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NEW YORK STATE BAR ASSOCIATION

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Drawing the fuzzy line between personal and business expenses for those in the public eye.

by Robert W. Wood

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

Our Dual Roles

Mark H. Alcott

Our Association plays dual roles as the voice of the profession and the advocate for the public. Here are two important illustrations of each of these roles.

Voice of the Profession: Age Discrimination

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

That compelling insight in defense of our civil liberties was written in 1928 by the great American jurist, Louis Brandeis, dissenting in the famous case of *Olmstead v. United States*, 277 U.S. 438 (1928). *Olmstead* involved the admissibility of wiretap evidence. Forty years later, Brandeis's dissenting view on that subject was adopted by the Supreme Court's majority in *Katz v. United States*, 389 U.S. 347 (1967). And today, 80 years after it was rendered, Brandeis's dissenting opinion in *Olmstead* is as timely and on-target as the day it was written.

But if Brandeis sat on the highest court in New York, rather than the highest court in the United States, we would not have had the benefit of this wisdom. Brandeis was 71 years old when he wrote the dissent in *Olmstead*, beyond the age when New York Court of Appeals judges are sent out to pasture. As you of course know, our Court of Appeals judges must retire at age 70. New York Supreme Court justices also must retire at age 70, although their tenure can be extended up to age 76 if they meet some mysterious, undefined criteria.

We recently marked the sesquicentennial of the birth of Justice Brandeis, born on November 13, 1856. Brandeis had a brilliant career as a practicing lawyer and advocate for important causes. He was appointed to the Supreme Court at the age of 60 – not far from the age when many law firms today require their partners to leave the profession. He served on the Court for 23 years, retiring at the age of 83. Brandeis's career serves as Exhibit A in the case against mandatory retirement for lawyers and judges – an issue high on my reform agenda.

Brandeis was on the Court when Franklin D. Roosevelt made one of his very few mistakes when he launched his court-packing scheme. Roosevelt rationalized his proposal, in part, by arguing that the existing Supreme Court justices were too old. He offered legislation that would allow the president to appoint a new Supreme Court justice to serve in tandem with each incumbent older than 70 who refused to retire – in effect, a minder for the presumptively senile. Six of the existing justices fell into this category; Brandeis, age 80, was the oldest.

Although a friend of Roosevelt, Brandeis was appalled, and worked behind the scenes to kill the measure. He dispatched his wife to convey his views to the wife of a key senator. What ultimately resulted from his strategy was a letter from the Chief Justice demonstrating that the Court was current with its work and that any increase in the number of justices would impair the Court's efficiency. The court-packing scheme failed.

Brandeis went on to author the seminal decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the case we all studied in our early weeks at law school. Justice Brandeis was 81

MARK H. ALCOTT can be reached at president@nysbar.com.

years old when he wrote that decision. Computer studies reveal that it has been cited some 25,000 times. *Res ipsa loquitur*.

Unfortunately, New York continues to follow the policy that our federal government rejected. And so we have prematurely lost the services of some exceptional judges, including, most recently, Court of Appeals Associate Judge Albert M. Rosenblatt.

The theme of my presidency is: Strengthen and defend core values, while promoting needed reform. One area that very much needs reform is the treatment of gray lawyers. I have spoken and written about this often, and it has been widely covered in the media. I have appointed three new committees to examine various aspects of this issue:

The Task Force on the Mandatory Retirement of Judges, chaired by Hon. Leo Milonas, which is examining and will make recommendations on New York's archaic judicial retirement policy.

The Special Committee on Age Discrimination in the Profession, chaired by Mark Zauderer, which is examining and will report on practices and policies that adversely impact lawyers because of their age – too old, too young, too in-between – including policies that force lawyers to retire from practice at increasingly early ages.

The Senior Lawyers Committee, chaired by Justin Vigdor, which will provide professional, educational, public service and social opportunities for gray lawyers.

The Special Committee on Age Discrimination has already issued its report condemning mandatory retirement in the profession. The other reports are expected soon, and all will be considered at the spring House of Delegates meeting. I look forward to the discussion with great enthusiasm.

Advocate for the Public: Town and Village Justice Courts

As troubling as it is to lose the service of a seasoned jurist merely due to an age requirement, it is equally troubling that non-lawyers are at the helm of nearly 1,500 of the Justice Courts in our towns and villages.

The independence of the courts and the bar are the twin pillars of our legal system. These pillars are buttressed by public confidence in the court system and by the perception that, when litigants step into a courtroom and appear before a judge, whether that court is located in a bustling city or quaint village, they will receive justice and equal treatment according to the law.

Unfortunately, as we have learned from the widely circulated *New York Times* series on the Justice Courts,[1] it is a fact that, at least in some cases, the designation "Justice Court" is a misnomer. This is very troubling to the bar; I can think of few issues that have caused lawyers to reach out to me, as President, with such a high level of concern. I share their dismay, because the reputation of the Justice Courts directly affects our profession and the legal system. When public confidence in any facet of the court system is weak, the pillars of our legal system crumble, and the authority of our entire system of justice is undermined. Public confidence in every judge in this state is crucial to the continued vitality of the bench and the bar. Indeed, due to the nature of the cases that come before Justice Courts, public confidence in those tribunals is particularly necessary.

New York's Justice Courts – often referred to as "the first line of defense of our justice system" – handle cases that affect the everyday lives of New Yorkers: DWIs, Requests for Orders of Protection, Landlord-Tenant Disputes. Those appearing before a Justice Court could face loss of the right to drive a car and, thus, their livelihood. They could face imprisonment or eviction from their homes. They could be denied an order of protection desperately needed to save them from further episodes of domestic violence.

For many of New York's citizens, the Justice Courts may be the only contact they have with the court system. In addition, many of these litigants have limited resources and must take refuge in the lower tier of our judicial system. Therefore, it is essential to public confidence in our judicial system that the Justice Courts be open to all and treat each person with the dignity, respect and fairness that is expected from all of New York State's tribunals.

To ensure public confidence in the court system, the Justice Courts must be fundamentally reformed. It is the long-standing position of the Bar Association that all justices who preside over these courts should be lawyers. Currently, the State Constitution authorizes the Legislature to fix qualifications for those who serve in the Justice Courts, and the Legislature allows non-attorneys to fill the positions. There is an urgent need for legislation to reform this system.

Of the nearly 2,000 justices in these courts, 72% are not attorneys. Until recently, the Office of Court Administration required just one week of training for non-attorney justices; under OCA's new Action Plan for the Justice Courts, which we applaud, training will be doubled to two weeks. However, while the OCA is doing the best that it can with the limited resources and authority it holds, even two weeks of training is insufficient, given the scope of power and breadth of issues that come before the Justice Courts.

Indeed, greater education is required to perform other services in New York State. For example, the state requires hair removal–waxing technicians to complete 75 hours of training and pass an examination.[2] The state requires nail specialists to receive 250 hours of training;[3] and massage therapists must have a high school diploma, complete 500 hours of training and pass an exam.[4]

It is absurd that nail specialists and massage therapists must receive more training than the Justice Court's non-attorney justices. These justices are responsible for, among other things,

selecting juries, admitting evidence, conducting criminal and civil trials, reporting dispositions, assessing fines, issuing orders of protection, arraigning felons and securing defendants in local or county jails. New York's Justice Courts handle one-third of the state's caseload, hearing more than 2 million cases annually and collecting more than $210 million in fines. The law has become increasingly more complex in the 40 years since the Legislature last approved the use of justices who are not lawyers, and it is no longer acceptable for non-attorneys to preside in our Justice Courts.

Moreover, the same matters, occurring within a city, would come before a judge who must be admitted to the bar. For justice to truly be equal, New York's citizens, whether they reside in a city or in a rural area, deserve to have their cases heard by judges who are attorneys. Further, it is unfair for litigants in civil or criminal cases to have matters determined by a person who may be unfamiliar with the law and who is not bound by the Code of Professional Responsibility and the Code of Judicial Conduct. According to the *New York Times*, when many of these justices made a mistake, they used their non-lawyer status as an excuse, acknowledging their mistakes and stating, "I'm not a lawyer." We have to eliminate this excuse. In modern times, there is no reason that all judges cannot and should not be lawyers, and public confidence requires that local justices have appropriate training and be held to enforceable ethical standards.

Given the new energy in Albany, it is the season of reform. We are the profession's voice and the public's advocate, and we will continue to play both roles with vigor. ■

1. William Glaberson, *Broken Bench*, N.Y. Times, Sept. 25–27, 2006.
2. Department of State, Legal Memorandum L107.
3. 19 N.Y.C.R.R. § 162.1.
4. N.Y. Education Law § 7806.

Gender Equity in the Workplace

The most competitive law firms are those that hire and retain well-qualified, productive attorneys. The best attorneys stay with their firms because they are satisfied that they are treated equally, they receive equal opportunities, their evaluations are fair, and their work is valued. Firms with the best attorneys stand above the rest in terms of respect and profitability.

Women comprise the majority of law school students, new bar admissions, and new associates entering law firms. They make up a large and growing percentage of firm "superstars." Yet, after as little as five years' employment, more than half of female associates leave their firms; this figure reaches nearly two-thirds for minority female associates.

This is bad for law firms, bad for clients and bad for the profession.

To help law firms address this issue, the New York State Bar Association Gender Equity Task Force has developed a tool – "Self Audit of Gender Equity in the Workplace" – which is being mailed to law firms and employers across the state this February. The audit is also available on the Association Web site.

The purpose of the audit is to help firms discover what they are doing right and wrong and where they can improve their efforts to retain the best and the brightest in their firms, who more and more often are women. As NYSBA President Mark H. Alcott noted, "Women are the future of our profession, and we must provide a hospitable work environment in which they can thrive." The audit is strictly for internal use by employers; the Association is not asking for the results but would appreciate feedback on the audit itself.

Best Practices

Along with the self audit, the Task Force has released "Principles of Best Practices: How to Improve Gender Equity and Overall Quality of Life at Your Workplace." "Best Practices" is a compilation of model policies to help employers achieve equity in the workplace; it looks at such topics as compensation, work environment, opportunity and work/life balance. But this document is not by any means exhaustive. In fact, it is only a start.

Through the audit, you will uncover your own best practices. We want your real-life examples of policies, practices and benefits that work for your firm, to add to our on-going list of Best Practices, to share with your peers – our members.

The "Self Audit of Gender Equity in the Workplace" will be in your mailbox soon.
Or go to www.nysba.org/GETFSelfAudit.

NYSBACLE

Partial Schedule of Spring Programs *(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.

Bridging-the-Gap: Crossing Over Into Reality

Fulfills NY MCLE requirement for all attorneys (16.0): 3.0 in ethics and professionalism; 6.0 in skills; 7.0 in practice management and/or professional practice

February 14–15	New York City

How to Litigate a Products Liability Case: The Fundamentals

Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 3.0 in skills; 3.0 in practice management and/or professional practice

February 23	Albany; Melville, LI
March 2	Buffalo; New York City

Eleventh Annual New York State and City Tax Institute

+Fulfills NY MCLE requirement (7.5): 1.0 in ethics and professionalism; 6.5 in skills, practice management and/or professional practice

March 1	New York City

Employment Law for the General Practitioner and Corporate Counselor

March 8	New York City
April 19	Syracuse
May 4	Albany
May 10	Buffalo

Legal Malpractice

(half-day program)

March 23	Albany; Syracuse; Tarrytown
March 29	New York City
March 30	Melville, LI

Practical Skills Series: Family Court Practice

Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 4.0 in skills; 2.0 in practice management and/or professional practice

April 17	Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

Civility and Ethics

(half-day program)

April 20	New York City; Rochester
April 27	Albany; Buffalo; Melville, LI

Depositions

April 20	Albany; Buffalo; Melville, LI
April 27	New York City; Syracuse

Sarbanes-Oxley and Hot Securities Litigation Topics

April 25	New York City

Women on the Move IV

(half-day program 1:00 – 5:15 pm)
(reception: 5:15 – 7:00 pm)

April 26	New York City

Equitable Distribution and Maintenance: Cutting Edge Trends and Drafting, Litigation and Settlement Solutions

April 27	Hauppauge, LI
May 11	Tarrytown
May 18	Rochester
June 8	Albany
June 15	New York City

Practical Skills Series: Basic Elder Law Practice

Fulfills NY MCLE requirement for all attorneys (7.0): 1.0 in ethics and professionalism; 0.5 in skills; 5.5 in practice management and/or professional practice

May 2	Albany; Melville, LI; New York City; Rochester; Syracuse; Westchester

DWI on Trial – The Big Apple VII

(one-and-one-half-day program)

May 3–4	New York City

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

Third Annual International Estate Planning Institute

(two-day program)

May 3–4	New York City

Health Law

May 4	New York City
May 11	Melville, LI
May 17	Albany

Zealous Representation

(half-day program)

May 4	Ithaca
May 11	Albany
May 17	Melville, LI
May 18	New York City

Litigating and Working Out a Problem Loan

(half-day program)

May 10	New York City
May 18	Syracuse

Insurance Coverage

May 11	Syracuse
May 16	New York City
May 18	Albany; Buffalo; Melville, LI

Crisis Intervention Training

May 11	New York City

Practical Skills Series: How to Commence a Civil Lawsuit

Fulfills NY MCLE requirement for all attorneys (6.5): 1.0 in ethics and professionalism; 3.0 in skills; 2.5 in practice management and/or professional practice

May 15	Albany; Buffalo; Melville, LI; New York City; Rochester; Syracuse; Westchester

Trust Planning

May 16	Albany; Tarrytown
May 17	Buffalo
May 23	Binghamton; Uniondale, LI
May 30	New York City; Rochester
May 31	Syracuse

Bankruptcy Restructuring

May 22	New York City

Automobile Crashworthiness Litigation '07

June 1	New York City

Practical Skills Series: Collections and the Enforcement of Money Judgments

Fulfills NY MCLE requirement for all attorneys (7.5): 1.0 in ethics and professionalism; 1.5 in skills; 5.0 in practice management and/or professional practice

June 4	Albany; Hauppauge, LI; New York City; Syracuse; White Plains

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NYSBA

When High-Priced Celebrity Lawyers Are Tax Deductible

By Robert W. Wood

Robert W. Wood (wood@woodporter.com) practices law with Wood & Porter, in San Francisco, and is the author of *Taxation of Damage Awards and Settlement Payments* (3d ed., Tax Institute 2005 with 2006 Update) available at www.damageawards.org. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.

Celebrities often pay higher legal fees than the norm. In some cases, this is because of the type of lawyer they need, the type of legal matter they are pursuing (or defending), or both. Winona Ryder's shoplifting charge racked up far larger legal fees (not to mention public interest) than the typical shoplifting case. The fact that she paid her lawyer more than the customary fee for such a defense should make the tax impact of these fees of greater interest.

Perhaps everything about celebrities is of greater interest. Celebrity lawyers become quasi-celebrities themselves. Several television programs are devoted to celebrity legal matters, on Court TV, E!, and even more traditional networks. Several news channels have their own brand of legal tabloid broadcast. Fox News Channel's show is hosted by former prosecutor and former San Francisco first lady Kimberly Guilfoyle.

The phenomenon of high legal fees and high interest in the legal woes of celebrities is not restricted to criminal cases of the likes of Winona Ryder, Robert Blake, or telephone-brandishing supermodel Naomi Campbell. The latter represents an avid consumer of legal services, after several telephone-wielding misunderstandings, and an expensive breach of confidentiality suit against London's *Daily Mirror*. This suit was filed over photos of the model leaving a drug treatment center. When she lost, the British court system (where the loser always pays the winner's costs) required Campbell to bear the *Mirror*'s legal fees of £350,000, plus her own legal fees.

Fortunately for her, the decision was overturned in 2004, awarding Campbell £3,500 in damages, and refunding her £350,000 in fees. Although Campbell's total fees are not known, the *Mirror*'s total legal fees are thought to exceed £1,000,000. Models may prove profitable for lawyers. Danish supermodel May Andersen was arrested in April after allegedly hitting a flight attendant on a flight from Amsterdam to Miami.

Martha Stewart's case also deserves mention. The domestic doyenne paid legal fees all out of proportion to her crime, an obstruction of justice charge arising out of the sale of Imclone stock. News reports had her selling 75,000 shares of Martha Stewart Living Omnimedia, Inc. to pay legal fees (raising $4.67 million).[1] Then SEC filings revealed that she sought reimbursement (as an officer and director) for $3.7 million of fees.[2] The $3.7 million figure applied to Stewart's successful defense on a single criminal count, the charge that she tried to lift her own company's share price in 2002 by declaring that she was innocent of insider trading. That charge was dismissed.

Then there's the granddaddy of all celebrity legal fiascos, the Michael Jackson molestation trial. Although Jackson's year-long residence in Bahrain put him less in the spotlight, his acquittal on child molestation charges came at a price. Some estimates put the King of Pop's legal expenses as high as $20 million. Such stratospheric numbers should prompt the celebrities, their advisors, and perhaps the tabloid-devouring public to ask: When Winona Ryder, Martha Stewart, Naomi Campbell or Michael Jackson pay such whopping fees, are they deductible and if so, how?

Whether incurred in the criminal or civil context, such bloated legal fees raise significant tax issues. Deductibility is ultimately controlled by a question of nexus to the conduct of a trade or business or to income-producing activity. In the case of celebrities, where connections between income and publicity are symbiotic, it is surprising that these questions rarely get asked.

Deductibility of Legal Fees

Given the societal omnipresence of lawyers and their fees, it may seem surprising that the Internal Revenue Code does not expressly provide for the deductibility of legal fees. Instead, legal expenses (like many other expenses of various types) are deductible as "business expenses," if

they are paid or incurred in a trade or business. Similarly, if the legal fees are paid or incurred pursuing investment activity (generally something that is intended to produce a profit, but that does not rise in activity to the level of a *bona fide* trade or business), the legal fees will be deductible as investment expenses.

Deductions for trade or business expenses are much more useful than deductions for investment expenses, because of various percentage limitations and arcane tax rules such as the alternative minimum tax. For that reason, much of the tax law surrounding the deductibility of legal fees concerns the line between trade or business expenses on the one hand and investment expenses on the other. Fees paid for tax advice occupy a preferred status (amen!). Fees for tax advice are *always* deductible as investment expenses, even if related to divorce or some other personal matter.

Despite this dividing line, one point is painfully clear: you get *no* deduction for legal expenses of a personal nature. Unless you can show (to the satisfaction of the IRS or a court if it comes to that) that your legal fees are connected to the operation of your trade or business, or at least to an investment or profit-making activity, you receive no tax deduction. That means the legal expenses of a divorce, of a dispute over a fistfight at the local pub, or the costs of defending a rape or paternity charge, yield no deduction because these are personal expenses. Yet, as you might suspect, what is considered "personal" and what qualifies as either an investment or business expense can be debated.

Celebrities may be in a unique position when it comes to legal fees, because few personal decisions are not in the public eye. Few are therefore devoid of economic consequences. In Michael Jackson's case, the question of personal vs. business/investment applied to the expenses of a messy criminal sex charge may seem rhetorical. Before we turn to what is considered personal and the inevitable though often fuzzy line between personal and business, let's focus first on some basics about what is considered a business or investment expense.

Interestingly enough, although a trade or business expense might be likened to a gold-plated deduction (whereas an investment expense is merely silver or bronze), many of the same rules apply. Legal fees in both cases must be ordinary, necessary and reasonable. Similarly, legal fees in both cases must be paid or incurred during the tax year for which you are seeking a deduction. And, in either case, they must be current expenses rather than capital expenditures.

Problems With Personal Expenditures

All expenses that arise in connection with personal, living or family expenses are not deductible.[3] Deductions for professional fees have generated substantial controversy in this area of the tax law. Taxpayers often attempt to show a close nexus between legal expenses and a trade, business or investment activity. Yet, virtually any settlement or judgment payment which arises out of a business will be treated as deductible. But, just what "arises out of a business" can be debated.

Celebrities may be in a unique position when it comes to legal fees, because few personal decisions are not in the public eye.

For example, legal fees incurred in connection with a divorce, separation or decree for support, by either party, are not deductible.[4] The origin of the claim, not its consequences, is key. In the seminal case of *United States v. Gilmore*,[5] legal fees and associated expenses of divorce litigation were held to be nondeductible personal expenditures even though an adverse decision would destroy the taxpayer's business. That meant the husband was truly fighting for the life of his business in the divorce. The origin of the claim was the divorce litigation rather than its potential consequences to the business, no matter how draconian those consequences seemed to be. Thus, the legal expenses were held to be nondeductible personal expenditures.

Most tax advisors have assumed that legal fees relating to sexual harassment, gender or race discrimination, wrongful termination, and a variety of other claims made against an officer or employee of a company are deductible by the company. The conclusion may turn on whether there is an express indemnity obligation under applicable law, under any instrument of corporate governance, or under any employment contract. Virtually all harassment or discrimination cases arguably arise out of some personal activity that could, at least under one reading of the facts, be considered outside the course and scope of employment. Thus, the line between deductible and nondeductible in this context can be a thin one.

Kelly v. Commissioner[6] involved a personal (nondeductible) vs. business (deductible) distinction, where a taxpayer sought to deduct fees paid in defending a sexual assault charge. Kelly had been charged with criminal sexual assault, and he sought to deduct his legal fees as a business expense. The Tax Court found these legal costs to be nondeductible, noting that the sexual harassment

charges arose out of Kelly's personal activities, not out of any profit-seeking activities.

The court distinguished *Clark v. Commissioner*,[7] another tax case involving the legal costs of a sexual assault charge. In *Clark*, the taxpayer had been wrongfully accused of assault with intent to rape during the course of his employment. The court found the expenses deductible, because Clark had been working within the course and scope of his employment, and had not committed the rape of which he was accused. The Tax Court in *Kelly* found that sexual assault activity was not within the course and scope of the defendant's employment, nor was it conducted for a legitimate business purpose. The Tax Court found that Kelly's pursuits were purely personal.

Some taxpayers find themselves claiming that expenses are necessary to protect their business reputation, and this argument is occasionally made even outside the rarefied world of show business. For example, an attorney recently argued that it was necessary to settle a dispute with clients to avoid negative publicity, and that this settlement payment therefore was a valid business expense. In *Robert E. Kovacevich et ux. v. Commissioner*,[8] the attorney was named in a lawsuit by a client as a result of the lawyer's representation of another client. The lawsuit alleged fraud, not malpractice. The attorney eventually settled the case and sought to deduct the payment as a business expense.

The lawyer (who also deducted the cost of his Rolls Royce) claimed that it was necessary for him to make payment on the lawsuit to avoid bad publicity. The IRS did not dispute the deductibility of the payment to settle the fraud suit. The sole question was whether the payment was deductible as a business expense or was rather an investment expense (meaning an itemized deduction). The lawyer claimed that he paid the settlement not out of a concern with his ultimate liability, but rather to protect his business and personal reputation. The lawyer had been continuously engaged in the private practice of law for a number of years. Personal client relationships a lawyer may have are arguably separate and apart from corporate goodwill.[9]

Although the Tax Court recognized that Kovacevich was engaged full-time in the business of practicing law, the court inquired whether this settlement was really attributable to his trade or business. The court found that it was not. Because Kovacevich was an employee of his professional corporation, the Tax Court found that he could only deduct these expenses as a miscellaneous itemized deduction.

The Tax Court was not persuaded that a desire to protect one's business reputation entitled one to a full business expense deduction, and the Ninth Circuit agreed.[10] Kovacevich attempted to rely upon *Marks v. Commissioner*.[11] The court in *Marks* found that the settlement payment was made to protect the defendant's business rather than his personal reputation. The motivating concern in *Marks* was that bad publicity would have hurt the business, rather than him personally.

Cases such as *Marks* suggest that a taxpayer is entitled to consider the benefits and burdens of publicity. This may beg the question, of course, whether an entertainer might be benefited or burdened by a wave of publicity, whether that publicity is nominally bad or good.

Crime and Punishment

Because criminal charges brought against a person generally involve personal matters, the cost of such legal representation may well be nondeductible. In some cases, the crime alleged to have been committed arises in the context of the defendant's profession or business. The cases denying deductions for legal expenses in connection with criminal representation have typically referred to the lack of a nexus between the crime which was alleged to have been committed and the defendant's business.

For example, a management consultant was not allowed to deduct legal expenses incurred in defending a charge against him for fraudulently selling securities, since he was not in the business of selling securities.[12] The degree of nexus required is well-illustrated by *Commissioner v. Tellier*,[13] in which the Supreme Court allowed a deduction for an unsuccessful criminal defense. The case involved a securities dealer convicted of violating the 1933 Securities Act and mail fraud statutes in conducting his business. The *Tellier* decision overturned several lower court cases, and made irrelevant the success or failure of the defense of the criminal charges.[14]

If the nexus between the trade or business and the alleged crime is not strong, the deduction will be denied. For example, the mere fact that a defendant's business will be destroyed if he is convicted of a crime is not a strong enough nexus to sustain deductibility for the attendant legal costs.[15] Indeed, even though a conviction may disqualify a defendant from engaging in a business or profession, if the claim does not arise out of the business or profession to begin with, the legal fees will not be deductible.[16]

As Investment Expenses

Some taxpayers have argued that legal fees incurred in defending against a criminal prosecution should be deductible as expenses incurred in connection with investment activities, even though they may not rise to the level of an active conduct of a trade or business. In *Accardo v. Commissioner*,[17] Anthony Accardo was prosecuted under the RICO Act for charges involving racketeering in labor unions, including accepting kickbacks and commissions involving employee welfare benefit plans. Accardo was acquitted, and deducted the legal fees he incurred in his defense. He argued that the legal fees

were deductible, since the indictment sought a forfeiture judgment and Accardo sought to conserve and maintain income-producing assets.

