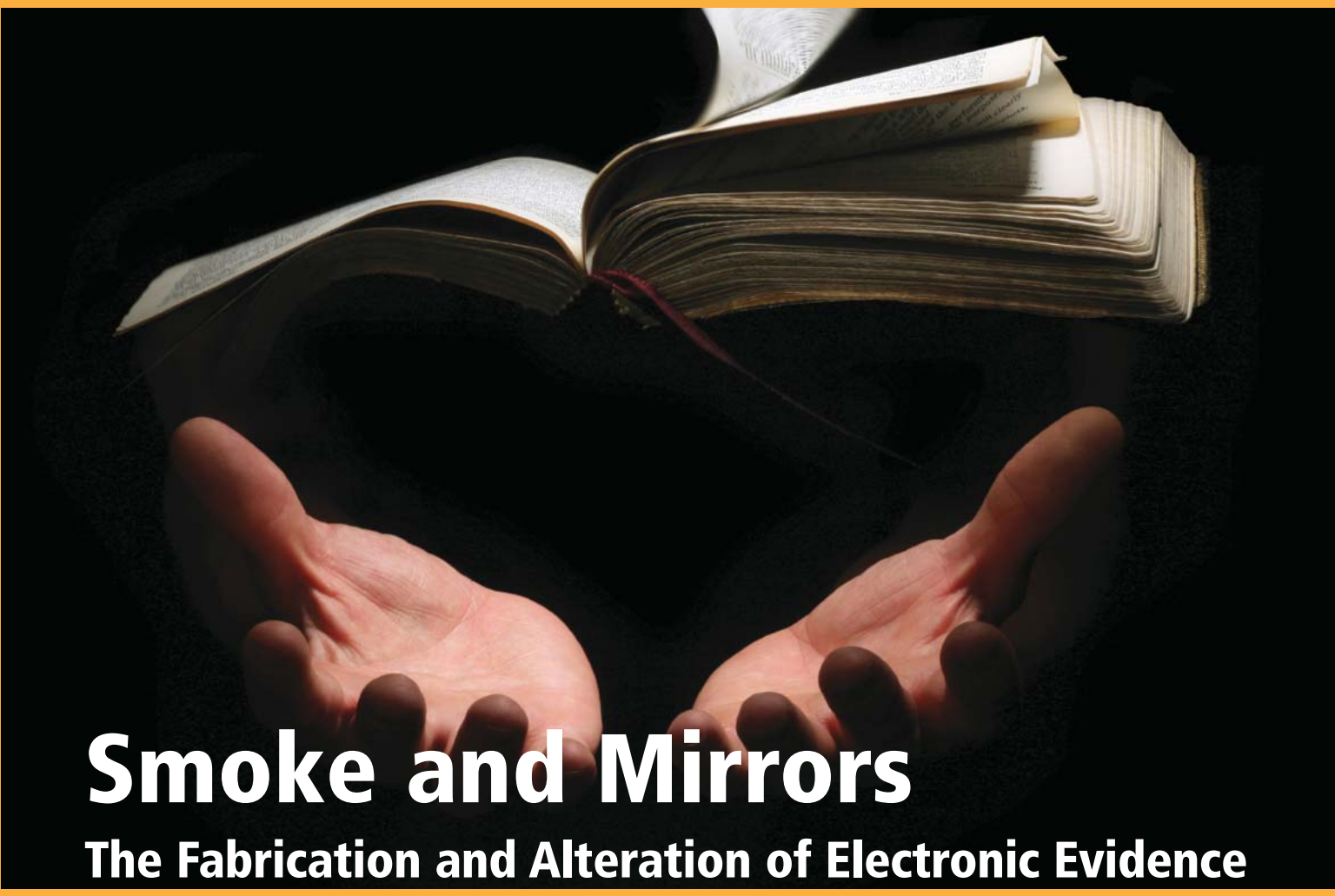

Smoke and Mirrors

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Manipulated Evidence Can Be More Powerful Than the Sum of Its Parts

by Sharon D. Nelson and John W. Simek

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Lawyer Referral and Information Service

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June 2007

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EDITORIAL OFFICES
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ADVERTISING REPRESENTATIVE
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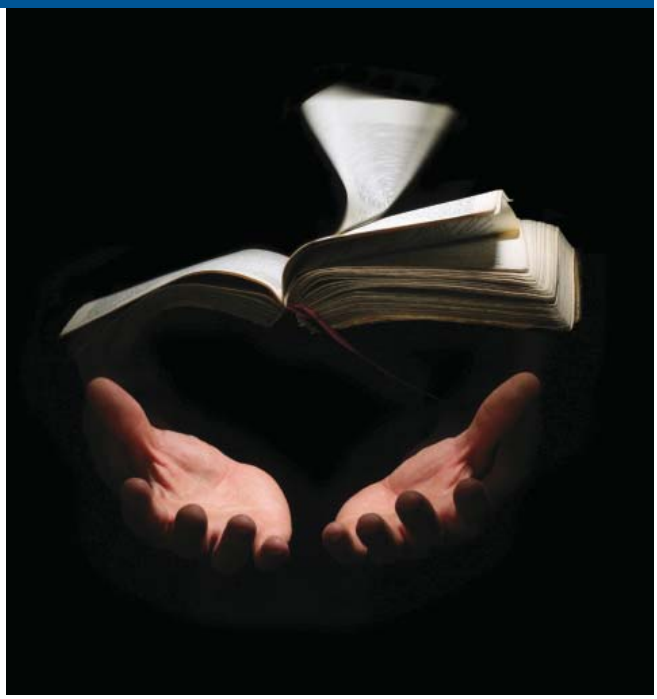

SMOKE AND MIRRORS

The Fabrication and Alteration of Electronic Evidence

BY SHARON D. NELSON AND JOHN W. SIMEK

DEPARTMENTS

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PRESIDENT'S MESSAGE

KATHRYN GRANT MADIGAN

There's No Place Like Home

A wise person once said that Abraham Lincoln was a great president because he knew he was only acting president. I am no Abraham Lincoln, but I will endeavor to keep that in mind throughout the year ahead – I am your acting President for one short year, here to serve our diverse membership with a commitment to making a genuine and enduring difference.

We are all shaped by our earliest experiences and influences. As the second of seven children growing up in a spirited Irish Catholic home, I was blessed with a father who passed on the Jesuit traditions of education as a lifelong pursuit, serving others, and making a difference. He also taught me that anything worth doing is worth doing well. These values have motivated and inspired me all my life, especially during my 28 years as an active member of this Association. The State Bar has, in many ways, been my professional home – a place where I have found purpose, value and enduring relationships, and unparalleled opportunities for professional growth and service to our members, the public and our profession. In taking the helm of this great Association as its 110th President, my goal is for every licensed New York lawyer to find a home at the State Bar.

Meeting this goal will require the long view, one that focuses on securing the State Bar's legacy as the voice of the New York lawyer, growing our membership and implementing a long-range strategic financial plan. As stewards of our member dollars, we must judiciously allocate our resources within the Association in order to provide greater value and relevance to our members.

Over the course of my many years as a state and local bar leader and throughout my year as President-Elect, I have met with lawyers across this state and have marveled at your passion for the law and your commitment to serving your clients and your communities. I have witnessed the challenges you face daily in achieving a measure of work/life balance, and how diverse we truly are as a profession. I have listened to your ideas and concerns, what motivates and informs you. I have learned what we, as the largest voluntary state bar association in the country, do well, and what we can do even better.

I want to continue those conversations throughout this year. I hope my *Journal* columns will engage and inspire you to become better lawyers, more effective community and bar leaders, stronger advocates for those who cannot speak for themselves, and defenders of the rule of law.

In order to provide greater opportunities to expand these vital conversations, I will soon be launching our first-ever "Presidential Blog" and look forward to your participation via this new technology.

Together we can continue to enhance our credibility and visibility as New York lawyers, influencing public policy not only here in New York, but in national and international arenas. We are the bellwether state, and we must continue our tradition of being ahead of the wave – tuned in to emerging trends, sharing the extraordinary expertise of our 72,000 members and helping to find solutions to the challenges we face today. A society is measured by the way in which it cares for its poor, its children and its elderly. And we have miles to go.

We live in a time when half of our college students and far too many voters lack an understanding of the fundamental principles of our democratic republic, including the importance of an independent and fairly compensated judiciary. We can play a significant role in reinvigorating our civic education programs in our middle and high schools, as well as in our community and senior centers. This, in turn, will have the added benefit of modeling law as a career for youth of color, thereby strengthening our ongoing efforts to diversify the profession.

I am committed to building on the leadership of Mark Alcott, his reform initiatives, and the legacy of those who preceded us. Our President-Elect, Bernice Leber, is also committed to this long view, to the importance of continuity and ownership of our Association's future, and to providing greater meaning, service and leadership opportunities for every member.

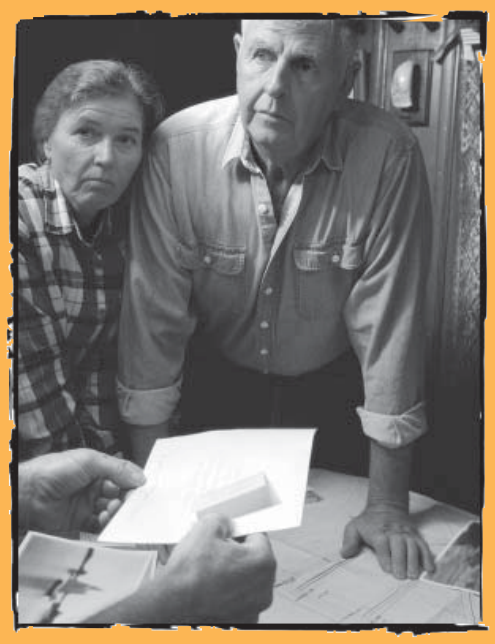
There really is no place like home, and I can think of no better "home base" for all New York lawyers than our Association.

Welcome home.

KATHRYN GRANT MADIGAN can be reached at president@nysbar.com

There are millions of reasons to do Pro Bono.

(Here are some.)



Each year in communities across New York State, indigent people face literally millions of civil legal matters without assistance. Women seek protection from an abusive spouse. Children are denied public benefits. Families lose their homes. All without benefit of legal counsel. They need your help.

If every attorney volunteered at least 20 hours a year and made a financial contribution to a legal aid or pro bono program, we could make a difference. Please give your time and share your talent.

Call the New York State Bar Association today at **518-487-5640** or go to **www.nysba.org/probono** to learn about pro bono opportunities.

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NYSBACLE

Spring Programs and Tentative Fall Schedule

(Subject to Change)

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

Spring Programs

Ethics and Professionalism
(half-day program)
Fulfills NY MCLE requirement for all attorneys (4.0): 4.0 of ethics and professionalism

June 11	Melville, LI; Syracuse
June 14	Ithaca
June 15	Albany; Tarrytown

Drafting Elder Law Documents – Old and New
+Fulfills NY MCLE requirement (7.5): 7.5 of professional practice and/or practice management

June 15	Rochester

Distressed Real Estate – Current Topics in Foreclosures and Bankruptcy
+Fulfills NY MCLE requirement (7.0): 7.0 of professional practice and/or practice management

June 19	Melville, LI
June 22	Albany
June 27	New York City

Fall Programs

Trust Your Planning: A Comprehensive Review of Trust Planning and Drafting Techniques
+video replay

September 19	Jamestown

Supplemental Needs Trusts

September 24	Tarrytown
September 25	Albany; Buffalo; Melville, LI; New York City

Crisis Intervention Training

September 25	New York City

Update 2007
live sessions

October 5	Syracuse
October 19	New York City

+ video replays

October 24	Binghamton
October 25	Utica
October 30	Albany; Buffalo
November 1	Rochester
November 7	Ithaca; Plattsburgh; Saratoga
November 8	Jamestown; Suffern
November 15	Uniondale, LI; Tarrytown
November 16	Canton
November 28	Poughkeepsie
November 30	Loch Sheldrake; Watertown

Practical Skills Series – Basic Matrimonial Practice

October 10	Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

Second Corporate Counsel Institute
(two-day program)

October 11–12	New York City

2007 No-Fault Insurance Update

October 11	New York City
October 12	Albany
October 18	Syracuse
October 19	Melville, LI

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

Women's Health/Medical Malpractice

October 12 New York City

Real Estate Titles and Transfers

October 12 New York City
October 26 Tarrytown
November 1 Albany
November 2 Melville, LI
November 14 Rochester

A Day in Discovery with Jim McElhaney

October 16 Syracuse
October 17 Buffalo
November 7 Melville, LI
November 8 New York City

Health Law

October 19 New York City

Practical Skills Series –
Estate Planning and Will Drafting

October 23 Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

+ Ninth Annual Institute on Public Utility Law

October 26 Albany

Special Education Law Update

October 26 Albany; Buffalo; New York City

At the Ramparts: Challenges in Representing and Litigating With Public Companies in the Post-DURA/IPO/Sarbanes-Oxley Environment

October 30 New York City

+Fifth Annual Sophisticated Trusts and Estates Institute

(two-day program)

November 8–9 New York City

Practical Skills Series –
Purchases and Sales of Homes

November 13 Albany; Buffalo; Hauppauge, LI; New York City; Rochester; Syracuse; Westchester

Ethics and Professionalism

(half-day program)

November 16 New York City
November 19 Tarrytown
November 28 Melville, LI
November 30 Albany; Syracuse
December 7 Rochester
December 12 Buffalo

Practical Skills Series –
Basics of Civil Practice: The Trial

November 27 Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

+Advanced Real Estate Practice

November 30 New York City

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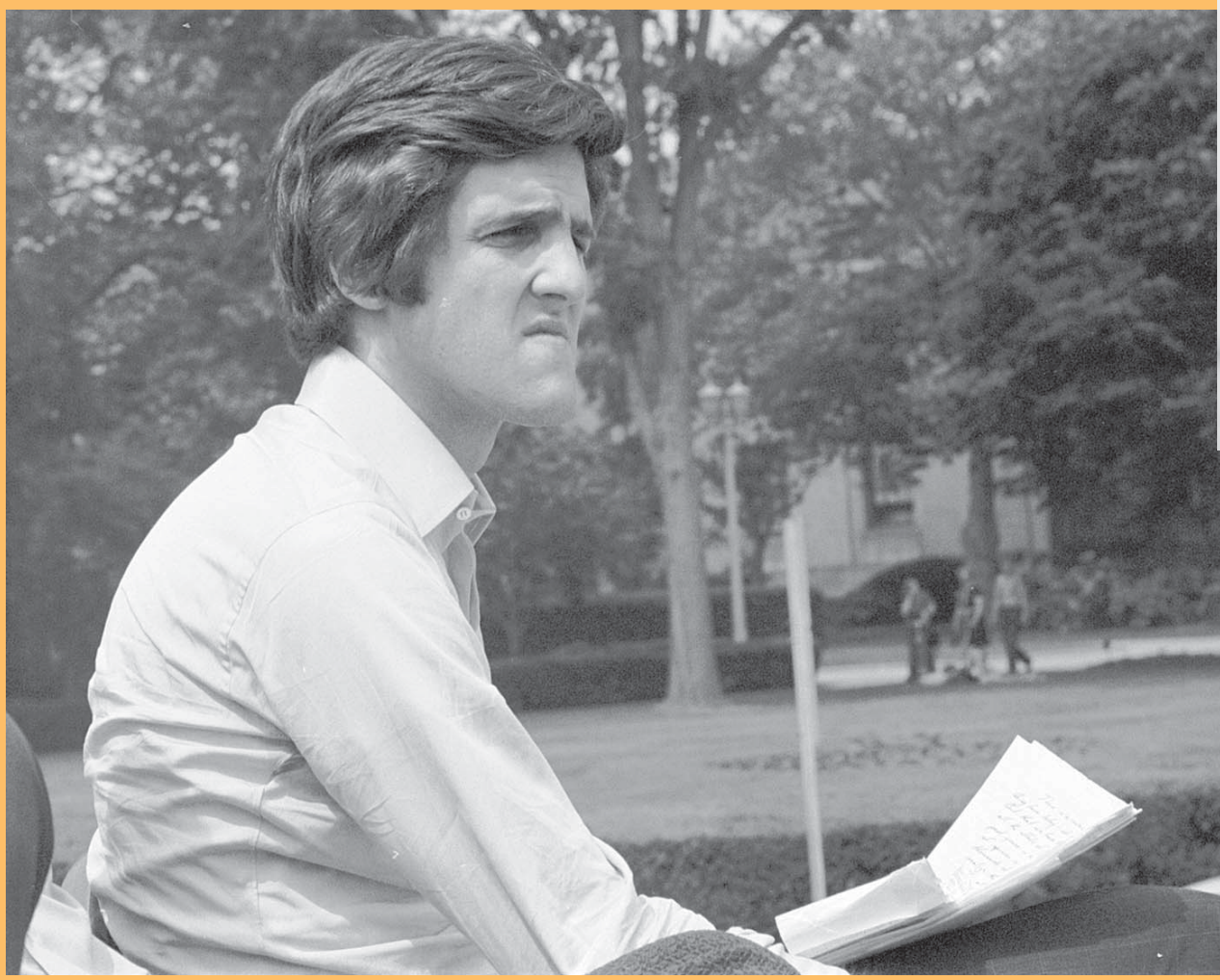
Fonda Speaks To Vietnam Veterans At Anti-War Rally

Actress And Anti-War Activist Jane Fonda Speaks to a crowd of Vietnam Veterans as Activist and former Vietnam Vet John Kerry (LEFT) listens and prepares to speak next concerning the war in Vietnam (AP Photo)



Ken Light/Corbis

Owen Franken/Corbis

Sharon D. Nelson, Esq., is President and **John W. Simek** is Vice President of Sensei Enterprises, Inc., a legal technology and computer forensics firm based in Fairfax, Virginia. www.senseient.com

Smoke and Mirrors

The Fabrication and Alteration of Electronic Evidence

By Sharon D. Nelson and John W. Simek

Sufficiently advanced technology is indistinguishable from magic. – Arthur C. Clarke

Welcome to the Digital Tech Fun House of the next millennium. Does some public relations staffer at NBC want Katie Couric to look 20 pounds slimmer? A wave of her electronic wand, and it is so. Does a Reuters freelance photographer in Beirut want his photos of violent explosions to have a greater "shock and awe" factor? It is simple to do – he just uses a graphics program to darken the explosions. Mad at your former lover and want to put her head on a porn queen's body and post it on your Web site? A quick cut and paste and it is done.

Nothing in the world is really new, so they say. In truth, the alteration of photos is an old story – remember all the UFO photos of the '50s that turned out to be an aluminum-wrapped, gussied-up version of Mom's dinner plate?

The digital alterations of things can be charming – witness the use of digital alteration in *Forrest Gump* to make Forrest a part of history. Absolutely inspired. Then look again – at *Time* magazine's bizarre editorial decision to artificially darken O.J. Simpson's face for its cover. Dispiriting how far we, as a society, have *not* come.

Someone, presumably not a John Kerry fan, stitched together two separate photos to make a com-

posite allegedly showing him as speaker with Jane Fonda at an anti-war rally. When you see the original photos, you can see what happened. But barring that, your eyes would likely believe what they see – and therein lies the great danger of accepting things electronic as real.

How do the pros spot digital alteration? Often, by blowing things up. When viewed at the pixel level, doctored photos don't "fit." Rarely does anyone doctor photos with so much precision that the doctoring can't be seen when enlarged. What is not apparent to the naked eye becomes readily apparent when looking at a photo under the equivalent of a microscope. Today, there are even mathematical algorithms to help determine whether a photo has been altered.

There are harmless and even fun uses for digital alteration – a charming but fake photo of President Clinton in a pink tutu, which made the Internet rounds some years ago, comes immediately to mind. But there are grave uses, many with criminal complications. The most common one, by far, is e-mail spoofing.

Stealing someone's identity by using their e-mail address is done all the time – the average 13 year old knows how to create and transmit falsified e-mail.

E-mail Spoofing: Who Do You Want to Be Today?

Stealing someone's identity by using their e-mail address is done all the time – the average 13 year old knows how to create and transmit falsified e-mail. Look at all the spam that we receive everyday, where the messages appear to come from people we know or from what appear to be otherwise legitimate sources. Viruses and worms are also known to gather e-mail addresses from an infected machine and send messages that appear to come from one of the newly harvested addresses.

Unfortunately, there is nothing you can do to stop someone else from sending an e-mail appearing to come from you. Even if you do succeed in tracking them down, they are often in foreign countries where there is no incentive to cooperate with U.S. authorities. Imagine our embarrassment several years ago when pornographic spammers were sending risqué e-mail messages, complete with images, with fabricated addresses from our domain name. You can't imagine our relief when they moved on to some other hapless victim.

Although you can't directly stop falsified transmissions, how do you determine if the e-mail is authentic or spoofed? If you are involved in a case where e-mail is at issue, do not accept the presentation of the message on paper. Anybody can use a typical word processor package to create a document that looks like a printed e-mail. Get the message in electronic form so that you can interrogate the headers. Don't know what an e-mail header is? The message header is electronically stored information that shows values such as sender, recipient, message ID number, routing information (the servers and devices that transmitted the message along its path), priority level and other similar information. The way to view the header information varies, depending on the e-mail client that is used. As an example, to view the header data in an open message using Microsoft Outlook, select "View" and then "Options," which will then show the information in the dialog box.

How do you read a header or even understand it? Probably one of the most popular software tools for decoding headers is a product called Sam Spade. The official Web site for Sam Spade has been having technical difficulties for several months, but a Google search should show alternate locations to download the software.

You read e-mail message headers from the bottom up. Figure 1 shows a sample of a header from a message received last December.

As you read from the bottom up, go until you reach the first "Received:" information (marked in red in Figure 1). In our example (headers from a real message) the originating e-mail server is named "intern" and has an IP address of 68.236.214.31. This is the first point to determine if the message is spoofed. Spammers will normally "bounce" their messages off of an unsecured server. In those cases, the transmitting server has no relationship to the originating domain. As you can see, decoding headers can get very complicated, but it is absolutely essential in determining the authenticity of the message. Is this a do-it-yourself proposition? Probably not, unless you are pretty tech-savvy.

In the typical case, angry ex-spouses or significant others spoof the e-mail of their former loved ones to prove that they wrote hateful or threatening messages to them, usually for the purpose of gaining an advantage in a custody battle, but sometimes just to humiliate them, or to try to cause them to lose their jobs. We've even seen an angry supervisor pretend to be his own employee writing threatening e-mails to the supervisor for the purpose of laying the groundwork for firing him.

