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NEW YORK STATE BAR ASSOCIATION

Journal



Building Bridges Between Parallel Paths

*The First New York Listening Conference for
Court Officials and Tribal Representatives*

*by Marcy L. Kahn, Edward M. Davidowitz
and Joy Beane*

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Subrogation Rights of
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CONTENTS

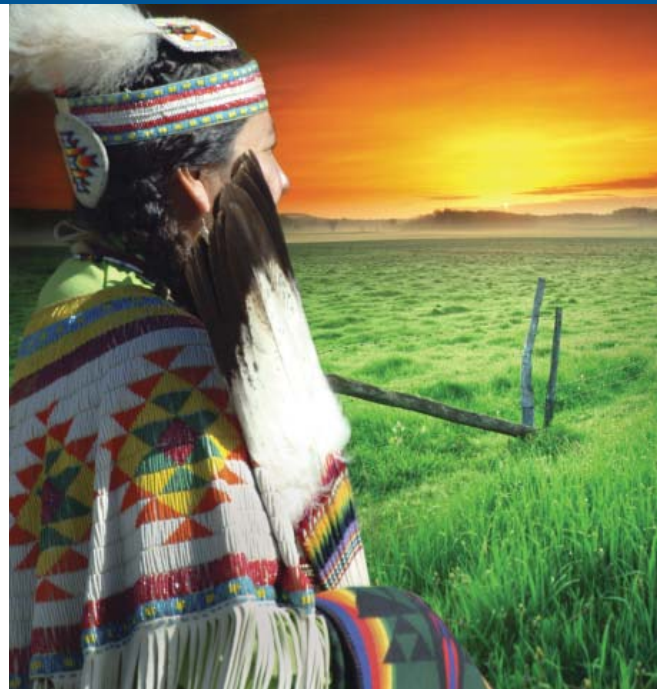
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BY MARCY L. KAHN, EDWARD M. DAVIDOWITZ
AND JOY BEANE

10



32 Subrogation Rights of Health Care Providers

BY J. MICHAEL HAYES

DEPARTMENTS

5 President's Message

8 CLE Seminar Schedule

20 Burden of Proof
Can an Old Dog Learn New Tricks?
BY DAVID PAUL HOROWITZ

24 Point of View
Move Village Elections to November
BY WILLIAM S. GREENAWALT AND DAVID A. KOENIGSBERG

30 Presentation Skills for Lawyers
Powerful Openings
BY ELLIOTT WILCOX

36 Presentation Skills for Lawyers
The Joke Shouldn't Be on You
BY ART SAMANSKY AND ERIC SAMANSKY

38 Index to Articles

47 Index to Authors

54 Attorney Professionalism Forum

56 New Members Welcomed

60 Index to Advertisers

60 Classified Notices

61 Language Tips
BY GERTRUDE BLOCK

63 2006-2007 Officers

64 The Legal Writer
BY GERALD LEBOVITS

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Achieving Gender and Ethnic Diversity in the Profession

Mark H. Alcott

In my first message, which appeared in the June issue of the *Bar Journal*, I introduced the major theme of my presidency: defend and strengthen core values; promote needed reform. In the messages that followed, I have detailed what the Association is doing to protect the independence of the bar and the courts and to provide access to justice for the poor and disadvantaged, addressing all but one of our core values. In this issue, I turn to our remaining core value – diversity of the profession – and highlight two major areas that deserve our attention and require reform.

Gender Equity in the Workplace, Re-Entry into the Workforce

In 1975, women represented only 14% of all legal professionals working at medium-size and large law firms. By 1992, that number had risen to 37%. Today, women are a majority of our law students; a majority of new bar admissions; a majority of those entering our law firms. They bring with them great talent, energy and enthusiasm. Anyone who has been involved, as I have been for many years, in evaluating the performance of associates in the early years of their practice, knows that women not only hold their

own, but in fact make up more than their share of superstars.

And yet, when we look at the same class several years later, a disproportionate number of women, including high performers, have left. After less than five years' employment, more than half of the female associates leave law firms. And nearly two-thirds of the minority female associates leave. This high attrition rate is distressing to women associates, wasteful to law firms, and a disservice to the profession, which is deprived of large numbers of experienced, talented lawyers at a key point in their careers.

Ultimately, although women make up about half of the associates at law firms nationwide, women account for only 17% of the partners in these firms. Even more abysmal are the statistics reflecting the numbers of women of color who become partners, as they are faced with a dual challenge, given that minorities – male and female – make up only 4.63% of the partners at large firms nationwide.

There are many reasons for the disparity that exists in top-level law firm positions, but certainly one is that, due to family needs and the desire to achieve a healthy work-life balance, women often are unable or unwilling,

over the long haul, to devote the enormous number of hours required for these positions.

That is why it is imperative that law firms take a look at their policies and practices and self-evaluate the status of gender equity within their firm. We are working on a tool that will help them do so. Under the leadership of my predecessors, the Bar Association's Gender Equity Task Force, chaired by Carla M. Palumbo, was given the task of preparing a self audit for law firms and employers. The self audit is an internal assessment tool that will assist employers in achieving gender equity and improving the quality of life in their workplace. The self audit will be accompanied by "Principles of Best Practices" – a compilation of model policies and practices for employers to emulate in their workplace. The Task Force will also be encouraging law firms across the state to submit their own best policies and practices, to be included in an updated "Principles of Best Practices." If you are particularly proud of a policy or practice, this will be your opportunity to share it. We

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

PRESIDENT'S MESSAGE

can learn from each other and work together to achieve gender equity and improve the quality of life in law firms throughout New York.

We must also address the needs of women who, in balancing the demands of their profession, the needs of their family, and their desire for a satisfying personal life, leave their firm or withdraw from the profession, with the intent or the hope of returning. For some, the absences are brief. For others, the absences are lengthy. This time away from the profession is not, or should not be, a problem. A lawyer has a career life expectancy of 45 years or more. If she takes a leave of absence of a few months or a number of years, she can still have a very productive career.

For many, however, their time away from the profession becomes longer than originally intended, and the prospect of re-entry becomes a daunting challenge. Some are unable to surmount this challenge and are lost to the profession – either permanently or longer than circumstances require.

To address this issue, I have formed the Special Committee on Lawyers in Transition, chaired by Lauren J. Wachtler. The mission of this committee is to make re-entry to the profession less challenging, perhaps even to make the absences less extended, by creating programs that preserve the links between the profession and lawyers during their leaves and help them when they are ready to return. I am confident that the difficulties of re-entry can be eased by providing the lawyer, during her absence, with networking programs, CLE courses, lectures, social activities, mentoring, training, career counseling, public service activities and the like.

With these initiatives, we are approaching the gender gap from two angles. First, we are working to achieve gender equity and work-life balance in the workplace which will, in turn,

decrease the number of women who find it necessary to leave the profession. Second, we are helping those who take a leave of absence, reaching out to encourage and assist them in re-entering the profession. Women are the future of our profession, and we must provide a hospitable work environment in which they can thrive.

Diversity on the Bench

Diversity in New York's judiciary, from the highest court down to the courts of our counties and cities, is essential to public confidence in and the independence of the judiciary.

Judge George Bundy Smith's recent departure from the Court of Appeals, leaving that Court without an African-American judge, reminds us all that there is much to do to increase racial diversity in New York's courts. A look at the numbers, however, serves as more than a reminder; it reveals just how serious the problem really is.

In 2003, persons of color represented just 13.7% of New York's judges. This lack of diversity on the bench has taken its toll on public confidence in New York's judiciary. While 76% of New York's white registered voters believe that the state's judges are fair and impartial, only 60% of Latino voters and 51% of African-American voters hold that belief. Further, a majority of African-American and Latino voters believe that they receive worse treatment from New York's judges than do other groups.

Increasing the number of minorities on the bench would cultivate confidence in the judiciary which, in turn, would strengthen the independence of the courts. Moreover, a diverse judiciary would result in judicial decisions that reflect insight and experiences as varied as New York's citizenry.

But how do we increase the diversity of our courts? First, we must employ a new mindset. In other words,

we simply must make increasing the diversity of our courts a priority. In selecting our judges, no matter the method, we must strive for a judiciary that reflects the diversity of our society. Our Association is working to achieve that level of diversity in the judiciary. Indeed, in our diversity policy adopted in 2003, we recognize that diversity increases our "strengths, capabilities and adaptability" and that, through increased diversity, we can "more effectively address societal and member needs with the varied perspectives, experiences, knowledge, information and understanding inherent in a diverse membership." These principles also apply to our court system, and true change will come only when the public recognizes that we all benefit from a judiciary as diverse as New York's population.

Second, we must continue to find ways to help our minority members ascend to the bench. Our Task Force on Increasing Diversity in the Judiciary has presented "nuts and bolts" programs throughout the state designed to educate lawyers on how to make the transition from the bar to the bench. Promotional materials for these programs were directed at members of minority groups, with the hope of assisting minorities with the selection process.

In addition, to entice skilled lawyers to leave the financial security of private practice, we must continue to push for an increase in judicial salaries. The actual cost of living has risen more than 25% since the last judicial pay raise in 1999. New York state judges have received only two pay increases in the last 18 years. How can we reasonably expect to attract the best and brightest to the bench if those putting on a robe risk financial insecurity?

Achieving diversity in our profession requires our concentrated, sustained effort. Let's get to it. ■

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November 8 Buffalo

+Update 2006

(video replays)

Fulfills NY MCLE requirement (7.5): 7.5 practice management and/or professional practice

November 8 Ithaca; Plattsburgh; Saratoga

November 9 Jamestown

November 17 Poughkeepsie; Watertown

November 28 Melville, LI; Nanuet

November 29 Buffalo

December 1 Loch Sheldrake

December 5 Tarrytown

Ethics and Professionalism

(half-day program:)

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November 9 Rochester

November 14 Albany

November 17 Tarrytown

November 30 Melville, LI

December 1 Syracuse

December 7 New York City

December 13 Buffalo

Update on Trucking Litigation and Claims

Fulfills NY MCLE requirement for all attorneys (7.0): 2.0 skills; 5.0 practice management and/or professional practice

November 9 Melville, LI

November 16 Syracuse

November 30 New York City

Ethics for Real Estate Lawyers

(half-day program)

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November 9 Albany

December 4 Tarrytown

December 6 New York City

December 7 Rochester

December 15 Buffalo

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November 14 New York City

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November 14 Melville, LI

November 17 Binghamton

November 28 New York City

December 13 Rochester

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(half-day program)

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November 14 Buffalo

December 4 New York City

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November 15 Albany; Buffalo; Hauppauge, LI; Rochester; Syracuse; Westchester

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November 17 Buffalo

November 20 Albany

November 30 Syracuse

December 1 New York City

December 6 Melville, LI

December 8 Tarrytown

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December 1 Albany

December 6 Buffalo

December 7 Melville, LI

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November 30 Albany

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Building Bridges Between Parallel Paths





The First New York Listening Conference for Court Officials and Tribal Representatives

By Marcy L. Kahn, Edward M. Davidowitz and Joy Beane

Introduction

"Excellent!" "Just keep them going!" "This was a fabulous, ambitious and historic undertaking!" These are some of the reactions of participants in the First New York Listening Conference to a two-day program on American Indian law and culture for court and justice system officials. Held in Syracuse from April 26–27, 2006, the Listening Conference ("Conference") brought together for the first time in history more than 140 participants from New York's federal and state court systems and the Indian Nations and Tribes residing in and recognized by New York State. The Conference convened state and federal judges and court officials in sessions with tribal judges, chiefs, clan mothers,¹ peacemakers and other representatives from the justice systems of New York's Indian Nations and Tribes, to exchange information and learn about our respective concepts of justice. It was sponsored by the New York Tribal Courts Committee ("Committee");² the New York State Judicial Institute;³ and the Center for Indigenous Law, Governance and Citizenship of Syracuse University College of Law,⁴ in affiliation with the New York Federal-State-Tribal Courts Forum ("Forum").⁵ The feedback shows this was no ordinary judicial conference: its origins lie in an outreach process dating back several years on both national and state levels.

The first part of this article introduces the nine Nations and Tribes recognized by the state of New York. The second reviews the origins and development of the federal-state-tribal courts forum movement nationally and includes a synopsis of the development and work of the New York Forum. The third and fourth sections discuss Conference planning and implementation, and summarize the information presented at the Conference. The last section previews the next steps for the Forum after the Listening Conference.

Recognized Tribes and Nations

The Native American population of New York State originally consisted of the Haudenosaunee and Algonquian Nations. Presently, more than 82,000 Indians from those Nations and others reside in New York.⁶ While Native Americans may be found in every county in the state, many from the Haudenosaunee and Algonquian

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Nations continue to live in communities in New York's Indian country.⁷ The Haudenosaunee Confederacy, also known as the Iroquois Nation, or Six Nations, is located, generally, in western, central and northwestern New York. It is composed of the following six Nations and Tribes: the Cayuga Indian Nation, the Mohawk Indians of Akwesasne,⁸ the Oneida Indian Nation, the Onondaga Nation, the Seneca Nation⁹ and the Tuscarora Nation. The Shinnecock Tribe and the Unkechaug Nation, both part of the Algonquian Nation, make their homes in eastern Long Island. Currently, the governments of the United States and New York State officially recognize the Cayuga Indian Nation, St. Regis Mohawk Tribe, Oneida Indian Nation, Onondaga Nation, Seneca Nation of Indians,

Leaders continue to send members of their communities to the Forum meetings to serve as their "eyes and ears."

Tonawanda Band of Seneca Indians and the Tuscarora Nation. The state also officially recognizes the Shinnecock Tribe and the Unkechaug Nation.

New York's Nations and Tribes have developed separate and unique justice systems. While many are firmly rooted in traditional justice values, they all vary widely. Some Nations, such as the Tuscarora and Onondaga, do not rely on written law or formalized court systems. Others have written laws and formal courts and procedures, such as the justice system established relatively recently by the Oneida Indian Nation.¹⁰ For the most part, jurisdiction extends to all Indians whether or not they are members of the particular Nation.¹¹ The systems function and operate independently of each other.

Historical Developments

Federal-State-Tribal Courts Forums

The New York Tribal Courts Committee and the New York Federal-State-Tribal Courts Forum originate from a project of the Conference of Chief Justices, an organization of the chief judges of the courts of the 50 states, the District of Columbia and United States territories, whose mission is to improve the administration of justice in state court systems.¹² In 1985, the Conference created a committee to address state civil jurisdiction over Indians, after questions were raised by the United States Supreme Court's two decisions in *Three Affiliated Tribes v. Wold Engineering*.¹³ The Committee on Jurisdiction Within Indian Country, later called the Tribal Relations Committee (TRC), held a series of panels and conferences on tribal jurisdiction.¹⁴ The TRC obtained funding from the National Center for State Courts and the State

Justice Institute to study tribal-state court relations, and set up demonstration forums in Arizona, Oklahoma, and Washington.¹⁵

In 1991, the TRC held a national conference in Seattle, Washington, with representatives of tribal, federal and state governments and justice systems. The TRC study and demonstration forums emphasized the need for cooperative efforts among federal, state and tribal entities,¹⁶ and the idea of creating forums to address and to resolve jurisdictional conflict expanded after this initial conference. By 2003, 17 states had created tribal-state court forums.¹⁷ In addition, the National Center for State Courts and the State Justice Institute published a 10-page guide for creating a forum, as encouragement for other states.

New York's Tribal Courts Committee and Forum

In 2002, Chief Judge Judith S. Kaye of the New York Court of Appeals created the New York Tribal Courts Committee to study the possibility of establishing a federal-state-tribal courts forum in New York and to explore how different justice systems might collaborate to foster mutual understanding and minimize conflict. She appointed Justice Marcy L. Kahn of the New York State Supreme Court to chair the Committee. Justice Edward M. Davidowitz, also of the New York State Supreme Court, soon joined the Committee and, under the guidance of Justices Kahn and Davidowitz as co-chairs, the Committee has worked for more than three years in a variety of ways to accomplish its mission.¹⁸

Emerging Issues and Consensus for a Forum

On May 22, 2003, the Committee met in Liverpool, New York, with representatives of New York's nine state-recognized Indian Tribes and Nations to ascertain their interest in developing a federal-state-tribal courts forum. Since then, meetings have been held semiannually in Liverpool and Syracuse, New York. The initial meeting sought to identify topics of special concern to the Nations.¹⁹ Among the issues discussed were difficulty with implementing the Indian Child Welfare Act (ICWA),²⁰ especially in ensuring an appropriate tribal role in state family court decisions regarding the placement of Indian children through foster care or adoption;²¹ tribal efforts to implement judicial systems and law enforcement through their own governments;²² and the need to educate and train state court judges on Indian government and culture.²³ The Committee asked that tribal representatives discuss in their home communities the possibility of establishing a permanent forum in New York to address such issues.

At the group's second meeting on November 3, 2003, Native participants agreed to help establish a permanent federal-state-tribal courts forum in New York. Subsequently, the group focused on three main issues: the placement of Indian children by the state family courts



under ICWA; the resolution of jurisdictional conflicts arising from disparate rulings among federal, state and tribal justice systems; and the need to educate state and federal judges on tribal law and culture.²⁴

During the three years following those initial meetings, members of the Committee and interested members of all nine Nations and Tribes have met every six months in Syracuse²⁵ as the New York Federal-State-Tribal Courts Forum Planning Group ("Planning Group") to address these and other issues of continuing and developing mutual interest.

Creating the Forum

In 2004, the group formalized the New York Federal-State-Tribal Courts Forum, creating and adopting an organizational structure and mission statement. Although these plans call for all nine State-recognized Nations to be members of the Forum, at this writing, in addition to the New York Unified Court System and the United States Courts for the Second Circuit, only the Oneida Indian Nation, St. Regis Mohawk Tribe, Seneca Nation of Indians, Shinnecock Tribe and the Unkechaug Nation have formally designated their members and alternate members to the Forum. While some of the Haudenosaunee Nations have not yet formally joined, their leaders continue to send members of their communities to the Forum meetings to serve as their "eyes and ears."

Committee Visits to the Nations

As part of the Forum's development, the Committee visited the Onondaga Nation longhouse, where they met with chiefs, clan mothers and council members from the Haudenosaunee, including the Onondaga Nation, Cayuga Indian Nation, Tonawanda Seneca Nation, Mohawk Nation Council and the Tuscarora Nation.²⁶ Members of the Committee also visited the Tuscarora and Oneida reservations, where they met with tribal officials and toured each Nation's territory.

First New York Listening Conference

The Development of the Listening Conference

As early as its second meeting, the Planning Group proposed an educational session at which tribal representatives could meet with federal and state judges to discuss the key issues previously identified by Native peoples in New York.²⁷ The prime importance of these issues was readily apparent – ICWA, jurisdiction and judicial education are all interrelated. Problems in one area could not be solved without, at the same time, successfully addressing each of the other issues.²⁸

At the Planning Group meeting on March 24, 2005, the Committee proposed a New York Listening Conference to educate state judges on these core issues. The subcommittee formed to plan the Conference²⁹ was a diverse group that consisted of Natives and non-Natives; federal, state and tribal judges; court administrators; lawyers; tribal administrators; child protective workers; educators; and a tribal chief. The members' spirit of cooperation and perseverance was, by itself, a ground-breaking achievement.

The endeavor could not have succeeded without the professional support of several other entities. The New York State Judicial Institute, as principal sponsor of the event, oversaw every aspect of the Conference, ensuring that its state-of-the-art resources were deployed and that continuing legal and judicial education credit was provided. The Center for Indigenous Law, Governance and Citizenship at Syracuse University College of Law joined as co-sponsor from the earliest stages of the program's development, guiding the curriculum and helping to locate Native speakers. Professor Jo Ann Harris, scholar-in-residence at Pace University School of Law and 2006 Faculty Fellow at the Judicial Institute, served as consultant and project advisor. In addition, the United States Department of Justice, Bureau of Justice Assistance, Office of Justice Programs provided a grant to underwrite travel and accommodation expenses for Native American attendees. Enthusiastic encouragement and wise counsel were provided by the Tribal Judicial Institute³⁰ at the University of North Dakota School of Law.