The Tax Court nevertheless held that Accardo's legal fees were not deductible, finding his situation no different from that of any other defendant in a criminal or civil trial. Under the origin of the claim test, the claim against Accardo arose in connection with his income-producing assets. A desire to preserve income-producing assets was not sufficient to sustain a deduction for the legal fees Accardo paid in his defense. Legal fees paid with respect to a purely personal matter are not deductible, even if the legal fees have an effect on capital preservation. The applicable Treasury Regulations state that

> [a]n expense (not otherwise deductible) paid or incurred by an individual in determining or contesting a liability asserted against him does not become deductible by reason of the fact that property held by him for the production of income may be required to be used or sold for the purpose of satisfying such liability.[18]

Legal Fees in Disciplinary or Malpractice Proceedings

The cost of disciplinary or licensing proceedings against a person in connection with his business or profession may be deductible. The question is whether the conduct stems from the taxpayer's business rather than from his personal activities. The nature of the suit or legal proceeding against the person is controlling: *i.e.*, whether it stems from professional or business actions, or personal actions.

Thus, a deduction for legal fees incurred by a lawyer in defending a legal malpractice case would be allowed. However, legal fees paid by a doctor in defending a bribery conviction which ultimately resulted in a loss of a medical license would not be. Despite its professional consequences, the doctor's conduct would not lead to a deduction, because the bribery was a personal offense.[19] On the other hand, if the doctor had bribed a medical device supplier, that should lead to a different result.

Sometimes, it is difficult to determine whether a deduction for legal fees is appropriate based on the business nature of the suit, or whether the genesis of the suit really is personal. For example, in *McDonald v. Commissioner*,[20] a lawyer was denied a deduction for amounts paid to settle a threatened lawsuit to contest a will that made several bequests to the lawyer. The court reasoned that, although the suit might threaten the lawyer's profession, the origin of the claim was personal. Similarly, in *Solomon v. Commissioner*,[21] an accountant was denied a deduction for expenses resulting from the settlement of a lawsuit against him for misappropriation of his father's funds. The court determined that the matter was personal in nature rather than related to the accountant's trade or business.

Sometimes the IRS will seek to dissect a transaction into minute pieces in order to deny deductions where it would seem that purely personal activities are being pursued. In *Peters, Gamm, West & Vincent, Inc. v. Commissioner*,[22] the Tax Court considered charges brought by the SEC against Peters, a partner in an investment firm. Although the firm was not named in the case, charges against Peters were pursued and ultimately resulted in significant legal fees. The firm paid the legal fees, and the question was whether they were deductible.

Ultimately, the Tax Court agreed with the IRS that deductions by the corporation should be disallowed, and that the payment should be considered constructively paid by the investment firm to Peters and, in turn, paid by Peters to the lawyers. That meant that Peters, not his firm, could deduct the fees. Unfortunately, the legal fees were deductible by Peters only as investment expenses under § 212 rather than as trade or business expenses under § 162. That produced an alternative minimum tax problem.

Even judges can have legal expenses. In Revenue Ruling 74-394,[23] a judge was allowed to deduct defense costs against charges of misconduct in office. Politicians can incur legal expenses too. In Revenue Ruling 71-470,[24] a public official was allowed to deduct defense costs against a voter recall. Nevertheless, the Service has successfully litigated a number of cases where legal expenses have been disallowed.

Ordinary and Necessary Expenses?

The requirement that legal fee expenses be ordinary, necessary and reasonable in order to be deductible, applies under both § 162 (trade or business expenses) and § 212 (investment expenses). The "ordinary and necessary" requirement has generated substantial confusion. Generally speaking, an expense is "ordinary" if a businessperson would commonly incur it in the particular circumstances involved.[25] Taxpayers frequently confuse the "ordinary" requirement with the notion that the particular expenses must arise over and over again, and hence would be ordinary in the common usage of that word as a synonym for "recurrent."

The courts have not been restrictive in their interpretation of the ordinary and necessary requirement. In fact, the Supreme Court has noted that an ordinary expense may be extremely *irregular* in occurrence. A lawsuit affecting the safety of a business may happen once in a lifetime. Yet, even if legal fees are high, the expenses are ordinary, because we know from experience that payments for such a purpose are the common and accepted means of defense against attack.[26]

Just as the "ordinary" requirement has been liberally interpreted, the "necessary" requirement has been given wide berth. It is not necessary to inquire whether the taxpayer really *had* to incur a particular expense, such as taking a client to lunch, if incurring such an expense was appropriate or helpful.[27] Moreover, with attorney fees,

there may be even greater latitude in determining when something is "necessary." Some courts have looked not to whether the employment of an attorney is appropriate or helpful, but to an even more watered-down standard.

Thus, in one case, legal fees were ordinary and necessary where engaging attorneys was an act a reasonably prudent man in the same circumstances might undertake.[28] Indeed, where legal fees are incurred to either bring or defend a lawsuit, it is hard to imagine the ordinary and necessary nature of the expense being questioned. The critical question is the *nature* of the lawsuit. The origin of the claims test applies with respect to legal fees, as it does with respect to the characterization of the underlying recovery.

Reasonableness

The ordinary and necessary nature of legal expenses in this context is rarely questioned as long as the requisite nexus can be established between the lawsuit and the business or investment activity of the plaintiff or defendant. Nevertheless, there is still the question of the overall reasonableness standard. Most lawyers' fees may not seem reasonable. Yet, generally, the reasonableness of a payment of legal fees will not be questioned. Since litigation is by its very nature adversarial, the reasonableness of a payment of legal fees to dispose of litigation or discharge a settlement or judgment is rarely questioned.

However, the issue has been considered in a few cases, and a portion of the claimed legal fee expenses were disallowed.[29] Contingent fee arrangements may result in quite large legal fee payments. Even so, the sheer size of the legal fees will not necessarily make the fees unreasonable. As long as the fee arrangement was the subject of an arm's-length contract between the parties, the reasonableness of the resulting contingent fees should not be in dispute.[30]

Celebrity Cases

For the typical celebrity criminal defendant – say Hugh Grant's solicitation of prostitution charges, Robert Blake's murder charge, or Winona Ryder's shoplifting charge, the nexus between the conduct and the legal expense is likely to be purely personal, whatever the effects on the celebrity's career.

Yet, in the case of Naomi Campbell's breach of contract case, more analysis is needed. An invasion of privacy claim may be axiomatically personal. But, a defamation case may involve either personal or business reputation, and so may give rise to tax-deductible lawyers' fees. Naomi Campbell's legal fees arguably arose out of her contract with the *Daily Mirror*. While that deal may have involved solely what she perceived to be her privacy, the privacy of a public figure, this wasn't an invasion of privacy suit but rather one for breach of contract. Establishing a business nexus with a breach of

contract suit would be far easier than with an invasion of privacy suit.

Although it is awfully difficult to see legal fees relating to child molestation charges as business (or even investment) expenses, Michael Jackson may have at least some arguments to lessen the sting of $20 million in legal bills. First, he was acquitted. Under *Commissioner v. Tellier*,[31] conviction versus acquittal is plainly not the linchpin of a deduction. Even so, it's almost always easier to claim (and defend) a deduction after an acquittal.

Second, Jackson's legal battle arguably arose (at least in part) out of his own foray into media spin and self-promotion. Jackson's problems may not have *started* with the media, but they certainly got worse because of it. The now-infamous broadcast "Living with Michael Jackson" first aired in February 2003. This less-than-flattering documentary from British journalist Martin Bashir focused tremendous attention on Jackson's proclivities, particularly his penchant for sleeping with young boys.

Because Jackson and his handlers surely thought that granting Bashir access was a smart public relations move, I'm guessing that Jackson incurred costs in allowing such access, which he treated as deductible advertising or public relations expenses. If I'm right about this, then there is a kind of chicken-and-egg phenomenon here. Arguably, the dominoes started to fall with the February broadcast of the Bashir documentary. Neverland Ranch was searched in November, Jackson was booked and charged (in December 2003), and the rest is history.

Once Jackson went public with his TV special and appeal, there is little doubt that his legal woes got worse. After the documentary, most observers say his profile with prosecutors went way up. If the prosecutors were smoldering charcoal briquettes, his media activities amounted to a liberal dose of lighter fluid. I'm not sure one can argue that the molestation charges and ensuing trial *arose* out of his business, and out of his media (mis)handling, but I'm also not sure one cannot.

Indeed, there is some evidence it was the media, and Michael's (mis)management of it that set off the maelstrom. The primary prosecutor, Tom Sneddon, admitted that he pursued the case primarily because of his view that Jackson revealed so much in his TV saturation. At a minimum, perhaps one could bifurcate Jackson's fees and expenses between those related to or arising out of the media blitz, and those caused by the underlying charge. Arriving at principled percentages may be difficult, but recognizing the dual nature of the expense and trying to apportion it makes perfect sense.

Quite apart from all this, there is the whole charitable activity and Neverland Ranch symbiosis. I see these as distinct, so let's take the charitable issue first. Michael Jackson routinely gives money, time and energy to charitable causes, particularly those involving children. A cynic might say that he does this only to get close to the kids for his own ulterior motives.

But, consider the possibility that the criminal charges arose solely (or primarily) because of his altruistic behavior. If it did, maybe the fees (or at least some portion of them) are deductible as out-of-pocket expenses incurred in connection with his charitable works. Although one gets no charitable contribution deduction for the value of one's services, out-of-pocket expenses should be deductible.

Bear in mind too that we are not talking about standards beyond a reasonable doubt. We're not talking about guilt or innocence here. His innocence was already established. We're only talking about tax arguments, and I think they can be made with a straight (non-surgically altered) face.

Then, take Neverland Ranch. It is a veritable amusement park and zoo rolled into one, not to mention a very valuable piece of property. With most, if not all, of the molestation alleged to have occurred on the ranch itself, and with its operation being so central to Jackson's persona and career, is the ranch *itself* a business? Is it an investment?

You see where I'm going here. I don't know if Mr. Jackson claims any tax deduction for the operation of the ranch apart from the inevitable property tax, but I'll bet he does. There is surely extensive security, and there are probably other expenses that are solely attributable to his career. Then, there are the costs of his charitable functions, the caterers, the clowns, the animal trainers, and so on. I have no idea how Jackson's tax lawyers and accountants treat the millions all this has to cost. I don't even know which entity or entities this is all run through.

I'm guessing, though, that as many zeros as are involved, someone *has* looked at these issues. I'm also guessing that Neverland Ranch and all its operations are not entirely funded with after-tax dollars. You may say that all of this has nothing whatsoever to do with the deductibility of legal fees incurred in Jackson's successful defense of his molestation charges. With the arguably close connection between the charges and the Ranch's operation (charitable, investment, hobby?), though, I'm not so sure.

Trade or Business Nexus

To address the deductibility of legal fees in a case such as Jackson's, the key question is whether the origin of the case against him is personal or arises out of trade or business or investment activity. "Origin" sounds primal, and this sounds like a point easily resolved. After all, *United States v. Gilmore*[32] holds that if a case and corollary legal expenses have their origin in personal activity (a divorce, child molestation charges, etc.), the mere fact that grave business or investment consequences may flow from that case (as surely would have from Jackson's conviction)

does not convert the origin of the claim from personal to business or investment.

In *Gilmore*, the subject of the litigation was a high-profile (and expensive) divorce that threatened to close the husband's car dealerships. The Detroit automakers had told Mr. Gilmore that if his wife got control of any of the dealerships they would not sell to her and would cancel Gilmore's dealer agreements. Notwithstanding the substantial business motives that the car dealer had to fight over his business assets, Gilmore's divorce expenses were held nondeductible by the U.S. Supreme Court.

Against this tough standard, Mr. Jackson's legal expenses seem plainly personal. It is hard to argue that the criminal charges against him can in any respect be viewed as connected to his business. Yet, as I've attempted to show, he may have colorable arguments for a potential bid to have the government share in his legal costs.

Thriller?

Between the poles of authorities like *Gilmore* (personal) and *Tellier* (upholding business nexus), how do celebrity legal fees stack up? Like non-celebrities, the answer will depend on the facts. As with non-celebrities, the origin of the claim, not the effects it may have on the celebrity's business or investments, should control. In many cases, such as Hugh Grant's solicitation charge, Robert Downey Jr.'s drug charges or Robert Blake's murder trial, there is no argument that any portion of the legal fees is related to business or investment.

In some cases, though, I believe the standard for the deductibility of legal expenses may be somewhat lessened for celebrities. Put differently, I believe it may be easier for at least some celebrities to make connections between the genesis of legal expenses (rather than their mere effects) and their business or investment activities. Martha Stewart's considerable legal expenses arose out of her Imclone stock trading, surely an investment activity.

However, a portion of her legal expenses related not merely to investments, but rather to her trade or business. Managing the Imclone affair doubtless involved advertising and image consultants, as well as legal expenses legitimately related to Martha Stewart's omnipresent business. In any case, she won reimbursement for $3.7 million in fees attributable to a business claim that she had attempted to lift the company's share price by proclaiming her innocence to the insider trading charge. This simple example should show that a huge part of the issue here can be allocations of legal bills. Much like the post-*INDOPCO*[33] bifurcation of legal bills between deductible and capitalized acquisition costs, celebrity legal bills may withstand a good deal of this.

Naomi Campbell's legal expenses related to her phone-bashing are plainly personal, whatever the effects. But, her expenses related to her *Daily Mirror* suit seem to relate to her contract with the tabloid. Despite the invasion of privacy tenor of the dispute and its focus on photos of the model exiting drug rehab, that contract arguably arose entirely out of her trade or business. Michael Jackson's legal fees may be a stretch, so much so that I expect some readers will think I've lost my marbles by mentioning some of the arguments I've suggested here. The truth is, I don't know enough about the allegations, about Jackson's business and investment entities, or even about his charitable work, to carry these arguments very far.

Yet, I suspect that at least some of his legal fees may arguably be deductible on some theory. That may make Jackson similar to dethroned investment banking star Frank Quattrone, to jailed and released (and now even more beloved) Martha Stewart, and to a host of other celebrity and non-celebrity users of legal services. Celebrity clients can be a boon to lawyers, but when you take the celebrity's tax posturing into account, sometimes taxpayers are footing at least part of the bill. ■

1. *See Martha Stewart Sells Shares for Legal Fees*, N.Y. Times, June 12, 2004.
2. *See Martha Stewart Starts Appeal*, CNNMoney.com, Mar. 17, 2005.
3. I.R.C. § 262.
4. Treas. Reg. § 1.262-1(b)(7).
5. 372 U.S. 39 (1963), *on remand*, 245 F. Supp. 383 (N.D. Cal. 1965).
6. T.C. Memo. 1999-69.
7. 30 T.C. 1330 (1958).
8. T.C. Memo 2003-161, *aff'd*, 177 F. App'x 561 (9th Cir. 2006).
9. *See Martin Ice Cream v. Comm'r*, 110 T.C. 189 (1998).
10. T.C. Memo. 2003-161.
11. 27 T.C. 464 (1956).
12. *See Price v. Comm'r*, T.C. Memo. 1973-65 (1973).
13. 383 U.S. 687 (1966).
14. *See* Rev. Rul. 66-330, 1966-2 C.B. 44 (1966) (indicating that whether the defense of a criminal action is successful or unsuccessful is irrelevant).
15. *See Hylton v. Comm'r*, T.C. Memo. 1973-262.
16. *See Patch v. Comm'r*, T.C. Memo. 1980-11.
17. 94 T.C. 96 (1990), *aff'd*, 942 F.2d 444 (7th Cir. 1991), *cert. denied*, 503 U.S. 907 (1992).
18. Treas. Reg. § 1.212-1(m).
19. *See Margoles v. Comm'r*, 27 T.C.M. (CCH) 319 (1968). For similar cases, see *Tinkoff v. Comm'r*, 120 F.2d 564 (7th Cir.), *cert. denied*, 314 U.S. 581 (1941); *Joseph v. Comm'r*, 26 T.C. 562 (1956).
20. 592 F.2d 635 (2d Cir. 1978).
21. T.C. Memo. 1974-127.
22. T.C. Memo. 1996-186.
23. 1974-2 C.B. 40.
24. 1971-2 C.B. 121.
25. *See Comm'r v. Chicago Dock & Canal Co.*, 84 F.2d 288 (7th Cir. 1936); *see also Comm'r v. Heininger*, 320 U.S. 467 (1943).
26. *Welch v. Helvering*, 290 U.S. 111 (1933).
27. *See Lilly v. Comm'r*, 343 U.S. 90 (1952).
28. *Kanelos v. Comm'r*, 2 T.C.M. (CCH) 806 (1943).
29. *See Harvey v. Comm'r*, 171 F.2d 952 (9th Cir. 1949); *Michaels v. Comm'r*, 12 T.C. 17 (1949), *acq.*, 1949-1 C.B. 3.
30. *See* Treas. Reg. § 1.162-7(b)(2).
31. 383 U.S. 687 (1966).
32. 372 U.S. 39 (1963), *on remand*, 245 F. Supp. 383 (N.D. Cal. 1965).
33. *INDOPCO v. Comm'r*, 503 U.S. 79 (1992).

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Beneath Contempt

Having written three columns in a row about new rules, my thoughts naturally, albeit perversely, turned to breaking rules. This led me to consider penalties for breaking rules, and thus my next column topic was revealed. Having written in the past about case dismissals as penalties for a variety of conduct, I thought I would look at penalties that were a little more personal: contempt, and sanctions for frivolous conduct.

The judiciary in New York State possess a variety of mechanisms to punish attorneys and non-attorneys who, in word or deed, violate court orders or rules of conduct, whether inside or outside the courtroom. One mechanism is a court's power to punish for contempt. Another is the sanction power pursuant to Rule 130-1.1.[1] Never one to miss an opportunity to write two columns rather than one,[2] I will address contempt in this issue, and sanctions in the next.

A threat to be held in contempt must be taken seriously. The penalties, both personal and professional, can be quite serious. There will be occasions where attorneys, parties, witnesses, and/or jurors behave in such a way that a contempt finding is a foregone conclusion, and a number of cases illustrate this. There will also be occasions when a reviewing court determines, quite properly, that a contempt finding should be vacated for a mistake of fact or law, a scenario also illustrated in a number of cases. And, finally, there will be times when a court abuses its contempt power, illustrated most recently, and dramatically, in the Court of Appeals recital of facts in *In re Duane A. Hart*. Unfortunately, space limitations in this column militate against a review of the case. Nonetheless, everyone in our profession should read the decision.[3] In the rare instance where judicial abuse of the contempt power occurs, an attorney's steadfastness may be sorely tested in seeking redress.

The contempt power's origin and continued vitality, together with an in-depth review of the law in New York, is set forth in *Contempt and the Courtroom*.[4] A judge's authority to punish contempt is inherent in, and an integral part of, a court's fundamental power. "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution."[5]

New York provides two statutory bases for a presiding court to impose contempt: one civil,[6] the other criminal.[7] Some acts may only constitute civil or criminal contempt, while other acts may constitute both.[8] This was the case where an attorney, while representing herself *pro se* in a matrimonial proceeding, forged a judge's signature on a document.[9] Her actions warranted both a civil and criminal contempt finding.[10] Thereafter, the attorney was disbarred, with one of the three charges sustained by the Appellate Division being the conviction for criminal contempt, a "serious crime" within the meaning of Judiciary Law § 90(4)(d).[11]

Civil contempt empowers a "court of record," in enumerated situations, to "punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced."[12] Courts "not of record" have "such power to punish for a civil contempt as is specifically granted to it by statute."[13] Definitions exist for certain types of conduct subject to a contempt penalty. For example, disruptive conduct is defined as "any intentional conduct by any person in the courtroom that substantially interferes with the dignity, order and decorum of judicial proceedings."[14] The punishment that a court may mete out upon a finding of civil contempt is set forth in, and limited by, the statute. The contempt "must be punished as prescribed" in the Judiciary Law.[15]

Criminal contempt is authorized by Judiciary Law § 750.[16] In addition to the presiding court's contempt power, there exists in the Penal Law the crime of criminal contempt in the second degree.[17] The Judiciary Law empowers a court of record[18] to punish acts set forth in the statute, and "no others."[19] The statute also empowers "the supreme court . . . to punish for a criminal contempt any person who unlawfully practices or assumes to practice law."[20] A proceeding to punish the unlawful practice of law may be commenced on the "court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar association incorporated under the laws of this state."[21]

Punishment for criminal contempt "may be by fine, not exceeding one thousand dollars, or by imprisonment, not exceeding thirty days, in the jail

of the county where the court is sitting, or both, in the discretion of the court."[22] Violations of certain orders of protection are punishable by a term of imprisonment not to exceed three months, and where a person is imprisoned for failing to pay a fine imposed for contempt, he or she must be discharged "at the expiration of thirty days." Except where there has also been sentence for a definite term for the contempt, the 30 days runs from the end of the definite term.[23]

Penalties in excess of those set forth in the statute are not permitted, so that a court's "award of [a] conditional money judgment [in the sum of $48,000], which was tantamount to a fine, was not authorized by Judiciary Law §§ 751 and 773."[24] Similarly, where a finding of both criminal and civil contempt was made by a court, a sentence that included community service and a course of psychiatric treatment was not permitted by statute for either finding (unfortunately, the contemnor had already performed both portions of the sentence):[25]

> We further conclude that the court improperly sentenced defendant to 300 hours of community service and a course of psychiatric treatment. Judiciary Law § 751(1) provides that punishment for criminal contempt "may be by fine, not exceeding one thousand dollars, or by imprisonment, not exceeding thirty days, . . . or both, in the discretion of the court." Judiciary Law § 770 similarly authorizes a fine, imprisonment or both as punishment for civil contempt. Thus, the court was without authority under the Judiciary Law to impose a sentence including community service and psychiatric treatment for either civil or criminal contempt. However, given that defendant has apparently satisfied those parts of his sentence, any issue with respect to them is now moot.[26]

In a limited number of situations, a court may impose contempt summarily, that is, at the time the offense is committed. The Court of Appeals has explained the basis for the summary contempt power: "It is the need for the preservation of the immediate order in the courtroom which justifies the summary procedure – one so summary that the right and need for an evidentiary hearing, counsel, opportunity for adjournment, reference to another Judge, and the like, are not allowable because it would be entirely frustrative of the maintenance of order."[27] A court may exercise summary civil contempt power only when "the offense is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing."[28]

The foundation requirements for a proper summary contempt finding are strictly applied, as a recent Appellate Term case illustrated:

> The circumstances of the present matter, involving a fight in a courthouse hallway, while properly constituting criminal contempt, do not rise to the level at which summary punishment is permitted. By the account of the judge involved, he emerged from his courtroom as the four contemnors, including appellant herein, were being placed under arrest some 40 feet from the courtroom door. In the circumstances, there was no further immediate disciplinary effect that summarily imposing a 30-day jail sentence could have had upon them. Thus, the factors underlying proper exercise of the summary contempt power – the immediate need to restore order in the course of an ongoing proceeding and to uphold the dignity of the court – were absent.[29]

A summary contempt order ordinarily is reviewable only by an Article 78 proceeding.[30] However, in a case where the judge who issued the contempt finding was dead, and the contempt finding was made after a hearing was held and a sufficiently detailed record was made, the Appellate Term has conducted a review on a direct appeal.[31]

For civil contempt "an order must be made by the court, judge, or referee, stating the facts which constitute the offense and which bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor."[32] For criminal contempt, whether or not imposed summarily, "the particular circumstances of his offense must be set forth in the mandate of commitment."[33]

In order for civil contempt, based upon a violation of an order, to lie, the order must be "clear and unequivocal."[34] "To sustain a finding of civil contempt based upon a violation of a court order, it is necessary to establish that a lawful court order clearly expressing an unequivocal mandate was in effect and that the person alleged to have violated that order had actual knowledge of its terms."[35] Accordingly, civil contempt will not lie where the court does "not make a finding that the defendant willfully violated a clear and unequivocal mandate" of the court.[36]

There is a danger in relying on a perceived ambiguity in the terms of a court's mandate to justify not following the terms of the order. If there is ambiguity, clarification should be obtained.[37] "If the appellants and nonparty-appellants believed that the mandate was so ambiguous in failing to precisely delineate what they were required to disclose, they should have sought a clarification from the court before deciding to take no action whatsoever."[38]

Where the order is not clear and unequivocal, contempt will not lie:[39]

> The language in the so-ordered stipulation dated January 30, 2003, did not constitute a clear and unequivocal mandate. The stipulation did not direct the defendant to forward, complete, or execute any forms and/or authorizations within 10 days. Indeed, the Supreme Court did not make a finding that the defendant willfully violated a clear and unequivocal mandate of the Supreme Court.[40]

Where the court makes a mistake of fact of a fact central to the contempt finding, the contempt finding will be reversed. This was the result where a court based a contempt finding upon an order entered in open court on a particular day, when, in fact, no order was so entered on that date.[41]

Where a party seeks to hold another in civil contempt, the burden of proof is on the party seeking contempt. In order to prevail, "the movant must demonstrate that the party charged violated a clear and unequivocal court mandate, thereby prejudicing a right of another party to the litigation. . . . The contempt must be proven by clear and convincing evidence."[42] If there is no issue of fact raised, a hearing is not required.[43]

Where a party, on papers, establishes, *prima facie*, the contempt of another party or person, due process considerations nonetheless require that an opportunity to contest the accuracy of the supporting affidavits be given.[44]

A court's summary contempt finding concerning an attorney's conduct during *voir dire* and cross-examination was reversed where the attorney's conduct "was not insolent, did not disrupt or threaten to disrupt the proceedings, nor did it destroy, undermine, or tend seriously to destroy or undermine the dignity of the court so as to render the court unable to continue to conduct its normal business in an appropriate way."[45]

It is not just attorneys who get cited for contempt, as prospective jurors have learned. The First Department affirmed a summary contempt finding, and the imposition of a $1,000 fine, where the following exchange with the prospective juror occurred when he was asked if he could be fair and impartial:[46]

> [PETITIONER]: I'm not going to be fair and impartial in this case. I have been held up three times at gunpoint. One time almost identical, sir, to this.
>
> THE COURT: You would judge the case on what happened to you even if you were satisfied he was not guilty, you would vote on what happened to you, right?
>
> [PETITIONER]: I am already looking at him, I think he is a "scumbag."
>
> THE COURT: First of all, that is an insult not only to him, . . . to me, and the other people in the room. What do you do [for] a living?
>
> [PETITIONER]: What does that matter?