Fabrication That Pays Handsomely: Phishing

We've all gotten them – those fraudulent e-mails that purport to be from our bank or credit card company asking us to kindly verify our financial information. The number of new phishing sites has spiked dramatically from 4,367

Figure 1

Received: from mail126c25.carrierzone.com ([64.29.147.196]) by ffx3975.senseient.com with Microsoft SMTPSVC(6.0.3790.1830);

Mon, 18 Dec 2006 15:02:23 -0500

MIME-Version: 1.0

Content-Type: multipart/alternative;

boundary="----_=_NextPart_001_01C722DF.6E7BB180"

Received: from intern (static-68-236-214-31.nwrk.east.verizon.net [68.236.214.31]) (authenticated bits=0)

by mail126c25.carrierzone.com (8.13.6.20060614/8.13.1) with ESMTP id kBIJo28u026412; Mon, 18 Dec 2006 19:50:04 GMT

Return-Path: <markszep@sandpiperpartners.com>

X-Mailer: Microsoft Office Outlook, Build 11.0.5510

X-OriginalArrivalTime: 18 Dec 2006 20:02:23.0636 (UTC) FILETIME=[6EDCBD40:01C722DF]

X-MimeOLE: Produced By Microsoft Exchange V6.5

X-Authenticated-User: markszep.sandpiperpartners.com

Content-class: urn:content-classes:message

Subject: Your Nomination for The E-Discovery Special Master and Expert Witness Directory

Date: Mon, 18 Dec 2006 14:50:03 -0500

Message-ID: <200612181950.kBIJo28u026412@mail126c25.carrierzone.com>

X-MS-Has-Attach:

X-MS-TNEF-Correlator:

Thread-Topic: Your Nomination for The E-Discovery Special Master and Expert Witness Directory

thread-index: Acci3bWn9hp+8QoPTROaF3Gji23D9Q==

From: "Mark Szep" <markszep@sandpiperpartners.com>

To: "Mark Szep" <markszep@sandpiperpartners.com>

in October of 2005 to 37,444 in October of 2006, according to the Anti-Phishing Working Group. Gone are the days when the e-mail was clearly written by someone for whom English was a distant second language ("Please to come to our site to complete you're Citibank data securities form"). Gone are the clumsy attempts to replicate graphics. Now the phishing e-mails are so clever that even the experts sometimes have trouble discerning the fakes.

Those victims who are taken in click on "their bank's" link, only to find themselves in a clever imitation of their bank's Web site where they obligingly fill out the requested financial data form and thereby ensure that their real bank account will soon be substantially lightened. The best of these bogus sites are a real tribute to the ingenuity of the criminal mind – and a continual thorn in the side of law enforcement, as the sites are shifted from server to server in a matter of days, making these operations nearly impossible to track down and shut down.

Metadata: Pay Very Close Attention to the Man Behind the Curtain

More and more attorneys are becoming familiar with metadata, especially as it relates to documents and spreadsheets. Generally, metadata refers to "data about data," which isn't a very helpful definition. When referring to a Word document, metadata would be such information as the author, last date printed, date of file creation, number of words, tracked changes, and similar information.

The metadata proved conclusively that the letter had been created *after* the disciplinary proceedings had been filed.

So how do you tell if an electronically produced document is authentic? Viewing the metadata can determine if there may be justifiable suspicions that the document is falsified. Perhaps you receive a Word document from your client, which is a contract supposedly drafted by your client's president. However, when you look at the metadata it shows the author as being a competitor and further reveals that the document was created several years earlier. Clearly, further investigation is warranted.

How do you see the metadata? The simplest way is to go to "File" and then "Properties." Using this method doesn't show all of the available metadata, but is enough for many purposes. Another alternative is to use a product that removes metadata (a good thing for you) but also shows you metadata in documents received from someone else (often a bad thing for the other side). Several well-known software applications for viewing and "scrubbing" metadata are Metadata Assistant, Workshare Protect and iScrub.

We've had many a case where metadata was important, but here's one that lawyers should heed: An attorney who was defending against disciplinary charges for mishandling a case suddenly produced a letter to his client which stated that, on her instructions, he would do nothing further in the case. The problem? The metadata proved conclusively that the letter had been created *after* the disciplinary proceedings had been filed. This brings to mind the old adage about going from the pot directly into the fire. To no one's surprise, his license was suspended.

Windows Metadata: Toying With the Fourth Dimension

There is also metadata for operating systems. We'll address Microsoft Windows metadata since it is the most widely used operating system. Windows metadata is the information that a user can observe by selecting "File" and then the "Properties" function. The most common metadata values are known as MAC (modified, accessed, created) dates. These times/dates can be used to identify when files were created, or perhaps accessed. For example, the history of a party's Internet searching activity on a computer may have great significance when dealing with child custody cases and determining the fitness of a parent, particularly where there are allegations of 'Net pornography addiction or searches for child pornography.

Authentication of the MAC values assumes that the clock on the computer was accurate at the time the files were created or accessed. This can be problematic since the computer clock is so easy to change. But, before you get paranoid about the file dates on your client's computer, clock manipulation is not normally seen in the "real world" and those who attempt it are usually caught.

There are several ways to determine if an intentional clock change has occurred. The simplest way is to look at the system logs using the Event Viewer application in Windows. The Event Viewer can be accessed from the "Administrative Tools" group. When the Event Viewer is opened, observe the entries in the System and Application logs. Entries in these logs are written in a sequential fashion; therefore, the date and time entries should be consistently decreasing as you read down the entries. An obvious gap or jump in the dates will indicate that the computer clock has been intentionally modified. There are other methods to determine clock manipulation, but those are best left to forensic technologists. The good news is that the Windows MAC values are typically what they purport to be.

Though we've rarely seen clock manipulation, there was a case in which a computer-savvy wife planted child pornography on her husband's computer, changing the clock so the created dates would indicate only times when he was home and she was not. She obviously had not read the paragraph above.

Law Enforcement's Continual Black Eye: Stomping on the Evidence

Sometimes the alteration of evidence can be the answer to an attorney's prayer. In spite of a concerted effort by law enforcement to teach first responders how to properly seize electronic evidence, we still see instances where the last access dates of files have been altered by officers looking at the evidence post-seizure. It appears to be particularly alluring to take a look at anything involving sex, but trampling on the evidence in their eagerness to see what they have provides (for the ardent defense counsel) a fortuitous result in which proper forensic procedures were not followed and the dates of last access by the defendant are now unknown.

Are there hundreds of other examples of digital alteration? Absolutely, and they are appearing more and more often in the courts. The good news is that we have gotten better and better at detecting the alteration of electronic evidence. More good news is that most people who try to fabricate or alter evidence aren't precisely intellectual overachievers. The bad news is that there is a cadre of unprincipled criminals who are superb at evidence alteration – and they are often one step (and sometimes light years) ahead of the good guys. ■

BY DAVID PAUL HOROWITZ

David Paul Horowitz (dhorowitz@nyls.edu) practices as a plaintiff's personal injury litigator in New York City. Mr. Horowitz teaches New York Practice at New York Law School, is a member of the Office of Court Administration's CPLR Advisory Committee, and is a frequent lecturer and writer on the subject.

"Daddy, What Did You Do in Court Today?"

Lying to My Children

One of the great joys of having young children is that, unlike their older siblings, your spouse or significant other, and assorted family members and friends, they have a genuine interest in what goes on in your life while you are away from them. Despite their tender years, young children have an innate understanding that you are a lawyer, and that this means you are an important person who does important things. They especially understand that when you are in court, you are doing very important things. Aren't children wonderful?

So you return home from work, and spend the obligatory time "oohing and aahing" over the finger-paint pictures on the fridge, the misshapen ceramic ashtrays, and the indeterminate objects painstakingly constructed out of Lego. Then, your young child looks up at you adoringly, and asks: "Daddy [or Mommy],[1] what did you do in court today?" You look down at that tender young face, glistening with at least one bodily fluid, and are faced with an ethical dilemma. Lie, and make your day sound exciting and, in the process, make being a lawyer sound like something worth seven years of higher education. Tell the truth, and leave your child wondering why on earth you didn't opt for a career in fast food or automotive quick lube, either of which would provide more excitement, not to mention better stories, than being a litigator.

Me? I lie. Like so many others, I began my legal career certain that I would have an endless supply of real-life anecdotes and war stories with which to regale any and all listeners. Like so many of my colleagues, it did not take long to have that dream, along with others, wither and then die.

Had I elected to tell the truth, my story would have run something like this: I went to court to attend a Preliminary Conference. I arrived in court [late] and couldn't find a seat. I spent a few minutes calling out the name of my case, looking, in vain, for a glimmer of recognition on the face of one of the 75 to 100 attorneys in the room. I finally cadged a seat when a colleague foolishly got up for a minute to get a third "Additional Directives" form, and buried my face in the *New York Times*. Time passed. I traded my *New York Times* for my neighbor's *New York Post*. More time passed. I read and re-read a *Pennysaver* left behind by another attorney, and then, lo and behold, I finally saw . . . someone I went to law school with. More time passed, we reminisced, and were "shushed" every five or 10 minutes by the court officer. I bent down low in my seat and snuck a telephone call on my cell phone, whispering behind my cupped hand. More time passed. Finally, my opponent arrived, claiming to have been stuck in another part upstairs, while snow visibly melted on the shoulders of his coat. Then, after a [insert the elapsed time] wait, the case was called, my opponent requested an adjournment [he was covering the case for another attorney who fell ill], and we were directed to return in four weeks. Voila! In and out in three minutes. Mission accomplished. After a full morning in court, exhausted, I leave the courthouse and catch the tail end of lunch hour. Then, back to the office for an afternoon of drafting bills of particulars or reports to the carrier.

Wouldn't you lie?

Attending preliminary and compliance conferences, a necessary experience in almost every civil case since the advent of Differentiated Case Management (DCM), often mirrors the experience described above. All too often, counsel are unfamiliar with the case they are covering and/or do not have the relevant [or any] portions of the case file with them. These attorneys are often aided and abetted by the court – often burdened with 100 or more conferences in a given morning – signing off on orders that are often unclear, setting deadlines that are vague or are unrealistic, and lacking in enforcement mechanisms.

> An entirely unscientific, purely personal, list of conference order pet peeves.

Having experienced this frustration many times, I have drafted an entirely unscientific, purely personal, list of conference order pet peeves, modeled on the David Letterman "Top Ten" format. Along the way, I offer a suggestion or two for improving the conferencing experience.

Top 10 Civil Conference Complaints

#10 – "Depositions of All Parties to Be Conducted Day to Day Until Completed"

This language usually appears at or about the time of the fourth or fifth "compliance" conference, when depositions, previously court ordered, have not been conducted. While an exquisitely painful penalty to impose on the attorneys in a case, draconian terms such as these punish in equal measure the recalcitrant attorney along with the one who has been ready to go each time.

Suggestion: None. By this point, there is little likelihood of swaying the court to change its ruling. Grin and bear it.

#9 – "Depositions to Be Held at the Courthouse"

Language that occurs when the attorneys cannot agree about the location of a deposition, it invariably indicates that at least one of the attorneys is acting like a jackass. Forgetting any number of aesthetic and practical issues, the courthouse is rarely a location conducive to putting the witness at ease, thus hindering the ability to conduct an effective deposition.

Suggestion: Offer to do the deposition at your office, opposing counsel's office, anyone's office.

#8 – "All [Nine] Parties to Be Deposed on [Insert Date]"

This is often perceived to be a time-saving device, the idea being that spreading depositions in a simple case over several days is inefficient. More often than not, it is false economy. While it sometimes works in the simplest case, usually it falls apart once more than two witnesses are to be deposed, or where there is any mildly complex issue in the case.

Suggestion: Accurately assess the likely length of a witness's deposition, factoring in travel, preparation time, bathroom and lunch breaks, and attorney tardiness, lack of preparation, and/or incompetence. Have any subsequent witness "subject to call" (and don't forget to make the call).

#7 – "On or Before"

My personal nemesis, this language in an order exponentially increases calendaring problems. Instead of calendaring a date for a deposition, it is necessary to calendar a date to confer with opposing counsel, a date to confirm the deposition date, a date to make certain a deposition date has been set and calendar that date, and, finally, the actual on or before date itself. This practice allows the attorneys to escape the court's clutches without agreeing to a date, after which the likelihood of an agreement declines dramatically. The need for this language usually arises when the attorneys do not know their clients', or their own, availability. Only slightly ameliorated by inserting the follow-up language "and, if not held on that date, to be held on [insert date]."

Suggestion: Borrowing from GEICO, an idea so simple even a caveman could think about it: BEFORE the conference, attorneys should obtain at least three dates, spread over a period of six to eight weeks (and timed appropriately based upon the parties' need for pre-deposition disclosure and position in the case), when both they and their clients are available. Also, realistically assess whether a witness can be deposed in one day. If not, schedule two days in the order, so that the deposition schedule does not get derailed if the witness's testimony is not completed.

#6 – "No Adjournments Without Prior Approval of the Court"

Everyone decries the decline in collegiality in the legal profession. The idea that counsel cannot agree among themselves to vary the date for performing a task which, while set forth in a court order, does not require a submission to the court, frustrates any natural inclination attorneys have to work with one another. The problem arises when a court refuses to enforce the terms of an agreement between counsel that varies the terms of the court's order.

This practice allows the attorneys to escape the court's clutches without agreeing to a date, after which the likelihood of an agreement declines dramatically.

Suggestion: The safe practice is to obtain a written stipulation, and have it "so ordered," every time attorneys jointly wish to vary the terms of a court order. More realistically, and economically, courts can certainly enforce stipulations between the parties that do not impact on an appearance in court or court filing. Can't we all just get along?

#5 – "Plaintiff to File Note of Issue Within 90 Days of This Order"

This is a penalty with only one possible victim: the plaintiff. When courts serve a CPLR 3216 90-day notice on the parties in a compliance conference order, the burden to file, or extend the time, or arrange for post-note disclosure, is on the plaintiff, even if the defendant is solely at fault for disclosure not being completed. And the penalty, dismissal of the plaintiff's case, is usually way

out of proportion to the transgression, even when it is the plaintiff who transgresses.

Suggestion: Allow judges to be judges [systemically], and, where appropriate, make your case to the court to vary the deadlines based upon the unique factors in each case.

#4 – "To Be Completed Following the Filing of the Note of Issue"

The other half of the court-served 90-day notice is the prevalence of post-note disclosure in today's civil litigation practice. When the bulk of disclosure in a given case is being conducted post-note, the system is misaligned.

Suggestion: *See* #5, *above*.

#3 – "Supplement Within 30 Days of . . ."

When this language appears in orders, it usually serves to direct a party to supplement information in a prior disclosure or bill of particulars, within 30 days of a defined event. For example, plaintiffs are often directed to supplement specials in a bill of particulars within 30 days of the plaintiff's deposition. Unfortunately, the plaintiff's knowledge, or lack of knowledge, of particular information often bears no relation to the defined event that the requirement to supplement flows from.

Suggestion: The CPLR already mandates prompt amendment or supplementation of disclosure responses. Let this mechanism do its job, and if a party feels aggrieved, a motion to compel amendment or supplementation is always available.

#2 – "All Parties to Comply With All Prior Orders Within 30 Days"

This language, by failing to specify what it was, precisely, that was not complied with in a prior order, leaves the door wide open for disagreement later on, about the terms of the order. This often arises when one or more parties are not certain what disclosure has actually been completed.

Suggestion: Write out the terms of the prior orders that have not been complied with in the new order. Clarity will be enhanced, and subsequent motion practice, if needed, will be streamlined. Have someone with good handwriting do the writing.

#1 – "To the Extent Not Furnished"

Again, how does this help? This language means, once again, that one or more of the attorneys does not know what information has, or has not, been disclosed. It is the refuge of the unprepared. It places an ill-defined burden on all parties, including those fully compliant, to review their files and divine what it is that they did not do, or did not do completely, if anything.

Suggestion: Go to court armed with all disclosure requests, responses, and prior orders. After all, it is a disclosure conference. Do not agree to the inclusion of this language. Have the attorney demanding this language specify [lending your file materials if necessary] the disclosure that was omitted or incomplete.

Conclusion

My introduction notwithstanding, I truly enjoy attending disclosure conferences. Properly used, they are an excellent tool for moving a case forward, resolving disputes without motion practice, and periodically assessing and reassessing what is necessary to satisfy the burdens you must satisfy in order to prevail on a claim or defense.

They are also a great way to run into law school classmates you have not seen in a while. ■

1. I struggled for some time to come up with a gender-neutral sentence that did not sound stilted or awkward. I failed.

The Modern Cruise Passenger's Rights & Remedies – Part II

By Thomas A. Dickerson

Traditionally, a maritime case brought on behalf of injured passengers may be brought *in personam* in state or federal court based upon the doctrine of "saving to suitors"[1] or may be removed to federal court.[2] However, the passenger's claim may be brought *in rem* or *quasi in rem* against the ship, thereby coming within the admiralty jurisdiction of a federal court.[3] Generally, the rights of the cruise line under maritime law are paramount to those of the injured or victimized passenger.[4] "The purpose of 46 U.S.C. § 183(c) . . . 'was to encourage shipbuilding and (its provisions) . . . should be liberally construed in the ship owner's favor.'" It can be difficult prosecuting passenger claims because of litigation roadblocks, both substantive and procedural in nature.

Limitation of Vessel Owner's Liability Act

Ship owners are permitted under the Limitation of Vessel Owner's Liability Act[5] to limit their liability for passenger claims to the value of the vessel. The Limitation Act provides in relevant part that "'[t]he liability of the owner of any vessel . . . for any . . . loss . . . without the privity or knowledge of such owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and the freight then pending.'"[6] The most recent use of the Limitation Act was by the city of New York in seeking to limit its liability for the 2003 deaths of 11 passengers in a crash of the Staten Island Ferry.[7] A Limitation action can, if successful, dramatically limit a passenger's recoverable damages.[8]

Thomas A. Dickerson is an Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court. Justice Dickerson is the author of *Class Actions: The Law of 50 States* (Law Journal Press, N.Y., 2007); *Travel Law* (Law Journal Press, N.Y., 2007); Article 9 of 3 Weinstein, Korn & Miller, *New York Civil Practice CPLR* (2005, 2006) and over 230 legal articles.

Passenger Tickets

A cruise passenger's rights are, to a large extent, defined by the terms and conditions set forth in the passenger ticket. Modern consumers expect the size of the print in consumer contracts to be large enough to be visible and readable. New York State, for example, requires consumer transaction contracts to be "printed . . . clear and legible [in print] eight points in depth or five and one-half points in depth for upper case type [to be admissible] in evidence in any trial."[9] Clearly, the microscopic terms and conditions in passenger tickets are meant to be unreadable and invisible. In fact, maritime law, which governs the rights and remedies of cruise passengers, preempts all state laws requiring consumer contracts to be in a given type size.[10] In addition, the terms and conditions in passenger tickets may be enforceable, even though the passenger can neither read nor understand the language in which the tickets are printed.[11]

Time Limitations: Physical Injury Claims

Many states allow injured consumers at least 2.5 years in which to commence physical injury lawsuits and up to six years for breach of contract and fraud claims. Maritime law, however, allows cruise lines to impose very short time limitations for the filing of claims and the commencement of lawsuits. For physical injuries occurring on cruise vessels that touch U.S. ports,[12] passengers may be required to file a claim within six months and commence a lawsuit within one year.[13] On occasion the courts may decide not to enforce the one-year time limitation because of a lack of notice.[14]

For non-physical injury claims, cruise lines may impose even shorter time limitation periods.[15] On occasion, the courts may decide not to enforce these particularly short time limitations.[16]

Jurisdictional Issues

Most consumers purchase cruise vacations from their local retail travel agent. The cruise will depart from one of several domestic ports of call, typically, where the cruise line is headquartered,

Traditionally, cruise ships have not been held vicariously liable for the medical malpractice of the ship's doctor.

e.g., New York, Miami, Florida or Seattle, Washington. Even though cruise companies may distribute brochures through and take orders from retail travel agents, such marketing activities are insufficient to serve as a basis for jurisdiction.[17] The "solicitation-plus" doctrine governs jurisdiction in travel cases with the "plus" equivalent to contract formation in the local forum.[18] With the possible exception of Internet sales through interactive Web sites,[19] the courts have generally held that contract formation does not take place at the consumer's location. Some courts, however, have been willing to assume jurisdiction on little more than local advertising.[20]

Forum Selection Clauses

The passenger ticket may contain a forum selection clause and a choice of law clause, both of which can have a negative impact upon the passenger's ability to prosecute his or her claim. A forum selection clause may require that all passenger lawsuits be brought in the local court where the cruise line is headquartered.[21] Generally, such clauses are enforceable.[22] "A forum selection clause is enforceable unless (1) 'the incorporation of the clause was the result of fraud, undue influence, or overreaching bargaining power; (2) the selected forum is so gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court; or (3) enforcement . . . would contravene a strong public policy of the forum in which the suit is brought.'"[23] In addition, notice of the forum selection clause must be adequate.[24] Recently, two major cruise lines have drafted and implemented a forum selection clause that not only requires that all lawsuits be brought in a specific forum such as Florida or Washington but that the lawsuit must also be brought in U.S. District Court. The enforcement of what amounts to a "sovereign selection clause" may have the effect of eliminating jury trials otherwise available in state court.[25]

Choice of Law Clauses

In addition to forum selection clauses, passenger tickets may also designate the law to be applied in resolving any dispute which may arise. The law selected may be that of the Bahamas,[26] China,[27] Italy,[28] or pursuant to the Strasbourg Convention.[29] Choice of law clauses are, generally, enforceable unless the passenger can demonstrate that enforcement would be unreasonable, or to prevent fraud or overreaching[30] or that "enforcement would contravene a strong public policy of the forum in which the suit is brought."[31]

Medical Malpractice Disclaimer

A cruise passenger at sea and in medical distress does not have any meaningful choice but to seek treatment from the ship's doctor. Traditionally, cruise ships have not been held vicariously liable for the medical malpractice of the ship's doctor or medical staff, as in *Barbetta v. S/S Bermuda Star*.[32] See, for example, *Carlisle v. Carnival Corp.*,[33] a case involving a 14-year-old female passenger who became "ill with abdominal pain, lower back pain and diarrhea and was seen several times in the ship's hospital by the ship's physician 'who misdiagnosed her condition as flu when, in fact, she was suffering from an appendicitis.'" After several days of mistreatment she was removed from the cruise ship, underwent surgery after her appendix ruptured and was rendered sterile. The Florida District Court of Appeal found, however, that cruise lines may be held vicariously liable for the malpractice of ship's doctor. This decision was recently reversed by the Florida Supreme Court[34] on the grounds that "Florida district courts of appeal must adhere to the federal principles of harmony and uniformity when applying federal maritime law," in essence, following the *Barbetta* case.

Shore Excursion Disclaimers

The courts have been willing to enforce disclaimers of liability regarding accidents that occur during shore excursions.[35] Such a disclaimer may not be enforceable if the injured passenger relied upon representations or warranties regarding safety,[36] competence and reliability of on-shore suppliers of travel services.