The New York State Unified Court System Office of Court Administration and the United States Courts for the Second Circuit were fully committed partners, as were the Native Tribes and Nations: seven of the nine state-recognized Tribes and Nations sent presenters. A total of 140 participants – members of the federal and state judiciary and all nine Tribes and Nations – attended the Conference in Syracuse.

Conference Programs

Opening the Conference

On April 26, 2006, a Wednesday night, the New York Listening Conference opened with words of thanksgiving – The Words That Come Before All Else – from the Tadodaho, Sidney Hill, spiritual leader of the Haudenosaunee and the Onondaga Nation, followed by welcoming remarks from the Tribal Courts Committee and Conference co-chair, Justice Edward Davidowitz. Todd Weber, a Tribal Courts Committee member, opened the conference as moderator of the evening program

addressing principles of restorative justice and its use in traditional tribal judicial systems. Rena Smoke, coordinator of the Mohawk Council of Akwesasne Restorative Justice Program and director of its Akwesasne Community Justice Program, discussed the scope of services and inter-agency cooperation among the Akwesasne Justice Department, the State of New York, and the Provinces of Quebec and Ontario, Canada. She explained that restorative justice focuses on the harm of the wrongdoing, rather than on rules broken, and demonstrations of concern and commitment to the victims: the goal is to restore victims through actions of the wrongdoer in the presence of the community.

The Akwesasne Community Justice Program uses clan mothers and other community members as peacemakers who listen to both sides and guide participants through the justice process. Peacemakers are not decision makers and do not assume roles analogous to those of state court

Council of the Shinnecock Tribe, also spoke about restorative justice.

Morning Events

On Thursday, April 27, 2006, the Conference reconvened. Justice Marcy Kahn opened the proceedings, taking note of the remarkable gathering of state and federal judges, tribal justice system representatives and tribal leaders. Greetings were also offered by the Honorable Ann Pfau, First Deputy Chief Administrative Judge of the New York State Unified Court System, and by the Honorable Richard C. Wesley, Circuit Judge of the United States Court of Appeals for the Second Circuit, on behalf of their respective Chief Judges.

Brian Patterson, a member of the Oneida Indian Nation Men's Council, also welcomed the assemblage, focusing his remarks on the Guswhenta, or two-row wampum belt.³¹ He explained that it represented two

Clan mothers and other community members are used as peacemakers to listen to both sides and guide participants through the justice process.

judges. Rather, they closely resemble facilitators who assist in bringing the parties to an acceptable, and just, solution. Both the perpetrator and the victim must agree to the process, and only misdemeanors may be settled in this manner. Ms. Smoke concluded by observing that the greatest challenge facing the Mohawk people has been the creation of a judicial and criminal court system that would embrace traditional cultural values while successfully working with federal and local procedures, both in Canada and the United States.

Murray MacDonald, a Crown Attorney for Stormont, Dundas and Glengarry Counties, Province of Ontario, provided a prosecutor's perspective on the Akwesasne restorative justice program, observing that his initial skepticism yielded to great enthusiasm for the program. MacDonald also noted that Canadian law favors the restorative justice approach to sentencing. He explained that although the provincial courts are not bound by findings from hearings conducted by clan mothers and peacemakers, they are generally followed.

In the second portion of the evening program, Valerie Staats, a Mohawk Turtle Clan Mother from the Six Nations/Grand River reservation in Ontario, Canada, and the President of the Native American Council on Alcoholism and Substance Abuse, Inc., presented a talk titled "Rekindling the Sacred Fires: Empowering Change, Transformation and Healing in Indian Country." She addressed issues of addiction, their relation to the punitive judicial process and the restorative and healing processes. Reverend Mike Smith, a member of the Men's

vessels traveling side by side, neither forcing its way into the other nor trying to steer the other, symbolic of the relationship between the Haudenosaunee and the federal and state governments. A lively, traditional welcoming dance by the Niagara River Iroquois Dancers followed.

The first substantive session of the morning, "Indian Country Jurisdiction 101: An Historical Review of Native American Tribal Sovereignty as Reflected in Federal and New York State Indian Law," presented the history of the exercise of sovereign jurisdiction by the Indian Nations since the founding of this country, discussing pertinent United States Supreme Court decisions, acts of Congress and federal and New York State executive policy.

Professor Robert Odawi Porter, a member of the Seneca Nation of Indians and Senior Associate Dean for Research, Professor of Law, and Dean's Research Scholar of Indigenous Nations Law at the Syracuse University College of Law, discussed the historical perspective of state and Indian affairs and the unique relationship between New York and the Indian Nations. While displaying the Guswhenta, Professor Porter explained that New York embraced an active role in Indian affairs and had followed the two-row wampum ideal for much of its history. The foundation for this relationship, he explained, was the Treaty of Canandaigua in 1794.³²

Professor Jo Ann Harris followed, noting that, with few exceptions, the federal government has asserted primacy over the states in Indian affairs. She explained that

CONTINUED ON PAGE 16

this position is rooted in the constitutional principle³³ that Indian nations are sovereigns and that, absent a specific delegation to states, only Congress has the power to engage in dealings with them that could affect their sovereign jurisdiction.

Forum delegate Peter D. Carmen, General Counsel of the Oneida Indian Nation, next described the interrelationship between jurisdiction and sovereign immunity in his primer titled "Indian Country Jurisdiction 101."

Professor Carrie Garrow, a member of the St. Regis Mohawk Tribe and the Executive Director of the Center for Indigenous Law, Governance and Citizenship at Syracuse University College of Law, emphasized the primacy of treaties and the importance of knowing the

The constitutional principle is that Indian nations are sovereigns.

context in which they were written. She encouraged the audience to endeavor to understand the viewpoints of the federal, state and tribal governments, to better appreciate the significance of each treaty to the tribe.

The second session of the morning covered a representative group of the tribal justice systems in New York. Justice Davidowitz, as moderator, introduced the panelists: Joseph J. Heath, General Counsel for the Onondaga Nation; and Forum delegates Honorable Stewart Hancock, Chief Appellate Judge for the Oneida Indian Nation Court and a former Associate Judge of the New York Court of Appeals; Honorable Robert Pierce, Administrative Judge of the Supreme Court of the Seneca Nation of Indians and Councilor with the Seneca Nation Council; and Chief Harry B. Wallace, the elected Chief of the Unkechaug Nation Tribal Council. Each chronicled the history of the justice system of their respective Nations and made several proposals. Summaries of their remarks were distributed to the attendees and are briefly recounted below.

The Onondaga Nation. The Onondaga Nation does not have a separate court system, written laws or statutes. Instead, the Nation employs a community-based dispute resolution system originating at the clan level with its clan mothers. This involves an oral system of traditions and precedents that have existed for hundreds of years. If a solution is not reached, or a dispute is not resolved by the clan mothers, the issue is then brought to the tribal council, or to the longhouse where the parties can present their cases. They and the chiefs attempt to reach a consensus solution that will hold the wrongdoer responsible, benefit the community and help affected individu-

als. There is no police force, but there is a Nation patrol and a neighborhood watch. The Nation has entered into a written agreement with the Onondaga County Sheriff's Office: law enforcement officers may not enter the reservation unless invited by a chief or required to do so because of a life-threatening situation.

Criminal cases can be referred to the Onondaga Town Justice Court and can be returned by that court to the Nation if the offender accepts responsibility and the authority of the Nation. It is the Nation's belief that the community-based dispute resolution system founded on principles of restorative justice is a more beneficial way to resolve minor criminal matters.

The Oneida Indian Nation. In 1997, this Nation established a trial court, a peacemakers' division and a court of appeals. A court clerk was appointed as well as trial and appellate judges, who serve alternate terms. The Nation also enacted comprehensive penal law, criminal procedure law and civil procedure acts, which largely follow their respective counterpart statutes under New York State law. Criminal jurisdiction is limited to offenses committed by Indians on reservations and that constitute misdemeanors under New York law.³⁴ Civil jurisdiction extends to matters relating to conduct, activities or undertakings on the reservation. The rules of civil procedure, which generally follow the New York Civil Practice Law & Rules, apply to such actions.

Most criminal trials are held before a judge, without a jury, unless expressly requested by the defendant. A jury consists of six members selected from the Nation. The maximum sentence on all crimes is imprisonment for one year and/or a fine not to exceed \$5,000. In any event, sentencing emphasizes restitution or the offender's reconciliation with the victim and the Nation; an offender is expected to right his wrongdoing. In large part, rules of evidence codify rules found in New York case law.

In 2000, the Oneidas created their own juvenile justice system, which governs children under the age of 16 who reside on the reservation and who are alleged to be juvenile offenders. Hearings are private – only interested parties may attend – and the proceedings are not considered criminal. Disposition options include placing the child with a guardian or relative, or in an institution, and restitution.

The St. Regis Mohawk Tribe. The St. Regis Mohawk Tribe has enacted a vehicle and traffic code and has its own traffic court. There are two peacemaker judges, whose decisions may be appealed to the tribal council. The Tribe also maintains its own police force which has nearly concluded the process of being officially recognized by the state of New York.

The Tribe is currently developing a family court, which is expected to begin operating in the spring of 2007. The court will address all aspects of family life and will have health and human services personnel, as well

as members of law enforcement and court administrative personnel, on its staff. The Tribe is currently determining the litigation and dispute resolution procedures to be used by its newest court.

The Seneca Nation of Indians. The Constitution of the Seneca Nation of Indians established a tribal court system composed of a peacemakers' court, a surrogate's court and a court of appeals for each of its two principal reservations. All court judges are elected to four-year terms. The peacemaker court, composed of three judges, handles disputes between Indians on each reservation. Its decisions can be reversed by the court of appeals, which is composed of six judges. That court's judgments are subject to appeal to the tribal counsel. Decisions by the tribal counsel are final and cannot be appealed.

The principles of substantive law upon which the courts rely are known as the "archives." Each court has a set of civil procedure rules. A judiciary law contains procedures for administering the different courts.

The Unkechaug Nation. The Unkechaug Nation does not have a formal tribal justice system; matters are generally referred to the New York state courts. However, the Nation requests that its laws, customs and traditions be considered as the first choice of law when litigating issues in the New York courts, according to Chief Wallace. Regulations adopted in 1964 also provide that a violation of tribal rules may be brought before the tribal council, which, in turn, may refer state law violations to the Suffolk County police department. The Chief made clear, however, that this grant of jurisdiction was not intended to yield sovereignty issues to the state of New York.

Afternoon Session

At the morning session's conclusion, participants were treated to a stirring lunchtime keynote address by Chief Oren Lyons, Faithkeeper of the Onondaga Nation. Afterward, the Conference resumed with two concurrent sessions.

One panel focused on Indian children in the state family courts. It used frequently encountered scenarios to illustrate ICWA and its application in New York. Discussion was moderated by Justice Hugh Gilbert, Non-Native Co-Facilitator of the Forum, Supervising Judge of the Family Courts for the Fifth Judicial District and Chair of the Supervising Judges of the Family Courts outside the city of New York. The first speaker, James Bay, Assistant Executive Director of the St. Regis Mohawk Tribe Administration, spoke about the work of the Tribe on youth cases and its efforts to end youth displacement from the Nation. He emphasized the need for a tribal voice in proceedings dealing with Indian children in New York state courts.

Margaret Burt, an attorney specializing in trial and appellate work in the area of child welfare, answered questions regarding the use and interpretation of ICWA.

Indian Nations and Reservations in New York State¹

Cayuga Nation of Indians

1,000 enrolled members.

Office: North Collins, Erie County

Oneida Indian Nation

630 enrolled members.

Oneida Nation Territory

Madison County (17,000 acres)

Onondaga Nation

1,475 enrolled members.

Onondaga Reservation

Onondaga County (7,300 acres)

St. Regis Mohawk Tribe

8,000 enrolled members.

St. Regis Mohawk Reservation

Franklin County (14,640 acres)

Seneca Nation of Indians

6,400 enrolled members.

Allegany Reservation

Cattaraugus County (22,640 acres)

Cattaraugus Reservation

Erie, Cattaraugus and Chautauqua Counties

(21,680 acres)

Oil Springs Reservation

Allegany and Cattaraugus Counties (1 square mile)

Tonawanda Band of Senecas

1,200 enrolled members.

Tonawanda Reservation

Erie, Genesee, and Niagara Counties (7,549 acres)

Tuscarora Nation

1,200 enrolled members.

Tuscarora Reservation

Niagara County (5,700 acres)

Shinnecock Tribe

1,300 enrolled members.

Shinnecock Reservation

Suffolk County (400 acres)

Unkechaug Nation

283 enrolled members.

Poosepatuck Reservation

Suffolk County (60 acres)

1. Sources:

New York State Office of Children and Family Services, *A Proud Heritage* 62-63 (2001).
Shinnecock Nation Official Web site: <<http://www.shinnecocknation.com/history.asp>> (last visited July 28, 2006).

The Six Nations of the Iroquois. See <http://tuscaroras.com/pages/history/six_nations.html> (last visited July 28, 2006).

U.S. Census Bureau, *Census 2000 Summary File 1*. See <http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US36&-_box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1_U&-format=ST-8> (last visited July 31, 2006).

U.S. Environmental Protection Agency Indian Program. See <<http://www.epa.gov/Region2/nations/index.htm>> (last visited July 28, 2006).

She discussed the need to follow ICWA and, particularly, the often-overlooked aspect of ICWA that requires a Nation to be treated in the state courts as, essentially, a third parent with its own rights.

Jamie E. Gilbert, a Tuscarora Home School Coordinator at the Niagara Wheatfield School District in Sanborn, New York, addressed the social services, child protective and foster care services available to Indian children in state family courts. She characterized the Tuscarora Nation's experiences in state court as difficult and reminded the audience that courts should always respect and recognize the importance of clan mothers who intervene in ICWA cases as representatives of the Nation.

The other, concurrent afternoon session, "Criminal Jurisdiction in Indian Country: the Application of 25 U.S.C. § 232," was moderated by Justice Kahn and included three panelists: Forum member Honorable Hugh Scott, United States Magistrate Judge, Western District of New York; Peter Carmen; and Professor Harris. The panel discussed a series of hypotheticals illustrating situations frequently encountered by the courts, and addressed the effect of federal law on the jurisdiction of state courts over crimes committed by Natives or non-Natives in Indian country and on the authority of tribal courts to conduct criminal prosecutions, and the extent and limits of federal criminal jurisdiction.

The final afternoon plenary session was titled "Problem-Solving: Hopes/Wishes for Justice Systems and the Interface Between Native and Non-Native Justice Systems." The panelists were Ms. Gilbert; Marguerite A. Smith, Esq., Shinnecock Tribal Representative, member of the Suffolk County Executive Task Force to Prevent Family Violence; Andrew Thomas, Chief of the St. Regis Mohawk Tribe Police Department; and Chief Oren Lyons. The speakers addressed areas of successful cross-jurisdictional efforts and identified others where similar initiatives might be fruitful, including the development of jurisdictional protocols. The group also emphasized the need for state courts to recognize the role of clan mothers; to continue educational efforts to understand the different cultures and communities within the different Indian Nations; to reach agreements between the Nations and

the state on law enforcement and security issues; and to confront racism and issues of inequality.

Participants at the conference were also treated to generous expositions of Indian culture. Members of several Nations displayed and offered for sale their crafts, jewelry and beadwork. The conference ended with a ceremonial dance performed by the Oneida Nation Dancers and a traditional concluding message by the Tadodaho, Sidney Hill.

The feedback from those who attended the Listening Conference was overwhelmingly positive. This groundbreaking event enabled its participants to learn from one another in novel ways, thereby furthering understanding of one another's respective concepts of justice.³⁵ Even judges from judicial districts that do not encompass Indian territory learned that they, too, can be affected by emerging trends in Indian law.³⁶

Next Steps

The programs and accomplishments of the First New York Listening Conference will be memorialized through the issuance of a publication under the auspices of the United States Department of Justice, Bureau of Justice Assistance. Additionally, the Forum will pursue strategies suggested at the Conference, for example, by convening regional small group meetings to address discrete local problems in particular judicial districts. One such gathering will bring together tribal clan mothers with law guardians who handle ICWA cases to educate the latter group on principles of governance and culture of the Tuscarora Nation. In addition, the clerks of the tribal courts resident in New York will have the opportunity to attend the annual training seminar offered by the New York State Association of Magistrates Court Clerks. State and federal judges from the Tribal Courts Committee will continue the committee's program of visits to New York's Indian country to meet directly with tribal leaders. The Judicial Institute will develop additional training programs based on the Listening Conference for judges of courts of record as well as town and village justices.

All in all, the participants in the First New York Listening Conference felt they had created a blueprint for building solid bridges between Native and non-Native justice systems in our state, while respecting their discrete, parallel pathways, as symbolized by the Guswhenta. ■

1. Clan mothers are tribal officials who represent their clans and are responsible for the welfare of the community. They are often instrumental in selecting the chiefs and have the power to remove them if their actions do not benefit the clan. The position is hereditary. See <<http://sixnations.buffnet.net/Culture>> (last visited July 19, 2006).

2. See "New York's Tribal Courts Committee and Forum," *infra*, for a description.

3. The New York State Judicial Institute, located in White Plains, is a year-round center for education and research designed to enhance the quality of the courts and ensure judicial excellence in New York. Inaugurated on May 5, 2003,



the Judicial Institute is the first judicial research and training facility built by and for a state court system.

4. The Center for Indigenous Law, Governance and Citizenship is a research-based law and policy institute focused on indigenous nations, their development and their interaction with the United States and Canadian governments. See <<http://www.law.syr.edu/academics/centers/ilgc>> (last visited July 17, 2006).

5. See "New York's Tribal Courts Committee and Forum," *infra*.

6. New York State Office of Children and Family Services, A Proud Heritage, at 1 (2001) available at <<http://www.ocfs.state.ny.05/main/publications/Pub4629ProudHeritage.pdf>>.

7. *Id.*

8. Three governmental bodies exist within the Akwesasne territory: the Mohawk Nation Council, which has its roots in the original Six Nations; the St. Regis Mohawk Tribe, which is the body of tribal governance recognized by the governments of the United States and the state of New York, and which operates in territory within the state of New York; and the Mohawk Council of Akwesasne, which operates entirely within the boundaries of Canada. Unless otherwise indicated, the references to the Mohawk people in this article will be to the St. Regis Mohawk Tribe.

9. The Seneca Nation formerly consisted of two separate tribal organizations, each recognized by the State of New York: the Seneca Nation of Indians, which occupies the Cattaraugus and Allegany reservations, and the Tonawanda Band of Seneca Indians, having its own reservation near Akron, New York. The Seneca Nation of Indians is currently recognized as the Seneca Nation by the governments of the United States and the State of New York. The Tonawanda Band, like the Onondagas, the Tuscaroras and the Cayugas, and in contrast with the Seneca Nation of Indians, still retains the traditional form of tribal government of the Haudenosaunee Confederacy, which involves government based on consensus. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 877 n.1 (2d Cir. 1996); see "First New York Listening Conference," *infra*, for a discussion. In this article, the references to the Nations will be referenced separately and by their currently recognized names.

10. A more detailed description of some of these justice systems was presented at the Listening Conference and is discussed in "First New York Listening Conference," *infra*.

11. See *U.S. v. Lara*, 541 U.S. 193, 210 (2004) (criminal jurisdiction); Indian Civil Rights Act, 25 U.S.C. § 1301(2), (4).

12. Ralph J. Erickstad & James Ganje, *Tribal and State Courts: A New Beginning*, 71 N.D. L. Rev. 569 n.1 (1995); National Center for State Courts, History of the Conference of Chief Justices, at 14 (1993) ("CCJ History"), available at <<http://ccj.ncsc.dni.us/HistoryPt1.pdf>> (last visited July 31, 2006).

13. 476 U.S. 877 (1986); *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138 (1984). In those cases, a federally recognized Indian tribe living on the Fort Berthold reservation in North Dakota sued in North Dakota state court for negligence and breach of contract in connection with a non-Indian defendant's construction of a water supply system on Indian land. The Court held that the application of a North Dakota statute, which had conditioned resort by Indian tribes to jurisdiction of state courts for purposes of bringing suit against non-Indians on tribes' waiver of sovereign immunity and consent to application of state law in all cases, was impermissible and was preempted by federal law. See CCJ History *supra* note 12, at 29–30.