After referring to the rules governing decorum within the courts of the First Judicial Department,[47] the First Department affirmed the contempt finding:

> [W]e conclude that petitioner's public and vulgar condemnation of the defendant in a criminal case, "in a very arrogant tone of voice" before the entire prospective jury panel, followed by his defiant behavior in approaching the bench without permission and failing to leave the courtroom despite repeated demands by the court and court officer or officers, constituted contempt.[48]

In another case involving a juror, this time one who refused to return for jury selection, the trial court ordered a jail sentence of four days, noting that the juror was able to "absorb a fine," failed to apologize to the court when offered an opportunity to do so, and managed to both lie and be disrespectful in a letter to the court, concluding: "Respondent neither understands the importance of jury service nor respects the authority of this court."[49]

Attorneys and other participants in judicial proceedings can, from time to time, stray beyond the bounds of acceptable conduct. Should this happen to you, or a client, a prompt acknowledgment of misconduct, coupled with a sincere apology to the court, will often result in contempt being avoided, or purged. Should pride, or a sense of righteousness (justified or otherwise), prevent apology, request a stay of enforcement and immediately seek review in an Article 78 proceeding, preferably with the help, and independent assessment, of outside counsel. Anyone contemplating a course of action that might result in a contempt finding should heed the admonition of Detective Baretta: "Don't do the crime if you can't do the time." So, make certain to keep your conduct beneath contempt. ■

1. 22 N.Y.C.R.R. § 130-1.1.

2. Thus reducing the telephone calls and e-mails from David Wilkes, the editor of this *Journal*, alternately cajoling and threatening, all goading me to come up with my next submission.

3. 7 N.Y.3d 1, 816 N.Y.S.2d 723 (2006).

4. Lawrence N. Gray, Contempt and the Courtroom (1996).

5. *United States v. Hudson*, 11 U.S. 32, 34 (1812).

6. N.Y. Judiciary Law § 753 ("Jud. Law").

7. Jud. Law § 750.

8. *See, e.g., State v. Rossi*, 18 A.D.3d 982; 794 N.Y.S.2d 721 (3d Dep't 2005).

9. *Henning v. Ritz*, 22 A.D.3d 524, 801 N.Y.S.2d 768 (2d Dep't 2005).

10. *Id.*

11. *Henning v. Ritz*, 32 A.D.3d 161, 819 N.Y.S.2d 540 (2d Dep't 2006).

12. Jud. Law § 753(A).

13. Jud. Law § 753(B).

14. 22 N.Y.C.R.R. § 604.1(c).

15. Jud. Law § 754.

16. Jud. Law § 750.

17. N.Y. Penal Law § 215.50.

18. "A court not of record has only such power to punish for a criminal contempt as is specifically granted to it by statute and no other." Jud. Law § 750(C).

19. Jud. Law § 750(A).

20. Jud. Law § 750(B).

21. *Id.*

22. Jud. Law § 751(1).

23. *Id.*

24. *Corrado v. Corrado*, 18 A.D.3d 599, 795 N.Y.S.2d 616 (2d Dep't 2005) (citations omitted).

25. *Data-Track Account Servs., Inc. v. Lee*, 17 A.D.3d 1115, 1117, 796 N.Y.S.2d 206 (4th Dep't 2005).

26. *Id.* (citations omitted).

27. *Katz v. Murtaugh*, 28 N.Y.2d 234, 238, 321 N.Y.S.2d 104 (1971).

28. Jud. Law § 755.

29. *People v. Boston*, 8 Misc. 3d 130(A), 801 N.Y.S.2d 779 (Sup. Ct. App. Term 2005) (citations omitted). *See generally* Jud. Law §§ 750, 755.

30. *Id. See Shockome v. Shockome*, 30 A.D.3d 529, 817 N.Y.S.2d 115 (2d Dep't 2006).

31. *People v. Boston*, 8 Misc. 3d 130(A), 801 N.Y.S.2d 779 (Sup. Ct. App. Term 2005):

> It should be noted that normally summary criminal contempt proceedings are reviewable in a CPLR article 78 proceeding, commenced in the Appellate Division [see CPLR 506], because the record is usually not sufficient to afford proper direct appellate review. In this matter, however, a hearing on the record was held, at which time both the judge involved (who is now deceased) and the respondent made sufficiently detailed statements concerning the circumstances to permit direct appellate review (citations omitted).

32. Jud. Law § 755.

33. Jud. Law § 752.

34. *Somerville v. Somerville*, 26 A.D.3d 647, 809 N.Y.S.2d 642 (3d Dep't 2006).

35. *Id.* at 648.

36. *Vujovic v. Vujovic*, 16 A.D.3d 490, 491, 791 N.Y.S.2d 648 (2d Dep't 2005).

37. *Riverside Capitol Advisors, Inc. v. First Secured Capital Corp.*, 28 A.D.3d 455, 811 N.Y.S.2d 592 (2d Dep't 2006).

38. *Id.* at 457 (citation omitted).

39. *Vujovic*, 16 A.D.3d 490.

40. *Id.* at 491.

41. *Clark v. Clark*, 28 A.D.3d 415, 811 N.Y.S.2d 571 (2d Dep't 2006).

42. *Riverside Capitol Advisors, Inc.*, 28 A.D.3d at 456.

43. *Id.* at 455.

44. *Id.* 28 A.D.3d 455. *See Lutz v. Goldstone*, 31 A.D.3d 398, 819 N.Y.S.2d 64 (2d Dep't 2006).

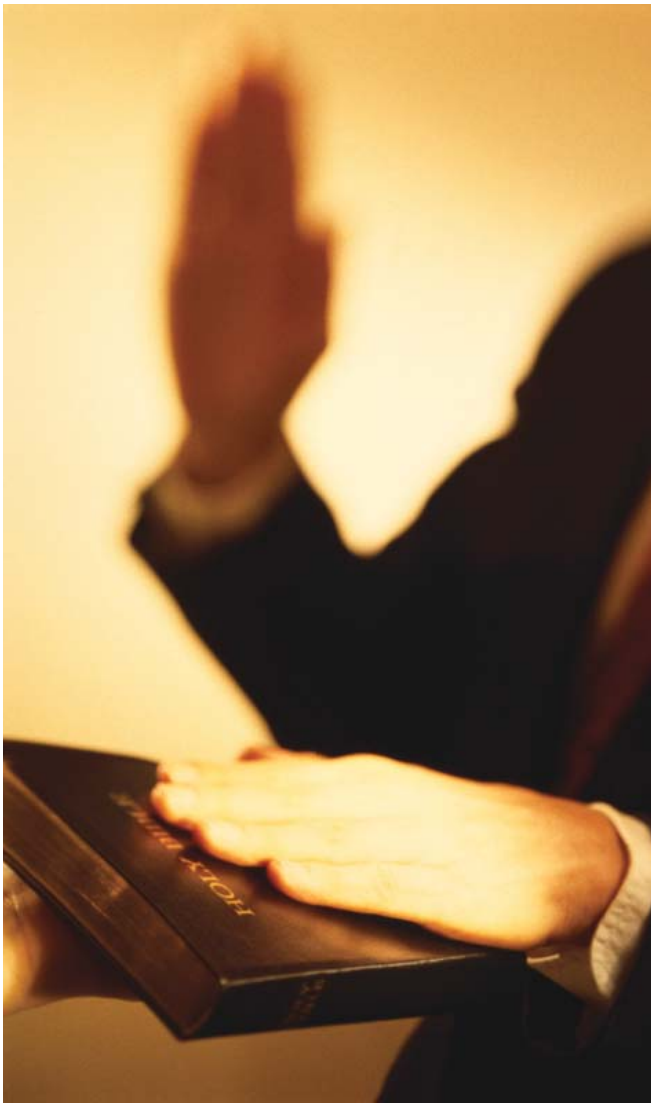
45. *Greenberg v. Starkey*, 20 A.D.3d 419, 420, 797 N.Y.S.2d 307 (2d Dep't 2005).

46. *Caruso v. Wetzel*, 33 A.D.3d 161, 161, 818 N.Y.S.2d 506 (1st Dep't 2006).

47. 22 N.Y.C.R.R. § 604.2(a)(1).

48. *Caruso*, 33 A.D.3d at 164.

49. *In re Pringle*, 6 Misc. 3d 1025(A), 800 N.Y.S.2d 355 (Sup. Ct., N.Y. Co. 2005) (McLaughlin, J.).



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Better Expert Disclosure in New York? Change Outdated CPLR 3101(d)

By Steven A. Stadtmauer

The Legislature crafted the expert witness disclosure rule, CPLR 3101(d), to provide for adequate and thorough trial preparation and conservation of judicial resources through fostering early settlement. Requiring complete expert disclosure would discourage the parties from asserting unsupportable claims or defenses.[1] As enacted, however, the statute is ineffective at eliciting adequate disclosure and in alleviating heavily burdened court dockets. The plaintiffs' personal injury bar effectively lobbied to prevent statutorily prescribed timeframes for disclosure of expert testimony, and the resultant ambiguous and inconsistently imposed time limitations have nearly eviscerated any gains achieved by the statute.[2]

Arguably, there exists sufficient precedent to warrant revisiting CPLR 3101(d) and supplementing it with language that would serve to compel adversaries and their experts to give up the goods well enough in advance of trial to be useful. The statute, in its current form, leaves parties no recourse from having to aggressively seek amended or supplemental disclosures, which are usually insufficient to obtain enough detailed information in a timely fashion. As careful consultation with a party's own experts is required in order to evaluate the ultimate admissibility of adverse expert testimony under New York's application of the *Frye* "general acceptance" standard,[3] litigants often must resort to early summary judgment motions or late motions *in limine* in an effort to test the adverse expert's theories. However, recent appellate decisions interpreting CPLR 3212(a) have made the motions *in limine* route less feasible and the summary judgment motion almost mandatory, thus lending even more support for a legislative overhaul.

Expert Identification

Under the heading "Trial preparation," CPLR 3101(d) provides the extent of statutory requirements for expert disclosure. "Upon request," we are ambiguously instructed,

> each party shall identify each person upon whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each

expert witness and a summary of the grounds for each expert's opinion.[4]

Much to the chagrin of the requesting party, the language provides no guidance as to how soon after the demand the disclosing party must provide such information. Looking to the minimum response times for deposition notices, interrogatories and notices to admit, at least one commentator has suggested that 20 days is reasonable.[5] However, no minimum timeframe for the disclosure is articulated. While often addressed in a preliminary conference order, the requirements imposed may be equally vague and futile, commonly mandating disclosure only 30 days in advance of trial.[6] Given that anticipating the "real" date of a trial in many counties – particularly downstate – is more an art than a science, such deadlines are rather ambiguous and do little to effectuate efficient trial preparation.[7]

Precisely *what* constitutes disclosure in "reasonable detail" is also left open to interpretation. Since the CPLR only permits further disclosures, such as detailed written reports or depositions, upon a showing of "special circumstances,"[8] practitioners must insist on the maximum disclosure in the first instance. Cases interpreting the parameters of these disclosures are sparse and provide little guidance.

In one of the earlier decisions following the 1985 implementation of CPLR 3101(d), the court was asked to pass upon the sufficiency of the expert disclosures of the defendant hospital in a medical malpractice action.[9] The court noted that, while the plaintiff had provided specific and detailed disclosures, the defendant hospital had failed to provide a summary of the grounds of its expert's opinions beyond a general denial of liability. The court held that "[t]he information provided is so general and nonspecific that the plaintiff has not been enlightened to any appreciable degree about the content of this expert's anticipated testimony." The court went on to acknowledge an inability to "delineate the exact contents of a satisfactory disclosure," but noted that the statute requires, at a minimum, "that any reply must represent a good-faith effort to comply with the statutory mandates." This is, of course, a very subjective standard.[10]

In *Chapman v. State*,[11] a medical malpractice case from the Third Department, the plaintiff served an expert disclosure identifying the plaintiff's treating physician and stating that he was expected to testify as to the plaintiff's "'current physical condition,' 'the effect of the injuries that were inflicted upon him . . .' and that it was 'anticipated' that the physician would 'describe the nature and extent of the injuries that were sustained.'"[12] Citing *Saar*, the court found this nebulous disclosure inadequate.

Other decisions have addressed such inadequacies as well. For example, in *Brossoit v. O'Brien*, an action for injuries sustained in a car accident, the plaintiff served a CPLR 3101(d) statement containing an economic expert's damages opinion, but failed to provide specific grounds for or the underlying methodology of the opinion. The defendant moved to compel the plaintiff to provide the missing information. Recognizing the deficiency in the plaintiff's expert disclosure, the court held that the plaintiff was required to provide the defendant with specific grounds for the expert's opinion, including details regarding the methodology used by the expert in forming the opinion:

> [P]laintiffs did not adequately comply with CPLR 3101(d)(1)(i) in merely disclosing their economist's opinion of the value of [the decedent's] lost services. The statute's requirement that a party disclose the "substance of the facts and opinions on which each expert is expected to testify . . . and a summary of the grounds for [his] opinion" will not be satisfied with a mere statement of the ultimate conclusion reached. In our view, defendants are entitled to a statement as to what services were considered in the estimate, how the alleged losses were computed and the manner in which the losses were converted to present value.[13]

Even more maddening is the complete lack of legislative guidance as to the proper sanction for a party's failure to disclose. The reporters are replete with cases supporting just about every possible remedy, from preclusion and summary judgment to almost no sanction at all.[14] The majority of the cases, however, adhere to the traditional considerations supporting the imposition of sanctions, focusing on whether the failure to disclose was willful or intentional and whether the adversary has been prejudiced by the failure to disclose.[15]

In medical malpractice and other scientifically based actions, expert testimony is often the "single most important element of proof."[16] Obtaining as much information about the opposing experts' opinions as quickly as possible is crucial. In light of a flurry of recent cases interpreting the admissibility of expert – particularly medical – evidence, parties seeking to gain an advantage must explore all available options to acquire the information. A disclosure obtained only a few short weeks before trial – or, in a worst-case scenario, only a few days before trial – is of limited utility. The sooner the information is obtained, the sooner it may be evaluated, tested and, where lacking, challenged.

Frye-ed

New York law requires expert testimony to be scientifically valid and able to withstand scrutiny under the *Frye* standard.[17] "The long-recognized rule of *Frye* . . . is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field."[18] In *People v. Wesley*, the Court of Appeals unanimously held that scientific evidence is admissible only if it is based upon a principle that is "sufficiently established" to be

considered "reliable within the scientific community generally."[19] The party advancing the expert scientific testimony bears the burden of establishing general acceptance.[20] Where an expert's testimony is challenged and shown to be neither recognized nor accepted, the testimony will be disallowed.[21] This commonly occurs when the proponent cannot adduce evidence sufficient to show that the causation theory has gained general acceptance in the scientific community after the party seeking to exclude the testimony has made a prima facie showing that it has not.[22]

Not all peer-reviewed literature is created equal.

The *Frye* test emphasizes "counting scientists' votes," finding a scientific principle to be "generally accepted" only if there is a "consensus" "by the majority of the experts in the field."[23] "So long as an expert has utilized techniques and procedures that have been approved by a majority of the experts in the field in arriving at his opinion, that opinion is admissible in evidence without [requiring] a separate judicial determination regarding the validity or acceptance of the operative scientific principles."[24] However, courts have consistently held that "[a]bsent any [cited] controlled studies, clinical data, medical literature, peer review or supportive proof indicating that [the expert's] theory was generally accepted by the relevant medical community," the theory will be excluded.[25] Thus it is important to know precisely which of these items the adverse expert relies on, or ignores.

A key factor in determining the issue of general acceptance is whether the theory has been tested, since an untested hypothesis cannot possibly have "'gained general acceptance' in its specified [scientific] field."[26] Experts' own assurances that their opinions are valid are legally insufficient – validation through "the scrutiny of fellow scientists" is required.[27] While peer review and publication alone do not establish general acceptance, "a complete failure to publish in a peer reviewed scientific journal would be highly relevant" to show a lack of general acceptance.[28]

While long recognized and distinguished by federal courts in toxic tort and product liability actions,[29] only recently have New York courts begun to specifically address the twin requirements of "general" and "specific" causation. Decisions from both the First and Second Departments in 2005 have explained the distinction. Proof that the subject toxin or substance is capable of producing the alleged injury is referred to as general causation. Specific causation, demonstrating the probability that the toxin caused a particular plaintiff's illness, involves weighing the possibility of alternative causes of the injury.[30] An essential element of such proof is a review of the relevant scientific literature.[31]

As far as causation is concerned, not all peer-reviewed literature is created equal. In *Heckstall v. Pincus*,[32] a pharmaceutical product liability action, the plaintiff alleged that the decedent's ingestion of two tablets of bupropion[33] – a subtherapeutic dose – caused her fatal heart attack. Without any published literature directly linking the drug to the alleged injury, the plaintiff pointed to various listings "found in the Canadian Adverse Drug Reaction Letter, reports of the British regulatory body MCA and the Center for Drug Evaluation and Research" to support his theory of liability. The First Department determined that these assertions, as well as other observational studies listed by the plaintiff, "must be classified as unverified listings and reporting of adverse reactions" and "such observational studies or case reports are not generally accepted in the scientific community on questions of causation."[34]

Similarly, in *Selig v. Pfizer*, a case involving allegations of product liability against the erectile dysfunction drug Viagra®, the plaintiff's expert opined that Viagra had caused the plaintiff's heart attack. The trial court ruled that "the conclusion reached and methodologies utilized by [the plaintiff's expert] are not generally accepted in the scientific community."[35] In affirming summary judgment for the defendant, the First Department agreed with the trial court that the plaintiffs' expert's testimony at a pretrial *Frye* hearing failed to demonstrate general acceptance in the scientific community:

> In the absence of any clinical data supporting their expert's theory that there is a causal link between the use of the drug Viagra and heart attacks in men with preexisting coronary artery disease, it was incumbent upon plaintiffs to set forth other scientific evidence based on accepted principles showing such a causal link.[36]

The plaintiff's expert in *Selig* had attempted to link Viagra with heart attacks in men with preexisting coronary artery disease by showing that Viagra causes a small drop in blood pressure and an increase in heart rate, but failed "in the absence of evidence showing that such changes could contribute to a heart attack in persons with coronary artery disease."[37] A study purporting to show "the deleterious effects of a drug related to Viagra known as milrinone was not relevant where there was no showing that the effect of milrinone was the same as that of Viagra."[38] While the plaintiff also attempted to convince the court of the relevance "of a study that indicated that Viagra use might cause deleterious cardiac consequences based on studies of responses in human tissue samples," the court found that "it was not sufficient

to support a finding that his conclusion that a causal link exists was based on generally accepted principles, where the study relied on failed to conclude that such a link existed, but only that enough evidence was presented to warrant further research."[39] Finally, the court found that the plaintiff's expert cited a consensus document of the American Heart Association and the American College of Cardiology, which "showed, at best, support for the conclusion that persons with active coronary ischemia had not been adequately studied prior to marketing of the drug" but that "[i]t did not demonstrate a causal effect between ingestion of the drug and heart attacks in this population."[40]

Compare these First Department decisions to one more recently handed down in the Second Department. *Zito v. Zabarsky* involved allegations that the defendant physician departed from accepted medical practice by prescribing an excessive dose of the cholesterol-reducing drug Zocor®, causing the plaintiff to develop the autoimmune condition polymyositis.[41] Shortly after she began taking an 80-milligram dose of the drug, the plaintiff experienced weakness, pain in her joints and shortness of breath.[42] In support of her claims, the plaintiff's experts cited only a single reference in the medical literature to support their theory, a 1997 case study from the medical journal *Lancet* documenting the history of a patient who had developed polymyositis, said to be induced by a 20-milligram dose of simvastatin, the generic name for Zocor. Finding that "the *Frye* test could not be satisfied without medical literature which expressly reported a connection between an excessive dose of Zocor and the onset of the disease," the trial court precluded the expert and granted judgment to the defendant as a matter of law.[43]

Not so fast, ruled the Second Department, reversing judgment for the defendant. The appellate court agreed that the theory was a novel one, but added that the trial court had erroneously "believed that the *Frye* test could only be satisfied with medical texts, studies, or other literature which supported the plaintiff's theory of causation under circumstances virtually identical to those of the plaintiff."[44] The *Frye* test was held to be "not that exacting" and the testimony was admitted.[45]

Is there a split in the Departments on the evaluation of or requirements for scientific literature supporting expert opinions? Probably not. In *Selig*, the plaintiff's expert pointed only to a chemical analogy involving a *similar* pharmaceutical, and not the drug at issue; in the *Heckstall* case, the plaintiff's experts had apparently relied solely on unverified case reports, some of which were not even peer-reviewed. The plaintiff's experts in *Zito*, however, had pointed to what the court refers to as "other scientific evidence based on accepted principles showing such a causal link."[46] While the sufficiency of such "other scientific evidence" was clearly challenged by the defense, and the Second Department appears to be taking a slightly

more permissive stand on the issue, the importance of learning and evaluating the scientific bases for a disputed opinion cannot be questioned or underestimated.[47]

There also appears to be some inconsistency with respect to the methodology utilized by the plaintiff's expert in *Zito*, the analysis of the "dose/response relationship." This scientific theory holds that both the beneficial and/or harmful effects of a drug will be increased with increased dosages.[48] The Second Department accepted testimony based on this theory in *Zito*, yet rejected similar testimony the year before in *Parker v. Mobil Oil Corp*. In that case, the Second Department held that the experts of a gas station attendant exposed to toxic benzene had not "articulated with any specificity the level of benzene to which the plaintiff was exposed."[49] Without such quantification, the plaintiff's expert could not connect the exposure to the injury.[50] The plaintiff in *Zito* also could not precisely identify the dose required to cause the injury; the testimony was nonetheless accepted.[51]

More recently, the First Department appears to be leaning toward the more non-specific approach embraced in *Zito*. In *Nonnon v. City of New York*, a mass-tort action for injuries resulting from exposure to toxic substances in a landfill, the plaintiffs' experts could not specify the amounts of exposure of each plaintiff to the alleged toxins.[52] The court, recognizing that "no scientist could make an accurate measurement of the doses of the [toxins] to which these plaintiffs were exposed," determined that such a requirement would be too restrictive.[53] Addressing a vigorous dissent focused on the lack of establishment of the dose/response threshold, the majority stated that "if the dissent had its way, nearly all plaintiffs suffering the ill effects, some lethal, of environmental contaminants would be barred from obtaining redress from those responsible."[54] Less emphasis appears therefore to be placed on quantifiable science.

The Court of Appeals also recently addressed this issue when it took up *Parker*. The Court rejected the Second Department's requirement that the amount of toxic exposure be quantified exactly, but concluded that the experts had failed to demonstrate the causation necessary to defeat summary judgment. Citing federal precedent, the Court found that "it is not always necessary for a plaintiff to quantify exposure levels precisely . . . provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community."[55] Hardly a definitive statement. The lesson to be learned is to know the court, know the science, and, of critical importance, to know the adversary's experts. The case will likely turn on what details the attorney is able to elicit, or those that the adversary is unable to provide.

Motion *In Limine* Drawbacks

So how, exactly, does an opposing party challenge the admissibility of the expert's testimony when CPLR 3101(d) does not require such detailed information to be disclosed? Obviously, the scientific feasibility of the testimony cannot be evaluated until the disclosure is received. But when it is received on the veritable eve of trial, can it be effectively challenged? One previously popular method is through the motion *in limine*. Motions *in limine* seek to have the admissibility of anticipated evidence ruled upon by the presiding judge in advance of the trial.

While a motion made at any time would arguably require the same amount of detail, it would be wise to avoid doing so at the very same time that the judge is hurrying attorneys through jury selection.

Several problems arise. First, almost as a rule, motions *in limine* are not decided until immediately before, or sometimes during, the trial. This severely limits their effectiveness as a vehicle for keeping out an adversary's questionable evidence. It also means that attorneys must otherwise prepare for trial, often starting this process even before receiving an adversary's expert disclosures. Furthermore, despite the Individual Assignment System in place in New York courts, in many counties the trial judge is not likely to be the same judge that has shepherded the action along from inception. A motion *in limine*, therefore, will require you to educate a new judge who is unfamiliar with either the facts or the applicable law. While a motion made at any time would arguably require the same amount of detail, it would be wise to avoid doing so at the very same time that the judge is hurrying attorneys through jury selection.

Second, although adequate precedent exists,[56] courts seem reluctant to convene *Frye* hearings. The sufficiency of the basis of an expert's opinion is often viewed as going to the weight to be accorded to the evidence. Attempts to limit the testimony have been found invasive upon the province of the jury as the designated fact finder.[57] Courts may also be loath to hear the expert testimony twice – once at the pretrial hearing and again at trial – reasoning that a limiting instruction to the jury will sufficiently thwart prejudice should the testimony ultimately need to be excluded.

