NEW YORK STATE BAR ASSOCIATION

Journal

JANUARY 2007
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"A Firm Hand of Stern Repression"

United States v. O'Leary

by William H. Manz

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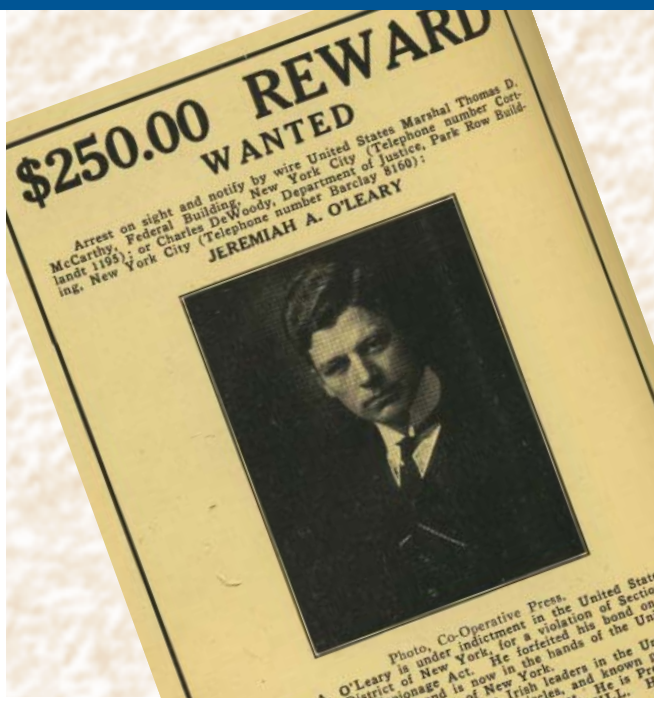

DEPARTMENTS

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A Mid-Term Report

Mark H. Alcott

Six months ago, I stood before the House of Delegates, took the oath of office and pledged that I would use my presidential term to strengthen and defend our core values, while promoting needed reform. Since then, I have been busily engaged in that endeavor, and, having reached the mid-term of my presidency, I can report progress on all of these fronts.

Core Values: Independence of the Courts and the Bar

Independence of the courts and the bar are the twin pillars of our legal system. At my inaugural last June, I undertook to support those pillars by defending the reputation and mission of our profession and resisting political interference in our courts. I have used the bully pulpit of this office to do just that.

These core values are integral to the Association's radio announcements that were broadcast throughout the metropolitan New York area more than 1,000 times in the month following Election Day. Because these are public service announcements, we received hundreds of thousands of dollars of free air time in return for a $30,000 donation to the State Broadcasters Association.

The theme of the announcements is, "That's what lawyers do." The announcements educate the public about what lawyers do to help people solve real-life problems in business, housing, employment and the like; what lawyers do to help the poor; and how lawyers defend judges from political attacks, thereby protecting the public's rights. It is our hope that people hearing these messages will have a better understanding of, and a little more respect for, the legal profession and the court system, thereby enhancing the independence of the bar and the courts.

In addition to the radio announcements, I have spoken out vigorously and often in support of judicial independence. In the fall, I spoke on this theme to an audience of judges and practitioners at "Hail to the Chiefs," an outstanding event staged by the Commercial and Federal Litigation Section, chaired by Lesley Rosenthal, in honor of the new chief judges of various federal courts.

I even took the message of judicial independence to Shanghai, in a major address to a global audience of lawyers, judges and officials at the spectacular fall meeting of our International Law and Practice Section, chaired by Jack Zulack. As you know, China has its own problems and challenges – far more severe than ours – on the issue of independent courts and judges. I did not feel it was appropriate to visit China and lecture its citizens on the shortcomings in their system, of which the Chinese legal community is painfully aware. On the other hand, I could not address a legal conference in China without confronting this most crucial subject. Therefore, I stated that China must press forward vigorously to expand, modernize and reform its legal system; that the effort to do so will require constant vigilance; and that we Americans have learned this lesson from our own experience. I explained that the fight to preserve independent courts and judges, free from political interference, is common to both developing and mature legal systems. I then offered a vigorous defense of independent courts, free of political interference – a message not often heard in China but one that resonated with the Chinese legal community.

The Association also made an important contribution to the inde-

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pendence of the judiciary during the summer by vetting the Judicial Commission's nominees for Judge of the Court of Appeals. This effort was carried out by our exceptionally distinguished and hard-working Committee to Review Judicial Nominations, chaired by Max Pfeifer. Within 10 days, the Committee members had researched, read opinions, interviewed, and checked the references of the seven candidates, and ranked their qualifications. The Committee recently engaged in this effort a second time due to the December 31 retirement of Associate Judge Albert M. Rosenblatt, and very soon the Committee will, for a third time, begin the process anew due to the expiration of Chief Judge Judith S. Kaye's term. With three groups of Court of Appeals nominees to review in just a matter of months, the Committee has been extremely busy, and I am grateful for its effort and dedication to its important work.

We have also worked toward strengthening the independence of the bar. Last June, the House of Delegates approved the report of the Association's Attorney-Client Task Force, created by immediate past president Vince Buzard and chaired by Steve Hoffman, which condemned efforts by federal prosecutors to prevent companies from advancing defense costs to their employees in criminal matters – a policy embodied in the notorious Thompson Memorandum. In August, we joined the American Bar Association's Task Force on Attorney-Client Privilege and brought a resolution before the ABA's House of Delegates that criticized the government's practice; the ABA House adopted this joint resolution. Our position generated a great deal of media attention, and I advocated it in television, radio and newspaper interviews. These efforts coincided with the decision of Judge Kaplan in the *KPMG* case, which held those portions of the Thompson Memorandum to be unconstitutional. Collectively, these efforts have made an impact. The government appears to have pulled back from the practice of discouraging companies from paying the criminal defense costs of their employees and encouraging them to waive the attorney-client privilege, along with other legal rights. As of press time, U.S. Department of Justice officials had indicated that, amidst all of the criticism from our Association and others, they are revising these policies; but some of us are concerned that the changes will not be enough. We will continue to monitor the situation and use our collective voices to ensure that the bar is able to effectively represent corporate clients and their employees, thereby preserving the bar's independence.

Core Value: Diversity of the Profession

At my inaugural, I reflected back on our celebration of the 50th Anniversary of a seminal event in the nation's history – the Supreme Court's decision in *Brown v. Board of Education*. That occasion reminded us that lawyers have played a key role in advancing the course of civil rights and breaking down racial barriers. I then posed this question: What comparable triumphs will be celebrated 50 years from now or, better yet, five years from now? And, what will lawyers do to make them happen?

To address this question, I have formed a major new committee of our Association: the Special Committee on the Civil Rights Agenda. The mission of the Special Committee is to create specific, realizable goals in the continuing effort to break down racial barriers, increase racial diversity in the legal system and the legal profession, and advance the cause of civil rights – goals that can be achieved during the next five years. The Committee's task is to study the issues, consult experts, and prepare a report that lays out these goals and challenges the profession to take a leadership role in achieving them. I am extremely pleased that the Honorable George Bundy Smith, having completed his distinguished tenure on the Court of Appeals, will chair this blue-ribbon committee, whose members include judges, public officials and practitioners.

In a further effort to foster ethnic diversity in the profession, I attended and spoke at two events. One was a reception held by the Corporate Counsel Section, under the leadership of Barbara Levi, in recognition of its first minority interns. The program provides summer internships for minority law students at the in-house counsel offices of Section members. The program is named in honor of our former president – "the Kenneth Standard internship." The quality of the interns was very high, and it was exciting to meet them and witness the launching of this program. Similarly, the Commercial and Federal Litigation Section has donated funds to The Bar Foundation for the purpose of funding a summer fellowship for a minority law student in a public sector litigation position.

I also attended and spoke at a Youth Law Day Program organized by the Committee on Youth Outreach, chaired by Ken Standard. The program brought inner-city high school students to Fordham Law School to open their eyes and minds to the prospect of a legal career. The enthusiasm of these young people was palpable, and it was a treat to address them. I hope to see some of them as active members of our profession and our Association in years to come.

Efforts to enhance the diversity of the profession suffered a setback recently because of an ill-advised increase in the passing score on the bar exam implemented last year. There never was any good reason to increase the passing score, and we vigorously opposed it at the time. In doing so, we said that the increase was likely to have a disparate adverse impact on minorities. Our opposition was instrumental in the Chief Judge's decision to suspend further increases in the passing score until the Board of Law Examiners studied the impact of the increase.

That study has now been completed, and it confirms our worst fears. It demonstrates that the increase in the passing score has indeed had a dis-

parate impact on minorities, and any further increase would seriously exacerbate that disparity. Accordingly, I have called for an immediate rollback of the five-point increase and cancellation of the additional scheduled increases. I was the first to issue such a call; I am confident that others will join me and hopeful that this call will be heeded.

Core Value: Access to Justice for the Poor

As you know, my signature initiative in the area of access to justice is the Empire State Counsel program, which I highlighted in my first message. Lawyers who self-certify that they have rendered 50 hours of free legal services to the poor will earn this honorary title and will be celebrated by the Association. The program has generated an enormous response – including national media coverage, great enthusiasm among our members and, expressly following our lead, a look-alike program in at least one other state and perhaps more. The program is receiving great support from the leaders of our Association's pro bono effort – Jim Kelly, Lillian Moy and, of course, President-elect Kate Madigan.

I did not expect any lawyers to certify as Empire State Counsel until January, because the eligibility period runs until December 31. But, to my astonishment, by late October almost 100 lawyers had already qualified and received their buttons, ribbons, certificates and congratulatory letters. I am certain that many more will follow their lead.

I also took great satisfaction in our members' response to the legal needs of the flood victims in upstate New York. The Committee on Lawyer Referral Services provided free legal advice to the residents of the 13 counties that were declared disaster areas after receiving the record-breaking rainfall last June. President-elect Kate Madigan spearheaded the Association's efforts to provide these people with legal services, and many attorneys provided free consultations. Whether it is providing free legal services to the poor or helping flood victims, every day lawyers are helping the public. Our Association took the lead and ensured that people with legal questions received the answers they needed at that difficult time.

Promoting Needed Reform

I hope you share my excitement and satisfaction about these developments in the effort to strengthen and defend our core values. But equally exciting – in fact, downright exhilarating – is our effort to promote major reform, and the prospect of genuine accomplishment in that area. As proposed by the Steering Committee on Legislative Priorities, chaired by Henry M. Greenberg, the Association has approved six legislative priorities for 2007: merit selection of judges; equal legal rights for same-sex couples; adoption of "no-fault" divorce; the "Compact" for financing long-term care for the frail elderly; access to the civil justice system for both low- and middle-income consumers; and judicial salary reform.

We are already pushing for these reforms. Last month, I testified before the New York State Assembly Committees on Aging, Health and Insurance in support of a "compact" for the financing of long-term care. This pioneering plan, developed by the Elder Law Section, chaired by Ellen G. Makofsky, is an alternative to – and substantial improvement upon – traditional Medicaid financing; a bold, yet common-sense reform that addresses the problem of long-term care funding while permitting our frail elderly and disabled to retain their dignity. Joining me at the hearing were Louis W. Pierro and Vincent J. Russo, past Section chairs, and Gail Holubinka of MedAmerica Insurance Company. We have also offered a resolution in support of the Compact to the ABA, and I will lead the debate on that issue in the ABA House of Delegates next month.

Another matter that has engaged my attention and energy is the issue of merit selection of judges. Due to the Second Circuit decision in *Lopez Torres*, the Legislature must act this year to replace New York's unconstitutional convention system of nominating candidates for Supreme Court judges. This mandate presents a once-in-a-lifetime opportunity to bring about lasting reform to the way we select trial judges in New York. In November, I testified before the New York State Assembly Judiciary Committee on the issue of New York's ailing judicial selection process. On behalf of the Association, I advocated for a merit selection process for judicial appointment, a position that the Association has held for more than 30 years. To preserve the independence of our judicial system, we must keep the clubhouse out of the courthouse. Merit selection would eliminate the influence of partisan politics in judicial selection, and insure that competence, temperament and integrity, rather than political favor, are the primary factors in judicial selection. The full text of my remarks, as well as other writings and speeches, is on the President's Page of the Association's Web site.

Merit selection and other judicial reforms, such as judicial salary raises, court merger, and term and age limits, are vital to achieving judicial independence. I have made court reform and judicial independence the focus of my Presidential Summit, which is the centerpiece of our Association's Annual Meeting, to be held this month. At the 2007 Summit, expert panelists will debate these timely and important issues. If you have not done so already, I encourage you to register for this exciting event.

As you can see, much has happened since my June inauguration. And, with a new governor poised to implement an agenda of sweeping change, I am hopeful that this year will prove to be a time of major reform for the legal system and our profession. There is much to be done. This is not the time to trim our sails or look for a safe harbor. The wind of change is blowing; the tide of reform is running. We have an historic opportunity for genuine reform. We must press forward. ■

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(half-day program)
March 23 Albany; Syracuse; Tarrytown
March 29 New York City
March 30 Melville, LI

Special Education Law Update
March 23 Buffalo
March 30 Albany; New York City

Practical Skills Series: Family Court Practice
April 17 Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

Civility and Ethics
(half-day program)
April 20 New York City; Rochester
April 27 Albany; Buffalo; Hauppauge, LI

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

Practical Skills Series: Basic Elder Law Practice
May 2 Albany; Long Island; 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

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
May 10 New York City
May 15 Syracuse

Crisis Intervention Training
May 11 New York City

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"A Firm Hand of Stern Repression"

United States v. O'Leary

By William H. Manz

On September 30, 1916, the following telegram from President Woodrow Wilson was reprinted on the front pages of newspapers across the county: "*Your telegram received. I would feel deeply mortified to have you or anyone like you vote for me. Since you have access to many disloyal Americans and I have not, I ask you to convey this message to them.*"[1] The telegram, sent to Manhattan attorney Jeremiah A. O'Leary, was a presidential election campaign ploy, but its theme, the widely shared belief that certain Americans were "disloyal," became, after American entry into World War I, the basis of an unprecedented attack on civil liberties, one that has been described as "a dreary, disturbing, and in some respects, shocking chapter out of the nation's past."[2] Although the current controversies over provisions of the Patriot Act and the administration's eavesdropping policies may cause some to recall the prosecution of Vietnam-era protesters, or the excesses of the McCarthy period, any threats to First Amendment freedoms arising from those events did not compare to what transpired during the World War I period.

O'Leary, the object of the public presidential rebuke, was a well-known Irish-American, the president of the anti-British, pro-neutrality, American Truth Society, and the editor of its satirical magazine, *Bull*. Born in Glens Falls in 1881, he and his entire family were solid examples of Irish-American upward social mobility. A 1903 graduate of N.Y.U. Law School, he was a financially successful general practitioner with a wife and three children. His courtroom successes included judgments of $4,000 for a worker who fell from a scaffold,[3] $2,500 for the victim of a traffic accident,[4] $2,000 for a worker hit by a beam,[5] and a $20,000 verdict for the disabled victim of a falling bolt.[6] O'Leary's best known-client was Jack Binns, an English Marconi wireless operator, who gained instant fame by summoning rescue vessels to the scene of a collision between the White Star liner *Republic* and another vessel, the *Florida*. O'Leary served as co-counsel for Binns in a right-of-privacy lawsuit against the company whose movie depicted the event, and won a verdict of $12,500.[7]

In a 1915 case with more far-reaching implications, O'Leary represented the Bricklayers Union in an effort to enforce a New York law requiring that only American citizens be employed for public works projects,[8] an action that threatened to stop construction of the New York City subway system. The case eventually reached the Court of Appeals, which upheld the statute in an opinion written by Benjamin Cardozo.[9] By 1916, O'Leary's political activities were interfering with his law practice, but he was still handling cases, including a successful effort to break the will of an elderly widow who left a $500,000 estate, and who, before her death, reportedly ate from the same plates as her numerous cats, cut the grass with scissors, and stored her coal in the parlor and the cinders in the cupboard.

O'Leary was best known for his activities in the American Truth Society, which he helped found in 1912, but he also belonged to the Gaelic League, the Sinn Fein Society,[10] and the Clan na Gael (a secret society that supported Irish independence), and was a member of the executive committee of the recently established Friends of Irish Freedom. He served with the heavily Irish 69th regiment from 1905–1910, rising to the rank of lieutenant. His negative view of the British reflected the prevailing attitudes of many Irish-Americans, which derived from traditional Irish antipathy and historical American grievances. Irish-Americans like O'Leary were convinced that the British Empire continued to threaten American national interests, and took a dim view of the prevailing Anglophile attitudes of the American educated elite. They also strongly opposed the then-popular Social Darwinist notions of Anglo-Saxon racial superiority, which they feared would undermine their social and economic gains, thus relegating them to the status of second-class citizens.

Bull, the American Truth Society's magazine, began publication in March 1916. Its title was intended to describe British propaganda and the pro-British statements of the so-called American "Anglo-maniacs." Each issue was approximately 30 pages long, and sold for 15 cents. In keeping with its motto, "A most effective way to promote truth is to ridicule falsehood," the magazine contained articles, cartoons, verse, and other short items mocking the British, and deriding such pro-Allies public figures as Theodore Roosevelt and former Secretary of State and Nobel Peace Prize winner Elihu Root. It also regularly featured old anti-American cartoons taken from 1860s and 1870s issues of *Punch* and other British magazines, as well as quotes from the Founding Fathers condemning England and warning against foreign alliances.

Irish-Americans like O'Leary were convinced that the British Empire continued to threaten American national interests.

Once World War I began, O'Leary and many American Irish opposed any U.S. aid to the British, hoping that Britain's defeat would lead to Irish independence. Their commonly held view as for the Germans, expressed by Irish-born New York Supreme Court Justice John W. Goff, was: "Huns, Vandals, Pagan or Christian, Barbaric or Civilized, we are with them when they are against England."[11] O'Leary made frequent speaking appearances at American Truth Society events in New York, Chicago, and elsewhere, inveighing against huge munitions exports to the Allies, and protesting the granting of war credits to the British and French. He was also active in the unsuccessful attempt to intimidate banks into refusing to underwrite war loans by threatening them with massive depositor withdrawals. He frequently attacked mainstream newspapers, maintaining that they were controlled by the British. In turn, his activities received unfavorable press coverage. He was labeled "pro-German" and an "Irish agitator."

During the 1916 presidential election, O'Leary and many other Irish-Americans threw their support to Re-

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publican Charles Evans Hughes, fearing that, if re-elected, Woodrow Wilson would lead the nation into war on the side of the British. His hostility to Wilson's policies led to the September 29 telegram to the president. Characterized as "impudent and insulting" by the *Washington Post*,[12] it attributed the decisive Democratic primary defeat of New Jersey Attorney General John W. Wescott to Wilson's foreign policy, stating, "Senator Martine won because the voters of New Jersey do not want any truckling to the British Empire."[13] O'Leary later professed to have been surprised to receive a response from the president. A telegram he sent to the president a year earlier stated: "The voters of the Bronx placing America first have elected William S. Bennet . . . as a protest against your Administration, which has always placed England first."[14] That message drew no presidential response, but Wilson saw O'Leary's latest missive as an opportunity to dramatically repudiate "that small alien element amongst us which puts loyalty to any foreign power before loyalty to the United States."[15] Quickly arranging a special press conference, he announced his reply.

Wilson's rejection of O'Leary and the so-called hyphenate vote brought an enthusiastic response from the president's associates and supporters. The *New York Times* called it "stirring and emphatic";[16] his secretary, Joseph P. Tumulty, believed that it "won the hearty and unanimous approval of the country for the President";[17] presidential advisor Colonel Edward M. House immediately wrote to say, "Your telegram to O'Leary is the best thing so far in the campaign, and will do more good than you realize."[18] Similarly, Secretary of State Robert Lansing later called the response "a piece of political statecraft which can hardly be matched in any presidential campaign," and claimed that "[i]t made thousands of votes for its author."[19] (How much additional support Wilson gained because of his O'Leary telegram is a matter of speculation, since many voters believed he'd kept the country out of the war, and others, including many German- and Irish-American voters, were not particularly impressed with Hughes.)

O'Leary responded to the president by sending a telegram stating, "[Y]ou seek by an indirect charge of disloyalty . . . to escape the questions you cannot answer . . . while three of my uncles were dying in defense of the Union, those of your kin who dared to fight were struggling to destroy it."[20] In subsequent speeches, he declared that Wilson's telegram was intended to appeal to "small-minded people,"[21] and to those "obsessed by racial and religious bigotry."[22] Meanwhile, the Democrats sought to use O'Leary as a campaign issue. His inclusion in a group meeting with the Republican candidate prompted Democratic charges of a secret deal, and caused the *New York Times* to editorialize, "The man whose vote President Wilson would regard as an affront, the restless mover of a dozen leagues of dual citizenship and anti-Americanism is not turned away from Mr. Hughes' door."[23]

When war was finally declared on Germany, some New York City German- and Irish-American spokesmen quickly adapted to wartime conditions. Bernard Ridder, publisher of the *New-Yorker Staats Zeitung*, resigned from the American Truth Society and made conspicuous professions of loyalty to the United States. Friends of Irish Freedom leader Justice Daniel F. Cohalan, afraid of how the government might react, opposed calling an Irish race convention, which prompted O'Leary to ask: "[H]ave the fighting Irish suddenly become conservative?"[24] As for *Bull*, it continued to contain anti-British material and criticism of Wilson's policies, a slant that would make O'Leary the target of federal prosecutors.

The law under which O'Leary and many others were eventually charged was the Espionage Act of 1917 (the "Act").[25] Signed into law on June 15, 1917, it provided for 20 years in prison and/or a $10,000 fine for those who, in wartime,

> shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States.[26]

Another provision of the Act empowered the postmaster general to bar from the mails any publication that violated its provisions.[27]

The Act as passed was a less-stringent version of the original bill, causing Attorney General Thomas Gregory to later complain that "most of the teeth which we tried to put in [the Act] were taken out."[28] However, the effect

of the law depended largely on the manner in which it would be enforced by the Department of Justice, and in Wilson's or Gregory's pronouncements there was little comfort for those regarded as "disloyal." In his war message to Congress, the president stated: "If there should be disloyalty, it will be dealt with with a firm hand of stern repression."[29] The attorney general had equally tough words about the "disloyal": "May God have mercy on them, for they need expect none from an outraged people and an avenging government."[30]

Postmaster General Albert Sidney Burleson wasted little time in implementing the mailing provisions of the Espionage Act. He had barred 15 periodicals by July 1917, including such socialist publications as *The Masses*, the *American Socialist*, and the *Milwaukee Leader*. The *Masses* ban, based on allegedly seditious cartoons and text, resulted in an immediate court test. The publisher's request for an injunction was heard by District Court Judge Learned Hand, a Harvard-educated Albany native, appointed to the federal bench by President Taft in 1909. There was little precedent to guide the judge in deciding the case since no federal law had barred seditious expression since the Sedition Act of 1798 expired in 1801.

Learned Hand proved to be unlike many other members of the wartime lower federal judiciary, who, as one commentator has noted, were "intent on meting out quick justice and severe punishment to the 'disloyal' and no provision of the first amendment was thought to stand in the way."[31] In an opinion that his chief biographer describes as "an original, penetrating analysis,"[32] Hand rejected the prevailing view that speech was punishable if the probable effect was the violation of the law. Instead, he risked his judicial future with an interpretation of the Espionage Act setting a "direct incitement test" that considered the content, rather than the effect of speech. Accordingly, he enjoined Burleson from barring *The Masses* from the mails.[33]

Afterwards, Hand would complain that "all this building [the federal courthouse] is against me."[34] Thus, it was hardly surprising that his injunction was stayed two weeks later,[35] and was reversed by the Second Circuit in early November. The court rejected Hand's direct incitement test, reasoning that speech was punishable "[i]f the natural and reasonable effect of what is said is to encourage resistance to a law."[36] This was critically important, for as Professor Zechariah Chafee later noted, the effect "was to establish the old-time doctrine of remote bad tendency in the minds of district judges throughout the country."[37] As for the requirement of intent, Chafee explained that it "became mere form since it could be inferred from the existence of the indirect injurious effect."[38]

While the *Masses* case was being decided, *Bull* attracted negative press coverage. In July, the *Washington Post* used the headline "Foes' Strength Gladdens O'Leary," to

describe his pessimistic article on the current war situation.[39] A few days later, a *New York Times* story, titled "Pro-German Paper Ridicules America," objected to cartoons lampooning Wilson and Allied leaders, and to another titled "The Lion and the Mouse," which it claimed portrayed the American people as a rat.[40] Others who were equally offended by *Bull*'s content wrote to Burleson, complaining that the publication had "treasonable aims," was "disloyal" and "scurrilous," and "should not be allowed to exist for one moment."[41] The postmaster himself charged that the magazine advocated "treason, insurrection, and the willful resistance to the laws of the United States,"[42] and, on August 16, barred it from the mail. Despite the ban, *Bull* continued to appear until October, when O'Leary suspended operations because of Burleson's complaints that it interfered with the war effort.