14. Erickstad & Ganje, *supra* note 12, at 570–73.

15. *Id.* at 571.

16. *Id.* at 572.

17. Marcy L. Kahn, address at meeting of New York Federal-State-Tribal Courts Forum Planning Group, May 22, 2003, at 2 (on file with the authors).

18. In addition to co-chairs Kahn and Davidowitz, the original members of the New York Tribal Courts Committee included the Honorable John F. Keenan, United States District Judge for the Southern District of New York; Karen Milton, Esq., Circuit Executive for the United States Courts for the Second Circuit; Mizzi Diamond, Esq., Executive Assistant to the Deputy Administrative Chief Judge for the Courts Outside of New York City; and Todd Weber, Esq., Principal Law Clerk to the Honorable Jan Plumadore, New York State Supreme Court Justice and Administrative Judge for the Fourth Judicial District. The Committee currently includes judges and court administrators from federal and state courts throughout New York.

19. In order to focus its efforts on developing solutions to conflicts and working toward mutual understanding, the group has entirely excluded from all of its discussions, including those held at the Listening Conference, any reference to issues of taxation, land claims, gaming and matters in litigation.

20. Indian Child Welfare Act, 25 U.S.C. §§ 1901–1923.

21. Minutes of meeting of New York Federal-State-Tribal Courts Forum Planning Group ("Planning Group Minutes"), May 22, 2003, at 2 (on file with the authors). See Indian Child Welfare Act, 25 U.S.C. § 1912(a); 18 N.Y.C.R.R. § 431.18(c).

22. Planning Group Minutes, May 22, 2003, at 2–3.

23. *Id.* at 3–5.

24. Planning Group Minutes, Nov. 3, 2003, at 1 (on file with the authors). Participants also suggested the creation of a database which would include relevant tribal laws, codes, traditions and precedents, for reference by state court judges in cases in which such information is relevant and for interested tribes. Several of the Nations have submitted copies of their written laws which are currently housed at the Judicial Institute. *Id.*

25. Meeting space has been provided through the generosity of the United States Courts for the Second Circuit and the leadership of Chief Judge John M. Walker. Logistical assistance has been facilitated by the Honorable Norman Mordue, Chief Judge of the United States District Court for the Northern District of New York, and Karen Milton, Esq., Circuit Executive for the United States Courts for the Second Circuit.

26. *Id.* at 1. These Nations all operate within the Grand Council of the Haudenosaunee.

27. Planning Group Minutes, Nov. 3, 2003, at 2–3.

28. *Id.* at 1–2.

29. Transcript of meeting of New York Federal-State-Tribal Courts Planning Group, Mar. 24, 2005, at 28, 36–37. See "New York's Tribal Courts Committee and Forum," *supra*.

30. The Tribal Judicial Institute at the University of North Dakota School of Law, founded in 1993, provides technical assistance and training to tribal justice system personnel throughout the country. See <www.law.und.nodak.edu/nplc/judicial/index.php> (last visited on July 24, 2006).

31. The two-row wampum, or Guswhenta, commemorates treaties of the Haudenosaunee with the United States and other nations. It represents the sovereignty of the Six Nations. The two rows of dark wampum symbolize two canoes traveling down the same river. Though they are traveling side by side, the boats do not cross paths. One represents the Haudenosaunee people, as well as their religion and traditions, while the other represents the other nation and its culture. The belt symbolizes that the two entities will never try to steer the vessel of the other; neither will they interfere with the internal affairs or beliefs of the other. The dark wampum is separated by three rows of white wampum, which symbolize peace, respect and friendship forever. See <<http://www.akwesasne.ca/kaswentha.htm>> (last visited July 19, 2006).

32. 7 Stat. 44 (Nov. 11, 1794). Signed by the Chiefs of the Six Nations of the Haudenosaunee and by representatives of the United States, the Treaty of Canandaigua established the peace and friendship between the United States and the Six Nations of the Haudenosaunee and acknowledged the lands reserved to the Onondaga Nation, Oneida Nation, Cayuga Nation and Seneca Nation.

33. U.S. Const. art. I, § 8.

34. The Indian Civil Rights Act prohibits tribal courts from imposing any criminal penalty that exceeds imprisonment for a term of one year. 25 U.S.C. § 1302(7); see Major Crimes Act, 18 U.S.C. § 1153 (re-posing exclusive jurisdiction in the federal government to prosecute certain enumerated major felonies).

35. This effort was aided by conference materials which were distributed on CDs, and which included reference materials on the New York Indian Nations, their culture and history, as well as a bibliography offering hyperlinks to other reference sources.

36. See, e.g., *In re Baby Boy C.*, 27 A.D.3d 34, 805 N.Y.S.2d 313 (1st Dep't 2005), which was discussed during the afternoon ICWA session. (Appellate Division, First Department declined to adopt the "existing Indian family" exception, which avoids application of ICWA in certain cases, holding that ICWA applied in case of private adoption, irrespective of whether the Indian child's birth parents had significant connections to the tribe; case originated in New York County).

BURDEN OF PROOF

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Can an Old Dog Learn New Tricks?

Last issue's column reported on the promulgation of new rules governing deposition practice in New York state courts, scheduled to take effect on October 1, 2006. By the time this column is published, motions will have been made both to enforce the new rules and to seek sanctions and/or disclosure penalties for violations of the rules. Some time next year there should be enough lower court, and perhaps appellate, decisions to warrant a column on judicial enforcement of the new rules.

In the interim, until there is guidance from the courts, what does compliance with the new rules require? Can attorneys continue with their present tactics and techniques, or is change required? And, if change is required, for experienced attorneys, including the barking attorney from last issue's column, I repeat the question posed at the end of the last column: Can an old dog learn new tricks?

What Remains the Same; What Changes

Many will argue that the new rules simply codify the existing case law, and, therefore, everything remains the same. This position ignores the fact that there is a certain degree of variance in existing case law on important deposition procedures. It also ignores the fact that some issues were not, to this author's knowledge, previously addressed.

Directing Witnesses Not to Answer Questions

Variance in existing case law is perhaps best illustrated by comparing two well-known First Department cases

addressing the propriety of an attorney directing a witness not to answer a question. In *Spatz v. Wide World Travel Service, Inc.*,¹ a 1979 decision, the First Department stated: "Counsel is without authority to direct a witness to refuse to answer questions at an examination before trial." However, in a 1999 decision, *Monica W. v. Milevoi*,² the First Department refused to permit further inquiry by the questioning attorney where the defending attorney had on more than 100 occasions directed the witness not to answer questions.³ The First Department explained:

As noted by this Court in *Wyda v. Makita Elec. Works* (162 A.D.2d 133), the broad discretion extended to Supreme Court to supervise disclosure . . . also extends to the Appellate Division . . . and it is not necessary that plaintiffs demonstrate an abuse of discretion to warrant reversal of the discovery order under review. . . . Defendants have not established that the line of inquiry they seek to pursue will avail them of any useful information relevant to the cause of the infant plaintiffs' impairment (*see, Osorio v. Olga Taxi Co.*, 23 A.D.2d 730 [no need for examination before trial to elicit facts that cannot be proven at trial]). Therefore, this Court declines to permit further examination in this area.⁴

Interestingly, the First Department in *Monica W.* did not cite *Spatz*.

These two contradictory cases have provided fodder for both sides involved in motion skirmishes over directions not to answer questions at a deposition.

What do the new rules say about this practice?

§ 221.2 Refusal to answer when objection is made

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.⁵

So, for starters, *Spatz*, which could not possibly have ever meant what it said,⁶ is out since the new rule specifically contemplates a direction by counsel not to answer a question, under § 221.2(i), where there is a "privilege or right of confidentiality."

Most privileges are easy to identify, at least in the abstract. However, pinpointing when questioning at a deposition crosses over from foundation issues, to which a privilege generally does not apply, to a protected matter, is sometimes difficult. And, since counsel may be subject to discipline for disclosing privileged information, tight control over a witness at a deposition, and erring on the side of caution, is necessary.

The "right of confidentiality" is harder to define, although case law provides some guidance. For example, tax returns: "[B]ecause of their 'confidential and private nature' disclosure of tax returns is disfavored, and defendants are required to establish

that the information contained in the returns they seek 'is indispensable to this litigation and unavailable from other sources.'"⁷ It necessarily follows that if the documents are "confidential and private" in nature so that their disclosure may only be had upon a special showing by the party seeking them, then questioning a witness concerning the contents of a tax return at a deposition is improper without the questioning party establishing entitlement to the information.⁸

Enforcing a Limitation Set Forth in a Court Order

Here, the new rules simply state a proposition that has always existed and which cannot be seriously disputed.

Section 221.2(ii) of the new rules does not distinguish between a written order and an order made verbally by the court, whether at a conference or in the course of seeking a ruling, be it in person before the court, telephonically, or on papers. The rule is written "to enforce a limitation set forth in an order of a court." So, where the scope of examination has, in some way, been limited by an order of the court, counsel may direct a witness not to answer a question so as to carry out the terms of, consistent with the intent of, the order.

What if the order, rather than limiting the examination, directs that a witness answer specific questions, or line of questioning? What happens to the attorney who, for example, believes that a question seeks "confidential and private" information, for which the requisite showing of entitlement has not been made? May counsel direct the witness not to answer, despite a clear order by the trial court directing that the question be answered? The new rules do not address this situation, so attorneys must fall back on existing case law and rules of procedure.

Plainly Improper and Significant Prejudice

Finally, § 221.2(iii) does, in fact, constitute a change in existing case law. The leading case prior to the adoption of

the new rules, *White v. Martins*,⁹ established the following rule:

But there is always the possibility of questions that infringe upon a privilege, or that are so improper that to answer them will substantially prejudice the parties; or questions that may be so palpably and grossly irrelevant or unduly burdensome that they should not be answered. Thus, although the statute provides that the deposition shall proceed, it adds "subject to the right of a person to apply for a protective order." (Such a protective order may be obtained either by formal motion or by informal application for a ruling to the Justice designated to make such rulings.)¹⁰

Other courts have used different terminology in describing questions that need not be answered at a deposition:

[U]nless a question is clearly violative of a witness'[s] constitutional rights, or of some privilege recognized in law, or is palpably irrelevant, questions [at an examination before trial] should be freely permitted and answered, since all

objections other than those as to form are preserved for the trial and may be raised at that time.¹¹

Under *White*, four distinct categories of questions were improper:

1. those that infringe upon a privilege;
2. those so improper that to answer them will substantially prejudice the parties;
3. those palpably and grossly irrelevant; and
4. those unduly burdensome.

Privilege is covered by § 221.2(i). Under the new rules, the last three categories are merged into one, requiring a dual showing before a direction not to answer may be given: "When the question is plainly improper and would, if answered, cause significant prejudice to any person." What exactly does this mean?

Presumably, "plainly improper" is the functional equivalent of "palpably improper." What is "palpably improper"? As the Second Department helpfully explained last year: "The demands were palpably improper in

that they were, inter alia, of an overbroad and burdensome nature.”¹²

Are you starting to feel as though you are going in circles? At the end of the day, “plainly improper” will, in all likelihood be like pornography – a judge will know it when he or she sees it. Not much guidance, I know.

However, the inquiry does not end with “plainly improper.” In order to direct a witness not to answer the “plainly improper” question, the question must also “cause significant prejudice to any person.” Unfortunately, this element is not explained in the new rules, and case law, to my knowledge, does not offer guidance.

Hold on, we are not done yet. It is also a requirement under § 221.2 that “[a]ny refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor.”¹³ Fair enough. But there is a danger in making a “succinct and clear” statement on the record. What if your statement goes beyond being “succinct and clear”?

Speaking Objections

The new rules now codify in New York State practice the teachings of *Hall v. Clifton Precision*.¹⁴

§ 221.1(b) Speaking objections restricted.

Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.¹⁵

Last issue’s column quoted *Hall* and offered a practical suggestion or two to avoid running afoul of this section of the new rules.

Talking to Your Witness

What about the common practice of pulling the witness out of the deposition room to confer? The new rules

address this practice in “succinct and clear” terms:

§ 221.3 Communication with the deponent

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

As always, the practice may continue with consent of all parties. Absent consent, the only basis is to determine whether a basis exists under one of the subsections of § 221.2 not to answer the question.

Does this bar conferring with the deponent in a way that does not “interrupt the deposition”? After a question is answered and before a new question is asked? On a lunch break during the deposition? Over dinner between days one and two of a deposition? Hard to tell with the way the rule is written.

Running Interference

Finally, obstructionist and other bad, but all-too-common, behavior is now barred by the new rules:

Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

Interference of this sort has long been criticized by courts, perhaps best in a 2003 First Department opinion, *Orner v. Mount Sinai Hospital*.¹⁶

That some of plaintiff’s counsel’s questions were inartful or otherwise imperfect did not give defense counsel license to react impatiently nor interfere as he did. A complete reading of the depositions reveals that defense counsel’s attitude toward plaintiff’s counsel was sardonic and unprofessional which, in turn, fostered an uncooperative attitude from defendants’

witnesses. Indeed, “[d]efendants’ counsel, in ordering his clients not to respond during depositions to questioning in areas which counsel unilaterally deemed to be irrelevant, and in continually objecting to matters other than form . . . effectively thwarted plaintiffs’ efforts to depose defendants.”

No grey area here under the new rules.

Conclusion

While the new rules are salutary in their intent, practical application of some of the provisions may be problematic, even for attorneys fully intent on complying with both the letter and spirit of the rules. Hopefully, members of the bar will work together to eliminate much of the contentiousness that has marred depositions in the past, and will, at the same time, temper their requests for judicial enforcement and penalties during a reasonable “break-in” period for the new rules. ■

1. 70 A.D.2d 835, 418 N.Y.S.2d 19 (1st Dep’t 1979).
2. 252 A.D.2d 260, 685 N.Y.S.2d 231 (1st Dep’t 1999).

3. *Id.* (“In the course of a deposition that extended over five days and produced a transcript of 815 pages, Quintina W. was asked some 103 questions concerning the nonparty siblings of the infant plaintiffs, to which counsel directed her not to respond. Other questions, which she was also directed not to answer, concerned her general medical history, her total number of pregnancies, including any abortions, and the medical history of the twins’ father, including alleged alcohol abuse.”) *Id.* at 261.

4. *Id.* at 264.

5. 22 N.Y.C.R.R. § 221.2.

6. It is my personal opinion, without case citation to back me up, that *Spatz* has led to the practice of certain attorneys to advise their clients not to answer questions at a deposition, rather than directing the witness not to answer, a distinction I have always believed was one without a difference.

7. *Nanbar Realty Corp. v. Pater Realty Co.*, 242 A.D.2d 208, 209, 661 N.Y.S.2d 216 (1st Dep’t 1997) (citation omitted).

8. How to do this procedurally is another matter, which space here does not permit coverage.

9. 100 A.D.2d 805, 474 N.Y.S.2d 733 (1st Dep’t 1984).

10. *Id.* at 805 (citations omitted). See CPLR 3113(b).

11. *Dibble v. Consol. R.R. Corp.*, 181 A.D.2d 1040, 1040, 582 N.Y.S.2d 582 (4th Dep’t 1992) (citation omitted).

12. *Bongiorno v. Livingston*, 20 A.D.3d 379, 382, 799 N.Y.S.2d 98 (2d Dep’t 2005) (citation omitted).

13. 22 N.Y.C.R.R. § 221.2.

14. 150 F.R.D. 525 (E.D. Pa. 1993).

15. 22 N.Y.C.R.R. § 221.1(b).

16. 305 A.D.2d 307, 309–310, 761 N.Y.S.2d 603 (1st Dep’t 2003) (citation omitted).

POINT OF VIEW

BY WILLIAM S. GREENAWALT & DAVID A. KOENIGSBERG



WILLIAM S. GREENAWALT represented the referendum petitioners from Ardsley and Dobbs Ferry in the Supreme Court and Appellate Division cases discussed in this article.

DAVID A. KOENIGSBERG, an attorney, was a proponent of the referendum vote in Dobbs Ferry.

Move Village Elections to November

New York State's Election Law provides that the election for local village officers shall take place in March each year. Villages may, however, opt to change their election schedule. Changing the time of the village general election from March to November has the potential to save a village thousands of taxpayer dollars every year, increase voter participation, and provide a fuller discussion of local issues because of a longer campaign in better weather. The New York Village Law provides that a village's annual budget will be formulated in March and adopted in April.¹ Thus, the November election provides more seasoned officers time to review the budget instead of requiring them to vote almost immediately after a March election.

The process for changing the date of a village's election appears on its surface to be relatively simple. A referendum to change the village election date may be placed on the ballot either by a resolution of the village board of trustees or by a petition of registered voters for a referendum and a favorable referendum vote.

However, two recent companion court cases highlight procedural pitfalls in the statutes that can be used to thwart the referendum process should a local board of trustees oppose such a change. Absent cooperation from a village's trustees, voters petitioning to have the question put to a referendum vote must have a thorough understanding of the state's Village Law and Election Law, to insure that

the question is placed on the ballot. Petitioners need to know what are the various statutes deemed applicable by courts, their consequences, and how to navigate or challenge the decisional law to ensure that the petition process results in a referendum being held on the date sought.

The Statutory Structure

Section 15-104 of the Election Law provides that a general village election shall be held on the third Tuesday in March, unless a village adopts a proposition to elect its officers on a different date.² The board of trustees may adopt a resolution to have the election occur on the day of the regular November general election.³ If its action is not challenged by local petitioners, it becomes final and the date is changed. If enough petitioners challenge the board's action, the proposed change is subject to a "permissive referendum" vote by the village. If the referendum vote is favorable to the board's action the election date will be changed.

Section 9-912 of the Village Law also authorizes the board of trustees to pass a resolution, and permits the voters to submit a petition, to place on the ballot for referendum the question of changing the voting date.⁴ Where the village board opposes changing the time for the village election, and refuses or fails to adopt a resolution to do so, local voters by petition can force the board to place the question on the ballot. This is called a "mandatory referendum," which is conducted in the same way as a permissive referendum.⁵ The require-

ments for the content and form of this citizen initiative petition are set forth in §§ 9-900 and 9-902(8) of the Village Law.

If the petitioners seek to hold the referendum vote at the annual March village election, or on a special village election date selected by the village board, the number of signatures necessary to compel the board to place the referendum on the ballot varies with the size of the particular village; but, even for villages with a population of 5,000 or more, the requirement does not exceed 200 registered voters.⁶ In that case, the question shall be submitted at the next regular or special election for village officers, "held not less than thirty days after the filing of such petition."⁷

If, however, the petition demands that the referendum be held at a time other than the regular or a special village election, "such petition must contain twice the number of signatures otherwise required."⁸ Thus, if voters seek to have the referendum held on a specific date, such as the date of the November general election, rather than in March, the petition must have double the number of signatures, or as many as 400 signatures for a village of 5,000 or more. In either case, "such referendum shall be held no less than thirty, nor more than sixty, days after the filing of such petition."⁹ Accordingly, if the petition specifies a referendum date such as the November general election day, it must be filed between 30 and 60 days before the date for the proposed referendum.¹⁰

Another requirement, which figured prominently in two recent cases, is set forth in Election Law § 4-108. This law provides that when a petition seeks to have a village referendum held at the November general election, the village clerk must transmit to the County Board of Elections “at least thirty-six days prior to the election . . . a certified copy of the text of such . . . referendum, and a statement of the form in which it is to be submitted” to a vote of the people of the village.¹¹

Petitions and Opposition in Westchester

In the fall of 2003, petition drives were mounted in the villages of Ardsley and Dobbs Ferry, in the Town of Greenburgh in Westchester County, to hold referenda to change each village’s election day from March to November. In each case, the referendum process was initiated by means of citizen petitions submitted to the respective boards of trustees, requesting that a referendum be held on the date of the general election, November 4, 2003.¹² The petitions were submitted in anticipation of the boards’ action at their mid-September meetings.¹³

The Ardsley petition required 200 signatures and had 431, and was filed on September 15, 2003. The Ardsley village manager was told on September 9, 2003, that the petition would be submitted on September 15 in advance of the Board Meeting that night. The petition was submitted, accompanied by a cover letter, a copy of Village Law § 9-912, a form of resolution for the Ardsley Board of Trustees, a notice of adoption of the resolution for transmittal by the clerk, and an abstract of the referendum question. At the meeting, the Mayor stated that the petition had been duly filed, and that Village Law § 9-912 required the Board to have the question placed on the November 4, 2003, ballot. But the Mayor said he was opposed to changing the village election date, and referred the matter to the Village Attorney for “study,” saying it would be revisited at the Board’s next meeting on October 7.