Finally, the trial court's decision may not be appealable. Decisions on such motions have been held to be "advisory rulings" and not appealable. Only rulings that

limit the scope of issues to be tried, thus affecting the merits and substantial rights of the parties, are considered tantamount to summary judgment and appealable.[58] Courts have held that a motion *in limine* is an inappropriate vehicle for dismissal of a claim or defense.[59] In this procedural version of a catch-22, attorneys may be overly successful. If the adversary's cause of action hinges upon expert testimony, an application for dismissal will be considered one for complete or partial summary judgment, and a late one at that. The trial court is prohibited from dismissing the case at this late stage.[60]

A line of cases holds that where a motion seeks to preclude evidence such that "if the requested order was issued, it would require outright dismissal," such a motion "is, in reality, in the nature of one for summary judgment," even if not denominated as such.[61] The somewhat punitive response for the late filing of such a motion is to require the parties to go forward with the expense of a trial whose outcome is certain, even in the face of a party's clear entitlement to summary judgment.[62] This is a counterproductive result, especially when the objective of the motion *in limine* was to facilitate early resolution.

Summary Judgment: Move Early and Often

Resourceful practitioners have long used the carefully crafted summary judgment motion as a tool for obtaining necessary expert discovery that would otherwise be unavailable. Opposing such a motion requires the adverse party to "lay bare" its case through supporting affidavits. This roundabout method of drawing out the identity of an otherwise well-concealed expert is simultaneously used as a device to commit the adversary to a theory of the case, thus creating an opportunity to test and exploit weaknesses in the case well in advance of trial. However, unless the Legislature fixes the problem, without a timely motion for summary judgment, parties will be forfeiting their final opportunity to obtain accelerated judgment short of trial.

The CPLR permits the filing of a summary judgment motion in any action at any time after issue has been joined.[63] However, with the 1997 amendment to CPLR 3212(a), the individual court may set a deadline after which no such motion may be filed.[64] This deadline may be no earlier than 30 days after the note of issue is filed and, although it may theoretically extend indefinitely, the rule sets a default deadline of 120 days after filing the note of issue.[65] Since the amendment of the rule, courts have routinely incorporated deadlines ranging from 30 to 90 days in preliminary conferences or other initial scheduling orders.[66] A late filing may be excused by the court only "for good cause shown."[67]

A plaintiff's summary judgment motion must be supported by affidavits, admissions, deposition transcripts and any other evidence showing that "there is no defense to the cause of action or defense has no merit."[68] The movant must show that "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."[69] The motion requires the parties to lay bare their proof; uncontroverted facts are deemed admitted. The court assumes that any evidence or facts not submitted or pointed out by the parties are immaterial.

Much has been written on the precise standard to be applied and the court's role in deciding such motions (*i.e.*, issue finding versus issue determination, etc.). It is clear, however, that the evidence submitted by the parties for consideration by the court must be in *admissible* form. In other words, the court is charged with determining the admissibility of the evidence as part of its summary judgment determination. This, of course, extends to expert opinion evidence. The court must analyze whether all submitted expert evidence satisfies the *Frye* standard of general acceptance.

This procedure was addressed approvingly by the First Department in *Heckstall v. Pincus*. The defendants, a pharmaceutical manufacturer and prescribing physician, moved for summary judgment dismissing the plaintiff administrator's wrongful death product liability claims. In support of its motion, the manufacturer submitted the affidavit of its medical expert establishing that the drug at issue had been approved since 1997, that its safety

had been repeatedly demonstrated in clinical studies and that there was no evidence that it could cause either the decedent's injury or the type of injury alleged.[70] The court held that "[s]uch evidence warranted the granting of summary judgment in favor of the defendants, unless plaintiff submitted scientific evidence sufficient to raise an issue of fact as to whether his theory of causation has gained general acceptance in the scientific community."[71] The plaintiff failed to do so and the action was dismissed.[72]

Parties face certain risks when filing such a motion. To begin with, they must commit to disclosing an expert or experts in advance of their adversary. The element of surprise will be lost. This may be a serious and legitimate concern, particularly in the medical, dental and podiatric malpractice arena, where parties may keep the identity of their experts secret until trial.[73] While the widespread use of electronic databases to identify experts has essentially eliminated any possibility of truly surprising an adversary, any advantage is not readily relinquished.[74]

Furthermore, an affidavit from each expert must be submitted. If the summary judgment motion is truly used as a discovery device, the affidavit need only be sufficiently detailed to state a prima facie case upon which the court could grant the motion in the unlikely event of a default by an adversary; some ammunition may still be held in reserve. The adversary, however, will not have this luxury since opposing the motion requires the respondent to "lay bare" the proofs in the expert's affidavit. Holding anything back creates the significant risk of the court determining that the opposition papers fail to sufficiently rebut the moving expert's affidavit, and thus deciding the issue as a matter of law. As indicated in *Heckstall*, the motion court is charged with evaluating the sufficiency of the scientific evidence presented at the summary judgment stage. If it's not in the affidavit, and the court does not order a *Frye* hearing, the court will not consider it. Worse yet, if the eventual decision is appealed – as such decisions frequently are – the appellate court will be unable to consider matters or opinions not before the motion court and thus not in the record.[75]

One final note of caution: Experts' opinions submitted in connection with summary judgment motions have been precluded for the failure to provide a 3101(d) disclosure statement.[76] Therefore, one should exercise caution and serve the disclosure concomitantly with the motion. Since an expert has already prepared an affidavit, such a statement should be easy to draft.

Conclusion

In the absence of clear, consistent standards for expert disclosure, "trial by ambush" still prevails in New York. Complete expert opinions must be aggressively pursued as soon as possible in order to adequately prepare for trial. Given that the required standard disclosures under CPLR 3101(d) may be insufficient to make out a prima facie case, the summary judgment motion remains a useful way to force adversaries to flesh out their theory of the case. It provides the only opportunity and forum to educate the court and test the scientific evidence sufficiently in advance of trial to help evaluate the case and properly prepare for trial. It may also be the only way to take advantage of an adversary's weak expert and thus avoid a trial. However, the Legislature's twin objectives of better trial preparation and thinning court dockets clearly have not been met. ■

1. *Silverberg v. Cmty. Gen. Hosp. of Sullivan Co.*, 290 A.D.2d 788, 736 N.Y.S.2d 758 (3d Dep't 2002); *Deitch v. May*, 185 Misc. 2d 484, 713 N.Y.S.2d 278 (Sup. Ct., Rockland Co. 2000).

2. David D. Siegel, New York Practice 566 (4th ed. 2005); Thomas F. Gleason & Patrick M. Connors, *Search Engine Technology "Overrules" Expert-Witness Laws*, NYLJ, Nov. 21, 2005.

3. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

4. CPLR 3101(d)(1)(i).

5. Patrick M. Connors, McKinney's Practice Commentary, CPLR 3101:29A (2005).

6. *See Marks v. Solomon*, 174 Misc. 2d 752, 667 N.Y.S.2d 194 (Sup. Ct., Westchester Co. 1997).

7. Further undercutting judicial attempts to regulate these disclosures, the CPLR instructs that, for good cause shown, an expert retained "an insufficient period of time before the commencement of the trial" will not be precluded "solely on [the] grounds of noncompliance" with notice requirements. CPLR 3101(d)(1)(i).

8. CPLR 3101(d)(1)(iii). Interestingly, a party may take "full disclosure" of its *own* expert without leave of court. *Id.*; CPLR 3101(a)(3). Since this opens the door to unfettered discovery of the expert by the adversary, it is understandably a seldom utilized exception. CPLR 3101(d)(1)(iii).

9. *Saar v. Brown & Odabashian, P.C.*, 139 Misc. 2d 328, 334, 527 N.Y.S.2d 685 (Sup. Ct., Rensselaer Co. 1988).

10. *Id.* at 334.

11. 189 A.D.2d 1075, 593 N.Y.S.2d 104 (3d Dep't 1993).

12. *Id.* at 1075.

13. 169 A.D.2d 1019, 1020–21, 565 N.Y.S.2d 299 (3d Dep't 1991) (internal citations omitted); *Syracuse v. Diao*, 272 A.D.2d 881, 707 N.Y.S.2d 570 (4th Dep't 2000).

14. *Compare Breen v. Laric Entm't Corp.*, 2 A.D.3d 298, 300, 769 N.Y.S.2d 270 (1st Dep't 2003) *and Grassel v. Albany Med. Ctr. Hosp.*, 223 A.D.2d 803, 636 N.Y.S.2d 154 (3d Dep't 1996) *with St. Hilaire v. White*, 305 A.D.2d 209, 759 N.Y.S.2d 74 (1st Dep't 2003) *and Neel v. Mount Sinai Hosp.*, 196 Misc. 2d 343, 762 N.Y.S.2d 224 (App. Term 1st Dep't 2003).

15. "[P]reclusion for failure to comply with CPLR 3101(d) is improper 'unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party.'" *Young v. Long Island Univ.*, 297 A.D.2d 320, 320, 746 N.Y.S.2d 390 (2d Dep't 2002) (quoting *Shopsin v. Siben & Siben*, 289 A.D.2d 220, 221, 733 N.Y.S.2d 697 (2d Dep't 2001)); *see St. Hilaire*, 305 A.D.2d at 210; *Neel*, 196 Misc. 2d 343.

16. Mem. of State Executive Dep't, 1985 McKinney's Session Laws, at 3024–25.

17. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

18. *People v. Wesley*, 83 N.Y.2d 417, 422, 611 N.Y.S.2d 97 (1994); *see People v. Wernick*, 89 N.Y.2d 111, 117, 651 N.Y.S.2d 392 (1996).

19. *Wesley*, 83 N.Y.2d 422–23 (quoting *Frye*).

20. *See, e.g., Castrichini v. Rivera*, 175 Misc. 2d 530, 669 N.Y.S.2d 140 (Sup. Ct., Monroe Co. 1997).

21. *Lara v. N.Y. City Health & Hosps. Corp.*, 305 A.D.2d 106, 106–107, 757 N.Y.S.2d 740 (1st Dep't 2003) (trial court dismissal upheld where expert could cite no reported case or medical writing that supported his theory).

22. *Selig v. Pfizer, Inc.*, 290 A.D.2d 319, 320, 735 N.Y.S.2d 549 (1st Dep't), *appeal denied*, 98 N.Y.2d 603, 745 N.Y.S.2d 502 (2002) (citing *Wesley*, 83 N.Y.2d at 422); *Oppenheim v. United Charities of N.Y.*, 266 A.D.2d 116, 698 N.Y.S.2d 144 (1st Dep't 1999); *Hammond v. Alekna Constr., Inc.*, 269 A.D.2d 773, 774, 703 N.Y.S.2d 332 (4th Dep't 2000).

23. *Wesley*, 83 N.Y.2d at 438–39 (Kaye, C.J., concurring).

24. *People v. Bethune*, 105 A.D.2d 262, 267, 484 N.Y.S.2d 577 (2d Dep't 1984), *appeal denied*, 64 N.Y.2d 1016 (1985).

25. *Saulpaugh v. Krafte*, 5 A.D.3d 934, 936, 774 N.Y.S.2d 194 (3d Dep't 2004).

26. *Wesley*, 83 N.Y.2d at 422.

27. *Id*. at 439 (Kaye, C.J., concurring).

28. *Castrichini v. Rivera*, 175 Misc. 2d 530, 537, 669 N.Y.S.2d 140 (Sup. Ct., Monroe Co. 1997) (if the methodology is accepted only by "a minority of scientists in the relevant field," that "manifestly negates 'general acceptance'"). *Id.* at 539 n.3.

29. *See* Reference Guide on Epidemiology 336 (2d ed. 2000), reprinted in Reference Manual on Scientific Evidence 479-480 (2d ed. 2005–2006).

30. *Heckstall v. Pincus*, 19 A.D.3d 203, 797 N.Y.S.2d 445 (1st Dep't 2005); *Parker v. Mobil Oil Corp.*, 16 A.D.3d 648, 793 N.Y.S.2d 434 (2d Dep't), *aff'd on other grounds*, 7 N.Y.3d 434, 824 N.Y.S.2d 584 (2006); *Zaslowsky v. J.M. Dennis Constr. Co. Corp.*, 26 A.D.3d 372, 810 N.Y.S.2d 484 (2d Dep't 2006). *See also Duffy v. Bristol-Myers Prods.*, 12 Misc. 3d 1155(A), 819 N.Y.S.2d 209 (Sup. Ct., N.Y. Co., 2006).

31. *Parker,* 16 A.D.3d 648.

32. 19 A.D.3d 203, 797 N.Y.S.2d 445 (1st Dep't 2005).

33. Bupropion is the active ingredient in Wellbutrin® and Zyban®.

34. *Heckstall*, 19 A.D.3d at 205; *Pauling v. Orentreich Med. Group*, 14 A.D.3d 357, 787 N.Y.S.2d 311 (1st Dep't), *leave denied*, 4 N.Y.3d 710, 797 N.Y.S.2d 817 (2005).

35. 185 Misc. 2d 600, 607, 713 N.Y.S.2d 898 (Sup. Ct., N.Y. Co. 2000).

36. *Selig v. Pfizer, Inc.*, 290 A.D.2d 319, 320, 735 N.Y.S.2d 549 (1st Dep't), *appeal denied*, 98 N.Y.2d 603, 745 N.Y.S.2d 502 (2002).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. 28 A.D.3d 42, 812 N.Y.S.2d 535 (2d Dep't 2006).

42. *Id.* at 43.

43. *Id.* at 45.

44. *Id.* at 46.

45. *Id.*

46. *Id.*

47. The experts in *Zito* also relied heavily on the temporal relationship between ingestion and the development of symptoms. As one court has explained, relying on such an association "is a bit like saying that if a person has a scratchy throat, runny nose and a nasty cough, that person has a cold; if, on the other hand, that person had a scratchy throat, runny nose, nasty cough, and wears a watch, they have a watch-induced cold." *Kelley v. Am. Heyer-Schulte Corp.*, 957 F. Supp. 873, 882 (W.D. Tex. 1997), *subseq. app.*, 139 F.3d 899 (5th Cir. 1998).

48. *Zito*, 28 A.D.3d at 46.

49. 16 A.D.3d 648, 652, 793 N.Y.S.2d 434 (2d Dep't), *aff'd on other grounds*, 7 N.Y.3d 434, 824 N.Y.S.2d 584 (2006).

50. *Id.* at 653.

51. *Zito*, 28 A.D.3d at 42.

52. 32 A.D.3d 91, 819 N.Y.S.2d 705 (1st Dep't 2006).

53. *Id.* at 105.

54. *Id.* at 104.

55. *Parker*, 7 N.Y.3d 434.

56. *See, e.g., People v. Wernick*, 89 N.Y.2d 111, 117, 651 N.Y.S.2d 392 (1996) (noting the "need for a *Frye* or *Frye*-like hearing in all instances when a party seeks to present novel scientific or . . . medical evidence"); *Selig v. Pfizer, Inc.*, 290 A.D.2d 319, 735 N.Y.S.2d 549 (1st Dep't), *appeal denied*, 98 N.Y.2d 603, 745 N.Y.S.2d 502 (2002); *People v. Coulter*, 182 Misc. 2d 29, 35, 697 N.Y.S.2d 498 (Dist. Ct., Nassau Co. 1999) (indicating that if "scientific literature or judicial opinions" are insufficient, "the Court must conduct a hearing at which expert testimony will be taken on the issue of general acceptance in the relevant scientific community."); *Drago v. Tishman Constr. Corp.*, 4 Misc. 3d 354, 361, 777 N.Y.S.2d 889, 894–95 (Sup. Ct., N.Y. Co. 2004); *Gallegos v. Elite Model Mgmt. Corp.*, 195 Misc. 2d 223, 226, 758 N.Y.S.2d 777 (Sup. Ct., N.Y. Co. 2003). A *Frye* hearing is appropriately held "where the challenged theory of causation finds no objective support, but instead is based solely upon the expert's own unsupported beliefs." *Marsh v. Smyth*, 12 A.D.3d 307, 312, 785 N.Y.S.2d 440 (1st Dep't 2004) (Saxe, J. concurring). *See also Duffy v. Bristol-Myers Prods.*, 12 Misc. 3d 1155(A), 819 N.Y.S.2d 209 (Sup. Ct., N.Y. Co. 2006).

57. *Marsh*, 12 A.D.3d at 308 (citing *People v. Wesley*, 83 N.Y.2d 417, 422–23, 611 N.Y.S.2d 97 (1994)).

58. *Vaughan v. St. Francis Hosp.*, 29 A.D.3d 1133, 815 N.Y.S.2d 307 (3d Dep't 2006); *Rondout Elec., Inc. v. Dover Union Free Sch. Dist.*, 304 A.D.2d 808, 810–11, 758 N.Y.S.2d 394 (2d Dep't 2003).

59. *Downtown Art Co. v. Zimmerman*, 232 A.D.2d 270, 648 N.Y.S.2d 101 (1st Dep't 1996) ("Plaintiff's motion *in limine* was an inappropriate device to obtain relief in the nature of partial summary judgment"). *But see Parker v. Mobil Oil Corp.*, 16 A.D.3d 648, 793 N.Y.S.2d 434 (2d Dep't), where dismissal was granted upon an *in limine* motion. The Court of Appeals affirmed, 7 N.Y.3d 434, 824 N.Y.S.2d 584 (2006), but did not address the issue.

60. *Brill v. City of N.Y.*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004); *see Miceli v. State Farm Mut. Auto. Ins. Co.*, 3 N.Y.3d 725, 786 N.Y.S.2d 379 (2004).

61. *George Miller Brick Co., Inc. v. Stark Ceramics, Inc.*, 9 Misc. 3d 151, 167, 801 N.Y.S.2d 120 (Sup. Ct., Monroe Co. 2005); *Clermont v. Hillsdale Indus., Inc.*, 6 A.D.3d 376, 773 N.Y.S.2d 901 (2d Dep't 2004); *Downtown Art Co.*, 232 A.D.2d 270.

62. *Brill*, 2 N.Y.3d at 653.

63. CPLR 3212(a). Since additional party discovery may be taken up until a note of issue and certificate of readiness for trial are filed, parties will in most cases await the filing of a note of issue before moving for summary judgment.

64. *Id.*

65. *Id.*

66. All parties seeking summary judgment must move within the limit set by the court; parties cross-moving on timely motions for the same relief are also subject to the same strict time period. *Levy v. Deer Trans. Corp.*, 27 A.D.3d 279, 813 N.Y.S.2d 55 (1st Dep't 2006); *Colon v. City of N.Y.*, 15 A.D.3d 173, 788 N.Y.S.2d 606 (1st Dep't 2005).

67. CPLR 3212(a). *See Perkins v. AAA Cleaning*, 30 A.D.3d 790, 816 N.Y.S.2d 600 (3d Dep't 2006).

68. CPLR 3212(b).

69. *Id.*

70. *Id.*; *Heckstall v. Pincus*, 19 A.D.3d 203, 205, 797 N.Y.S.2d 445 (1st Dep't 2005).

71. *Heckstall*, 19 A.D.3d at 205 (citing *Oppenheim v. United Charities*, 266 A.D.2d 116, 698 N.Y.S.2d 144 (1st Dep't 1999)).

72. The Second Department affirmed such a dismissal in *Zaslowsky v. J.M. Dennis Constr. Co.*, 26 A.D.3d 372, 810 N.Y.S.2d 484 (2d Dep't 2006).

73. CPLR 3101(d)(1).

74. Gleason & Connors, *supra*, note 2.

75. Summary judgment decisions are interlocutorily appealable as of right under CPLR 5501(a)(1). This is a huge advantage not available in the federal courts or most other jurisdictions. As discussed above, a ruling on a motion *in limine* may not be appealable at all.

76. *Gralnik v. Brighton Beach Assocs., LLC*, 3 A.D.3d 518, 770 N.Y.S.2d 633 (2d Dep't 2004) (court may reject affidavit of purported expert, "since the plaintiff failed to identify the expert in pretrial disclosure, and served the affidavit after filing a note of issue and certificate of readiness attesting to the completion of discovery"); *Dawson v. Cafiero*, 292 A.D.2d 488, 489, 739 N.Y.S.2d 190 (2d Dep't 2002) (same).

BY WILLIAM H. MANZ

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Researching New York Records and Briefs

Appellate briefs are a well-known font of legal arguments, relevant cases, and other sources of authority. For many practitioners, briefs from Appellate Division cases are particularly valuable because they constitute a huge body of material covering the types of issues often encountered in everyday practice. Often, accompanying the briefs is another valuable resource, the court record, which provides a detailed history of the case, including such materials as the complaint, answer, affidavits, exhibits, trial transcript, verdicts, and judgments. Records and briefs from both the New York Court of Appeals and the Appellate Division are available for cases decided since their establishment in 1847 and 1896 respectively. Depending on the age of the case, the court record and brief may be available online or on microform, in hard copy or microform, or only in hard copy.

Electronic

Online databases containing New York appellate briefs are a relatively recent development. Unlike United States Supreme Court briefs, there is no Web site offering free access, and the researcher is limited to subscription databases provided by LexisNexis and Westlaw. Currently, Westlaw provides selected appellants', respondents', reply and amicus briefs for the Court of Appeals since 1992 in the NY-COA-BRIEF database and for the Second Department since 1997 in the NY-APP-BRIEF database. The LexisNexis NYMTBR file includes selected Court of Appeals and Appellate Division briefs. The oldest Court of Appeals briefs date from 1999. The database's limited back file of Appellate Division briefs begins with 1998 for the First and Second Departments, 2005 for the Third Department, and 2001 for the Fourth Department. Neither Westlaw nor LexisNexis includes the court records.

Microform

Court of Appeals records and briefs for cases published in the second series of *New York Reports*, and in volumes 265 through 309 of the first series, have long been available on microfilm produced by the Hein Co.; since the start of the third series, the Hein set has been published on microfiche. Court of Appeals records and briefs for cases decided since 1996 are also available on fiche from West Court Record Services. Both sets provide appellants' and respondents' briefs as well as any reply or amicus briefs. The court record accompanies the briefs for virtually all non-confidential civil cases, but usually not for criminal actions. The fiche for both companies is produced from originals received from the Court of Appeals, and ships on a monthly basis.

Appellate Division records and briefs from all four departments were published on microfilm by Hein from 1972 to 1984 (38 A.D.2d–99 A.D.2d). Since 1984, they have been reproduced on microfiche in a set that is now published by West Court Record Services. In addition to appellants' and respondents' briefs, the set will include any pro se and reply briefs, and appendices. Material currently appears on fiche within 30 days of receipt. The fiche set is produced from hard copy received by West from the court clerks on an ongoing basis, except for the Fourth Department, which sends its materials at the end of the year. As with the Court of Appeals, the court record accompanies the briefs for virtually all non-confidential civil cases, but generally not for criminal actions.

Cases which are excluded from the Appellate Division set include matrimonial actions covered by § 235 of the Domestic Relations Law, cases arising in family court, youthful offender adjudications, those that identify the victims of sex crimes, and cases sealed by court order or that are deemed confidential by the chief clerk of each Department. Thus, for example, no documents are provided in an attempted rape/sexual abuse case, *People v. Pitman*.[1] The Appellate Division microfiche set contains only a blank fiche, marked "Confidential Case," and the case number.

Locating a given Court of Appeals brief on microfilm or microfiche is a simple matter because it requires only the knowledge of the relevant case's official citation. This is not the case with the current Appellate Division fiche set. Instead of being indexed by official citation, or the date of decision, each case is assigned a multi-digit number under a system originally instituted by the Office of Court Administration. The first number identifies the department, and the next two the year; the next four are unique to the case, and indicate in what order the case was argued in a given year. For example, the case of *Buffalo Bills v. Slominski*,[2] the 312th case argued that

year, was assigned the fiche card number "4-84-0312."

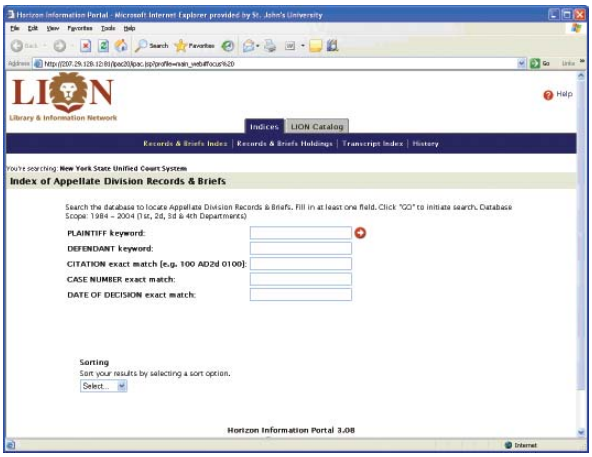
Formerly, the only way to locate these numbers was by using paper-bound indexes. Fortunately, these have now been replaced with an online index available on the Unified Court System Web site <http://www.courts.state.ny.us/lawlibraries/lion/index.shtml>. Maintained by the Court System's Library and Information Network (LION), Appellate Division cases first appeared online in 2000. Cases are searchable by plaintiff or defendant name, the *Appellate Division Reports 2d* citation, case number, and date of decision. The index database contains information on over 200,000 Appellate Division cases. Coverage begins with 1984, but is comprehensive only from 1990 to 2004; backfilling for older cases is still ongoing.