Force Majeure/Act of God Defense

The cruise line may claim that a delay in sailing or a cancellation of the cruise vacation or an itinerary change was caused by a storm or hurricane,[37] that is, an Act of God. As stated by the U.S. Supreme Court in 1887 in *Majestic*,[38] "the act of God is limited . . . to causes in which no man has any agency whatever; because it was never intended to arise." Acts of God may include storms at sea[39] and snowstorms.[40] To prevail, however, the carrier must establish a causal connection between the Act of God or force majeure and the carrier's failure to deliver timely transportation. In addition, the carrier must prove that it acted reasonably to reinstitute the transportation service once the snowstorm or unexpected event ceased.[41]

Limitations on Recoverable Damages

Cruise vessels that touch U.S. shores may not disclaim liability for loss, death, damage or delay caused or contributed to by the vessel's negligence.[42] In 1996 the cruise industry was able to convince Congress to enact a provision permitting provisions or limitations in contracts,

agreements or ticket conditions of carriage with passengers which relieve the operator of a vessel from "liability for infliction of emotional distress, mental suffering, or psychological injury."[43] Such a disclaimer does not apply to physical injuries or those arising from being "at actual risk of physical injury" caused by the negligence or intentional misconduct of the cruise vessel or crew. Nor does such a disclaimer limit liability arising from "sexual harassment, sexual assault or rape."

The Athens Convention

While the United States is not yet a signatory to the Athens Convention, passengers on cruises that do not touch a U.S. port should be aware of its liability limiting provisions. Some cruise contracts contain language limiting the passenger's recoverable damages under the Athens Convention to Special Drawing Rights (SDRs).[44] The 1976 Protocol to the Athens Convention provides a damage limit of 46,666 SDRs, while the 1990 Protocol provides for 175,000 SDRs. The Athens Convention is important since it may apply to as many as 20% of U.S. cruise passengers who annually "sail from, and back to, foreign ports, like a Mediterranean or Caribbean cruise."[45] The Athens Convention is presently the subject of discussions amongst interested parties; proposed changes are available from the International Maritime Organization.[46]

Conclusion

Cruise vacations can be wonderful experiences. However, potential cruise passengers are well advised to think carefully about their legal rights should they be injured or otherwise dissatisfied with a cruise vacation. ■

1. *See* Michael D. Eriksen, *U.S. Maritime Public Policy Versus Ad-hoc Federal Forum Provisions in Cruise Tickets*, Fla. B.J., Dec. 2006, p. 21:

> "By reason of the saving clause, state courts have jurisdiction *in personam*, concurrent with the admiralty courts, of all [common law] causes of action maritime in their nature." . . . More recently, in *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 454–55 (2001), the court forcefully reaffirmed that both a state forum choice and a trial by jury are remedies "saved" absolutely to maritime common law suitors in the U.S. by the Saving to Suitors Clause of 28 U.S.C. § 1333(1). . . . Thus, under Saving to Suitors since 1789, all maritime common law suitors otherwise required to sue in the U.S. have been entitled to initiate in state court and to remain there unless and until removed by a defendant to federal court on diversity grounds. Maritime common law state court actions which fail any requirement for federal diversity jurisdiction cannot be removed to federal court at all."

Recently, however, the two largest cruise lines, Carnival and NCL, have introduced into their passenger contracts a federal forum selection clause which may require that all passenger claims be litigated in a federal court in Florida. *See infra*, note 25.

2. *See, e.g.*, *Giordano v. Norwegian Cruise Line*, No. 06CV1270, 2006 WL 1229085 (E.D.N.Y. May 4, 2006) (passenger's physical injury case removed to federal court on basis of diversity jurisdiction); *Pate v. Princess Cruise Lines, Ltd.*, No. 3:04-CV-0259-RRB, 2006 WL 278607 (D. Alaska Jan. 26, 2006) (passenger's physical injury claim arising from slip and fall in shower in shore excursion hotel removed to federal court and motion to remand denied).

3. *See, e.g.*, *Dresdner Bank AG v. M/V Olympia Voyager*, 463 F.3d 1210 (11th Cir. 2006) (banks and Italian catering company bring *in rem* action against Greek-flagged and Liberian-owned cruise ship; U.S. law applied to enforce maritime lien).

4. *Schwartz v. S.S. Nassau*, 345 F.2d 465, 467 (2d Cir. 1965) (case involving a passenger's physical injuries, applies equally today).

5. 46 U.S.C. ch. 305.

6. *In re Royal Caribbean Cruises, Ltd.*, 55 F. Supp. 2d 1367, 1370 (S.D. Fla. 1999), *aff'd sub nom. Royal Caribbean Cruises v. Hommen*, 214 F.3d 1356 (11th Cir. 2000).

7. *See* Tim Akpinar, *Defeating Limitation of Liability in Maritime Law*, Trial Mag., Feb. 2006, pp. 44–45:

> "Before a Staten Island ferry struck a pier on October 15, 2003, killing 11 people and injuring more than 60, most of the passengers were unaware of an arcane concept of maritime law known as limitation of liability. . . . After an investigation revealed that the pilot in the Staten Island ferry crash had passed out at the helm the city of New York, citing the act, filed a complaint seeking to limit its liability to $14.4 million, the post casualty value of the ferry.

> . . . Limitation of liability was invoked in the loss of the *Titanic*, which in April 1912 struck an iceberg and sank, taking more than 1,500 lives. In the wrongful death and injury lawsuits that followed, Supreme Court Justice Oliver Wendell Holmes held that the *Titanic*'s British owner should be allowed to limit liability to the ship's post-casualty value, which amounted to about $92,000 for a cluster of its remaining lifeboats."

8. *In re UFO Chuting of Hawaii, Inc.*, 233 F. Supp. 2d 1254 (D. Haw. 2001) (plaintiffs went parasailing and, unfortunately for them, rope attaching them to the boat snapped, causing them to fall into the water); *In re Complaint of Illusions Holdings, Inc.*, 78 F. Supp. 2d 238 (S.D.N.Y. 1999) (scuba accident; exoneration under Limitation Act granted); *In re Bay Runner Rentals, Inc.*, 113 F. Supp. 2d 795 (D. Md. 2000) (personal watercraft accident; exoneration under Limitation Act denied).

9. CPLR 4544. *See, e.g.*, *Walch v. N.Y. Sports Club Corp.*, N.Y.L.J., Mar. 21, 2001, p. 19 (Civ. Ct.) (applicability to health club contracts discussed); *Hamilton v. Khalife*, 289 A.D.2d 444, 735 N.Y.S.2d 564 (2d Dep't 2001) (applied to car rental contracts); *Bauman v. Eagle Chase Assocs.*, 226 A.D.2d 488, 641 N.Y.S.2d 107 (2d Dep't 1996) (applied to home improvement contracts).

10. *Lerner v. Karageorgis Lines, Inc.*, 66 N.Y.2d 479, 497 N.Y.S.2d 894 (1985) (enforcement of time limitation provision in four-point type; maritime law preempts New York's statute requiring consumer contracts to be in 10-point type).

11. *Paredes v. Princess Cruises, Inc.*, 1 F. Supp. 2d 87 (D. Mass. 1998) (time limitations in passenger ticket in English language enforced even though passenger was unable to read English).

12. *Lerner*, 66 N.Y.2d 479 (46 U.S.C. § 183(b) time limitations apply only to cruise vessels touching U.S. shores).

13. *Oltman v. Holland Am. Line-USA, Inc.*, No. C05-1408JCR, 2006 WL 2222293 (W.D. Wash. Aug. 1, 2006) (plaintiffs "fell sick when a gastrointestinal illness broke out among the passengers" and time limitations were enforced); *Pate v. Princess Cruise Lines, Ltd.*, No. 3:04-CV-0259-RRB, 2006 WL 278607 (D. Alaska Jan. 26, 2006) (passenger injured when she fell stepping from a shower at the Mt. McKinley Princess Wilderness Lodge in Talkeema, Alaska; time limitations enforced).

14. *Ward v. Cross Sound Ferry*, 273 F.3d 520 (2d Cir. 2001) (slip and fall on gangway; one year time limitations clause not enforced; passenger receiving ticket two minutes before boarding did not have proper notice of time limitations clause); *Gibbs v. Carnival Cruise Lines*, 314 F.3d 125 (3d Cir. 2002) (minor burns to feet on hot deck surface; one year time limitations period tolled for minor until after parent began to serve as guardian *ad litem* after filing of lawsuit); *Long v. Holland Am. Line Westours Inc.*, 26 P.3d 430 (Alaska 2001) (slip and fall at museum during land tour; one year time limitation period not enforced because of contractual overreaching).

15. *Insogna v. Princess Cruises, Inc.*, N.Y.L.J., June 10, 2002, p. 37 (Sup. Ct.) (six months' time limitation clause in ticket for filing lawsuit enforced; claim time barred).

16. *Barton v. Princess Cruises, Inc.*, No. B123107, 2002 WL 31677178 (Cal. App. Nov. 27, 2002) (deceptive port charges; clause in passenger ticket requiring the filing of written notice of claims within 15 days and the filing of a lawsuit within 90 days may be unenforceable).

17. *Kauffman v. Ocean Spirit Shipping Ltd.*, No. 4:90-CV49, 1990 WL 483909 (W.D. Mich. Oct. 15, 1990) (dissemination of cruise brochures through travel agents and advertising in scuba magazine insufficient to support long-arm jurisdiction).

18. *Afflerbach v. Cunard Line, Ltd.*, 14 F. Supp. 2d 1260 (D. Wyo. 1998) (national advertising of cruise vacations and sales through travel agents insufficient for jurisdiction).

19. Thomas A. Dickerson, *False, Misleading & Deceptive Advertising in the Travel Industry: The Consumer's Rights & Remedies* 2003 *available at* <http://www.classactionlitigation.com/library/ca_articles.html>.

20. *Nowak v. Tak How Inv. Ltd.*, 899 F. Supp. 25 (D. Mass. 1995) (guest drowns in Hong Kong hotel pool; being available for litigation in local forum is reasonable cost of doing business in the forum), *aff'd*, 94 F.3d 708 (1st Cir. 1996).

21. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (a clause in the ticket provided that "[i]t is agreed . . . that all disputes . . . shall be litigated . . . before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country").

22. *Chapman v. Norwegian Cruise Line Ltd.*, No. 01 C 50004, 2001 WL 910102 (N.D. Ill. July 6, 2001).

23. *Id.* at *2; *see Heinz v. Grand Circle Travel*, 329 F. Supp. 2d 896 (W.D. Ky. 2004) (passenger on Rhine River cruise sustains injuries "when the ship's automatic doors failed"); *Schlessinger v. Holland Am., N.V.*, No. BC278939, 2003 WL 21371851 (Cal. App. Jan. 29, 2003) (Basel, Switzerland forum selection clause enforced), *aff'd*, 120 Cal. App. 4th 552 (Cal. App. 2004); *Hughes v. Carnival Cruise Lines, Inc.*, No. 01 CIV. 9681, 2003 WL 1740460 (S.D.N.Y. Mar. 31, 2003) (passenger breaks hip aboard ship; Florida forum selection clause enforced).

24. *Casavant v. Norwegian Cruise Line, Ltd.*, 63 Mass. App. Ct. 785 (Mass. App. 2005) (passengers cancel September 16, 2001 and court refused to enforce forum selection clause because ticket delivered 13 days before cruise; concluded that forum selection clause was unenforceable); *Ward v. Cross Sound Ferry*, 273 F.3d 520 (2d Cir. 2001) (passenger obtained ticket "just two or three minutes before boarding the ferry . . . possession of the ticket for such a short period of time was insufficient to give [passenger] reasonable notice that the ticket contained important contractual provisions").

25. *See, e.g.*, *Garnand v. Carnival Corp.*, No. CIV A G-06-024, 2006 WL 1371045 (S.D. Tex. May 16, 2006) (Florida forum selection clause providing that lawsuits "shall be litigated, if at all, before the United States District for the Southern District of Florida in Miami"); *Taylor v. Carnival Corp.*, No. 05-CV-72656, 2006 WL 508632 (E.D. Mich. Mar. 1, 2006) (motion to enforce Florida federal court forum selection clause denied because of factual dispute as to whether passenger received ticket prior to embarking); *see* Eriksen, *supra* note 1, at p. 22:

> "For all of the last century, and for most of the current one, nearly all major cruise carriers have complied with the Saving to Suitors Clause by employing ticket provisions offering all passengers their "historic option" to sue the carrier in state court (subject of course to a defendant's right to remove an appropriate diversity case from state to federal court pursuant to 28 U.S.C. § 1441). In 2002 Carnival abruptly deviated from this norm and installed federal forum provisions in passenger tickets for its Carnival Cruise Lines brand. . . . Norwegian Cruise Line (NCL) adopted an identical clause in 2005. These provisions operate, without expressly saying so, to require suit in nonjury federal admiralty court for all claims failing any requirement for federal diversity (law side) jurisdiction (*e.g.*, citizenship, amount in controversy)."

26. *Kirman v. Compagnie Francaise*, 1994 American Maritime Cases 2848 (Cal. Sup. 1993) (choice of Bahamian law clause enforced where the cruise was between Singapore and Australia).

27. *Jewel Seafoods Ltd. v. M/V Peace River*, 39 F. Supp. 2d 628 (D.S.C. 1999) (choice of Chinese law clause enforced).

28. *Falcone v. Mediterranean Shipping Co.*, No. CIV 01-398, 2002 WL 32348240 (E.D. Pa. Apr. 3, 2002) ("In light of the fact that its passengers hail from around the world [cruise line] acted reasonably in selecting an . . . Italian venue . . . cruise departed on an Italian vessel from Genoa, Italy, and [cruise line] is headquartered in Italy. . . . The choice of law provision in the ticket contract selects Italian law . . . which Italian courts are in the best position to interpret.").

29. *Heinz v. Grand Circle Travel*, 329 F. Supp. 2d 896 (W.D. Ky. 2004) (passenger sustains injuries on Rhine River cruise; Basel, Switzerland forum selection clause enforced; cruise contract also provides that liability issues will be resolved pursuant to the Strasbourg Convention).

30. *Long v. Holland Am. Line Westours, Inc.*, 26 P.3d 430 (Alaska 2001).

31. *Milanovich v. Costa Crociere, SPA*, 954 F.2d 763, 768 (D.C. Cir. 1992).

32. *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988).

33. *Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. App. 2003).

34. *Carnival Corp. v. Carlisle*, No. 5CO4-393, 2007 WL 471172 (Fla. Feb. 15, 2007) ("[W]e quash the decision of the district court and hold that the ship owner is not vicariously liable under the theory of *respondeat superior* for the medical negligence of the shipboard physician.").

35. *Dubret v. Holland Am. Line Westours, Inc.*, 25 F. Supp. 2d 1151 (W.D. Wash. 1998) (bus accident during shore excursion; disclaimer of liability enforced); *Henderson v. Carnival Corp.*, 125 F. Supp. 2d 1375 (S.D. Fla. 2000) (passenger injured on catamaran trip while on excursion from cruise; notwithstanding Carnival logo on catamaran and crew member shirts cruise ship disclaimer of ownership or control of catamaran company enforced); *In re Royal Caribbean Cruises, Ltd.*, 55 F. Supp. 2d 1367 (S.D. Fla. 1999), *aff'd sub nom. Royal Caribbean Cruises v. Hommen*, 214 F.3d 1356 (11th Cir. 2000) (day trip to Coco Cay Island

owned by cruise line; passengers rent Sea-Doo, sign waiver and are injured in accident; no negligence found).

36. *Bergonzine v. Maui Classic Charters, Inc.*, No. CIV-94-00489, 1995 WL 688427 (D. Haw. Aug. 9, 1995) (350-lb. handicapped passenger broke ankle because of inattention and lack of assistance by crew; misrepresentations in brochure that cruises were "suitable for handicapped individuals"; $42,500 in special damages was awarded).

37. *Domblakly v. Celebrity Cruises, Inc.*, No. 96CIV8333, 1998 WL 734366 (S.D.N.Y. Oct. 21, 1998) (passengers injured when cruise ship battered by hurricane); *In re Catalina Cruises, Inc.*, 137 F.3d 1422 (9th Cir. 1998) (passengers injured when cruise ship sails into storm); *Williams v. Carnival Cruise Lines, Inc.*, 907 F. Supp. 403 (S.D. Fla. 1995) (207 passengers seasick after cruise ship sails into storm).

38. *The Majestic*, 166 U.S. 375 (1897).

39. *DeNicola v. Cunard Line Ltd.*, 642 F.2d 5 (1st Cir. 1981); *Domblakly*, No. 96CIV8333; *In re Catalina Cruises, Inc.*, 137 F.3d 1422 (9th Cir. 1998); *Williams v. Carnival Cruise Lines, Inc.*, 907 F. Supp. 403 (S.D. Fla. 1995).

40. *Ahlstrom Mach., Inc. v. Associated Airfreight, Inc.*, 251 A.D.2d 852, 675 N.Y.S.2d 161 (3d Dep't 1998) (air carrier breached contract in failing to deliver cargo notwithstanding force majeure clause in contract of carriage and unanticipated snowstorm).

41. *Bernstein v. Cunard Line, Ltd.*, 19 Aviation Cases 17,485 (S.D.N.Y. 1985).

42. 46 U.S.C. § 183(c); *see Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984) (malfunctioning toilets; disclaimers not enforced).

43. 46 U.S.C. § 183c(b)(1).

44. *Mills v. Renaissance Cruise, Inc.*, No. C 91-3001, 1992 WL 471301 (N.D. Cal. Aug. 17, 1992).

45. Edelman, *The Athens Convention and American Lawyers*, N.Y.L.J., May 29, 2003, p. 3.

46. *See* <www.imo.org/index.htm>.

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Hon. John C. Bivona is a Justice of the New York State Supreme Court in Suffolk County District 1. He holds a J.D. from Brooklyn Law School and is a Judge Advocate Officer in the New York Guard. He serves as Chairman of the Military Law Committee of the Suffolk County Bar Association.

Alexander M. Selkirk, Jr. received a B.A. from St. John's University, a J.D. from New York Law School and an LLM in Trade Regulation from New York University School of Law. He is a Retired Staff Judge Advocate from the New York Army National Guard and a Retired Assistant Town Attorney from the Town of Huntington.

Military Voting Rights Protection in New York

By John C. Bivona and Alexander M. Selkirk, Jr.

Protecting the right to vote is essential to the preservation of a democracy. No aspect of voter protection is more important than its application to our military personnel who risk their lives in foreign lands to protect our democratic way of life. Article 10 of the New York Election Law sets forth the basics of the service member's rights and duties involved in the selection of our elected officials.

Statutory Eligibility

In New York, the right to vote by military ballot applies to service members of the Army, Navy, Marine Corps, Air Force, and Coast Guard along with employees of the Coast and Geodetic Survey, the public health service, the National Guard when called in to federal service, as well as cadets or midshipmen at the U.S. Military, Naval, Air Force and Coast Guard academies.[1] To be eligible, the New York resident who was in active military service must be absent from the election district on the day of registration or election or a voter discharged from military service, within 30 days of an election.[2] The same provision allows the parent, spouse or child accompanying the military voter the same opportunity if he or she is a qualified voter and resident of the same election district as the service member.

The right to vote by military ballot does not extend to members of the U.S. Maritime Service,[3] but does apply to prisoners of war.[4]

Registration and Application

An attorney called upon to represent a service member or his or her dependent whose ballot has been challenged in a general or special election must not only be aware of eligibility but time limits applicable to the registration, obtaining and filing of military ballots.

Article 10 provides that, no later than 35 days before an election, the names and addresses of all military voters who filed applications for military ballots by such day and who are not already registered shall be registered by the Board of Elections in the election district of their residence.[5] The Board of Elections that registers the military voter is empowered in the space designated "other remarks" to enter the military address of the voter, that being the address where the voter is assigned in performance of his or her military duties, or such military address as shall be entered in the computer files from which the computer-generated list is prepared.[6]

These registration poll records are stamped or marked conspicuously with the legend "Military Voter"; or the records of such military voters in the computer files are coded in a manner which distinguishes such voters from other voters in such files. The Board of Elections is further empowered to alter the military address of the military voter to such extent as may be necessary to the security and safety of the United States. A military voter is not required to register personally and an application for a military ballot shall constitute permanent personal

registration. A military voter is deemed registered under the rules and regulations prevailing under the permanent personal registration upon the filing of the application and the entering of his or her name in the appropriate registration records.[7]

Notwithstanding the legal provision that a military voter may not be required to register personally, in the past the courts have allowed the military voter the right to register personally where the individual was a member of the Armed Forces and would be absent from his or her election district on Election Day.[8]

Between 90 and 75 days before the general election, each county or city Board of Elections is required to send each person who is registered as a military voter, and to every other military voter in such county or city for whom it has a military address, an application for a military ballot for such general election in the form that is prescribed by the State Board of Elections, which must include a place for such military voter to enroll in a party, on a postcard bearing the return address of such Board of Elections.[9] The State Board of Elections must forward to the appropriate Board of Elections all applications it receives for military ballots.

An application from a military voter not previously registered must be received by the local Board of Elections where the military voter otherwise resides no later than 10 days before a general or special election, or 25 days before a primary election, in order to entitle the applicant to vote in such election. Where a military voter is already registered, the application must be received at least seven days before an election in order to entitle the applicant to vote at such election, except that an application from a military voter who delivers his or her application to the Board of Elections in person must be received no later than the day before the election.[10]

The Board of Elections is required to add immediately to registration records the name and residence and military address of every military voter not previously registered, upon receipt of a valid application for a military ballot. If a valid application for a military ballot is received by a Board of Elections from a person already registered other than as a military voter from the residence address set forth in such application, then the Board shall mark the registration records of such voter in the same manner as the registration records of other military voters.[11]

Each year the Board of Elections is required to prepare a list of names and residence addresses for primary election party enrollments of military voters appearing on such registration poll records. This list must be prepared no later than seven days preceding an election. It is required that one copy be kept at the office of the Board of Elections for public inspection and the Board is required to transmit one copy to the chairman of each political party in the county upon written request.[12]

The law provides that if a Federal Postcard Application Form is received from a person who is qualified to vote as a military voter but who is not previously registered as one, the Federal Postcard Application Form is to be treated in all respects as an application for registration and enrollment as a military voter and for a military ballot. It is further provided that if such Federal Postcard Application Form is received from a person already registered as a military voter, then the application shall be treated in all respects as an application for a military ballot.[13] If the Board of Elections denies the application of a person in military service to register to vote or to receive a military ballot, such Board of Elections is required to immediately send the applicant a written explanation for such denial.[14]

The application may be signed by the spouse, parent, adult child, brother or sister of the military voter.