The Dobbs Ferry petition required 400 signatures and had 613, and it was filed with the clerk on September 22, 2003, with the same additional documents. At the Dobbs Ferry Board meeting on September 23, the Mayor acknowledged the filing, but stated that the “matter was referred to the Village Attorney and Village Administrator for appropriate action under the law.” The Board did not pass the requested ministerial resolution asking the county Board of Elections to place the question on the November 4, 2003 ballot, nor was a special meeting of the Board called for that purpose.

None of the petition signatures in either village was challenged. The Dobbs Ferry clerk waited nine days and then certified on October 2, 2003, that all the signatures on the Dobbs Ferry petition were authentic and correct. The Ardsley clerk waited 22 days

and similarly certified on October 7, 2003.

Petitioners Seek Relief

A majority of the trustees in each village opposed a change in the village election date and, as noted, neither Board passed a ministerial resolution placing the matter on the ballot, and neither clerk immediately transmitted the necessary paperwork to the Westchester County Board of Elections. On October 1, 2003, petitioners in both villages commenced CPLR Article 78 mandamus proceedings in the Supreme Court, Westchester County, by verified Petition and Order to Show Cause, to compel the villages and the County Board of Elections to place the question on the November ballot for referendum. In addition to the Mayor, the Board of Trustees and the Clerk of each village, the Commissioners of the

POINT OF VIEW

Westchester County Board of Elections were also named as Respondents in each suit, to insure swift compliance with any court orders. Each village filed a motion to dismiss the respective Article 78 proceeding and Petition.

Article 16 of the state's Election Law requires priority and expedited review of election law disputes concerning "any proposed . . . proposition or question"¹⁴ brought by special proceeding. A hearing was held on October 8, 2003. The Ardsley petitioners prevailed, and the Ardsley referendum vote was held as requested, but the Dobbs Ferry petitioners were unsuccessful, and the vote

Petition.¹⁶ The court opined that the Legislature did not intend in Village Law § 9-912 to allow two elections in November, the general election and another special election. Using what it termed a "reasonable, appropriate and practical" construction, the court held that the phrase "regular election" in Village Law §§ 9-910 and 9-912 referred to the regular general election rather than the regular village election.¹⁷ Thus by filing double the minimum number of signatures, the petitioners could have the referendum at the November general election if the petition specified that date. The court held that "in compliance

on September 22, 2003, 43 days before November 4, it was untimely under the 45-day provision, precluding a referendum on November 4, 2003.²¹ On the basis of how this 45-day requirement fell, the Ardsley petition was granted, and the Dobbs Ferry petition was dismissed.²²

The court found "no contradiction" between MHRL and Election Law § 4-108(1)(b), which was the primary statute urged by the village trustees. That provides that "at least thirty-six days prior to the election at which [a] . . . referendum is to be submitted," the village clerk shall transmit to the

Procedural pitfalls can be used to thwart the referendum process should a local board of trustees oppose such a change.

was not conducted until March 2004. The technical grounds by which the courts distinguished these two petition efforts, rewarding one and frustrating the other, are examined below.

In court, the trustees of each village contended that they were not bound to hold the referendum on November 4, 2003, the date specified in the petitions, but had the discretion to determine, within the time limits prescribed by the Village Law, the special election date for the referendum vote.¹⁵ The boards in both villages provided diversionary referendum dates and placed them before the court. The Ardsley Board, at its October 7, 2003, "revisitation" meeting, voted to hold the referendum at a special election on November 12, 2003. That date would have required the voters to vote twice in November 2003. The Dobbs Ferry Board represented to the court that it was "undertaking steps that will place the ballot referendum before the voters in the March 2004 general village election."

The petitioners contended, and the Westchester County Supreme Court held, that the referendum date specified in the petition controlled, and that the trustees had no discretion or power to schedule the referendum on a date other than the one designated in the

with the language of the various statutes . . . the regular election date would be the regular election on November 4th [2003]."¹⁸ The court also noted that no objections were filed to either set of petitions "within the five day period of time for filing such objection contained in Village Law § 9-902."¹⁹

The petitioners contended that since they had complied with the 30–60 day filing window specified in the Village Law prior to the November 4, 2003 referendum, the referendum should proceed on November 4. But the court did not consider this undisputed fact, or this statute, dispositive. Instead, the court went on to hold that under Municipal Home Rule Law (MHRL) § 23 and § 24, each petition had to be filed more than 45 days before the specified referendum date in order to allow the village clerk enough time to inspect the petition and transmit a certificate of examination and a copy of the proposal to the Westchester County Board of Elections.²⁰ The court held that the Ardsley petition had been timely filed on September 15, 2003, 50 days before November 4, and directed that the referendum be placed on the Ardsley November 2003 election ballot. On the other hand, the court held that because the Dobbs Ferry petition had been filed

County Board of Elections "a certified copy of the text of . . . [the] referendum and a statement of the form in which it is to be submitted," and an abstract stating its purpose and effect in clear language.²³ The court found that the Legislature intended the six-day difference between 36 days and 30 days as a span of time for receipt of mail.²⁴

The Ardsley Board of Trustees did not appeal the decision and order, and the referendum was duly placed on the November ballot by the County Board of Elections. The referendum passed 453–321,²⁵ and Ardsley's first November village election was held on November 2, 2004.

The Dobbs Ferry petitioners moved for reargument by Order to Show Cause on October 15, 2003. The petitioners' primary point on reargument was that MHRL § 23 and § 24 by their terms do not apply to citizen-initiative petitions. MHRL § 24(b) applies to a "local law adopted by a village" which is "subject to referendum on petition" (that is, a permissive referendum) when sufficient local electors, meaning registered voters, protest against the law by petition. MHRL § 23 applies to a local law adopted "subject to mandatory referendum," and only incorporates by reference the "certifi-

cation by the clerk” process for those petitions filed within 30 days “after the adoption of such local law . . . [and] requesting its submission at a special election” (emphasis added), which is not the November general election. Further, MHRL § 23 and § 24 require a greater number of petitioners than is needed for the citizen initiative petition procedure under the Village Law and the Election Law. Finally, MHRL § 24 refers to permissive referendum procedures under Village Law Article 9, not to mandatory referenda.

On October 22, 2003, the supreme court issued its opinion on submission of papers, granting reargument but adhering to its original determination.²⁶

Dobbs Ferry Petitioners Appeal

The Dobbs Ferry petitioners appealed to the Appellate Division, Second Department, urging again that the 45-day time period in Municipal Home Rule Law § 23 and § 24 did not apply to the citizen initiative referendum process set forth in Village Law § 9-912. The trustees argued that MHRL § 23 and § 24 applied to all mandatory referenda in New York State, and that the “clerk review” specified there was necessary for the Dobbs Ferry petition.

The Second Department agreed with the Dobbs Ferry petitioners on this point, holding that MHRL § 23 and § 24 had no applicability to citizen initiative petitions, and that the lower court had “improperly relied” upon the MHRL to dismiss the Dobbs Ferry petition as untimely.²⁷ The Appellate Division left undisturbed the holding that the referendum date specified in the petitions was controlling, and that the village board could not substitute another date.²⁸ It held that the petitioners had indeed complied with the requirements of Village Law § 9-912 for citizen-initiated propositions to be considered by the electors of a village, including filing the petitions 30–60 days before the referendum date.²⁹

The court, however, found a fatal impediment to the Dobbs Ferry referendum. Under Election Law § 4-108(1)(b),

the village clerk is required to transmit to the Board of Elections, within 36 days before a proposed referendum vote, a certified copy of the text of the proposal that is to be voted on.³⁰ This required a village clerk to transmit the proposition “when it is *certain* that such proposal will in fact be placed on the ballot.”³¹ In the case of Dobbs Ferry, at the time the 36-day window deadline expired on September 29, 2003, the Dobbs Ferry Village Clerk had not yet completed her review of the petition for purposes of certification, and therefore, according to the court, could not timely forward a certified copy of the proposition’s text to the Westchester County Board of Elections, pursuant to the Election Law.³² Although voter signature cards are at the village clerk’s office, and it could not take more than a few minutes to review a signature, the appellate court held that, in the absence of any evidence rebutting the clerk’s statement “that she did not delay in her review of the petition and that she did not engage in inaction with respect thereto,” the supreme court had properly dismissed the petition “under the circumstances,”³³ thereby precluding a November 2003 referendum vote in Dobbs Ferry.³⁴

Guidelines and Reflections

As a result of these court decisions, several matters have been clarified about citizen efforts to change a village’s election date. A significant result for citizen-petitioners is the holding that petitioners submitting double the minimum signatures can designate the November general election date for their referendum, and it must be observed. The trustees may not ignore that date and schedule the referendum for a different date. Although the cases involved petitions designating the referendum date for the general November election, and not for a regular or special village election, it appears that submitting double the required signatures mandates that the referendum be held on the date named therein, not a special election date set by a potentially unfriendly board.

Other points appear to require further examination and harmonizing through litigation or legislation. Although Village Law § 9-912 requires that the petition be filed between 30 and 60 days before the date specified for the referendum vote, it should be filed with the village clerk as close to the 60-day date as possible. As matters stand now, the Village Law’s already narrow 30-to-60 day window

POINT OF VIEW

for the filing of petitions before the referendum has been pared back to 36-to-60 days, or perhaps even 45-to-60 days. This severe reduction results from the Appellate Division's engrafting Election Law § 4-108 onto Village Law § 9-912, holding that the village clerk has a mandatory period, but of unspecified duration, to review and certify the petition to the county Board of Elections. The Appellate Division has suggested that it must be filed an unspecified number of days greater than 36 days before the date of the proposed vote, to comply with the requirement of Election Law § 408(1)(b) that the village clerk is to certify the petition and transmit the paperwork to the Board of Elections.

Thus, as a practical matter, the petition should be filed near the 60-day outside limit to avoid or and to overcome any argument that not enough time was permitted for the clerk's review and certification.

Election Law § 4-108 should not be used to eviscerate or control the citizen-initiative petition process. The proposition that it takes more than a day, or at most two, for a village clerk with voter signature and address cards to review 400 or 600 petition signatures of local village residents, is not compelling. Giving a clerk, who is responsible to a village board that is hostile to a petition, the power to stretch "review" of the petition to seven days, or 22, and thus keep it from the ballot, is not consistent with the legislative structure.

The village trustees contended, and the courts found, that a clerk review was called for here. However, it has been held that in the absence of a statutory "clerk review" provision for the specific type of petition in question, the clerk has no power to review or to hold up submission of the petition, but must perform "strictly ministerial" duties in forwarding it.³⁵ Election Law § 4-108(1)(b) does not explicitly provide for any village clerk review of the petition. It provides only that the clerk shall do ministerial acts:

[T]he clerk of such political subdivision, at least thirty-six days prior

to the election at which such proposal, proposition or referendum is to be submitted, shall transmit to each board of elections a certified copy of the text of such proposal, proposition or referendum and a statement of the form in which it is to be submitted.

Moreover, § 4-108(b) does not require that the certified copy be transmitted to the Board of Elections only "when it is *certain* that such proposal will in fact be placed on the ballot." The Appellate Division has engrafted a substantive "clerk review" requirement onto Village Law § 9-912, as opposed to the ministerial acts set forth in § 4-108. The "certainty" standard is circular since it is not "certain" the proposal will be placed on the ballot until the clerk certifies. The court has also compounded the clerk's (and a village board's) ability to frustrate the citizen-initiative petition process by placing the burden of proof on the petitioners to show that the clerk delayed his or her review or "engaged in inaction" if, as would be expected, the clerk swears in an affidavit that he or she acted properly. Contradicting affidavits by petitioners would only create a question of fact on that point, and might not be decisive.

Moreover, leaving uncertain the number of days a village clerk must certify before the 36-day submission deadline in § 4-108 makes it extremely difficult and unpredictable for petitioners. The current state of the law severely truncates the 30-60 day window of § 9-912. Further legislative or judicial refinement of the procedural parameters for this citizen effort appears necessary.

In addition to being cognizant of these legal requirements and practical principles, proponents of the referendum process who desire to hold the referendum vote at the regular November election should, preferably before they start gathering signatures, check with the County Board of Elections to verify the Elections Board's deadlines for placing referenda on the ballot, and the type of documentation that must be supplied by the village clerk. At the time the petition is filed, the petition-

ers, as they did in Ardsley and Dobbs Ferry, should provide the village clerk with written notice of the deadline to transmit the proposition to the Board of Elections and remind the clerk of his or her duty to promptly and diligently review the petition to meet that deadline. As in Ardsley and Dobbs Ferry, the referendum proponents should also provide a written proposed form of resolution that tracks the language of the proposition as stated in the petition, and other ancillary documents, to assist the clerk in providing the necessary documentation to the Board of Elections.

Conclusion

Conducting local village elections in November instead of March can save local governments thousands of dollars, lead to fuller discussion of issues, and result in greater voter participation in local elections and better informed debate during the budget process. The March date can be changed through referendum. In the event a village's trustees do not pass a resolution setting a November election date, or setting a referendum date to vote on such a change, the citizens have the right to petition and to set the date for such a referendum. By gathering the signatures of several hundred voters and presenting the petition to the village clerk between 45 and 60 days before the date of the proposed vote, the citizens of a village have the power to effect change that, on the local level, will save money and increase participation in the democratic process. ■

1. See Village Law §§ 5-502–5-510 for changing the village's fiscal year.

2. Election Law § 15-104(1)(a). See generally J. Bellano, *A Change for the Better: Changing the Date of Village Elections*, N.Y. St. B.J. (Oct. 1996) p. 44.

3. Election Law § 15-104(1)(c). The village board may also resolve, subject to a permissive referendum, to have the village election conducted by the County Board of Elections, instead of by town or village election officials.

4. Village Law § 9-912(1), (2)(e).

5. Village Law § 9-900.

6. Village Law § 9-912(1).

7. *Id.*

8. *Id.*
9. *Id.*
10. Village Law § 9-912 does not say where the petition is to be filed, nor does it refer to any other statute's filing requirements.
11. Election Law § 4-108(1)(b). See *Broda v. Monahan*, 309 A.D.2d 959, 767 N.Y.S.2d 111 (2d Dep't 2003).
12. The drives were conducted by the Ardsley Good Government Committee and the Dobbs Ferry Good Government Committee.
13. In 1998, Mamaroneck's Clerk-Treasurer and Board of Trustees, who later campaigned against the referendum changing the date, nonetheless accepted and forwarded to the County Board of Elections on or about September 18, 1998, the petition filed September 11, 1998 for a referendum at the 1998 November general election on changing the Mamaroneck village election date to November, together with ancillary documents. See September 18, 1998 forwarding Letter of Leonard M. Verrastro, Mamaroneck Clerk-Treasurer.
14. Election Law §§ 16-100, 16-104(2).
15. See Transcript of Proceedings, *Nardecchia v. Abate*, Index No. 15693/03; *Broda v. Monahan*, Index No. 15694/03, at 55 (Sup. Ct., Westchester Co., Oct. 8, 2003).
16. *Id.* at 62-63.
17. *Id.* at 61-63.
18. *Id.* at 70.
19. *Id.* at 49-50; Village Law § 9-902(9).
20. *Nardecchia v. Abate*, Index No. 15693/03; *Broda v. Monahan*, Index No. 15694/03 at 66-67; MHRL § 24(1)(a); alternatively § 24(1)(a) required clerk certification not later than 30 days after its filing if that was an earlier date. Here, the 45-day backwards date was the earlier one.
21. *Nardecchia v. Abate*, Transcript of Proceedings, Index No. 15693/03 (Sup. Ct., Westchester Co. Oct. 8, 2003).
22. *Id.* The court said, "This is good news for one municipality and not so good news for the other." *Id.* at 66.
23. Election Law § 4-108(1)(b), (d).
24. *Id.* at 67-68. This is confusing, since MHRL says that the 30-day period is for the village clerk receiving a petition in response to "a local law adopted"; it does not refer to the County Board of Elections clerk.
25. See *Ardsley Election Date Proposal Passes*, The Journal News, Nov. 14, 2003.
26. *Broda v. Monahan*, Decision and Order, Index No. 15694/03 (Sup. Ct., Westchester Co., Oct. 23, 2003).
27. *Broda v. Monahan*, 309 A.D.2d 959, 767 N.Y.S.2d 111 (2d Dep't 2003).
28. *Id.*
29. The court did not consider petitioners' point that, even if *arguendo* there is any "review" period, since no objections to the petition had been made within the five-day period allowed under Village Law § 9-902(9), and since that was certainly an adequate review period, the Village Clerk had to forward the petition.
30. *Broda v. Monahan*, 309 A.D.2d 959, 767 N.Y.S.2d 111 (2d Dep't 2003) (quoting Election Law § 4-108(1)(b)).
31. *Broda*, 309 A.D.2d 959 (emphasis in original).
32. *Id.* The Dobbs Ferry clerk had asserted she had 30 days to complete the review under MHRL § 24(1)(a). In Dobbs Ferry, the referendum petition was signed by over 600 voters.
33. *Broda*, 309 A.D.2d 959. The Appellate Division Decision and Order was dated October 30, 2003, only five days before the November 4 election date. The County Board of Elections had raised practicality questions about placing the referendum on the ballot, and about absentee voters, many of whom had already voted on a ballot without the referendum. These points were not discussed by the court, but may have been part of the "circumstances."
34. Notwithstanding their victory in court, the Trustees passed a resolution to conduct the referendum during the March 2004 village election. The referendum passed by a vote of 787 in favor of changing the time of the village election, and 685 against. See *Dobbs Ferry Elections to Move to November*, The Journal News, Mar. 18, 2004. As a result, the Dobbs Ferry Village elections are held at the time of the regular elections in November each year, beginning in November 2005.
35. *Arditti v. Jacobson*, 180 Misc. 884, 44 N.Y.S.2d 750 (Sup. Ct., Nassau Co. 1943).

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PRESENTATION SKILLS FOR LAWYERS

BY ELLIOTT WILCOX



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

Powerful Openings

"Ladies and gentlemen, Madam Chairman, and distinguished members of the head table – thank you for letting me speak with you tonight. It is a real pleasure to be here at the Acme Company annual meeting. I just flew in from Duluth, and boy, are my arms tired. [Pause for laughter.] Let me apologize in advance, but I didn't know I was going to be called on tonight to speak . . ."

Ugh. If that's how the speech started, would you want to listen to any more? Unfortunately, that's exactly how many speeches start, wasting opportunities that are only available at the beginning of the presentation.

The first moments of a speech set the mood for the entire presentation. Start with a whimper, the audience predicts the rest of your speech will bore them. Ramble at the onset, they bet the rest of your speech lacks direction, too. But start your speech with power, energy, and conviction, they scoot to the edge of their seats, focus their eyes on you, and pay rapt attention. Successful openings can accomplish three objectives:

1. Grab the audience's attention. Effective openings capture the audience's attention from the very first word. Remember, it's not enough to just start strong – the rest of your speech must deliver on the promises you make with the opening.

2. Focus their attention (introduce the topic). When you begin, the audience may not be focused on you. You're competing with incoming Blackberry messages, catastrophes at home, even their desserts. You need them to focus on you and your presentation. Give the

audience a reason to listen to your presentation. When they understand why the topic matters to them, they'll want to listen to the rest of your speech.

3. Connect with the audience. Smile. Look them in the eyes. Show enthusiasm. These first moments let you develop rapport with your audience. The more they like you, the more they want to listen to you.

Here are six techniques to help jump start your next presentation:

Start with a story. "As I drove past the guard gate and pulled into Sarah's driveway, I had no idea how much my life was about to change. It was early April, 1998 . . ." People's ears perk up when they hear a story.