Microform versions of Court of Appeals records and briefs are widely held by law school, bar association, and court libraries throughout the state. Distribution of the Appellate Division briefs set is not as extensive, and includes mainly supreme court libraries, along with a few other selected locations, including the libraries of the New York County Lawyers' Association and the Association of the Bar of the City of New York, which have the fiche for all four departments. Another comprehensive collection is located at the State Library in Albany, which has microform for most Court of Appeals cases since 1956, and Appellate Division cases beginning with 54 A.D.2d. For a fee it will provide either paper copies or duplicate fiche. Many of the court libraries hold only the Appellate Division fiche for their own department, and sometimes also an adjoining one. However, complete sets are held by the supreme court libraries located in Erie, Kings, New York, Oneida, Onondaga, Oswego, Queens, Steuben, and Suffolk Counties.

Hard Copy

Researchers will generally only encounter hard copy versions of records and briefs when working with either very recent cases or those predating the mid-1970s. Briefs for cases recently decided by the Court of Appeals are available from the Court, which will ship the originals overnight at the borrower's expense. This service is also available for briefs from recent cases decided by the Third Department. In the First Department, records and briefs from the court's recently decided cases can be checked out overnight from the clerk's office. Since the number of cases decided by the Second Department is so large, briefs from its cases are not retained, but are instead sent back to the court of original jurisdiction. However, if they have not yet been returned, they may be available for onsite copying. The Fourth Department Law Library does not circulate briefs from its recent cases, but for a fee will send photocopies.

Researchers interested in older opinions can reasonably expect to find written briefs for cases decided as far back as the 1850s. By the end of that decade, possibly because of the imposition of time limits on oral argument, "most New York attorneys were submitting written arguments that could stand on their own if necessary,"[3] and by 1860, they had "become a sophisticated, independent argumentative presentation."[4] Hard copy briefs for the older cases are available in thick, bound volumes, usually containing documents from several decisions. These collections take up a considerable amount of space. For example, the State Archives collection of Court of Appeals briefs (1847–1993) consists of 16,856 volumes, and its Third Department collection (1896–1983) contains 7,413. One portion of the New York County Lawyers' Association Library collection of First Department records and briefs (1906 to the early 1930s) is shelved on 10-foot high wooden stacks, and takes up



most of a large, high-ceilinged basement storeroom.

Because of these space considerations, large collections of older records and briefs in hard copy are held by only a small, select group of libraries. This includes the State Library which has records and briefs for the Court of Appeals since 1847 and for all four Appellate Division departments since 1896. Holdings for the Court of Appeals are in hard copy from 1847 to 1956, and for the Appellate Division from 1896 though 53 A.D.2d (1976); materials for later cases are on microfiche. For a fee, the Library will make photocopies; older, bound material will be copied if its condition permits. Researchers wishing to use older materials onsite are requested to call several days in advance.

The State Archives has a collection of hard copy records and briefs which is separate and distinct from that of the State Library. It was compiled by the clerk of the Court of Appeals, and it contains some types of cases (pauper cases, restricted cases, and same-sex marriage cases) not found in other paper sets or in the microfiche edition. The Archives holdings for the Court of Appeals cover cases since the Court's establishment through 1993; it also holds records from the old Court of Errors, between 1784 and 1847. Its collection of Appellate Division records and briefs varies by department. It has Second Department records briefs from 1896 to 1935, and Third Department briefs from 1896 to 1983. For the First Department, it holds only trial transcripts from New York County criminal courts from 1883 to 1927; it has no holdings from the Fourth Department. The Archives provides photocopies of briefs if the condition of the binding and the paper permits copying. The cost of is $.25 per page, the maximum charge permitted by FOIL.

Another comprehensive set of hard copy briefs is held by the New York County Lawyers' Association, which has on-site records and briefs from the Court of Appeals (1920–1940), the First Department (1906–1972), the Second Department (1940–1972), and the Third and Fourth Departments (1950–1972). Currently, the library of the Association of the Bar of the City of New York has briefs for the Appellate Division on site from 1896–1940, and in off-site storage from 1941–1973. Another major source within New York City is the Brooklyn Supreme Court Library which has stored off-site briefs for the Court of Appeals (1869+), the First Department (1929+), the Second Department (1896+), and the Third and Fourth Departments (1929+).

In western New York, a source for Fourth Department records and briefs is the Erie County Supreme Court Library, which has hard copy briefs covering approximately 1946 to 1976. A larger collection is located at the Fourth Department Library in Rochester, which has bound briefs (which it will send overnight) for the First, Second and Third Departments from 1896 through 91 A.D.2d, and for the Fourth Department from 1896–60 A.D.2d, and 103 A.D.2d–309 A.D.2d. In a recent development, the Fourth Department Library's hard copy records briefs holdings are now being entered into the LION online briefs index database. If an older case has been added to the database, the volume number containing the record and brief will be indicated.

Future Developments

In the near future, researchers may have more options in obtaining copies of records and briefs for older cases. West Court Records Services has initiated a microfiche project that will cover Court of Appeals briefs from 1880 to 1934, which it intends to market to law school libraries. The first full volume of *New York Reports* that will be covered is volume 264, with the remainder of the volumes covered in descending order. The initial shipment will also include those cases from volumes 265 and 266 that were not included in the Hein microfilm set, whose retrospective coverage ended with volume 265 (1934). West is also considering producing a searchable DVD containing New York Court of Appeals records and briefs from 1847 to 1934, and briefs from the old Court of Errors back to 1830. In addition to merits briefs, this DVD would include amicus briefs and exhibits, including photos.

There will also be additional sources for records and briefs for current cases. Eventually, Westlaw hopes to expand its Appellate Division coverage to additional departments. In 2007, the William S. Hein Co. is planning to shift its coverage of Court of Appeals records and briefs from its current fiche product to its Hein Online service[5] <http://heinonline.org/front/front-index>, which is available at all New York law schools, the Appellate Division libraries, 14 supreme court libraries, and 40 major law firms. Records and briefs for cases decided in 2005 and 2006 and all new cases will be made available in a searchable pdf format. Hein Online subscribers who so choose will also be able to order preservation rolls of microfilm at the end of a given year. ■

1. 25 A.D.3d 361, 805 N.Y.S.2d 834 (1st Dep't 2006).
2. 104 A.D.2d 740 (4th Dep't 1984).
3. R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 Am. J. Leg. Hist. 482, 522 (1994).
4. *Id*. at 521.
5. Current Hein Online content includes law reviews and other legal journals, treaties and agreements, the *Federal Register* (1936–2006), *United States Reports* (1754–2002), U.S. Attorney General Opinions (1791–1996), selected federal legislative histories, presidential materials, the *Statutes at Large* (1789–2002), and selected classic legal treatises.

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Irregular Migrants and Compensation for Personal Injury: Resolution and Ambiguity

By Jagdeep S. Bhandari

These are heady times for the debate on immigration-related matters, both for specialists and for the policy watchers among the general public. In December 2005, the House of Representatives passed H.R. 4437 (the Sensenbrenner-King bill), which proposed construction of a Berlin Wall-type fence across portions of the U.S.-Mexico border and which would have made the continuing presence of undocumented aliens (referred to as "irregular migrants" or "*migrants irrèguliers*" in the rest of the industrialized world) a felony, along with legislating other draconian enforcement measures.[1]

Meanwhile, in May 2006, the U.S. Senate passed S. 2611, which also authorized construction of a border fence, but which focused on "earned legalization" for the current stock of 11 million to 12 million unauthorized aliens present in the United States, along with additional provisions for guest workers. Proposals for an amnesty for irregular migrants or those in guest worker programs did not satisfy the House. (Apparently, the sponsors of the House bill drew upon the experiences of countries, such as Germany with Turkish *Gastarbeiter* in decades past, and the words of the Swiss author Max Frisch, who wrote, "We asked for workers and we got people.") Ultimately, on the eve of mid-term elections, Congress enacted a bill focusing only on border enforcement (Secure Fence Act of 2006), which was signed into law by President Bush on October 26, 2006. All sides promised further reforms.

Although the states of residence of irregular migrants are increasing in variety, with states such as North Carolina and Nebraska exhibiting large, recent increases in their unauthorized migrant populations, the highest numbers of such persons are still found in California

(2.4 million), Texas (1.4 million), Florida (850,000), and New York (650,000).[2] The choice of state of residence for irregular migrants is no doubt influenced by factors such as the availability of state-funded public benefits for such persons and the prior existence of social or kinship networks. For present purposes, it suffices to observe that, all things being equal, the greater the number of individuals who exist in a particular class, the higher the number of legal controversies involving that class. Add to this the fact that the number of registered automobiles and the state population and work force in New York are at the high end of the spectrum for the nation, it is entirely unsurprising that, among the states, New York has a comparatively large number of incidents jointly involving irregular migrants who are injured (fatally or otherwise) in motor vehicle accidents, or at the workplace in occupational incidents.[3]

While unauthorized migrants might no doubt be reluctant to file suit in the U.S. because of concerns of revealing themselves, the same could doubtless have been said of the plaintiffs in the landmark U.S. Supreme Court decision in *Plyer v. Doe*.[4] In point of fact, there is a surprisingly large and growing number of cases involving irregular migrants seeking compensation in areas such as common law negligence – encompassing motor vehicle accidents and medical malpractice; state workplace statutes such as the New York Scaffold Law; state and federal wrongful death acts; Title VII; cases under federal statutes such as the Fair Labor Standards Act (FLSA); the National Labor Relations Act (NLRA); and good number of cases under state workers' compensation statutes, among others.[5]

Despite the markedly higher population of such individuals in three other states, New York has the largest number of reported cases involving irregular migrants, at least with respect to negligence claims – which are often appended to workplace safety violation claims – including a case decided by the New York Court of Appeals in February 2006.[6] The only other state in which the court of last resort has considered the issue is, somewhat surprisingly, New Hampshire.[7] However, lower courts in a number of states as diverse as Illinois, Kansas, Texas, California, and Florida, among others, have decided such cases and have been badly fractured in their reasoning and results, especially in the wake of a controversial U.S. Supreme Court decision from 2002, involving federal labor law protections for undocumented workers under the NLRA.[8]

The very recent *Balbuena II* decision by the New York Court of Appeals does much to dispel some of the confusion and disarray in the lower courts of New York; however, a number of important ambiguities and unresolved issues remain. It would have been entirely straightforward for the *Balbuena II* Court to offer concrete guidance to the lower courts with respect to the remaining unsettled issues, which pertain, in part, to trial procedures, jury instructions, the use of expert testimony and the appropriate amount of damages. But, it was not to be for now.

The Cases

It is convenient to delineate three time periods for analysis of the cases dealing with tort compensation for irregular migrants. These are (a) pre-IRCA (pre-1986), (b) IRCA-*Hoffman* (1986–2002), and finally (c) post-*Hoffman* (2002–present). With respect to recovery for damages by irregular migrants, there are several possibilities: (a) no recovery at all; (b) recovery at U.S. rates (which assumes that the unauthorized alien would have continued to reside in and work in the U.S. for the relevant work life); (c) recovery at home country rates (which assumes counterfactually, that the alien would certainly have been immediately deported); and (d) recovery at U.S. rates, but adjusted for the empirically low probability of removal from the U.S.

Of these possibilities, courts have variously endorsed options (a) through (c) above with resultant variety in the quantum of recoverable damages. However, it is suggested that a true measure of loss would instead result if option (d) were followed, with the aid of appropriate expert testimony.

The Pre-IRCA Period

IRCA was enacted into law on November 6, 1986. Some decades had elapsed since the end of the second *Bracero* program in 1964, which permitted U.S. employers to legally employ temporary unskilled labor from Mexico. The end of the program did not signal the end of migration from Mexico, for the former *Braceros* had already forged networks in the U.S. What was once legal migration morphed into illegal and more permanent migration to the U.S. after 1964.

Before the enactment of IRCA, no federal law prohibited employment of unauthorized aliens in the U.S. For the first time, there was a national policy discouraging employment of such persons; the policy was implemented in IRCA by visiting penalties upon the employer (not the *employee*) who knowingly employed unauthorized aliens. The second major prong of IRCA was the large-scale legalization (amnesty) of some 2.8 million unauthorized aliens who were present in the U.S. by then. By its own terms, IRCA expressly preempted all existing state-imposed penalties for such employment.[9] Nothing in IRCA preempted either state remedies for compensation or federal labor law protections for all persons, including undocumented aliens. In fact, the House Committee Report accompanying the legislative history of IRCA specifically stated that the IRCA was not intended to curtail existing labor protections.[10]

While employer sanctions for hiring an irregular migrant did not exist before 1986, deportation or removal

from the U.S. has long been a feature of immigration law. Thus, there was always the possibility of involuntary departure from the U.S. work force due to removal. However, other than for serious criminal offenses, the deportation power of the federal government was rarely utilized.

An early pre-IRCA decision from New Mexico involving compensation for wrongful death of an unauthorized alien is instructive.[11] The court insightfully construed the New Mexico wrongful death statute, which extended protection to "any person," as being unqualified by any reference to immigration status. Accordingly, recovery was permitted at prevailing U.S. wage rates as though the alien would have continued to reside in and work in the U.S. for the remainder of the alien's work life. The *Torres* case is instructive for its strict and accurate construction of a state statute – the wrongful death statute – as protecting all persons.

In similar fashion, courts in a large variety of jurisdictions have concluded that, unless specifically prohibited, the protections of worker compensation statutes apply to all persons, regardless of alienage or immigration status (the only current exceptions being Nevada and Wyoming, both of which expressly limit worker compensation benefits to lawful residents).

Finally, what is true of one type of injury – fatal injury resulting in death – must *a fortiori* be expected to apply to non-fatal personal injury as well, even though the personal injury action was always known at common law and is not a creature of statute. It would be an odd exercise in logic to conclude that the beneficiaries of an irregular migrant killed in an accident in the U.S. may recover compensatory damages, yet not so if the alien were to survive with serious injuries. Truth, however, has always been stranger than many a fiction.

While there appear to be no reported New York cases on point during this period, a California case, *Rodriguez v. Kline*, decided on the eve of passage of IRCA, had important implications for future cases.[12] In *Rodriguez*, a California appeals court determined that the burden of proof with respect to continued employment in the U.S. was to be allocated to the alien plaintiff, rather than the defendant being required to establish the imminence of the alien's deportation. If the plaintiff could not meet its burden, recovery would be limited to home country rates, even if no deportation proceedings had commenced.

More significantly for present purposes, the court indicated in *dicta* the possibility of bifurcated procedures whereby the judge alone would determine the plaintiff's immigration status as a preliminary question of law, away from the jury. As discussed later, such a bifurcated procedure in which the jury is not informed of the plaintiff's unlawful presence or employment at the *liability* stage of the trial may be necessary to prevent a serious risk of prejudice.

From IRCA to *Hoffman*

Two years following passage of IRCA, the Fifth Circuit decided a case involving personal injuries to an undocumented longshoreman under a federal statute, the Longshore and Harbor Workers' Compensation Act.[13] The case is of interest for two reasons. First, as a precursor to *Hoffman*, the defendants attempted to raise the defensive shield of an earlier NLRA case; the argument was unavailing.[14] Second, the Fifth Circuit chose a burden of proof regarding eventual deportability, later adopted in several New York decisions.[15] Specifically, unless the defendant could show that the alien plaintiff was *about to be* or *surely would be* deported, recovery for prospective losses was to be at U.S. wage rates.

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Meanwhile, the seeds of the *Balbuena II* decision were sown in a trilogy of decisions involving a single case.[16] Before *Collins* there had been no precedent in the Empire State dealing with compensation for personal injuries caused to an undocumented alien due to common law negligence or medical malpractice. In that case, an undocumented restaurant worker from India died allegedly due to medical malpractice in a New York county hospital. The Supreme Court for Queens County summarily denied the estate's claim for lost future wages at U.S. rates. Even though the defendant had offered no evidence of commencement of deportation proceedings, and even though New York's wrongful death statute did not (and still does not) exclude a class of persons based upon immigration status, the estate could only recover for future lost wages at home country rates. Re-argument (*Collins II*) did not alter the outcome.

A powerful rationale for the *Collins* trial court apparently was its belief that the transaction (the unauthorized employment) was illegal in itself. A year later, in 1993, the First Department decided a case from another county involving very similar facts: wrongful death of

an undocumented alien worker.[17] *Bronx County* correctly reasoned that, unlike acts that were *malum prohibitum* in themselves – such as bookmaking or construction of a pipe bomb – the work performed in the case was entirely legal and there was no nexus between the underlying illegality (unauthorized employment in the U.S.) and the resulting injury.

On appeal, the Second Department, in *Collins III*, endorsed the same reasoning. No longer was summary judgment appropriate with damages being measured as a matter of law, at either U.S. wage rates or home country rates. Instead, the length of time the injured plaintiff could have remained in the U.S. and earned wages were factual issues for determination by the jury upon development of relevant facts at trial. The reasoning of *Collins III* ultimately found its way into the *Balbuena II* decision by the New York Court of Appeals, but this took a dozen years.

The Wunderwaffe: *Hoffman* (2002)

The wonder weapon for defense lawyers arrived in March 2002 with the *Hoffman* decision. Ironically, *Hoffman* did not deal with negligence issues or accidental injuries at all, but instead with an intentional federal labor law violation. The Supreme Court determined in that decision that undocumented aliens were barred from the traditional remedy of back pay in the face of a proven NLRA violation committed by the employer. The Court reasoned that awarding back pay to an undocumented alien who had been unlawfully terminated under the NLRA would jeopardize the nation's immigration policy as articulated in IRCA; federal immigration law must necessarily take precedence over federal labor law and would thereby cancel out the NLRA remedy.

Various commentators recognized the deep flaws in the Court's reasoning. The purpose of IRCA, which was made amply clear in its legislative history, was to reduce illegal immigration into the U.S. by making it unattractive for U.S. businesses to employ undocumented aliens. Congress chose to focus primarily on the *demand* for illegal migrants by requiring verification of employee work eligibility and by imposing admittedly anemic employer sanctions for IRCA violations.

It is no intellectual feat to recognize that continuing to enforce awards such as back pay for labor law violations committed by U.S. employers who had hired undocumented workers would be entirely complementary to the expected functioning of IRCA. In fact, not permitting back pay awards to a class of unlawfully terminated workers would ensure a result precisely contrary to the objectives of IRCA.

For now, the effective cost to the U.S. employer of employing undocumented workers would be reduced, making U.S. employers more eager to hire such workers, precisely because they could terminate them at will or disallow them from engaging in protected collective bargaining activity. Instead of curbing the demand for undocumented workers, and thereby reducing one set of incentives for illegal immigration into the U.S., *Hoffman* perversely generates the very opposite incentives.

It is odd indeed that the *Hoffman* Court, which reduced resolution of the possible conflict between the NLRA and IRCA to purely economic terms, *i.e.*, the incentives for potential unlawful migrants to enter the U.S., did not cite a single study or report to support its theorizing.

In addition, much of the *Hoffman* Court's discussion dealt with counterfactual hypotheses it postulated regarding the effects of IRCA on the *supply* of undocumented workers. Other than increases in the Border Patrol budget, IRCA dealt with diminishing the traditional "*demand* pull" factors for such aliens – the desire of U.S. employers to hire low-cost labor. The crucial distinction escaped the High Court and, in the end, its reasoning remained a confusing mix of economic half-truths and inconsistencies. No one would credibly contend that undocumented workers migrate to the U.S. hoping that their employer commits labor law violations against them just so they may possibly collect back pay awards after protracted federal litigation.

It would be even more bizarre to believe that undocumented aliens migrate to the U.S. hoping to be seriously injured or killed in an accident, just so they (or their survivors) may possibly collect tort awards. In the context of motor vehicle accidents, moreover, concerns about employer preferences for unauthorized migrants and IRCA sanctions cannot arise. There is simply no employer involved, but merely two private parties locked together in an unfortunate involuntary transaction: the accident.

In fact, the *Hoffman* defense has become somewhat of a reflexive response from defense attorneys in cases involving alien plaintiffs of questionable immigration status. Courts in several states, including New York, have either acquiesced in or eagerly embraced the *Hoffman* justification – *i.e.*, the primacy of federal immigration policy – for denying or sharply limiting recovery for the undocumented alien, not just under the NLRA, but also under other federal statutes, such as the FLSA and, more dismayingly, under state common law or state statutes. *Hoffman* itself, meanwhile, was utterly silent on its applicability beyond the limited context of the NLRA in which it arose.

After *Hoffman*: 2002–Present

The shadow of *Hoffman* extended far and wide. The decision itself was grounded in a web of inconsistencies and *non sequiturs*, as noted above. Extension of its holding to other areas and remedies, particularly state decisional law, would compound the illogic. To engage in this exercise, it would be necessary to determine that IRCA, which deals with *employer* sanctions, impliedly

preempted state or federal compensatory remedies for the *employee.* Nothing in the history or text of IRCA or *Hoffman* itself suggests a conclusion so bold. Yet, courts in a growing number of jurisdictions, including New York until *Balbuena II*, have reached precisely that unfortunate result. A year after *Hoffman* was decided, federal diversity courts in Kansas and Florida determined that IRCA as interpreted by *Hoffman* foreclosed an undocumented worker's claim for lost future wages due to personal injury or death.[18] However, that *vision ètrange* did not appear for state courts in Illinois and Texas.[19]

Shortly thereafter, in 2005, the Supreme Court of New Hampshire reviewed a similar case involving personal injuries to an undocumented alien worker and arrived at a strange compromise involving a carve-out for a "knowing employer." In answering certified interlocutory questions, the Supreme Court of New Hampshire determined that recovery for an injured alien tort plaintiff was to be native country wage rates, *unless* the employer had knowingly hired an unauthorized worker (committing an IRCA violation), in which case, the defendant would be required to compensate the alien at the much higher U.S. wage levels.

In effect, the state court took it upon itself to enforce IRCA and to impose a *de facto* monetary penalty upon the employer-tortfeasor for an IRCA violation. This decision could well be invalid under the preemption provisions contained in IRCA. Under the language of the statute, employer sanctions following enactment of IRCA were to be solely a federal prerogative and all existing state penalty schemes were expressly displaced.[20]

As in the pre-*Hoffman* era, courts in New York have continued to be a source of rich but confusing jurisprudence in this area. Several trial courts in New York had already held that *Hoffman* or IRCA were not implicated at all in an undocumented worker's claim for damages under state law (either common law or state statutory law; *e.g.*, the state's Scaffold Law pertaining to work site safety).[21] But there were troubled waters in the Appellate Division's First and Second Departments.

In two cases decided on the same day, *Sanango II* and *Balbuena I*, the First Department ruled that the lost wages claims at U.S. rates of an undocumented worker were preempted by virtue of *Hoffman* and IRCA.[22] A short while later, the Second Department, after careful discussion of the preemption issue, arrived at the very opposite result in *Majlinger II*.[23] As in *Collins III*, there was no automatic recovery at U.S. wage rates; instead, the jury was to take the plaintiff's immigration status into account, "along with the myriad other factors relevant to a calculation of lost earnings, in determining . . . whether the plaintiff would have continued working in the United States."[24]

Faced with an alarming and growing number of inconsistent decisions, the New York Court of Appeals issued a thoughtful opinion on two cases consolidated for

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appeal, *Majlinger II* and *Balbuena I*. After careful analysis, the *Balbuena II* Court properly concluded that nothing in IRCA expressly or impliedly preempted state law compensation, either under ordinary principles or under New York statutory law governing workplace safety. It was left for the Court of Appeals to distinguish its holding from the possibly weighty precedent of *Hoffman*. It did so, on the narrow ground that the *employee* in *Hoffman* had tendered false documents, but in the cases before the New York Court, the *employers* had simply failed to examine employee eligibility altogether.

Thus, in *Hoffman,* the employee had committed an IRCA violation and the employer an NLRA violation. In the pair of cases before the *Balbuena II* Court, the employers were guilty of IRCA violations (by failing to conduct I-9 verifications) as well as violations of New York law. No documentary fraud was committed by the employees in the two cases before the Court of Appeals. Whether this change in the constellation of equities should have mattered is a topic to be addressed elsewhere. The preponderant point of *Balbuena II*, however, is that, at least in New York, the unlawful migrant status of a tort plaintiff (or a state statutory law plaintiff) cannot bar recovery either at the pleadings stage or in summary judgment disposition.

Unresolved Matters

It might have been preferable if the Court of Appeals had taken the opportunity in *Balbuena II* to clarify the role of expert witnesses in this context, or of the possibility of taking judicial notice of government reports indicating the infinitesimally low likelihood of immigration enforcement in the interior, or, perhaps, of indicating that such documents and reports could be admitted under applicable hearsay exceptions.

For a jury to "analyze the probability of legalization" or defer departure from the U.S. through one of the many available technical procedures, such as cancellation of removal, extended voluntary departure, temporary protected status, marriage to a U.S. citizen, etc., might require more expertise than even many attorneys possess. Furthermore, a demonstrably important source of mischief could have been eliminated if the Court had required a bifurcated trial procedure, *i.e.*, one in which alien status of the plaintiff may only be raised in a separate damages phase of the proceeding, but not at the earlier liability stage to avoid the ever-present risk of prejudicing the jury.[25]

Assessing the possibility of separation from the U.S. workforce due to undocumented alien status alone is a matter that is wholly appropriate for expert testimony. The information embodied in quantifying the probability of such separation from the workforce would clearly qualify as "specialized knowledge" under Rule 702 of the Federal Rules of Evidence and equivalent state rules. One would not expect that an extensive *Daubert* hearing would be required to qualify experts. The only issue of relevance for expert testimony relates to the apprehension and possible expulsion of the claimant from the U.S. workforce in the future.