A qualified voter who has been enlisted in the military service but who has not taken the oath of allegiance prior to 30 days preceding a general or special election, as well as the spouse, parent or child residing in the same election district as such voter, is entitled to register before the Board of Elections of his or her county of residence on or before the 10th day preceding such election, provided the individual shall on or before the day of such election actually be in the military service. The voter shall then receive a military ballot and the registration record will be stamped with the legend "Military Voter" in accordance with the Election Law.[15]

A local Board of Elections may send to any spouse, parent, adult child, brother or sister of a military voter who is serving outside the continental limits of the United States an application for a military ballot in the form set forth by the State Board of Elections. The application is to be on a postcard addressed to the appropriate Board of Elections and must include a statement reading, "I understand that this application will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn."[16]

The application may be signed by the spouse, parent, adult child, brother or sister of the military voter. Upon receipt of such an application from the relative of a military voter, the Board of Elections is required to mail a military ballot to the military voter together with an application for a military ballot and instructions that such application must be completed and returned together with an envelope containing the military ballot. No ballot sent to a military voter upon the application of a relative

of such military voter shall be cast or canvassed unless a completed application for a military ballot signed by such military voter is received with the ballot.[17]

The courts of the state have always given a military voter the option of registering and voting as any other qualified citizen or, alternatively, by military ballot, and leave this decision with the individual and not with the local Board of Elections.[18]

It should be noted that a military voter may vote by absentee ballot rather than military ballot as long as he or she complies with all other provisions of the Election Law.[19]

Distribution and Return of the Ballot

The State Board of Elections has a principal responsibility for taking all necessary steps to effectuate the provisions of any other legislation in order to fully utilize any federal or other facilities in the distribution of military ballots. It has the power to adopt and promulgate orders and regulations with regard to military voters of the state of New York.[20] Similarly, the State Board of Elections is responsible for providing information regarding voter registration procedures and absentee ballot procedures applicable to military and special federal voters wishing to register or vote in any jurisdiction of the state.[21]

The courts of the state have always given a military voter the option of registering and voting as any other citizen.

Recently enacted New York law provides that ballots for military voters must be mailed or otherwise distributed by the Board of Elections 32 days before a primary or general election, 25 days before a New York City Community School Board District or City of Buffalo School District election, 14 days before a village election conducted by the Board of Elections and 12 days before a special election. A voter who submits a military ballot application is entitled to a military ballot thereafter for each subsequent election through and including the next two regularly scheduled general elections held in even number years, including any runoffs that may occur, provided such application shall not be valid for any election held within seven days after its receipt.

Ballots shall also be mailed to any qualified military voter who is already registered and requests such military ballot from such Board of Elections in a letter, which is signed by the voter and received by the Board of Elections not later than the seventh day before the election for which the ballot is requested and which states the address where the voter is registered and the address to which the ballot is to be mailed. The Board of Elections is required to enclose with such ballot a Form Application for a military ballot.[22]

With regard to a primary election, the Board is required to deliver only the ballot of the party with which the military voter is enrolled according to the military voter's registration records. In the event a primary election is uncontested in the military voter's election district for all offices or positions except the party position of a member of the ward, town, city or county committee, no ballot shall be delivered to the military voter for such election and the military voter shall be advised of the reason why he or she shall not receive a ballot.[23]

If the local Board of Elections of any county fails to mail or otherwise distribute ballots to military voters of such county by the date required in the Election Law, that Board is required to notify the State Board of Elections in writing of the facts and reasons for such noncompliance.[24] Thereafter, ballots are required to be distributed to persons whose names and military addresses are added to the registration poll ledgers as military voters, except that the military ballots may be delivered by hand to the military voters who personally file an application with the Board of Elections of their county of residence. The military ballot shall be delivered to such military voter together with a ballot envelope and a second envelope addressed to the appropriate Board of Elections on which it is printed "Official Election Balloting Material – Via Air Mail."[25]

Each local Board of Election must cast and count all military ballots it receives before the close of the polls on Election Day. It must also do so for ballots contained in envelopes showing a government postal cancellation mark or showing a dated endorsement of receipt by another agency of the United States Government with a date no later than the day before the election and received by such Board of Elections not later than seven days following the date of a primary or special election and not later than 13 days following the day of a general election. These ballots are to be processed in the same manner as the Election Law provides for the processing of absentee ballots.[26]

In marking the ballot, the military voter is required to mark the military ballot in the same manner as an absentee ballot. After marking the ballot, he or she must fold the ballot and enclose it in the ballot envelope bearing the military voter's statement and seal the envelope. He or she must then properly complete the requested information and sign the statement. The envelope containing the ballot is then to be inserted in the envelope addressed to the appropriate Board of Elections, which should be mailed or otherwise delivered to the local Board of Elections of the military voter's county of residence.[27]

The courts of the state have made every effort to prevent the military ballot from being invalidated and have held such ballot to be valid even where it contained

extraneous marks or was noncompliant with the requirements as to the place of marking ballots.[28] In like manner, the courts have also held that the failure to seal a military ballot envelope did not invalidate the vote where the ballot envelope was enclosed in a sealed envelope addressed to the Board of Elections.[29] The courts have further held that the marking of a military ballot and its enclosure in the accompanying envelope are presumed to have been done by the service member personally.[30]

To further preserve the validity of the military ballot, state Election Law provides that the State Board of Elections and the County Board of Elections shall determine three days before the first day for the distribution of military ballots the names of all candidates duly nominated for public office and the amendments, referenda, propositions and questions to be voted on for such ballots. If at a later date the nomination of any candidate named on a military ballot is found invalid, the ballot shall still be valid but no vote cast for any such candidate and such ballot shall be counted at the election.

The failure of the County Board of Elections to include the name of any candidate or any amendment, referendum, proposition or question on the military ballot shall not in any way affect the validity of the election with respect to the office for which the nomination was made or the validity of the military ballot as to any other matter.[31] New York courts have consistently upheld the intent of this statute long before its enactment.[32]

The cost of printing, mailing, and return postage as well as all other costs and expenses incurred with regard to the administration of military voting, aside from those charges borne by the State Board of Elections, is a county charge and in the city of New York is a city charge, and is appropriated and paid in the same manner as all other election costs.[33]

Registration Cancellation

The fact that a military voter is discharged from the military service does not in and of itself result in the cancellation of his or her registration. New York law provides that if the Board of Elections receives notice from a military voter that the voter has left the military service and is residing at his or her residence address, the Board shall cross out or otherwise obliterate the "Military Voter" legend on the voter's registration and thereafter treat such records as if the individual was a regularly registered voter in the election district of his or her residence.[34]

It is further provided that if any ballot, application form or other mail sent to a military voter at his military address by the Board of Elections is returned by the Post Office as undeliverable, the Board of Elections is required to ascertain that the military member is residing at the address given on his registration records as his permanent address. If the member is found to be residing at the permanent address, the Board will not send the voter any further military ballots unless he applies in the ordinary manner, giving a new military address.

If it is determined that the military voter is not residing at the permanent address, the Board of Elections is required to send a confirmation notice to the military voter at the voter's military address by first class mail, return postage guaranteed, and shall place the registration of the voter in an active status. If, however, the voter notifies the Board of Elections that he or she has moved to a new military address, the Board is then required to restore the registration of the voter to active status in the same manner as applicable to any other voter seeking re-registration of voting rights from inactive status.[35] The Board of Elections is further required to process and preserve the records of such registrations, including the original applications for each registration, in the same manner and for the same period of time as the records of other voters under permanent personal registration.[36]

Like any other registered voter, military voters may have their registration cancelled for such acts as conviction of a felony disqualifying them from voting, being adjudicated an incompetent, refusing to take a challenge oath, permanently changing their residence outside the city or county where their permanent registration is filed, failing to vote in two consecutive general elections and personally requesting removal of their name from the list of registered voters.[37] Military voters whose registration

is cancelled for one of these causes are nevertheless eligible to re-register in the same manner as any other voter once the disability is lifted, where they otherwise elect to do so.[38] Upon cancellation of the registration of a military voter for one of these causes, the Board of Elections is required to notify the voter at his or her last military address and at his or her permanent residence address of the fact of the cancellation, the reason, and the right to re-register within the requirements of the Election Law.[39]

In construing the cancellation provision of the Election Law, the Appellate Division found that a technical sergeant in the Air Force who was stationed in another state was qualified to vote as a resident of a New York City, where he had lived in the city for seven years while stationed at an Air Force base and continued to file a state tax return and unequivocally stated his intention to return to the city where he retired from the military.[40]

Liberality of Application

The true effectiveness of the provisions of the Election Law regarding military voting lies in the flexibility of their application. A specific provision of Article 10 sets forth that its provisions are to be liberally construed for the purpose of providing military voters the opportunity to vote and the State Board of Elections shall have the power to adopt and promulgate regulations to effectuate the provisions of this Article.[41]

The courts, taking a similar approach, have frequently applied the law to facilitate the efficacy of the service member's ballot. For instance, a military ballot that was marked first in pencil over which there was superimposed in ink a cross mark in the voting square, was valid and the court held that it should have been counted.[42]

In still another case where the Board of Elections had received an application for what was described as a domestic military ballot and erroneously placed thereon the number of an election district other than that of the voter's residence and registered him in the wrong district and sent him a ballot to be voted therein, the court held that the voter was to be considered a voter in that district and the ballot counted for any candidate for whom the voter could vote if personally present in his polling place.[43]

In a situation where there was no buff card with which to compare the voter's signature on a military ballot, the Appellate Division for the Second Department held that this was not grounds for invalidating the vote absent a showing lack of compliance with the provisions governing registration of military personnel.[44]

Conclusion

U.S. Supreme Court Justice John Marshall Harlan wrote, "In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful."[45] In a free and democratic society no right is more essential to the preservation of honest and efficient government than the right to vote. By the same token, few are more deserving with regard to exercising that right than those who selflessly offer up their very lives to protect and preserve our freedoms. It is, therefore, essential for attorneys representing military clients as well as Election Law practitioners to be aware of those statutes that enable American service personnel to vote wherever they are assigned. We cannot claim to be the arsenal of democracy if the most fundamental right of its existence is denied to those essential to its survival. ■

1. N.Y. Election Law § 10-102(1) ("Elec. Law").
2. Elec. Law § 10-102(2).
3. Op. Atty. Gen. 391 (1944).
4. *Id.*
5. Elec. Law § 10-106(1).
6. Elec. Law § 10-106(2).
7. *Id.*
8. *Sullivan v. Cohen*, 183 Misc. 141, 50 N.Y.S.2d 185 (Sup. Ct., N.Y. Co. 1944).
9. Elec. Law § 10-106(4).
10. Elec. Law § 10-106(5).
11. Elec. Law § 10-106(6).
12. Elec. Law § 10-106(7).
13. Elec. Law § 10-106(7a).
14. Elec. Law § 10-106(8).
15. Elec. Law § 10-106(10).
16. Elec. Law § 10-106(11).
17. *Id.*
18. *Sullivan*, 183 Misc. 141.
19. Elec. Law § 10-122.
20. Elec. Law § 10-124(1).
21. Elec. Law § 10-124(2).
22. Elec. Law § 10-108(1).
23. *Id.*
24. Elec. Law § 10-108(2).
25. Elec. Law § 10-108(3).
26. Elec. Law § 10-114(1), (2).
27. Elec. Law § 10-112.
28. *In re Cosgrove*, 46 N.Y.S.2d 181 (Sup. Ct., Richmond Co. 1943), *modified on other grounds*, 267 A.D. 822, 46 N.Y.S.2d 195 (2d Dep't), *aff'd*, 292 N.Y. 111, 54 N.E.2d 33 (1944).
29. *See id.*
30. *In re Waggoner*, 270 A.D. 455, 60 N.Y.S.2d 778 (3d Dep't 1946).
31. Elec. Law § 10-116.
32. *See In re Luther*, 185 Misc. 921, 57 N.Y.S.2d 871 (Sup. Ct., Ontario Co.), *aff'd*, 269 A.D. 965, 59 N.Y.S.2d 386 (4th Dep't 1945); *see also Perfetti v. Nehill*, 7 A.D.2d 611, 178 N.Y.S.2d 371 (3d Dep't), *aff'd*, 5 N.Y.S.2d 771, 179 N.Y.S.2d 865 (1958).
33. Elec. Law § 10-118.
34. Elec. Law § 10-106(12).
35. Elec. Law § 10-109(2).
36. Elec. Law § 10-109(3).
37. Elec. Law §§ 5-400, 10-109(4).
38. Elec. Law § 10-109.
39. Elec. Law § 10-109(5).
40. *DiMaggio v. Cicotti*, 179 A.D.2d 1092, 579 N.Y.S.2d 789 (4th Dep't), *appeal dismissed*, 79 N.Y.2d 850, 580 N.Y.S.2d 197 (1992).
41. Elec. Law § 10-126.
42. *In re Mahoney*, 267 A.D. 478, 47 N.Y.S.2d 234, *aff'd*, 292 N.Y. 710, 56 N.E.2d 119 (1944).
43. *Cosgrove*, 46 N.Y.S.2d 181.
44. *Franke v. McNab*, 73 A.D.2d 679, 423 N.Y.S.2d 494 (2d Dep't 1979).
45. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

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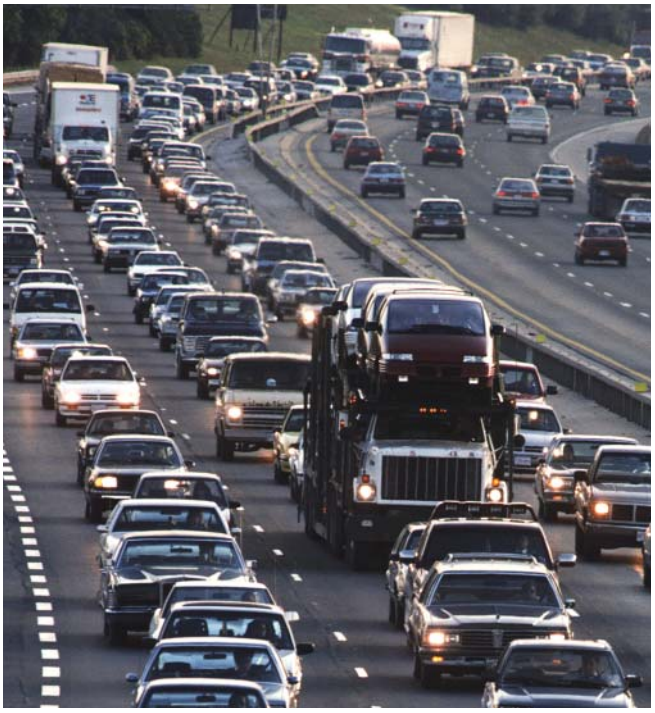

Jonathan A. Dachs, a member of the firm of Shayne, Dachs, Stanisci, Corker & Sauer, in Mineola, New York, is the author of several articles on insurance law and in the context of automobiles. Mr. Dachs is a graduate of Columbia University and received his law degree from New York University.

Uninsured Motorist/ Supplementary Uninsured and Underinsured Motorist Update – Part I

A Review of Cases Decided in 2006

By Jonathan A. Dachs

As in the past, 2006 was an active and notable year in this constantly evolving and extremely complex area of insurance law. Indeed, so many interesting and significant decisions were handed down in 2006 that it is necessary to present this summary in two parts. This installment addresses general issues pertinent to uninsured motorist (UM), underinsured motorist (UIM) and supplementary uninsured motorist (SUM) law and practice. In Part II, which will appear in a following issue of the *Journal*, I will review several additional general issues, as well as certain issues more specific to the different types of coverage.

Insured Persons – "Residents"

The definition of an "insured" under the UM and SUM endorsements includes a relative of the named insured, and, while residents of the same household, the spouse and relatives of either the named insured or spouse. The concept of residence has two components – physical presence and intent to remain.

In *Rohlin v. Nationwide Mutual Ins. Co.*,[1] the court noted that "[t]he term 'household,' as used in insurance policies, is ambiguous. Thus, 'its interpretation requires an inquiry into the intent of the parties,' and the term should therefore be interpreted in a manner favoring coverage, as

should any ambiguous language in an insurance policy." Moreover, the court observed that the issue of whether an individual is a member of the insured's household is often "best resolved by the trier of fact, 'taking into account the reasonable expectations of the average person purchasing [automobile liability] insurance, as well as the particular circumstances of [this] case.'"

In *State Farm Mutual Automobile Ins. Co. v. Jackson*,[2] the court observed that "'[a] resident is one who lives in the household with a certain degree of permanency and intention to remain.'" In that case, the evidence established that the respondent, the father of six children, resided in Dunkirk, New York, with his girlfriend, who was the children's mother. The respondent was unemployed and received disability benefits that were sent to the girlfriend's address in Dunkirk. The accident occurred in Dunkirk when the respondent was a passenger in an uninsured car driven by a Dunkirk resident. After his hospitalization, the respondent was released to the care of his girlfriend in Dunkirk and all of his follow-up care took place in Dunkirk. Under these circumstances, the court upheld the jury's verdict that the respondent was not a member of his mother's household, but, rather, a member of his girlfriend's household (only).

> The claimant must be an "occupant" of a particular vehicle to qualify for coverage under the UM or SUM coverage of that vehicle's policy.

Occupants

The claimant must be an "occupant" of a particular vehicle to qualify for coverage under the UM or SUM coverage of that vehicle's policy. As defined in the mandatory UM endorsement, the term "occupying" means "in or upon or entering into or alighting from" a vehicle. Similarly, the Regulation 35-D SUM endorsement defines "occupying" as "in, upon, entering into, or exiting from a motor vehicle."

In *Travelers Property Casualty Co. v. Landau*,[3] the evidence established that the claimant/insured exited from his parked vehicle intending to help his friend make a delivery of food he was unloading from a minivan parked across the street. When the friend declined his offer of help, he turned and walked back to his vehicle. As he was preparing to re-enter his vehicle, he was struck from behind by another vehicle. Under these facts and circumstances, the court held that the finding that the claimant was not "occupying" his vehicle at the time of the accident was supported by a fair interpretation of the evidence. The trial court, which heard the witnesses and was in the best position to evaluate their credibility, resolved the issues of fact as to whether the claimant had departed from his vehicle incident only to some temporary interruption in the vehicle's journey. Thus, the trial court adequately determined whether his original occupancy could be deemed continuing in nature or, if not, whether at the moment he was struck, he was actually in the process of "entering into" his vehicle or merely intending to do so.

"Motor Vehicles"

The UM/SUM endorsements refer to the payment of damages for bodily injury caused by uninsured "motor vehicles," but do not specifically define the types of vehicles included within the coverage. In *Liberty Mutual Fire Ins. Co. v. Rondina*,[4] the court held that because all-terrain vehicles (ATVs) are specifically excluded from the definition of motor vehicles set forth in Vehicle & Traffic Law § 125, uninsured motorist coverage did not encompass a claim for injuries sustained by a passenger in an uninsured ATV.

"Accidents"

The UM/SUM endorsements provide for benefits to "insured persons" who sustain injury caused by "accidents" "arising out of the ownership, maintenance or use" of an uninsured motor vehicle. In *Liberty Mutual Ins. Co. v. Goddard*,[5] the court reiterated the well-settled rule that "an intentional and staged collision caused in furtherance of an insurance fraud scheme is not a covered accident under a policy of insurance. In *Eagle Ins. Co. v. Gueye*,[6] the court clarified that if the liability insurer is entitled to disclaim bodily injury coverage to the claimant on the ground that the injuries were not the result of an accident, "there can be no recovery for the same injuries under the uninsured motorist endorsement."[7]

Duty to Provide Timely Notice of Claim

The UM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." A failure to satisfy the notice requirement vitiates the policy.[8]

As reported on last year, the Court of Appeals definitively spoke to the issue of the "no-prejudice" rule in two cases decided on the same day in April 2005. In *Argo Corp. v. Greater New York Mutual Ins. Co.*,[9] the Court held that the general "no-prejudice" rule applicable to liability insurance policies was not abrogated by *Brandon v. Nationwide Mutual Ins. Co.*[10] Three years earlier, *Brandon* had held that the carrier must show prejudice before disclaiming based on late notice of a lawsuit in the SUM

context. In *Argo*, the Court stated that *Brandon* should not be extended to cases where the carrier received unreasonably late notice of the claim. Insofar as the "rationale of the no-prejudice rule is clearly applicable to a late notice of lawsuit under a liability insurance policy,"[11] the Court held that a primary (liability) insurer need not demonstrate prejudice to disclaim coverage based upon a late notice of lawsuit.

However, in *Rekemeyer v. State Farm Mutual Auto. Ins. Co.*,[12] the Court held that the "no-prejudice" rule should be relaxed in SUM cases and, thus, "where an insured previously gives timely notice of the accident, the [SUM] carrier must establish that it is prejudiced by a late notice of SUM claim before it may properly disclaim coverage." The idea behind strict compliance with the notice provision in an insurance contract was to protect the carrier against fraud or collusion. In *Rekemeyer*, where the plaintiff gave timely notice of the accident and made a claim for no-fault benefits soon thereafter, the Court found that notice was sufficient to promote the valid policy objective of curbing fraud or collusion. Under these circumstances, "application of a rule that contravenes general contract principles is not justified." The Court further concluded that the insurer should bear the burden of establishing prejudice "'because it has the relevant information about its own claims-handling procedures and because the alternative approach would saddle the policyholder with the task of proving a negative.'"[13]

In *Nationwide Mutual Ins. Co. v. Mackey*,[14] the court applied *Rekemeyer* to a case involving a failure by the insured to complete and return a "Proof of Claim" form supplied by the insurer. As stated by the court,

> The rationale in *Rekemeyer* applies here, as respondent's attorney supplied prompt written notice of the accident, made a claim for no-fault benefits and indicated that SUM coverage was implicated. Written notice as to a SUM claim was repeated at least twice over the ensuing six months. The respondents forwarded to petitioner the police accident report of the accident as well as the pertinent medical records. The petitioner does not deny receiving any of these various letters and documents from the respondents. The petitioner failed to show any prejudice and, under the circumstances of this case, should not be permitted to disclaim SUM coverage.[15]

In *State Farm Mutual Automobile Ins. Co. v. Rinaldi*,[16] the court reiterated the *Rekemeyer* rule and held that, although no prejudice had been demonstrated by the insurer and because *Rekemeyer* was decided after the Supreme Court's decision, the matter should be remanded "'for the carrier to have an opportunity to demonstrate prejudice,' if any."[17]

In *New York Central Mutual Fire Ins. Co. v. Reinhardt*,[18] the court held that even though the insured/claimant did not comply with the SUM endorsement requirement that she "immediately" forward to the SUM carrier the summons and complaint in her lawsuit against the tortfeasor (a breach of the "Notice of Legal Action" condition), the carrier was required to show prejudice before relying on that breach pursuant to *Brandon v. Nationwide Mutual Ins. Co.* In *Reinhardt*, the carrier failed to do so.[19]

The interpretation of the phrase "as soon as practicable" continued to be a hot topic in 2006. In *Morris Park Contracting Corp. v. National Union Fire Ins. Co.*,[20] the court stated that "notice requirements are to be liberally construed in favor of the insured."