In late September, a cache of German documents brought O'Leary more notoriety. The release of the papers, seized in an April 1916 raid on the New York office of German Embassy secretary Wolf von Igel, caused a sensation in the press. The stories included a multi-page feature in the *Christian Science Monitor* that provided O'Leary's picture along with such notable Germans as von Igel, Ambassador Count von Bernstorff, and Prince von Hatzfeldt-Trachenberg, the Embassy counselor.[43] O'Leary was again the subject of negative press reports in early October after the release of a copy of a telegram from the German Foreign Office to von Bernstorff. Dated January 26, 1916, it stated that O'Leary and two other Irish-American notables could provide information on persons suitable for carrying out sabotage in the United States and Canada.[44] Simultaneously, fresh charges of disloyalty were coming from New York City Mayor James Purroy Mitchel. Engaged in a tough re-election campaign against Tammany Hall candidate Judge John E. Hylan and anti-war, anti-draft Socialist attorney Morris Hillquit, Mitchel sought votes by accusing Hylan of associating with O'Leary and others "whose disloyalty has been denounced by the U.S. government."[45]

Hylan crushed Mitchel in the ensuing election, but O'Leary had little time to enjoy the results. A few weeks later, he was indicted along with the American Truth Society, and *Bull* employees Adolf Stern and Luther S. Bedford, on multiple counts of violating the Espionage Act. It was charged that cartoons and text in the August, September, and October issues of *Bull* were intended to cause disaffection among members of the armed services and to obstruct the draft and discourage enlistments. O'Leary professed to be shocked by the indictment but, considering his high profile, and *Bull*'s strong anti-British, anti-administration content, it was not surprising that he was targeted. Press reaction included a *Brooklyn Daily Eagle* editorial stating: "We have too long trifled with sedition . . . if the indictment . . . serves no other end than that of frightening such people into silence it will have produced a good effect."[46]

O'Leary's indictment was part of a wider campaign to silence the allegedly seditious press. For example, in Pennsylvania, officers of the *Philadelphia Tageblatt* were arrested;[47] across the Hudson River in New Jersey, a U.S. attorney proclaimed that he would seek the death penalty for the publishers of the *New Jersey Freie Zeitung*; in New York, Max Eastman, editor of *The Masses*, was charged with Espionage Act violations. Meanwhile, in California, the disincentive to publishing content deemed anti-British was demonstrated by the seizure of *The Spirit of '76*, a melodramatic film epic set during the Revolutionary War that included several scenes of British atrocities. Federal District Judge Benjamin Bledsoe upheld the seizure noting that its purpose was to "incite hatred of England," and maintaining that "this is no time . . . [for] creating animosity or want of confidence between us and our Allies."[48] The film's producer was subsequently convicted of violating the Espionage Act and sentenced to 10 years in prison.

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O'Leary did not appear for his trial, set for May 20, 1918. His $2,500 bail was forfeited, a warrant was issued for his arrest, and a nationwide manhunt began. The press speculated as to his whereabouts, and suggested that he was in New England, Mexico, or even on the high seas. Family members stated that they thought he'd gone to the Adirondack Mountains for a rest, and his older brother, New York attorney John J. O'Leary, announced his intention to go there and search for him. In fact, O'Leary, accompanied by his stenographer, Arthur Lyons, had departed from New York City by train on May 7, arriving in Portland, Oregon, on May 12. Once there, the attorney purchased a chicken ranch in nearby Sara, Washington, to use as a place to hide from federal authorities.

O'Leary would later explain that he left for the West to handle a divorce matter in Reno, but on reaching Ogden, Utah, decided not to return. He said that at the time, his mind was "disorganized," that he was still recuperating from an appendicitis operation, and that he'd become convinced he would not get a fair trial. He cited as evidence the withdrawal of his lawyer, former U.S. Attorney and Spanish-American War veteran Henry A. Wise, who quit the case in part because he feared an association with

O'Leary would hurt his chances of rejoining the Army for service against Germany. His traveling companion, Arthur Lyons, added that during the trip, O'Leary complained of being hounded by "secret service agents," expressed fears of a spy plot frame-up, and stated that "political prisoners had no chance."[49]

While the search for the fugitive lawyer went on, O'Leary busied himself caring for the ranch's chickens and selling its rabbits as pets to local boys for nominal sums. However, his life in hiding did not last long. On June 12, while he was under his automobile attempting to make repairs, federal agents descended on the ranch. O'Leary was quickly arrested, taken to Portland, and then placed on a train to New York. On June 18, he arrived in New York, and was brought to the Federal Building for an appearance before Judge Learned Hand. Once the court proceedings were over, the former fugitive was taken to Manhattan's Tombs prison and held without bail.

A week after O'Leary failed to appear for trial, his brother John J. O'Leary was arrested and charged with assisting his flight. Bail was set at $100,000, and he was imprisoned in the Tombs. Federal authorities were in no hurry to set a trial date, but Judge Learned Hand, noting the size of the bail, held that the prisoner must be tried promptly. Thus, when Jeremiah O'Leary arrived back in New York he was just in time to become the star witness at his brother's trial. On June 20, he took the stand and stated that family members had no idea that he was leaving for the West. After one juror was discovered to be under indictment in a bankruptcy case, a mistrial was declared. At the second trial, held in July, O'Leary again testified, and was extensively cross-examined about the details of his flight, and his activities with the American Truth Society.

The jury failed to agree in the John J. O'Leary case and he was released on $2,500 bail, but his younger brother remained in the Tombs, where his activities included helping process the large numbers of alleged draft-dodgers jailed during the so-called "Slacker Raids" of September 1917. O'Leary's trial, scheduled for October 24, was subsequently delayed indefinitely when he contracted Spanish influenza and was taken to the Bellevue Hospital prison ward, where he remained until January 7, 1919. Two weeks after his return to the Tombs, O'Leary discovered he was facing charges of treason. He was now accused of conspiring with two German agents, Baroness Maria von Kretschmann (named in the indictments and known in the press as Mme. Maria de Victorica), and Hermann Wessels (named in the indictments under his alias, Karl Rödiger). He and several others were charged with being part of a plot to locate persons willing to transmit information to Germany, participate in an Irish

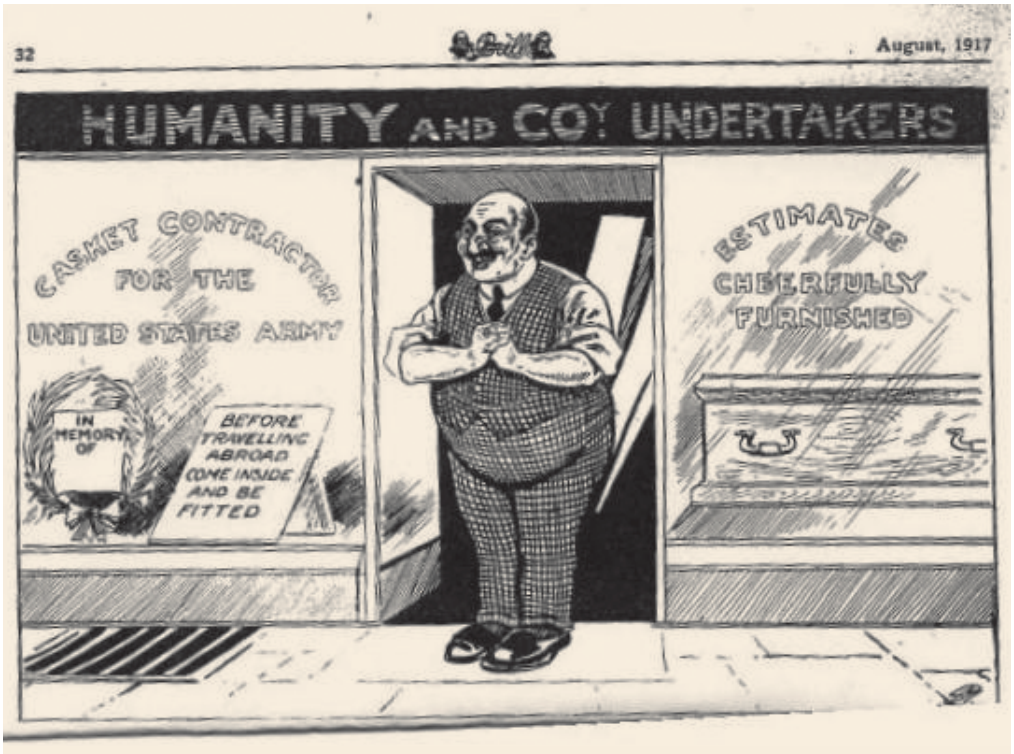
uprising, and commit sabotage in Great Britain. His alleged overt acts consisted of two meetings with von Kretschmann in July 1917.

When the long-awaited trial on the sedition charges finally began on January 21, 1919, O'Leary was represented by Colonel Thomas B. Felder, who also defended John J. O'Leary. Felder was a well-known attorney who had relocated to New York from Georgia. Described by one commentator as a "cane-carrying popinjay,"[50] Felder was no stranger to controversy. In 1911, he challenged the governor of South Carolina to a duel, and, in 1913, was accused of offering a bribe to obtain documents related to the controversial Mary Phagan murder case. His list of former clients included the proprietor of Atlanta's leading brothel, and banker/shipping magnate C.W. Morse, whose 1912 federal pardon was allegedly obtained after he faked Bright's disease by drinking soapy water mixed with chemicals. Prosecuting the case for the government was Assistant U.S. Attorney John W. Osborne 2d. Assisting him was H. Snowden Marshall, the U.S. Attorney for the Southern District from 1913–1917, whose great-grand uncle was former Chief Justice John Marshall.

The trial judge was Augustus Noble Hand, the cousin and close companion of Judge Learned Hand. Hand was from the Adirondack Mountain community of Elizabethtown. A Harvard College and Harvard Law School graduate, he was named to the federal bench by Woodrow Wilson in 1914. Although Learned Hand is far better remembered today, during his lifetime Augustus N. Hand was also held in high regard, as reflected by Supreme Court Justice Robert Jackson's remark about having once been told "to quote Learned, but cite Gus."[51] The O'Leary trial was not the judge's first high-profile sedition case. The previous year, he presided when *Masses* editor Max Eastman and his co-defendants escaped conviction when a few jurors held out for an acquittal.

Although Judge Hand denied Felder's motion to dismiss the indictment,[52] it was clear from the outset that the defense was fortunate to have him on the bench. He ordered the government to return O'Leary's files, bankbooks, papers, and diaries, which had allegedly been seized without a warrant. More important, at the start of the trial, he instructed the jury that if the defendants "had in mind a purpose to foster pure Americanism and to keep the country out of foreign entanglements, or to help the Irish cause, then the intent would be lacking to obstruct enlistment or promote disloyalty."[53] As for the jury, complaints about unrepresentative panels were common in high-profile World War I sedition cases, but the defense managed to obtain one juror with Irish-born parents and one German-American. The only juror who raised suspicions of bias was the foreman, Ernest R. Hunter, a Wall Street broker.

The prosecution's star witness was German agent Baroness Maria von Kretschmann (Mme. de Victorica), whose testimony was allowed on the grounds that it was relevant to O'Leary's state of mind when editing *Bull*. Sent to the United States in late 1916, she was the daughter of a Prussian general, and a former journalist. Although noted World War I American code-breaker Herbert O. Yardley would later describe her as "the most daring and dangerous spy encountered in American history,"[54] it appears that her activities were largely limited to spending the Kaiser's money, chatting up people at Irish-American rallies, making plans, and moving from hotel to hotel.[55] A former head of the wartime German military intelligence department would later claim that her mission was limited to political propaganda, although after her arrest, it was alleged that she was also involved with never-implemented plans to smuggle explosives into the country hidden in toy blocks and a church altar.



At the O'Leary trial, the stylish von Kretschmann appeared in court dressed in a sable coat with matching muff, and wearing two diamond rings and an emerald.

She testified about her contacts with O'Leary, claiming that he had arranged for an Irish-American street-speaker, Willard J. Robinson, to carry secret messages for her to German officials in the Netherlands. Another female prosecution witness was Mme. Josephine Gonzalez, a worker at the 1917 Irish Bazaar held to raise money for victims of the Easter Rising. She said that, at the end of that event, she attended a closed meeting at which O'Leary outlined plans to resist the draft. Aubrey Pettit was another key government witness. Pettit, the former police chief of Long Beach, claimed to have seen O'Leary, Robinson, and von Kretschmann together at the Hotel Nassau in that city during the summer of 1917. The prosecution also attempted to tie O'Leary to the Germans with the testimony of a vessel hull inspector, Charles A. Martin, who claimed he saw the defendant at a cheap Manhattan restaurant with agent Hermann Wessels (Karl Rödiger).

None of these witnesses fared well. Von Kretschmann admitted she'd been a morphine addict for 20 years, and was still receiving the drug from her captors. She was subsequently denounced as a "dope fiend" by the defense and a series of medical experts came forth to testify that the credibility of such a person was utterly worthless. Pettit stumbled over such details as whether Willard J. Robinson wore a mustache, and was described in the press as a "poor witness."[56] Gonzalez was revealed to have a checkered marital past and admitted to having sought the release of a man interned by the government. The defense also produced several Bazaar workers who testified that the so-called "secret meeting" Gonzalez claimed to have attended was in fact held in a room with open windows and doors, and that O'Leary's comments were limited to thanking them for their services. Hull inspector Martin, aggressively cross-examined by O'Leary himself, was shown to have done very few hull examinations since being hired by the government; he also stumbled over such details as the color of O'Leary's robe when he identified him in a Bellevue Hospital ward, and the layout of the restaurant where the alleged meeting with Wessels took place.

Another government witness cross-examined by O'Leary was Adolph S. Ochs, publisher of the *New York Times*, called by the government to disprove the defendant's frequent claims that the *Times* was controlled by English press baron Lord Northcliffe. They sparred over the paper's purported pro-British bias, and at the close of Ochs's testimony, Hand refused to allow the prosecution to place any more newspapermen on the stand. The judge also hurt the government case when, during efforts to show that the American Truth Society was the recipient of German money, he pointed out to the jury that a cashier's check submitted in evidence had no indication of its origin other than the name of the banking house that issued it.

The defense produced alibi witnesses who testified that O'Leary was in the Adirondacks at times when he was said to be meeting von Kretschmann. Defense witnesses also related how the defendant had advised others to obey the draft law and/or enlist. Martin Conboy, director of the draft for New York City, appeared to testify that there was no evidence the local Irish were inclined to obstruct the draft or refuse military service. War veterans in uniform took the stand to express their admiration of O'Leary, tell of their military service, and express their dislike of England; one veteran also derided suggestions that a *Bull* cartoon depicting a smiling undertaker would have influenced him in any way.

"I'm doing the best I can, with an experience of thirty-five years at the bar. If you think you can do any better go ahead and do it."

Character witnesses included several Catholic priests, three judges and an assistant district attorney. Family members also testified, including the defendant's father, telling of the O'Learys' long history in America, the three family members killed while fighting with the Union Army, and the large number of relations who served in the war against Germany.

As the trial progressed, O'Leary sometimes complained vociferously in court about the prosecution's tactics or its witnesses' testimony. He also prompted his defense attorney with unwanted advice. At one point, an exasperated Felder responded, "I'm doing the best I can, with an experience of thirty-five years at the bar. If you think you can do any better go ahead and do it."[57] However, it was as the defense's star witness that O'Leary made the greatest impression. He was on the stand for several days, and his wide-ranging testimony included a denial that he'd opposed the draft and his belief that the publication of *Bull* did not violate the Espionage Act. He admitted going to Long Beach a few times during the summer of 1917, but denied ever meeting von Kretschmann there. Instead, he maintained that she first appeared in his office in April 1917, seeking a divorce from her Argentine husband, de Victorica. The defendant said his contacts with her related only to that case and that he dismissed her from his mind when she did not appear to be serious about pursuing the matter. He also stated that the he'd never heard of German agent Wessels until he saw newspaper stories about his arrest.

The long-running case finally reached the jury on March 21. Judge Hand's one-hour-and-20-minute charge

included instructions that proof of seditious acts was not enough to convict, and that the jurors needed to be convinced that the acts were done with the specific intent to obstruct recruiting and encourage insubordination. In response to a question by the foreman, Hand also indicated that even after the passage of the Espionage Act, O'Leary had the right to criticize the government as long as this did not interfere with enlistments or cause insurrections; he added that the jury had to be convinced beyond a reasonable doubt that this was the effect. After 58 hours of deliberation, the jury acquitted the defendant on three of the four sedition counts, and split 9–3 on the remaining charge. Afterwards, it was reported that 11 of the jurors agreed that O'Leary was always within his constitutional rights, that they entirely disregarded von Kretschmann's testimony, and that an acquittal on all counts was blocked by foreman Hunter, the Wall Street broker.[58]

In retrospect, it is not surprising that Osborne and Marshall were unable to secure a conviction. Given O'Leary's long involvement in Irish causes, their contentions that his activities were merely a front for a pro-German agenda were simply not credible. The defense also benefited from its lengthy list of eminently respectable witnesses and Judge Hand's determined efforts to preside over a fair trial. Another advantage was a jury consisting of New York City residents. After the war, the *Times* would complain about the relatively few sedition convictions obtained in New York. For example, the government was twice unable to convict the *Masses* defendants, and Scott Nearing, a socialist professor whose trial occurred at the same time as O'Leary's, escaped conviction after the jury failed to agree. A final advantage was the timing of the trial. By February 1919, wartime passions were rapidly cooling, and recently returned Irish-American war veterans were available to testify.

The government eventually dropped the remaining sedition charge and the treason indictments against O'Leary. He resumed his law practice, which would later include a successful United States Supreme Court case.[59] He apparently outlived everyone else connected to his trial, dying at age 90 in March 1972. Baroness von Kretschmann later appeared as a witness at the 1919 treason trials of Willard J. Robinson and Albert Paul Fricke, a German-American accused of aiding Wessels/Rödiger, but both defendants were acquitted;[60] she never returned to Germany, and died of pneumonia in 1920. Defense attorney Thomas B. Felder was disbarred in 1925 after being convicted of fraud in the highly publicized Glass Casket Co. case.[61] Prosecutor Osborne also faced criminal charges during the 1920s. He was accused of receiving stolen securities, but was acquitted. Less fortunate was former prosecution witness, ex-Police Chief Aubrey Pettit. In 1921, he was sentenced to two-to-five years in Sing Sing for his participation in a Nassau County stolen car ring. As Learned Hand feared, his *Masses* decision delayed his appointment to the Second Circuit bench, but he was finally promoted in 1924. His cousin, Augustus N. Hand, joined him on that court in 1928.

Postmaster General Burleson's campaign against seditious publications, whose excesses sometimes distressed the president, continued for a time even after the war ended. As for the World War I Espionage Act prosecutions of which the O'Leary case was but one well-publicized episode, they are credited with starting the American civil liberties movement. As one commentator has observed, "[I]t was in reaction to the country's excesses, that the modern civil liberties began,"[62] because such rights "did not go into the discard when a nation is engaged in war."[63] ■

1. *See, e.g.*, *Wilson Wants No Disloyal Vote Cast on His Side*, N.Y. Times, Sept. 30, 1916, at 1; *Wilson Flays Critic*, Wash. Post, Sept. 30, 1916, at 1.

2. Paul Murphy, World War I and the Origin of Civil Liberties 15 (1979).

3. Respondent's Points at 2, *Garrett v. Nat'l Fireproofing Co.*, 137 A.D. 917, 121 N.Y.S. 1131 (1st Dep't 1910).

4. Record at 13, *Costello v. Erie Transfer Co.*, 153 A.D. 891, 137 N.Y.S. 1116 (1st Dep't 1912).

5. Record at 5, 11, *Nagle v. Thompson Starrett Co.*, 163 A.D. 856, 147 N.Y.S. 1128 (App. Div. 1914).

6. The First Department later reversed, ordering a new trial unless the plaintiff agreed to accept reduced damages of $15,000. *See Rosse v. R. Hoe & Co.*, 172 A.D. 908, 157 N.Y.S. 1144 (1st Dep't 1916).

7. *See Binns v. Vitagraph Co. of Am.*, 71 Misc. 203, 130 N.Y.S. 876 (Sup Ct., N.Y. Co.), *rev'd*, 132 N.Y.S. 237 (1st Dep't 1911), *aff'd*, 210 N.Y. 51, 103 N.E. 1108 (1913).

8. 1909 N.Y. Laws, ch. 36.

9. *See People v. Crane*, 214 N.Y. 154, 108 N.E. 427, *aff'd*, 299 U.S. 195 (1915).

10. The Sinn Fein movement was founded in Ireland in 1905 by nationalist Arthur Griffith. The term "Sinn Fein" is generally translated as "We Ourselves" or "Ourselves Alone."

11. Michael Doorley, Irish-American Diaspora Nationalism: The Friends of Irish Freedom, 1916–1935, 54 (quoting memorandum of British Consul-General Broderick (Jan. 19, 1917)).

12. *Offensive Personalities*, Wash. Post, Sept. 30, 1916, at 6.

13. Michael A. Kelly, *Biographical Sketch*, *in* Jeremiah A. O'Leary, My Political Trial and Experiences 45 (1919). Martine benefited from a heavy German-American vote. *See German-American Votes in New Jersey Win for Martine*, N.Y. Times, Sept. 28, 1916, at 1.

14. *Hyphenates Enter American Politics*, N.Y. Times, Nov. 11, 1915, at 5 (quoting Wilson speech).

15. Robert Lansing, War Memoirs of Robert Lansing, Secretary of State 162 (1970).

16. *Names Cohalan as Spokesman for Pro-Germans*, N.Y. Times, Oct. 24, 1916, at 1.

17. Joseph P. Tumulty, Woodrow Wilson as I Knew Him 214 (1921).

18. Letter from Edward M. House to Woodrow Wilson (Sept. 30, 1916), *in* 2 The Intimate Papers of Colonel House 376 (Charles Seymour ed., 1926).

19. Lansing, *supra* note 15, at 162–63.

20. *Attacks Wilson's Kin*, Wash. Post, Oct. 1, 1916, at 3.

21. *German Campaign on Wilson Begins*, N.Y. Times, Oct. 6, 1916, at 3.

22. *O'Leary Continues Attacks on President*, N.Y. Times, Oct. 19, 1916, at 3.

23. *The Witness Against Himself*, N.Y. Times, Oct. 24, 1916, at 12.

24. Doorley, *supra* note 11, at 67 (citing Letter from Jeremiah A. O'Leary to James McGuire, *reprinted in* Gaelic American, Aug. 4, 1917).

25. Act of 15 June 1917, ch. 30, 40 Stat. 217. Over 2,000 persons were charged under the Espionage Act of 1917 and the Sedition Act of 1918. There were approximately 1,000 convictions. Murphy, *supra* note 2, at 210–11 (citing Henry N. Scheiber, The Wilson Administration and Civil Liberties, 1917–1921, 46–47, 61–63 (1960)).

26. Act of 15 June 1917, ch. 30, tit. I, sec. 3, at 40 Stat. 219.

27. *Id*. tit. XII, sec. 2, at 40 Stat. 230–31.

28. Thomas Gregory, *Suggestions of Attorney General Gregory to Executive Committee in Relation to the Department of Justice*, 4 A.B.A. J. 305, 306 (1918). The original version contained a controversial press censorship provision that was strongly supported by Wilson.

29. *Text of the President's Address*, N.Y. Times, Apr. 3, 1917, at 1.

30. *All Disloyal Men Warned by Gregory*, N.Y. Times, Nov. 21, 1917, at 3.

31. Thomas A. Lawrence, *Eclipse of Liberty: Civil Liberties in the United States During the First World War*, 21 Wayne L. Rev. 33, 70 (1974).

32. Gerald Gunther, Learned Hand: The Man and the Judge 152 (1994).

33. *See Masses Publ'g Co. v. Patten*, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

34. Gunther, *supra* note 32, at 160 (citing letter from Learned Hand to Charles C. Burlingham (Oct. 6, 1917)).

35. *See Masses Publ'g Co. v. Patten*, 246 F. 102 (2d Cir. 1917).

36. *Masses Publ'g Co.*, 246 F. at 38.

37. Zechariah Chafee, Free Speech in the United States 50 (1954).

38. *Id*.

39. *See Foes' Strength Gladdens O'Leary*, Wash. Post, July 24, 1917, at 5.

40. *See Pro-German Paper Ridicules America*, N.Y. Times, July 27, 1917, at 7.

41. *O'Leary Opposed Ridder's Loyalty*, N.Y. Times, Sept. 21, 1917, at 3.

42. *Id*.

43. *See State Department Exposes German Intrigue System*, Christian Sci. Monitor, Sept. 24, 1917, at 6–8.

44. O'Leary responded by stating: "I can positively say that I have had nothing to do with sabotage, nor have I ever been approached by any German agent on the subject." *Berlin Backed Sabotage Here, Lansing Shows*, N.Y. Times, Oct. 11, 1917, at 1, 2.

45. *Mayor Accuses Hylan as a Member of the German Propaganda Here*, N.Y. Times, Oct. 31, 1917, at 1, 4.