At its most elementary level, the new factor introduced by the undocumented alien status relates only to the counterfactual, no-injury case. Even without occurrence of the accident in question, the plaintiff just might be detected, apprehended and involuntarily removed from the U.S. workforce in the future. Hence, the expected future earnings of the claimant, *absent* the accident, may be viewed as a weighted average of wages expected to be earned in the U.S. and those in the home country, weighted by the probability of non-separation and separation respectively from the U.S. workforce, and each measured in a common currency (U.S. dollars) in discounted, present-value terms.

The key factor unique to cases involving undocumented workers is the probability of separation from the U.S. labor force. Until the Department of Homeland Security (DHS) develops and implements a detailed dataset of overstay tracking results, individualized by state, work sector and other worker attributes, it is necessary to resort to gross approximations. Data on immigration enforcement published by the DHS appear in the Yearbook of Statistics and the newly begun series of Annual Reports.

Data presented in these publications on enforcement activities, such as formal removals, voluntary departures, and similar measures, are on a gross national basis or by Border Patrol sectors and not by state. Approximately 99% of these removals and departures have occurred at the borders. Interior enforcement activities are no longer reported in detail as in previous Yearbooks. However, the 2004 Annual Report on Immigration Enforcement Actions, dated August 2005, indicates that in 2004 between 51,000 and 104,000 aliens were removed from the interior.

The most recent estimate of DHS itself for the total stock of undocumented aliens in the U.S. as of January 2005 appears to be around 11 million, and perhaps 12 million by mid-2006. Most such residents are known to be in the U.S. labor force. Passel estimates that at least 7.2 million were employed in the U.S.[26] Assuming very generously that of the 100,000 removals some 85,000 had been in the labor force, yields a probability of only 0.012 (or 1.2%) for actual removal from the U.S. workforce (by immigration enforcement in the interior) of a randomly selected undocumented worker.

As a preliminary matter, therefore, a discount of at most 5% for the possibility of separation from the U.S. workforce for any year is proposed. This figure implies in turn, that an estimate of future earnings losses prepared at U.S. levels alone could be no more than a small overestimate for any given year. By contrast, exclusive use of foreign country rates as apparently required by some courts could be a gross underestimate of lost future earnings.

Conclusion

The last word has hardly been spoken. The strange vision of courts in Florida and Kansas, among others, will not appear, at least not in New York. In New Hampshire, the state Supreme Court may already have slipped over the precipice. But, there are still many jurisdictions that have yet to pronounce sentence and more remains to be clarified in New York. What remains certain is there will be many such cases to come in the near future. And, so shall the legal profession have a *regal grand*. ■

1. Under current law, only the initial entry into the U.S. of an alien is a civil and criminal violation. Continued presence in the U.S. is not a further offense, except for a sub-class of aliens who have been previously removed from the U.S. or denied admission. Currently, there is no sanction imposed (under immigration laws dealing with employment enforcement) for aliens who engage in unauthorized employment in the U.S., as long as they do not utilize false documents to procure or maintain employment. Employers meanwhile have been subject to civil and criminal penalties for knowingly employing undocumented aliens since the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3360 (contained at 8 U.S.C. § 1324a *et seq.*). By contrast, several European countries including France and Germany impose penalties for unauthorized employment on both the employer and employee and the monetary fines tend to be vastly larger than in the U.S. *See* Philip Martin & Mark Miller, *Employer Sanctions: French, German and U.S. Experiences* (Int'l Migration Papers 36, Int'l Labour Office, Geneva, 2000).

2. *See* Jeffrey Passel, Unauthorized Migrants: Numbers and Characteristics (Pew Hispanic Ctr., June 2005) (estimates averaged over 2002–2004). Figures for 2006 may be expected to be higher for each state.

3. Nationwide, the total number of motor vehicle fatalities was 42,600 in 2003 (of which approximately 1,500 occurred in New York). The number of non-fatal traffic accident injuries nationwide in that year was a staggering 2.9 million (data from National Highway Safety Administration). In 2002, the Bureau of Labor Statistics (BLS) reported approximately 4.4 million workplace injuries nationwide, of which 5,500 resulted in fatalities.

4. *Plyer v. Doe*, 458 U.S. 1131 (1982).

5. For a recent survey of remedies for irregular migrants, see Note, *Legal Protections for Illegal Workers*, 118 Harv. L. Rev. 2224 (2005).

6. The case is *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 812 N.Y.S.2d 416 (2006) ("*Balbuena II*").

7. *Rosa v. Partners in Progress Inc.*, 152 N.H. 6, 868 A.2d 994 (2005).

8. *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137 (2002).

9. *See* 8 U.S.C. § 1324a(h)(2).

10. *See* H.R. Rep. No. 99-682, 1986 U.S. Code Cong. & Admin. News 5649, 5662.

11. *Torres v. Sierra*, 89 N.M. 441, 553 P.2d 721 (1976).

12. *Rodriguez v. Kline*, 186 Cal. App. 3d 1145, 232 Cal. Rptr. 157 (Cal. Ct. App. 2d Dist. 1986).

13. *Hernandez v. M/V Rajaan*, 848 F.2d 498 (5th Cir. 1988); *see* 33 U.S.C. § 905(b).

14. The earlier NLRA case is *Sure-Tan v. NLRB*, 467 U.S. 883 (1984).

15. *See, e.g., Klapa v. O & Y Liberty Plaza Co.*, 168 Misc. 2d 911, 645 N.Y.S.2d 281 (Sup. Ct., N.Y. Co. 1996).

16. *Collins v. N.Y. City Health & Hosp. Corp.*, 151 Misc. 2d 266, 575 N.Y.S.2d 227 (Sup. Ct., Queens Co. 1991) (*Collins I*); *adhered to in Collins v. N.Y. City Health & Hosp. Corp.*, 151 Misc. 2d 270, 580 N.Y.S.2d 834 (*Collins II*) *and rev'd by Collins v. N.Y. City Health & Hosp. Corp.*, 201 A.D.2d 447, 607 N.Y.S.2d 387 (2d Dep't 1994) (*Collins III*).

17. *Pub. Adm'r of Bronx County v. Equitable Life Assurance Soc'y of the U.S.*, 192 A.D.2d 325, 595 N.Y.S.2d 478 (1st Dep't 1993).

18. *See Hernandez-Cortez v. Hernandez*, 2003 WL 22519678 (D. Kan. 2003) *and Veliz v. Rental Serv. Corp.*, 313 F. Supp. 2d 1317 (E.D. Fla. 2003).

19. *First Am. Bank ex rel. Estate of Montero v. W. DuPage Landscaping, Inc.*, 2005 WL 2284265 (N.D. Ill. 2005) *and Tyler Foods v. Guzman*, 116 S.W.3d 233 (Tex. App. 2003).

20. 8 U.S.C. § 1324a(h)(2).

21. See, e.g., *Cano v. Mallory Mgmt.*, 195 Misc. 2d 666, 760 N.Y.S.2d 816 (Sup. Ct., Richmond Co. 2003) (illegal status is a factual item that may be presented to the jury on the issue of damages for lost wages, but *not* for pain and suffering which must be compensated at U.S. rates, and declining to extend *Hoffman*); *Ordonez v. Brooklyn Tabernacle*, 9 Misc. 3d 1102(A), 806 N.Y.S.2d 446 (Sup. Ct., Kings Co. 2005) (issue of illegal status to be presented to jury: *Hoffman* not implicated at all) and an insightful decision in *Echeverria v. Estate of Lindner*, 7 Misc. 3d 1019(A), 801 N.Y.S.2d 233 (Sup. Ct., Nassau Co. 2005) (allowing future lost earnings U.S. rates, but noting that the probability of deportation is "quite slim" and that the remote possibility of deportation would barely would impact an award measured solely at U.S. rates), among others. *See also* Formal Opinion of the Attorney General of New York, N.Y. Op. Atty. Gen. No. F-3, Oct. 21, 2003 (*Hoffman* does not prevent enforcement of wage payment laws on behalf of illegal immigrants).

22. *Sanango v. 200 E. 16th St. Hous. Corp.*, 15 A.D.3d 36, 788 N.Y.S.2d 314 (1st Dep't 2004) (*Sanango II*, reversing a trial court decision) ("*Hoffman* has critical implications for this case . . . [and] . . . it follows ineluctably from *Hoffman* that New York law, to the extent that it would permit plaintiff to recover the wages he would have earned . . . in the United States, is preempted by IRCA.") *Id.* at 318–19. *Balbuena v. IDR Realty*, 13 A.D.3d 285, 787 N.Y.S.2d 35 (1st Dep't 2004) (same holding; recovery at home rates only) ("*Balbuena I*").

23. *Majlinger v. Cassino Contracting Corp.*, 25 A.D.3d 14, 802 N.Y.S.2d 56 (2d Dep't 2005) ("*Majlinger II*"). The Second Department tersely observed that in its view, the First Department's interpretation of the *Hoffman* decision was "unduly broad." *Id.* at 23.

24. *Id.* at 30.

25. This is not mere speculation; see the trial judge's absurdly prejudicial remarks in open court regarding unlawful migrants in *Hernandez v. Paicius*, 109 Cal. App. 4th 452, 134 Cal. Rptr. 2d 756 (Cal. App. 4th Dist. 2003). Part of the trial judge's comments were "[t]here's a lot of jurors . . . [who] feel that anyone that comes into this fine country illegally . . . and then try and take advantage of our system. . . . If those people come in illegally . . . by phoneying up an I.D. or social security number, lying and getting treatment . . . it's like forfeited ab initio. It's just without any claims, without any pity." *Id.* at 457.

26. Passel, *supra* note 2.

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The Lien Law Trust: Lenders Beware

A mortgage encumbering real property in New York wil typically contain a so-called Lien Law covenant in which the mortgagor agrees that it will, in compliance with § 13 of New York's Lien Law, receive the loan proceeds in trust and apply the proceeds first to pay for any improvements made to the property. If the mortgage contains such covenant, the lender has no obligation to see to the proper application of advances by the owner. A deed delivered in New York contains a similar recital.[1]

A lender may therefore assume that when it is repaid it does not need to verify that mechanic's lienors and materialmen (collectively referred to as "mechanics"), performing work or furnishing materials for an improvement at the mortgaged property, were paid. Due to recent decisions of the Court of Appeals, however, failing to verify that mechanics have been paid may have consequences for a lender; and that may be the case even when the lender did not advance funds on the security of a real estate mortgage.

Under Lien Law Article 3-A ("Definition and Enforcement of Trusts"), funds received by the owner of real property in connection with the making of an improvement are trust assets to be held by the owner as a trustee[2] to ensure that the claims of mechanics have been paid or discharged. If a trust asset is paid, transferred or applied other than to pay those claims, there is a diversion of trust assets.[3]

In addition to filing a mechanic's lien against the real property,[4] a mechanic can commence an action to enforce a trust claim against the owner within one year of the completion of the improvement. In such an action, trust assets in the hands of "any person," including a transferee who received the trust assets with the knowledge that they were trust funds, together with interest thereon from the time of the diversion, can be recovered, and the trust fund assets that are recovered are distributable to all beneficiaries of the trust whose claims are then payable.[5] A transferee of trust assets has a defense if it can establish that it is "a holder in due course of a negotiable instrument or . . . a purchaser in good faith for value . . . without a notice that the transfer to him [was] a diversion of trust assets."[6]

Until the 2004 decision of the Court of Appeals in *Aspro Mechanical Contracting, Inc. v. Fleet Bank, N.A.*,[7] a mortgage lender was not generally considered to be the trustee of an Article 3-A trust. In *Aspro Mechanical*, Berry Street Corp. entered into an arrangement with the New York City Housing Authority (NYCHA) under which Berry Street acquired title to three parcels of land in Brooklyn under a so-called turnkey arrangement. Berry Street was to construct residential buildings on the sites and, on completion of construction, transfer title to the parcels to the NYCHA (the "Turnkey Contract"). Loans secured by a building loan mortgage and a project loan mortgage were made by Norstar Bank, which assigned the loans and mortgages to Fleet Bank, N.A. (collectively referred to as the "Lender"). The loans were also secured by an assignment to the Lender of Berry Street's rights under the Turnkey Contract.

Once the project was completed, the balance due under the Turnkey Contract was advanced by NYCHA but paid directly to the Lender, which applied the money to the repayment of its loans. An action was commenced by the mechanics to recover the funds allegedly diverted by the Lender.

The Court of Appeals held that when the Lender was assigned the Turnkey Contract it became an owner-trustee of an Article 3-A trust and was required to administer the trust solely in the interests of the trust beneficiaries. The Court indicated that the Lender would not have been charged with a diversion of trust assets if it had filed either a notice of lending under Lien Law § 73, to notify trust beneficiaries that trust assets would be applied to repay advances that it had made, or a notice of assignment under Lien Law § 15, to give notice of the assignment of moneys due or to become due under a contract for the improvement of real property.

Before the Court's decision in *Aspro Mechanical*, notices of lending were typically filed by a mortgage lender only when it was advancing funds for an improvement prior to the execution of a building loan contract.[8] (The filing of a notice of assignment has not been common in real estate mortgage lending.) Since the Aspro Mechanical decision, certain construction lenders are routinely filing notices of lending on any building loan. They do so to avoid a charge that they participated

in a diversion of funds when their loans are repaid before the claims of mechanics are satisfied. This may be a manageable procedure for a construction lender.

Following its decision in *Aspro Mechanical*, the Court of Appeals expanded the net of Article 3-A. It held, in *LeChase Data/Telecom Services, LLC v. Goebert*, decided February 21, 2006,[9] that a lender that is a "Factor"[10] may be an Article 3-A trustee even if it did not have actual knowledge that money repaid to reduce its loan constituted assets of a Lien Law trust.

In *LeChase Data*, Light House Communication Design, Inc., entered into an agreement with MCI WorldCom Network Services, Inc., to construct for WorldCom "telecommunications network infrastructure" at sites in Monroe County, New York. To secure working capital, Light House had entered into an accounts receivable purchase agreement with Business Funding Group, Inc., a Factor, under which Business Funding would advance money to Light House in exchange for an assignment of its accounts receivable. Light House instructed WorldCom to pay all invoices directly to Business Funding with a portion of each payment to be rebated by Business Funding to Light House. Business Funding filed a UCC-1 financing statement; it did not file a notice of lending or a notice of assignment.

LeChase Data/Telecom Services, LLC, a subcontractor, was to receive progress payments as Light House was paid by Worldcom. When it was not paid in full, LeChase filed mechanic's liens against the property, and it also commenced a separate action against Business Funding alleging a diversion to it of trust funds. Business Funding moved for summary judgment to dismiss the complaint, contending that because it had no actual knowledge of construction or installation activities by Light House it was a "purchaser in good faith for value and without notice" and should not be subject to an action to enforce the Article 3-A trust.

The Court of Appeals stated that there was no dispute that the contracts between Worldcom and Light House and between Light House and LeChase were contracts to improve real property, Light House's assignment to Business Funding was an improper diversion of statutory trust funds, and LeChase was a trust beneficiary entitled to recover trust assets. The only issues were the standard of notice that would be applied to determine if Business Funding would be protected by the "good faith purchaser" exception to Article 3-A liability and whether there were triable issues of fact concerning notice.

> The Court of Appeals has broadly applied the trust fund concept.

The Court held that the proper standard of notice for the case was not whether Business Funding's principal had actual knowledge that the funds it received were trust assets but whether Business Funding, as a transferee of trust funds, knew or should have known that it had received payments that should have been applied to pay for the construction of improvements on real property. It quoted from the opinion of the lower court, which had reasoned as follows:

> [T]he notice requirement(s) under Lien Law § 72 for a "good faith purchaser" are those defined in UCC 1-201(25). Notice that a transfer is a diversion of trust assets . . . occurs when there is actual knowledge, when there is a notice or notification, *or from all of the facts and circumstances known at the time of the transfer there is reason to know that it is a diversion of trust assets.*[11]

According to the Court of Appeals, Business Funding's principal "knew or should have known that Business Funding was receiving payments from WorldCom for construction of improvements to real property."[12] Business Funding had copies of work orders, including one that authorized Light House to construct portions of a telecommunications network. It also knew, from e-mails and notes in its possession, that Light House's invoices were approved by WorldCom's construction managers, which "leads to the inference that Business Funding should have known that these invoices were for construction work."[13] Business Funding was therefore not protected as a good-faith purchaser, notwithstanding its lack of actual knowledge that the funds it received were trust assets.

The Court of Appeals, in *Aspro Mechanical* and *LeChase Data*, has broadly applied the trust fund concept. The lenders in those cases could have been protected, however, by filing either a notice of lending or a notice of assignment. A lender, whether or not its loan is secured by a mortgage, may therefore find it prudent to file a notice, when loan proceeds are being used, or after a reasonable inquiry, it is determined that loan proceeds may be used, for the construction of an improvement to real property. ■

1. "Nothing in this subdivision shall be considered as imposing on the lender any obligation to see to the proper application of such advances by the owner." Lien Law § 13(3) ("Priority of liens").
2. Lien Law § 70 ("Definition of trusts").
3. Lien Law § 72 ("Diversion of trust funds").
4. Lien Law § 10 ("Filing of notice of lien").
5. Lien Law § 77 ("Action to enforce trust").
6. Lien Law § 72(1). The diversion of trust funds by a trustee of a Lien Law trust also constitutes the criminal offense of Larceny. Lien Law § 79-a ("Misappropriation of funds of trust"); 1958 Op. Att'y Gen. Mar. 18 (informal).
7. 1 N.Y.3d 324, 773 N.Y.S.2d 735 (2004).
8. The Lien Law § 22 affidavit filed as part of a filed Building Loan Contract may recite the amount, if any, to be advanced from the loan to repay amounts previously advanced to the Borrower pursuant to Notices of Lending for costs of the improvement.
9. 6 N.Y.3d 281, 811 N.Y.S.2d 317 (2006).
10. "[A] company that lends money to others on the security of their accounts receivable." *Id.* at 284.
11. *Id.* at 288 (emphasis in original).
12. *Id.* at 292.
13. *Id.* at 293.

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Lost Backup Tapes, Stolen Laptops, and Other Tales of Data-Breach Woe

By Eric Friedberg and Michael McGowan

Employees' and executives' laptops are being stolen from conference rooms and left in taxicabs; data storage vendors are losing corporate backup tapes with uncomfortable frequency; overnight delivery firms are losing backup tapes and servers; law firm IT departments' external hard drives loaded with client data are walking out the door over holiday weekends! Many of these lost devices contain protected personal information, including names, credit card numbers, social security numbers, and medical information. Almost none of these data are encrypted. Data losses are straining relations with clients, creating regulatory and civil exposure, and causing enormous damage to reputations.

Investigation into the circumstances of the theft or disappearance, and technical analysis of whether the data on these computers are easily readable, may be critical to knowing whether reporting obligations have been triggered under the patchwork of state data breach notification statutes.[1] Making this evaluation often requires application of a combined forensic, investigative, and legal methodology. Victims may wish that the lost data are not easily readable. Ultimately, however, data losses may push companies to consider more carefully their retention and usage policies regarding confidential and personal information and to utilize technologies that encrypt data on backup tapes, laptop drives, and removable media so that the data are unreadable if lost, regardless of the skills of the thief, or the person who finds them.

The Law

On September 25, 2002, California enacted the first data breach notification statute, which has been used as a model by other states. New York followed suit on August 10, 2005, with the enactment of N.Y. General Business Law § 899-aa. Generally, data breach notification statutes require that certain individuals, and sometimes the state, be notified if, as the result of a breach in a company's computer security, individuals' "personal information" is compromised. The statutes, for the most part, share the same key elements but vary in how those elements are defined, including the definitions of "personal information," the entities covered by the statute, the kind of breach triggering notification obligations, and the notification procedures required.

In New York, personal information means "any information concerning a natural person which, because of

name, number, personal mark or other identifier, can be used to identify that natural person," plus any one of the following: social security number, driver's license number or non-driver identification card number, or account number, credit or debit card number – plus PIN or other necessary code. In California, data breach notification is triggered if there is an "unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information." Again, most of the states follow California's formulation. Florida, Montana, Nevada, and Tennessee add the requirement that the security breach be "material," although it is unclear what materiality means in this context, since a breach of even a few records could lead to identity theft and fraud. All states, except Rhode Island, exempt personal information that is publicly available from federal, state, or local government records.

Most statutes exempt reporting if the compromised information is "encrypted," although in New York, information is still "personal information" if the encryption key has also been compromised. Arkansas, Florida, New Jersey, Rhode Island, and Washington exempt reporting if, under all of the circumstances, there is no reasonable likelihood of harm, injury, or fraud to customers. Arkansas requires the company to make "reasonable investigation" before coming to the conclusion that there is no reasonable likelihood of harm.

Notification to the affected customers may ordinarily be made in writing, electronically, or telephonically, or, in the case of large-scale breaches, by publication. Many of the statutes require simultaneous notification to a designated state agency. New York's and California's statutes require notification at "the most expedient time possible and without unreasonable delay." Additional notification considerations include: if more than 5,000 persons must be notified at one time, consumer reporting agencies must also be notified, and whenever a business must notify *any* New York residents, the Attorney General, Consumer Protection Board, and State Office of Cyber Security and Critical Infrastructure Coordination must also be notified.

Fines for failure to notify can be per day, per violation, per incident, or some combination thereof. For example, New York assesses the greater of $5,000 per incident or $50 per person who should have been but was not notified; the fines are capped at $150,000.

Technology and Strategy

The technological and strategic analysis for dealing with lost media differs between lost backup tapes and lost computers and hard drives.

Backup Tapes

When backup tapes are misplaced or stolen, the company can avail itself of the statutory exemption that applies if the data on the tapes are encrypted. Unfortunately, most corporate backup tapes are not encrypted, because encrypting tapes can be an expensive, time-consuming, and bandwidth-consuming process.

But what if the data on lost backup tapes – while not encrypted – are so difficult and expensive to restore to a readable form that, as a practical matter, that data are as good as encrypted? Well, that's a big "if." While the statutes do not specify an encryption standard, arguably "very difficult and expensive to read" is not encryption. If configured and used in the most secure manner, domestic, commercial encryption products make the data impossible to read without private encryption "keys," and a user's or administrator's pass phrase, regardless of the skill of the thief. By contrast, most unencrypted backup tapes can be read in whole or in part by a skilled adversary with the right hardware and software.

In the few states that exempt reporting where there is no "reasonable likelihood" of harm to consumers, the difficulty of reading data off the lost or stolen backup tapes bears directly on the likelihood of harm, and a technical assessment of that difficulty could well support a decision not to notify consumers.

Assuming "very difficult and expensive" to read provides a legal basis to avoid reporting, a careful technical and investigative methodology must be used to reach such a conclusion about a backup tape. First, traditional investigative techniques must be deployed to determine as much as possible about the circumstances of the theft, the motivation and identity of the thieves and likelihood of recovery of the stolen media. If corporate backup tapes were stolen by a Russian organized crime ring specializing in identity theft, with the complicity of a corporate insider, the risk profile is far different than if the backup tapes fell off a truck and were picked up off the street by a Mister Softee driver. The skill level and resources that will

be devoted by the organized crime group to read data off the tapes could be substantial. To determine whether the disappearance was a result of targeted theft or negligent loss, traditional investigative techniques should be deployed. Depending on the circumstances, this may require examination of chain of custody records, interviews of custodians, background checks on potentially complicit insiders, analysis of videotapes and card-key logs, and research on similar thefts to identify patterns or research on organized crime groups that may be targeting similar forms of data across a series of companies.

If the tapes have not been stolen by a skilled and motivated thief, it is highly unlikely that the data could be accessed. If an average person finds a lost tape, he or she would have no idea what hardware, software, or restoration techniques to use to access the data on the tape. Some risk remains, however, that an unskilled thief could sell or otherwise transfer the stolen media to more skilled persons, who are motivated to make the investment in time and money to recover the data. The question then becomes, as a practical matter, how difficult is it for a skilled and motivated thief to read stolen or found enterprise backup tapes? Is it so difficult that it could be argued that the tapes are *de facto* encrypted? Is it at least sufficiently difficult to read the stolen data to support the argument that there is no reasonable harm to consumers?

Enterprise backup tapes are often made using expensive hardware devices, called "tape drives," into which the tapes are loaded and which write data to and read data from the tapes. Enterprise hardware solutions can cost many thousands of dollars. However, individual tapes can often be read with individual tape drives that are commercially available new for under $10,000, purchased used for half of that, and rented for as little as $1,500 per month. If an insider is complicit in the theft of the tape, the thief may also be given free access to an appropriate tape drive to read data off the tape. Accordingly, citing the high cost of buying a new, full enterprise backup environment as a barrier to reading a stolen or lost tape is likely an insufficient basis to claim there is no reasonable harm to consumers from the theft. Rather, skilled thieves would likely be able to obtain the hardware at little or no cost. Medium- to low-skilled individuals who find the tape would not likely even be able to get that far.

Companies also sometimes reason that lost backup tapes are, as a practical matter, unreadable because the thief likely cannot afford to buy the expensive software with which the backup is made. Licenses for the expensive software, such as Veritas or ARCserve, used to create the backup tapes can easily exceed $10,000. Normally, corporate environment backup tapes are restored to readable form using the same software. Nevertheless, the retail cost of that backup software may not be a barrier to retrieving the data off the tape since copies of this software can sometimes be illegally downloaded from "warez" sites. In addition, "raw" data can often be read directly off the tapes without the software used to create the backup. When raw data are dumped from a tape to a hard drive, some or much of that data may not be in a proprietary format and, thus, may be readable without the original software. In other words, some or much of the data may be in clear text that is searchable with standard search utilities. Some backup systems, such as IBM's Tivoli system, make it infeasible to read data on individual tapes. The Tivoli backup system relies on a tape index to reconstitute complete files and compresses data in a proprietary format, rendering data effectively inaccessible without the Tivoli backup software.