In *Steinberg v. Hermitage Ins. Co.*,[21] the court held that a delay of 57 days after the insured became aware of the incident that gave rise to the claim – without any valid excuse or explanation for the delay – was unreasonable as a matter of law. The court rejected the insured's contention that the delay was justified by the insured's "good faith belief" that it was not liable for the claimant's injuries because that claim was belied by evidence which established that upon reasonable investigation the insured should have realized that there was a reasonable possibility of liability. Moreover, while the injured party had an independent right to provide notice to the insurer, the unexplained delay of five months in providing such notice was unreasonable as a matter of law as well.

In *Hartford Ins. Co. of the Midwest v. Gamiel*,[22] the court held that notice of an SUM claim, provided 16 months after the claimant's receipt of notice that the tortfeasor's insurer was insolvent and in liquidation, was not deemed to be "as soon as practicable"; thus, it was untimely as a matter of law.

In *Allstate Ins. Co. v. Marcone*,[23] the court observed that, pursuant to Insurance Law § 3420(a)(3),

> [a] party injured by an insured individual has an independent interest in the protection afforded by the insured's liability coverage. Accordingly, "when the insured has failed to give proper notice, the injured party, by giving notice himself [or herself], can preserve his [or her] rights to proceed directly against the insurer." Notice given by an injured party "is not to be judged by the same standards, in terms of time, as govern notice by the insured, since what is reasonably possible for the insured may not be reasonably practical for the injured person. . . . In each case, the test is one of reasonableness, measured by the diligence exercised by the injured party in light of the prospects afforded to him under the circumstances."[24]

The court further recognized that in most cases, the reasonableness of any delay and the sufficiency of the excuse offered present questions of fact to be resolved at trial.

In *Progressive Northeastern Ins. Co. v. Yeger*,[25] the court held that "Insurance Law § 3420(a)(3) does not impose a *duty* on the injured party to provide notice to an alleged tortfeasor's insurer. Moreover, there is no exclusion from the requirement to provide compulsory uninsured motorists coverage pursuant to Insurance Law § 3420(f)(1) triggered by an injured party's failure to provide timely

notice to a tortfeasor's insurer." In *City of New York v. Welsbach Electric Corp.*,[26] the court held that "an insured's obligation to provide timely notice is not excused on the basis that the insurer has received notice of the underlying occurrence from an independent source." The court further noted that "it has been held that timely notice by the insured can constitute notice by an additional insured where the two parties can be said to be 'united in interest.'"[27]

In *Jeffrey v. Allstate Ins. Co.*,[28] the insured reported the accident to his broker three months after the accident. However, he failed to notify the insurer, which did not receive notice of the claim until 16 months after the accident. The policy in question had a notice provision containing "we," "us" and "our" to describe who should be notified, without clearly identifying the insurer as the party to whom those terms applied. Given this ambiguity, the court held that the policy should be interpreted to allow notice to the broker. The court further held that the insured complied with the provision requiring notice "as soon as practicable."

Discovery

The UM and SUM endorsements contain provisions requiring, upon request, a statement under oath, examination under oath, physical examinations, authorizations and medical reports, and records. The provision of each type of discovery, if requested, is a condition precedent to recovery.

In *State-Wide Ins. Co. v. Womble*,[29] the court held that the insurer failed to make a timely request for the discovery it claimed to require, by making no attempt to obtain such discovery for a period of 17 months between its receipt of notice of the UM claim and its receipt of the Demand for Arbitration. Thus, the insurer waived its right to such discovery and/or a stay of arbitration pending such discovery. In *State Farm Mutual Automobile Ins. Co. v. Goldstein*,[30] on the other hand, the court held that three letters seeking disclosure, which went unanswered, "clearly manifested the petitioner's intent to pursue its policy rights to obtain disclosure and that the petitioner did not fail to pursue the opportunity to obtain disclosure." Thus, the court granted a temporary stay of arbitration pending the completion of pre-arbitration discovery.

The UM and SUM endorsements also provide that "[p]roof of claim shall be made upon forms we furnish unless we fail to furnish such forms within 15 days after receiving notice of claim." In *New York Central Mutual Fire Ins. Co. v. Gonzalez*,[31] the court held that the claimant's failure to complete and return a "Notice of Intention to Make Claim" form provided by their insurer constituted a breach of a condition of coverage under the SUM endorsement, providing a basis for disclaimer or denial of coverage. This idea was reaffirmed by the Court of Appeals in *New York Central Mutual Fire Ins. Co. v. Aguirre*.[32]

Petitions to Stay Arbitration

Under Regulation 35-D and its prescribed SUM endorsement, the insured has the choice of proceeding to court or to arbitration to resolve disputes in cases involving coverage in excess of the statutory minimums of $25,000 per person or $50,000 per accident. Cases involving 25/50 coverage must be submitted to arbitration and cannot be litigated in court.[33]

The 20-day time limit is jurisdictional and, absent special circumstances, courts have no jurisdiction to consider an untimely application.

In *USAA v. Melendez*,[34] the policy issued by the petitioner in Connecticut provided for arbitration only if both parties agreed. Although the petitioner declined to arbitrate, the policy also contained uninsured motorist coverage sufficient to satisfy the requirements of Insurance Law § 5101. The court held that "[t]here is no requirement under the New York no-fault [and uninsured] statutes and regulations that mandates arbitration where, as here, a policy issued out of state meets the minimum financial security requirements of Insurance Law § 5107."[35]

Filing and Service

CPLR 7503(c) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded." The 20-day time limit is jurisdictional and, absent special circumstances, courts have no jurisdiction to consider an untimely application.[36] In *State Farm Mutual Automobile Ins. Co. v. Scudero*,[37] the court rejected the insurer's contention that the 20-day limitation period does not apply when the basis for the stay is *res judicata*.

In *GEICO v. Castillo-Gomez*,[38] the court held that "[t]he validity of the 20-day limitation depends on compliance with the requirements of CPLR 7503(c), and not those of the rules promulgated by the American Arbitration Association." Since the claimant's notice of intent to arbitrate complied with all of the statutory requirements, it was held to be sufficient to commence the 20-day period of limitations. In *Liberty Mutual Ins. Co. v. Cooper*,[39] the

court reiterated the well-established rule that "[t]he 20-day period is to be calculated from the date the carrier receives the demand." When the 20th day after receipt of the Demand for Arbitration is a Sunday (or Saturday or public holiday), according to General Construction Law § 25(a), the Petition to Stay Arbitration may be filed on the next business day.[40]

In *Harris v. Niagara Falls Board of Education*,[41] the Court of Appeals held that the plaintiff did not comply with the commencement-by-filing system when he began his personal injury action using an index number from a prior special proceeding. Because the defendants timely objected to the plaintiff's failure to purchase a new index number, the Complaint was dismissed. The Court noted,

> Pursuant to the commencement-by-filing system, a party initiates an action or special proceeding by paying the necessary fee, obtaining an index number and filing the initiatory papers – a summons and complaint or a summons with notice in an action, or a petition in a special proceeding – with the clerk of the court. Under the procedure mandated by the CPLR, "service of process without first paying the filing fee and filing the initiatory papers is a nullity, the action or proceeding never having been properly commenced."[42]

The plaintiff did not comply with the commencement-by-filing system when he began his personal injury action using an index number from a prior special proceeding.

The *Harris* court further noted that in *Fry v. Village of Tarrytown*,[43] it made clear that a defect in compliance with the commencement-by-filing system does not deprive a court of subject matter jurisdiction and is waived absent a timely objection by the responding party. "Strict compliance with CPLR 304 and the filing system is mandatory and the extremely serious result of noncompliance, so long as an objection is timely raised by an appearing party, is outright dismissal of the proceeding."

In *Ballard v. HSBC Bank USA*,[44] the Court of Appeals held that the failure by the petitioner to include a return date in a Notice of Petition does not constitute a non-waivable jurisdictional defect under Executive Law § 298. Since the respondents failed timely to raise a challenge to personal jurisdiction, that claim was waived and the petition was allowed to go forward. In *Kane v. Leistman*,[45] the court held that the mere fact that the RJI number was not purchased when the petition was filed does not constitute a jurisdictional defect mandating dismissal. Thus, the petitioner was not charged with the county clerk's error in accepting the Notice of Petition without an RJI, in violation of 22 N.Y.C.R.R. § 202.6(a).

Jurisdiction

In order successfully to bring another party into the proceeding to stay arbitration, such as the tortfeasor's purported insurer, there must be a jurisdictional basis to do so. In *GEICO v. Basedow*,[46] the alleged offending vehicle was insured by American Independent Insurance Co. After that insurer disclaimed coverage on the ground that its insured's policy had lapsed, the claimant demanded arbitration of a UM claim against his own carrier. In a proceeding to stay arbitration, the SUM carrier sought to join American as an additional respondent. On its motion to dismiss the petition for lack of personal jurisdiction, American argued that it was a Pennsylvania corporation and was not present in New York State for jurisdictional purposes. The court agreed that American "lacked sufficient contact with New York State to be subjected to personal jurisdiction in New York State absent a waiver,"[47] thus granting American's motion. Notably, the court granted the SUM carrier a stay of the hearing for 60 days to afford it an opportunity to commence an action in the state of Pennsylvania, American's domicile, to determine the issue of whether American's coverage was in effect on the date of the accident.[48] In *Eveready Ins. Co. v. Modeste*,[49] the court found that Southern United Fire Ins. Co. was a foreign insurer based in Alabama, was unauthorized to transact business in New York, and had no contacts with New York sufficient for the exercise of long-arm jurisdiction.

Burden of Proof

"A party seeking a stay of arbitration of an uninsured motorist claim has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue that would justify the stay."[50] In *Utica Mutual Ins. Co. v. Colon*,[51] the court held that by producing the police accident report containing the vehicle's insurance code, the petitioner showed, *prima facie*, that the proposed additional respondent insured the offending vehicle, thus shifting the burden to the other insurer to establish a lack of coverage.

In *Travelers Indemnity Co. v. Machado*,[52] the court held that testimony of an underwriter detailing the name, address and vehicle searches she conducted to determine if the insurer insured the offending vehicle at the time of the accident, plus computer printouts corroborating the search results, constituted sufficient evidence of an

"exhaustive search" to rebut the *prima facie* showing of coverage. The court added that

> [t]o the extent that the Appellate Division, First Department's decision in *Highlands Ins. Co. v. Baez* (18 A.D.3d 238) can be read to hold that the [insurer] was required to attempt to locate the owner of the offending vehicle by telephone or letter or to compel her appearance at the hearing, we decline to follow it. It is properly the burden of the insurer for the claimant, not the disclaiming insurance company, to produce this type of additional evidence of coverage once sufficient evidence, *i.e.*, the "exhaustive search" is introduced to rebut the *prima facie* case.[53]

Scope of JHO's Authority

If the court determines that a hearing should be held on the issues raised in the Petition to Stay Arbitration, it may refer the matter to a referee or judicial hearing officer (JHO) to try at a framed issue hearing. In *Allcity Ins. Co. v. Rhymes*,[54] the issue raised on the Petition to Stay Arbitration of an uninsured motorist claim was whether the alleged offending vehicle was the one involved in the accident. The court referred the matter to a JHO to "determine all issues preliminary to arbitration, including the issue of the identity and participation of the . . . vehicle in this accident." The order of reference directed the JHO to hear and determine "all issues raised in the papers." Following a hearing, the JHO granted the petition to stay based upon the lack of any evidence that the claimants were involved in the subject accident.

That issue was raised, *sua sponte*, by the JHO at the close of the hearing, over the objection of counsel for the claimants. The court held that the JHO exceeded the scope of the order of reference in making her determination, and thus reversed, and denied the petition. "Even assuming that this was a threshold issue to be determined by the court in the first instance, nowhere in the petition or in any of the other papers submitted to the court did any party or proposed party raise an issue as to whether the [claimants] were involved in the underlying accident. . . . Thus, this issue should not have been reached by the JHO."[55] In *USAA Casualty Ins. Co. v. Hughes*,[56] the trial court determined that the petition was timely and referred the issue of coverage to a JHO to hear and determine. The JHO determined, inter alia, that the petition was untimely. The JHO was without authority to make such a determination.

In *Allstate Ins. Co. v. Joseph*,[57] the reference to the JHO was for a hearing "on the question of coverage." This reference was held to allow consideration of the issue of non-permissive use, which was relevant to the denial of coverage, notwithstanding that it was raised for the first time at the hearing. Thus, the JHO providently exercised her discretion to consider that issue. However, the JHO erroneously denied the insurer's request for a continuance to enable it to investigate the owner's story pertaining to non-permissive use, attempt to locate relevant witnesses and prepare a legal response to that newly raised issue, especially considering that a brief delay in the conclusion of the non-jury hearing would not likely have caused any prejudice.

"Serious Injury" Requirement

In *Raffellini v. State Farm Mutual Automobile Ins. Co.*,[58] the court held that notwithstanding the presence of specific language in the Regulation 35-D SUM endorsement,[59] which is applicable to both uninsured and supplementary uninsured/underinsured motorist coverage, indicating that the coverage does not apply "for non-economic loss, resulting from bodily injury to an insured and arising from an accident in New York State, unless the insured has sustained serious injury as defined in Section 5102(d) of the New York Insurance Law," a claimant is *not* required to demonstrate a "serious injury" in a contract action against his or her insurer to recover benefits under the optional, underinsurance coverage portion of the policy (as opposed to the basic mandatory uninsured motorist coverage). Indeed, the court invalidated that portion of the Regulation and, thus, the endorsement as applied to the underinsurance context, on the basis that it was unauthorized and, indeed, contrary to the enabling statute, Insurance Law § 3420(f)(2).

As noted by the court, whereas Insurance Law § 3420(f)(1), the provision governing the basic, mandatory *un*insured motorist coverage, specifically provides that "[n]o payment for non-economic loss shall be made under such policy provision to a covered person unless such person has incurred a serious injury, as such terms are defined in [§ 5102] of this chapter," no similar provision appears in § 3420(f)(2), dealing with the voluntary supplementary uninsured/*under*insured motorist cover-

Because the respondents could have contested the insurer's assertions in the prior proceeding, the doctrine of *res judicata* was properly applied.

age. In *Scotland v. Allstate Ins. Co.*,[60] the court held that the "serious injury" threshold of Insurance Law §§ 3420(f)(1) and 5102(d) does not apply where the subject policy was issued out of state.

Collateral Estoppel

The doctrines of *res judicata* and collateral estoppel are as applicable to arbitration awards as they are to judicial proceedings. In *New York Central Mutual Fire Ins. Co. v. Reinhardt*,[61] the claimant went to arbitration with the tortfeasor's insurer in lieu of a lawsuit. The arbitration agreement provided that the maximum amount of the award would be $25,000, the limit of the tortfeasor's policy, but it also provided that this limitation would be confidential and would not be revealed to the arbitrator. The arbitrator awarded exactly $25,000 to the claimant. Because it was unclear whether the claimant sought to establish damages of a greater amount, or withheld proof of the full extent of her injuries in light of the arbitrator's limited authority, and also whether, despite the agreement to "keep the arbitrator in the dark" about the agreed-upon maximum recovery, the arbitrator was aware of it and conformed the award to this limitation, the court remitted the matter for a framed issue hearing on whether the claimant was barred by collateral estoppel from seeking additional recovery under the SUM endorsement. Interestingly, the court added that "the arbitration award against the tortfeasor may be entitled to preclusive effect as to the amount of [the claimant's] damages even if the award was not confirmed and reduced to judgment. Moreover, the issue of whether to grant preclusive effect to a particular arbitration award in a later arbitration is for the court, not the arbitrator."[62]

In *Allstate Ins. Co. v. Williams*,[63] the respondents were involved in a motor vehicle accident with a vehicle that fled the scene. Although the operator of the vehicle was unknown, the police report contained the license plate number and identity of the registered owner of the vehicle. The respondents commenced an action for personal injuries against the registered owner. That party alleged, in defense, that his license plates had been removed from his vehicle and placed on another vehicle without his permission. The respondents thereafter filed a demand for uninsured motorist benefits and the SUM carrier moved to stay arbitration on the ground that the alleged offending vehicle was insured. The alleged owner and his insurer were added as additional respondents. The Petition to Stay Arbitration was subsequently granted on default. The respondents did not appeal that order, or seek a severance or any other relief. Instead, they continued to pursue their action against the driver, which ultimately resulted in dismissal after the owner produced proof that his license plates had been stolen. Thereafter, the respondents filed a second demand for arbitration and the carrier brought a second proceeding to stay arbitration, which was granted on the grounds of *res judicata*.

As explained by the court,

> The policy against relitigation of adjudicated disputes is strong enough to bar a second action or proceeding even when further investigation indicates that the prior determination was erroneously made, whether due to the parties' oversight or court error. Under New York's transactional approach to *res judicata*, once a claim is brought to final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or even if seeking a different remedy. The doctrine is applicable to an Order or Judgment entered upon default that has not been vacated, as well as to issues that were or could have been raised in the prior proceeding.[64]

Here, because the respondents could have contested the insurer's assertions in the prior proceeding, the doctrine of *res judicata* was properly applied. Having been aware of the owner's stolen license plate defense prior to their filing of the initial demand for arbitration, after the court stayed the arbitration on default of the other insurer, they could have sought a severance and requested a hearing on the stolen license plate issue. Instead, they took no further action in that proceeding and did not seek appellate review.

In *Culpepper v. Allstate Ins. Co.*,[65] prior to the trial of the plaintiff's action against the tortfeasor, the tortfeasor conceded liability in exchange for the plaintiff's agreement not to seek recovery against him personally in excess of his coverage limits of $25,000. The plaintiff also had SUM coverage of $100,000. The same carrier was the tortfeasor's bodily injury liability insurer and the plaintiff's SUM insurer. In exchange for the concession of liability, that carrier also agreed not to seek recovery against the tortfeasor for the amounts it would pay the plaintiff under the SUM coverage.

At the trial of the underlying action, at which the tortfeasor was represented by counsel supplied by the carrier, the jury awarded the plaintiff $115,000 in damages. After the carrier paid its liability limits of $25,000 in (partial) payment of the judgment, the plaintiff sought to recover from the carrier under her SUM coverage, but the carrier refused to pay that claim. The plaintiff thereafter sued the carrier for breach of contract.

The court granted the plaintiff's motion for summary judgment on the basis that the carrier was collaterally estopped from contesting the issue of damages insofar as the sole issue litigated at the trial of the personal injury action was the same issue that the carrier sought to litigate in the breach of contract action. At trial on the issue of damages, the carrier's interest and that of the tortfeasor/insured did not diverge and the carrier was the only party with a financial risk in that action. Thus, the carrier and the tortfeasor were "in privity" on the issue of damages for purposes of the doctrine of collateral estoppel. Moreover, the amounts at issue in the underlying action were not "trivial stakes." Thus, the carrier was collaterally estopped from contesting the issue of damages.

In *State Farm Mutual Auto. Ins. Co. v. Sceviour*,[66] the court held that a determination in a declaratory judgment action involving the tortfeasor's insurer was binding, under the doctrine of collateral estoppel, upon an uninsured motorist insurer in a separate proceeding. The court rejected the UM carrier's contention that a hearing was required on the issue of coverage for the tortfeasor because the determination of non-coverage in the declaratory judgment action was not binding on it because it was not a party to that proceeding. The court observed that

> a non-party may be said to have had sufficient opportunity to be heard in the prior proceeding if the non-party was, for purposes of that proceeding, in privity with a party who fully litigated the issue. . . . Generally, one in privity has "a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation."

Finding no doubt that the issue of the tortfeasor's coverage was "necessarily decided" in the declaratory judgment action, and that the claimant "asserted meaningful and comprehensive opposition to Clarendon's motions," the court found that there was privity between the UM carrier and the claimant in the prior proceeding because the UM carrier's "obligations are contingent upon [the claimant's] rights, albeit inversely." In the prior action, the interests of the UM carrier and the claimant were aligned because both would be served by a finding that the tortfeasor's insurer was required to provide coverage.

Finally, the court concluded that this result was not unfair insofar as the UM carrier had notice of the issues to be decided in the declaratory judgment action and of the potential impact upon its own interests, but it never sought to intervene. "Fairness does not require this Court to reward [the UM carrier's] decision to 'sit idly by' during the prior litigation by allowing it a second chance to proffer the same arguments and evidence that [the claimant] asserted without success. Nor does it require the imposition of a duplicative evidentiary burden upon [the tortfeasor's insurer]."[67]

In *State Farm Mutual Automobile Ins. Co. v. Chandler*,[68] the court held that the insurer was not obligated to provide coverage for any claims made in connection with a motor vehicle accident based upon the doctrine of judicial estoppel (the doctrine against inconsistent positions) because the claimants accepted a settlement of an uninsured motorist claim from their own insurer based upon the fact that the tortfeasor's insurer had disclaimed coverage. The claimants could not subsequently challenge the validity of that disclaimer. ■

1. 26 A.D.3d 749, 750, 809 N.Y.S.2d 374 (4th Dep't 2006) (citations omitted).
2. 31 A.D.3d 1171, 1171, 818 N.Y.S.2d 882 (4th Dep't 2006) (citation omitted).
3. 27 A.D.3d 477, 811 N.Y.S.2d 427 (2d Dep't 2006).

4. 32 A.D.3d 1230, 821 N.Y.S.2d 325 (4th Dep't 2006).

5. 29 A.D.3d 698, 699, 815 N.Y.S.2d 650 (2d Dep't 2006).

6. 26 A.D.3d 192, 810 N.Y.S.2d 26 (1st Dep't 2006).

7. *Id.* at 193. For cases discussing the nature and extent of proof necessary to establish that an "accident" was staged, see *State Farm Ins. Co. v. Paul*, N.Y.L.J., Nov. 3, 2006, p. 24, col. 1 (Sup. Ct., Nasssau Co.); *V.S. Med. Servs., P.C. v. Allstate Ins. Co.*, 11 Misc. 3d 334, 811 N.Y.S.2d 886 (Civ. Ct., Kings Co. 2006); *Universal Open MRI v. State Farm Mut. Auto. Ins. Co.*, 12 Misc. 3d 1151(A), 819 N.Y.S.2d 852 (Civ. Ct., Kings Co. 2006).

8. *See The Doe Fund v. Royal Indemnity Co.*, 34 A.D.3d 399, 825 N.Y.S.2d 450 (1st Dep't 2006); *Progressive Ins. Cos. v. House*, 34 A.D.3d 889, 823 N.Y.S.2d 560 (3d Dep't 2006); *Morris Park Contracting Corp. v. Nat'l Union Fire Ins. Co.*, 33 A.D.3d 763, 822 N.Y.S.2d 616 (2d Dep't 2006); *Allstate Ins. Co. v. Marcone*, 29 A.D.3d 715, 815 N.Y.S.2d 235 (2d Dep't 2006).

9. 4 N.Y.3d 332, 340, 794 N.Y.S.2d 704 (2005).

10. 97 N.Y.2d 491, 743 N.Y.S.2d 53 (2002).

11. *Argo*, 4 N.Y.3d at 340.

12. 4 N.Y.3d 468, 476, 796 N.Y.S.2d 13 (2005).