46. *A Warning to the Seditious*, Brooklyn Daily Eagle, Nov. 25, 1917, at 4.

47. Five persons connected with the *Tageblatt* were later convicted of Espionage Act violations; three of these convictions were affirmed by the Supreme Court. *See Schaefer v. United States*, 251 U.S. 466 (1920). For other Court decisions affirming convictions, see *Schenk v. United States*, 249 U.S. 47 (1919) (anti-war pamphleteer); *Debs v. United States*, 249 U.S. 211 (1919) (Socialist Party leader); *Frohwerk v. United States*, 249 U.S. 204 (1919) (copy editor of the *Missouri Staats Zeitung*); *Abrams v. United States*, 250 U.S. 616 (1919) (pro-Bolshevik socialists and anarchists).

48. *United States v. Motion Picture Film "The Spirit of '76"*, 252 F. 946, 948 (S.D. Cal. 1917). The producer, Robert Goldstein, spent three years in prison before his sentence was commuted.

49. *Details of Escape Told*, Christian Sci. Monitor, June 18, 1918, at 4.

50. Steve Oney, And the Dead Shall Rise: The Murder of Mary Phagan and the Lynching of Leo Frank 104 (2003). Phagan's employer, Jewish business executive Leo Frank, was convicted of the crime and later lynched.

51. Gunther, *supra* note 32, at 647.

52. Dismissals in sedition cases were rare, and two district court judges who did so suffered considerable vilification. *See United States v. Hall*, 248 F. 150 (D. Mont. 1918) (Judge George Bourquin); *United States v. Schutte*, 252 F. 212 (D.N.D. 1918) (Judge Charles Fremont Amidon).

53. *O'Leary Cautious on Picking Jury*, N.Y. Sun, Jan. 29, 1919, at 5.

54. Herbert O. Yardley, The American Black Chamber 90 (1931).

55. For profiles of von Kretschmann, see Reinhard Doerries, Diplomaten und Agenten 42–43 (2001); Reinhard Doerries, Imperial Challenge 281–82 n.212 (1989); David Kahn, The Reader of Gentlemen's Mail: Herbert O. Yardley and the Birth of American Codebreaking 33–34 (2004).

56. *Long Beach Police Head Poor Witness Against O'Leary*, Brooklyn Daily Eagle, Feb. 11, 1919, at 2.

57. *O'Leary's Society Got Secret Fund*, N.Y. Sun, Feb. 5, 1919, at 18.

58. O'Leary, *supra* note 13, at 456.

59. *See Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, *aff'g* 261 N.Y. 140, 184 N.E. 737 (1933) (upholding New York statute allowing interest on liquidated or unliquidated damages for breach of contract). The Court's decision preserved the plaintiff's $60,000 verdict.

60. *See United States v. Robinson*, 259 F. 685 (S.D.N.Y. 1919) (directed verdict of acquittal by Learned Hand); *United States v. Fricke*, 259 F. 673 (S.D.N.Y. 1919).

61. *See In re Felder*, 214 A.D. 57, 209 N.Y.S. 716 (1st Dep't 1925).

62. Geoffrey R. Stone, Perilous Times: Free Speech in Wartime 230 (2004).

63. *Id*. (citing John Dewey, *Liberalism and Civil Liberties*, *in* 2 John Dewey, The Later Works, 1925–1953, at 374 (Jo Ann Boydston ed., 1987)).

BY DAVID PAUL HOROWITZ

"You've Got Mail" (And You Better Not Delete It!)

New Federal Rules Governing Electronic Discovery

By the time you read this column, new rules governing electronic disclosure in federal courts will have gone into effect. As of December 1, 2006, and applicable to all pending actions (to the extent just and practicable), the new rules represent, to a degree, a codification of the extant federal case law. Accordingly, some of the "new" rules have been followed by knowledgeable litigators for some time.

The new rules have a number of advantages over the ad hoc arrangements that have prevailed in federal electronic disclosure, not least of which are uniformity of practice and a degree of certainty concerning the lay of the electronic landscape.

The rules require that attorneys involved in litigation address electronic disclosure issues at the earliest stages of discovery planning. For practitioners who are still unaware of basic electronic disclosure issues, the new rules will serve to highlight the existence of these issues. Meanwhile, electronically savvy attorneys will now be able to point their less knowledgeable brethren to concrete rules, which is far easier than suggesting the equivalent of a summer reading course: five generations of *Zubulake*,[1] and their progeny.

Equally important, the new rules provide a framework for the courts, judges and magistrates to address electronic discovery issues that, if present trends continue, will enmesh many of them.

Lastly, where clients are concerned, attorneys may find it easier to point clients to the new rules, instead of offering a synthesis of the numerous extant court decisions. The rules can be used to educate and cajole clients into complying with counsel's instructions. This is particularly helpful when a client's compliance may be expensive, disruptive to operations, and has the potential to reveal damaging information.

Electronic disclosure in New York state courts, the subject of a prior column,[2] continues as a quiet backwater. Where litigants have a choice between state and federal court, and electronic disclosure issues play a significant role in a case, a party commencing an action, and one contemplating removal of a state court action, should carefully consider differences in state and federal practice. Perhaps nowhere does this comparison provide a starker contrast than in the area of the cost of electronic production. Cost allocation and shifting is, itself, a litigation arena in federal court. Not so in state court, where the party seeking production bears the cost of electronic disclosure, thus disadvantaging Davids struggling against Goliaths. Putting cost aside, federal court requirements for retention, preservation, and storage of electronic data have been extensively litigated and can be quite stringent, particularly compared with state court requirements, where little guidance is available.

So, what do the new rules say?

In order to make clear that the scope of discovery in federal court actions includes electronic information, Rule 26(a)(1)(B) is amended to change the term "data compilations" to "electronically stored information."[3] There is a parallel amendment to Rule 34, which now includes "Electronically Stored Information" in its title.[4] Rule 34(a) repeats this language,[5] and Rule 34(b) provides that discovery requests "may specify the form or forms in which electronically stored information is to be produced."[6]

The mandate to address electronic discovery issues at the earliest stages of a case is set forth in Rule 16, titled "Pretrial Conference; Scheduling; Management."[7] Rule 16(b) is amended to add two new subsections, five and six. Subsection five requires that the Rule 16 scheduling order may include "provisions for disclosure or discovery of electronically stored information." Rule 26(f) is amended to provide for discussion of electronically stored information by including the language "to discuss any issues relating to preserving discoverable information."[8] Form 35, Report of Parties' Planning Meeting, is also amended to include a report to the court about electronic disclosure.

Two new subsections, three and four, are also added to Rule 26(f). Rule 26(f)(3) provides that parties confer

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and discuss "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced."[9] Rule 26(f)(4) requires discussion of "any issues relating to claims of privilege or of protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order."[10]

New subsection six of Rule 16(b) permits the parties to agree to arrangements for asserting post-production claims of privilege for privileged matter disclosed. Thus, the scheduling order may include "any agreements the parties reach for asserting claims of privilege or protection as trial-preparation after production."[11] This and other provisions permitting re-capture of privileged or protected matter are referred to as a "claw back" provision.

Rule 26(b)(2)(B), a new subsection, establishes what has been referred to as a "two tier" system for addressing discovery requests for electronically stored information that is not readily accessible.[12] The party receiving the discovery request bears the burden of establishing the unreasonableness of the request, and, if this burden is met, the court then balances the objecting party's claim against the need shown by the demanding party.

The first tier provides that "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."[13] The second tier requires, whether in opposing a motion to compel or as part of a motion for a protective order, that the party resisting discovery "must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause."[14]

Rule 26(b)(5)(B) is the so-called "claw-back" provision whereby a party that produces matter that is privileged or protected as trial preparation may notify the recipients of the claim of privilege or protection and the basis for the claim. The recipient is thereafter required to promptly return, sequester, or destroy the matter, and would be barred from utilizing the matter until any claims of protection were adjudicated. The recipient would also be required to make reasonable efforts to itself recapture any of the information that it disseminated before the notification from the producing party. There is a provision for presenting the information to the court under seal for review. The producing party is obligated to preserve the matter until the claim is adjudicated.

This provision is problematic to the extent that it encourages laxity in screening for privileged or otherwise protected matter. The potential for waiver to be found, thus making the privileged or protected matter fair game, remains. The extent to which parties have addressed issues of inadvertent exchange in discussions under Rule 26(f) and agreements under Rule 16(b)(6) will undoubtedly be considered by the court in addressing claims of waiver.

Rule 33(d) is amended to provide that answers to interrogatories "may be derived or ascertained from the business records, *including electronically stored information*, of the party upon whom the interrogatory has been served."[15]

A "two-tier" system addresses discovery requests for electronically stored information that is not readily accessible.

Rule 37(f) provides a safe harbor, whereby a party that loses or destroys electronic information will not be liable for a spoliation or other sanction providing the loss or destruction occurred as a result of a routine operation, and the party took reasonable steps to preserve the matter.[16] The new subsection, titled "Electronically Stored Information," provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine,

The proposed rule has impact beyond the federal courts.

good-faith operation of an electronic information system."[17]

The issue of when a litigation "hold" must be placed on electronic information falls outside the scope of this article, and may have an impact on the resolution of a sanction where a Rule 37(f) defense is raised. The rule will not protect those who intentionally destroy information discoverable in the litigation.

Finally, Rule 45, dealing with subpoenas, has been amended to conform to the changes in the other rules by including language for "copying, testing or sampling"[18] matter, including "electronically stored information."[19]

The amendments to the Federal Rules of Civil Procedure are not the end of the federal court rules changes. There is a proposal to amend the Federal Rules of Evidence by adding Rule 502[20] to address issues arising from the changes in the Federal Rules of Civil Procedure involving the effect of disclosure of matter subject to the attorney-client privilege or work-product protection, as well as the issue of waiver raised in *Hopson v. The Mayor and City Council of Baltimore*.[21] The public comment period does not end until February 15, 2007, and it is unlikely that the rule will become effective before some time in 2008.

The proposed rule has impact beyond the federal courts, because it provides that the disclosure of attorney-client or work-product matter, when made to a federal public office or agency in the exercise of its regulatory authority, does not operate as a waiver of the privilege in federal court proceedings. These provisions, among others, appear to ensure close scrutiny as the rule moves forward.

The new rules require careful thought and preparation before commencing an action, or, for a party being sued, preparation well in advance of receipt of a summons and complaint. E-discovery vendors and consultants are as common today as Y2K vendors and consultants were on the eve of the new millennium. Fear of making a misstep in the world of e-discovery is justified, and many grey areas remain in electronic discovery. So, think twice before hitting the "delete" key! ■

1. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).
2. D. Horowitz, Burden of Proof, *Small Shocks and Lots of Static: Developments in Electronic Disclosure*, N.Y. St. B.J., Jul./Aug. 2006, p. 18.
3. Fed. R. Civ. P. 26(a)(1)(B).
4. Fed. R. Civ. P. 34.
5. Fed. R. Civ. P. 34(a).
6. Fed. R. Civ. P. 34(b).
7. Fed. R. Civ. P. 16.
8. Fed. R. Civ. P. 26(f).
9. Fed. R. Civ. P. 26(f)(3).
10. Fed. R. Civ. P. 26(f)(4).
11. Fed. R. Civ. P. 16(b)(6).
12. Fed. R. Civ. P. 26(b)(2)(B).
13. *Id.*
14. *Id.*
15. Fed. R. Civ. P. 33(d) (emphasis added).
16. Fed. R. Civ. P. 37(f).
17. *Id.*
18. Fed. R. Civ. P. 45(a)(1)(C), (D).
19. Fed. R. Civ. P. 45(a)(1)(C), (D).
20. Proposed Fed. R. Evid. 502 reads as follows:

    Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

    (a) Scope of waiver. – In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

    (b) Inadvertent disclosure. – A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings – and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

    [(c) Selective waiver. – In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection – when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority – does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

    (d) Controlling effect of court orders. – A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

    (e) Controlling effect of party agreements. – An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

    (f) Included privilege and protection. – As used in this rule: (1) "attorney-client privilege" means the protection provided for confidential attorney-client communications, under applicable law; and (2) "work product protection" means the protection for materials prepared in anticipation of litigation or for trial, under applicable law.

    Proposed subsection (c) was released for Public Comment in brackets, because the Advisory Committee on Evidence Rules, Committee on Rules of Practice and Procedure, has yet to take a position on its merits.

21. 232 F.R.D. 228 (D. Md.).

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Attorney Labor Unions

By Mitchell H. Rubinstein

Introduction

Interest in the law governing attorney labor unions (and, for that matter, interest in an article on the subject) is usually the result of one of two factors. The first is that unhappy staff attorneys may be thinking about organizing and bargaining collectively. The other is that their superiors in the firm or office may be worrying that they are planning to do just that, and are intent on preventing it. This article outlines certain key issues that can arise where attorneys attempt to organize a union.

Attorneys may be interested in joining a labor union for the same reasons as other employees.[1] Through a collective voice, attorneys may be able to achieve "more," which has always been the goal of organized labor. They might obtain more wages, more benefits and, perhaps most importantly, more job security. Unionization may also bring order to a law firm by imposing certain job-related standards, such as hours of work. Violations could be grieved under the collective bargaining agreement, just as in any workplace where a union and a collective bargaining agreement exist.

Although there is relatively little precedent or history in the area of attorney unions, the federal National Labor Relations Board (NLRB or "Board") has asserted jurisdiction over law firms since 1977,[2] provided a firm has $250,000 in gross revenue.[3] The general process of establishing a union would be the same as it is for employees in other fields.[4]

There are instances where such unionization has occurred without contest.[5] Many reported cases involving law firms actually concern support staff,[6] although there are those that also involve attorneys.[7]

What if there is a contest? As a general proposition, attorneys enjoy the same legal rights as other employees in deciding whether or not they want to be represented by a union.[8] The employer's or law firm's desires are irrelevant. However, attorney-employers are likely to raise certain points in opposition to attorney unionism. They may argue that staff attorneys are not eligible to unionize because they are either confidential employees, or supervisors, or managerial employees. They might also claim that attorneys should not organize because the ethics of the legal profession will impede the collective bargaining process. Each of these is discussed in turn.

Exclusion of "Confidential Employees"

Employees in law firms and private corporations, including attorneys, must be treated like any other employees covered under the National Labor Relations Act (NLRA or the "Act").[9] Thus, the Board has rejected attempts by some law firms to exclude attorneys and other law firm employees from the definition of employee because they are "confidential employees."[10]

Like many terms in labor law, the term "confidential employee" is a term of art. A confidential employee has nothing to do with the confidential nature of attorney work. Rather, confidential employees are those involved in internal confidential labor relations matters with respect to their employer. The focus is on the attorney's employer – not his or her clients.

The general rationale for the exclusion of confidential employees from the definition of "employees," who may join a union, is as follows: management should not be forced to negotiate with a union which has among its members employees with access to advance information on the company's collective bargaining negotiating position, grievances and other labor relations matters.[11] The U.S. Supreme Court addressed this exclusion, however, in *NLRB v. Hendricks County Rural Electric Corp.*[12] Under *Hendricks*, an individual claimed to be exempt on this basis must work directly for and in a confidential capacity to a person who decides and effectuates labor relations policy. As the Board later explained:

> The Board's long-established test for determining whether an employee possesses confidential status is whether that employee "assist[s] and act[s] in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." This is termed the "labor nexus" test and its validity as an appropriate measure of confi-

> dential status was endorsed by the Supreme Court in *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170 (1981). Under this definition it is insufficient that an employee may on occasion have access to certain labor related or personnel type information. What is contemplated instead is that a confidential employee is involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by it.[13]

Consequently, access to confidential business information does not transform someone into a confidential employee, since the standard is limited to those who act and assist in a confidential capacity to persons who exercise managerial authority in labor relations.[14] More recently, the Board seemed to narrow confidential employees to those who "work on labor relations issues on a regular basis."[15]

The burden of establishing that an individual is a supervisor is on the party attempting to exclude such person from the protection of the Act.

Most law firm associates or staff attorneys will not be confidential employees. This is because they are not involved in labor issues involving the management of the firm for which they work.

"Supervisors" as Exempt Category

Perhaps the most significant hurdle with respect to attorney unionization concerns the fact that many attorneys supervise secretaries and other support staff, or even junior associates, and thus might be considered "supervisors," which would prevent them from becoming a member of a union. The term "supervisor" is also a term of art in labor law, and is often litigated. There has not been much litigation with respect to attorneys, but there have been developments in the law that must be considered in evaluating their status.

The burden of establishing that an individual is a supervisor is on the party attempting to exclude such person from the protection of the Act, and that party is typically the employer.[16] However, not every "order giver" qualifies – a traffic director might tell the president of the company where to park, but that does not make him or her a supervisor.[17] Additionally, the NLRA does not require that every work location have a supervisor present.[18]

In *NLRB v. Health Care & Retirement Corp.*,[19] the Supreme Court described the appropriate test for supervisory status:

> [T]he statute requires the resolution of three questions; and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have the authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require "the use of independent judgment"? Third, does the employee hold the authority "in the interest of the employer"?[20]

Significantly, an employee need only possess *one* indicia of supervisory authority to be a supervisor.[21] However, this must always involve the exercise of independent judgment.[22] The Board has found that the exercise of judgment beyond regular or customary activities, which is not controlled by outside sources, is "independent."[23] In *Providence Hospital*,[24] the NLRB held that certain nurses were not supervisors, reasoning:

> [W]hen a professional gives directions to other employees, those directions do not make the professional a supervisor merely because the professional used judgment in deciding what instructions to give. For example, designing a patient treatment plan may involve substantial professional judgment, but may result in wholly routine direction to the staff that implements that plan.

In *NLRB v. Kentucky River Community Care, Inc.*,[25] however, the U.S. Supreme Court largely rejected this analysis. The Court seemed to be concerned with the Board's "categorical exclusion" of professional judgment. The Court did recognize that some nominally supervisory judgments may be performed without a sufficient *degree* of judgment or discretion, and thus would not warrant a finding of supervisory status. Unfortunately, the Court did not further explain what it meant by this, other than to state that "the degree of judgment . . . may be reduced below the statutory threshold by detailed orders and regulations issued by the employer."[26] In *dicta*, the Court also indicated that the Board can distinguish between employees who "direct the manner of others' performance of discrete *tasks* from employees who direct other *employees*."[27] However, the Board has not appeared to distinguish supervisory status in this exact manner.

On September 29, 2006, the NLRB issued a trio of decisions designed to clarify what is meant by the terms "assign," "responsibly to direct" and "independent judgment" as those terms are used in the definition of a supervisor in § 2(11) of the Act.[28] These decisions, which the NLRB itself described as "major,"[29] are particularly applicable to attorney unionization because it is likely that an employer may claim that the attorneys assign or

responsibly direct the work of others with the requisite independent judgment.

Oakwood Healthcare, Inc.[30] is the most important of the trio because the other two decisions simply apply the law established in *Oakwood*. In *Oakwood*, the NLRB, divided along party lines, held that fulltime regularly employed charge nurses[31] were supervisors within the meaning of the Act. In so holding, the Board described the word "assign" as follows:

> The ordinary meaning of the term "assign" is "to appoint to a post or duty" . . . we construe the term "assign" to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. In the health care setting, the term "assign" encompasses the charge nurses' responsibility to assign nurses and aides to particular patients. It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function.
>
> The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as "assign" within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to "assign." . . . In sum, to "assign" for purposes of Section 2(11) refers to the charge nurse's designation of significant overall duties to an employee, not to the charge nurse's ad hoc instruction that the employee perform a discrete task.[32]

However, with respect to the term "responsibly to direct," the Board held that term may encompass ad hoc instructions even though such instructions would not constitute an assignment. Interestingly, the majority defined the responsible direction by responding to the dissent's claim that such responsible direction should be limited to actions undertaken by department heads or higher level management:

> [T]he authority "responsibly to direct" is not limited to department heads as the dissent suggests. . . . If a person on the shop floor has "men under him," and if that person decides "what job shall be undertaken next or who shall do it," that person is a supervisor, provided that the direction is both "responsible" . . . and carried out with independent judgement. * * * [F]or direction to be "responsible,". . . the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. . . . Thus, . . . it must be shown that the employer delegated to the putative supervisor the authority to . . . take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.[33]

Oakwood also confirmed that any one of the 12 listed functions contained in § 2(11) must be done with independent judgment for an individual to be a supervisor, and defined independent judgment as follows:

> "Independent" means "not subject to control by others." . . . Thus, as a starting point, to exercise "independent judgment" an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.
>
> * * *
>
> [W]e find that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.[34]

In *Golden Crest Healthcare Center,*[35] a second case from the trio, the Board noted that there is a distinction between requesting certain action and having the authority to require certain action to be taken, such as

mandating that employees stay late. For an individual to be a supervisor, he or she must have the authority to take supervisory action.[36] In *Croft Metals, Inc.*,[37] the third case in the trio, the Board noted that a lead person occasionally switching tasks that need to be performed is not a supervisory "assignment" because that is similar to ad hoc instructions involving a discrete task.[38]

These definitions present obvious difficulties in attempting to organize attorneys. However, these issues are not unique to attorneys. In their dissent in *Oakwood*, the two Democratic Board members, Wilma B. Liebman and Dennis P. Walsh, stated that they feared that most professionals may be swept up into supervisory status under the majority's definition, which would be contrary to the intent of Congress which recognized that professionals are employees under the Act.[39]

Some attorney-employers may seek to argue that attorneys cannot unionize because they are "managerial employees."

In one of the first cases decided after the trio, the Board held that staff nurses were not supervisors.[40] This was largely because the testimony lacked specificity and was conclusionary. Although, § 2(11) only requires that a supervisor have the authority to carry out supervisory duties, the evidence must establish that the purported supervisor actually has such authority.[41]

It is important to recognize that the law in this area of labor law is still developing.[42] Therefore, it is necessary to also examine some cases that were decided before the trio. In *Hospital General Menonita v. NLRB*,[43] for example, the First Circuit held that an RN's assignment of tasks to LPNs and to technicians was not statutory supervision. The RN's role in assigning tasks was regulated by management protocol and by the physician's orders, which negated the need for any meaningful supervision. "This is precisely what the Supreme Court meant when, in *Kentucky River*, it indicated that discretion 'may be reduced below the supervisory threshold by detailed orders and regulations.'"[44]

Some authority to assign, discipline and hire is not considered statutory supervision if, as indicated above, those responsibilities are considered routine, and do not require the exercise of independent judgment.[45] In one case, one employee occasionally notified other employees that they must fill in for someone who was out, and initialed time cards and time-off requests in the supervisor's absence. That employee was not considered a supervisor. The employee did not actually verify attendance, and signed off on time-off requests as a routine matter; further, although the employee participated in interviews for new hires, he did not make any independent hiring recommendation. Rather, he discussed with more senior management whether they should recommend that the person be hired.[46]

Similarly, in *Armstrong Machine Co., Inc.*,[47] the Board held that a job repair foreman was not a supervisor. This was because he did not exercise independent judgment in assigning work or in addressing customer inquiries;[48] merely giving some instructions or minor orders to other employees does not confer supervisory status on the employee in question. Only individuals with "genuine management prerogatives" are considered supervisors.[49]

Accordingly, merely reporting an incident is insufficient to establish that an employee effectively recommended discipline.[50] The Board has also held that "program managers" who did not have the authority to suspend or discharge "resident advisors" – even though they had the authority to issue general counseling and verbal warnings as part of a progressive discipline system – were not supervisors. The Board viewed the managers' role as "reportorial" because written warnings had to be approved by higher management, and none of the verbal warnings introduced into evidence referenced a prior verbal warning. The Board concluded that the employer did not meet its burden of establishing that "actual consequences flow from the documented verbal warnings."[51]

As one can see, determining whether an employee is a supervisor is often difficult and can be the product of litigation. Undoubtedly, some attorneys are indeed supervisors; however, it is equally likely that many attorneys are not. Any such determination with respect to attorneys or other employees needs to be examined on a case-by-case basis, in accord with the law discussed above.

The "Managerial Employees" Exclusion

Some attorney-employers may seek to argue that attorneys cannot unionize because they are "managerial employees." The NLRA itself is silent with respect to the issue. However, the legislative history of the 1947 amendments to the NLRA indicates that Congress intended to exclude them from the definition of "employee" under the Act.[52] The managerial exclusion is the product of case law developed by the NLRB and U.S. Supreme Court.[53]

Managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative decisions of their employer." The central inquiry made by the NLRB and the courts is whether the employee "represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy."[54] The party seeking to exclude employees as managerial has the burden of proof.[55]

After the Supreme Court's decision in *Bell Aerospace*,[56] the Board on remand held that the employees at issue

(buyers) were not managerial employees. The Board, noting that the employees did not exercise sufficient discretion to be aligned with management, relied upon the fact that the employer had "comprehensive manuals and instructions," which limited the buyers' discretion. The Board also explained that managerial status is not conferred on rank-and-file workers or upon employees who make routine decisions. Rather, managerial employees are those who hold executive-type positions.[57]

To be aligned with management, the employee's duties must be "outside the scope of duties routinely performed by a similarly situated professional."[58] As the D.C. Circuit explained: "The Supreme Court has made it clear that employees whose decision making is limited to the routine discharge of professional duties in projects to which they are assigned are not managers under the Act."[59]

Occasional advice to management does not transform someone into a managerial employee, particularly where he or she is simply providing information, or advising management. The critical question is whether the employee could take "discretionary action" and whether his or her recommendations "control or implement" company policy.[60]

The managerial exclusion is obviously similar to the supervisory exclusion. However, the managerial exclusion can pertain to executives who may or may not have direct supervisory responsibility.[61] Thus, even if an employee is not a supervisor, he or she may still not be a simple employee under the Act, but rather a manager. However, as with the other categories of excluded employees discussed above, the facts of each case must be carefully examined.