It is easy for a skilled attacker to search for the valuable identity information using "grep" searches.

Technical investigation can determine how much and what kind of information on the tape is "in the clear." In some cases, credit card numbers, social security numbers, and dates of birth may exist on the tape in the clear. Although they may be interspersed in large swaths of unreadable, proprietary data, it is easy for a skilled attacker to search for the valuable identity information using "grep" searches. A grep search is a search through the data for numbers or characters that have a specified logic. For example, a grep search for all 16 digit numbers beginning with 5424, 5466, 5473 or any of the other MasterCard prefixes, or for four digit numbers ending in 06, 07, 09, or 10, representing expiration dates, could be executed. The search could further specify that 100 characters on either side of one of these grep searches be retrieved, in the hope that within those 100 characters might be names associated with credit card numbers or expiration dates. Grep searches can return results against enormous quantities of data in a matter of hours. Thus, the total volume of data on a lost backup tape does not act as much of a speed bump for a thief who has the skill to run the appropriate searches: for the skilled thief, the wheat is easily separated from the chaff.

Sometimes, however, the critical data on a backup tape are in a proprietary format that makes the data extremely difficult or impossible to read without the application or hardware that created the data. Further difficulty in read-

ing data from a tape can occur when larger files are stored in non-contiguous "blocks" (discrete storage areas) on the tape, "striped" across tapes (meaning where the backup system puts different parts of the same file on multiple tapes, so that the file cannot be read linearly off a single tape), or "compressed" (meaning that an algorithm has been used to pack more data into the limited space on the tape). In making an assessment that such factors would render critical data on a backup tape *de facto* unreadable, the better practice is to perform an actual test of whether a skilled forensic examiner can unscramble the data, rather than relying solely on theoretical pronouncements. The tests should be performed on the most representative sample of the lost data. This may be the backup tape made nearest in time to the lost tape or a current backup of the contents of the server for which the backup tape was lost.

Data, as stored on servers or when backed up to tape, can be encrypted in a number of ways. Enterprise database applications such as SQL and Oracle can encrypt database tables as they reside on their servers. When the servers are backed up to tape, the data are already encrypted. One added advantage to these technologies is that they protect against live hacks of database servers. If the hacker is able to compromise the server, the tables he or she accesses are unreadable due to the encryption. The disadvantage to these technologies is that they degrade the "performance" (speed) of the server, since every time data is read it must be decrypted, which takes processing time.

Many of the major enterprise backup technologies – including CA ARCserve, IBM Tivoli Storage Manager (TSM), and Veritas NetBackup have the ability to encrypt data during the backup process, although these solutions present overhead and encryption key management issues. On the other hand, these technologies are simply a part of existing backup software infrastructures, and thus present no additional cost. Other technologies – such as MediaMerge/TapeSecure from eMag Solutions – can impose a layer of encryption when copying a tape for shipment offsite. Obviously, such a solution requires a second set of tapes, which can be very expensive. Finally, encryption of a redundant copy can be achieved using a hardware storage appliance that sits in the path of the data, does not degrade server performance, and has centralized encryption key management. The principal disadvantage to such a solution is cost.

Executives are going to have to assess the extra cost in tapes and system resources in deploying such technologies, and to weigh that cost against complying with data breach notification statutes, possible fines, and damage to reputation when unencrypted data are lost. In a recent case involving the theft of a single server that housed medical information tied to social security numbers, the victim spent hundreds of thousands of dollars in tape restoration, forensic, and database costs to identify the hundreds of thousands of affected consumers, and then to establish their current addresses for notification purposes.

Laptops and External Hard Drives

When it comes to lost or stolen laptops, desktops, or external hard drives, the technical and investigative questions are somewhat different than those involving backup tapes. If third parties gain possession of a computer that has no Windows password, they will be able to read the data on the computer simply by booting it up. A Windows password-protected computer will be harder to access, although even a moderately skilled thief can install utilities to bypass the Windows password or simply take the hard drive out and connect it to another computer. In this way, a thief can view the contents of any unencrypted files stored on the hard drive in the same way as one would browse to the contents of a CD-ROM.

Sometimes, individual files or e-mail attachments – such as Word documents or Excel spreadsheets – can be password-protected. Commercially available password-cracking utilities can be used to attempt to crack such passwords by "brute force," that is, by successively trying millions of combinations of letters and numbers. This effort is not trivial, however, and could take a week of processing time on a very fast computer to crack even a single, moderately strong password. If the user has protected a document with a "strong" password that incorporates 10 numbers, letters, and symbols, some upper case and some lower, the file may be effectively unbreakable by even a motivated attacker, absent the harnessing of massive computing power capable of generated billions of combinations in an acceptable period of time. The use of either strong or weak file-protecting passwords would probably count as "encryption" within the meaning of the data breach notification exemptions, since most file-based password technologies scramble the data in the file rather than just prevent the opening of the file.

A host of true encryption programs can be used to protect data on laptop, desktop, and external hard drives. These include PGP ("Pretty Good Privacy"), Whole Disk Encryption, and EFS encryption technology, which comes with Windows XP. These technologies can be used to encrypt an entire hard drive, a "volume" (a smaller, defined area on a hard drive), folders, or individual files. The loss of any lost data in an encrypted disk, volume, folder or file does not trigger data breach notification under the above statutes, but would be exempt. Among the advantages of disk encryption is that not only do all of the traditional files within the encrypted disk get encrypted, but so do the temporary files, deleted files, and remnants of merely viewing files. A highly motivated thief might attempt to use forensic techniques to recover these collateral materials, which can contain just

as much valuable information as the original file itself. Disk encryption prevents such forensic recovery, unless a thief gains live access to the disk while it is being used in a decrypted state.

Some e-mail programs, such as Lotus Notes, have built-in encryption that can be enabled, so that, if a computer is stolen or lost, the e-mail residing on the computer will be encrypted.

> Most companies keep enormous stores of unnecessary data whose only effect is to increase risk.

Ironically, while victims who use encryption technology can clearly invoke the encryption exemption to avoid reporting the loss of encrypted data, in many situations it is not the encryption program itself, but the strength of the user's pass phrase, that controls whether a thief can decrypt the data. For example, a number of encryption programs use a "dual key" system. In such systems, an encryption algorithm[2] is used to generate a "key pair," including a private key and a public key. The user publishes this public key to others, who may then use that key to encrypt messages to send to the user. Those messages can only be decrypted with the user's private key. The real strength of the most effective, current encryption programs is that intruders cannot decrypt messages if they are intercepted in transit over the Internet. The algorithms are so strong that they do not create any patterns that can be reversed into plain text without use of the private key, and the private key cannot be deduced from the public key.

However, if a disk encryption product or an e-mail encryption product is configured on a hard drive, as they often are, so that public *and* private keys are on the hard drive, then a thief who comes into possession of the hard drive can attempt to decrypt the data on the drive by using the private key. The private key is normally protected with a pass phrase. If the pass phrase is weak (*e.g.*, three lowercase letters like "abc"), a brute force attack on the pass phrase can be successful, leading to a compromise of the data. A more secure practice – though highly inconvenient – is to keep one's private key on a separate device that is attached to the computer only when decryption is desired. That way, if the computer is lost or stolen, the attacker is faced with the impossible or near-impossible task of attempting to decrypt the data by breaking the algorithm (by detecting patterns in the encrypted data and reversing them into clear text), since the private key is unavailable.

Prevention

In tandem with deploying encryption technologies, companies can eliminate wide swaths of risk through changes in corporate governance, user behavior, and data retention/recycling policies. Most companies keep enormous stores of unnecessary data whose only effect is to increase risk: companies keep weeks, months, and years of backup tapes pursuant to misguided disaster recovery plans when there is no legal obligation to do so; retail credit card databases keep highly sensitive data that is key to identity theft, such as CV2 records (those three numbers on the back of your credit card), in violation of their agreements with the card issuers; companies, law firms, and consulting firms fail to physically secure laptops, desktops, and external hard drives from common theft by cleaning personnel, messengers, and vendors who steal the devices not for the data but the hardware; and companies let outdated lists of identity information relating to employees, customers and would-be customers languish for years on servers. "Privacy audits" can help companies take stock of and mitigate the risk presented by their data retention profiles.

Conclusion

Once unencrypted data are lost or stolen, companies will incur costs in investigating the loss, determining the number and identities of affected customers, assessing their data breach notification obligations across many state statutes, and then complying with those obligations. Encryption technologies at the desktop, server, and backup tape level provide excellent security and complete exemption from notifying consumers. Technological solutions should be employed as feasible, in tandem with company-wide efforts lawfully to reduce the kinds and amounts of legacy, identity data that provide marginal business benefit but enormous risk. ■

1. 2005 Ark. Acts 1526 (codified as Ark. Code Ann. §§ 4-110-101–4-110-108); Cal. Civ. Code § 1798.82; 2005 Conn. Pub. Acts 148 (codified as Conn. Gen. Stat. §§ 36a-701–36a-701b); 75 Del. Laws 61 (2005) (codified as Del. Code Ann. tit. 6, §§ 12B-101–12B-104); 2005 Fla. Laws ch. 229 (codified as Fla. Stat. § 817.5681); 2005 Ga. Laws 163 (codified as Ga. Code Ann. §§ 10-1-910–10-1-912); 2005 Ill. Laws 36 (codified as 815 Ill. Comp. Stat. 530/1–530/30); 2005 Ind. Acts 91; 2005 La. Acts 499 (codified as La. Rev. Stat. Ann. §§ 51:3071–51:3077); 2005 Me. Laws 379 (codified as Me. Rev. Stat. Ann. tit. 10, §§ 1346–1349); 2005 Minn. Laws 167 (codified as Minn. Stat. § 325E.61); 2005 Mont. Laws 518; 2005 Nev. Stat. 485 (codified under ch. 205 of tit. 15 of Nev. Rev. Stat. Ann.); 2005 N.J. Laws 226 (codified as N.J. Stat. Ann. §§ 56:11-45–56:11-50); N.Y. Gen. Bus. Law § 899-aa (2006); 2005 N.C. Sess. Laws 414 (codified as N.C. Gen. Stat. §§ 75-60–75-79); 2005 N.D. Laws 447 (codified as N.D. Cent. Code §§ 51-30-01–51-30-07); H.B. 104, 126th Gen. Assem., Reg. Sess. (Oh. 2005) (codified as Ohio Rev. Code Ann. §§ 1345.51, 1347.12, 1349.19, 1349.191–1349.192); 2005 Pa. Laws 94; 2005 R.I. Pub. Laws 225 (codified as R.I. Gen. Laws §§ 11-49.2.1–11-49.2.7); 2005 Tenn. Pub. Acts 473 (codified as Tenn. Code Ann. § 47-18-2107); 2005 Tex. Gen. Laws 294 (codified as Tex. Crim. Code Ann. art. 2.29; Bus. & Com. §§ 48.001–48.002, 48.101–48.103, 48.201–48.203); 2005 Wash. Laws 368 (codified as Wash. Rev. Code § 19.255.010). Hereinafter, these statutes will be referred to by the name of their respective state.

2. Some leading encryption algorithms are RSA, Triple DES, Blowfish, and IDEA.

BY ELLIOTT WILCOX

Speaking "Off the Cuff"

Elliott Wilcox is creator of *The Trial Notebook: Lessons Learned from the Courtroom*. To sign up for his FREE weekly *Trial Tips Newsletter*, featuring trial advocacy tips and techniques, visit www.TrialTheater.com.

It's your first firm-wide meeting. Unexpectedly, the senior partner asks you a few questions about a project you've been researching. As you rise to your feet, your brow begins to glisten with sweat. You stammer the first words that come to mind, losing your train of thought several times. After rambling incoherently for several minutes, the senior partner finally takes pity on you, and moves to the next agenda item.

Of all the speaking opportunities you'll encounter, impromptu speaking can present the greatest difficulties. With little or no time to write out your speech, you are expected to entertain, educate, and/or persuade. But that's why impromptu speaking is also the most exhilarating and rewarding type of public speaking. Responding to an objection, handling a job interviewer's questions, or debating for the presidency are just a few of the many areas where impromptu speaking skills can prove invaluable. In this article we'll explore how you can do the impossible: prepare for an impromptu speech.

Know what your audience expects of you. If your audience is a group of co-workers at a meeting, examine the meeting schedule ahead of time and be prepared to speak on the topics listed. If you are calling on prospective clients, you should know your product or service, the likely objections, and why they should use *you* instead of your competitor. Have you been called before the TV cameras or into the courtroom? Hopefully, you know what you're accused of. Anticipate the questions you will be asked *before* you walk into the room, and plan your responses. No matter where you speak, you can do *some* advance preparation so you aren't caught completely off-guard.

Decide what your point(s) will be. The great philosopher, Yogi Berra, once remarked, "If you don't know where you are going, you will wind up somewhere else." Do you know where your impromptu speech is headed? Don't ramble on and string together a series of disconnected nothings. Keep your ideas logically grouped around a central thought: the main point you want the audience to remember. Think of the central point in your speech as the headline – everything else should relate to it. Be as specific as possible – the more concrete your point, the easier it will be for your audience to remember.

Have something worthwhile to say. Mark Twain once said, "It takes me three weeks to prepare a good impromptu speech." You can begin by continually improving yourself: listening, observing, reading, and learning. Not just the business section or *Florida Law Weekly* – take the Renaissance approach. Learn something about art, science, music, math, wine, food, or anything else that expands your breadth of knowledge. You'll not only be more interesting at cocktail parties, you'll gain the knowledge to give an impromptu presentation on a wide variety of topics. You'll add color and flavor to your arguments, and you'll captivate your audiences.

Have plenty of examples and stories to tell. Unlike quotes or statistics, examples and stories are easily remembered because you lived through the experience. If you immediately start with an example, you won't need to think about your word choices – the words will easily flow from your lips as you share the experience. Using an example gets you into the swing of speaking, allowing your first-minute jitters to disappear. Most importantly, a true-life example grabs your audience's attention immediately.

Speak with animation and force. Use your body, hands, eyes, face, vocal inflections, different pitches and tones. *What* you say is important, but *how* you say it conveys a significant portion of your message. Some studies suggest that it conveys the majority of your message. Once you become interested in your speech, you will speak with energy and forcefulness. Be enthusiastic about your subject matter and your hands and body will move naturally, without conscious thought, effortlessly emphasizing the points you want to make.

How to respond to an impromptu question. Here are five steps to follow when presenting an impromptu speech.

1. Listen for the question. If you don't hear it, you won't be able to respond.

2. Pause. Take a deep breath. Take a moment to think about what point(s) you will make and what you want the audience to think, feel, or do differently when you're done.

3. Confirm. Did you hear the question correctly? Make sure: "Mr. Chairman, you want to know my position on taxation without representation?"

4. Respond. This is the bulk of your speech. Focus on the one point you want the audience to remember.

5. End! Many impromptu speeches fade away. Let yours end with a final statement, quote, or phrase that concludes with power and resonates in your audience's ears.

Delivering an impromptu presentation isn't easy, but it's worth the practice to hone your skills. Once you master the art of speaking "off the cuff," you'll never be at a loss for words again. ■

ATTORNEY PROFESSIONALISM FORUM

Editor's note: Due to a production error, the question from "Commodities Counsel" was published in the January Forum. That question will be answered in the March/April Forum.

To the Forum:

My firm has been retained by a large, out-of-state national law firm to act as local counsel and attorney of record in a case that has been filed in New York. I am the contact person at our firm. Although we have asked national counsel to provide us with copies of court submissions at least two days in advance of any given deadline, we often have received our copy last minute, with little or no time for a substantive review. Recently, national counsel has asked me to provide her with my user name and password so that she may e-file any papers by the applicable deadline. Undoubtedly, this will make it even less likely that I or anyone else at my firm has an opportunity to review what is to be filed beforehand, much less contribute.

National counsel is a prominent attorney and has successfully litigated countless cases in the field of law at issue, and it is clear to me that she is not interested in my input. Nevertheless, she is not licensed to practice in New York, nor has she been admitted pro hac vice.

What are my professional and ethical obligations regarding a substantive review of the filings? Is it improper for me to sign and file papers prepared by national counsel if I have not substantively reviewed them? Is it improper for me to circulate my user name and password for purposes of e-filing?

Sincerely,

Concerned Local Counsel

Dear Concerned:

You have raised some difficult questions about the obligations local counsel owes to the client, the court, and to national counsel.

The Code of Professional Responsibility does not use the term "local counsel" and makes no distinction regarding an attorney's duties based on local counsel status. You are obligated, therefore, to represent your client's interest zealously (see DR 7-101(A)), and to honor your professional responsibilities in all respects.

As you are undoubtedly aware, absent admission pro hac vice a lawyer admitted in a sister state is not permitted to practice in the New York state courts. N.Y. Judiciary Law § 478; 22 N.Y.C.R.R. § 520.11. Further, attorneys are obligated not to assist others in the unauthorized practice of law. The Lawyer's Code of Professional Responsibility, Canon 3.

National counsel has retained your services because she is not authorized to practice in the jurisdiction in which the matter is pending. As local counsel and an attorney of record, you are obligated to serve your client and to earn your fee by, among other things, advising national counsel as to local practice and procedure. If you are not given an opportunity to substantively review the documents to be filed and to ensure that the filing comports with local procedure, you will be nothing more than national counsel's "mail drop." *See Lightron Corp. v. J. S. M. Holdings, Inc.*, 149 Misc. 2d 617, 619, 567 N.Y.S.2d 976 (Sup. Ct., Nassau Co. 1990) (cautioning local counsel that an "attorney cannot present himself as an attorney-of-record and charge a fee for services without subjecting himself to the concomitant responsibilities").

National counsel should, therefore, provide you with a genuine opportunity to substantively review the filings so that you may serve the client's interests. If you are stripped of your chance to do so you cannot zealously represent your client, and have not earned your fee. If national counsel continues to refuse to make filings available two days before their due date, as you have requested, your client's best interests may be served by your withdrawal from the case. DR 2-110(C)(3) (A lawyer may withdraw if "[t]he lawyer's inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal").

In the same vein, national counsel's request for your e-filer username and password is improper. It is also worth noting that the rules governing electronic filing provide that an e-filer's signature operates as a signature for all purposes, including Rule 11 of the Federal Rules and its New York state court counterpart, Part 130 of the Uniform Rules for the Trial Courts. 22 N.Y.C.R.R. § 202.5-b(e)(2); see also U.S. Dist. Ct. Rules S.D.N.Y., App. M, Procedures for Electronic Filing, 8(a)–(b). An e-filer is obligated to maintain the confidentiality of his or her password and to advise the clerk of any security breach. 22 N.Y.C.R.R. § 202.5-b(d)(6); see also U.S. Dist. Ct. Rules S.D.N.Y., App. M, Procedures for Electronic Filing, 1(c). More to the point here, the e-filer rules specifically provide that the e-filer "shall retain full responsibility for any papers filed" if the e-filer provides his or her user name and password to another person for purposes of filing papers. 22 N.Y.C.R.R. § 202.5-b(d)(6).

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.

Given these rules, and in addition to the risk of assisting national counsel in the unauthorized practice of law, turning over your e-filer information as requested will effectively authorize an unlicensed lawyer to use your signature to certify that the filings are not frivolous. 22 N.Y.C.R.R. § 130-1.1A; see also Fed. R. Civ. P. 11. Therefore, and although it is not specifically prohibited, providing your user name and password to national counsel and authorizing her to file papers using your signature without your review ultimately may subject you and your firm to sanctions if any particular filing is later found to be frivolous.

Finally, every lawyer owes a duty "to strive to avoid not only professional impropriety but also the appearance of impropriety." EC 9-6. If you allow national counsel to bypass your firm and its local expertise, you are doing a disservice to your client and to the court, and you create an "appearance of impropriety." It is not recommended, therefore, that you provide national counsel with your e-filer information. Rather, you should diligently represent the client, review the filings substantively, and supervise all such filings to ensure that they are not frivolous and comport with local practice and procedure.

The Forum, by
Danielle M. White
Paul Hastings Janofsky & Walker, LLP
New York City

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a mid-level partner at a major law firm, specializing in commodities contracts regulation. A client of mine in the financial services industry has devised a transaction that he would like to implement. Without going into the details, suffice it to say that the client proposes to bring together some 20 or 30 high net worth individuals to pool their money and form an investment vehicle. The structure raises novel questions of commodities and securities regulation, such that each of these individuals would need to conclude, to a high level of confidence, that participating in the transaction will not expose him or her to civil and/or criminal penalties. I have examined the issues, and in principle I believe that we can achieve the requisite comfort level, subject, of course, to the actual facts pertaining to the transaction as a whole and to each person's participation.

My client would like me to offer my services as counsel on these matters to each of the targeted individual participants, to address both the overall facts and the individual's specific circumstances, and also to render legal advice. We have discussed fees – of course each client would, in one way or another, bear the cost of my representation – but we have not decided whether to propose that I be paid purely on an hourly basis, or only if the deal actually closes.

There are two practical reasons why my client is urging me to accept this role, apart from the fees I will earn. First, I have already done the basic work, so this will be more efficient for each individual than hiring his or her own lawyer – and my client is especially concerned that the passage of time that would result from bringing in many new attorneys could erode the commercial opportunity, or allow the idea to leak. Second, the area is so specialized and some of the issues are so novel that it would not be easy to find lawyers who could replicate my efforts independently; it would serve no one's interests to get less than the best advice available.

I am convinced that what my client wants makes eminent sense from a purely business perspective, but something tells me that I should be concerned about conflicts and about whether my participation would constitute prohibited solicitation. Do you have any advice for me?

Sincerely,
Commodities Counsel

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: In a recent article, Albany attorney Kevin D. Moloney read the statement, "What a difference 40 years *make*."(My emphasis.) He added that in that context, he would have used the singular form of the verb: *makes*.

Answer: Attorney Moloney is right. The rule is that after a collective noun (in this sentence "40 years"), you should use a singular verb. Collective nouns are nouns that represent a group, class, entity, company, faculty, etc. The reasoning behind the rule is that these groups are considered singular entities. In other words, logic trumps grammar. Below are additional collective nouns that take singular verbs.

- The United States *intends* to modify *its* Middle East policy.
- Barton & Barton *has* lost *its* biggest customer.
- A group of Nobel Prize winners *was* present at the meeting.
- Three months *is* long enough to decide.
- The couple *was* recently married at the home of the bride.

However, the "collective noun" rule has a few exceptions. In the final sentence, above, the singular verb is correct. But you might select the plural verb in, "The couple have been divorced for three years." In that sentence, the couple may be considered as individuals. And in a statement like, "A couple of people have complained," the plural verb indicates that the people are thought of as individuals. Similarly, in the statement, "The group disagree about the outcome," the members of the group might be considered as separate individuals.

But the word *number* is peculiar. It does not depend on the viewpoint of the user. When *number* is preceded by *the* it is followed by a singular verb. When it is preceded by *a* it is followed by a plural verb:

- The number of asterisks indicates the importance of the situation.
- A number of important points are to be made.

Question: This next question came from Mitchell G. Shapiro, an attorney in New York City: "In the November/December issue of this *Journal*, in a letter to the 'Attorney Professionalism Forum' (page 55), the following language appeared: 'Given the recent ferment in New York about the rules . . . .' At first blush I thought the writer should have said 'foment.' Looking up both words, I am confused. Your view?"

Answer: As of this date (December 15, 2006) I have not yet received that issue of the *Journal*, so I do not know the context of the quoted language. But the words are look-alikes having in common the idea of activity. *Ferment* can be either a noun or a verb; *foment* is always a verb.

Both words have changed in meaning since they were introduced into English. The noun *ferment* came into Middle English from Old French, with its literal meaning, "turbulence or agitation," such as occurs in bread dough when yeast is added. *Ferment* then developed a figurative meaning, expressing any such activity. A crowd of people, awaiting a significant individual, might be said to be in a ferment of anticipation.

The verb *foment* came into Middle English with a medicinal or therapeutic meaning, its activity being "to promote healing or good health." At first it referred to warm damp compresses applied to the skin for those purposes. But it then downgraded and has taken on the sense of activity to promote discontent or strife. The noun form is *fomentation*. One could say that the *ferment* of the crowd awaiting a speaker might *foment* strife.

Question: Please write a column on how to choose the appropriate word in the following pairs: *in behalf of/ on behalf of* and *compared to/compared with*.

Answer: Traditionally, lay dictionaries distinguished between *in behalf* and *on behalf*; *in behalf of* meaning "in the interest of and for the benefit of," and *on behalf of* meaning, "as the agent of."

Ballentine's Law Dictionary (3rd ed., 1969) agrees with that distinction, citing to *State v. Eggerman & Co.*, 81 Tex. 569, 572. The phrase *in behalf of* came into late Middle English (about 1450) after the French invasion, as *bi halve* ("on your side"), roughly, "I will be on your side only." Later the spelling *on behalf of* became common, with the same meaning. Sometime thereafter the two meanings became distinguished. (Commonly, in English, when two similar words mean the same thing, either their meanings differentiate or one word disappears.)

However, current dictionaries reflect the merging of the two phrases. *Webster's Third* (2000) lists them as synonyms, not surprisingly, since those who act as agents for others also act in their interest. Many courts also ignore the distinction between interest and agency. The phrase *on behalf of* seems to be more popular. In those decisions that were reported in *Words and Phrases*, *on behalf of* appeared in 31, *in behalf of* only in seven decisions.