Start with a question. "How confident do you feel about your retirement plan? Will you be able to maintain the lifestyle you've grown accustomed to?" A good question will pique your audience's interest and keep them listening for your answer.

Start with the benefits. "Imagine crafting an opening statement where your client's story comes to life. The jury leans forward, listening with rapt attention and nodding their heads in agreement. From the corner of your eye, you see your opponent writing (a very large) number on a piece of paper, hoping that you might still be willing to settle." Audience members want to know, "What's In It For Me?" Speak to their interests, and they'll reward you with their attention.

Describe their problem. "As the clock sounds 7 o'clock, you call home and apologize – you're going to miss dinner, again. Two hours later, you stop at the drive-thru for your high-

carb, high-fat dinner. By the time you finally arrive home, the kids are already in bed, and you have just enough energy to watch a little TV before crawling into bed. Sound familiar? How many of you feel there aren't enough hours in the day? Let me tell you about a case management system that can add 1 1/2 to 2 hours to your day." If they recognize themselves in the problem you've described, they'll want to listen to your solution.

Start with a quote or poem. Others have already said it better than you can, so take advantage of their wisdom. "Henry Ford said, 'You can't build a reputation on what you're going to do.' Neither can this firm. If we're going to have a reputation as the best labor relations firm in the city, we need to achieve three objectives."

Start with a contradiction. Imagine a candidate addressing the national convention with this statement: "If you elect me, you'll pay more taxes next year." Would that grab your attention? Once the politician grabs audience attention, he explains how he wants them to pay a lower tax rate, but to earn significantly more money under a new job creation and development program. Audiences often pay more attention when they disagree with what you say. What accepted beliefs can you challenge? Start with the bombshell, and then explain your position.

Whether it's an opening statement or a speech to the local service organization, the first moments of your presentation are essential. Take the time to craft a dynamic opening, and your audience will give you their undivided attention. ■



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Subrogation Rights of Health Care Providers

By J. Michael Hayes

Independent Health Association and other health care providers have begun asserting “liens” or, more properly, subrogation claims for medical payments made.

Personal injury clients may not recover for medical expenses paid by a third party, like an insurance carrier, according to the CPLR.¹ For many years, liability insurance carriers pushed for limiting the recovery for collateral source payments. They succeeded in 1986 when section 4545(c) was enacted. It provides in applicable part:

In any action brought to recover damages for personal injury . . . where the plaintiff seeks to recover for the cost of medical care, . . . [where] such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source such as insurance . . . [the court] shall reduce the amount of the award by such finding.

Thereafter, medical insurance providers must realize a potential subrogation right for monies paid to health care providers on behalf of the injured party and have sought to establish a right of repayment. Insurance providers routinely include subrogation language in contracts. They have also sought to retroactively modify their contractual arrangements by requiring a claimant to sign an agreement to reimburse them for payments made. In some cases, the modifications go so far as to require

that the health insurer be repaid before the injured party recovers anything for his or her personal injuries.

The question of when and how an insurance carrier could assert its rights reached the Court of Appeals in 1996, when the Court held that “while the insurer had no lien on the funds, intervention was proper to permit the insurer to establish its contractual right to reimbursement of any medical expenses actually included in the settlement.”² The case was remanded to the trial court for further proceedings to determine whether the settlement included reimbursement for medical expenses.

Since *Teichman*, medical insurance providers have been very assertive in pursuing their subrogation rights/claims. The First, Second and Third Appellate Departments have ruled that insurance providers have no right of intervention. Their rationale states that the purpose of CPLR 4545 is both to prevent double recovery by plaintiffs and to limit liability costs to policyholders.³ The Second Department also observed that “intervention of various medical providers could create an adversarial posture between carriers and plaintiffs.”⁴ Such a situation could develop when the amount of insurance available is insufficient to adequately compensate the plaintiff, let alone repay the medical insurer.⁵

The Fourth Department chose a different path in *Independent Health Ass’n v. Grabenstatter*.⁶ The plain-

tiff, Independent Health, commenced an action seeking repayment for medical expenses by Grabenstatter, based upon a provision of the contract stating that Independent Health had a lien for medical expenses paid. The court upheld such a "lien." However, since the insurer had not "proven" that the settlement had included reimbursement for identified medical expenses, the complaint was dismissed.

The Fourth Department has recently expanded its view to hold (in two 3-2 decisions) that the insurer or health care provider has an independent right to intervene.⁷ These decisions also expressly concluded that CPLR 4545 did not preclude the insurer from recovering paid medical expenses from the tortfeasor. In each case the litigants attempted to petition the Court of Appeals; both appeals were dismissed as the cases were not "finally resolved."

Since then, the Fourth Department has maintained its consistency and recently, unanimously affirmed a health care provider's right "to assert an equitable subrogation claim against" the tortfeasor.⁸

Impediments to Settlement

Subrogation claim issues and considerations seem to apply to almost all personal injury cases. They may come into play whenever a private health insurer is involved, whether it is a fall-down, a dog bite, medical malpractice or a host of other common torts. The issues are especially germane to motor vehicle cases where additional personal injury protection (APIP) benefits may be involved. The regulations state that the company providing the APIP endorsement has a subrogation right against the responsible third party. The Court of Appeals has held that the statute of limitations in an APIP subrogation claim is three years.⁹ However, should the plaintiff settle the action after the three-year period and the settlement includes compensation for medical expenses paid by APIP, one might expect the carrier could make a direct claim against the plaintiff under the provisions of the contract for health care between parties.

The downstate Departments are correct in reasoning that allowing intervention complicates negotiation and the potential for resolution of claims. Practically speaking, there is no problem when there is ample coverage. The attorney may even represent both the injured party and the health care provider without conflict in such cases. The attorney may recover and receive attorney fees on the personal injury settlement and may also represent the health insurance company, recover its expenditures for medical expenses and take a fee. The personal injury client should then benefit to the extent that expenses/disbursements are shared on a *pro rata* basis.

The issue becomes much more complicated where there is limited coverage – an attorney may not represent both the injured party and the health insurance company.

There are competing claims for the same limited pool of money, and it is an obvious conflict of interest for the attorney attempting to represent two parties with competing claims.¹⁰ This is nearly the exact problem anticipated in *Humbach v. Goldstein*.

There is another complication that plaintiffs' attorneys face. Assume the personal injury action can be resolved for the full policy. The plaintiff and his or her attorney have made no claim for medical expenses and their settlement does not contemplate that aspect of the case; their intent is to settle the case for the "injuries, pain and suffering." This will work provided the liability carrier will accept a general release limited to "only bodily injury, conscious pain and suffering" and where the general release also states that the settlement "shall not affect the subrogation rights of any individuals, corporations, insurance carriers or other entities." In these circumstances, both the plaintiff and the plaintiff's attorney should be protected and all the settlement funds should go to the client.

A problem is developing as liability carriers expand their releases to require that a plaintiff release, guarantee and indemnify against any and all liens (which may be acceptable) and all subrogation claims. This language is unacceptable and, logically, makes no sense. If the plaintiff were to settle for everything including the subrogation rights of his or her insurer, the plaintiff would

be violating the policy terms and the rights of the carrier. For example, the language of the Insurance Regulations for APIP endorsement is as follows:

In the event of any payment for extended economic loss, the Company is subrogated to the extent of such payments to the rights of the person to whom, or for whose benefit, such payments were made. Such person must execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing to prejudice such rights.¹¹

If the defense carrier demands that any settlement of the personal injury action is contingent upon the plaintiff also releasing the subrogation rights of his or her insurer, this could result in a situation where the plaintiff is responsible for repaying his or her own carrier despite the fact that the plaintiff had not received any additional compensation in the settlement in consideration of the medical expenses.

The most recent version of language the writer sees as acceptable in a release is as follows:

... we ever had, now have or which our heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, and more particularly all claims for *only bodily injury and conscious pain and suffering* arising from an incident which happened on _____, in the County of _____, State of New York.

The undersigned further represents that there are no liens by any hospital, ambulance service or other medical provider, Medicare, Medicaid, insurance company, or attorney enforceable against the proceeds of this settlement or against the parties, released, the _____ and/or any of its Subsidiaries, Divisions or other associated companies, or the persons, firms, or corporations making the payment herein. If such a lien is asserted against the proceeds herein, or against the released parties, or against _____ and/or any of its Subsidiaries, Divisions or other associated companies, or the persons, firm or corporation making the payment herein, then, in consideration of the payment made to the undersigned, the undersigned covenants to pay and satisfy such asserted lien, or to satisfy the same on a compromise basis, and to obtain in any event a release of the parties released herein, the _____ and/or any of its Subsidiaries, Divisions or other associated companies, or the persons, firm, or corporations making the payment herein, and to indemnify and hold harmless said parties from any costs, expenses, attorney fees, claims, actions, judgments, or settlements resulting from the assertion or enforcement of such lien by any entity having such lien *provided however this release shall not affect the subrogation rights of any individuals, corporations, insurance carriers or other entities.*

One argument proffered by defense counsel is a claim that if they exhaust their insured's policy, they will still be obligated to defend the insured in any subsequent action

by the health care provider. This assertion is incorrect. A line of cases from the Second Department holds that once the policy is exhausted, the obligation of the insurer to defend or indemnify is released.¹²

Perhaps the only area where the plaintiff may be safe is for claims made under the plaintiff's own SUM policy. There appears to be no viable medical expenses subrogation right for SUM recoveries.¹³ In a SUM claim, the policyholder is the claimant and the "first party." The Court of Appeals has determined that subrogation rights are exercisable only against third parties. However, one must still look to the language of the contract between the policy holder and the carrier.

This is an evolving area of the law and the practitioner must carefully consider all the nuances at the time of settlement negotiations, and prior to delivery of releases and distribution of any settlement proceeds. ■

1. CPLR 4545(c).
2. *Teichman v. Cmty. Hosp.*, 87 N.Y.2d 514, 640 N.Y.S.2d 472 (1996).
3. *Humbach v. Goldstein*, 229 A.D.2d 64, 653 N.Y.S.2d 950 (2d Dep't 1997), *leave dismissed*, 91 N.Y.2d 921, 669 N.Y.S.2d 263 (1998); *Halloran v. Don's 47 W. 44 St. Rest. Corp.*, 255 A.D.2d 206, 680 N.Y.S.2d 227 (1st Dep't 1998); *Berry v. St. Peter's Hosp.*, 250 A.D.2d 63, 678 N.Y.S.2d 674 (3d Dep't 1998).
4. *Humbach*, 229 A.D.2d 64.
5. *Berry*, 250 A.D.2d 63.
6. 254 A.D.2d 722, 678 N.Y.S.2d 220 (4th Dep't 1998).
7. *Omiatsek v. Marine Midland Bank*, 9 A.D.3d 831, 781 N.Y.S.2d 389 (4th Dep't 2004); *Kaczmarowski v. Suddaby/Indep. Health Ass'n, Inc.*, 9 A.D.3d 847, 779 N.Y.S.2d 394 (4th Dep't 2004).
8. *Oakes v. Patel & Health Now N.Y., Inc.*, 23 A.D.3d 1023, 803 N.Y.S.2d 455 (4th Dep't 2005).
9. *Allstate v. Stein*, 1 N.Y.3d 416, 775 N.Y.S.2d 219 (2004).
10. The Lawyer's Code of Professional Responsibility, DR 1-105(a).
11. 11 N.Y.C.R.R. § 65-1.3; *cf.* Insurance Law § 2307(b).
12. *See Hosp. for Joint Diseases v. Hertz Corp.*, 22 A.D.3d 724, 803 N.Y.S.2d 670 (2d Dep't 2005) (holding that "where . . . an insurer has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease").
13. *Shutter v. Philips Display Components Co.*, 90 N.Y.2d 703, 655 N.Y.S.2d 379 (1997).



"If you're found guilty and sent to prison for life I'm willing to give you a seven percent discount off my usual fee."

PRESENTATION SKILLS FOR LAWYERS

BY ART AND ERIC SAMANSKY



The Joke Shouldn't Be on You

Have you heard the one about the senior partner who walks to the podium and starts the speech with a joke?

To no one's surprise, it falls flat.

Senior partners at law firms, private practitioners, corporate general counsel, and other C-level corporate executives – from the chairperson to the chief technology officer – usually do not leave the boardroom for the comedy club circuit for good reasons. This is evidenced by occasional news reports on failed jokes or poor attempts at humor by executives, among others, at public forums.

For any lawyer or corporate executive, the pitfalls of the verbal pratfall are hardly worth chancing. And, while the hazards may be greater when uttered by a senior executive, danger lurks for speakers at any level representing an organization at an event.

First, there is the joke itself.

David Letterman of CBS, just to name one late-night television talk show host, typically works alongside four writers who toil away to develop a fresh daily monologue. By comparison, the joke most lawyers and corporate leaders might tell is virtually certain to have been heard, or read on the Internet, before – and often. At best, the audience listens politely. Or, audience members begin to talk knowingly to nearby seatmates about the joke and coming punchline, taking attention *away* from the speaker. The executive's thoughts are not advanced in either case. Moreover, attention lost is hard to get back.

Still more damaging, the joke may backfire once it is associated with the remainder of the speaker's remarks, or later when an unexpected client or corporate situation develops.

A highly skilled employment attorney that we know confided in us that he had learned his lesson years ago when, during a client-sponsored talk on sexual harassment laws and rules, he opted to tell a joke which previously had won laughter in dinner settings with friends. The joke centered on the use of the word "girls." Until the joke, the women in the audience had listened attentively to his commentary. "After the joke, the women clearly tuned out to anything I had to say," he said.

Moreover, even if the joke is novel or reasonably fresh, many attorneys and executives lack the comedic timing to pull it off. Some executives are so unaccustomed to joke telling that they fumble through it, easily botching their efforts. One former corporate chieftain of a globally known manufacturer, whom we heard some years ago, told his joke so poorly that he stumbled on the punchline and had to fix it mid-way through. It is impossible to know whether the marginal laughter had to do with the joke, or if it was "nervous laughter" due to the speaker's ineptness.

Even if the joke or quip is delivered without being bungled, it may not "translate" well into printed words or broadcast sound bites. And, considering the global nature of business, the joke may not translate well into

another language, potentially confusing a few audience members.

Some could miss that the comment is supposed to be funny: such a misunderstanding may have business consequences, may require post-joke clarification, or may even affect a company's stock price. Some years ago, for example, the chief executive officer of a well-known company quipped in a question-and-answer session at a conference that he would like to buy one of his competitor's units. Shares of both companies declined despite many analysts dismissing the idea.

Surely countless men and women from all walks of life have tried the comedy stage after being told by friends and family how funny they are: only a few are truly amusing and even fewer actually make it. Attorneys and executives should not fall for the same staff-meeting praise as they prepare to deliver speeches and presentations.

Even then-United States Supreme Court nominee Judge Samuel Alito Jr. tried going for the laugh-line in his opening remarks at his Senate confirmation hearings in early January 2006. As some media reported, the attempt failed. And, for those who may have missed the moment, some in the media recited it.

Consider a January 9, 2006, Associated Press dispatch by Laurie Kellman that noted: "Nobody said a Supreme Court justice has to be a laugh riot. Even so, Samuel Alito Jr. might want to think about keeping his day job, assuming he gets it."

Other leaders sometimes suffer similar "in-print" reviews, which don't

reflect well on the person or the organization, and may detract from the message.

Then there are the potential consequences of the joke itself. What is benign to one person is hardly so to another. Ample evidence exists in media reports of various leaders apologizing for telling jokes that were seen as insulting, impolitic, or inappropriate.

Self-deprecating lines have consequences, too: not everyone with a "problem" or "condition" has the confidence of the speaker telling the joke. The joke may be more painful than funny to some in the audience. Clearly, this will not advance the corporate

message, perception of the organization, or the reputation of the attorney.

Perhaps before considering the joke-telling approach, all speakers should review a *New York Times* article from December 31, 2005, by Adam Liptak, who reported on a study by Jay D. Wexler, a law professor at Boston University, about from-the-bench humor by U.S. Supreme Court Justices.

The article noted: "Lawyers get laughs sometimes, too, but it is a dangerous business. In the guidebook the court provides a stern warning to lawyers preparing to argue before it: 'Attempts at humor usually fall flat.'"

In short, humor is a potential third rail: lawyers and other executives would be well advised to watch where they verbally step. Clients, corporate compensation committees, and shareholders pay executives to represent the company enthusiastically, effectively deliver the strategic messages, and build the business, not to be funny. And that is no joke. ■

ART AND ERIC SAMANSKY are principals of The Samansky Group (www.samanskygroup.com), a public affairs consultancy which includes presentation and speech training in its portfolio.

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INDEX TO ARTICLES 2000–2006

This index places the articles in one of the following categories. Please note that all articles from January 2000–November/December 2006 are available online, to members.

Administrative Law

Antitrust Law

Appeals

Arbitration / Alternative Dispute Resolution

Attorney Professionalism

Banking / Finance Law

Bankruptcy

Books on Law

Civil Procedure

Commercial Law

Computers and the Law

Constitutional Law

Consumer Law

Courts

Criminal Law

Crossword

Elder Law

Environmental Law

Evidence

Family Law

Government and the Law

Health Law

History

Humor—Res Ipsa Jocatur

Intellectual Property

International Law

Labor and Employment

Law Practice

Legal Writing

Poetry

Point of View Column

Real Property Law

Science and Technology

Tax Law

Torts and Negligence

Trial Practice

Trusts and Estates

Women in Law

TOPIC / ARTICLE AUTHOR ISSUE / Pg.