Staff physicians and dentists, without more, are generally not managerial employees.[62] The same should hold true with respect to staff attorneys. As most staff attorneys and associates are not involved in the management of the law firm or company that employs them, most will not be considered to be "managerial employees."

Attorney Professional Responsibilities

Attempts to disqualify attorneys and others from organizing a union based on a perceived violation of professional conduct have generally been rejected.

The Board has repeatedly rejected arguments that lawyers' professional responsibilities prevent them from organizing a union.[63] The fact that attorneys are officers of the court is not a sufficient basis for denying them the protections and benefits of the NLRA.[64] In fact, the Board interpreted EC 5-13 as specifically recognizing that attorneys have the right to join unions.[65]

Attorney ethical requirements need to be distinguished from union conflict of interests – which may occur with respect to attorney as well as non-attorney bargaining unit members. In general, a union may not represent employees if a conflict of interest exists on the part of the union, such that good-faith negotiations between the employer and the union could be jeopardized. The burden of proof is on the party making this claim, and it is a very heavy burden. It must be shown that representation would cause an "innate danger" that the union would bargain on behalf of its own interests rather than for the employees whom the union seeks to represent. Such extreme situations generally arise only where the union actually owns or controls a business enterprise in the same industry as the employer, in direct competition with the employer.[66] A "conflict of interest" on the part of union-side law firm attorneys representing unions has been rejected as a basis for halting attorney unionizing activity.[67]

Conclusion

While there is surprisingly little NLRB precedent with regard to attorneys, they are no different from other employees in the area of unionizing activity. If the attorney works in an employment-at-will state such as New York, which provides virtually no protection to employees, unionization may be a viable option to consider.[68] The reasons why partners and other legal managers want to avoid a union are ultimately no different from those found in other industries, and union organizers should keep this in mind.

If there is interest, the NLRB maintains an excellent Web site which attorneys, unfamiliar with traditional labor law, can visit and use.[69] This Web site contains links to cases, a representation manual and copies of the requisite forms. Perhaps, unionization is something that attorneys might want to consider. ■

1. Though less than 10% of the private sector workforce is unionized, studies show that between one-third and one-half of American workers would be interested in joining a union. Joseph E. Slater, *The "American Rule" That Swallows the Exceptions*, __ Emp. Rts. & Emp. Pol'y J. __ (forthcoming 2007) (collecting authorities and noting some of reasons for the disparity in the percentage of unionization in this country, as compared with the number of employees who are interested in joining unions). There is no reason to believe that attorneys would be less interested in joining unions than the American workforce in general.

2. *Foley, Hoag & Eliot*, 229 NLRB 456 (1977). For a discussion of prior law, see *Recent Development: Labor Law – NLRB Declines to Assert Jurisdiction Over Law Firms*, 41 Tenn. L. Rev. 745 (1974).

3. *Camden Reg'l Legal Servs., Inc.*, 231 NLRB 224 (1977); *David Van Os & Assocs., P.C.*, 346 NLRB No. 79 (Mar. 31, 2006).

4. For those who believe unionization may be a viable option, it takes only 50% plus one of the unit members to vote in favor of unionization. The union election is held in the unit of employees which is "appropriate" for bargaining as determined by the NLRB. The appropriate unit for bargaining is very important to both labor and management. It will determine who can vote in the election and who will be in the union if the union prevails. *Am. Hosp. Ass'n v. NLRB*, 899 F.2d 651 (7th Cir. 1990), *aff'd*, 499 U.S. 606 (1991). Two types of issues typically come up: unit scope (if there are a multiple locations) and unit composition (specific job titles that would be covered). *See, e.g., Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570 (1st Cir. 1983) (distinguishing between unit scope and unit composition). It is beyond the scope of this article to discuss appropriate unit principles in any more detail other than to state that there can be more than one appropriate unit, and that the employees do not have to petition for the "most appropriate unit." Therefore, a separate unit of attorneys might be appropriate, as well as a combined unit of attorneys and other employees.

5. Under the NLRA, employers can voluntarily recognize unions. *Triangle Bldg. Prods. Corp.*, 338 NLRB 257 (2002). Additionally, NLRB elections are often held pursuant to stipulated election agreements. In fiscal year 2004, the Board was able to negotiate a stipulated election agreement in 89% of such cases. *Performance and Accountability Report FY 2004*, at 2 (NLRB 2004), *available at* <www.nlrb.gov>. While a stipulated election agreement does not necessarily mean that the parties did not engage in litigation over certain conduct (such as post election Unfair Labor Practices or Objections), the fact that such a large percent of elections are conducted pursuant to stipulations means that many unions are recognized without litigation.

6. *Foley, Hoag & Eliot*, 229 NLRB 456 (1977) (unit of file clerks and messengers); *Camden Reg'l Legal Servs.*, 231 NLRB 224 (unit of secretaries, receptionists, clerks, assistant bookkeeper, clerical assistant); *Stroock & Stroock & Lavan*, 253 NLRB 447 (1980) (unit of clerical and support staff); *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 NLRB 450 (1980) (unit of office workers, executive secretaries, administrative secretary, file clerk, mail clerk, receptionists).

7. *Wayne County Neighborhood Legal Servs., Inc.*, 229 NLRB 1023 (1977) (unit of staff attorneys); *Kaplan, Sicking, Hessen, Sugarman, Rosenthal & Zientz*, 250 NLRB 483 (1980) (unit of attorney, paralegal, law clerk and investigator); *Am. Fed'n of State-County-Mun. Employees Council 93*, 1-RC-21569 (Regional Director, Dec. 5, 2002) *available at* <http://www.nlrb.gov/nlrb/shared_files/decisions/dde/2002/1-RC-21569.pdf> (self determination election ordered to determine if associate general counsels should be in a separate unit or in a unit including field staff representatives, senior field staff representatives, organizers); *Kennedy, Schwartz & Cure, P.C.*, 2-RC-22718 (Regional Director 2003) *available at* <http://www.nlrb.gov/nlrb/shared_files/decisions/dde/2003/2-RC-22718.pdf> (election in unit of attorneys or attorneys and secretaries, legal assistants, receptionists and bookers ordered). *Cf. In re Lumbermen's Mut. Cas. Co. of Chicago*, 75 NLRB 1132 (1948) (unit consisting in part of attorneys employed by insurance company).

8. Indeed, the *Restatement of Law* (3rd) governing lawyers recognizes that lawyers are subject to the same labor relations laws as other employees. Specifically, the *Restatement* (3rd) provides in relevant part: "A lawyer who hires a lawyer or nonlawyer as an employee is subject to applicable law governing the employment relationship, such as contract law, antidiscrimination legislation, unjust-discharge law, and labor relations law." Restatement (Third) of Law Governing Lawyers § 56(k).

9. *Kennedy, Schwartz & Cure, P.C.*, 2-RC-22718, slip op. at 24 (Regional Director 2003) *available at* <http://www.nlrb.gov/nlrb/shared_files/decisions/dde/2003/2-RC-22718.pdf>.

10. *Id*. at 22, n.12; *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 NLRB 450 (1980).

11. *NLRB v. Meenan Oil Co.*, 139 F.3d 311 (2d Cir. 1998).

12. 454 U.S. 170 (1981).

13. *Intermountain Rural Elec. Ass'n*, 277 NLRB 1, 3–4 (1985), *aff'd*, 1988 WL 166520, 112 Lab. Case (CCH) ¶11, 269 (10th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989) (citation omitted).

14. *Ford Motor Co.*, 66 NLRB 1317, 1322 (1946).

15. *E.C. Waste Mgmt. Inc.*, 339 NLRB 262, n.2 (2003).

16. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001); *Mich. Masonic Home*, 332 NLRB 1409 (2000); *Health Res. of Lakewood, Inc.*, 332 NLRB 878 (2000); *see NYU Med. Ctr. v. NLRB*, 156 F.3d 405 (2d Cir. 1998).

17. *NLRB v. Sec. Guard Serv.*, 384 F.2d 143 (5th Cir. 1967); *Food Store Employees v. NLRB*, 422 F.2d 685, 690 (D.C. Cir. 1969) ("Almost any employee 'directs' other employees in some fashion at some time."); *Miss. Power & Light Co.*, 328 NLRB 965, 971 (1999) ("Both the Board and courts have recognized that not every act of assignment or direction makes an employee a supervisor."), *abrogated by Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001); *Hosp. Gen. Menonita v. NLRB*, 393 F.3d 263 (1st Cir. 2004) ("[T]he mere fact that an employee gives other employees instructions from time to time does not . . . render him . . . a supervisor.").

18. *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 649 (D.C. Cir. 1999).

19. 511 U.S. 571 (1994).

20. *Id*. at 573–74 (quoting *Northcrest Nursing Home*, 313 NLRB 491, 493 (1993)). These 12 factors are contained in the definition of a supervisor. Section 2(11) of the NLRA defines a supervisor as follows: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

21. *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001); *Pub. Serv. Co. v. NLRB*, 271 F.3d 1213 (10th Cir. 2001) (§ 2(11) requirements are read in the disjunctive).

22. *King Broad. Co.*, 329 NLRB 378 (1999).

23. *Training Sch. at Vineland*, 332 NLRB 1412 (2000).

24. 320 NLRB 717 (1996), *enforced*, 121 F.3d 548 (9th Cir. 1997), *overruled by Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006).

25. 523 U.S. 706 (2001).

26. *Id*. at 714.

27. *Id*. at 720 (emphasis in original).

28. *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (Sept. 29, 2006); *Golden Crest Healthcare Ctr.*, 348 NLRB No. 39 (Sept. 29, 2006).

29. *NLRB Issues Lead Case Addressing Supervisory Status in Response to Supreme Court Decision in Kentucky River*, Press Release, Oct. 3, 2006, *available at* <www.nlrb.gov>.

30. 348 NLRB No. 37.

31. Where an individual only is engaged in supervisory duties part of the time, the test is "whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions." This refers to a pattern or schedule. While there is no strict numerical test, the Board has found supervisory status where the individual functioned as a supervisor 10%–15% of their total work time. *Id.*, slip op. at 11. For other cases, see, *Entergy Gulf States v. NLRB*, 253 F.3d 203 (5th Cir. 2001). *See also Training Sch. at Vineland*, 332 NLRB 1412 (2000) (employee who provides limited oversight to other employees is not a statutory supervisor); *Somerset Welding Co.*, 291 NLRB 913 (1988) (exercise of some supervisory authority in clerical, perfunctory or sporadic manner does not require a finding of supervisory status); *Commercial Fleetwash*, 190 NLRB 26 (1971) (occasional isolated instance is generally insufficient to establish that an individual is a supervisor); *Robert Greeenspan, D.D.S.*, 318 NLRB 70 (1995), *enforced*, 1996 WL 98783 (2d Cir.) (n.o.r.), *cert. denied*, 519 U.S. 817 (1996) (same, finding that dentists did not supervise dental assistants.); *Franklin Home Health Agency*, 337 NLRB 826 (2002) ("The exercise of 'some supervisory authority in routine, clerical, perfunctory or sporadic manner' or through giving 'some instructions or minor orders to other employees' does not confer supervisory status.").

32. *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 slip op. at 4–5.

33. *Id.*, slip. op. at 7–8.

34. *Id.*, slip op. at 9–10.

35. 348 NLRB No. 39 (Sept. 29, 2006).

36. *Id.*, slip op. at 4–5.

37. 348 NLRB No. 38 (Sept. 29, 2006).

38. *Id.*, slip op. at 7.

39. 348 NLRB No. 37, slip op. at 20 (Liebman and Walsh, dissenting).

40. *Avante at Wilson, Inc.*, 348 NLRB No. 71 (Oct. 31, 2006). In this case, the Board also considered the secondary factor of supervisory ratio. If the Board were to find that the staff nurses were supervisors, as argued by the employer, there would be an "improbably high ratio of 22 supervisors to 27 employees." *Id.* at n. 4.

41. *Id.*, slip op. at 2.

42. Indeed, after these trio of decisions were decided, a number of cases were remanded back to the Regional Director. *See, e.g.*, *Rockspring Development, Inc.*, 348 NLRB No. 75 (Nov. 15, 2006).

43. 393 F. 3d 263(1st Cir. 2004).

44. *Id.* at 268.

45. *Los Angeles Water & Power Employees' Ass'n*, 340 NLRB 1232 (2003).

46. *Id.*

47. 343 NLRB No. 122 (2004).

48. *Id.* The Board described the foreman's duties as follows: "Meier answered employees' questions and assigned departmental work. In making work assignments, Meier referred and adhered to a priority list generated by management. He also took into account employees' skills and experience and whether the employees were able to work together. In addition, when the Respondent's owner, Clifford Porter, was absent, Meier answered customer inquiries related to the repair department. . . . [T]he record fails to demonstrate that Meier exercised independent judgment in assigning work or in addressing personnel problems. . . . Nothing in the record supports a finding Meier's employee placements are based on anything other than common knowledge, present in any small workplace, of which employees have certain skills and which employees do not work well together. In other words, the record fails to evince that Meier's assignment of work was anything other than routine."

49. *Id.* at n.4.

50. *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644 (D.C. Cir. 1999). *Nathan Katz Realty v. NLRB*, 251 F.3d 981(D.C. Cir. 2001) (same); *Los Angeles Water & Power Employees' Ass'n*, 340 NLRB 1232 (2003).

51. *Ken-Crest Servs.*, 335 NLRB 777 (2001); *Hosp. Gen. Menonita v. NLRB*, 393 F.3d 263 (1st Cir. 2004) ("[I]t is well settled that where an employee's involvement in the evaluation process is merely reportorial in nature, it is not sufficient to meet the supervisor classification.").

52. Gorman & Finkin, Basic Text on Labor Law § 3.7 (2d ed. 2004).

53. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

54. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682–83 (1980).

55. *LeMoyne-Owen Coll.*, 345 NLRB No. 93 (2005) (holding that faculty were managerial employees because they effectively make decisions in critical areas such as curriculum, course content, determination of honors, grading, admission standards, and participation in tenure decisions).

56. 416 U.S. 267 (1974).

57. *Bell Aerospace Co.*, 219 NLRB 384 (1975).

58. *Nurses United*, 338 NLRB 837, 840 (2003).

59. *Evergreen Am. Corp. v. NLRB*, 362 F.3d 827 (D.C. Cir. 2004).

60. *NLRB v. Meenan Oil Co.*, 139 F.2d 311 (2d Cir. 1998).

61. For example, the exercise of editorial discretion, without more, does not confer executive type status. *Bakersfield Californian*, 316 NLRB 1211, 1219 (1995). However, an editor who is directly involved in making fundamental decisions about the direction of the newspaper and who chaired policy meetings was held to be a managerial employee. *Bulletin Co.*, 226 NLRB 345 (1976).

62. *Third Coast Emergency Physicians*, 330 NLRB 756 (2000); *Montefiore Hosp. & Med. Ctr.*, 261 NLRB 569 (1982).

63. *Lumbermen's Mut. Cas. Co. of Chicago*, 75 NLRB 1132 (1948); *Foley Hoag & Eliot*, 229 NLRB 456, 458 (1977); *Kennedy, Schwartz & Cure, P.C.*, 2-RC-22718, slip op. at pp. 20–25 (Regional Director 2003) *available at* <http://www.nlrb.gov/nlrb/shared_files/decisions/dde/2003/2-RC-22718.pdf>.

64. *Lumbermen's Mut. Cas. Co. of Chicago*, 75 NLRB 1132.

65. *Kennedy, Schwartz & Cure, P.C.*, 2-RC-22718, slip op. at pp. 10–25 (Regional Director 2003) *available at* <http://www.nlrb.gov/nlrb/shared_files/decisions/dde/2003/2-RC-22718.pdf>. EC 5-13 provides:

> A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how to fulfill his or her professional obligations to a person or organization that employs the lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, the lawyer should be vigilant to safeguard his or her fidelity as a lawyer to the employer, free from outside influence.

66. *CMT, Inc.*, 333 NLRB 1307 (2001); *see Guardian Armored Assets LLC*, 337 NLRB 556 (2002) (no conflict where union seeks to represent private guards because union also represents police officers in public sector).

67. *Kennedy, Schwartz & Cure, P.C.*, 2-RC-22718, slip op. at 22, n.12.

68. *See Horn v. N.Y. Times*, 100 N.Y.2d 85, 760 N.Y.S.2d 378 (2003) (employer may discharge employee for a good reason or no reason so long as it does not violate some statutory right). Even in conservative states such as New York, however, a cause of action for breach of an implied contract is recognized if an attorney is terminated for insisting that his or her law firm comply with DR 1-103(A), which imposes an obligation on attorneys to report another attorney's misconduct. *Wieder v. Skala*, 80 N.Y.2d 628, 593 N.Y.S.2d 752 (1992). *See also Connolly v. Napoli, Kaiser & Bern LLP*, 12 Misc. 3d 530, 817 N.Y.S.2d 872 (Sup. Ct., N.Y. Co. 2006) (associate fired for refusing to violate DR 1-102 which imposes an obligation on attorneys not to engage in dishonesty, fraud, deceit or misrepresentation states a cause of action for breach of implied contract). Outside the area of professional ethics, attorneys are treated the same as other employees.

69. Some attorneys who practice employment law or pension law may sometimes identify themselves as labor lawyers, but their area of practice is to be distinguished from traditional labor law matters where unionization is involved. The NLRB's Web site is www.nlrb.gov.

BY ELLIOTT WILCOX

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The Power of Eye Contact

You can't say why, but for some reason, you just don't trust this speaker. It sounds right, but it doesn't feel right. Why can't you trust him? Suddenly, it hits you. Even though he's been speaking for 15 minutes, he hasn't made eye contact with you or anyone else in the room. His eyes have been buried in his notes, with an occasional glance to the clock behind you. Even though the content of his presentation was persuasive, you just didn't believe him.

The Power of Eye Contact

They say that the eyes are the window to the soul. When you present, what do your eyes say about you? There are three reasons to look your audience in the eyes. First, eye contact helps your audience trust you. Growing up, you probably heard the old adage, "Don't trust someone who can't look you in the eye." Do you still follow that advice? Even though some of the best con men on the planet can look you square in the eye all day long, and some very honest people might never look you in the eyes, you are probably less trusting of someone who won't meet your gaze.

Second, eye contact lets you connect with your audience. Think back to the last time you sat in a large audience. Did the speaker make eye contact with you? If so, how did you react? Did you pay more attention after that? Did you feel that the speaker was interested in you? Did you feel a connection to the speaker? Even casual eye contact can have a tremendous effect upon audience members.

Finally, eye contact lets you read your audience. Some speakers bury their heads in their notes, and never look at their audience. The audience could be bored to tears, completely confused, or even walking out of the room – the speaker would never know. As a speaker, you need to check in with your audience periodically. If you don't, you can't adjust your presentation to best suit their needs. Maybe you need to speed up, slow down, or answer a question – you'll never know if you aren't reading your audience.

The Most Common Barrier to Effective Eye Contact

Speaking in public can be a nerve-wracking experience, especially if you're not prepared. Many speakers are overcome with a desire to bury their heads in their notes and read their speeches word-for-word. This eliminates the opportunity to make eye contact with the audience. How often do your speeches need to be word-for-word perfect? Very few speeches do. For those rare exceptions, such as a State of the Union address, you could use a teleprompter. Otherwise, you can eliminate the most common barrier to effective eye contact by throwing away your speech script. Instead, use a minimal outline, and the notes will stop competing for your attention. Without the "crutch" of notes before you, you'll automatically make more eye contact with your audience.

Don't Persuade the Flip Chart

Another common barrier to effective eye contact arises during the use of visual aids. If you were persuading a jury to find for your client, wouldn't you want to look them in the eyes? But many attorneys stop making eye contact with the jurors when they use visual aids, such as flip charts or enlarged photographs. Rather than looking at the jury, they focus their attention on the flip chart. Why? They're not trying to persuade the flip chart. If you want to persuade someone, you need to look that person in the eyes. The next time you use a visual aid, ask yourself, "Where are my eyes focused? Am I

making eye contact with the person I'm trying to persuade?" If not, make a special effort to stop looking at the visual aid. Focus your eyes upon your audience, and you'll be more persuasive.

Eye Contact with Large Audiences

How can you make eye contact with everyone in the room when you're speaking to an audience of hundreds or thousands? You can't look at each person individually – it takes too much time. But you don't need to look at each person individually. You can make each person *feel* like you've looked at them directly. How? By working the room in sections. In larger groups, you might be more than 100 feet away from some of the audience members. At that distance, they can't tell exactly where your eyes are focused. When you look at one person in a large group, the people around that person will feel like you've made direct eye contact with them, too.

Start by dividing the room into quadrants. You'll want to make eye contact with someone in each of the room's quadrants. You'll especially want to make eye contact with the person sitting in each of the far corners of the room. By looking at the person in each of the corners, you'll make indirect eye contact with the majority of the people in the room. For example, you might start by making direct eye contact with the person sitting in the back, left side of the room. Hold eye contact with that individual for a moment. The people sitting around that person will think you're looking directly at them, too. After that, you'll shift your gaze to a different quadrant of the room and make direct eye contact with someone there. Continue moving around the room, consciously hitting all four quadrants. Your audience will leave with the impression that you were talking directly to *them.*

Eye Contact with Smaller Audiences

With smaller audiences, it is much easier to make direct eye contact with every audience member. It's also far more important. If your audience is a group of six jurors, you need to make direct eye contact with *each* of them. If you ignore one person, he or she will notice. Jump from juror to juror, holding eye contact with them for varying lengths of time. Try maintaining eye contact long enough to determine the color of the juror's eyes. Holding the eye contact makes it a personal conversation between the two of you. Just be careful not to get into a staring contest or making someone uncomfortable.

Eye contact is powerful. Use it to convey sincerity, to share a moment of levity, or to draw audience members back into your presentation. Your audience will be looking at you – make sure that you look at them, too! ■

Is the Public Being Protected?

A Lead Agency's Duty Under SEQRA to Review Newly Discovered Information

By James Bryan Bacon

The government agency bearing primary responsibility for examining the potential environmental effect of a sponsor's proposed project – the "lead agency" – discharges that responsibility through the review of an environmental impact statement, or EIS. It then issues a determination as to whether the statement is approved or disapproved, or whether some changes must be made before approval is given.

What happens, however, when conditions change after the review is complete and the project gets underway? A specific section of the State Environmental Quality Review Act[1] (SEQRA), addresses that concern. All too often, however, court decisions provide little insight as to how one particularly important subpart – "newly discovered information" – should be applied to meet the overall goal of environmental protection.

The Goal of the Rule Requiring Disclosure of New Information

What does SEQRA require when conditions change following the lead agency's requisite findings that a project's impacts had been avoided, or minimized to the maximum extent practicable.[2] SEQRA's § 617.9(a)(7)(i)(b)

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is the response which seeks to protect the public and environment by authorizing the lead agency to require a supplemental EIS.

It is an important issue, because many projects are delayed beyond their projected start-date. After completing the review, or SEQR, events may occur rendering the lead agency's mitigation measures ineffective. This would require reexamination as to whether the project's adverse environmental impacts were indeed adequately mitigated. If a new "hard look"[3] is not taken in such cases, the adverse environmental consequences can be much worse than expected.