13. *Id.* at 476 (citations omitted).

14. 25 A.D.3d 905, 808 N.Y.S.2d 797 (3d Dep't 2006).

15. *Id.* at 907.

16. 27 A.D.3d 476, 810 N.Y.S.2d 346 (2d Dep't 2006).

17. *Id.* at 477 (citation omitted); *see Nationwide Mut. Ins. Co. v. Perlmutter*, 32 A.D.3d 947, 821 N.Y.S.2d 253 (2d Dep't 2006).

18. 27 A.D.3d 751, 813 N.Y.S.2d 158 (2d Dep't 2006).

19. In *Am. Transit Ins. Co. v. B.O. Astra Mgmt. Corp.*, 12 Misc. 3d 740, 814 N.Y.S.2d 849 (Sup. Ct., N.Y. Co. 2006), the court held that the rationale of *Brandon* applied in a non-SUM case. Thus, where the insurer was not only given timely notice of claim (as in *Brandon*), but it was also informed that counsel had been retained, and in response, the insurer stated that it would investigate the claim and provided counsel with the name of a claims adjuster; where the insurer was also the No-Fault carrier and requested the claimant to appear for an IME five weeks after the accident and followed up that request with three additional requests; and where the insurer received notice of the lawsuit before a default judgment had been entered (unlike *Argo*) and, indeed, could have prevented the default "but chose instead to allow the default judgment to be entered unopposed so that it could later avail itself of the 'no-prejudice' rule," the court held that the "no-prejudice" rule did not apply. Furthermore, the court held that even if the "no-prejudice" rule were to apply under the facts of this case, the claimant's counsel's letter to the insurer informing it that counsel had been retained and of potential claims against it satisfied the notice of lawsuit requirement because it served the notice requirement's function, as identified in *Argo*, of allowing the insurer "to be able to take an active, early role in the litigation process and in any settlement discussions and to set adequate reserves."

20. 33 A.D.3d 763, 764, 822 N.Y.S.2d 616 (2d Dep't 2006).

21. 26 A.D.3d 426, 809 N.Y.S.2d 569 (2d Dep't 2006).

22. 34 A.D.3d 244, 824 N.Y.S.2d 237 (1st Dep't 2006).

23. 29 A.D.3d 715, 815 N.Y.S.2d 235 (2d Dep't 2006).

24. *Id.* at 717 (citations omitted); *see USAA v. Ogilvie*, 12 Misc. 3d 1157(A), 819 N.Y.S.2d 213 (Sup. Ct., N.Y. Co. 2006).

25. 30 A.D.3d 524, 525, 817 N.Y.S.2d 119 (2d Dep't 2006) (emphasis added).

26. 11 Misc. 3d 1085(A), 819 N.Y.S.2d 847 (Sup. Ct., N.Y. Co. 2006).

27. *Id.* (citations omitted); *see Ocean Partners, LLC v. N. River Ins. Co.*, 25 A.D.3d 514, 810 N.Y.S.2d 430 (1st Dep't 2006) ("The insurer's actual knowledge of the fire at the subject building did not relieve plaintiff of its independent obligation to give timely notice of its own claim.").

28. 26 A.D.3d 355, 809 N.Y.S.2d 174 (2d Dep't 2006).

29. 25 A.D.3d 713, 811 N.Y.S.2d 707 (2d Dep't 2006).

30. 34 A.D.3d 824, 824, 825 N.Y.S.2d 248 (2d Dep't 2006).

31. 34 A.D.3d 816, 825 N.Y.S.2d 132 (2d Dep't 2006).

32. 7 N.Y.3d 772, 820 N.Y.S.2d 848 (2006).

33. *See Russell v. N.Y. Cent. Mut. Fire Ins. Co.*, 11 A.D.3d 668, 783 N.Y.S.2d 404 (2d Dep't 2004); *Cacciatore v. N.Y. Cent. Mut. Fire Ins. Co.*, 301 A.D.2d 253, 750 N.Y.S.2d 712 (4th Dep't 2002).

34. 27 A.D.3d 296, 811 N.Y.S.2d 641 (1st Dep't 2006).

35. *Id.* at 297; *see also, to same effect*, Hartford *Ins. Co. v. Connolly*, 11 Misc. 3d 1079(A), 819 N.Y.S.2d 848 (Sup. Ct., Queens Co. 2006), dealing with a Florida policy that required both parties to agree to arbitration. There, the court observed that "[u]nder New York law, a party is not obligated to arbitrate a dispute unless there is an explicit and unequivocal agreement to do so."

36. *See State Farm Mut. Auto. Ins. Co. v. Scudero*, 33 A.D.3d 927, 824 N.Y.S.2d 300 (2d Dep't 2006); *GEICO v. Obi*, 12 Misc. 3d 1167(A), 820 N.Y.S.2d 843 (Sup. Ct., N.Y. Co. 2006).

37. 33 A.D.3d 927, 824 N.Y.S.2d 300 (2d Dep't 2006).

38. 34 A.D.3d 477, 478, 824 N.Y.S.2d 159 (2d Dep't 2006) (citation omitted).

39. 10 Misc. 3d 1072(A), 814 N.Y.S.2d 562 (Sup. Ct., Kings Co. 2006).

40. *See GEICO v. Obi*, 12 Misc. 3d 1167(A), 820 N.Y.S.2d 843 (Sup. Ct., N.Y. Co. 2006).

41. 6 N.Y.3d 155, 811 N.Y.S.2d 299 (2006).

42. *Id.* at 158 (citations omitted).

43. 89 N.Y.2d 714, 723, 658 N.Y.S.2d 205 (1997).

44. 6 N.Y.3d 658, 815 N.Y.S.2d 915 (2006).

45. 13 Misc. 3d 1230(A), ___ N.Y.S.2d ___ (Sup. Ct., Richmond Co. 2006).

46. 28 A.D.3d 766, 816 N.Y.S.2d 106 (2d Dep't 2006).

47. *Id.* at 767.

48. *Cf. Utica Mut. Ins. Co. v. Colon*, 25 A.D.3d 617, 807 N.Y.S.2d 634 (2d Dep't 2006) (hearing required to determine whether the court had personal jurisdiction over American Independent Insurance Co.).

49. 25 A.D.3d 695, 810 N.Y.S.2d 89 (2d Dep't 2006).

50. *Utica Mut. Ins. Co. v. Colon*, 25 A.D.3d 617, 618, 807 N.Y.S.2d 634 (2d Dep't 2006).

51. *Id.*

52. 28 A.D.3d 569, 813 N.Y.S.2d 497 (2d Dep't 2006).

53. *Id.* at 570.

54. 29 A.D.3d 787, 788, 816 N.Y.S.2d 505 (2d Dep't 2006).

55. *Id.* at 789; *see* CPLR 7503(b).

56. 35 A.D.3d 486, 825 N.Y.S.2d 531 (2d Dep't 2006).

57. 35 A.D.3d 730, 826 N.Y.S.2d 700 (2d Dep't 2006).

58. 36 A.D.3d 92, 103, 823 N.Y.S.2d 440 (2d Dep't 2006).

59. *See* 11 N.Y.C.R.R. subpt. 60-2.

60. 35 A.D.3d 584, 827 N.Y.S.2d 209 (2d Dep't 2006).

61. 27 A.D.3d 751, 813 N.Y.S.2d 158 (2d Dep't 2006).

62. *Id.* at 753 (citations omitted); *see Aetna Cas. & Sur. Co. v. Bonilla*, 219 A.D.2d 708, 709, 631 N.Y.S.2d 438 (2d Dep't 1995); *Hilowitz v. Hilowitz*, 85 A.D.2d 621, 444 N.Y.S.2d 948 (2d Dep't 1981).

63. 29 A.D.3d 688, 816 N.Y.S.2d 497 (2d Dep't 2006).

64. *Id.* at 690 (citations omitted).

65. 31 A.D.3d 490, 818 N.Y.S.2d 544 (2d Dep't 2006).

66. N.Y.L.J., Sept. 8, 2006, p. 26, col. 1 (Sup. Ct., Nassau Co.).

67. *Id.*; *cf. Town of Wilton v. Tarrant Mfg. Co.*, Index No. 2005-2585 (Sup. Ct., Saratoga Co. June 13, 2006), (separate fire damage subrogation claims by two different insurers – one of which insured a garage, and the other of which insured the cars therein – wherein the Supreme Court declined to find the requisite privity between the two insurers to invoke the doctrine of collateral estoppel on behalf of the alleged tortfeasor to bind the second insurer to the determination in favor of the tortfeasor and against the first insurer); *see also* Norman H. Dachs & Jonathan A. Dachs, *Issue Preclusion and UM/UIM/ SUM Cases*, N.Y.L.J., Jan. 9, 2007, p. 3, col. 1.

68. 35 A.D.3d 588, 827 N.Y.S.2d 207 (2d Dep't 2006).

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Estate Planning and Will Drafting in New York provides an overview of the complex rules and considerations involved in the various aspects of estate planning in New York State. Each chapter has been brought completely up to date for the 2006 revision. Several chapters – including "New York Estate and Gift Taxes" and "Marital Deduction" have been totally revised for this update.

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Richard B. Long
(rlong@cglawoffices.com) is Chair, New York Commission on Uniform State Laws. He is a Life Member of the National Conference of Commissioners on Uniform State Laws and is Of Counsel to Coughlin & Gerhart, LLP, in Buffalo, where he was a Partner from 1961 to 2001. Mr. Long earned his undergraduate degree from Cornell and is a graduate of Cornell Law School.

The National Conference of Commissioners on Uniform State Laws

A Continuing Work in Progress

By Richard B. Long

The National Conference of Commissioners on Uniform State Laws (NCCUSL) began its second century as America's foremost champion of uniformity of laws among the states, the District of Columbia, Puerto Rico, and the Virgin Islands, when it met on July 31, 1992, in San Francisco. The first commissioners had gathered 100 years earlier at the Grand Union Hotel in Saratoga Springs to organize an institution that would promote consistency of laws throughout the United States.

The 115th annual legislative conference of NCCUSL met in South Carolina in July 2006. New York commissioners Justin L. Vigdor, Richard B. Long, Sandra S. Stern and Norman L. Greene were joined by the more than 300 lawyers, judges, law professors, legislators and government attorneys appointed in their respective jurisdictions to serve as uniform law commissioners and members of the National Conference. Notable past commissioners include President Woodrow Wilson; Supreme Court Justices Louis Brandeis, John Rutledge, and William Rehnquist; legends of legal scholarship Roscoe Pound, Samuel Williston, John Wigmore, and William Prosser; and Court of Appeals Judges Francis Bergan and Sol Rosenblatt.

The 2006 Conference

The uniform law commissioners, as they have done each summer since 1892, gathered for a full week to discuss and debate, line by line and word by word, legislative proposals drafted by their colleagues during the year. The following eight acts were approved in South Carolina and are now available for enactment in every state:

The new *Uniform Emergency Volunteer Healthcare Practitioners Act*, which will allow state governments to give reciprocity to other states' licensed emergency services providers so that covered individuals may provide services without meeting the disaster state's licensing requirements. This act was drafted in response to the recent devastation in the Gulf States from Hurricanes Katrina and Rita, and specifically to address the problem of allowing out-of-state medical professionals to practice in the afflicted areas.

The new *Uniform Anatomical Gift Act* updates the act that was originally promulgated in 1968 and adopted in

every state (a revised version has been available since 1987) in light of changes in federal law relating to the role of hospitals and procurement organizations in securing organs for transplantation. The new act expands the number of individuals authorized to make anatomical gifts; it also encourages the creation of donor registries, which are already in use in some states.

The *Uniform Prudent Management of Institutional Funds Act* (UPMIFA), which, like its predecessor, the Uniform Management of Institutional Funds Act (UMIFA), provides statutory guidelines for management, investment, and expenditures of endowment funds of charities. The new act expressly provides for diversification of assets, pooling of assets, and total return investment, to implement whole portfolio management, bringing the law governing charities in line with modern investment and expenditure practice.

The *Uniform Child Abduction Prevention Act* provides courts with guidelines to follow during domestic dispute proceedings, in order to help courts identify families with children at risk for abduction, and to provide methods to prevent the abduction of children.

The *Uniform Power of Attorney Act* provides a simple way for people to deal with their property by providing a power of attorney that survives the incapacity of the principal. While the act is primarily a set of default rules that can be altered by specific provisions within a power of attorney, the act does contain safeguards for the protection of an incapacitated principal.

The *Uniform Limited Liability Company Act* permits the formation of limited liability companies (LLCs), which provide the owners with the advantages of both corporate-type limited liability and partnership tax treatment. Though every state has enacted some sort of LLC legislation, state LLC laws are far from uniform. This new act provides the states with modern, updated legislation governing the formation and operation of LLCs.

The *Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act* seeks to improve the representation of children in proceedings directly affecting their custody by clearly defining the roles and responsibilities of children's representatives and by providing guidelines to courts in appointing representatives.

The *Model Registered Agents Act* provides states with one registration procedure for registered agents no matter the kind of business entity represented by the agent. Because almost every state requires an entity created in another jurisdiction to designate a registered agent for service of process and other legal proceedings, this act should simplify registration procedures by providing one registered agent database in each state.

Information on all of these acts, including the approved text of each one, can be found at the Conference Web site at www.nccusl.org.

Once an act has been approved by NCCUSL, it is officially promulgated for consideration by the states.

New Business

After completion of its work on the eight preceding acts scheduled for final approval, the Conference considered, in the same line-by-line and word-by-word fashion, several additional proposed uniform acts being presented for first reading. These acts, which are scheduled to return for final approval at the annual legislative conference in the summer of 2007 include: a *Uniform Statutory Trust Entity Act*; a *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*; a *Revised Model State Administrative Procedures Act*; a *Uniform Collateral Sanctions and Disqualifications Act*; and an *Interstate Depositions and Discovery Act.*

Once an act has been approved by NCCUSL, it is officially promulgated for consideration by the states, and the legislatures are urged to adopt it. Since its inception, NCCUSL has been responsible for more than 200 acts, among them such bulwarks of state statutory law as the Uniform Commercial Code, the Uniform Probate Code, the Uniform Partnership Act, and the Uniform Interstate Support Act. New York has enacted more than 60 uniform or model acts promulgated by the Conference.

The procedures of the Conference insure meticulous consideration of each uniform or model act. The Conference usually spends a minimum of two years on each draft. Sometimes, the drafting work extends much longer. No single state has the resources necessary to duplicate this careful, non-partisan work. Working together, with resources gathered from throughout the country, New York and every other state join to produce the impressive body of laws known as the "uniform state laws."

All uniform state law commissioners donate their time, which can exceed 200 hours per year. New York does not currently reimburse its commissioners for their actual out-of-pocket expenses in attending the annual legislative conference, despite a statutory mandate that those expenses be paid.[1] New York's four commissioners will continue to serve New York as members and chairs of Study Committees and Drafting Committees, and as participating commissioners at NCCUSL's annual legislative conference.

1. N.Y. Executive Law § 165.

BY LOUIS BASSO

Louis Basso is President of The Alcott Group, Chairman, New York State Leadership Council of the National Association of Professional Employer Organizations, and recognized as an advocate for small businesses. Mr. Basso is a Certified Professional Employer Specialist and a graduate of Adelphi University.

Heightened Regulations and Licensing Requirements Raise the Bar for PEOs

Professional Employer Organizations (PEOs) are companies that contract to perform human resources functions for other businesses. PEO activities include managing payroll and tax payments, administering benefits, assisting with compliance and performing other employment-related tasks.

In the past few years, PEOs have undergone a major metamorphosis. Earlier "staff leasing" models have been abandoned in favor of a co-employment model, which is now codified in many states, including New York. PEOs now must meet new standards – both self-imposed and legislated at the state level. Higher thresholds for entry into the business and more detailed standards of performance have been imposed. For an attorney to guide a client in deciding whether to contract with a PEO, it is imperative to understand the new PEO paradigm and how it works.

New York's Groundbreaking Legislation

On September 24, 2002, New York State Governor George E. Pataki signed the groundbreaking New York Professional Employer Organization Act (the "Act") into law.[1] Sponsored by Senator Dean Skelos, R-Rockville Centre and Assemblyman Paul Tonko, D-Amsterdam, the Act established a baseline for all PEOs operating in New York State. It created state oversight of the industry, set standards for PEO operations, provided registration requirements, and developed a framework of assurance for businesses contracting with PEOs. The law prohibits unregistered organizations from referring to themselves as PEOs.

The New York PEO Act puts into place the following public protections for employers using PEO services: the registration requirement provides the state Department of Labor with the opportunity to review and approve those who would provide PEO services; annual financial statements, from a certified public accountant (CPA), and minimum net worth requirements assure that PEO operators have satisfactory financial capacity to provide services; verification of New York State Workers' Compensation and Disability Insurance provides assurance that this legal obligation has been met; quarterly attestation by a CPA of the payment of federal and state payroll taxes provides independent verification of these actions; and annual renewals of registration allows for continued state oversight.

The annual registration renewal, along with the CPA's attestation of the PEO's financial net worth and verification of its timely tax payments, aim to prevent potential problems for unsuspecting companies. These requirements provide for state oversight, reinforce regulatory compliance and make it less likely that employees would be denied their wages should the PEO cease operations.

Other States

New York is not alone in regulating businesses operating as PEOs. Presently, more than two dozen states require some form of registration or licensing; legislators in Arkansas, Florida, Illinois, Montana, New Hampshire, New Mexico and Oregon are considering various elements of additional PEO legislation or regulation.[2]

States differ in which governing agency mandates PEO regulation. PEOs may be regulated by departments, divisions or bureaus of Insurance, Labor, Business and Professional, Workers' Compensation, Commerce, Securities Registration, Employee Leasing, Regulation & Licensing, Industrial Relations, Consumer Affairs, and so on.

An effort is needed to develop uniform standards among the states, especially regarding financial solvency, which will benefit both the workers and the businesses that join a PEO. Such standards will assure that funds will be available to pay the workers and also give businesses a degree of confidence that they will not be held responsible as an individual employer for taxes and benefits, but can be treated as part of a larger unit.

Stepping Up to the Plate

State governments are not alone in their concern about the service quality and professional integrity of businesses operating as PEOs. The industry has made a major effort to develop uniform standards among states. While the industry has long promoted licensing and registration for PEOs, the National Association of Professional Employer Organizations (NAPEO) has championed higher, uniform nationwide

standards. NAPEO's initiative created the Employer Services Assurance Corporation (ESAC) – an independent, non-profit organization. ESAC serves the PEO industry by offering accreditation and financial assurance; it currently covers PEOs representing over $14 billion in annual employee wages. It functions much like the FDIC, for banking, and the SIPC for the securities industry.

ESAC, led by a board of distinguished regulatory professionals with extensive compliance monitoring experience, offers accreditation – its "seal of approval" – to PEOs that meet its standards. Accreditation attests to a PEO's high level of service quality, operations and financial responsibility. In addition, ESAC-accredited PEOs are covered by a $5 million surety bond held in trust by a national bank. The bond covers any claims in excess of the $1 million bond held for each PEO. It is important to note that there have been no defaults by ESAC-accredited PEOs or unresolved claims of litigation.

Workers' Compensation Risk Management

The Certification Institute is another entity taking a leadership role in promoting high standards within the PEO industry. Like ESAC, it is an independent, non-profit organization. Its first program certified workers' compensation risk-management practices, an initiative developed with ESAC's assistance and the financial support of NAPEO. The PEO Workers' Compensation Risk Management Certification Program provides independent, professional verification that a PEO meets proven insurance risk-management best practices for reducing work-related accidents and health exposures, and controls workers' compensation insurance losses. Again, this offers assurance to the PEO's client companies. Certification in this area attests to the PEO's ability to maintain certain risk-management outcomes. Insurance carriers understand that Workers' Compensation Risk-Management Certified PEOs adhere to proven practices for containing losses relating to workers' compensation claims.

Outcome of New Accreditations, Regulations

Heightened regulations and development of industry accreditations have not led to a sweeping shake-out within the PEO industry, but they do reflect a consistent change toward state recognition, enhanced professional standards and greater industry self-regulation. Through legislation, states are taking measures to enforce stricter standards for and compliance by PEO companies. If the PEOs fail to comply, the states take action and clients are advised that they must turn to another PEO or reassume responsibility for functions performed by the non-complying company.

This was not the case before states began passing such laws. For example, in New York State, before the Act was passed, a general complaint against companies representing themselves as "PEOs" was their failure to pay wages for employees; the current legislation protects against this outcome. More important, since passing the Act, the state has not seen any significant number of claims against PEOs.

In sum, government entities whose mission is to protect workers and their employers applaud the quality assurance measures taken by the state legislators and by the PEO industry itself. The least expensive means of law enforcement is voluntary compliance. When employers, such as PEOs serving as co-employers with their client companies, choose to "do the right thing," they help their companies – and the clients they serve – operate more efficiently, which benefits their employees. This allows states to focus their enforcement efforts on employers that choose to operate unethically, unsafely and not in the best interest of their employees.

As the PEO industry works with the states to assure that its industry members live up to higher standards, it takes a positive step to a better, more secure future. ■

1. 2002 N.Y. Laws ch. 565, effective March 23, 2003.

2. The following states have some form of registration or licensing legislation in place: Alabama, Arizona, Arkansas, Florida, Illinois, Indiana, Kentucky, Louisiana, Maine, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont and Virginia.

"At the law firm I used to work for, overtime was optional."

BY PAUL BENNETT MARROW

Paul Bennett Marrow (pbmarrow@optonline.net) is an attorney and arbitrator practicing in Chappaqua. He is a member of panels for the AAA, ADR Systems, NAF, NAM, NSE and NASD. He is a member of the Chartered Institute of Arbitrators, London, England.

Selecting the Proper Provider to Administer Your Arbitration

When it's time to select a provider for the administration of your arbitration clause, you need to do your homework or you may possibly be in for an unsettling surprise.

Most lawyers who recommend arbitration expect a forum with arbitrators who will understand the unique nature of the dispute and the rules and regulations that will accommodate their client's need for speed, efficiency, and finality. The choices are many, which means that you must compare the offerings and match them to your client's requirements. If you don't, you run the risk of a mismatch. If that happens, your client will be looking to you for an explanation.

Here's a sampling of the marketplace:

- There are organizations that comprehensively administer proceedings while others merely provide a structure for non-administered arbitration.
- Some have a national presence, some are more regional, and some specialize in addressing the needs of the international community.
- Each has panels that specialize in certain types of subject matter disputes as well as rules and procedures tailored to address specific types of procedural concerns.

The reality is that arbitration isn't "one size fits all." Before you make your selection, you need to know a lot more about all of these alternatives. Let's take a look at some of the options that are available.