Regarding *compared to/ compared with*, the correspondent was taught that *compare to* indicates the similarity between two or more things, but *compare with* indicates both similarities and differences. He asked, "Is that rule still observed?

Hardly ever. Probably some conservative users still follow it, but more often the two verb phrases are used synonymously, and most dictionaries now ignore the distinction. In a book I am now writing about popular English expressions and anecdotes, I've included that rule in a list of grammar rules that you may safely ignore.

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).

On the other hand, dictionaries and educated users still observe the difference between the pairs *contrast with* and *contrast to*, antonyms of *compare with* and *compare to*. Use the preposition *with* when you use *contrast* as a verb. But when you use *contrast* as a noun, use *to*.

- The response of the administration today contrasts with its previous response.
- In contrast to its previous response, the group ignored the opposition today.

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Joshua Paul Weisser
Howard H. Weller
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David K. Wolfe
Joanna Rae Wolfe
Mauro M. Wolfe
Connie Wong
Kia M. Wright
Carolyn Chia Ye Wu
Shana M. Yates
Inna Zumor

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Marie Artus
Michael Guy Babcock
Poopeh Banky-Paksima
David Mario Curcio
Steven A. Feldman
Raphael Gil
Arik Hirschfeld
Paul Huebner
Shapse Jakob
Alexander Karasik
Michael George Koueiter
Edward J. Kravitz
Kathryn Leonilda Liverani
Sean James McKinley
Alex Nocerino
Tiffany Michelle Nowell
Marina Plotkin
Mukunda Vijaya Raghavan
Robert Howard Rickner
Jasmine Rodriguez
Michael John Shollar
Walter Jan Simeon Saukin
Sherzod R. Tuychibaev
Lindsey Ann Weber
Avi Weiss
Amy C. Wheeler
Peter Thomas Young
Anthony Zurica

THIRD DISTRICT
Kelly Ann Ryan

FIFTH DISTRICT
Edward A. O'Hara
Jordan Robert Pavlus

SEVENTH DISTRICT
Andrew Quinn Conroy
Randall Scott Wayland

EIGHTH DISTRICT
Jason B. Desiderio

NINTH DISTRICT
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Joseph Paul DePaola
Michele C. Durso
Philip F. Foglia
Daniela Fuda
Zaida King
Daniel Milton Laub
Francis Joseph Malara
Gino Angelo Marmorato
Donna Marie Mollica
Abdulwali Muhammad
Phillip Musegaas
Juliana P. Oliveira
Jennifer Reinke
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Donna L. Tapellini

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Jacques Claudel Daniel
Sarah Ellen Feld
Cathryn A. Harris
Tamara Harris
David A. Kubikian
Tasha N. Lloyd
Laquan M. London
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Diane Monaco McClernon
Matthew Michael Mulvihill
Syed Raheen
Andrea Del Pilar Rodriguez
Salvatore P. Spezio
Ronald G. Vachula
John Matthew Wong

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Michael Davidov
Michael J. Eatroff
Daniel J. Hartmann
Susan Beth Lander
Jason Robert Lipkin
Nancy Sami Mahmoud
Teresa Ombres
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Paul R. King
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Roberto Antonio Reveron
Peter Manuel Rivera
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Kawan Lathisha Simmons
David Sosa
Johanna B. Steinberg
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Kirstin Bohn
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Julia Marie Clinton
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Hubert Charles Cutolo
Judith Liliana Davila
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Daniel Huff
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Richard Joseph Isolde
Dana Kalichman
Laurence Sui Kao
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Emmet John Keary
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Jane Lembeck Kuesel
Sanghyun Lee
Ying-yi Lee
Edward Eugene Lehman
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Hsien-chen Li
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Babu Varghese
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New York, NY

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important,[12] but the litigants' interests shouldn't be sacrificed for judicial economy. Missing an issue because a judge used form precedent or form language is inexcusable. It causes litigants expense, delay, and anguish.

Judges, who must keep an open mind, should consider each case anew, even if the issues seem familiar. Judges who pen boilerplate opinions signal their laziness, and "[a] court must constantly be the alert against mental laziness. The decision suggested by habit might not be the right one."[13]

nature judgments, orders, and decrees, but "no authority . . . countenances the preparation of the opinion by the attorney for either side. That practice involves the failure of the trial judge to perform his judicial function."[20] The other extreme occurs when a judge decides a case without reading the lawyers' papers.[21]

The rules prohibiting plagiarism affect extrajudicial writing as well. A Michigan judge was publicly censured for not acknowledging passages from one article and for incorporating without attribution portions of another.[22]

Judges may use language from case law or a lawyer's brief if they cite

written opinion reflects a judge's skill and temperament. Every word and citation must be the judge's authentic voice. A judge shouldn't credit the law clerk's work. In New York, the Law Reporting Bureau (LR B) has put into effect the Court of Appeals's policy forbidding judges from thanking their law clerks or interns in opinions: The LRB won't publish the acknowledgment. Before this rule went into effect, many judges lauded clerk and intern contributions.[30] Some still do.

A judge may use a law clerk, student intern or extern, special master, or referee to assist in opinion writing. A judge may not use an outside expert,

Judges, who must keep an open mind, should consider each case anew, even if the issues seem familiar.

Plagiarism

Plagiarism is "the unauthorized use of the language and thoughts of another author and the representation of them as one's own."[14] Judges who don't attribute fairly act unethically. No specific code or rule exists on this topic, but two New York rules are implicated. First, the Rules Governing Judicial Conduct (RGJC) require judges to act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[15] Second, the RGJC requires judges to "be faithful to the law and maintain professional competence in it."[16]

Judges may not steal words, intentionally or otherwise.[17] They must avoid obvious and intentional plagiarism: copying headnotes or quoting without crediting. Sometimes judges plagiarize by copying language from a lawyer's brief. A famous example is from Chief Justice John Marshall in *M'Culloch v. Maryland*.[18] He used Daniel Webster's words as his own: "An unlimited power to tax involves, necessarily, a power to destroy."[19]

A court that copies commits reversible error if in doing so it doesn't exercise independent thought. Judges may direct attorneys to submit for signature the source when paraphrasing or use quotation marks and attribution when words are taken verbatim. The opposite of plagiarism is scholarship: It's scholarship to cite the starting point from which the judge's idea was derived.

Law Clerks

It's ethical for judges to rely on law clerks to research and help draft opinions.[23] Although doing so is an accepted judicial practice,[24] judges must be wary about potential dangers. The RGJC requires judges to perform their duties diligently.[25] Diligence doesn't mean delegating a task and forgetting about it. Even if the clerk plays a large role writing the decision, the judge must always take a hands-on approach.

Judges should give their clerks direction.[26] If the clerk believes that the judge is mistaken, the judge should listen to the clerk and adjust the opinion, if necessary.[27] This process should continue throughout the research and writing. The judge should edit the clerk's drafts for style, research, and substance.[28]

Regardless how much the law clerk contributed to the decision, the judge is responsible for the result.[29] A well-

such as a law professor, to write the opinion.[31] Judges who let court outsiders write for them can be reprimanded, censured, or removed from office.

Extrajudicial Writing

Judges may write things other than judicial opinions if the writing doesn't cast doubt on their ability to act impartially, affect the court's dignity, or interfere with judicial performance.[32] Judges are prohibited from writing about pending or impending cases, whether about the merits, the facts, the litigants, or the attorneys.[33] The RGJC doesn't expressly prohibit judges from commenting on cases they've decided, but judges should avoid doing so.[34] Unlike statutes, which legislative history clarifies, an opinion is self-contained. A judge's extrajudicial comments shouldn't guide future courts.[35] Controversy on this issue arose recently when a New York Family Court judge on the verge of retiring wrote a *New York Law Journal* commentary criticizing the Appellate Division, Second Department, for reversing one of his decisions.[36]

The RGJC provides that "[a] judge shall not lend the prestige of judicial office to advance the private interests

of the judge or others."[37] The Advisory Committee on Judicial Ethics has issued several advisory opinions about extrajudicial writing that advances private interests.

Judges face ethical dilemmas when they write personal recommendations that give the appearance of partiality. Judges should mark "personal and unofficial" on whatever letter isn't part of the court's official business, and they should avoid writing unsolicited letters.

That said, New York judges may write recommendation letters on behalf of a law-school or job applicant[38] or an attorney who seeks admission to an 18-B panel.[39] A judge may recommend a former assistant district attorney for private employment.[40] A judge may recommend a court employee seeking work in another court.[41] A Criminal Court judge may not write a recommendation on behalf of a law student to a district attorney whose assistants appear before the judge.[42] A judge may authorize a job candidate to list the judge as a reference; a judge may also respond to a district attorney's request for information about the candidate.[43] A judge may recommend a candidate with a "To Whom It May Concern" letter[44] that the judge gives the candidate. A judge may also serve as a reference for attorneys seeking employment with a law firm that doesn't appear before the judge and is located outside the judge's jurisdiction.[45] A judge may write a character letter for a co-op application.[46] A judge shouldn't write a recommendation for a police officer who will likely be a witness in a case before the judge.[47] A judge is prohibited from giving a reference letter to a bank on behalf of a friend seeking a loan.

Judges may not lend their office's prestige to further a friend's private business interests.[48] Or their own interests: Judges shouldn't use judicial stationery for private matters.

Judges may teach, write, and speak on the law, the legal system, and the administration of justice and be compensated for doing so.[49] But judges shouldn't give continuing legal education instruction to associates of a law firm, even if the law firm doesn't have pending cases before the judge.[50] This behavior "associate[s] the judge with the competence of a private law firm and would serve the exclusive interests of that firm . . . rather than the common professional interests of a heterogeneous, unconnected group of lawyers, who . . . might be the beneficiaries of a judge's lecture on legal practice, e.g., at a bar association program."[51]

A judge may publish fictional works but, again, may not publicly comment on pending or impending cases, even if a judge uses fictitious names to protect the innocent or guilty.[52] Judges may write a book review but may not endorse the book: Judges "may not provide a quot[ation] about a book for the purpose of its being used in the book jacket in conjunction with its sale. Such activity would involve a judge in the commercial and promotional aspects of marketing and . . . is prohibited."[53]

Judges must also be careful about publicly commenting on the law. Judges may not comment on a legal issue that might come before them or state a political view that might call their impartiality into question.[54] It's also improper for a judge to attack higher-court decisions. Doing so detracts from confidence in the judiciary and casts doubt on the judge's ability to follow precedent.[55] Still, judges may — and should — write to explain substantive law and procedure and comment on issues facing the judiciary, such as judicial-writing ethics.[56]

Conclusion

A judge's behavior on the bench might be forgotten. Not so a judge's writing. Being ethical is critical for judges. They set examples for lawyers and laypersons. They decide cases and expound on the law. Written opinions reflect a judge's values — and society's values. Judges must never forget the special role entrusted to them. They must never forget to do what's right within the bounds of the law and the law of ethics. Judges who stay within these bounds have done their jobs. For doing their jobs well, they will be venerated. The judiciary, the litigants, and society are better for it. ■

Judges should not write pretentiously or overuse adjectives, adverbs, clichés, and overdeveloped metaphors.

1. Am. B. Ass'n — Appellate Judges Conference, Judicial Opinion Writing Manual 1 (1991).

2. Bernard E. Witkin, Manual on Appellate Court Opinions § 103, at 202–03 (1977).

3. *Id.* at § 103, at 204–05 (emphasis in original).

4. Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdictional Opinions*, 46 U.C.L.A. L. Rev. 75, 97–99 (1998).

5. Steven Stark, *Why Lawyers Can't Write*, 97 Harv. L. Rev. 1389, 1392 (1984). Courts understand that the passive voice can deceive. *See, e.g., J & A Vending, Inc. v. J.A.M. Vending, Inc.*, 303 A.D.2d 370, 373, 757 N.Y.S.2d 52, 55 (2d Dep't 2003) (mem.) ("This attorney's use of the passive voice, a grammatical device that conceals as much as it reveals, betrays an unwillingness to identify . . . .").

6. Gerald Lebovits, The Legal Writer, *Writers on Writing: Metadiscourse*, 74 N.Y. St. B. J. 64 (Oct. 2002).

7. *See* David Margolick, *Sustained by Dictionaries, a Judge Rules that No Word, or Word Play, is Inadmissible*, N.Y. Times, Mar. 27, 1992, at B16; Howard Bashman, *20 Questions for Circuit Judge Bruce M. Selya of the U.S. Court of Appeals for the First Circuit*, *available at* http://20q-appellateblog.blogspot.com/2004_03_01_20q-appellateblog_archive.html (last visited Aug. 4, 2006). Judge Selya is famous for using in his decisions what he calls "neglected" words — including "sockdolager," "algid," "longiloquent," and "decurtate."

8. Judith S. Kaye, *Rethinking Traditional Approaches*, 62 Albany L. Rev. 1491, 1497 (1999).

9. *See* N.Y. St. Jud. Cttee. on Women in the Courts, Fair Speech: Gender Neutral Language in the Courts (2d ed., N.Y. St. Unified Ct. Sys. 1997); N.Y. St. Law Reporting Bureau, Official Edition New York Law Reports Style Manual § 12.1, at 65–66 (2002 ed.) (Tanbook), *available at* www.courts.state.ny.us/reporter/Styman_Menu.htm (last visited Aug. 4, 2006). For more, see Gerald Lebovits, The Legal Writer, *He Said — She Said: Gender-Neutral Writing*, 74 N.Y. St. B.J. 64, 64 (Feb. 2002).

10. Judith S. Kaye, Perspective, *A Brief for Gender-Neutral Brief-Writing*, N.Y.L.J., Mar. 21, 1991, at 2, col. 3.

11. *See* David Mellinkoff, Legal Writing: Sense & Nonsense 101 (1982) (noting that forms offer "pre-packaged law . . . . taken on quick faith by the

ignorant, the timid, and the too busy — law and all; needed or not."); Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 Cal. L. Rev. 831, 837 (1961) (observing that form opinions can lead to judicial shortchange).

12. *See generally* Elizabeth Ahlgren Francis, *A Faster, Better Way to Write Opinions*, 4 Judges' J. 26 (Fall 1988).

13. William L. Reynolds, Judicial Process in a Nutshell 63 (2d ed. 1991).

14. Webster's Universal College Dictionary 604 (1997).

15. 22 NYCRR 100.2(A).

16. *Id.* 100.3(B)(1).

17. *See generally* Jaime S. Dursht, *Judicial Plagiarism: It May be Fair Use But is it Ethical?*, 18 Cardozo L. Rev. 1253 (1996).

18. 17 U.S. 316, 327 (1819).

19. Daniel J. Kornstein, *Legal Writing for Litigators* (N.Y. County L. Ass'n CLE, Feb. 4, 2004), *available at* http://nycla.org/index.cfm?section=CLE&page=DVD---CD_Detail&itemID=149.

20. *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724–25 (4th Cir.1961) (quoted in *Bright v. Westmoreland County*, 380 F.3d 729, 732 (3d Cir. 2004)).

21. *See generally* Daniel J. Kornstein, *No Ruling Without Reading*!, N.Y.L.J., Feb. 2006 (Mag.), at 48, 48.

22. *See In re Brennan*, 433 Mich. 1204, 447 N.W.2d 712 (1989).

23. *See* Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 Brook. L. Rev. 685, 697–98 (2001) (noting that law clerks write most decisions); Richard A. Posner, Cardozo: A Study in Reputation 148 (1990) (same); Abby F. Rudzin & Lisa Greenfield Pearl, *Ten Brief-Writing Don'ts — The Judicial Clerk's Perspective*, 85 Ill. B.J. 285, 285 (1997) (same). For more about law clerks and opinion writing, see Gerald Lebovits, Reflection, *Judges' Law Clerks Play Varied Roles in the Opinion Drafting Process*, 76 N.Y. St. B.J. 34 (July/Aug. 2004). In New York, "law clerks" work for Court of Claims judges and elected Supreme Court justices. All other law clerks are "court attorneys." For the ethical differences between law clerks and court attorneys, see Gerald Lebovits, Outside Counsel, *Judicial Ethics, Law Clerks and Politics*, N.Y.L.J., Oct. 21, 1996, at 1, col. 1.

24. A. Leo Levin & Michael E. Kunz, *Thinking About Judgeships*, 44 Am. U. L. Rev. 1627, 1640–42 (1995).

25. 22 NYCRR 100.3.

26. Douglass K. Norman, *Legal Staff and the Dynamics of Appellate Decision Making*, 84 Judicature 175, 175, 177 (2001) (stating that clerk should receive initial guidance from judge).

27. Peter N. Thompson, *Confidentiality in Chambers: Is Private Judicial Action the Public's Business*, 62 Bench & B. Minn. 14, 17 (Feb. 2005) (noting that law clerks "'are sounding boards for tentative opinions and legal researchers who seek authorities that affect decision'") (quoting *Hall v. Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983) (Rubin, J.)).

28. *See* Norman, *supra* note 26, at 175 (stating that after reviewing draft, judge should ask clerk to make changes ranging from grammatical corrections to major rewrite).

29. Fed. Jud. Ctr., Judicial Writing Manual 11 (1991) (explaining that opinion must be judge's work, no matter how capable clerk is).

30. *Wolkoff v. Church of St. Rita*, 132 Misc. 2d 464, 473, 505 N.Y.S.2d 327, 334 (Sup. Ct., Richmond Co. 1986) (Kuffner, J.); *Acceptance Ins. Co. v. Schafner*, 651 F. Supp. 776, 777 (N.D. Ala. 1986) (Lynne, J.), *practice condemned in Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988).

31. *In re Fuchsberg*, 43 N.Y.2d (j) (y), 426 N.Y.S.2d 639, 648 (Opn. of Censure — Ct. on Jud. 1978) (per curiam); *In re Judicial Disciplinary Proceedings Against Tesmer*, 219 Wis. 2d 708, 580 N.W.2d 307 (1998) (per curiam). Judges may, however, consult experts ex parte if, after they receive the expert's report, they share the report with the litigants. *Cf.* Advisory Comm'n on Jud. Ethics Op. 04-88, N.Y.L.J., May 20, 2005, at 7, col. 1 (requiring Drug Court judges to inform parties of contents of ex parte communications from court personnel).

32. 22 NYCRR 100.4(A)(1), (2) & (3).

33. N.Y. St. Advis. Cttee. on Jud. Eth., Formal Op. at 00-115 (Jan. 25, 2001); William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 Geo. J. Legal Ethics 589, 598–99 (1989) (discussing extrajudicial commentary from standpoint of Model Rules of Judicial Conduct).

34. Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 Hofstra L. Rev. 703, 713 (1997) (stating that although RGJC doesn't prohibit commenting about cases that judge already decided, doing so is unwise).

35. Ross, *supra* note 33, at 602.

36. *See* Guy P. DePhillips, *Family Court Cares*, N.Y.L.J., May 18, 2006, at 2, col. 3. Three attorneys responded by attacking the judge. *See* Richard J. Montelione, *How to Influence a Higher Court*, N.Y.L.J., June 7, 2006, at 2, col. 6; Daniel L. Greenberg, *Judge Was Wrong on the Merits*, N.Y.L.J., May 31, 2006, at 2, col. 6; James Edward Pelzer, *Judge's Attack on Appellate Court is Inappropriate*, N.Y.L.J., May 25, 2006, at 2, col. 5.

37. 22 NYCRR 100.2(C).

38. Formal Op. 88-10 (Vol. I).

39. *Id.* at 96-32 (Vol. XIV). Under County Law art. 18-B, courts appoint 18-B attorneys to represent litigants financially unable to hire their own attorneys.

40. *Id.* at 94-36 (Vol. VII.).

41. *Id.* at 90-46 (Vol. V).

42. *Id.* at 88-53 (Vol. II).

43. *Id.*

44. *Id.*

45. *Id.* at 01-114.

46. *Id.* at 98-103.

47. *Id.* at 01-37; 22 NYCRR 100.2(C).

48. *Id.* at 89-15.

49. 22 NYCRR 100.4(B); 100.4(H)(1); Formal Op. 96-143 (Vol. XV), 90-204 (Vol. VII).

50. Formal Op. 01-31.

51. *Id.*; *see also* 22 NYCRR 100.2(C) (requiring judge in all judicial activities to avoid impropriety and its appearance).

52. Formal Op. 01-31.

53. *Id.* at 97-133.

54. Kaye, supra note 34, at 712–13; accord Republication Party of Minn. v. White, 536 U.S. 765 (2002) (finding Minnesota's Code of Judicial Conduct Canon announce clause unconstitutional under First Amendment because clause forbade candidates for judicial election to announce their views on disputed legal and political issues). Another recent controversy arose when a New York judge wrote a fictional book, Hot House Flowers. Some critics contend from the book's allusions and metaphors "that immigrants might not be receiving a fair shake in his courtroom." Thomas Adcock, Judge's Book on Illegal Aliens Draws Ire, N.Y.L.J., Dec. 1, 2006, at 1, col. 3.

55. Ross, *supra* note 33, at 624–34.

56. *See* Barbara E. Reed, *Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post-White Landscape*, 56 Mercer L. Rev. 971, 996 (2005) (noting judges' "affirmative duty to speak on the record about certain types of issues, and to help educate the public about the role and function of the judiciary and the courts").

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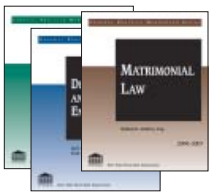

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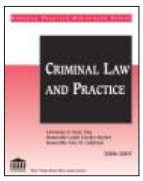

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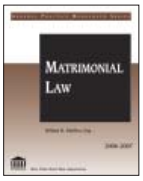

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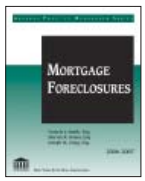

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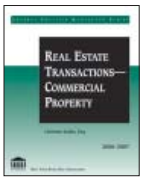

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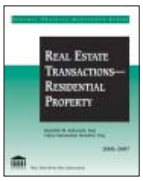

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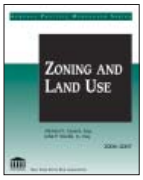

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Ethical Judicial Writing — Part III

For the past two issues, the *Legal Writer* offered suggestions on writing ethical judicial opinions. We continue.

Writing Style

A good opinion "expresses the decision and rationale of the court in language and style that generate confidence in the reader that justice has been fairly and effectively administered."[1] Judges may make their opinions readable: "[A] judicial opinion need not be a dull, stereotyped, colorless recital of facts, issues, propositions, and authorities but can be good writing and make good reading."[2] Memorable opinions with literary style best communicate the law. Nevertheless, a satisfactory "objective is not a literary gem but a useful precedent, and the opinion should be *constructed* with good words, not plastered with them."[3]

Judges must avoid pitfalls common to all legal writing. Nominalizations and the passive voice add unnecessary words that hide substance and allow a judge to escape or downplay responsibility for a decision.[4] Hiding the subject, or actor, can both deceive and make sentences abstract. Nominalizations turn nouns into verbs. One way to spot some nominalizations is to watch for an "of" or a word ending in "ion": "He committed a violation of the Penal Law." *Becomes:* "He violated the Penal Law." Passives place the action's object before the actor. Look for the word "by": "Opinions are written by judges." *Becomes:* "Judges write opinions." It's unethical to use a blank, or double or nonagentive, passive to hide an important actor or to misdirect the reader.[5] Example: "A mistake was made." *Becomes:* "This court made a mistake."

Metadiscourse is written throat-clearing, a needless preface to a substantive point. It introduces what the writer plans to write: "For all intents and purposes, the defendant disregarded the court's order." *Becomes:* "The defendant disregarded the court's order." Phrases like "bear in mind that," "that is to say," "it is the court's conclusion that," "the court recognizes that," "it is well settled that," "after careful consideration," "it appears to be the case that," and "it is hornbook law that" are metadiscoursive. Metadiscourse is pedantic and condescending.[6] Without saying that they're getting to the point, and especially without saying how well they researched or how seriously they considered the case, judges should get to the point, research fully, and consider the case carefully.

Judges should also refrain from writing pretentiously or overusing adjectives, adverbs, clichés, and overdeveloped metaphors. The opinion should leave the judge's personality in the background and focus on logical analysis. Likewise, judges shouldn't try to impress readers with vocabulary.[7] Forcing readers to look up words lessens clarity and insults readers. Judges should also avoid writing in Latin or French if a simple English equivalent is available. So, too, should judges avoid legalisms. As New York's Chief Judge Judith S. Kaye put it, "First, we need to make sure that our communications are accessible. For sitting judges, this starts with sensitive courtroom behavior and speaking clearly — in English, not in Latin, not in French, and not in pettifog . . . . We need to say what we mean in a way that people can understand."[8]

Judges who use sexist language offend both genders. Some states — New York included[9] — require that opinions be gender neutral. A judge who uses gender-neutral language will appear fair. Once again, Chief Judge Kaye said it best: "[G]ender-neutral writing is not only a good habit but also an easy one to acquire and internalize."[10]

Trial judges shouldn't to use "I" or "we." "I" is inappropriate because it's informal, placing the judge on the same level as the winning side. A trial judge writing an opinion shouldn't use "we"; the word is inaccurate. It's better to write "the court" or "this court." Using "we" is appropriate only at the appellate level, where more than one judge will contribute to the opinion. "I" is acceptable in concurring and dissenting opinions. Concurrences and dissents aren't the court's ruling but the individual author's argument.

Boilerplate Opinions

Faced with ever-increasing caseloads, judges are tempted to rely on the same cases or language to resolve issues encountered repeatedly. Boilerplate saves time. It's convenient. But a judge who relies on boilerplate might not pay attention to facts and issues particular to the case. A boilerplate opinion can ignore issues. It can amount to nothing more than an ill-advised judicial shortcut.[11] Writing quickly is

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