The Regulation

The New York State Legislature enacted the Environmental Conservation Law (ECL) Article 8 in 1975, modeling it after the National Environmental Policy Act.[4] The New York State Department of Environmental Conservation (DEC) promulgated SEQRA to implement the ECL's environmental protection goals.[5]

In 1982, in a case of first impression, the Second Department issued a holding weaving together core environmental review principles of federal case law to address a new issue – the treatment of newly discovered information arising post-SEQR. In *Glen Head-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay,*[6] the lead agency had approved a housing project on the basis that its sewage would be treated by the City of Glen Cove, in Nassau County. New information disclosed that the city would not accept the sewage. The information was not sponsor-driven, was newly discovered and affected a significant adverse environmental impact because no provision existed for the treatment of the project's expected sewage. The information was important, as the project's sewage disposal was a fundamental environmental impact. The court found that the new information was "not only accurate and highly relevant, it was at the heart of the environmental objections to the project."[7] Recognizing for the first time in New York State that a lead agency has a "continuing duty to evaluate new information relevant to the environmental impacts of its action,"[8] the court provided guidance as to the exercise of this duty, stating:

> The decision as to whether a supplement should be required has been based on the probative value of the information, its probable accuracy, and the present state of information contained in the impact statement.[9]

Largely in response to *Glen Head*, DEC promulgated § 617.9(a)(7) in 1987 to address post-SEQR events, stating its intent, as follows:

> SEQRA's maturity has created the need to clearly delineate when an agency should be required to prepare or cause to be prepared a supplemental draft or final EIS, other than site-specific EIS's which may follow final generic EIS's. The proposal incorporates the Federal standards set forth in the Council of Environmental Quality regulation at 40 C.F.R. 1502.9. The need for a supplemental EIS arises if a material change in circumstances, including project modification advancements in technology or newly discovered information, renders the EIS inadequate for any agency to make the requisite SEQR findings.[10]

Section 617.9(a)(7) as adopted states:

> Supplemental EISs.
>
> (i) The lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from:
>
> (a) changes proposed for the project;
>
> (b) newly discovered information; or
>
> (c) a change in circumstances related to the project.
>
> (ii) The decision to require preparation of a supplemental EIS, in the case of newly discovered information, must be based upon the following criteria:
>
> (a) the importance and relevance of the information; and
>
> (b) the present state of the information in the EIS.
>
> (iii) If a supplement is required, it will be subject to the full procedures of this Part.[11]

Subpart (i)(b), "newly discovered information," is the broadest category of the three subparts. Significantly, the newly discovered information does not have to relate to a so-called "sponsor-caused change." When urged to so limit the proposed rule (i)(b) in this manner, DEC declined, stating:

> Agencies have a continuing responsibility under the statute to consider significant environmental impacts. New information, or changes concerning significant adverse impacts, *from whatever source*, must be considered.[12]

There are, however, limitations to the application of the subpart. Like (i)(a) and (i)(c), the new information must relate to a specific significant adverse impact; the information must be important. Since the category of "newly discovered information" theoretically could include any information from any source that might be relevant to adverse environmental impacts, these limitations safeguard the provision from misuse. It allows a lead agency, or court, to reject the trivial. Therefore, integrating DEC's purposes for subpart (i)(b) along with the *Glen Head* holding, the following elements must be present for the subsection to apply:

1. the information can be from any source and does not have to involve an action by the sponsor;
2. the information must be newly discovered. It cannot be information that could have been included in comments filed on the original Draft EIS (DEIS) or Final EIS (FEIS);

3. the information must relate directly to one or more of the specific significant adverse environmental impacts identified in the prior EIS;
4. the information must be important; and
5. the information must not have been addressed in the prior EIS, or it must have been inadequately addressed.

Cases Since 1987

The cases decided since 1987 under subsection (i)(b) seldom discuss the above five factors, or explain how they do or do not apply. One case that does is *Doremus v. Town of Oyster Bay*.[13] There, the respondent town had approved a rezoning application, relying upon a 10-year-old EIS. The court found that new important information had arisen during these 10 years, particularly regarding water quality and the loss of open space.[14] New York State had designated the project site as part of the Long Island Special Groundwater Protection Area, thereby requiring an EIS for any action potentially causing a significant impact within the designated area. The court held the new information had caused a change of circumstances, requiring a Supplemental EIS (SEIS).

In a second case, from 2006, *Riverkeeper v. Planning Board*,[15] the Second Department reversed the lower court, requiring a SEIS where significant changes had taken place in the regulatory context of the project. The lead agency had failed to recognize that in the 12 years since the completion of SEQR, new information had arisen in the form of a series of regulatory determinations designed to protect New York City's Croton Watershed. The court detailed these changes and explained that "the changes to the regulatory environment, as described above, underscore the need to re-evaluate the project to assure its harmony with the new regulatory scheme."[16]

Unfortunately, the careful analyses found in these two cases appear to be rare.

The Court of Appeals has not been clear as to how and when this subpart should be applied. In two matters considered in 1990 and 1991, the Court could have applied § 617.9(a)(7)(i)(b) in requiring a lead agency to examine newly discovered evidence, but did not do so.

For example, in *Sutton Area Community v. Board of Estimate*, the Court of Appeals reversed the First Department's annulment of the lead agency's determination.[17] The First Department had held that serious factual questions existed because of "misleading environmental impact statements," which had not correctly identified the location and method utilized to dispose of the project's sewage.[18] However, the Court of Appeals ruled that the lead agency had taken the requisite hard look as it "was fully informed of all pertinent environmental issues including those dealing with the sewage treatment plant change, and considered these numerous factors before approving the project."[19] Similarly, in *Akpan v. Koch,* the Court examined the alleged new information and determined that the lead agency had adequately scrutinized the information during the SEQR process.[20]

More recently, the First, Second, Third, and Fourth Departments rejected new information allegations, finding that the claimed new information had been considered in the project's FEIS,[21] or that the evidence was insufficient to challenge the relied-upon data,[22] or that the new information did not compel the preparation of a SEIS.[23] However, these cases recite only conclusions. They do not discuss what information was actually presented or how it did or did not affect a significant environmental impact. They do not describe the source of the information, nor do they explain why the information was not important or relevant. This trend is disconcerting, as it keeps the practitioner and the public in the dark.

As DEC anticipated when it drafted the regulation, there is a danger that the subsection could be employed for the sole purpose of unnecessary delay.

As DEC anticipated when it drafted the regulation, there is a danger that the subsection could be employed for the sole purpose of unnecessary delay. Given its heavy caseload, a busy appellate court is no doubt tempted to dismiss such forays as quickly as possible. A curt, dismissive opinion that sheds no light on the reasons for rejection can hide, however, an antipathy to such cases, and the public needs to know the true position of the courts. The failure to articulate the reasons for dismissal can also breed litigation that might otherwise be avoided. If the appellate courts make clear what kind of information will not warrant a supplement, a practitioner filing such a case might know whether it could be considered frivolous, thus subjecting the practitioner to sanctions. That deterrent does not exist in the present climate. A recent decision by the Appellate Division, Second Department dramatically illustrates the dilemma.

CWCWC v. N.Y.C. DEP

In *Croton Watershed Clean Water Coalition v. New York City Department of Environmental Protection*, the information related to serious adverse environmental effects resulting from a massive project. The information appears at first

blush to be precisely the type that DEC had in mind when it amended § 617.9. The public will never know why the information was deficient, however, since the court stated only that the information presented by the petitioner was not "of the type" of newly discovered information described in subsection (i)(b).[24]

As background, late in 2003, DEP released a Draft Supplemental EIS (DSEIS) detailing its decision to build a Dissolved Air Flotation/Filtration (DAF/F) plant in Van Cortlandt Park, Bronx County. The plant will chemically treat and filter water from the Croton Watershed, a daisy chain system of 12 reservoirs north of New York City. This is the drinking water source for 10% of the city's population and up to 30% in times of drought.[25]

It is clear that the project, not scheduled for completion until 2011, will cause serious adverse environmental impacts. The most damaging short-term effects will result from site preparation and construction. A hole occupying over 8 acres, to a depth of 117 feet, will be required.[26] That excavation, and other site preparation, plus construction of the plant, will take over seven years.[27] During that time, nearby residents will be exposed to heightened noise levels, and exposed to the diesel truck exhaust and particulate matter resulting from the need to transport 1,250,000 cubic feet of dirt and rock out of the park and through residential neighborhoods. For the five-year period of construction, an estimated 162–300 truck trips per day will take place.[28] The level of fumes and particulates were and are of particular concern in this area, because the Bronx has one of the highest pediatric asthma rates in the United States.[29] In addition, large amounts of hazardous and potentially hazardous chemicals will be trucked through the neighborhood.[30]

Long term, the adverse effects are also significant. A large inventory of chemicals has to be maintained on site, with the risk of spills during both transport and storage.[31] The plant will use huge amounts of power, from 21 to 32 megawatts daily.[32] Noise levels will increase permanently, and air quality will decline. Citizens of the neighborhood will be denied the use of a significant portion of the park – no small matter, as for many local residents the park represents the principal source of personal and family recreation. DEP acknowledged that these adverse effects would occur, but said that the DAF/F plant was the only type of facility that could enable DEP to comply with soon-to-be-effective, more stringent federal drinking water standards.

The DSEIS issued in late 2003 was the culmination of a process started in 1999. It was delayed for years by litigation over site selection.[33] That issue was finally resolved, and DEP moved forward, retaining the same technology that it originally chose in 1999 for treating the water. The Croton Watershed Clean Water Coalition (CWCWC), a not-for-profit group dedicated to protecting the Croton Watershed, filed comments on the DSEIS, arguing that the DEP was ignoring new information, developed since 1999, regarding membrane filtration technology as an alternative treatment method.[34] It appeared that the technology would produce equal or better quality water, including better pathogen removal, while at the same time reducing or eliminating each of the serious adverse environmental effects resulting from the use of DAF/F.

CWCWC presented detailed information on the commercial viability of the technology and its increasing acceptability, and demonstrated that a membrane plant would take up a fraction of the space, require almost no excavation, use far less power and involve the storage and use of only a few maintenance chemicals. DEP ignored the comments, refused to reevaluate the choice of technology and moved forward, issuing an FSEIS in June 2004.

CWCWC filed an Article 78 petition in September 2004, arguing that DEP was required to take a "hard look" at membrane technology before site preparation or construction began to determine whether it would be more suitable for treatment of the Croton water. It was technically feasible to take the hard look. DEP was not scheduled to begin excavation until 2005 or commence the actual construction of the plant until 2006, a year and a half after the Article 78 was filed. The petitioners showed that long before actual construction commenced and prior to completion of the excavation activities, DEP would be able to assess membrane technology, a process CWCWC's experts concluded would take six months. If DEP made the decision to switch, the necessary environmental review could be completed while potential vendors submitted design plans. That would leave DEP's same stated 30-month time period to construct either plant; further, the membrane plant would not take as long to build, given its greatly reduced size and use of modular components.[35]

CWCWC further contended that if DEP had performed its duty under SEQRA when it should have, and if it had decided to switch, it might actually have completed the filtration plant two years sooner than scheduled. The petitioners stated that if DEP had taken a hard look at the new information on membrane technology, and had provided a reasoned elaboration for deciding to stay with the choice of DAF/F in the 2004 FSEIS, there would be no lawsuit. However, DEP took no such hard look, and advised the court that even were the petitioners to be correct, it would not reverse its 1999 decision to use DAF/F.[36]

The CWCWC case was heard at the trial court level before the Supreme Court, Queens County,[37] which decided the case without referring to or applying § 617.9(a)(7)(i)(b). Instead, it discussed the EIS process, the aging of data and noted that the lead agency had no duty to constantly update its information. The court stated that it should give deference to the decision of an

administrative agency, without explaining why SEQRA's section on newly discovered information did not apply – which could negate the impact of this deference.

CWCWC appealed,[38] and the Second Department issued a ruling affirming the trial court. The decision, only a few sentences long, does nothing to enlighten the practitioner or the public about the application of the section under discussion. In its ruling, the court found:

> The "new information" that the petitioners brought to the respondents' attention after the issuance of the final environmental impact statement (hereinafter the EIS) was not "of the type that would require" further environmental review of the project at issue (*Matter of Town of Pleasant Valley v. Town of Poughkeepsie Planning Bd.*, 289 A.D.2d 583, 736 N.Y.S.2d 70). Accordingly, contrary to the petitioners' contention, the respondents' determination not to prepare a supplemental EIS (*see* 6 NYCRR 617.9 [a] [7] [1] [b]) was neither arbitrary and capricious, nor an abuse of discretion.[39]

The Second Department provided no guidance as to why the new information was not of the type that would require further environmental review, beyond the reference to the *Town of Pleasant Valley* case.[40] By limiting the decision to the "type" of information, and not the sufficiency of the information, the court did not appear to be weighing the evidence presented. The citation to *Pleasant Valley* added nothing, since that holding simply said the unidentified information was not of the type requiring a Supplemental EIS.

It is hard to see how the *Stewart Park* case can be used as authority for the decision reached in the *CWCWC* case.

The *Pleasant Valley* court did cite two other cases, one of which further highlights the dilemma presented by the court's decision in *CWCWC*. *Stewart Park & Reserve Coalition v. New York State Department of Transportation* involved an allegation that the lead agency had erred by issuing a negative declaration regarding the need for a SEIS, where there had been several modifications to a formerly accepted project. In upholding the negative declaration, the court found that the lead agency had, in fact, anticipated and considered the effects of the modifications in the earlier EIS, which were planned at the same time as the original project. The court stated that the agency had taken a hard look at the information before the negative declaration had been issued, and had made a reasoned elaboration of its decision in such declaration. As to the need for a supplement simply because the data was stale, the court found that the passage of time alone did not make the information stale, since the EIS had in fact covered the later events about which the petitioner had complained. Finally, by the time the Article 78 Proceeding was brought, the project was substantially complete, and that was a bar to further SEQRA review.[41]

It is hard to see how the *Stewart Park* case can be used as authority for the decision reached in the *CWCWC* case. They are simply too different. In *Stewart Park*, the changes were anticipated and assessed. That constituted the necessary hard look. In *CWCWC*, DEP's 1999 FEIS did discuss membrane filtration technology as it existed in 1997, but did not anticipate the changes in technology that would occur over the next four-and-one-half years. DEP's 2003 DSEIS did not examine post-1997 information on membrane filtration. That new information answered the concerns expressed in DEP's 1999 FEIS. There was, therefore, no DEP analysis of the new information that could be considered by the court as a reasoned elaboration, a requisite element of the hard look test.[42]

The decision in the *CWCWC* case appears to be absolutely contrary to what DEC intended in adopting § 617.9(a)(7)(i)(b). For the petitioners and their attorneys it is frustrating that the court did not elaborate, as it had in *Stewart Park*, *Glen Head*, *Doremus* and *Riverkeeper*. The *CWCWC* court simply said only that the information was not of the type requiring a supplement. We do not know why.

Was it because no action of the sponsor was involved? DEC had rejected that as a reason in promulgating the rule. Was it because the information was not relevant to the adverse environmental impacts identified? It was relevant, to every impact identified. Was it that the information was not important? It was important, because it compelled a reexamination of the reason for subjecting the neighborhood to the substantial adverse impacts in the first place. Had the newly discovered information, unavailable at the time of the prior EIS, answered the reasons DEP gave for rejecting the more environmentally friendly treatment technique? Was it because the information came too late for a change? There was ample evidence presented that a pilot study could be done and, if DEP chose the alternative, that there would be time to complete the project by the existing deadline. Estoppel was not an issue as the project had not begun, as it had in *Stewart Park.* These issues needed to be addressed to justify the environmental hardship being created.

The court may have had good and sufficient reason to rule as it did. But, without an explanation as to why seemingly important information does not meet the requirements of § 617.9(a)(7)(i)(b), the public will never know what that reason was. If courts do not explain why a petitioner has failed to meet the DEC standard, it is impossible for the public to determine whether the regulation is being properly applied.

Conclusion

There can be little doubt that some environmental law cases have been brought on trivial grounds for the sole purpose of delay, and deserve to be dismissed. However, when a court is presented with a proceeding grounded on new information which, at least facially, meets the conditions set by the DEC for another hard look at the project, the public certainly would benefit from a full explanation if the court decides that nothing further need be done. ■

1. N.Y. Comp. Codes, R. & Regs. tit. 6, § 617 (N.Y.C.R.R.).

2. 6 N.Y.C.R.R. § 617.11(d)(5).

3. The judicial standard employed in determining whether a lead agency's determination should be annulled is whether the agency "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for their determination." *Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 397, 626 N.Y.S.2d 1 (1995).

4. 42 U.S.C. § 4321.

5. *See, e.g.*, ECL § 1-0101(1) Declaration of Policy. "It is hereby declared to be the policy of the State of New York to conserve, improve and protect its natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being."

6. 88 A.D.2d 484, 453 N.Y.S.2d 732 (2d Dep't 1982) *cited by* DEC's FGEIS for support in enacting 6 N.Y.C.R.R. § 617.9(a)(7)(i)(b). (FGEIS at 26.)

7. *Glen Head*, 88 A.D.2d at 495.

8. *Id.* at 494 (citing *Warm Springs Dam Task Force et al. v. Gribble*, 621 F.2d 1017 (9th Cir. 1980)).

9. *Id.* The court also cited with favor *Essex County Pres. Ass'n v. Campbell*, 536 F.2d 956 (1st Cir. 1976), where the trial court required the lead agency to issue a supplemental EIS because a moratorium on I-95 construction to the south of the project would change traffic patterns and reduce the need to reconstruct and widen I-95 to the north. The First Circuit affirmed, even though the I-95 construction was between 10% and 36% completed.

10. New York State Department of Environmental Conservation (DEC) *Final Generic Environmental Impact Statement Including Final Regulatory Flexibility Analysis for Revisions to 6 N.Y.C.R.R. Part 617* at 26. (Feb. 18, 1987) (FGEIS).

11. 6 N.Y.C.R.R. § 617.9(a)(7).

12. DEC, *FGEIS* at 27 (emphasis supplied).

13. *Doremus v. Town of Oyster Bay*, 274 A.D.2d 390, 711 N.Y.S.2d 443 (2d Dep't 2000).

14. *Id*. at 394.

15. 32 A.D.3d 431, 820 N.Y.S.2d 113 (2d Dep't 2006). The case involved three separate proceedings which were consolidated. The author represented the Croton Watershed Clean Water Coalition, Inc., a lead petitioner.

16. *Id.*

17. 78 N.Y.2d 945, 573 N.Y.S.2d 638 (1991).

18. *Sutton Area Cmty. v. Bd. of Estimate*, 165 A.D.2d 456, 459, 463, 568 N.Y.S.2d 35 (1st Dep't 1991).

19. *Sutton Area Cmty.*, 78 N.Y.2d at 947.

20. *Akpan v. Koch* 75 N.Y.2d 561, 555 N.Y.S.2d 16 (1990).

21. *Coal. Against Lincoln W., Inc. v. Weinshall*, 21 A.D.3d 215, 799 N.Y.S.2d 205 (1st Dep't 2005).

22. *In re Halperin*, 24 A.D.3d 768, 777, 809 N.Y.S.2d 98 (2d Dep't 2005); *Vill. of Pelham v. City of Mount Vernon Indus. Dev. Agency*, 302 A.D.2d 399, 400–401, 755 N.Y.S.2d 91 (2d Dep't 2003) ("no evidence of . . . newly discovered information . . . inadequately addressed in the FEIS"); *W. Vill. Comm., Inc. v. Zagata*, 242 A.D.2d 91, 669 N.Y.S.2d 674 (3d Dep't 1998).

23. *Hallenbeck v. Onondaga County*, 225 A.D.2d 1036, 639 N.Y.S.2d 27 (4th Dep't 1996).

24. *Croton Watershed Clean Water Coal., Inc. v. N.Y. City Dep't of Envtl. Prot.*, 20 A.D.3d 476, 477, 797 N.Y.S.2d 908 (2d Dep't 2005). The author was one of two attorneys representing CWCWC.

25. New York City Department of Environmental Protection, (DEP) *Draft Supplemental Environmental Impact Statement for the Croton Water Treatment Plant* (Dec. 31, 2003) (DSEIS).

26. DEP, *Final Supplemental Environmental Impact Statement for the Croton Water Treatment Plant* (*FSEIS*), (June 30, 2004), MOSVIS, at 25 and FSEIS MOSHAZ, at 64. *Available at* <www.ci.nyc.ny.us/html/dep/html/crotoneis.html>.

27. DEP, *FSEIS* Exec. Summ, at 80.

28. DEP, *FSEIS* MOSTRA, at 31, 42; DEP, *FSEIS* MOSAIR, at 28.

29. DEP, *FSEIS* MOSPUB, at 1, 4, 7, 8, 10.

30. DEP, *DSEIS* MOS HAZ at 46–47 (171,000 gallons of chemicals will be stored on-site, including quantities of sulfuric acid and phosphoric acid).

31. Hazen & Sawyer and Metcalf & Eddy, *Croton Water Supply System Extended Special Study Program Report* (*JV Report*) (Nov. 1997) at 3-33.

32. DEP, *FSEIS* Exec. Summ. at 40. According to an October 26, 2004 communication to author from an industry official, a DAF/F plant would use 3-1/2 times more power than required for a similarly sized membrane filtration treatment plant.

33. *Friends of Van Cortlandt Park v. City of N.Y.*, and *Norwood Cmty. Action v. Dep't of Envtl. Prot.*, consolidated with *U.S. v. City of N.Y.*, 96 F. Supp. 2d 195 (E.D.N.Y. 2000) certified to N.Y. Court of Appeals, *Friends of Van Cortlandt Park, v. City of N.Y.*, 95 N.Y.2d 623, 727 N.Y.S.2d 2 (2001).

34. Croton Watershed Clean Water Coalition, Inc. *Comments on the DSEIS* (May 2004).

35. Appellants' Brief, at 31–32.

36. Affidavit of Deputy Commissioner for the Bureau of Environmental Engineering at DEP, Warren M. Kurtz, 10/14/04 at ¶17.

37. *Croton Watershed Clean Water Coal., Inc., v. N.Y. City Dep't of Envtl. Prot.*, Index No. 21923/04 (Sup. Ct., Queens Co. 2004).

38. *Croton Watershed Clean Water Coal., Inc. v. N.Y. City Dep't of Envtl. Prot.*, 20 A.D.3d 476, 477, 797 N.Y.S.2d 908 (2d Dep't 2005).

39. *Id.* (citations omitted).

40. *Town of Pleasant Valley v. Town of Poughkeepsie Planning Bd.*, 289 A.D.2d 583, 736 N.Y.S.2d 70 (2d Dep't 2001).

41. *Stewart Park & Reserve Coal. v. N.Y. State Dep't of Transp.*, 157 A.D.2d 1, 555 N.Y.S.2d 481 (3d Dep't 1990).

42. *See supra* note 3.

2006 Legislation Affecting the Practice of New York Criminal Law

By Barry Kamins

This article reviews changes in the Penal Law, Criminal Procedure Law, and several related statutes that were enacted in the last session of the Legislature. The reader should review the new laws carefully since this article will distinguish between legislation that has already been signed by the governor and a few proposed bills not yet signed as of the time this article was written. Obviously, the reader should determine whether those few bills have been signed before citing them as "law." Note also that some changes which are viewed as minor or technical will not be discussed.[1]

New Crimes, Increased Penalties

In the past session the Legislature devoted a great deal of energy to enacting laws that create new crimes and increased penalties for weapons offenses and offenses relating to unlawful sexual acts. For example, the Legislature enacted a new Class A-II felony, Predatory Sexual Assault.[2] Under this new law, a person is guilty of Predatory Sexual Assault when he or she commits any one of four class B sexual crimes[3] and one of four aggravating factors is present.[4] For a first offense, the maximum sentence must be life imprisonment with a minimum of 10 to 20 years. One who commits the crime and is a second felony offender faces a minimum sentence of 15 years. A persistent felony offender faces a minimum of 25 years. In addition, when a person who is 18 years or older, commits one of the four predicate class B sexual crimes and the victim is less than 13 years of age, the underlying class B felony is elevated to a new A-II felony, Predatory Sexual Assault Against a Child.[5]

The Legislature has also redrafted the incest statute to close a loophole in the law that permitted certain child sexual offenders to obtain relatively lenient treatment. Previously, the crime of Incest was a class E non-violent felony offense for which a defendant could receive probation. Effective November 1, 2006, Incest is a crime that has three levels of severity.[6] Incest in the First Degree is a class B felony and is committed when a person commits Rape in the First Degree or a Criminal Sexual Act in the First Degree against a person related to him or her whether through marriage, or not. Incest in the Second Degree, a class D felony, and Incest in the Third Degree, a class E felony, are predicated on less serious sexual crimes.[7]

In the last session, the Legislature also focused its attention on the increased number of handguns in our communities. According to F.B.I. statistics, approximately 60% of the homicides that occur in New York City are committed with guns, and it is estimated that there are two million unregistered handguns in the city. Under a significant new bill, which Governor Pataki has recently signed, the Legislature dramatically increased the penalty for possession of one loaded firearm that is not possessed in one's home or business. Such possession, which was previously a class D felony, would now constitute a class C felony.[8] Thus, a person who is found in possession of one loaded handgun would face a mandatory determinate sentence of 3 1/2 to 15 years in prison. Only if a prosecutor consents, could a defendant plead to Attempted Criminal Possession of a Weapon in the Second Degree (a class D felony), and he or she would still face a mandatory determinate sentence of two to seven years. A court

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could only impose a non-jail sentence on the D felony if it found one of three factors present[9] and made a statement on the record of the facts and circumstances upon which it imposed a non-jail sentence. Finally, the new law eliminates the crime of possessing a loaded firearm with the intent to use it unlawfully (§ 265.03(2) of the Penal Law).

The new law is significant for two reasons. First, the possession of one handgun, forerly a class D felony, would now constitute a class C felony that would *not* be subject to any mitigating sentence factors. Thus, if a prosecutor refused to offer a plea to a class D felony, a jail sentence of at least 3 1/2 years would be *mandatory* under the C felony. Second, by eliminating the "possession with intent" crime, the Legislature has created a situation that could be harmful to victims of domestic violence. For example, an individual who possessed a gun within his or her home with the intention of using it against a spouse would, under the proposed law, only be guilty of a class A misdemeanor.