A number of organizations will administer all phases of mediation and arbitration and offer their services to all for a fee. Usually the size of the fee is determined by the size of the claim. Just about everyone has heard of the American Arbitration Association (AAA),[1] which has offices throughout the United States and abroad. The AAA administers proceedings soup to nuts and does so using specialized panels to address a wide variety of needs ranging from mediation to mini-trials to arbitration; and a wide variety of issues such as commercial disputes, construction industry disputes, disaster recovery claims, election disputes, employment and labor matters, insurance, New York State No-Fault and Uninsured Motorist claims, domain name issues, wireless industry claims, and many more.

JAMS[2] also provides comprehensive administration for a fee and has panels that specialize in disputes involving commercial matters as well as bankruptcy, class-action torts, surety law, and many other issues. Likewise, the National Arbitration Forum (NAF)[3] administers and features a broad offering of panels that specialize in commercial matters such as mortgage financing, asset-based lending, commercial equipment leasing, health care, insurance, intellectual property law, and real estate. In addition there are regional organizations that offer similar services such as ADR Systems in Chicago[4] and National Arbitration and Mediation (NAM) in Garden City.[5]

In the international arena, all of the providers mentioned above other than the regional organizations have specialized panels, rules, and procedures designed for international disputes. In addition, the International Chamber of Commerce (ICC)[6] provides an extensive choice of administrative services and panels. The Chartered Institute of Arbitrators, London, England,[7] provides "controlled cost arbitration" services, meaning that the Institute will appoint an arbitrator and supervise the proceedings for a flat fee charged to all parties.

The Institute for Conflict Prevention & Resolution (CPR)[8] provides non-administered mediation and arbitration services (national and international) and has panels specializing in general commercial disputes as well as areas such as anti-trust, the chemical industry, energy and utilities, fair housing, food, health, insurance, product liability, toxic torts and trademark. Non-administered services include committee membership and the promulgation of rules and regulations governing mediation, arbitration, and appeals, as well as assistance in locating an appropriate neutral, and education programs. CPR is a membership organization and its services are available to its members.

Each organization has its own rules of procedure and most post them at their official Web sites.[9] The substance of these rules varies dramatically on many important issues. By way of example, the rules for commercial cases administered by the AAA do not require the arbitrator to apply substantive law to resolve the dispute. But, Rule 1(a) permits the parties to modify the rules thereby freeing them to impose such a requirement *as long as there is unanimity*. By contrast, JAMS Comprehensive Arbitration Rule 24(c) requires the arbitrator to be guided by the rules of law and equity that the parties agree upon and if they fail to agree, by the rules of law and equity that the arbitrator deems appropriate. The NAF Code of Procedure, Rule 20(D) requires the arbitrator to follow the "applicable substantive law" with no mention of the preferences of the parties.

There are many other examples of variations in the rules. Rule 42(b) of the AAA Commercial Rules provides that the arbitrator needn't give a reasoned award unless the parties request it prior to the appointment of the arbitrator or unless the arbitrator deems such to be necessary. JAMS Rule 24(h) provides that unless all parties agree otherwise, the award "shall also contain a concise written statement of the reasons for the award." NAF Rule 37(h) provides that an award shall be a summary award "unless a prior written agreement of the Parties requires reasons, findings of fact or conclusions of law or a written notice is filed by a party seeking reasons, findings of fact or conclusions of law."

Another example involves the finality of an award. Traditionally, arbitration awards are reviewable only through *vacatur*. Appeals, if allowed, are a function of contract, not statutory right. The commercial rules of the AAA don't mention any procedure for an appeal of the award. However, JAMS and CPR have rules that permit the parties to agree to an appeals procedure, with the appeal being to a panel composed of arbitrators. JAMS's Optional Arbitration Appeal Procedure D permits a review of any issue and the appellate panel can confirm, reverse or modify an award. The CPR appellate procedure (Rule 8) empowers the panel to either modify or set aside the award on grounds that it "(i) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) is based upon factual findings clearly unsupported by the record" as well as the grounds available for *vacatur*.

A recent Supreme Court ruling has implications for your decision. In *Buckeye Check Cashing, Inc. v. Cardegna*[10] the Court reaffirmed the rule that absent "clear and unmistakable evidence" of an intention to have the arbitrator rule on all issues including jurisdiction, scope and arbitrability, the issue of the validity of the arbitration agreement must be determined by the court and not the arbitrator. Does incorporating by reference the rules of a provider that in turn "assign to the arbitrator initial responsibility to determine issues of arbitrability," provide clear and unmistakable evidence? The Court of Appeals for the Second Circuit has answered that question in the affirmative.[11] So, it becomes very important to review what the rules of the various organizations provide on this point. The rules of the AAA, CPR, JAMS, the ICC and NAF arguably do meet the Second Circuit test, but the rules of ADR Systems do not.[12]

There is more to the issue than initially meets the eye in selecting an arbitration organization, and the selection process requires research and careful consideration. Advising your client about what to expect from arbitration should include a discussion of all of the above issues and many others as well. All of the organizations mentioned in this article provide quality services but they do so with specific concerns in mind. Matching your client's needs to these offerings will insure that you make a choice that will serve you and your client well later on. ■

1. <www.adr.org>.
2. <www.jamsadr.com>.
3. <www.arbitration-forum.com>.
4. <www.adrsystems.com>.
5. <www.namadr.com>.
6. <www.iccwbo.org>.
7. <www.arbitrators.org>.
8. <www.cpradr.org>.
9. The exception is NAM. Their rules of procedure are only available on request but the request can be made by e-mail.
10. 546 U.S. 440 (2006).
11. *The Shaw Group, Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115 (2d Cir. 2003).
12. *See* AAA Commercial Rule 7; CPR Rules for Non-Administered Arbitration Rule 8; NAF Rule 20; JAMS Rule 11. The rules of ADR Systems are silent on the issue.

MEET YOUR NEW OFFICERS

President
Kathryn Grant Madigan

Kathryn Grant Madigan, a partner at Levene Gouldin & Thompson LLP, in Binghamton, took office on June 1 as president of the 72,000-member New York State Bar Association. The House of Delegates, the Association's decision- and policy-making body, elected Madigan at the organization's 130th annual meeting, held this past January in Manhattan.

Madigan received her undergraduate degree from the University of Colorado at Boulder, where she was elected to Phi Beta Kappa, received the 1975 Pacesetter (Outstanding Senior) Award, and was point guard for the Lady Buffs basketball team. She earned her law degree from Albany Law School.

The Binghamton resident has held a number of leadership positions within the NYSBA, serving 12 years on the Executive Committee, as secretary, as vice president for the Sixth Judicial District (Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga and Tompkins counties) and as a member-at-large.

Madigan chairs the Special Committee on Association Publications, and led the 2004 search for the new editor-in-chief of the *Journal*, a NYSBA publication. She is the former chair of the Membership Committee and the Elder Law Section, and chaired the section's Litigation Task Force, which recommended the historic *NYSBA v. Reno* lawsuit. She is a member of the Special Committee on Balanced Lives in the Law and spoke on work/life balance at the 2005 Young Lawyers Section Annual Meeting Program. Madigan is also a member of the committees on Bylaws, Diversity and Leadership Development, Membership, and the Special Committee on Fiduciary Appointments.

She served as founding chair of the Committee on Attorneys in Public Service. She was also a member of the Executive Council of the New York State Conference of Bar Leaders, Task Force on Solo and Small Firm Practitioners, Committee on the Future of the Profession, and Nominating Committee.

A long-term mentor for the Young Lawyers Section, Madigan has been a member of the House of Delegates for 19 years. She is a Life Fellow of The New York Bar Foundation and chair of the Sixth District Fellows.

Madigan was the first woman and youngest person to serve as president of the Broome County Bar Association and remains an active member of its CLE Committee. Under her leadership, the local bar twice received NYSBA's Award of Merit. A noted lecturer in the field of estate planning and elder law, Madigan is a member of the Administrative Board for the Offices of the Public Administrator, a Fellow of the American College of Trust and Estate Counsel, and a Fellow of the American Bar Foundation. She is also a member of the National Academy of Elder Law Attorneys.

She is a recipient of the 2000 Kate Stoneman Award given by Albany Law School, the 1987 NYSBA Outstanding Young Lawyer Award, and is listed in *America's Best Lawyers*.

Active in many community and civic organizations, Madigan is a trustee of the Binghamton University Foundation and is a past chair of the Harpur Forum. She is a trustee and past chair of the United Health Services Foundation. Madigan performs at the annual Greater Binghamton Chamber of Commerce Dinner as a Live Wire Player, and is a past president of the Chamber's Live Wire Club.

She has two sons, R. James "Jeb" Madigan, a student at Cornell Law School, Ithaca, and Grant, a student at St. Michael's College at the University of Toronto (Canada).

President-Elect
Bernice K. Leber

Bernice K. Leber, a partner in the New York City law firm of Arent Fox PLLC, took office on June 1 as president-elect of the 72,000-member New York State Bar Association. The House of Delegates, the Association's decision- and policy-making body, elected Leber at the organization's 130th annual meeting, held this past in January in Manhattan. As the current president-elect, Leber chairs the House of Delegates and co-chairs the President's Committee on Access to Justice (formed to help ensure civil legal representation is available to the poor). In accordance with NYSBA bylaws, she becomes president of the Association on June 1, 2008.

Leber concentrates her practice in the areas of prosecution and defense of complex civil business disputes, with an emphasis on those involving securities, financial issues and intellectual property. She is a 1975 graduate of Mount Holyoke College, and earned her law degree from Columbia University School of Law in 1978.

Long an active member in the Association, Leber has served as first vice-president to the Executive Committee and House of Delegates; she is a member of the Finance Committee and the Intellectual Property Law Section. Leber

is a former chair of the Commercial and Federal Litigation Section, and past chair of that section's subcommittees on Discovery, Appellate Practice and the Federal Judiciary. She is a director of The New York Bar Foundation.

A frequent author and lecturer, Leber was appointed in 2006 by then-Association President Vince Buzard to chair the State Bar's Task Force on Lawyer Advertising. The task force proposed changes to the disciplinary rules and procedures concerning lawyer advertising.

Leber is a member of the Corporate Board Selection Committee of the Financial Women's Association, and a member of the Courts of Superior Jurisdiction, Committee on Judicial Administration, and the Civil Courts Committee for the Association of the Bar of the City of New York. She served as a parliamentarian to the New York State Senate in the 1975 session.

Secretary
Michael E. Getnick

Utica attorney Michael E. Getnick is presently serving as the secretary of the Bar Association having previously served as a vice president representing the Fifth Judicial District (Herkimer, Jefferson, Lewis, Oneida, Onondaga and Oswego counties). He started his second term as secretary on June 1.

Getnick received his undergraduate degree from Pennsylvania State University in 1966 and his law degree from Cornell University in 1970. He is a partner in Getnick Livingston Atkinson Gigliotti & Priore, LLP, of Utica, and is of counsel to Getnick and Getnick of New York City.

Active in the State Bar, he is a member of the House of Delegates and a Fellow of The New York Bar Foundation. He is chair of the Committee on Court Operations and a member or liaison of/to various committees and sections including the Special Committee on Diversity and Leadership Development. He has been a presenter and panel participant on many NYSBA CLE programs.

A past member of the Nominating Committee, Getnick is a recipient of the Association's President's Pro Bono Service Award for the Fifth Judicial District. The award recognizes those lawyers who make outstanding contributions of time, resources, and expertise in the provision of legal services to the poor. He is a member of the Fifth Judicial District Pro Bono Committee, which in cooperation with the OCA is a pioneer project, to be a model for the entire state.

In addition to his NYSBA activities, Getnick is a past president of the Oneida County Bar Association (OCBA). He chaired OCBA's Liaison Committee to the NYSBA, the Domestic Relations Committee and the Private Attorney Involvement Committee. He is a member of the National Institute for Trial Advocacy and the New York State Academy of Trial Lawyers.

Among his many community activities, Getnick is a member of the Utica Board of Directors of the American Heart Association Northeast Affiliate; he was the initial counsel and attorney who incorporated the Mohawk Valley Committee Against Child Abuse, Inc. Currently, he is chair of the Zoning Board of Appeals of the Town of Kirkland.

Treasurer
James B. Ayers

James B. Ayers is a partner and chair of the Estate Planning and Administration Practice Group in the Albany law firm of Whiteman Osterman & Hanna, LLP. He concentrates his practice in the areas of estate planning, estate administration and estate litigation.

Ayers received his undergraduate degree from Colgate University and earned his law degree from Columbia Law School.

An active member of the Association, Ayers has served as treasurer since 2002. He served as vice-president of the Third Judicial District (Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan and Ulster counties) from 1999–2002.

A former chair of the Trusts and Estates Law Section, Ayers is a speaker and program chair of many of the section's meetings.

He has been a member of the Association's House of Delegates since 1995. He is a Fellow, as well as a member, of the Board of Directors of The New York State Bar Foundation.

Ayers is a Fellow of the American Bar Foundation and the American College of Trust and Estate Counsel.

Ayers has served as president of the Estate Planning Council of Northeastern New York. He has long been active in community organizations, having served as an officer or director of such organizations as the Community Foundation for the Capital Region, the American Red Cross of Northeastern New York, the Historic Albany Foundation and the Albany Charter of the Salvation Army.

BY ELLIOTT WILCOX

ELLIOTT WILCOX is a professional speaker and a member of the National Speakers Association. He has served as the lead trial attorney in over 140 jury trials, and teaches trial advocacy skills to hundreds of trial lawyers each year. He also publishes *Trial Tips*, the weekly trial advocacy tips newsletter <www.trialtheater.com>.

Adding Power to PowerPoint Presentations

The lights dim, and the first slide appears. You think to yourself, "Oh no, another boring PowerPoint presentation." The first line of text soars in from the left, each character twirling and dancing across the screen. You count 11 bullet points on the first screen (the shortest of which is 16 words long). The second slide is even more confusing. The third is a picture of his kids. Fortunately, the room is dark, so no one notices as you start to fall asleep. . . .

Why are most PowerPoint presentations so dreadful? When was the last time you saw a presentation that was actually *enhanced* by PowerPoint? The reason PowerPoint decimates the effectiveness of most presentations is because the presenters don't understand how or why to use it.

The Purpose of PowerPoint

PowerPoint is a supplement to, *not a substitute for,* the speaker's presentation. PowerPoint allows you to add visual imagery to your speech, but slides aren't the reason why the audience came to your presentation. If PowerPoint presentations were that effective, you could stay home and just email everyone a copy of your slides. The substance of the message comes from the presenter, not the slides. Once you accept this philosophy, your PowerPoint presentations will dramatically improve.

Guidelines for Creating Slides

Too many PowerPoint presentations become garbled and confusing because the presenter tries to cram too many ideas onto a single slide or uses every tool available from the Custom Animations toolbox. Follow these guidelines to minimize confusion and enhance understanding in your next PowerPoint presentation.

- **One main point per slide.** Slides are cheap (free, actually) so you don't need to cram multiple points on a single slide. If you're making an important point, give it a slide of its own.
- **Keep it simple.** Step 10 feet away from your monitor and look at your slide. Does the main point jump out at you? Is it immediately clear to you? If not, you may have too much information on the slide.
- **Use spell check.** Check your presentation before you get to the room. Spelling errors can ruin an otherwise professional presentation.
- **Font selection.** Don't use bizarre fonts – no one can read them. Stick with traditional, sans-serif fonts (*e.g.*, Impact, Helvetica, Arial) – they are easier for your audience to read. Also, use a large type size (40-point or higher) for easier audience comprehension.
- **Make it easy on the eye.** Your text should stand out from the background. Can you easily read the slide from the back of the room? Yellow text on a dark blue background works well, and so does black text on white, but experiment to find the color scheme that works best for you, your message, and your audience.
- **Use images.** Avoid PowerPoint's standard clip art – everybody's seen it. (How many times have you seen the picture of the man hitting his desk or the guy with the light bulb over his head?) Instead, use pictures. Search the Web for royalty-free stock photography, or use a digital camera to create your own.
- **Keep a design template for each slide.** Avoid the standard design templates that come with PowerPoint – everyone recognizes them. Create your own design template. Maybe you want to put your name, logo, or company name on each slide. If your firm does numerous presentations for the community, it may be worth the investment to hire a graphic designer to create a template for your slides.

Guidelines for Presenting

Even well-designed slides can't communicate your message if you present them poorly.

- **Avoid silly text animations or transitions.** Admit it. You hate

those stupid wipes, slides, and swirls between slides. You hate it when the text "types" out one word at a time or flies in from random corners of the slide. So does your audience. Minimize the custom animation effects and focus your attention on the substance of your slides.

- **Don't read the slides to your audience.** Assume your audience is smart. Let them read the slide to themselves. If they're too dumb to read the slide, they probably can't grasp the points you're trying to communicate anyway. To make sure they have enough time to digest the information, read it to yourself, quietly, at least twice.
- **Can everyone see it?** Get to the room early so you can look at the screen from various spots in the audience. If you can't see the screen, rearrange the room layout so that everyone can see the screen. You can also use masking tape to block off chairs in the back of the room or on the sides where the audience won't be able to see the screen.
- **No shadow puppets.** Don't walk between the projector and the screen – it distracts the audience.
- **Don't compete with the slides.** If you've finished discussing the information on the slide and don't want the slide to draw away the audience's attention while you speak, dim the screen. Hit "B" to turn the screen black, or "W" to turn the screen white.
- **Have a backup plan.** Sooner or later, it's going to happen. The computer will crash, the projector won't work, a virus will eat your presentation. . . . Whatever happens, have a backup plan and be prepared to present without your slides. When the substance of your message comes from *you*, not your slides, you'll deliver a powerful presentation, with, or even without, your PowerPoint slides. ■

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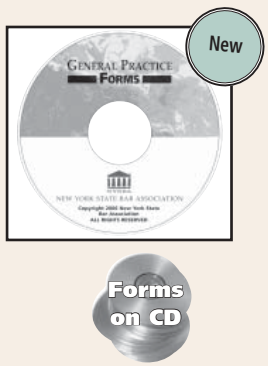

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am representing a client in a divorce case. The rules of the court require each party to submit a signed and acknowledged net worth statement. The attorney for the party must sign the following certification: "I, ……., certify that to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the foregoing paper or the contentions therein are not frivolous as defined in section (c) of section 130-1.1 of the Rules of the Chief Administrator of the Courts."

Section (c) of section 130-1.1 of the Rules of the Chief Administrator of the Courts reads, in relevant part, as follows:

> For purposes of this Part, conduct is frivolous if:
>
> * * *
>
> (3) it asserts material factual statements that are false.
>
> In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.

My client is in his own business and I know, from his own admission, that his income tax return does not reflect his entire income. If I advise the client to list his entire income in his sworn net worth statement, he has admitted to committing a crime. If I don't, I'm acting unprofessionally and filing a false certification. Is there a solution to my dilemma?

Sincerely,
Baffled

Dear Baffled:

Given your situation, feeling baffled is understandable. Matrimonial lawyers are faced with this conundrum on a regular basis. In your letter you speak of a "signed and acknowledged net worth statement." Actually the net worth statements must be sworn to by the party. This makes the problem even more difficult for the client.

The problem arises because the lawyer's related duties to act in the best interest of the client (EC 7-9), and to zealously represent the client (DR 7-101), do not free that lawyer from certain restrictions on his or her behavior. Chief among those restrictions is the requirement that an attorney must act within the bounds of the law. EC 7-19.

"The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. . . . A lawyer should, however, present any admissible evidence the client desires to have presented unless the lawyer knows, or from facts within the lawyer's knowledge should know, that such testimony or evidence is false, fraudulent, or perjured." EC 7-26.

EC 7-27 advises that "[b]ecause it interferes with the proper administration of justice, a lawyer should not suppress evidence that the lawyer or the client has a legal obligation to reveal or produce."

Clearly, you cannot continue to represent the client if he insists on reporting in his net worth statement that his income is as reported on his income tax return. Your first recommendation should be that your client file an amended tax return. But if the client refuses, does this mean that you must withdraw from your representation?

Not necessarily; there may be another course of action available. Under the law, the court and the other party to the matrimonial action are entitled to know your client's actual income. If the court determines that a party has not been forthright about this subject, the court will impute income beyond what is found in the net worth statement. In view of these factors, your client may list his actual income in his net worth statement with the notation that this is what he is capable of earning. He now has given the court and his spouse the true amount of his income, without surrendering his right against self-incrimination.

As a collateral benefit, this kind of candor can aid in bringing about a settlement, or, in case of trial, enhance the client's credibility.

We invite other matrimonial lawyers to write and share their solution to this vexing problem.

The Forum, by
George J. Nashak, Jr., Esq.
Queens, New York

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.

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

Two years ago, I took on a negligence case on a contingent fee basis. At the time, I believed that the claim possessed merit and had real monetary value. However, the more work I do on the case, the lower the chance of success seems. More to the point, it now appears that the cost of the time I have spent on this matter grossly exceeds the possible recovery, assuming that there is a recovery at all. Am I allowed to withdraw after putting in so much work? If so, what is the best withdrawal procedure? Is there an approach I can take to mitigate the consequences of a withdrawal?

Sincerely,
Wanting Out

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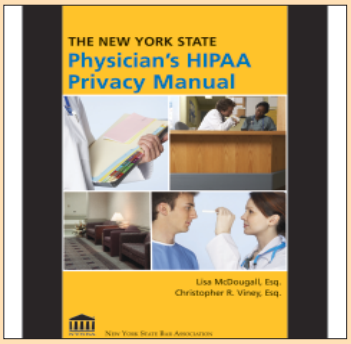

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—Margaret Davino, Kaufman Borgeest & Ryan, New York City

Authors
Lisa McDougall, Esq.
Philips, Lytle LLP
Buffalo, NY

Christopher R. Viney, Esq.
Lackawanna, NY

This new title is designed to be a "hands on" tool for health care providers as well as their legal counsel. Consisting of 36 policies and procedures—as well as the forms necessary to implement them—the *Manual* provides the day-to-day guidance necessary to allow the physician's office to respond to routine, everyday inquiries about protected health information. It also provides the framework to enable the privacy officer and the health care provider's counsel to respond properly to even non-routine issues.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: You mention in your columns that language is constantly changing. I wonder whether some changes have come behind my back. In particular, is the word *renown* now an adjective? And how about the new plural *incidences*? I hear both used by well-known public figures, but they sound strange to me.

Answer: Well-known public figures are not *renown*; they are *renowned* if they are widely honored or acclaimed, for the noun *renown* means "honor or acclaim." The noun *renown* has not yet become an adjective, but if it is used as an adjective often enough, it will become one. That has been typical of English since its birth: nouns becoming adjectives and verbs; verbs becoming nouns and adjectives, all easily switching categories due to popular usage.

That is how the Middle English noun *stan* ("stone") became an adjective in the phrase *stone house* along with hundreds of other nouns. But until the change of a noun to an adjective is widely accepted, it is considered ungrammatical. *Renown* has not yet reached that point, so when a television journalist mentioned "the renown John Kenneth Galbraith" the other night, his usage was ungrammatical.