Administrative Law

Survey of Practice Before Administrative Law Judges Finds Counsel Are Often Poorly Prepared, Poppell, B., Mar. / Apr. 2002 20

Antitrust Law

New York Antitrust Bureau Pursues Mandate to Represent State Interests in Fostering Competitive Environment, Cavanaugh, E., Jan. 2000 38

Appeals

Appeals Clinic – 7 Tips on Whether to Appeal, How to Write Better Briefs, Feathers, C., Feb. 2004 36

Update: Did the Appellate Odds Change in 2005?, Kassal, B., Oct. 2006 42

Update: Did the Odds Change in 2003?, Kassal, B., Nov. / Dec. 2004 28

Update: Did the Odds Change in 2004?, Kassal, B., Nov. / Dec. 2005 32

What Are the Odds? Appellate Statistics Reveal Patterns Among State and Federal Courts, Kassal, B., Jan. 2004 46

Arbitration / ADR (see also Labor and Employment)

Advocate's Perspective, An – Mediation in Commercial Cases Can Be Very Effective for Clients, Beha, J., II, Sept. 2002 10

Appealing an Arbitrator's Award: Suggested Approaches, Marrow, P., Nov. / Dec. 2005 14

Coming to New York? An Unconscionable Mediation Agreement, Marrow, P., Jul. / Aug. 2006 40

Courts Differ on Standard Applicable When Parties in Arbitration Cases Seek Provisional Remedies, Mone, J.; Wicks, J., Sept. 2000 35

Institution Versus Individual: The Arbitration Alternative to Litigation, Bennett, S., Nov. / Dec. 2005 26

Mediation Can Help Parties Reach Faster, Less Costly Results in Civil Litigation, La Manna, J., May 2001 10

Should Mediation Be Available as an Option to Reduce Litigation in Contested Guardianship Cases?, Beane, L., June 2002 27

"Team Red Hook" Addresses Wide Range of Community Needs, Calabrese, A., June 2000 14

View From Abroad – Turkey Embraces Arbitration as Step Toward Global Economic Integration, Grant, T., June 2002 46

Attorney Professionalism

18-B Experience, The – Court-Appointed Attorneys Face Legal and Financial Challenges, Korgie, T., May 2001 5

Annual Mock Trial Competition Introduces High School Students to the Law and Court Procedures, Wilsey, G., Mar. / Apr. 2000 10

Don't Tell Anyone (Our Confidentiality Rules Are Changing), Krane, S., May 2005 28

Estates With Multiple Fiduciaries Pose Ethical and Practical Issues for Attorney and Clients Alike, Freidman, G.; Morken, J., Nov. / Dec. 2001 22

Ethics – "Touting" in 1963 Was Replaced by a Flood of Information About Lawyers, Craco, L., Jan. 2001 23

Forum, Committee on Attorney Professionalism, Feb. – Nov. / Dec. 2003; Jan. 2004 – Nov. / Dec. 2006

In Memoriam: Charles E. Heming 1926–2003, Miller, H., Oct. 2003 42

In Memoriam: Lawrence H. Cooke 1914–2000, Kaye, J., Sept. 2000 50

Judiciary State Law Report of the Commission on Fiduciary Appointments, Jan. 2002 38

Justice Robert H. Jackson, Gerhart, E., Nov. / Dec. 2000 42

New York State Judicial Institute, The, Keating, R., May 2005 10

Professionalism Award: An Exemplary Lawyer, Netter, M., Jul. / Aug. 2002 52

Professionalism Award – Chronicle of a Career, Netter, M., May 2001 49

Recent News Events Illustrate Ethical Dilemmas Associated With a "Difficult" Organizational Client, DiLorenzo, L., Mar. / Apr. 2003 8

Reflections on Building a Practice – Lessons from the Neighborhood Provide Secrets to Success, Nolan, K., May 2002 16

Tournament Teaches Skills for a Lifetime, Korgie, T., Mar. / Apr. 2000 11

Tribute – William J. Carroll, May 2001 25

Using Threats to Settle a Civil Case Could Subject Counsel to Criminal Consequences, Holly, W., Jan. 2000 26

Banking / Finance Law

Confusury Unraveled: New York Lenders Face Usury Risks in Atypical or Small Transactions, Stein, J., Jul. / Aug. 2001 25

Funding Terrorism, Hayden, D.; Feldman, H., Sept. 2005 23

Gramm-Leach-Bliley Act Challenges Financial Regulators to Assure Safe Transition in Banking Industry, Di Lorenzo, V., Oct. 2000 36

Bankruptcy

Life Insurance and Annuities May Insulate Some Assets From Loss in Unexpected Bankruptcy Filings, Bandler, B.; Starr, S., Jul. / Aug. 2000 28

Books on Law

100 Years of Federalism (by Mark Curriden and Leroy Philips, Jr.), Moore, J., Mar. / Apr. 2000 50

Arbitration: Essential Concepts (by Steven C. Bennett), Poppell, B., Jul. / Aug. 2002 50

Business and Commercial Litigation in Federal Courts, 2d Edition (Robert L. Haig, editor-in-chief), Wesley, R., Jul. / Aug. 2006 50

Commercial Litigation in New York State Courts (Robert L. Haig, editor-in-chief), Alcott, M., Jul. / Aug. 2005 52

Contempt of Court: The Turn-of-the-Century Lynching That Launched Evidentiary Privileges (Grand Jury, Criminal and Civil Trials) (by Lawrence N. Gray), Boehm, D., June 2000 51

Greatest Player Who Never Lived, The: A Golf Story (by J. Michael Veron), Lang, R., Feb. 2001 57

Handling Employment Disputes in New York (by Sharon P. Stiller, Hon. Denny Chin, Mindy Novick), Bernstein, M., Mar./Apr. 2000 51

Inside/Outside: How Businesses Buy Legal Services (by Larry Smith), Tripoli, L., June 2002 55

Judicial Retirement Laws of the Fifty States and the District of Columbia (by Bernard S. Meyer), Gerhart, E., Feb. 2000 59

Ladies and Gentlemen of the Jury (by Michael S. Leif, H. Mitchell Caldwell, Ben Bycel), Wagner, R., Feb. 2001 56

Legal Muscle (by Rick Collins), Liotti, T., Mar./Apr. 2003 46

Lexis/Nexis Answer Guide New York Civil Disclosure (by David Paul Horowitz), Miller, H., June 2005 51

May It Please the Court! (by Leonard Rivkin with Jeffrey Silberfeld), Mulholland, E., Sept. 2000 54

Mobbing: Emotional Abuse in the American Workplace (by Noa Davenport, Ruth Distler Schwartz, Gail Pursell Elliott), La Manna, J., June 2000 52

Modern Legal Drafting, A Guide to Using Clearer Language (by Peter Butt), Gerhart, E., Jul./Aug. 2002 50

New York Evidence With Objections (by Jo Ann Harris, Anthony A. Bocchino, David A. Sonenshein), Kirgis, P., May 2000 50

New York Objections (by Justice Helen E. Freedman), Rosenberg, L., Jan. 2000 58

New York Zoning Law and Practice, 4th Edition (by Patricia Salkin), Gesualdi, J., Sept. 2000 54

On Trial: Lessons From a Lifetime in the Courtroom (by Henry G. Miller), Palermo, A., May 2002 52

Protect and Defend (by Richard North Patterson), Mulholland, E., Mar./Apr. 2001 53

Reflections on Reading – Moments of Grace: Lawyers Reading Literature, Turano, M., Oct. 2000 12

Robert H. Jackson: Country Lawyer, Supreme Court Justice, America's Advocate (by Eugene C. Gerhart), Wagner, L., Jul./Aug. 2003 47

Successful Partnering Between Inside and Outside Counsel (West Group/American Corporate Counsel Ass'n), Moore, J., Mar./Apr. 2001 52

Taxation of Damage Awards and Settlement Payments (by Robert W. Wood), Flora, J., Jul./Aug. 2005 50

Transforming Practices: Finding Joy and Satisfaction in Legal Life (by Steven Keeva), Mulholland, E., Feb. 2000 59

Business Law (see Commercial Law)

Children and the Law (see Family Law)

Civil Procedure

Adjournments in State Civil Practice: Courts Seek Careful Balance Between Fairness and Genuine Needs, Crane, S.; Meade, R., Jr., May 2000 36

Advanced Litigation Techniques – Canons and Myths: Strategies to Enhance Success, Young, S., Jan. 2004 10

Advanced Litigation Techniques – Conventional Wisdoms or Mistakes: The Complaint and the Response, Young, S., June 2004 28

Anything But Law: My Life in Paper, Siegel, D., June 2006 46

Bringing It Home: Feasible Strategies for Successful Discovery and Winning Dispositive Motions, Young, S., May 2006 10

Civil Procedure – CPLR Provided Escape From Common Law Technicalities, Siegel, D., Jan. 2001 10

Judicial Departments Differ on Application of Spoliation Motion When Key Evidence Is Destroyed, Rizzo, J., Feb. 2001 40

Navigating the New York City Civil Court: A Guide to Variations From Supreme Court Civil Practice, Ramos, W., Sept. 2006 36

New York's Long Arm Statute Contains Provisions Suitable for Jurisdiction over Web Sites, Bauchner, J., Mar./Apr. 2000 26

New York's Statutes of Limitations Affect Strategies That Involve Counterclaims and Recoupment, Beha II, J., Jan. 2003 22

Parties Who Do Not Receive Mail May Have Difficulty Obtaining a Hearing on Service Issues, Golden, P., Sept. 2002 18

Recent Court of Appeals Decisions Reflect Strict Interpretation of Procedural Requirements, Rosenhouse, M., Feb. 2003 30

Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation, Scheindlin S.; Redgrave, J., Jan. 2004 18

Suits Against Public Entities for Injury or Wrongful Death Pose Varying Procedural Hurdles, Bersani, M., Oct. 2002 24

To Fly, or Not to Fly . . ., Siegel, D., Nov./Dec. 2005 10

Will the Proposed Amendments to the Federal Rules of Civil Procedure Improve the Pretrial Process?, Ward, E., Oct. 2000 18

Commercial Law

Businesses Considering Renting in Commercial Condominiums Face Unique Contractual Issues, Leeds, M., Jul./Aug. 2001 43

Can a Choice of Forum Clause Force a Franchisee to Litigate in the Franchisor's Home State?, Kassoff, M., June 2004 22

Complex of Federal and State Laws Regulates Franchise Operations as Their Popularity Grows, Kassoff, M., Feb. 2001 48

Contractual Unconscionability: Identifying and Understanding Its Potential Elements, Marrow, P., Feb. 2000 18

Cooperatives Authorized to Use Business Judgment Rule in Terminating Shareholder Leases, Kastner, M.; Kassenoff, J., Jul./Aug. 2003 32

Courts Apply Investment-Contact Test to Determine When LLC Membership Interests Are Securities, Mahler, P., Jul./Aug. 2001 10

Courts in New York Will Enforce Non-Compete Clauses in Contracts Only if They Are Carefully Contoured, Gregory, D., Oct. 2000 27

Decisions on Liability for Debts Are Inconsistent for Corporations Dissolved for Unpaid Taxes, Miller, R.; Siskin, M., June 2002 18

Does the Doctrine of Contractual Unconscionability Have a Role in Executive Compensation Cases?, Marrow, P., Sept. 2003 16

Evolution of Corporate Usury Laws Has Left Vestigial Statutes That Hinder Business Transactions, Golden, P., May 2001 20

Federal Courts in New York Provide Framework for Enforcing Preliminary Agreements, Brodsky, S., Mar./Apr. 2001 16

Planning for Forum Selection in Commercial Transactions, Powers, J., Feb. 2006 22

Promissory Fraud, Ayres, I.; Klass, G., May 2006 26

Quirk in New York UCC Provisions Puts Signers of Company Checks at Risk for Personal Liability, Golden, P., Oct. 2004 36

Shareholder Wars: Internal Disputes in Close Corporations Do Not Always Lead to Judicial Dissolution, Mahler, P., Oct. 2004 28

Should a Franchise Holder Be Allowed to Continue Operating While Termination Suit Is Pending?, Kassoff, M., Jan. 2003 32

Transactions That Imperil National Security, Sabino, A., Nov./Dec. 2005 20

Use of Exculpatory Clauses Is Subject to Wide Variety of Definitions and Circumstances, Barken, M.; Seaquist, G., Mar./Apr. 2002 27

When Limited Liability Companies Seek Judicial Dissolution, Will the Statute Be Up to the Task?, Mahler, P., June 2002 8

Computers and the Law (see also Intellectual Property Law)

Beyond the Hold Notice in the Electronic Age, Barrasso, D.; Haas, E., Sept. 2006 22

Computers & the Law – Enabling Copyright Infringement, Miranda, D., Oct. 2005 34

Computers & the Law – GEICO v. Google and the Use of Trademarks by Search Engines, Miranda, D., Sept. 2006 44

Computers & the Law – Insurance Coverage for Intellectual Property Litigation, Miranda, D., Jul./Aug. 2005 4

<i>Computers & the Law – Supreme Court Permits Internet Wine Sales</i> , Miranda, D.,	Feb. 2006 28	<i>Jury Innovation in Practice: The Experience in New York and Elsewhere</i> , Hannaford-Agor, P.; Connelly, C.,	Oct. 2006 19
<i>E-Discovery: 2005 Update</i> , Fellner G.,	Jul./Aug. 2006 30	<i>Jury Reform Has Changed Voir Dire, But More Exploration Is Needed into the Types of Questions Asked</i> , Richter, R.,	June 2001 19
<i>Computers + Connectivity = New Opportunities for Criminals and Dilemmas for Investigators</i> , Fedorek, T.,	Feb. 2004 10	<i>Jury Voir Dire in Criminal Cases</i> , Bamberger, P.,	Oct. 2006 24
<i>Digging for Data – Today's Discovery Demands Require Proficiency in Searching Electronic Documents</i> , Wechsler, M.,	Mar./Apr. 2004 18	<i>Latest in Juries, The: What's Happening Around the Country That's of Interest to New York Lawyers and Judges?</i> , Krauss, E.,	Oct. 2006 16
<i>Electronic Discovery Can Unearth Treasure Trove of Potential Land Mines</i> , Friedman Rosenthal, L.,	Sept. 2003 32	<i>Learning Experience, A – Holiday Program at Bayview Prison</i> , Krauss, S.,	Feb. 2002 52
<i>Internet Web Sites Offer Access to Less Expensive Case Law and Materials Not Offered Commercially</i> , Manz, W.,	Nov./Dec. 2000 26	<i>Linguistic Issues – Is Plain English the Answer to the Needs of Jurors?</i> , Lazer, L.,	June 2001 37
<i>Knowledge of Computer Forensics Is Becoming Essential for Attorneys in the Information Age</i> , Abrams, S.; Weis, P.,	Feb. 2003 8	<i>Magic in the Movies – Do Courtroom Scenes Have Real-Life Parallels?</i> , Marks, P.,	June 2001 40
<i>Lawyers Taking Equity Interests in Internet Companies Must Be Alert to Special Ethical Risks</i> , Popoff, A.,	Oct. 2002 19	<i>Model Guardianship Part, The: A Novel Approach</i> , Leis, III, H.,	June 2006 10
<i>Protecting Trade Secrets from Disclosure on the Internet Requires Diligent Practice</i> , Cundiff, V.,	Oct. 2002 8	<i>My Life as Chief Judge: The Chapter on Juries</i> , Kaye, J.,	Oct. 2006 10
<i>Risk of SLAPP Sanction Appears Lower for Internet Identity Actions in New York Than in California</i> , Timkovich, E.,	Mar./Apr. 2002 40	<i>New Edition of State's "Tanbook" Implements Extensive Revisions in Quest for Greater Clarity</i> , Lebovits, G.,	Mar./Apr. 2002 8
<i>Tale of Legal Research, A: Shepard's® and KeyCite® Are Flawed (or Maybe It's You)</i> , Wolf, A.; Wishart, L.,	Sept. 2003 24	<i>New Rules on Surrogate's Court Assignments Prompt Review of Issues in "Dead Man's Statute"</i> , Radigan, C.R.,	June 2003 19
<i>Threshold Decisions on Electronic Discovery</i> , Brennan, K.,	Nov./Dec. 2004 23	<i>New York Adopts Procedures for Statewide Coordination of Complex Litigation</i> , Herrmann, M.; Ritts, G.,	Oct. 2003 20
<i>Web Research Update – Changes Expand and Contract Research Options in New York</i> , Manz, W.,	Feb. 2002 40	<i>New York Appellate Decisions Show Preference for Recent Cases, Commentaries and Bill Memos</i> , Manz, W.,	May 2002 8
<i>Web Research Update: New Web Sites Add to Research Resources Available Online</i> , Manz, W.,	Jan. 2003 42	<i>New York County Filing Project for Tax Certiorari Cases Records 30-fold Rise in Electronic Filings</i> , Silbermann, J.,	Feb. 2004 30
Constitutional Law		<i>New York's Problem-Solving Courts Provide Meaningful Alternatives to Traditional Remedies</i> , Berman, G.; Knipps, S.,	June 2000 8
<i>Appeals Can Avoid the "Stain" of Unpreserved Constitutional Issues if Criteria for Exceptions Are Met</i> , Golden, P.,	Nov./Dec. 2001 34	<i>Now You See It, Now You Don't: Depublication and Nonpublication of Opinions Raise Motive Questions</i> , Gershman, B.,	Oct. 2001 36
<i>Decisions of the Past Decade Have Expanded Equal Protection Beyond Suspect Classes</i> , McGuinness, J.,	Feb. 2000 36	<i>Pattern Instructions for Jurors in Criminal Cases Seek to Explain Fundamental Legal Principles</i> , Fisher, S.,	June 2001 29
Consumer Law		<i>Public Access to Court Decisions Expanded</i> , Spivey, G.,	Jan. 2006 32
<i>New York Consumers Enjoy Statutory Protections Under Both State and Federal Statutes</i> , Dickerson, T.,	Sept. 2004 10	<i>Public's Perspective – Successful Innovations Will Require Citizen Education and Participation</i> , Vitullo-Martin, J.,	June 2001 43
Contract Law (see Commercial Law)		<i>Reflections – Judges' Clerks Play Varied Roles in the Opinion Drafting Process</i> , Lebovits, G.,	Jul./Aug. 2004 34
Corporation Law (see Commercial Law)		<i>Review of Jury Systems Abroad Can Provide Helpful Insights Into American Practices</i> , Vidmar, N.,	June 2001 23
Courts		<i>Self-Evaluation Privilege in the Second Circuit: Dead or Alive?</i> , The, Blum, R.; Turro, A.,	June 2003 44
<i>Bridges Between Parallel Paths: The First New York Listening Conference for Court Officials and Tribal Representatives</i> , Kahn, M.; Davidowitz, E.; Beane, J.,	Nov./Dec. 2006 10	<i>Stare Decisis Provides Stability to the Legal System, But Applying It May Involve a Love-Hate Relationship</i> , Steinberg, H.,	Mar./Apr. 2001 39
<i>Court Facilities Renewal</i> , Younkens, R.,	Feb. 2001 12	<i>Statutes and Case Decisions Reflect Appellate Division Latitude in Reviewing Punitive Damages</i> , Baird, E.,	May 2002 32
<i>"Don't Come Back Without a Reasonable Offer" Surprisingly Little Direct Authority Guides How Judges Can Move Parties, Part Two – The Judge's Role</i> , Shoot, B.; McGrath, C.,	May 2004 28	<i>Summit Sessions Assessed Representative Quality of Juries and Juror Communication Issues</i> , Mount, C., Jr.; Munsterman, G.,	June 2001 10
<i>"Don't Come Back Without a Reasonable Offer" The Extent of, and Limits on, Court Power to Foster Settlement, Part One – The Theory and Practice of Settlement Before the Court</i> , Shoot, B.; McGrath, C.,	Mar./Apr. 2004 10	<i>Survey Shows Preferences of Northeastern Judges at Appellate Argument</i> , Lewis, D.,	Oct. 2004 42
<i>Educating Future Jurors – School Program Highlights Jury Service as Fundamental Right</i> , Wilsey, G.; Zullo, E.,	June 2001 50	<i>Turning the Tables – The Commissioner of Jurors Takes on a New Role</i> , Goodman, N.,	June 2001 32
<i>Experiment in Larger Juries in Civil Trials</i> , An, Landsman, S.,	Oct. 2006 21	<i>View from the Bench – The Most Powerful Word in the Law: "Objection!"</i> , Marrus, A.,	Jul./Aug. 2000 42
<i>Innovative Comprehension Initiatives Have Enhanced Ability of Jurors to Make Fair Decisions</i> , Joseph, G.,	June 2001 14	<i>View from the Jury Box – The System is Not Perfect, But It's Doing Pretty Well</i> , Gutekunst, C.,	June 2001 35
<i>Introduction to Special Edition on Juries</i> , Kaye, J.; Rosenblatt, A.,	June 2001 8	<i>Westchester Family Court Program – Student Attorneys and Mentors Help Domestic Violence Victims</i> , Barasch, A.; Lutz, V.,	Feb. 2002 27
<i>Judicial Roundtable – Reflections of Problem-Court Justices</i> ,	June 2000 9	<i>What's in Your Wallet? Attorney Designations in New York</i> , Brennan, D.,	Jan. 2006 34
<i>Juror Excuses Heard Around the State</i> ,	June 2001 34	<i>When Employees Are Called – Rules Set Standards for Employers and Allow Delays in Some Cases</i> , Mone, M.,	June 2001 47
<i>Juror Questions at Trial: In Principle and in Fact</i> , Diamond, S.,	Oct. 2006 23	<i>Who's Who? Researching Judicial Biographies</i> , Manz, W.,	Feb. 2006 10
		Covenants Not to Compete (see Commercial Law)	

Criminal Law

- 2005 Legislation Affecting the Practice of Criminal Law, Kamins, B., Jan. 2006 20
- Criminal Law – Dramatic Changes Affected Procedural and Substantive Rules*, McQuillan, P., Jan. 2001 16
- Expanded Enforcement Options for Orders of Protection Provide Powerful Reply to Domestic Violence*, Fields, M., Feb. 2001 18
- Forensic Social Work Reports Can Play Crucial Role in Mitigating Criminal and Immigration Cases*, Silver, M., Mar./Apr. 2004 32
- Grounds May Exist to Challenge Orders Suspending Speedy Trials in Aftermath of Sept. Attack*, Feinman, P.; Holland, B., Feb. 2002 34
- Hospital-based Arraignments Involve Conflicts in Roles of Press, Patients, Hospitals and Law Enforcement*, Taylor, P., Feb. 2000 41
- New York's Rockefeller Drug Laws, Then and Now*, Maggio, E., Sept. 2006 30
- "Project Exile" Effort on Gun Crimes Increases Need for Attorneys to Give Clear Advice on Possible Sentences*, Clauss, W.; Ovsiovitch, J., June 2000 35
- Recent Second Circuit Cases Reinforce Criminal Discovery Standards Set by Supreme Court*, Liotti, T., Jan. 2003 29
- Shootings by Police Officers Are Analyzed Under Standards Based on Objective Reasonableness*, McGuinness, J., Sept. 2000 17
- State and Federal Standards Require Proof of Discriminatory Intent in Ethnic Profiling Claims*, McGuinness, J., Oct. 2003 29
- Use of Race in "Stop-and-Frisk": Stereotypical Beliefs Linger, But How Far Can the Police Go?*, Gershman, B., Mar./Apr. 2000 42