By eliminating the "possession with intent" crime, the Legislature has created a situation that could be harmful to victims of domestic violence.

On July 27, 2006, New York City Mayor Michael Bloomberg signed into law the country's first Gun Offender Registration Act (GORA).[10] Under this new law (applicable only in New York City), effective March 24, 2007, every defendant who is convicted of Criminal Possession of a Weapon in the Third and Second Degree shall register with the Police Department of the City of New York at the time of sentence. The defendant must register in person at the police department within 48 hours of release from prison in the event a sentence of imprisonment is imposed, or within 48 hours from the date of sentence if a non-jail sentence is imposed. The defendant will be required to provide substantial personal information and a photograph may be taken. The period of registration will last four years from the date of conviction if the conviction does not include imprisonment or four years from the date of release from prison. During those four years, the defendant will be required to appear every six months to verify the previously submitted information. Failure to register or to verify any information shall constitute a misdemeanor punishable by imprisonment of up to one year and/or a $1,000 fine.

Other new crimes have been created by the Legislature. One, Reckless Assault of a Child, a class D felony, is committed when one engages in conduct that constitutes the "shaken baby syndrome."[11] Thus, it is a crime for one to shake, slam or throw a child on a hard surface causing serious physical injury or various types of hemorrhaging that are the classic signs of shaken baby syndrome. New York is the third state to enact such legislation and it was enacted because of a gap in criminal penalties for reckless assault of children. Previously, reckless assault could only be punished by Assault in the First Degree (a class B felony) or Third Degree (a class A misdemeanor).

The above law, called "Cynthia's Law," was named for Cynthia Gibbs, an eight-month-old child who died from a depressed skull fracture and bleeding on both sides of her brain. An estimated 2,000 cases of shaken baby syndrome occur each year in the United States and one shaken baby in four dies as a result of the injuries. In an unrelated measure, a bill was introduced to outlaw the naming of legislation after crime victims, as in "Cynthia's Law." In recent years, numerous laws have been named after their victims, such as Jenna's Law (eliminated parole for violent felonies), Kendra's Law (court-ordered treatment for mental patients), Megan's Law (sex offender registration), and Vasean's Law (drunk driving). Over the last 20 years, more than 30,000 laws across the country have been named after crime victims. The proponent of the bill opposing the practice argued that by using the victim's name, family members are subject to unnecessary exploitation and pandering. However, the Legislature failed to enact the measure.

Another new crime prohibits adults over the age of 18 from using a child under the age of 16 to effectuate a sale or attempted sale of a controlled substance.[12] Law enforcement officials are increasingly encountering situations where adults are using children to escape detection and arrest for drug cases, by having the children provide distraction and cover. The governor has also signed into law two new methods of committing Aggravated Harassment in the First Degree: placing swastikas on properties and burning crosses in public.[13] These two acts have been used to instill fear of bodily harm or death and now constitute class E felonies.

The Legislature also enacted a new crime, not yet signed into law, that addresses the common but dangerous situation in which a motorist fails to obey a police officer's order to stop his or her car. Under Unlawful Fleeing of a Police Officer in a Motor Vehicle, a person commits a class A misdemeanor if he or she disobeys an

order given by a uniformed police officer on foot or in a marked police vehicle with activated lights or siren, and the motorist flees by driving recklessly or by speeding at a speed of 25 miles per hour or greater.[14] If the motorist causes serious physical injury or death to the police officer or a third party, the crime is elevated to an E felony (if serious physical injury is caused) or D felony (if death results).

Two new laws address concerns about criminal activity committed on school buses. One prohibits the possession of a firearm on a school bus without the written authorization of school officials.[15] A second law expands the current penalties for drug sales near school grounds to apply to drug sales on a school bus.[16] Finally, a new law outlaws alcohol-vaporizing devices which mix vaporized liquor with oxygen to deliver a fine alcoholic mist.[17] An individual can use this device to breathe in the vapors through a tube for a "quick shot" of alcohol. This immediately affects the user because the alcohol is inhaled directly into the bloodstream through the lungs. These machines have been sold on Web sites to restaurants and private parties, and have even shown up at bar mitzvahs. The risk is great that children will be attracted to them – especially at underage drinking parties. Individuals who drive may not understand how their bodies are affected by alcohol vapors, as opposed to liquid alcohol, and the rapid onset of the intoxicating effect caused by the vapors. The device – known as Alcohol Without Liquid or AWOL – has been banned in 16 other states. In addition, there are potential health risks associated with the inhalation of alcohol.

Procedural Changes

Some new laws will effect certain procedural changes. The most significant change eliminates the statute of limitations for certain sex crimes: Rape in the First Degree, Criminal Sexual Act in the First Degree, Aggravated Sexual Abuse in the First Degree and Course of Sexual Conduct Against a Child in the First Degree.[18] While the Legislature had previously only exempted statutes of limitations for class A felonies, it recognized the comparative gravity of certain violent felonies and determined that individuals who commit certain sex crimes should not be shielded from prosecution by the mere passage of time. At least a dozen states, including Rhode Island, New Jersey and Delaware, have no statute of limitations restricting the prosecution of serious felonies. The Legislature felt that in certain serious sex crimes, the victims should be afforded additional protection – especially when the physical and emotional scars last for many years. The law applies prospectively to crimes committed on or after the effective date of the law (June 23, 2006), as well as retroactively where the former statute of limitations (five years) had not yet expired by June 23, 2006. Finally, the new law also extends the statute of limitations for a *civil* action arising out of these crimes to five years, or five years from the termination of a criminal action concerning the same conduct.

In another procedural change, the Legislature has amended the statute relating to *Batson* challenges in misdemeanor trials to conform to the statute for *Batson* challenges in felony trials. In 1989, the *Batson* felony statute was amended, on the subject of prior jury service, to provide that a prospective juror may only be challenged for cause when he or she served on a trial jury in a prior civil or criminal action involving the same *incident* charged.[19] Thus, jurors could no longer be challenged for cause merely because of prior jury service involving the same *type of crime* as the one alleged. The new law makes the same change for *Batson* challenges in misdemeanor trials.[20] Finally, a new law adds two counties (Essex and Orange) to the other 22 counties that already use electronic technology, *i.e.*, audio-visual machines, in lieu of a personal appearance by the defendant.[21]

Definitions and Penalties Expanded

In the past session, the Legislature enacted numerous bills that will expand both the definitions of and the penalties for existing crimes. Thus, one new law adds a new definition for "computer network" and "access" to a computer system.[22] These expanded definitions keep pace with the ever-changing world of computer technology. In addition, the crime of Criminal Tampering has been expanded to include individuals who enter nuclear-powered electric-generating facilities[23] Another bill expands the definition of Assault in the Second Degree with respect to injuries caused to transportation employees; the category of MTA signal person has now been added.[24] Two new laws subject repeat offenders to increased penalties. Individuals who commit certain vehicular crimes who have previously been convicted of an alcohol- or drug-related driving charge face increased penalties. Thus, Vehicular Assault in the Second Degree (class E felony) is elevated to a class D felony when the defendant has previously been convicted of any violation of Vehicle & Traffic Law § 1192 (VTL) within the preceding 10 years.[25] Similarly, Vehicular Manslaughter in the Second Degree (class D felony) is elevated to a class C felony under the same circumstances. The Legislature has enhanced the penalties for the manufacture or sale of unauthorized music recordings by reducing the felony threshold from 1,000 recordings to 100.[26] Finally, the definition of Riot in the First Degree, currently applicable to state correctional facilities, has been expanded to apply to local correctional facilities.[27]

Crime Victims

Each year the Legislature enacts measures addressing concerns of crime victims and this year was no exception. One of these new laws extends the maximum permissible duration of a final or permanent order of protection

issued by a court at the time of sentence.[28] Thus, in felony convictions, the duration had been raised from five years to eight years. For Class A misdemeanors, the maximum period has been raised from three years to five and in all other cases (class B misdemeanors, violations, unclassified misdemeanors), the maximum period has been raised from one year to two. Other new laws increase the penalties for *violating* orders of protection. For example, a defendant who violates an order of protection can be charged with Criminal Contempt in the Second Degree, a class A misdemeanor, and if the defendant has been previously convicted of Criminal Contempt in the First or Second Degree, the penalty is elevated to a class E felony.

A court is now authorized to order a defendant to refrain from injuring or killing an animal owned by a victim.

A new law adds Aggravated Criminal Contempt to the list of predicate offenses that can elevate the punishment to a class E felony.[29] Currently, a defendant can be charged with Aggravated Criminal Contempt when he or she violates an order of protection and causes physical injury or serious physical injury. Another new law permits a defendant to be charged with this crime when he or she commits Criminal Contempt in the First Degree and has either been previously convicted of Aggravated Criminal Contempt or Criminal Contempt in the First Degree within the preceding five years.[30]

In addition, a court is now authorized, as a condition of an order of protection, to order a defendant to refrain from injuring or killing an animal owned by a victim.[31] A Queens County judge recently issued such an order to protect a dog from injury. Finally, a new law requires the police to provide crime victims with information regarding their basic rights and the services available from the Crime Victims Board.[32]

Sex Offender Registration

Each legislative session brings changes to the Sexual Offender Registration Act that was enacted 10 years ago pursuant to Megan's Law. The law was originally effective on January 21, 1996, and it provided that sex offenders register for a period of 10 years. Earlier this year, with the 10-year registration period about to expire, the governor signed an amendment to the act extending and increasing periods of registration.[33] Effective January 18, 2006, Level One offenders must register for 20 years. Level Two and Three offenders must register for life, but Level Two offenders can petition for relief from registration after 30 years. Regardless of risk levels, those offenders who are designated sexual predators, sexually violent offenders or predicate sex offenders must register for life with no right to petition for relief. A class action in federal court challenged the validity of this legislation as to Level Two offenders who were originally governed by the 10-year registration requirement.[34] The court issued an order that invalidated the legislation, but the order was stayed and is currently being appealed.

A separate new law requires information about Level Two offenders to be posted on the Web site run by the Division of Criminal Justices Services.[35] Previously, only information regarding Level Three offenders was posted. The site had listed 23,000 offenders; the amendment will now add 8,000 more. The crime of Compelling Prostitution was added to the list of designated offenses for which registration is required and for which a DNA sample is now required.[36] Finally, the Board of Parole was given the responsibility of notifying local social services programs upon the release of a Level Two or Three sex offender when it appears that the inmate is likely to seek access to local social services for homeless persons.[37]

Collateral Consequences

The Legislature addressed an area it had not focused on previously: collateral consequences of criminal convictions. Initially, an amendment added a purpose to the Penal Law that promotes public safety through the successful reentry of individuals into society.[38] A second bill would permit an applicant for a Certificate of Relief from Civil Disabilities to obtain the probation report considered by the court in making its determination.[39]

Vehicle & Traffic Law

The Legislature turned its attention to the Vehicle & Traffic Law and enacted a comprehensive reform of alcohol- and drug-related driving charges. First, it created a new crime, Aggravated Driving While Intoxicated, which requires a blood alcohol level of .18% or higher.[40] This crime is a misdemeanor with enhanced fines of $1,000 to $2,500 except it is elevated to a class E felony for taxicab or livery drivers and a class D felony if the driver operates either a school bus carrying a passenger or a truck containing hazardous material. The law restricts plea bargaining and a conviction requires the completion of a drunk driver program as well as a mandatory license revocation for one year. A second new crime, Driving While Ability Impaired by the Combined Influence of Drugs and Alcohol[41] is classified a misdemeanor.

The comprehensive new law adds four factors that can raise the crime of Vehicular Manslaughter in the Second Degree (class D felony) to Vehicular Manslaughter in the First Degree (class C felony): the defendant causes the death of two or more persons; the defendant has been twice or more convicted within the previous five years of one of the provisions of § 1192 or three times within

the past 10 years; the defendant has previously been convicted of a homicide offense resulting from the operation of a motor vehicle; or the defendant has a blood alcohol level of .18% or more.[42] Finally, the law increases the mandatory revocation period for refusal to submit to a chemical test. For the first refusal the period is increased from six months to one year. The revocation period for repeat offenders is increased from one year to 18 months. Additionally, the civil penalty for refusal to submit to a chemical test for first offenders is increased from $350 to $550. There is also a provision for permanently revoking a driver's license for persistent offenders who are convicted of VTL § 1192. Operating a vehicle under a permanent license revocation will constitute a felony: Aggravated Unlicensed Operation. In a related measure, a new law has increased the penalties for Boating While Intoxicated and Boating While Impaired to become uniform with the penalties for Driving While Intoxicated and Driving While Impaired.[43]

Other measures will impact on drunk-driving charges. A new law increases penalties for repeat offenders who have out-of-state convictions. Previously, all out-of-state convictions for drunk-driving charges were deemed to be a conviction for impaired driving. Under the new law, the out-of-state conviction shall be considered a conviction for a misdemeanor or felony as if it had occurred in this state.[44] Another law permits a registered physician's assistant and certified nurse practitioner to withdraw blood to determine alcohol or drug content.[45] Finally motorists who cause physical injury or death resulting from a right-of-way violation will face a mandatory license suspension and will be required to participate in a motor vehicle accident prevention course as a condition of probation.[46]

DNA Database

A new law signed by the governor significantly expands the list of convictions for which a defendant must supply a DNA sample, which is then placed in the state DNA database.[47] Under the new law, a defendant convicted of *any* felony and any one of 18 specified misdemeanors must supply a sample. Some of the misdemeanors include Menacing, Stalking, Sexual Abuse, and Endangering the Welfare of a Child; for these crimes there seems to be a rational basis for a DNA sample. However, the list also includes Petit Larceny and Assault in the Third Degree.

Miscellaneous

A number of miscellaneous laws were enacted by the Legislature. One law amends the Public Health Law to conform state schedules of controlled substances to federal schedules of controlled substances.[48] This would eliminate much confusion that exists in the medical, pharmaceutical and law enforcement professions concerning the status of drugs as controlled substances. A second law would require prosecutors to notify child protective agencies upon the conviction of a defendant for child abuse.[49] Currently a prosecutor is only required to report suspected cases of child abuse to the state central registry upon the arrest of a defendant.

A new law significantly expands the list of convictions for which a defendant must supply a DNA sample.

As usual, the Legislature expanded the authority of certain classes of law enforcement personnel. Under these laws, the Legislature has granted peace officer status to the following individuals: Commissioners and court officers in the town of Rye;[50] court attendants in the town of Yorktown;[51] uniformed court officers in Lewis County;[52] members of the Erie County Medical Center security force;[53] court officers in the town of Riverhead;[54] Department of Army special agents, detectives and police officers;[55] court officers in the town of Southhold;[56] certain employees in the Village of Lake George.[57] Additionally, certain forest rangers of the Department of Environmental Conservation would become police officers.[58]

"Sunsets"

Each year the Legislature extends the expiration (or "sunset") of various laws by enacting "sunset extenders." This year it extended the law that authorizes defendants to appear at certain court proceedings through the use of audio visual equipment rather than in person. The law was extended three years until September 1, 2009.[59] In addition, it extended the law that permits payment of motor vehicle related fees and fines by credit card. The law was extended for four years until July 7, 2010.[60] ■

1. Although the term "sodomy" was replaced with "criminal sexual act" in 2004, a technical change makes the change in a statute that had not been conformed. Criminal Procedure Law § 720.10(2)(a) (CPL); Chapter 316, eff. July 26, 2006. Several conforming changes were made in the CPL to reflect the enactment of the new crime of Aggravated Murder of a Police Officer; Chapter 93, eff. June 3, 2006. The Police Department can now destroy weapons (rifles or shotguns) other than firearms that are not claimed within one year; Chapter 578, eff. Nov. 1, 2006. Individuals who are 14 years or older can now legally possess a pistol or revolver at certain pistol ranges to practice for or compete in competitions; Chapter 281, eff. July 26, 2006. Finally, prosecutors will not be prohibited from disposing of cases when they are unable to confer with the victim because the victim refuses to cooperate or the victim's whereabouts are unknown; Chapter 193, eff. Sept. 1, 2005.

2. Penal Law § 130.95, Chapter 107, eff. June 23, 2006.

3. Rape in the First Degree; Criminal Sexual Act in the First Degree; Aggravated Sexual Abuse in the First Degree; Course of Sexual Conduct Against a Child in the First Degree.

4. The defendant causes serious physical injury to the victim; uses or threatens the immediate use of a dangerous instrument; commits one of the four Class B felonies against more than one person; or has previously been convicted of any felony defined in Article 130 of the Penal Law, Incest, or the Use of a Child in a Sexual Performance.

5. Penal Law § 130.96; Chapter 107, eff. June 23, 2006.

6. Penal Law §§ 255.25, 255.26, 255.27; Chapter 320, eff. Nov. 1, 2006.

7. Rape in the Second Degree and Criminal Sexual Act in the Second Degree (Incest in the Second Degree); Sexual Intercourse, Oral Sexual Conduct and Anal Sexual Conduct (Incest in the Third Degree).

8. Penal Law § 265.03; Chapter 742, eff. Nov. 1, 2006.

9. Mitigating circumstances that bear directly upon the manner in which the crime was committed; the defendant was not the sole participant in the crime and his participation was relatively minor; possible deficiencies in proof of the crime. *See* Penal Law § 70.02(4)(b).

10. Introductory Local Law No. 362-A; eff. March 24, 2007.

11. Penal Law § 120.02; Chapter 110, eff. Nov. 1, 2006.

12. Penal Law § 220.28; Chapter 564, eff. Nov. 1, 2006.

13. Penal Law § 240.31(3), (4); Chapter 49, eff. June 15, 2006.

14. Penal Law § 270.25; S.8445, eff. Nov. 1, 2006 upon the governor's signature.

15. Penal Law § 265.01(3); Chapter 199, eff. Nov. 1, 2006.

16. Penal Law §§ 70.70(2)(a)(i), 220.00(17); Chapter 436, eff. Sept. 1, 2006.

17. General Business Law §§ 399-dd; Alcoholic Beverage Control Law 117-b; Chapter 172, eff. Nov. 1, 2006.

18. CPL § 30.10(2)(a); Chapter 3, eff. June 23, 2006.

19. *See People v. Beirati*, 136 Misc. 2d 959, 519 N.Y.S.2d 500 (Sup. Ct., Bronx Co. 1987).

20. CPL § 360.25(1)(e); Chapter 695, eff. Nov. 1, 2006.

21. CPL § 182.20; Chapters 470 and 532, eff. Aug. 16, 2006.

22. Penal Law § 156.00(6), (8); Chapter 558, eff. Nov. 1, 2006. *See People v. Versaggi*, 83 N.Y.2d 123, 608 N.Y.S.2d 155 (1994).

23. Penal Law § 145.15; Chapter 585, eff. Aug. 16, 2006.

24. Penal Law § 120.05(11); A.8351, eff. Nov. 1, 2006 upon the governor's signature.

25. Penal Law § 120.04; Chapter 245, eff. Nov. 1, 2006.

26. Penal Law § 275.40; Chapter 682, eff. Nov. 1, 2006.

27. Penal Law § 240.06; Chapter 13, eff. March 21, 2006.

28. CPL §§ 530.12, 530.13; Chapter 215, eff. Aug. 25, 2006.

29. Penal Law § 215.51; Chapter 349, eff. Nov. 1, 2006.

30. Penal Law § 215.52; Chapter 350, eff. Nov. 1, 2006.

31. CPL § 530.12(1)(f); Chapter 253, eff. July 26, 2006.

32. Executive Law § 625(a) ("Exec. Law"); Chapter 173, eff. Jan. 1, 2007.

33. Correction Law § 168-*l*(6)(a), (b) ("Corr. Law"); Chapter 1, eff. Jan. 18, 2006.

34. *Doe v. Pataki*, 427 F. Supp. 2d 398 (S.D.N.Y 2006).

35. Corr. Law § 168-*l*(6)(a), (b); Chapter 106, eff. June 23, 2006.

36. Corr. Law § 168-a(2)(a)(i); Chapter 9, eff. June 7, 2006.

37. Exec. Law § 259-c(16); Chapter 96, eff. Oct. 1, 2005.

38. Penal Law § 1.05(6); Chapter 98, eff. June 7, 2006.

39. Corr. Law § 702(6); Chapter 720, eff. June 7, 2006.

40. VTL § 1192(2-a); Chapter 732, eff. Nov. 1, 2006.

41. VTL § 1192(4-a); Chapter 732, eff. Nov. 1, 2006.

42. Penal Law § 125.13; Chapter 732, eff. Nov. 1, 2006.

43. Navigation Law § 49-a(2); Chapter 151, eff. Aug. 6, 2006.

44. VTL § 1192(8); Chapter 231, eff. Nov. 1, 2006.

45. Public Health Law § 3703(2); Chapter 618, eff. Aug. 6, 2006.

46. VTL § 510(2)(a)(vii), (viii); Penal Law § 65.10(2)(e-1); Chapter 571, eff. Nov. 1, 2006.

47. Exec. Law § 955(7); Chapter 441, eff. July 26, 2006 (applies to offenses committed on or after July 26, 2006 and to crimes committed prior thereto where the sentence was not completed by July 26, 2006).

48. Public Health Law § 3306; Chapter 431, eff. Aug. 16, 2006.

49. CPL § 440.65; Chapter 647, eff. Oct. 13, 2006.

50. CPL § 2.10(81); Chapter 581, eff. Aug. 16, 2006.

51. CPL § 2.10(81); Chapter 584, eff. Aug. 16, 2006.

52. CPL § 2.10(81); Chapter 653, eff. Sept. 13, 2006.

53. CPL § 2.10(81); Chapter 467, eff. Feb. 20, 2007.

54. CPL § 2.10(81); Chapter 482, eff. Aug. 16, 2006.

55. CPL § 2.15(26); Chapter 486, eff. Aug. 16, 2006.

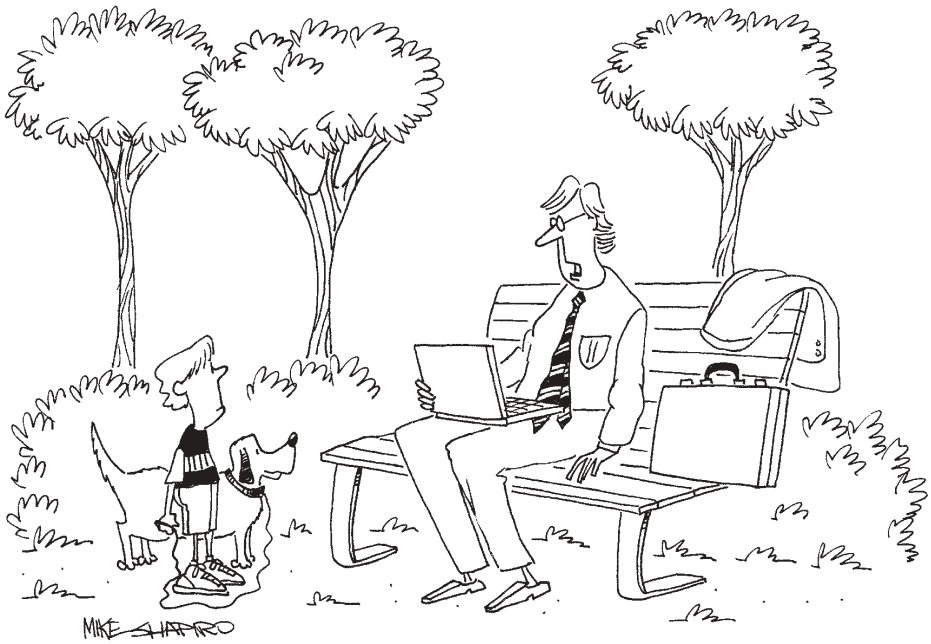
56. CPL § 2.10(81); Chapter 510, eff. Aug. 16, 2006.

57. CPL § 2.10(81); Chapter 438, eff. July 26, 2006.

58. CPL § 1.20(34)(v); Chapter 693, eff. Sept. 13, 2006.

59. CPL §§ 182.10–182.40; Chapter 34, eff. May 16, 2006.

60. Chapter 145, eff. July 7, 2006.



"No, I don't have a doggie. My case-load follows me home."

BY WILLIAM J. GIACOMO

William J. Giacomo is a Justice of the Supreme Court in the Ninth Judicial District. He was formerly assigned to the Matrimonial Part of the Supreme Court sitting in White Plains. He is a graduate of Boston College and received his law degree from Pace University School of Law.

Drafting *Pendente Lite* Motions

In most cases the first application made to a court during the pendency of a matrimonial action concerns requests for immediate and temporary financial and/or protective relief. It is usually brought by an "Order to Show Cause" and is commonly known as a "*pendente lite*" application.

In over a year and a half in the Matrimonial Part, this Court has reviewed hundreds of such motions. This article reviews some common errors made by practitioners when submitting motions for *pendente lite* relief, and it discusses other issues that must be considered when drafting these motions. The following is by no means exhaustive, however.