Incidentally, a nice distinction is being lost between the adjective *notorious* and *renowned*. Traditionally, they were antonyms. Both adjectives meant "widely known," but if you were renowned, you were widely known because you were honored; if you were notorious, you were widely known for unfavorable reasons. Thomas Jefferson was renowned; Guy Fawkes was notorious. Currently, however, perhaps due to ignorance of the meaning of *notorious*, journalists are calling honored individuals "notorious," and the distinction may disappear.

The nouns *incident* and *incidence* are not synonyms. An incident is a single event, separate and distinct. It could signify an occurrence or event that interrupts normal procedure or precipitates a crisis, as in "a shocking incident." The word *incident* is also an adjective meaning related or contingent upon something, as in, "Incident to heavy rains, there were numerous rear-end crashes on the Interstate."

On the other hand, the noun *incidence*, which descended from the same late Middle English noun (from the Late Latin noun *incidensia*) is still only a noun. Like *incident*, it can refer to one occurrence, as in, "The incidence of violence shocked the small community." But *incidence* usually refers to the extent, range, or frequency of occurrence, as in "the incidence of heart attacks in women."

In Geometry *incidence* indicates the partial coincidence of two figures, and in Optics *incidence* refers to the striking of a ray of light, etc., on a surface or the direction of a striking. In Physics, it refers to the arrival of incident radiation or an incident projectile at a surface.

The plural of *incident* is common: "Incidents like fender-benders occur daily in metropolitan areas." But the plural of *incidence* is less common, and when you hear it, the speaker is often mistakenly using it to refer *incidents.* Correctly used, *incidences* refers to the rates of occurrence of a particular disease in populations being studied as in "the incidences of cancer in developing nations." Even in this context, the singular form *incidence* is more usual.

Question: In a recent column I have seen the word *none* followed by a plural verb. That usage ought to be incorrect, because *none* means "not one." Please comment.

Answer: Logically, it could be argued that *none* should be a singular form, for it was singular in Old English, being the negative form, *ne an* ("not one") of the pronoun *an*. But through the centuries, *none* has come to mean either "not one," or "not any," depending on the speaker's intent, and dictionaries are unanimous in defining it as either a singular or a plural pronoun. Even the most conservative grammarians agree. (See, for example, *Fowler's Modern English Usage*, Second Edition at 394.)

The time may soon arrive that singular indefinite pronouns (like *everybody*, *anybody*, *nobody*, *everyone*, *someone*, *no one*, and the others) will also be considered both singular and plural forms. The so-called "sexist he" has caused many persons to shed the still-correct "Everybody should take his seat." To avoid the impression that they are ignoring women, and disliking the substitute *he/she*, almost all speakers now substitute statements like, "Everybody should take their seats."

There are ways to avoid both the "sexist he" and the still non-standard *they*, and this column has previously suggested substitutes in response to readers' questions. For example, it is often possible to frame the statement in the plural ("All participants should take their seats"). The problem, however, may soon be moot, for a large majority of English speakers and writers are now using *they* in reference to singular indefinite pronouns.

Potpourri:

The Oxford English Dictionary has added 3,500 words, which it says have recently entered the English language, to the fifth edition of its *Shorter Oxford Dictionary*. This edition is the OED's first in nine years, and it seems fitting to list some of the newly added words so that, should the appropriate situation occur, you can find the *cool* word (*cool* is one entry) to use without needing to peruse the *Shorter*. So here are a few of the "new" words listed: *grinch*, *beltway*, *body-piercing*, *lap dancing*, *sticker shock*, *road rage*, *get real*, *gomer*, *feet first*, *DVD*, *snail mail*, *body mass index*, and *gym rat*.

You may not need any help in translating most of these words. My spell-check complained only when I typed *grinch* and *gomer*. I will have to tell it that *grinch* means "spoilsport" and *gomer* means "inept colleague" (a word that you may have use for).

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).

"because," "before," "if," "though," "until," "when," "where," or "while") or a relative pronoun ("that," "which," "who," "whoever," or "whom") and will contain a subject and a verb. For variety, begin sentences occasionally with "after," "although," "as," "as if," "as long as," "because," "before," "if," "though," "until," "when," "where," or "while."

Not every sentence should be simple. A few should be compound, complex, or compound-complex. Compound sentences contain two independent clauses: the clauses are linked with a semicolon, or they are linked with a coordinating conjunction. *Example:* "New York City is fun and exciting, but it doesn't compare to Montréal." Complex sentences contain a main, independent clause and at least one dependent clause linked by a subordinating conjunction. *Examples:* "Although Montréal is a fun town, I don't visit often enough." Compound-complex sentences contain at least two independent clauses, and at least one dependent clause, all somehow linked. *Example:* "New York City is fun and exciting, and so is Montréal, but New York City doesn't compare to Montréal, although I don't visit Montréal often enough."

18. Love the Active Voice. Prefer the active voice to the passive. The passive voice comes in two forms: single passives and blank passives. Blank passives are sometimes called double or nonagentive passives. A single passive occurs when a sentence is converted to object, verb, subject from subject, verb, object. The blank passive hides the subject. The active voice lets readers know who did what to whom, in that order. The active voice is concise; the passive, wordy. The active voice is always honest; the passive is sometimes dishonest. People think in the active voice, not the passive. Active voice: "The lawyer wrote the brief." This sentence goes from subject, to verb, to object. Single passive: "The brief was written by the lawyer." If you see a "by," you'll see a single passive.

The active voice is concise; the passive, wordy. The active voice is always honest; the passive is sometimes dishonest.

Use single passives only to dovetail or to end a sentence with climax. To dovetail is to connect sentences. To climax is to end a sentence with emphasis. One dovetailing technique is to move from old to new. *Active example:* "Mr. Smith wrote the brief. Mr. Smith is a strong writer." *Dovetail examples:* The brief was written by Mr. Smith, who is a strong writer." *Or:* "The brief was written by Mr. Smith. Mr. Smith is a strong writer." *Climax example:* "The ground was shaken by an earthquake." The word "earthquake" brings about the climax; the words "the ground" aren't that important. The active version is less interesting than the passive version: "An earthquake shook the ground."

Sometimes blank passives hide what's important but harmful. Using blank passives to conceal information is unethical. *Example:* "Mistakes were made." In this sentence, you don't know who made the mistakes. *Becomes:* "Attorney Abe made mistakes." *Example:* "The suspect was read her *Miranda* rights." The problem with this sentence is that you don't know who read the suspect her rights. Write it in the active voice instead: "Officer Jones read the suspect her *Miranda* rights." *Exceptions:* Use blank passives if you don't know who the subject (actor) is or to de-emphasize an irrelevant or obvious subject (actor).

19. Love Gender-Neutral Language. Gender neutrality isn't about political correctness. It's about thinking and writing in a nondiscriminatory way. Sexist language is bad because it's offensive and degrading. It's discrimination in print. Sexist language is also bad because it focuses readers on style. Gender-neutral language focuses readers on content. A writer's goal is to emphasize content, not style.

The first way to make language gender neutral is to make the antecedent plural: "A law clerk can't be careless. She must be meticulous and precise." Change "a law clerk" to "law clerks" and "she" to "they" to eliminate the sexist language. *Becomes:* "Law clerks can't be careless. They must be meticulous and precise." The second way is to rephrase the sentence to eliminate the pronoun: "She who can't handle the work should find another job." *Becomes:* "Anyone who can't handle the work should find another job." "A waiter likes his customers to be generous." *Becomes:* "A waiter likes generous customers." The third way is to repeat the noun. "A police officer will be here soon. He'll help you." *Becomes:* "A police officer will be here soon. The officer will help you." The fourth way is to use the second-person pronoun: "you," "your," or "yours." "He who can write should apply for the job." *Becomes:* "If you can write, apply for the job."

Eliminate all sexist language. Use gender-neutral parallel language: Write "husband and wife," not "man and wife" or "man and woman." Delete the suffix "-man." Use "Assembly Member" not "Assemblyman"; "Chair" not "Chairman" or "Chairperson"; and "Police officer" not "Policeman." Avoid the suffixes "-ess" and "-trix." Use "executor," not "executrix"; "prosecutor," not "prosecutrix." Eliminate masculine terms: "humanity," not "mankind"; "made by hand," not "man-made"; "average person," not "common man." Don't use clumsy variants like "s/he/it," "s/he," "(s)he," "he or she," or "him or her," or alternate

between "he" and "she." Never write ungrammatically to solve a gender issue. *Incorrect:* "A gourmet likes their coffee black." *Correct:* "Gourmets like black coffee."

20. Love Good Quoting. To quote or not to quote — that's the question. Quoting shows readers you're reliable: The reader needn't consult the source to confirm your argument.

Readers think that if you'll cheat on rules, you'll lie about the record or not cite controlling authority.

Quoting is good if done reasonably. Quote essential things you can't say better than the original. Quote authoritative sources. If a case, contract, or statute is in dispute, quote it. Quote to eliminate any suggestion of plagiarism. Then quote only what's helpful or necessary. Quoting excessively makes your document look choppy and you look lazy. Excessive quoting doesn't substitute for analysis. Paraphrase and explain instead, and cite the source.

Don't use block quotations (also called blocked or set-off quotations) unless you're quoting important parts of a statute, contract, or critical test from a case. The Legal Writer recommends that quotations of 50 words or more be double-indented. Others suggest blocking quotations of three lines or more. Single-space block quotations, but double space between block paragraphs. Never end a paragraph with a block quotation. The Tanbook — New York's Official Style Manual — recommends that you use double quotation marks (" ") around the entire block quotation. The Bluebook advises not to surround the block quotation with quotation marks. The Legal Writer recommends using double quotation marks around the block quotation. They make it easier to see quotations, especially in documents published online.

Use single quotation marks (' ') around a quotation within a quotation. Otherwise use single quotation marks only in a newspaper headline. Use double quotation marks to set off or define a word or phrase and to repeat speech.

All quoting must be accurate. Always proofread your quotation from the original source to assure perfect quoting, letter for letter, comma for comma. Show if you've altered, added, or deleted language. Use brackets "[]" to show alterations or additions to a letter or letters in a word. *Alterations:* "Substantially" *becomes* "Substantial[]." "Substantial" *becomes* "Substantial[ly]." "Substantially" *becomes* [s]ubstantially." "Substantlly" *becomes* "substant[ia]lly." *Additions:* "The judge did [not] like to make jakes [sic] in court." When quoted material contains a spelling, usage, or factual error, use "[sic]," meaning "thus," after the error to show that the error is in the original. If the context makes it clear that the error was in the original, don't add "[sic]." If you overuse "[sic]," the reader will believe you've used the quoted material only to highlight the error. To prevent overusing "[sic]," alter the quotation or paraphrase it.

Use ellipses to show omission. Use three-dot ellipses (". . ."), all separated by spaces, to show omissions of punctuation or one word or more in the middle of the sentence. Use four-dot ellipses (". . . ."), all separated by spaces, to show omissions at the end of a sentence if (1) the end of the quotation is omitted; (2) the part omitted isn't a citation, a footnote, or an endnote; and (3) the remaining portion is an independent clause. Unless all three criteria are satisfied, use a period, not an ellipse. Don't use ellipses before the portion you quote. *Example:* The appellate court held that the lower court ". . . should have denied the summary-judgment motion." *Becomes:* The appellate court held that the lower court "should have denied the summary-judgment motion."

People don't like to read quotations. Tempt them. Introduce the quotation with a lead-in, weave the quotation into the sentence, or use an upshot to paraphrase the meaning of the quotation. *Lead-in:* "As the prosecutor explained, 'The defendant bought a gun.'" *Weave:* "The prosecutor explained that defendant 'bought a gun' before he committed the crime." *Upshot:* "The prosecutor explained that the defendant purchased the murder weapon before he committed the crime: 'The defendant bought a gun.'"

21. Love and Follow Rules. Readers think that if you'll cheat on rules, you'll lie about the record or not cite controlling authority. Your credibility — essential to legal writing — will vanish. If you're submitting a document to a court, follow the court's rules about page length, table of contents, font, paper color, and number of copies you must submit. It's easy to comply with these rules; many courts publish their rules on their Web sites. Make sure in particular to follow the rules of the judge who's presiding over your case. Your office might have its own rules on style and format. Follow them, too.

22. Love Good Format. Write for the ear, not the eye. But create easy-to-read documents. Presentation always counts. Readers need plenty of white space on a page. Your margins should measure at least one inch, up to 1.25 inches, on the bottom, sides, and top. Indent your paragraphs one tab from the margin. The Legal Writer prefers single spacing, although many court rules require double spacing between paragraphs. The Legal Writer prefers two spaces between sentences, not just one space. If you're writing an article for publication, for example, editors will convert to one space between sentences. The Legal Writer also prefers right-ragged margins to fully justified ones. Don't create a kaleidoscope of colored or highlighted text. Choose one font and stick to it. The Legal Writer recommends Times New Roman or any

font with the word "book" in it, with 12- or 13-point font size. Italicize case names. Don't underline and italicize at the same time. Number each page (suppress the first page) unless you're writing an affidavit or an affirmation, then number your paragraphs. Get rid of orphans and widows. An orphan is a single word or phrase at the end of a paragraph or page. A widow is a single word or phrase appearing alone at the top of a page.

23. Love Official Citations. Always cite the official version when you cite a New York case to a New York court. The court system gives most judges only the official reports; official citations are more accurate than unofficial ones; and CPLR 5529(e) requires lawyers to use official citations in appellate briefs. Prefer the New York Reports and its Second or Third Series (N.Y., N.Y.2d, N.Y.3d) to West's North Eastern Report and its Second Series (N.E. or N.E.2d) or West's New York Supplement and its Second Series (N.Y.S. or N.Y.S.2d); the New York Appellate Division Reports and its Second or Third Series (A.D., A.D.2d, A.D.3d) to West's New York Supplement and its Second Series (N.Y.S. or N.Y.S.2d); and the New York Miscellaneous Reports and its Second or Third Series (Misc., Misc. 2d, Misc. 3d) to West's New York Supplement and its Second Series (N.Y.S. or N.Y.S.2d). Use West's unofficial reports, but not instead of the official citations. In New York, it's unnecessary to give parallel citations. If you do, always cite and use the official citation (N.Y.3d, A.D.3d, Misc. 3d), if available, in addition to the unofficial citation. Use commas to separate parallel citations.

24. Love Good Citing. Readers love proper citation. It doesn't take long to look up the rule in the Bluebook, now in its eighteenth edition, or in ALWD, the Association of Legal Writing Directors Citation Manual, now in its third edition. The Bluebook has been around since 1926. Most lawyers, law journals, and Moot Court competitions use the Bluebook. Some law school legal-writing programs use ALWD as an antidote for the Bluebook blues. New York judges use the New York Law Reports Style Manual (Tanbook),[1] prepared by the New York Law Reporting Bureau.[2] Make it easy for the court to rule for you. Use the Tanbook when you write for New York courts. The Bluebook and ALWD are brilliant documents. But their recommendations on how to cite New York authorities are always wrong; and the Tanbook is always right.

Citing well makes you credible. It tells readers to trust you and your writing. Use the correct volume, reporter, page number, and case name. Accurate citations help readers find propositions fast. Give a full citation in each new section of your document before you give a short-form citation; then always use the short-form citation in that section of your document. Use signals to introduce citations. No signal is necessary after a quotation or if the citation supports your proposition directly. Use "contra" if your citation contradicts your proposition directly. Use "see" if your citation supports your proposition indirectly or by inference. When you use "see," explain in the text or in a parenthetical following the citation why the citation supports your proposition. Use "but see" if your citation contradicts your proposition indirectly.

Use pinpoint (jump) citations. This forces you to read the authority so that you're certain your authority supports your proposition fully; it also helps you find other citations and arguments. Pinpointing tells readers that you've read the case and know the material. It also prevents readers from rummaging through an entire document to find your point. When citing cases or secondary authorities, use pinpoint citations down to the footnotes. Use the correct court and year to tell the reader whether your authority is binding or persuasive. Mention in a parenthetical after your citation whether the opinion is a memorandum, per curiam, en banc, dissent, concurrence, or plurality opinion. Mention whether leave or certiorari was granted or denied. Use parenthetical explanations to clarify authority. Use lower-cased gerunds — a verb used as a noun that ends in "-ing" — at the beginning of the parenthetical explanation: "citing," "comparing," "distinguishing," "finding," "holding," or "noting." *Example: A v. B*, 3 N.Y. 123, 125 n.4, 55 N.Y.S.2d 231, 234 n.4, 1 N.E. 456, 457 n.4 (1981) (holding that landlord may take for personal use one or more apartments in building if landlord shows good faith at trial). Pinpoint even if your proposition is on the first page: *E v. F*, 16 Misc. 61, 61, 18 N.Y.S 75, 75 (App. Term 2d & 11th Jud. Dists. 2d Dep't 1961) (per curiam). The same applies if your authority has only one page.

One good citation is enough. Don't string cite obvious or threshold matters. Limit string citing to three cases except when you must document the sources necessary to understand authority or a split in authority. Separate different authorities by semicolons. Never cite headnotes and syllabuses.

25. Love Deadlines. Submit court documents on time. If you need more time, ask the court in advance, not after the document is due. If your boss gave you a deadline, follow it. Adhering to deadlines shows that you're professional and responsible. It shows that you respect and value someone else's time. If you gave yourself a deadline, follow it, too.

26. Love Visuals. Paint visuals for the reader. Attach to your legal document the authority you've cited if the authority is unpublished. If you're submitting a document to a trial court, attach the leading cases even if the cases are published or available on Westlaw or LEXIS. Highlight the relevant text in the attachment. Download photographs and include them in the document. Create graphs and charts if you can. Attach them in an appendix and explain them in the text.

In the next two columns, the Legal Writer will discuss legal writing's 26 don'ts. ■

1. *See* http://www.courts.state.ny.us/reporter/New_Styman.htm (last visited Apr. 20, 2007). A new edition of the Tanbook will be released sometime in the latter part of 2007.

2. *See* http://www.courts.state.ny.us/reporter (last visited Apr. 20, 2007).

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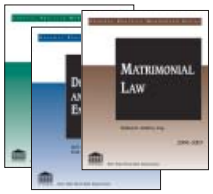

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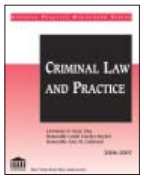

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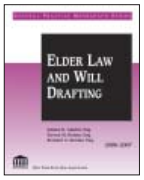

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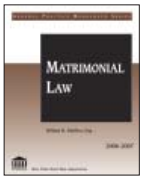

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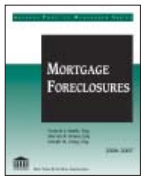

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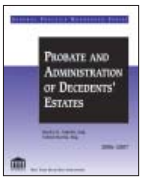

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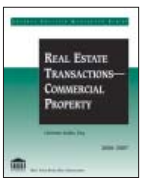

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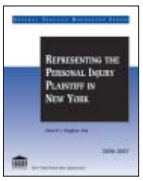

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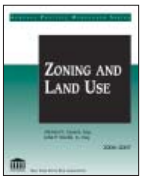

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BY GERALD LEBOVITS

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan. He thanks court attorney Alexandra Standish for assisting in researching this column. His e-mail address is GLebovits@aol.com.

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

In the last column, the Legal Writer discussed 13 things you should do in legal writing. We continue with our list of the next 13 do's. Together the columns are a double baker's dozen of legal writing's do's — the things writers should love.

14. Love Small-Scale Organization: Paragraphs. Paragraphs are the building blocks of writing. Start each paragraph with a topic or transition sentence. A topic sentence introduces what you're going to discuss in your paragraph. Every sentence in each paragraph must relate to and amplify your topic sentence. One way to have a topic sentence is to take the last sentence of a paragraph and put it onto the next. A transition sentence links the end of one paragraph to the start of the next paragraph by linking or repeating a word or concept. Use transitional devices to divide paragraphs and to connect one paragraph to the next when a paragraph becomes lengthy. The best transitional devices join paragraphs seamlessly. End your paragraph with a thesis sentence that summarizes and answers your topic sentence. Don't restate your topic sentence. Every sentence in the paragraph should lead to the conclusion set out in the thesis sentence. Each sentence must relate to the next, to the one before it, to the topic sentence, and to the thesis sentence. *Topic sentence:* "Defendant lied about his relationship with ABC." *Thesis sentence:* "The court should reject defendant's testimony as incredible." *Transition sentence:* "Defendant also lied about his relationship with XYZ."

15. Love Appropriate Paragraph and Sentence Length. A sentence with more than 25 words is hard to digest. Each sentence should contain one thought and about 15–18 words. A paragraph should rarely be longer than six sentences. It shouldn't exceed one thought and two-thirds of a double-spaced page or 250 words, whichever is less. Varying sentence and paragraph length makes your writing spicy and more readable. When in doubt, shorter is better. Reserve one-sentence paragraphs for those sentences that must have great emphasis. If you use too many one-sentence paragraphs, the emphatic effect will be lost. Also, too many short sentences or paragraphs in rapid order is angry-sounding, choppy, and distracting.

To see your "average words per sentence" on WordPerfect, go to "File," then "Properties," and then "Word Count." On Microsoft Word, you have two ways to see your "words" and "paragraphs." Go to "Tools," then "Word Count," or go to "File," then "Properties," and then "Statistics."

16. Love Small-Scale Organization: Sentences. Start sentences with familiar, less important information. End sentences with new, more important information. The best writing repeats in the beginning of the second sentence concepts, names, phrases, and words taken from the end of the first sentence. Transition from sentence to sentence by going from old to new, from simple to complex, from short to long, or from general to specific. The strongest emphasis is at the end of a sentence. The second strongest is at the beginning of a sentence. The least emphasis is in the middle of a sentence. *Example:* "Bill drinks, but he's a good worker." *Versus:* "Bill's a good worker, but he drinks." Start and end with power. Bury less important information in the middle. The best writing doesn't rely excessively on conjunctive adverbs like "additionally," "along the same lines," "furthermore," "however," "in addition," "in conclusion," "moreover," "lastly," and "therefore." If the logic and movement of your ideas are clear, your reader connects thoughts without needing artificial transitional devices that impose superficial logic.

17. Love Simple Declarative Sentences. Don't write convoluted sentences. Each sentence should contain a subject, a verb, and an object. Put the subject at the beginning of most sentences. *Examples:* "The court . . . ." "Defendant . . . ." "The witness . . . ." Use a short subject. Put the verb immediately after the subject. Don't put words between the subject and the verb: keep your subjects next to their verbs. *Examples:* "The court held . . . ." "Defendant fled . . . ." "The witness explained . . . ." Misplacing your subject, not keeping your subject next to your verb or object, or placing qualifying or descriptive information before the main subject and its verb ("front-loading") are common errors that lead to lack of clarity.

Don't begin every sentence with a subject. From time to time substitute subjects with subordinate clauses, also called dependent clauses, to assure flow and to rank ideas by importance. Then place the main idea in the main clause, after the dependent clause. A subordinate clause begins with a subordinate conjunction ("after," "although," "as,"

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