Crossword

- Eldridge, J.D. Mar./Apr. 2003–Oct. 2004

Discrimination (see Labor and Employment)

Elder Law (see also Trusts and Estates)

- Do Implied Contract Principles or Fraud Theories Support Medicaid Suits Against Community Spouses?*, Rachlin, M., Feb. 2001 32
- New Rules Published for Fiduciary Appointments* May 2003 42

Employment Law (see Labor and Employment)

Environmental Law

- Courts May Find Individuals Liable for Environmental Offenses Without Piercing Corporate Shield*, Monachino, B., May 2000 22
- Environmental Cases in New York Pose Complex Remediation Issues With Profound Impact on Land Values*, Palewski, P., May 2000 8
- Environmental Remediation Process Is Undergoing Sweeping Changes Mandated by New Brownfields Law*, Desnoyers, D.; Schnapf, L., Oct. 2004 10
- EPA's New Clean Air Rules, The – Mixed Results for Air Quality*, Sullivan M.; Fazio, C., Jan. 2006 10

ERISA (see Labor and Employment)

Estate Planning (see Trusts and Estates)

Estate Tax Law (see Trusts and Estates)

Ethics and the Law (see Attorney Professionalism)

Evidence

- Behavioral Decision Theory Can Offer New Dimension to Legal Analysis of Motivations*, Marrow, P., Jul./Aug. 2002 46
- Burden of Proof – Can an Old Dog Learn New Tricks?*, Horowitz, D., Nov./Dec. 2006 20
- Burden of Proof – Deposition Tips Your Parents Taught You*, Horowitz, D., Mar./Apr. 2005 18
- Burden of Proof – Dillenbeck's Back*, Horowitz, D., Sept. 2006 14
- Burden of Proof – "Dying to Get to the Courthouse . . ." Accelerated Disclosure Under CPLR 3407*, Horowitz, D., Feb. 2006 14
- Burden of Proof – HIPAA . . . Help!*, Horowitz, D., June 2005 20
- Burden of Proof – "How Do I Dismiss Thee . . .?" – Part I*, Horowitz, D., Jul./Aug. 2005 14

- Burden of Proof – "How Do I Dismiss Thee . . .?" – Part II*, Horowitz, D., Sept. 2005 18
- Burden of Proof – "How Do I Dismiss Thee . . .?" – Part III*, Horowitz, D., Oct. 2005 18
- Burden of Proof – In the Beginning, Motions In Limine*, Horowitz, D., May 2005 16
- Burden of Proof – Is Frye Still Generally Accepted?*, Horowitz, D., May 2006 22
- Burden of Proof – "Note to File . . . Obey Court Orders!"*, Horowitz, D., Jan. 2006 17
- Burden of Proof – Objections & Objectionable Conduct at Depositions*, Horowitz, D., Jan. 2005 20
- Burden of Proof – Out With the Bad and in With the Good – New Depositions Rules to Take Effect October 1, 2006*, Horowitz, D., Oct. 2006 30
- Burden of Proof – Small Shocks & Lots of Static: Developments in Electronic Disclosure*, Horowitz, D., Jul./Aug. 2006 18
- Burden of Proof – Spoliation . . . Not Spoliation*, Horowitz, D., Mar./Apr. 2006 17
- Burden of Proof – "Will the Gatekeeper Let Daubert In?"*, Horowitz, D., June 2006 18
- Clarifying Evidentiary Rules on Contents of Reports by Physicians Could Give Jurors More Information*, Friedman, M., Jan. 2002 33
- Close Attention to Detail Can Persuade Judges to Order Truly Complete Discovery Responses*, Weinberger, M., Jul./Aug. 2000 38
- Document Examination – Detecting Forgeries Requires Analysis of Strokes and Pressures*, Jalbert, R., Nov./Dec. 2000 24
- Judicial Certification of Experts: Litigators Should Blow the Whistle on a Common But Flawed Practice*, Kirgis, P., Feb. 2000 30
- Litigation Strategies – Reviewing Documents for Privilege: A Practical Guide to the Process*, Cohen, D., Sept. 2000 43

Need for a Testifying Physician to Rely on Reports by a Non-Testifying Physician Poses Evidentiary Problems, Friedman, M., Nov./Dec. 2001 28

Use of Surveillance Evidence Poses Risk of Ethical Dilemmas and Possible Juror Backlash, Altreuter, W., Jul./Aug. 2002 40

Family Law

Best Interests of the Child Remain Paramount in Proceedings to Terminate Parental Rights, Crick, A.; Lebovits, G., May 2001 41

Changing Population Trends Spur New Interest in Prenup Agreements for Love, Money and Security, DaSilva, W., Feb. 2002 8

Complex Laws and Procedures Govern Civil Contempt Penalties for Violating Orders of Protection, Fields, M., Feb. 2002 21

Court-Appointed Law Guardians Face Issues Involving Liability, Conflicts and Disqualification, Muldoon, G., Jul./Aug. 2004 30

Divorce Case Settlements Require Detailed Understanding of Pension Plan Options, David, R., May 2003 33

Drafting Matrimonial Agreements Requires Consideration of Possible Unconscionability Issues, Marrow, P.; Thomsen, K., Mar./Apr. 2004 26

Family Law – From Father Knows Best to New Rights for Women and Children, Whisenand, L., Jan. 2001 49

In Vitro Fertilization Options Lead to the Question, “Who Gets the Pre-Embryos After Divorce?”, Pollet, S., Feb. 2004 33

Is the Glass Half-Empty or Half-Full? The Unused or Underused License or Degree, Landau, H., Mar./Apr. 2006 46

Juvenile Drug Treatment Court Uses “Outside the Box” Thinking to Recover Lives of Youngsters, Sciolino, A., May 2002 37

Mediating Domestic Violence, Pollett, S., Sept. 2005 42

New Law Gives Parents Authority to End Futile Treatment for Retarded Adult Children, Golden, B., Feb. 2003 16

Protecting the Protectors, Kwieciak, S., III, Feb. 2005 42

Responses to Juvenile Crime Consider the Extent of Parents’ Responsibility for Children’s Acts, Pollet, S., Jul./Aug. 2004 26

Same-Sex Marriage Under New York Law: Advising Clients in a State of Uncertainty, Dorn, D., Jan. 2006 40

Uniform Interstate Family Support Act Has Made Extensive Changes in Interstate Child Support Cases, Aman, J., Jan. 2000 12

View From the Bench – One More Time: Custody Litigation Hurts Children, Fields, M., June 2000 20

Freedom of Information (see Government and the Law)

Government and the Law

Challenges to Challenging the Patriot Act, Bohorquez, F., Jr., Feb. 2005 24

Fine Line, A: The First Amendment and Judicial Campaigns, Stern, G., Jan. 2005 10

Military Law Cases Present Diverse Array of Vital Issues for Individuals and the Government, Fidell, E.; Sheldon, D., Feb. 2001 44

Municipal Law – Fundamental Shifts Have Altered the Role of Local Governments, Magavern, J., Jan. 2001 52

Tactics and Strategy for Challenges to Government Action Give Both Sides Much to Consider, Malone, L., Feb. 2004 40

Health Law

Government Audits Probe Potential Fraud and Abuse by Physicians and Health Facilities, Formato, P.; Schoppmann, M.; Weiss, R.; Wild, R., Jul./Aug. 2002 8

Medicaid and Medicare Fair Hearings Are Vital First Step in Reversing Adverse Decisions on Patient Care, Reixach, R., Jr., Feb. 2000 8

New Federal Regulations Expand Protections for Privacy of Health Records, Clemens, J., June 2002 37

Helpful Practice Hints (see Law Practice)

History

Court of Dreams, Card, S., Mar./Apr. 2005 10

Death by Statute: The Turbulent History of New York’s Death Penalty, Maggio, E., Feb. 2005 10

Historic Perspective, The – Belva Ann Bennett Lockwood: Teacher, Lawyer, Suffragette, Selkirk, A., May 2002 45

Historical Perspective – Benjamin Cardozo Meets Gunslinger Bat Masterson, Manz, W., Jul./Aug. 2004 10

Historical Perspective – Desegregation in New York: The Jamaica School War, 1895–1900, Manz, W., May 2004 10

Historical Perspective – Office of N.Y. Attorney General Sets Pace for Others Nationwide, Weinberg, P., June 2004 10

“I do solemnly swear” The Evolution of the Attorney’s Oath in New York State, Emery, R., Jan. 2005 48

“Of Practical Benefit” – Book Chronicles First 125 Years of New York State Bar Association, Feb. 2004 44

Owls Shouldn’t Claw at Eagles: Big Ed Reilly and the Lindbergh Kidnapping Case, Manz, W., June 2005 10

Palsgraf 75th Anniversary – Trial Judge Burt Jay Humphrey Had Long Career as Jurist, Manz, W., May 2003 10

People v. Gillette: The Trial of the 20th Century Lives on in the 21st, Smith, T., Jul./Aug. 2006 10

Preserving a Heritage – Historical Society Will Collect Record of New York’s Courts, Angione, H., Sept. 2002 8

Reflections on Sentencing – Adapting Sanctions to Conduct Poses Centuries-old Challenge, Boehm, D., Oct. 2001 33

Remembering Brown, Finch, M., Oct. 2005 44

Scenic Standing: The 40th Anniversary of Scenic Hudson and the Birth of Environmental Litigation, Card, S., Sept. 2005 10

Seriatim Reflections – A Quarter Century in Albany: A Period of Constructive Progress, Bellacosa, J., Oct. 2000 4

Taking Title to New York: The Enduring Authority of Roman Law, Massaro, D., Jan. 2000 44

World War II Right-to-Counsel Case – Colonel Royall Vigorously Defended Saboteurs Captured on U.S. Shores, Glendon, W.; Winfield, R., Feb. 2002 46

Humor – Res Ipsa Jocatur

Defending the Lowly Footnote, McAloon, P., Mar./Apr. 2001 64

Does the FDA Have Jurisdiction Over “Miracles”?, Rose, J., Sept. 2000 64

In Praise of Appraisal: Alternate Dispute Resolution in Action, Rose, J., Jan. 2000 56

NAFTA’s Why Santa Claus Is Not Comin’ to Town, Rose, J., Nov./Dec. 2000 64

Will New York State Nikes Become Pyhrric Victories?, Rose, J., Jul./Aug. 2000 64

Insurance Law (see Torts and Negligence)

Intellectual Property (see also Computers and the Law)

Appropriating Artists Face Uncertainty in Interplay Between First Sale and Fair Use Doctrines, Sanders, J., Jul./Aug. 2004 18

Development Agreements Are Vital to Prevent Later Disputes Over Proprietary Interests in Web Sites, Warmund, J., Nov./Dec. 2002 34

Intellectual Property – Substantive and Procedural Laws Have Undergone Fundamental Change, Carr, F., Jan. 2001 58

What Makes a Case “Exceptional”? Awarding Attorney Fees in Trademark Litigation, Holzman, L.; Hsia, S.; Bennett, P.; Burns, M., Mar./Apr. 2006 34

International Law

On the Road – Taking Depositions in Tokyo Or: The Only Show in Town, Disner, E., Mar./Apr. 2000 35

Russia in Transition – Sharing Legal System Objectives as Russia Revives Trial by Jury, Marks, P.; Bennett, M.; Puscheck, B.; Reinstein, R., Mar./Apr. 2003 36

Judiciary / Juries (see Courts)

Labor and Employment

Balancing Test and Other Factors Assess Ability of Public Employees to Exercise Free Speech Rights, Herbert, W., Sept. 2002 24

Can Employers Limit Employee Use of Company E-mail Systems for Union Purposes?, Young, M., Jan. 2000 30

Consumer Directed Assistance Program Offers Greater Autonomy to Recipients of Home Care, Bogart, V., Jan. 2003 8

"Final Regulations" Set Rules for Distributions From IRAs and Qualified Retirement Plans, Neumark, A.; Slater-Jansen, S., Feb. 2003 38

Gradual Changes Have Silently Transformed the Adjudication of Workers' Compensation Claims, Levine, B.; McCarthy, J., Oct. 2002 40

Grutter and Gratz Decisions Underscore Pro-Diversity Trends in Schools and Businesses, Higgins, J., Jan. 2004 32

Labor Law – A Formerly Arcane Practice Now Handles a Wide Range of Issues, Osterman, M., Jan. 2001 40

New Rules Offer Greater Flexibility and Simpler Distribution Patterns for IRAs and Pension Plans, Neumark, A.; Slater-Jansen, S., Mar./Apr. 2001 26

Protections for Public Employees Who "Blow the Whistle" Appear to Be Inadequate, Herbert, W., Feb. 2004 20

So What's ERISA All About?, Ehlers, S.; Wise, D., Oct. 2005 22

Summary of Report – Association Committee Recommends Pension Simplification, Lurie, A., May 2000 36

When Duty Calls: What Obligations Do Employers Have to Employees Who Are Called to Military Service?, Cilenti, M.; Klein, E., Nov./Dec. 2001 10

Who's the Boss? New York Defines Roles in the Professional Employer Organization Act, Salkin, B., Jul./Aug. 2005 34

Landlord / Tenant Law (see Real Property Law)

Land-Use Regulations (see Real Property Law)

Law Practice

Changes in Rules for Home Offices Provide New Possibilities for Deductions, Ozello, J., Mar./Apr. 2000 54

Computerized Research of Social Security Issues, Maccaro, J., May 2000 54

Developing Associates: "Shadowing" Program Provides Early Mentoring Opportunities, Levine, A.; Birnbaum, E., Jul./Aug. 2003 42

If It's Out There: Researching Legislative Intent in New York, Manz, W., Mar./Apr. 2005 43

Law Office Management – How Should Law Firms Respond to New Forms of Competition?, Gallagher, S., June 2000 24

Law Office Management – Yesterday's Strategies Rarely Answer Tomorrow's Problems, Gallagher, S.; Sienko, L., Jr., Sept. 2004 40

Law Practice Management, Kinard, M., Jan. 2005 41

Law Practice Management: Case Chronologies Create Litigation Efficiencies, Krehel, G., Mar./Apr. 2005 40

Law Practice Management: Parting May Be Sweet Sorrow, But It's Getting More Expensive, Giuliani, P., May 2006 32

Law Practice Management: Partner Compensation Plans, Rose, J., Mar./Apr. 2006 42

Legal Research: Recent Developments, Manz, W., Mar./Apr. 2006 49

Practice Tips: Ensuring an Accurate Transcript, Armstrong, D., Mar./Apr. 2006 40

Presentation Skills for Lawyers: "Our next speaker needs no introduction . . ." (Yes, he does), Wilcox, E., Sept. 2006 46

Presentation Skills for Lawyers: Powerful Openings, Wilcox, E., Nov./Dec. 2006 30

Presentation Skills for Lawyers: The Joke Shouldn't Be on You, Samansky, A.; Samansky, E., Nov./Dec. 2006 36

Records and Information Management Programs Have Become Vital for Law Firms and Clients, Martins, C.; Martins, S., Oct. 2001 21

Roundtable Discussion – U.S., British and German Attorneys Reflect on Multijurisdictional Work, June 2000 31

Sweeping Changes to Lawyer Advertising Scheduled to Take Effect November 1, 2006, Sept. 2006 20

Third Series, The: A Review, Lebovits, G., Mar./Apr. 2005 30

Unintended Consequences: Avoiding and Addressing the Inadvertent Disclosure of Documents, Barrer, R., Nov./Dec. 2005 35

Legal and Medical Malpractice (see Torts and Negligence)

Legal Education (see Attorney Professionalism)

Legal Profession (see Attorney Professionalism)

Legal Writing

Academic Legal Writing: How to Write and Publish, Lebovits, G., Jan. 2006 64

Apostrophe's and Plurals', Lebovits, G., Feb. 2004 64

Beyond Words: New Tools Can Enhance Legal Writing, Collins, T.; Marlett, K., June 2003 10

Bottom Line on Endnotes and Footnotes, The, Lebovits, G., Jan. 2003 64

Comparisons and Logic, Lebovits, G., Oct. 2006 64

Department of Redundancy Department, The: Concision and Succinctness – Part I, Lebovits, G., Jul./Aug. 2006 64

Department of Redundancy Department, The: Concision and Succinctness – Part II, Lebovits, G., Sept. 2006 64

Devil's in the Details for Delusional Claims, The, Lebovits, G., Oct. 2003 64

Dress for Success: Be Formal But Not Inflated, Lebovits, G., Jul./Aug. 2001 8

Ethical Judicial Writing – Part I, Lebovits, G., Nov./Dec. 2006 64

Free at Last from Obscurity: Clarity, Lebovits, G., Nov./Dec. 2003 64

Free at Last from Obscurity: Clarity – Part 2, Lebovits, G., Jan. 2004 64

Getting to Yes: Affirmative Writing, Lebovits, G., Oct. 2001 64

He Said – She Said: Gender-Neutral Writing, Lebovits, G., Feb. 2002 64

If I Were a Lawyer: Tense in Legal Writing, Lebovits, G., Nov./Dec. 2002 64

Ineffective Devices: Rhetoric that Fails, Lebovits, G., Feb. 2003 64

Judicial Jestings: Judicious?, Lebovits, G., Sept. 2003 64

Language Tips Column, Block, G.
Jan. 1999–Dec. 2000; Feb., Mar./Apr., June, Jul./Aug., Oct., Nov./Dec. 2001; Jan.–Nov./Dec. 2002; Jan.–May, Jul./Aug., Sept. 2003; Feb., May, June, July/Aug., Oct. 2004; Jan. 2005–Nov./Dec. 2006

Learning Disabilities and the Legal Writer, Lebovits, G., Sept. 2005 64

Legal Writing Ethics – Part I, Lebovits, G., Oct. 2005 64

Legal Writing Ethics – Part II, Lebovits, G., Nov./Dec. 2005 64

Legal-Writing Myths – Part I, Lebovits, G., Feb. 2006 64

Legal-Writing Myths – Part II, Lebovits, G., Mar./Apr. 2006 64

Not Mere Rhetoric: Metaphors and Similes – Part I, Lebovits, G., June 2002 64

Not Mere Rhetoric: Metaphors and Similes – Part II, Lebovits, G., Jul./Aug. 2002 64

"Off" With Their Heads: Concision, Lebovits, G., Nov./Dec. 2001 64

On Terra Firma With English, Lebovits, G., Sept. 2001 64

Pause That Refreshes, The: Commas – Part I, Lebovits, G., Mar./Apr. 2002 64

Pause That Refreshes, The: Commas – Part II, Lebovits, G., May 2002 64

Poetic Justice: From Bar to Verse, Lebovits, G., Sept. 2002 48

Pox on Vox Pop, A, Lebovits, G., Jul./Aug. 2004 64

Problem Words and Pairs in Legal Writing – Part I, Lebovits, G., Feb. 2005 64

Problem Words and Pairs in Legal Writing – Part II, Lebovits, G., Mar./Apr. 2005 64

Problem Words and Pairs in Legal Writing – Part III, Lebovits, G., May 2005 64

Problem Words and Pairs in Legal Writing – Part IV, Lebovits, G., June 2005 64

Problem Words and Pairs in Legal Writing – Part V, Lebovits, G., Jul./Aug. 2005 64