Timing an Application

Pursuant to N.Y. Code of Rules and Regulations (N.Y.C.R.R.) § 202.16(k)(1), a motion for *pendente lite* relief is to be made "before or at the preliminary conference, if practicable."[1] Attorneys should be familiar with this provision. It has been this Court's experience that too often attorneys wait until after a preliminary conference to prepare and file their motion for *pendente lite* relief. In fact, many attorneys delay such filing hoping that the court will order immediate relief from the bench at the preliminary conference. Although it is possible in an emergency, this is the exception rather than the rule. The reason is, of course, that at most preliminary conferences the parties have not yet prepared and filed a statement of net worth, which the court needs to examine prior to awarding any financial relief.[2] Accordingly, the best time to file is before the preliminary conference. Counsel should file the motion with the court and advise it of the preliminary conference date, so the court can insert a service date on or after the conference date. This will allow service to be effected at the preliminary conference, if desired.

Net Worth Statement

Probably the most important document submitted on a *pendente lite* motion is a client's statement of net worth. Pursuant to 22 N.Y.C.R.R. § 202.16(k)(2), a motion for *pendente lite* relief will not be heard "unless the moving papers include a statement of net worth in the official form prescribed by subdivision (b) of this section." Counsel must be made aware that the rule requiring a statement of net worth will be strictly enforced, unless the opposing party fails to raise an objection.[3] Unfortunately, many attorneys fail to adhere to this rule when filing *pendente lite* motions. In such a case, this Court will deny the motion, especially if such defect is brought to the court's attention in opposing papers. Undoubtedly, it would be difficult to discuss denial of a *pendente lite* motion with a client for failure to comply with this rule. This would be especially true if a client had already waited 60 days for the court's decision on the motion. It could certainly be a difficult conference with a client to discuss that the motion was denied for counsel's failure to comply with this rule, especially after the client has waited 60 days for a decision on the motion. Accordingly, attorneys are advised to comply with the rule rather than complacently relying on an adversary's failure to raise the proper objection. Last, in connection with any *pendente lite* motion seeking interim relief (which attorneys too often *fail to request* in their "Emergency Order to Show Cause"), no interim relief will be granted in the absence of a statement of net worth.[4]

Closely associated with the failure to include a statement of net worth in one's motion papers is a problem arising with alarming frequency: attorneys' neglect in reviewing a client's statement of net worth. Many attorneys allow their clients to prepare their statement of net worth themselves and then include it with their motion papers without adequately examining the information contained therein.

In many cases, this Court has found that statements of net worth submitted by counsel directly controvert and undermine the arguments advanced in their motion papers. For example, it is not unusual for a party to request a financial award, *e.g.*, in the range of $40,000–$50,000 per year, and then submit a statement of net worth wherein the client has claimed expenses of $70,000–$80,000 per year. This suggests to the court that someone is not being truthful and/or is greatly exaggerating his or her case.[5] Such representations cast doubt on one's entire argument. Whether the attorney

Attorneys ignore this rule when submitting their papers requesting counsel fees.

prepares the statement of net worth and then reviews it with the client or whether the client prepares it in the first instance, it is advisable to always review the statement of net worth carefully, focusing on what one can realistically request from the court.

Another issue that frequently arises regarding statements of net worth concerns the application of 22 N.Y.C.R.R. §§ 202.16(k)(4) and 202.16(k)(5). Section 202.16(k)(4) reads as follows:

> The party opposing any motion shall be deemed to have admitted, for the purpose of the motion but not otherwise, such facts set forth in the moving party's statement of net worth as are not controverted in (i) a statement of net worth in the official form prescribed by this section, completed and sworn to by the opposing party, and made a part of the answering papers, or (ii) other sworn statement or affidavit with respect to any fact which is not feasible to controvert in the opposing party's statement of net worth.

Further, 22 N.Y.C.R.R. § 202.16(k)(5) states:

> The failure to comply with the provisions of this subdivision shall be good cause, in the discretion of the judge presiding, either: (i) to draw an inference favorable to the adverse party with respect to any disputed fact or issue affected by such failure; or (ii) to deny the motion without prejudice to renewal upon compliance with the provisions of this section.

The Bar would be surprised by the number of times attorneys fail to comply with these rules.

Applying for Counsel Fees

When requesting an award of counsel fees, attorneys must be familiar with 22 N.Y.C.R.R. § 202.16(k)(3), which provides:

> No motion for counsel fees shall be heard unless the moving papers also include the affidavit of the movant's attorney stating the moneys, if any, received on account of such attorney's fee from the movant or any other person on behalf of the movant, and the moneys such attorney has been promised by, or the agreement made with, the movant or other persons on behalf of the movant concerning or in payment of the fee.

Too often, attorneys ignore the provisions of this rule when submitting their papers requesting counsel fees.

To prevent a counsel fee request from being denied for failure to comply with 22 N.Y.C.R.R. § 202.16(k)(3), the following information should be included with such papers:

1. A copy of the retainer agreement;
2. A copy of the billing records to date, specifically as to time spent, duties performed and amount due;
3. An affidavit/affirmation of counsel addressing the following items:
   a. Education/Experience of the attorney;
   b. Services rendered by the attorney to date;
   c. Agreed-upon hourly rate;
   d. Amount paid to date and by whom paid;
   e. The anticipated work to be done in the future and the cost expected for same;
   f. A request for a specific sum to be awarded; and
4. An updated statement of net worth is advisable.[6]

Motion for Reargument and/or Renewal

The court will take judicial notice that in many instances one party to a matrimonial action is unhappy with the court's or other decision on a *pendente lite* motion. As a result, the initial reaction of many attorneys is to discuss filing a motion to reargue or renew the court's decision. The general rule, however, is that "perceived inequities" brought on by *pendente lite* orders are best alleviated by pursuing a speedy resolution of the divorce action.[7]

When presented with a motion for leave to reargue, the court must determine (1) whether the arguments offered by the moving party are the same or different from those proffered earlier, and (2) whether the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law.[8] Similarly, where leave to renew the motion is sought, the court must determine, *inter alia*, whether the moving party has offered a valid excuse for not submitting the additional facts upon his or her original application and, if so, whether the new facts warrant a decision that is different from that rendered on the original motion.[9] So that the court may conduct these reviews, the movant must present copies of all papers submitted on the earlier motion.[10] Failure to submit all papers with this motion will result in a denial of the motion unless the papers on the prior motion are submitted to the court by another party. All too often counsel fails to submit all papers on the prior motion and the motions to reargue or renew are denied on this ground alone.

Motion for Leave to Serve by Publication

As most practitioners know, under CPLR 315, a court may authorize service by publication in a matrimonial action "if service cannot be made by another prescribed method with due diligence."[11] Stated differently, a party must first demonstrate that service has been made impracticable under the methods prescribed by CPLR 308 before service by publication will be permitted. Unfortunately, papers submitted in support of this application are often legally insufficient.

For example, counsel may properly submit an affidavit in support of a motion to serve by publication, but then fail to include one from the cli-

ent. Another common mistake occurs when submitting an affidavit from one's process server. There, counsel cannot simply indicate that the process server was unable to locate the other party at its last known address. Such an affidavit, without more, does not support an application for leave to serve by publication because it fails to show that service may have been made at a location other than the party's last known address, *i.e.*, an actual place of business, dwelling place, or usual place of abode.[12]

In requesting service by publication, one should: (1) submit a client affidavit as well as an attorney and/or process server affidavit; (2) establish the current address of the party sought to be served and state that it is not known that the other party has another address; (3) show that the process server was unable to serve the other party at the last known address; and (4) demonstrate that he or she has foreclosed the possibility of locating the other party by conducting a search of the Internet and public records, including records of the Department of Motor Vehicles and the military.

Other Issues

Length of Papers

Counsel should remember that when submitting papers in support of an Order to Show Cause for *pendente lite* financial relief, it is not the appropriate time to try the case. Too many attorneys submit voluminous pages full of irrelevant information in an Order to Show Cause. Although this practice may allow a client to vent his or her anger or frustration, it does nothing to address the financial issues which the court must decide. Accordingly, this Court limits affidavits that may be submitted on a *pendente lite* motion to twenty-five (25) pages and shall not consider any page in excess of that amount. Attorneys are strongly encouraged to be concise and to provide their reasons for filing the motion. Those reasons must demonstrate a client's need for immediate relief, usually of a financial nature.

Exclusive Occupancy of Marital Home

Pursuant to Domestic Relations Law § 234, courts are authorized to award interim exclusive use and occupancy of the marital residence to a party where there is sufficient cause.[13] As a general rule, however, such an award of exclusive use and occupancy should not be granted without a hearing, except upon persuasive evidence that such an award is necessary to protect the safety of persons and property.[14]

Too many attorneys submit voluminous pages full of irrelevant information.

To obtain this relief, an attorney must submit sufficient proof to establish either (1) one party has voluntarily vacated the marital residence and established a separate residence, and his or her presence has caused marital strife within the marital residence; or (2) a potential exists for harm to one's body or property due to physical violence.[15]

In addition to requests for exclusive occupancy, courts also receive frequent requests to order the sale of the marital home. Although it is a regular fact of life that during the course of a matrimonial litigation parties are not in a position to maintain two separate households, litigants should be made aware that, absent the agreement of the parties, the court has no authority to order the immediate sale of the marital home prior to the entry of a judgment of divorce.[16]

Conclusion

The foregoing are just a few of the issues which arise on a regular basis when this Court reviews *pendente lite* motions. Much care must be given to preparing these motions especially since court calendars will most likely limit a party's opportunity to obtain temporary financial relief to the initial motion. Accordingly, if a party fails to properly support its position, that party may risk losing the only opportunity to obtain meaningful relief prior to final judgment. Hopefully, this article has alerted practitioners to some of the common pitfalls with regard to drafting motions for *pendente lite* relief. ■

1. 22 N.Y.C.R.R. § 202.16(k)(1).
2. *See* 22 N.Y.C.R.R. § 202.16(k)(2).
3. *See Mann v. Mann*, 124 A.D.2d 565, 507 N.Y.S.2d 710 (2d Dep't 1986) (interpreting former 22 N.Y.C.R.R. § 699.11(a), (b), now 22 N.Y.C.R.R. § 202.16(g)).
4. *See Bertone v. Bertone*, 15 A.D.3d 326, 326, 790 N.Y.S.2d 35 (2d Dep't 2005) ("The plaintiff's failure to submit an updated net worth statement on her behalf rendered that branch of her cross motion which was for an award of an attorney's fee defective.").
5. Similarly questionable are requests for payments of expenses and interim child support and/or maintenance which, in their aggregate, are in an amount equal to or greater than the income of the payor-spouse.
6. *See Bertone*, 15 A.D.3d at 326; *see also Price v. Palagonia*, 212 A.D.2d 765, 766, 623 N.Y.S.2d 269 (2d Dep't 1995) ("The plaintiff's request for attorney's fees was properly denied as it was not supported by an affidavit of services from her attorney, which is an essential requirement for such relief.").
7. *See Fasano-Amon v. Amon*, 205 A.D.2d 493, 494, 613 N.Y.S.2d 186 (2d Dep't 1994).
8. *See Foley v. Roche*, 68 A.D.2d 558, 567, 418 N.Y.S.2d 588 (1st Dep't 1979).
9. *Id.* at 568.
10. *See* CPLR 2214(c) ("The moving party shall furnish . . . papers not already in the possession of the court."). *See also Sheedy v. Pataki*, 236 A.D.2d 92, 97, 663 N.Y.S.2d 934 (3d Dep't 1997), *leave denied*, 91 N.Y.2d 805 (1998) ("[A] Supreme Court Justice does not retain the papers following his or her disposition of a motion and should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions.").
11. CPLR 315; *see* CPLR 314(1).
12. *See* CPLR 308.
13. DRL § 234.
14. *See Delli Venneri v. Delli Venneri*, 120 A.D.2d 238, 507 N.Y.S.2d 855 (1st Dep't 1986).
15. *See Rauch v. Rauch*, 83 A.D.2d 847, 848, 411 N.Y.S.2d 749 (2d Dep't 1981); *Tillinger v. Tillinger*, 141 A.D.2d 535, 535, 529 N.Y.S.2d 147 (2d Dep't 1988); *Amy Cohen L. v. Howard N.L.*, 222 A.D.2d 677, 636 N.Y.S.2d 654 (2d Dep't 1995).
16. *See Kahn v. Kahn*, 43 N.Y.2d 203, 210, 401 N.Y.S.2d 47 (1977); *Portano v. Portano*, 85 A.D.2d 622, 623, 445 N.Y.S.2d 20 (2d Dep't 1981).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I work in a large law firm which recently hired a high-powered marketing director. The marketing director has organized our partners into teams to approach the general counsels of certain large corporations we have not previously represented, and to pitch our firm's capacity to provide high quality, cost-effective legal services. We are doing research about those corporations and their businesses so that we can sit down with in-house counsel and make a presentation. We intend to demonstrate how retaining us to perform certain legal services could help make their companies more profitable, while getting better legal services at lower cost.

Given the recent ferment in New York about the rules regarding lawyer advertising and solicitation, I'm wondering: is such marketing professional?

Sincerely,

Solicitous About Solicitation

Dear Solicitous:

The Bar's prohibitions on client solicitation have a longstanding relationship to attorney professionalism. Nearly 100 years ago, the American Bar Association's first set of standards for attorney conduct phrased its ethical proscriptions in terms of conduct that was "unprofessional." Under the 1908 Canons of Ethics, acting ethically meant acting "professionally," and Canon 27 provided that client solicitation was "unprofessional."

Seventy years later, in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), the United States Supreme Court upheld the imposition of professional discipline on a personal injury lawyer who had solicited an accident victim lying in traction on a hospital bed. It rejected the lawyer's First Amendment challenge to an Ohio rule that prohibited client solicitation except when the prospective client was a close friend, relative, former client, or current client. The Court indicated that the type of circumstances before it created the potential for deception, undue influence, and the invasion of privacy, and justified a prophylactic ban on client solicitation generally.

Almost 30 years later, the current rules in New York regarding client solicitation have not changed very much. In broad language, Judiciary Law §§ 479 and 485 make the solicitation of legal representation a misdemeanor. Under DR 2-103(A)(2) of the New York Lawyer's Code of Professional Responsibility ("Code"), written or recorded client solicitation is prohibited if, among other things, (a) it is false, deceptive or misleading; (b) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; (c) it involves coercion, duress or harassment; or (d) the lawyer knows or reasonably should know that the age or physical, emotional or mental state of the prospective client makes it unlikely that such person will be able to exercise reasonable judgment in retaining the lawyer.

In-person, live telephone, and arguably even real-time electronic solicitation is subject to an even broader ban, which does not take into account the manner or circumstances of the solicitation. Like the Ohio rule in *Ohralik*, DR 2-103(A)(1) generally prohibits such solicitation, "except that a lawyer may solicit professional employment from a close friend, relative, former client, or current client."

Thus, it appears from the foregoing that if your firm intends to submit truthful solicitations to the targeted general counsel, and those solicitations are not "live" but rather are written or pre-recorded, such marketing would be permitted under the Code. After the New York Court of Appeals's 1980 decision in *Koffler v. Joint Bar Association*, 51 N.Y.2d 140, 432 N.Y.S.2d 872, Judiciary Law § 479 could not constitutionally be applied to prohibit such marketing.

On the other hand, if your firm intends to pursue in-person or live telephone or real-time electronic contact with the general counsel of a corporation that is not and never was a client, and that general counsel does not fit into one of the four exceptions carved out in DR 2-103(A)(1), you should reconsider. Although the New York State Bar Association Committee on Professional Ethics Opinion 715 (1998) might be construed to suggest that DR 2-103(A)(1) does not prohibit lawyers from soliciting other lawyers to recommend them for employment, that view would not apply to this situation. Here, the corporation's general counsel is a key decision-maker of the targeted client, rather than an independent lawyer being solicited for a recommendation to an unrelated prospective client. Thus, under the current rules in New York, such uninvited solicitation of a corporation's general counsel would violate the Code and Judiciary Law § 479. Because acting in accordance with both the criminal law and the Bar's established ethical norms remain constitutive elements of attorney professionalism, such conduct also would be unprofessional.

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.**

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There is, however, movement afoot within the New York legal community to change the current rules regarding client solicitation. Along with a general push to reformat the Code to match the ABA's Model Rules, the NYSBA Committee on Standards of Attorney Conduct (COSAC) has proposed adding a fifth exception to the general prohibition of in-person solicitation, as is contained in the Model Rules. This change would allow your firm to approach the targeted general counsels on a more personal level. COSAC Rule 7.3(a), like ABA Model Rule 7.3(a), would prohibit client solicitation "by in-person, live telephone contact or real-time electronic contact" except for such solicitation from the four historically excepted groups – or from "a lawyer." COSAC states: "Unlike the Code, the proposed Rule makes an exception when the solicitation is to a fellow lawyer." Thus, if COSAC Rule 7.3(a) were adopted, you and your firm would be professional even if you "cold-called" the targeted general counsels or solicited them during, for example, a Bar Association meeting.

Reactions to the proposal contained in COSAC Rule 7.3(a) have been mixed. The NYSBA Task Force on Lawyer Advertising recommended last fall that COSAC's proposed Rule 7.3(a) be adopted. However, the amendments to the Code provisions addressing attorney advertising and solicitation, as proposed last Spring by the Presiding Justices of the four Appellate Division Departments, make no change to the current DR 2-103(A)(1) – in effect, rejecting COSAC Rule 7.3(a).

Notwithstanding the latter view, there are three reasons for adopting COSAC Rule 7.3(a), and for permitting what your marketing director has proposed. First and foremost, practical experience supports a distinction between attorneys and lay people for purposes of client solicitation. Communications with a corporation's general counsel, whether in-person, on the telephone, or by interactive electronic media, are a far cry from the solicitation in *Ohralik*. No matter how persuasive large firm lawyers can be, it is hard to believe that they are going to be able to defraud, overpower, or more subtly manipulate targeted general counsels into unwarranted retentions. Justice Marshall suggested as much in his *Ohralik* concurrence, pointing out that the Court did not directly address "'benign' commercial solicitation" in that case.

Second, the contours of attorney professionalism in the legal community, like the standards of any community, may change over time. There needs to be consistency between the legal profession's written standards and what highly regarded lawyers regularly do. COSAC Rule 7.3(a) reflects common practice within a significant sector of the New York legal community. It should be adopted so that respected lawyers are not accused of being scofflaws when their conduct would not otherwise be questioned by their peers.

Finally, the adoption of COSAC Rule 7.3(a) would focus attention on Judiciary Law § 479, which should be held unconstitutional if applied to benign commercial solicitation by lawyers. In 1993, a nearly unanimous Supreme Court legitimated such solicitation in the case of a certified public accountant who solicited employment from business executives by telephone. It concluded, in *Edenfield v. Fane*, 507 U.S. 761, that a Florida Board of Accountancy rule banning such solicitation violated the First Amendment. Any effort to enforce Judiciary Law § 479 with respect to the sort of personal solicitation permitted under COSAC Rule 7.3(a) should suffer the same fate.

In short, it violates the Code, and thus, is unprofessional, for your firm to engage in the in-person or telephone solicitation of the general counsels – but this will no longer be the case if COSAC Rule 7.3(a) is adopted.

The Forum, by
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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

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Treating litigants respectfully means avoiding innuendo. In *Main v. Main*,[21] a divorce action, an Iowa court attacked a husband for his past failed marriages and the wife for marrying for money. The reader is left wondering whether the court denied the divorce for legal or private reasons. This question recurs with judges who have had negative experiences in legal matters, like an unpleasant divorce or custody case. Judges affected by personal experiences must take precautions against prejudging cases or litigants. They must leave their baggage at the courthouse door.

Litigants question the impartiality of a judge who fails to consider the losing side's facts.

Litigants don't always see eye to eye with one another. Judges don't always get along with other judges. Judges shouldn't use opinions to criticize other judges, whether on a lower court,[22] on a higher court,[23] a dissenting judge,[24] or the author of a majority opinion.[25] Judges are entrusted to promote public confidence in the legal system. Judges who engage in infighting set a poor example to the public, who will believe that the case was decided because of animosity, not on the merits.

Judges should also avoid writing in formats foreign to opinion writing.[26] Some judges have written opinions as poetry[27] and prose.[28] Others have included fables,[29] animal references,[30] folksy language,[31] parody,[32] or popular references.[33] One judge disparaged medical-liability law by writing that "the work of the Alabama Legislature in the area of medical liability is a mule — the bastard offspring of intercourse among lawyers, legislators, and lobbyists, having no pride of ancestry and no hope of posterity."[34] Judges who use unusual formats send a message that they take lightly their opinions and their role as judges. Using clever prose or poetry forecloses the best and clearest language. A judge who tries to be a poet can't use all available language and hence creates the appearance that the attempt to be clever had priority over clarity and candor.

A good opinion is credible and impartial.[35] A dispute that requires judicial intervention is serious to society and the litigants. Judges owe a duty to deal with litigants' claims.[36] They may inject their own style and character in their written opinions. They may include emotional themes, without writing emotionally.[37] But an opinion should be written in the format the public expects: It should address the litigant's claims in an organized, reasoned, and honest manner. Deriding litigants, using droll references, and treating the opinion as though it were literature diminishes the opinion's quality.

The Facts

Facts set the stage for a judicial opinion. The law can be applied only to the facts the judge incorporates into a written opinion. It's an ethical problem when a judge fails to include key facts or incorporates too many facts. Judges should use accurate facts and use them accurately.[38] Without accurate facts, the ruling will be wrong. A judge who includes too many facts forces the reader to sift through irrelevant ones. That makes the opinion unfocused and results in dictum.[39] Irrelevant facts lengthen an opinion and decrease clarity.[40] A judge who omits important facts will write an erroneous opinion,[41] one that will affect a litigant's ability to appeal. An appellate court can't consider what's absent from the record.

Litigants shade facts to further their interests. Judges may never shade facts. An opinion should make the reader agree with the judge's rationale and conclusion[42] without crossing the line from persuasion to distortion. Nor should judges adopt a litigant's version of the facts verbatim[43] or fail to verify the facts in the record.[44] The law belongs to the judge, but facts belong to the parties, who won't forgive a judge who cheats or doesn't think independently.

Judges should incorporate facts helpful to the losing side to strengthen the opinion and assure the reader that the judge considered the relevant facts.[45] Without facts helpful to the losing side, the court's reasoning might be unsound — the judge couldn't justify the result in the face of the losing side's facts. Litigants question the impartiality of a judge who fails to consider the losing side's facts.

Getting the facts right on appeal is important not only to the litigants but also to the trial judge: "The prime expectation of the trial judge, when his adjudication goes to an appellate court, is that the latter, in its published decision, will make an honest statement of the case."[46]

Claims, Issues, and Standards of Review

Litigants are taught to pose issues persuasively. Judges should "[w]rite a judicious opinion, not a brief [, and s]tate the question to be decided neutrally."[47] Claims and issues should be introduced by combining law with fact. Only after they frame the issue can judges accept a party's argument. Judges who use headings in an opinion should write them neutrally, too.

Judges shouldn't choose one line of authority over another without explaining why.[48] When judges don't explain themselves, a reader familiar with the authority ignored will believe that the judge was sloppy, unable to distinguish the authority, or agenda-driven.

As to issues, a trial-court opinion should offer a logical, disinterested explanation of the case for the litigants that allows appellate review.[49] Intermediate appellate courts review trial-court opinions for correctness and sharpen the issues for further appellate consideration.

An appellate court that reviews a lower-court or agency determination must state the appropriate standard of review, such as "reasonable doubt," "clear and convincing evidence," "clearly erroneous," or "arbitrary and capricious." The standard should be stated neutrally, followed by a fair application of law to fact. Standards of review, and how they're written, often determine outcomes. Judges should avoid polarized standards, defined as one line of cases in which one class of litigant (*e.g.*, defendants) prevailed. Polarized standards, which lead to inevitable conclusions, confuse litigants. They allow "the court merely [to] invoke[] the 'tough' or 'easy' version of the standard of review."[50]

Next issue: This column continues with judicial writing style, boilerplate, plagiarism, law clerks, and extrajudicial writing. ■

1. 22 NYCRR 100.2(A).

2. *Id.* 100.3(B)(2).

3. *Id.* 100.3(B)(3).

4. David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 Geo. J. Legal Eth. 509, 515 (2001).

5. 22 NYCRR 100.3(B)(4).

6. *See, e.g.*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 597 (1998) (Scalia, J., concurring) (attacking French immigrants); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 156 (1994) (noting that majority's decision "is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or, as the Court would have it, the genders) and how sternly we disapprove the male chauvinist attitudes of our predecessors.") (Scalia, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would . . . cast aside millennia of moral teaching."); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (Holmes, J.) (affirming sterilization order against mentally challenged woman, stating that "[t]hree generations of imbeciles are enough").

7. 163 U.S. 537, 551 (1896) (Brown, J.).

8. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 435 (1980) (Rehnquist, J., dissenting).

9. McGowan, *supra* note 4, at 515.

10. *See, e.g.*, *Lason v. State*, 12 So. 2d 305, 305 (Fla. 1943) (Buford, C.J.) (describing sexual encounter graphically); *United States v. Irving*, No. 76–151 (E.D. Cal. 1977) (McBride, J.) (commenting in verse on size of defendant's sexual organ) (unpublished opinion quoted in George Rose Smith, *A Critique of Judicial Humor*, 43 Ark. L. Rev. 1, 14 (1990). Compare those cases with *United States v. Thomas*, 32 C.M.R. 278, 280 (Ct. Mil. App. 1962) (Kilday, J.) ("The evidence adduced at the trial presents a sordid and revolting picture which need not be discussed in detail other than as necessary to decide the certified issues."). *See generally* Gerald Lebovits, The Legal Writer, *Poetic Justice: From Bad to Verse*, 74 N.Y. St. B.J. 48 (Sept. 2002).

11. *E.g.*, *Searight v. New Jersey*, 412 F. Supp. 413, 414 (D. N.J. 1976) (Biunno, J.) (claiming that physician injected plaintiff with radium electric beam that caused voices in plaintiff's head); *Lodi v. Lodi*, 173 Cal. App. 3d 628, 630–31, 219 Cal. Rptr. 116, 117–18 (3d Dis't 1985) (Sims, J.) (deciding case about plaintiff who sued himself for raiding own trust fund). For more on delusional claims, see Gerald Lebovits, The Legal Writer, *The Devil's in the Details for Delusional Claims*, 75 N.Y. St. B.J. 64 (Oct. 2003).

12. *E.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dis't v. Grumet*, 512 U.S. 687, 737 (1994) (Scalia, J., dissenting) (using capital letters as sarcasm to attack majority opinion); *Continental Illinois Corp. v. Commr.*, 998 F.2d 513, 515 (7th Cir. 1993) (Posner, J.) ("The parties and the amici have favored us with more than two hundred pages of briefs, rich in detail that we can ignore."); *Smith v. Colonial Penn Ins. Co.*, 943 F. Supp. 782, 784 (S.D. Tex. 1996) (Kent, J.) (addressing motion to change venue).

13. *E.g.*, *United States v. Prince*, 938 F.2d 1092, 1093 (10th Cir. 1991) (Brorby, J.) (using humor to comment on defendant's attempt to rid himself of public defender by relieving himself on defender's table in front of jury); *Republic of Bolivia v. Phillip Morris Cos.*, 39 F. Supp. 2d 1008, 1009–10 (S.D. Tex. 1999) (Kent, J.) (using humor in granting motion to transfer case). One federal judge was so frustrated with the "Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts" that he used the children's game "Rock, Paper, Scissors" as alternative dispute resolution. *See Avista Mgmt., Inc. v. Wausau Underwriters Ins. Co.* (Presnel, J.) (M.D. Fl.) (June 27, 2006), *at* http://www.symtym.com/index.php?/site/category/Humor/ (last visited Aug. 4, 2006). Some will cheer the judge for using humor to discourage the parties from engaging in petty squabbles. Others will condemn the judge for directing the parties to resolve a question based on chance. *Cf.*, *In re Friess*, Ann. Rpt., N.Y. St. Comm'n on Jud. Conduct 84 (1984) (Mar. 1983), at 1983 WL 189799, at *3 (removing judge for, in part, using coin flip to make substantive decision); *In re Brown*, 468 Mich. 1228, 662 N.W.2d 733, 736 (Mich. 2003) (censuring judge for same); *In re Daniels*, 340 So. 2d 301, 303 (La. 1976) (same).

14. *E.g.*, *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668, 670–71 (S.D. Tex. 2001) (Kent, J.) (ridiculing attorneys' briefs); *In re Rome*, 542 P.2d 676, 680–81 (Kan. 1975) (per curiam) (reciting poem written by judge who sentenced prostitute to probation).

15. For an opinion in which a village justice appears to have decided a criminal case based in part on his dislike of how a prosecutor handled an unrelated matter, see *People v. Slade*, N.Y.L.J., Oct. 24, 2006, at 24, col. 1 (Nyack Vill. Ct.).

16. *E.g.*, Benjamin N. Cardozo, Law and Literature and Other Essays and Addresses 10 (1931), *reprinted in* 52 Harv. L. Rev. 471, 475 (1939), *and in* 48 Yale L.J. 489, 493 (1939), *and in* 39 Colum. L. Rev. 119, 123 (1939) (humor); Richard Delgado & Jean Stefancic, *Scorn*, 35 Wm. & Mary L. Rev. 1061 (1994) (scorn); James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 Trial Judges' J. 49, 50 (1969), *reprinted in* Robert A. Leflar, *Quality in Judicial Opinions*, 3 Pace L. Rev. 579, 586 (1983) ("[S]arcasm directed toward the parties is seldom in good taste."); Adelberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. Miami L. Rev. 693 (1987) (humor); Marshall Rudolph, *Judicial Humor: A Laughing Matter?*, 41 Hastings L.J. 175 (1989) (humor); Susan K. Rushing, *Is Judicial Humor Judicious?*, 1 Scribes J. Legal Writing 125 (1990) (humor); George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 Ark. L. Rev. 197, 210 (1967) (humor). For more about sarcasm, humor, and scorn, see Gerald Lebovits, The Legal Writer, *Judicial Jesting: Judicious?*, 75 N.Y. St. B.J. 64 (Sept. 2003).

17. 22 NYCRR 100.2(A).

18. Joyce J. George, Judicial Opinion Writing Handbook 334 (4th ed. 2000).

19. *Factac, Inc. v. King*, No. 05-56485-C (Bankr. W.D. Tex. Feb. 21, 2006) (Clark, J.), *available at* http://www.txwb.uscourts.gov/opinions/opdf/05-56485-lmc_King.pdf (last visited Aug. 4, 2006).

20. *Id.*

21. 168 Iowa 353, 356, 150 N.W. 590, 591 (1915) (Weaver, J.).

22. *E.g.*, *Akers v. Sellers*, 114 Ind. App. 660, 662, 54 N.E.2d 779, 780 (Ind. 1944) (Crumpacker, C.J.) (en banc) (attacking trial court's decision).

23. *E.g.*, *Salt Lake City v. Piepenburg*, 571 P.2d 1299, 1299–1300 (Utah 1977) (Ellett, C.J.) (attacking U.S. Supreme Court's obscenity standard), *disavowed by State v. Taylor*, 664 P.2d 439, 448 n.4 (Utah 1983).

24. *E.g.*, *People v. Arno*, 90 Cal. App. 3d 505, 514 n. 2, 153 Cal. Rptr. 624, 628 n.2 (2d Dis't 1979) (Thompson, J.) (directing at dissent seven consecutively numbered sentences, with first letters spelling "S-C-H-M-U-C-K").

25. *E.g.*, *Webster v. Reprod. Health Srvs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring) (stating that majority "cannot be taken seriously").

26. *See generally* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1421 (1995).

27. *E.g.*, *In re Love*, 61 Bankr. 558, 558 (S.D. Fla. 1986) (Cristol, J.); *Mackensworth v. American Trading Transp. Co.*, 367 F. Supp. 373, 374 (E.D. Pa. 1973) (Becker, J.); *Nelson v. State*, 465 N.E.2d 1391, 1391 (Ind. 1984) (Hunter, J.); *Wheat v. Fraker*, 107 Ga. App. 318, 318, 130 S.E.2d 251, 252 (1963) (Eberhardt, J.). For more, see Gerald Lebovits, The Legal Writer, *Poetic Justice: From Bad to Verse*, 74 N.Y. St. B.J. 48 (Sept. 2002).

28. *E.g.*, *State v. Baker*, 644 P.2d 365 (Idaho Ct. App. 1982) (Burnett, J.) (writing opinion like murder mystery); *Cordas v. Peerless Transp. Co.*, 27 N.Y.S.2d 198 (City Ct. N.Y. County 1941) (Carlin, J.) (writing opinion like pulp fiction).

29. *E.g.*, *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 274 (1974) (Douglas, J., concurring) (appending Gourmond fable to opinion); *Hatfield v. Bishop Clarkson Mem. Hosp.*, 701 F.2d 1266, 1272 (8th Cir. 1983) (Lay, C.J., dissenting) (imitating Aesop's fable).

30. *E.g.*, *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982) (Fay, J.) (using fish references in case about fraudulently selling shrimp), *cert. denied*, 459 U.S. 1170 (1983); *Miles v. City Council of Augusta*, 551 F. Supp. 349 (S.D. Ga. 1982) (Bowen, J.) (using cat

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references in case about taxing cat's earnings), *aff'd*, 710 F.2d 1542, 1544 (11th Cir. 1983) (per curiam).

31. *E.g. State v. Knowles*, 739 S.W.2d 753, 754 (Mo. Ct. App. 1987) (Nugent, J.) ("Old Dave Baird, the prosecuting attorney up in Nodaway County, thought he had a case against Les Knowles for receiving stolen property, to-wit, a chain saw, so he ups and files on Les").

32. *E.g.*, *Schenk v. Comm'r*, 686 F.2d 315, 316 (5th Cir. 1982) (Goldberg, J.) (parodying Ecclesiastes 3:1); *Allied Chemical Corp. v. Hess Tankship Co. of Delaware*, 661 F.2d 1044, 1046 (5th Cir. 1981) (Brown, J.) (parodying opening line from Edward George Earle Bulwer-Lytton's 1830 novel *Paul Clifford*: "It was a dark and stormy night.").

33. *E.g.*, *City of New York v. U.S. Dep't of Commerce*, 739 F. Supp. 761, 762 (E.D.N.Y. 1990) (McLaughlin, J.) (opening opinion with Bible lesson); *Carter v. Ingalls*, 576 F. Supp. 834, 835 (S.D. Ga. 1983) (Bowen, J.) (using Star Wars reference to express frustration about pro se defendants). One British judge even added his own code in a case about the *Da Vinci Code*. *See* http://www.hmcourts-service.gov.uk/images/judgment-files/baigent_v_rhg_0406.pdf (last visited Aug. 4, 2006). For more about popular references in opinions, see Gerald Lebovits, The Legal Writer, *A Pox on Vox Pop*, 76 N.Y. St. B.J. 64 (July/Aug. 2004).

34. *Hayes v. Luckey*, 33 F. Supp. 2d 987, 995 n.16 (N.D. Ala. 1997) (Smith, J.).

35. *See generally* William A. Bablitch, *Reflections on the Art and Craft of Judging*, 37 Judges' J., 40, 40 (Winter 1998) (discussing principled decision making).

36. 22 NYCRR 100.2(A) (requiring judges to act with integrity).

37. Bablitch, *supra* note 35, at 40 (noting that opinions should "neither [be] laden with emotion nor totally bloodless").

38. Moses Lasky, *A Return to the Observatory Below the Bench*, 19 Sw. L.J. 679, 689 (1965) ("[H]onesty allows no leeway in [a judge's] statement of facts, for they are not his.").

39. Timothy P. Terrell, *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, 38 Judges' J. 4, 38 (Spring 1999) ("Although the urge behind overinclusion is the defendable one of thoroughness, a truly controlled presentation is also focused.").

40. For more about writing shorter opinions, see Gerald Lebovits, The Legal Writer, *Short Judicial Opinions: The Weight of Authority*, 76 N.Y. St. B.J. 64 (Sept. 2004).

41. *See* Anthony D'Amato, *Self-Regulation of Judicial Misconduct Could be Mis-Regulation*, 89 Mich. L. Rev. 609, 619 (1990) (noting that one of worst things judges can do is ignore or misstate facts).

42. Judith S. Kaye, *Judges as Wordsmiths*, 69 N.Y. St. B.J. 10, 10 (Nov. 1997) ("Writing opinions is a lot like writing briefs. Both are, at bottom, efforts to persuade."); *accord* Alan B. Handler, *A Matter of Opinion*, 15 Rutgers L.J. 1, 2 (1983).

43. Although this practice is disapproved, "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous," *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985), or if the court didn't exercise independent judgment, *see* Kristen Fjelstad, Comment, *Just the Facts, Ma'am — A Review of the Practice of the Verbatim Adoption of Findings of Fact and Conclusions of Law*, 44 St. Louis U. L.J. 197 (2000).

44. *In re Las Colinas, Inc.*, 426 F.2d 1005, 1008 (1st Cir. 1970) (McEntee, J.); Merrill E. Otis, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 83, 85 (1940–1941).

45. Am. B. Ass'n, Section of Jud. Admin., Cttee. Report, *Internal Operating Procedures of Appellate Courts* 31 (1961) ("[A] lawyer may forgive a judge for mistaking the law. But not so if his facts are taken away from him . . . .").

46. William J. Palmer, *Appellate Jurisprudence as Seen by a Trial Judge*, 49 A.B.A. J. 882, 883 (Sept. 1963).

47. Robert E. Keeton, Judging 143 (1990).

48. Ruggero J. Aldisert, Opinion Writing 7 (1990) (stating that judges err when they don't explain why they choose one line of authority over another).

49. *See generally* Dwight W. Stevenson & James P. Zappen, *An Approach to Writing Trial Court Opinions*, 67 Judicature 336 (1984).

50. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1394 (1995).

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MEMBERSHIP TOTALS

NEW REGULAR MEMBERS 1/1/06 - 11/29/06	8,341
NEW LAW STUDENT MEMBERS 1/1/06 - 11/29/06	914
TOTAL REGULAR MEMBERS AS OF 11/29/06	69,012
TOTAL LAW STUDENT MEMBERS AS OF 11/29/06	2,922
TOTAL MEMBERSHIP AS OF 11/29/06	71,934

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: In bankruptcy law, the procedure known as *cram down* or *cramdown* is spelled either as one word or two, and sometimes both spellings in the same document. I am inclined to spell the verb as two words, *cram down*, but the noun and adjective forms as one, *cramdown*. I'd appreciate your shedding some light on this.

Answer: My thanks to recent law school graduate David J. Kozlowski of New York, who sent this question "of first impression." For readers who have never seen the expression *cram down*, a judge in *In re Sunflower Racing, Inc.*, 219 B.R. 587, 590 (Bankr. D. Kan. 1998), defined it this way: "'Cram down' is a colloquial expression used in bankruptcy practice to signify confirmation of a reorganization plan, notwithstanding the negative vote of a secured creditor class; the court figuratively crams the plan down the throat of the dissenting class."

This is a creative and descriptive name for the phrase, but because it is a relatively new expression describing a procedure used in a narrow field of law, Mr. Kozlowski enclosed some of the language of the decision in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), a recent important bankruptcy case, to demonstrate the problem. In that decision, the noun *cramdown* (one word) appears three times, but it is also spelled *cram down* numerous times (though often in quotations from other cases). Also in the decision, the noun *cram-down* is spelled as I would have spelled it – with a hyphen. The hyphenated form appears almost every time the word is used as an adjective: *cram-down provision*; *cram-down power*; *cram-down rule*; and *cram-down circumstance.*

The judicial indecision about the spelling is understandable. *Cram down* (sometimes a noun, sometimes a verb, and sometimes an adjective) is a relatively new coinage used primarily by bankruptcy lawyers, so the spelling has not yet become standard. Volume 10 of *Words and Phrases*, in its Paper Part, lists 32 citations of the phrase. In 14 citations it appears as a compound word (*cramdown*), in 16, it is listed as two words (*cram down*), and in two citations it is hyphenated: *cram-down*. Interestingly, when *cram-down* is used as an adjective, it is sometimes hyphenated and sometimes not. A *cram-down operation* and a *cram down option* are both cited in the opinion.

What David Mellinkoff called "the lure of precedent and its companion *stare decisis*" explains the variations in the spelling of *cram down* in the *Till* opinion. When a prior opinion spelled *cram down* as two words, that spelling was used, but when a previous court used the compound *cramdown* or the hyphenated form *cram-down*, so did the *Till* court when citing to that case.

Variations in spelling are normal for newly created compounds like *cram-down*. When they are first introduced, they retain their two-word form, as seen in *cram down*. As the new word becomes more widely used, it becomes hyphenated. Then when it comes into wide usage, the two words shed the hyphen and become a compound. This happened with many of the compounds that are now single words, for example, *ice box*, which became *ice-box* and finally *icebox*. That is also the sequence followed by *ballpark*, *passbook*, *mailman* and others.

As usage widens, not only spelling but pronunciation of the erstwhile two-word phrase changes. Notice that when you use *cramdown* as a hyphenated or single-word noun, you give it first syllable stress: *a cramdown* or *a cram-down.* If you are using the compound as a hyphenated adjective, you give both parts equal stress: *a cram-down option.* But when you are using *cram down* as a two-word verb, you give the second word slightly more stress: *cram down*.

All this may be more than you care to know about any one phrase. But chances are you will be interested in the following list, showing the importance of hyphens:

> Compare the following:
> A little-used sailboat and a little used sailboat.
>
> Extra-judicial duties and extra judicial duties.
> Re-covered office furniture and recovered office furniture.

And this item from *The Chronicle of Higher Education*, November 1995:

> Anyone who doubts the usefulness of the hyphen may change [his] tune after reading this title, on a statistical table from the National Center for Education Statistics: "Mean Teacher Turnover Rates."

(Aren't you glad you didn't have that teacher?)

From the Mailbag:

"I enjoyed your piece about redundancy. However, unless I missed it, you did not mention what I consider the ultimate redundancy in the law, a faux pas committed every day by learned types and in written judicial opinions, the expression *plaintiff's complaint*. After all, whose complaint is it rather than the plaintiff's? Drives me crazy and is one of the first things I teach beginning associates at our firm."

My thanks to the correspondent, who pointed out a redundancy that most lawyers ignore because it has become idiomatic. To avoid the redundancy, just say *the complainant alleges . . . .*

Potpourri:

Many of you may have seen the following item in the December 4th issue of *TIME* magazine, but the U.S. Department of Agriculture's creative euphemism seems worth repeating: The USDA, disliking the connotation of the word *hunger*, has replaced it in its annual report, with the following less-objectionable phrase. Many Americans (4.4 million of them) experience: "very low food security."

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

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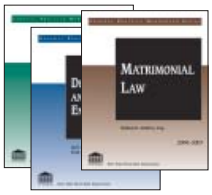

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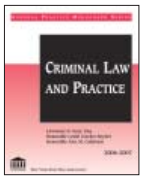

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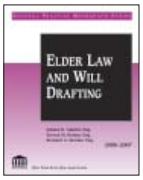

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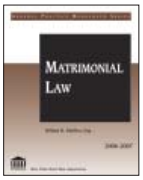

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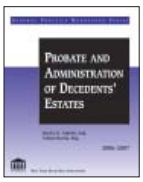

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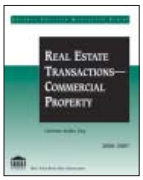

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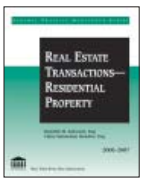

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Hariton, David P.
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Lindenauer, Susan B.
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McShea, Sarah Diane
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Moreland, Thomas H.
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Nathanson, Malvina
Opotowsky, Barbara Berger
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Williams, Bryan R.
Younger, Stephen P.

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DiGiovanna, Lawrence F.
Golinski, Paul A.
Kamins, Barry
Longo, Mark A.
Romero, Manuel A.
Slavin, Barton L.
Sunshine, Hon. Nancy T.
Szochet, Diana J.

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Carlucci, James A.
Cloonan, William N.
Copps, Anne Reynolds
Davidoff, Michael
Dixon, Philip H.
Dolin, Thomas E.
Doyle, Hon. Cathryn M.
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Fernandez, Hermes
Gold, Majer H.
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Kelly, Matthew J.
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Meislahn, Harry P.
Miranda, David P.
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Potter, James T.
Privitera, John J.
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Thornton, Timothy B.
* Williams, David S.
* Yanas, John J.

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Burke, J. David
Caffry, John W.
Coffey, Peter V.
Cullum, James E.
Ferradino, Stephanie W.
Haelen, Joanne B.
McAuliffe, J. Gerard, Jr.
Rider, Mark M.
Sterrett, Grace
Tishler, Nicholas E.

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Gall, Erin P.
Getnick, Michael E.
Girouard, Theresa M.
Greeley, Kristin B.
Hayes, David M.
Julian, Hon. Robert F.
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Rivera, Ramon E.
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† Madigan, Kathryn Grant
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Smyk, Stephen D.

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Schraver, David M.
Schultz, Jill K.
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* Witmer, G. Robert, Jr.

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Gerstman, Sharon Stern
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McCarthy, Joseph V.
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O'Donnell, Thomas M.
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Porcellio, Sharon M.
Shaw, James M.
Young, Oliver C.

NINTH DISTRICT
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Campanaro, Patricia L.
Casey, Bridget M.
Enea, Anthony J.
Gordon Oliver, Arlene Antoinette
Gouz, Ronnie P.
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Lagonia, Salvatore A.
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†* Standard, Kenneth G.
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Wallach, Sherry Levin
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Castillo, Nelson A.
Clarke, Lance D.
Cooper, Ilene S.
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England, Donna Marie
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Stempel, Vincent F., Jr.
Tell, M. David
Thompson, Charlene R.
Tully, Rosemarie
Walsh, Owen B.

ELEVENTH DISTRICT
Cohen, David L.
Dietz, John R.
Goldblum, A. Paul
Haskel, Jules J.
James, Seymour W., Jr.
Leinheardt, Wallace L.
Lomuscio, Catherine
Nashak, George J., Jr.
Terranova, Arthur N.
Walsh, Jean T.
Wimpfheimer, Steven

TWELFTH DISTRICT
Bailey, Lawrence R., Jr.
Chavez, Daniel M.
Kessler, Muriel S.
Millon, Steven E.
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Sands, Jonathan D.
Schwartz, Roy J.
Stansel, Lynn

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Peskoe, Michael P.
Ravin, Richard L.
* Walsh, Lawrence E.

† *Delegate to American Bar Association House of Delegates*
* *Past President*

BY GERALD LEBOVITS

Ethical Judicial Writing — Part II*

Last issue the *Legal Writer* offered some suggestions on writing ethical judicial opinions. We continue.

Tone and Temperament

Judges must maintain impartiality, credibility, and objectivity. The Rules Governing Judicial Conduct (RGJC) require judges to promote integrity in the judiciary,[1] to maintain order and decorum in the courtroom,[2] and to be patient, dignified, and courteous to all.[3] Judges must not be advocates: "An ethical judge cannot be a polemicist."[4]

The RGJC prohibits judges from showing bias or prejudice "based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status."[5] Some judges, even United States Supreme Court Justices, have written biased opinions.[6] In *Plessy v. Ferguson*, for example, Justice Henry B. Brown commented that if segregation offended African-Americans, it was "solely because the colored race chooses to put that construction upon it."[7] When the Sioux Nation sued to get land promised by the 1868 Fort Laramie Treaty, a dissenting Justice wrote that "Indians did not lack their share of villainy."[8] Judges must refrain from making any statement that could be construed as biased. They must "identify and understand [t]he[i]r own biases and how they affect [t]he[i]r reaction to a case."[9]

Judges should likewise refrain from incorporating graphic sexual descriptions into their opinions[10] except as necessary to resolve a case. Opinions should be dignified. They must not cater to voyeurs. In our Internet age, in which the public has access to many more opinions than before, judges should be careful about how and whether to identify individuals unimportant to the litigation.

Judges should treat lawyers and litigants respectfully. Lawyers aren't always prepared. Sometimes litigants behave poorly or are involved in seemingly humorous situations. Litigants don't always bring perfect cases. Delusional litigants bring bizarre claims.[11] A judge tempted to condemn an unprepared lawyer, berate a nasty or delusional litigant, or ridicule a litigant's unfortunate situation might use sarcasm,[12] humor,[13] or scorn[14] to attack or make fun of lawyers and litigants. Attacking lawyers or litigants is unseemly.[15] Humor, sarcasm, and scorn have no place in judicial opinion writing.[16] Judges who write this way undermine "public confidence in the integrity . . . of the judiciary."[17] As Judge Joyce George wrote, "propriety is at the very core of what a judge writes . . . . A judge's professional responsibilities require him to select carefully the language and phraseology necessary to communicate the decision and not to be humorous at the litigants' expense or to satisfy some personal need to be funny."[18]

One Bankruptcy judge from Texas used humor to deny a defendant's motion as incomprehensible. The judge compared the defendant and his motion "to Adam Sandler's title character in the movie 'Billy Madison,' after Billy Madison had responded to a question with an answer that sounded superficially reasonable but lacked any substance."[19] Billy Madison, like the defendant in this case, was berated for his stupidity:

> [W]hat you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.[20]

Attacking lawyers or litigants is unseemly.

Judges are different from everyone else in a courtroom. They should decipher rambling, irrational, incoherent thoughts. They should unearth the buried argument, comprehend the incomprehensible, clarify the opaque. They shouldn't give up easily on a litigant who sounds like Billy Madison. Judges who act disrespectfully to lawyers and litigants will in turn be treated disrespectfully.

CONTINUED ON PAGE 50

* *Editor's Note*: An updated version of Judge Lebovits's November/December 2006 Legal Writer column, "Ethical Judicial Writing — Part I," is available on Westlaw and through the Publications link on our Web site, www.nysba.org.

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