<i>Research Strategies – A Practical Guide to Cite-Checking: Assessing What Must Be Done</i> , Bennett, S.,	Feb. 2000 48	<i>Counterpoint – Pommells: The Facts, Nothing But the Facts</i> , Hutter, M.; Horowitz, D.,	June 2006 42
<i>Sentences and Paragraphs: A Revisionist Philosophy</i> , Lebovits, G.,	Jan. 2005 64	<i>Double-Dipping Lives On. Holterman and the Continuation of the O'Brien Dilemma</i> , Rosenberg, L.,	Sept. 2004 50
<i>Short Judicial Opinions: The Weight of Authority</i> , Lebovits, G.,	Sept. 2004 64	<i>Flexing Your Media Muscle: A Guide to Working Out With the Media</i> , Fantiono, L.,	Oct. 2002 52
<i>Statements of Material Facts in Summary Judgment Motions Require Careful Draftsmanship</i> , Campolo, J.; Penzer, E.,	Feb. 2003 26	<i>HP Proxy Fight, The: Circus or Government Paradigm?</i> , Wilcox, J.,	June 2002 54
<i>Technique: A Legal Method to the Madness</i> , Lebovits, G.,	June 2003 64	<i>Medicaid Planning: An Obligation to Senior Citizens</i> , Rachlin, M.,	Sept. 2004 52
<i>Technique: A Legal Method to the Madness – Part 2</i> , Lebovits, G.,	Jul./Aug. 2003 64	<i>Move Village Elections to November</i> , Greenawalt, W.; Koenigsberg, D.,	Nov./Dec. 2006 24
<i>That's the Way It Is: "That" and "Which" in Legal Writing</i> , Lebovits, G.,	Mar./Apr. 2004 64	<i>New Paradigm for Lawyers</i> , Borsody, R.,	Mar./Apr. 2002 54
<i>Uppercasing Needn't Be a Capital Crime</i> , Lebovits, G.,	May 2003 64	<i>New York Addresses Climate Change With the First Mandatory U.S. Greenhouse Gas Program</i> , Sussman, E.,	May 2006 43
<i>What's Another Word for "Synonym"?</i> , Lebovits, G.,	Jan. 2002 64	<i>New York State's Medical Malpractice Plan: Unfunded, Unworkable, and Unconstitutional</i> , Haskel, M.,	Feb. 2006 30
<i>Write the Cites Right – Part I</i> , Lebovits, G.,	Oct. 2004 64	<i>Participation of Women Should Be Required in Domestic Violence Cases</i> , Murphy, F.,	Jan. 2000 54
<i>Write the Cites Right – Part II</i> , Lebovits, G.,	Nov./Dec. 2004 64	<i>Public Service Tradition of the New York Bar, The</i> , Nathan, F.,	Jul./Aug. 2003 48
<i>Writers' Block: The Journal Peeks Behind the Column to Meet One of the Nation's Most Trusted Legal-Writing Advisers: Gertrude Block</i> , Card, S.,	Sept. 2006 10	<i>Reflections on Being Mediators</i> , Ross, D.; Schelanski, V.,	Jul./Aug. 2000 46
<i>Writers on Writing: Metadiscourse</i> , Lebovits, G.,	Oct. 2002 64	<i>Representing an Incapacitated Person at a Fair Hearing</i> , Rachlin, M.,	Sept. 2003 52
<i>Writing Clinic – An Attorney's Ethical Obligations Include Clear Writing</i> , Davis, W.,	Jan. 2000 50	<i>Re-thinking Retirement</i> , Seymour, W.N., Jr.,	Jan. 2003 50
<i>Writing Clinic – Analyzing the Writer's Analysis: Will It Be Clear to the Reader?</i> , Donahoe, D.,	Mar./Apr. 2000 46	<i>Slippery Slope, A: Discovery of Attorney Work Product</i> , Gabriel, R.,	Mar./Apr. 2004 50
<i>Writing Clinic – Examine Your Grammatical Acumen</i> , McCloskey, S.,	Sept. 2004 30	<i>Standing Down From the War on Drugs</i> , Weinstein, J.,	Feb. 2003 55
<i>Writing Clinic – Make Your Mark With Punctuation</i> , McCloskey, S.,	Nov./Dec. 2003 18	<i>State Legislative Power Supercedes Federal Laws in Accounting Reform</i> , Grumet, L.,	Mar./Apr. 2004 54
<i>Writing Clinic – Rhetoric Is Part of the Lawyer's Craft</i> , McCloskey, S.,	Nov./Dec. 2002 8	<i>Suggestion for Individuals and Businesses With Charitable Inclinations</i> , A, Siviglia, P.,	Sept. 2002 34
<i>Writing Clinic – So Just What Is Your Style?</i> , McCloskey, S.,	Nov./Dec. 2001 39	<i>Teed Off: The Rise in Golf Rage and Resulting Legal Liability</i> , Lang, R.,	Oct. 2004 48
<i>Writing Clinic – The Keys to Clear Writing Lead to Successful Results</i> , McCloskey, S.,	Nov./Dec. 2000 31	<i>Televised Criminal Trials May Deny Defendant a Fair Trial</i> , Murphy, F.,	Mar./Apr. 2000 57
<i>Writing on a Clean Slate: Clichés and Puns</i> , Lebovits, G.,	Mar./Apr. 2003 64	<i>To the Supreme Court: Keep the Courthouse Doors Open</i> , Weinberg, P.,	Feb. 2000 55
<i>You Can Quote Me: Quoting in Legal Writing – Part I</i> , Lebovits, G.,	May 2004 64	<i>Treatment Option for Drug Offenders Is Consistent With Research Findings</i> , Leshner, A.,	Sept. 2000 53
<i>You Can Quote Me: Quoting in Legal Writing – Part II</i> , Lebovits, G.,	June 2004 64	<i>Why the Legal Profession Needs to Mirror the Community It Serves</i> , Hall, L.,	Nov./Dec. 2000 38
<i>You Think You Have Issues? The Art of Framing Issues in Legal Writing – Part I</i> , Lebovits, G.,	May 2006 64	<i>Woe Unto You, Lawyers in the Tax Shelter Business</i> , Lurie, A.,	Mar./Apr. 2003 48
<i>You Think You Have Issues? The Art of Framing Issues in Legal Writing – Part II</i> , Lebovits, G.,	June 2006 64		
Liens (see Real Property Law)		Privileges (see Evidence)	
Litigation (see Trial Practice)		Probate (see Trusts and Estates)	
Matrimonial Law (see Family Law)		Professional Responsibility (see Attorney Professionalism)	
Mortgages and Liens (see Real Property Law)		Real Property Law	
Poetry		<i>Construction Insurance: Do You Only Get What You Pay For?</i> , Loveless, J.,	Mar./Apr. 2006 10
<i>Challenges</i> , Dunham, A.,	Jan. 2000 53	<i>Control of Suburban Sprawl Requires Regional Coordination Not Provided by Local Zoning Laws</i> , Weinberg, P.,	Oct. 2000 44
<i>David Orr – In a Grand Tradition</i> , Finch, M.,	Jul./Aug. 2005 10	<i>Early Assessment of Potential Liens Is Critical to Assure that Recovery Meets Client's Expectations</i> , Little, E.,	Mar./Apr. 2001 44
Point of View		<i>Enhanced Notice Requirements in Property Tax Foreclosure Cases Give Owners More Protection</i> , Wilkes, D.,	Mar./Apr. 2002 48
<i>Being Respectful and Respected in the Practice of Law</i> , Magner, P., Jr.,	Nov./Dec. 2003 39	<i>First Court Case to Interpret Property Condition Disclosure Act Holds Sellers Not Liable</i> , Holtzschue, K.,	Mar./Apr. 2003
<i>Cardozo Mystery, The</i> , Kornstein, D.,	May 2003 47	<i>Metes and Bounds – Payoff on the Eve of Sale</i> , Bergman, B.,	May 2006 34
<i>Chess and the Art of Litigation</i> , Weiner, G.,	Oct. 2003 46	<i>Metes and Bounds – Predatory Lending for All</i> , Bergman, B.,	Sept. 2005 46
<i>Client Protection Funds Serve Noble and Pragmatic Needs</i> , Miller, F.,	Feb. 2001 53		
<i>Conflicts Between Federal and State Law Involving the Spousal Right of Election</i> , Rachlin, M.,	June 2003 52		

<i>Metes and Bounds – (True) Purchase Money Mortgage and Usury</i> , Bergman B.,	Jan. 2006 30	<i>2003 Update on Issues Affecting Accidents Involving Uninsured and/or Underinsured Motorists</i> , Dachs, J.,	May 2004 38
<i>Mortgage Foreclosures Involve Combination of Law, Practice, Relationships and Strategies</i> , Bergman, B.,	Jul./Aug. 2001 19	<i>2004 Case Update – Part I: Uninsured, Underinsured, Supplementary Uninsured Motorist Law</i> , Dachs, J.,	May 2005 38
<i>Paying Off a Mortgage</i> , Bergman, B.,	Mar./Apr. 2005 47	<i>2004 Case Update – Part II: Uninsured, Underinsured, Supplementary Uninsured Motorist Law</i> , Dachs, J.,	June 2005 24
<i>Primer on Conveyancing, A – Title Insurance, Deeds, Binders, Brokers and Beyond</i> , Rohan, P.,	Oct. 2000 49	<i>2005 Update on Uninsured, Underinsured and Supplementary Uninsured Motorist Law – Part I</i> , Dachs, J.,	June 2006 34
<i>Purchase Money Mortgages Require Careful Drafting to Avoid Later Difficulties</i> , Bergman, B.,	Nov./Dec. 2002 29	<i>2005 Update on Uninsured, Underinsured and Supplementary Uninsured Motorist Law – Part II</i> , Dachs, J.,	Jul./Aug. 2006 22
<i>RPL Requires Disclosure Statement</i> ,	Mar./Apr. 2002 52	<i>Actions by Courts and Legislature in 2000 Addressed Issues Affecting Uninsured and Underinsured Drivers</i> , Dachs, J.,	Sept. 2001 26
<i>So Your Client Wants to Buy at a Foreclosure Sale: Pitfalls and Possibilities</i> , Bergman, B.,	Sept. 2003 43	<i>Aggrieved Disability Policyholders in New York Are Not Limited to Past Benefits as Remedy</i> , Hiller, M.,	Jul./Aug. 2002 32
<i>Tax Certiorari & Condemnation in the 9th Judicial District</i> , Dickerson, T.,	June 2006 22	<i>Banking Law Sets Strict Procedures for Canceling Insurance Policies Paid Through Finance Companies</i> , Lustig, M.,	June 2004 18
<i>This Land Is Your Land? Eminent Domain's Public Use Limitation</i> , Wilkes, D.; Cavallaro, J.,	Oct. 2005 10	<i>Black Mold Suits Yield Some Large Personal Injury Verdicts, But Their Future Is Uncertain</i> , Del Gatto, B.; Grande, R.,	June 2002 23
<i>Understanding Mechanic's Liens Reveals Approaches to Thwart a Developer's Improper Filing</i> , Lustbader, B.,	Jul./Aug. 2001 51	<i>Canceling a Private Passenger Automobile Policy</i> , Lustig, M.; Schatz, J.,	May 2005 33
<i>Wall Street Remains a Key Player in Commercial Real Estate Financing Despite Capital Market Fluctuations</i> , Forte, J.,	Jul./Aug. 2001 34	<i>Careful Defense Groundwork on Independent Medical Exams Can Help Balance Trial Testimony</i> , Lang, R.	Jan. 2003 17
<i>When a Mortgage Commitment Is Issued But Later Revoked, Who Keeps the Down Payment?</i> , Penzer, E.,	Sept. 2004 35	<i>Corporate Officers and Directors Seek Indemnification from Personal Liability</i> , Coffey, J.; Gaber, M.,	Mar./Apr. 2001 8
<i>Whole Truth, The? The Problem With "Truth in Lending"</i> , Seaquist, G.; Bramhandkar, A.,	June 2006 30	<i>Early Review by Medical Experts Offers Opportunity to Develop Theory of the Case More Efficiently</i> , Wilkins, S.,	Jul./Aug. 2004 42
<i>Yellowstone Injunctions in Federal Court</i> , Yankelunas, E.,	Sept. 2005 36	<i>If the Jury Hears That a Defendant Is Covered by Liability Insurance, a Mistrial Is Not a Certainty</i> , Haelen, J.,	Oct. 2002 35
Retirement (see Labor and Employment)		<i>In a Suit Based on Intentional Acts, Defendant May Attempt to Raise Comparative Fault Under CPLR 1411</i> , Beha, J., II,	June 2002 32
Science and Technology		<i>Insurance Department Regulations to Stem Fraudulent No-Fault Claims Upheld by Court of Appeals</i> , Billy, Jr., M., Short, S.,	Jan. 2004 40
<i>CaseMap (CaseSoft)</i> , Reed, J.,	Feb. 2000 58	<i>Know Thine Expert – Expert Witness Discovery in Medical Malpractice Cases</i> , Wilkins, S.,	Nov./Dec. 2004 31
<i>Expert Sourcing: Providing Small Firms With Large Firm Information Technology Resources</i> , Randall, S.,	Feb. 2005 36	<i>Lawsuits on the Links: Golfers Must Exercise Ordinary Care to Avoid Slices, Shanks and Hooks</i> , Lang, R.,	Jul./Aug. 2000 10
<i>Technology Primer – Video Teleconferencing of Hearings Provides Savings in Time and Money</i> , La Manna, J.,	Sept. 2000 8	<i>Litigators Must Prepare for Risk that Insurers May Go Into Rehabilitation or Liquidation</i> , Gillis, M.; Calareso, J., Jr.,	Mar./Apr. 2003 20
<i>Wide Use of Electronic Signatures Awaits Market Decisions About Their Risks and Benefits</i> , Zoellick, B.,	Nov./Dec. 2000 10	<i>Medicolegal Aspects of Whiplash – A Primer for Attorneys</i> , D'Antoni, A.,	Oct. 2003 10
Securities Law (see Commercial Law)		<i>New Court of Appeals Ruling Bolsters Use of Res Ipsa Loquitur in Medical Malpractice Cases</i> , Rogak, J.,	June 2003 28
Tax Law		<i>New York Insurance Department: Discretionary Clauses Violate the Insurance Law</i> , Gerber, D.; Whistler, K.,	Sept. 2006 18
<i>Community Foundations: Doing More for the Community</i> , Peckham, E.,	Feb. 2000 52	<i>"No-Prejudice" Rule Survives, Somewhat, The</i> , Timken, N.,	Feb. 2006 40
<i>Other Shoe, The: IRS Begins Enforcement Action Under Offshore Credit Card and Financial Arrangement Probe</i> , Andersen, R.,	Mar./Apr. 2006 30	<i>Normal Rules on Liability for Failure to Use Seat Belts May Not Apply in School Bus Accidents</i> , Effinger, M.,	June 2000 41
<i>Phase-Ins, Phase-Outs, Refunds and Sunsets Mark New Tax Bill, a/k/a EGTRRA 2001</i> , Peckham, E.,	Oct. 2001 41	<i>Not for the Faint of Heart – Additional Personal Injury Protection (APIP) Benefits</i> , Pajak, G.; Loftus, K.,	Mar./Apr. 2006 22
<i>Proposed GST Regulations Clarify Exemptions for Grandfathered Trusts</i> , Sederbaum, A.,	June 2000 48	<i>Paradigm Shift in No-Fault "Serious Injury" Litigation</i> , Nohavicka, J.,	Jan. 2006 26
<i>Qualified State Tuition Programs and Education IRAs</i> , Rothberg, R.,	May 2000 51	<i>Progress Against the Tide: Managing Tort Claims Against the City of New York</i> , Leoussis, F.,	May 2006 36
<i>Settlements and Taxes: The Seven Deadly Sins</i> , Wood, R.,	Feb. 2004 52	<i>Proof of Recurring Conditions Can Satisfy Prima Facie Requirement for Notice in Slip-and-Fall Litigation</i> , Taller, Y.D.,	Sept. 2000 27
<i>Specialty Retirement Plans</i> , Kozol, G.,	Jul./Aug. 2004 50	<i>Remarks at Annual Meeting Dinner, January 22, 2003</i> , Kaye, J.,	Nov./Dec. 2004 35
<i>State Income Tax: Not All Trusts Must Pay</i> , Michaels, P.; Twomey, L.,	Oct. 2001 52	<i>Removal of Personal Injury Actions to New York Federal District Courts</i> , Barrer, R.,	Oct. 2006 34
<i>Tax Alert – Major Changes in Rules Governing NQDCAs</i> , Mack, B.,	Sept. 2005 32	<i>Review of Uninsured Motorist and Supplementary Uninsured Motorists Cases Decided in 2001</i> , Dachs, J.,	Jul./Aug. 2002 20
<i>Tax Alert – Supreme Court Rules on Tax Treatment of Attorneys' Contingent Fees</i> , Mannino, L.,	Feb. 2006 47	<i>Scaffold Law Liability</i> , Pixley, W.,	Oct. 2005 30
<i>Timing the Transfer of Tax Attributes in Bankruptcy Can Be Critical to the Taxpayer</i> , Hansen, L.,	Oct. 2001 44		
Tax Techniques (see Tax Law)			
Torts and Negligence			
<i>2002 Update on Issues Affecting Accidents Involving Uninsured and/or Underinsured Motorists</i> , Dachs, J.,	June 2003 32		

<i>Subrogation Rights of Health Care Providers</i> , Hayes, J.,	Nov./Dec. 2006 32	<i>Changes Affecting Trust & Estate Law</i> , Rubenstein, J.,	Sept. 2005 28
<i>Summing up 1999 'SUM' Decisions: Courts Provide New Guidance on Coverage Issues for Motorists</i> , Dachs, J.,	Jul./Aug. 2000 18	<i>Changes in Estate and Gift Taxes Will Increase Exemption Amounts and Lower Federal Rates</i> , Mark, D.,	
<i>Take the Money and Run: The Fraud Crisis in New York's No-Fault System</i> , Stern, R.,	Oct. 2003 35	Schlesinger, S.,	Sept. 2001 37
<i>Third Parties Can Have Rights to Property Insurance Proceeds in Specific Circumstances</i> , Binsky, M.,	Oct. 2003 24	<i>Changes to Estate Laws in 2002 Affected Families of Terror Victims, Adoptions, Accountings and Trusts</i> , Rubenstein, J.,	Nov./Dec. 2002 15
<i>Torts and Trials – Changes Made in Juries, Settlements, Trial Procedures, Liability Concepts</i> , Miller, H.,	Jan. 2001 26	<i>Dividing Interests in Real Property Can Lead to Differences Among Competing Interests</i> , Donlon, E.,	Nov./Dec. 2003 27
<i>Twenty Years of Decisions Have Refined "Serious Injury" Threshold in No-Fault Accident Cases</i> , Centone, A.,	May 2003 36	<i>Early Detection of Possible Pitfalls in Fiduciary Obligations Can Prevent Later Problems</i> , Freidman, G.; Morken, J.,	Jan. 2002 22
<i>Wrongly Convicted May Recover Civil Damages, But Must Meet Exacting Standards of Proof</i> , Ruderman, T.,	Feb. 2002 30	<i>Guardian ad Litem Procedures Reflect Traditional Court Concerns for Those Lacking Representation</i> , Groppe, C.,	Nov./Dec. 2003 32
Trial Practice		<i>Kinship Proceedings: Proving the Family Tree</i> , Adler, D.,	June 2005 42
2005: A Banner Year for Juries, Kaye, J.,	May 2005 20	<i>Last Resort Estate Planning Finds Acceptance in Statutes and Cases Relying on Substituted Judgment</i> , Peckham, E.,	Mar./Apr. 2002 33
<i>Analytical Tools – Distinguishing Intended Deception from Unconscious Inaccuracy</i> , Teff, J.,	Mar./Apr. 2004 42	<i>Legislative Action in 2001 Updated Accounting Concepts and Made Procedural Changes</i> , Rubenstein, J.,	Jan. 2002 30
<i>Analytical Tools – How to Spot a Lie: Checking Substance and Source</i> , Teff, J.,	Jul./Aug. 2003 27	<i>New Allocation Rules and "Indirect Skips" Now Apply to Generation-Skipping Transfers</i> , Mark, D.; Schlesinger, S.,	Nov./Dec. 2002 26
<i>Analytical Tools – Human Memory Is Far More Fallible and Malleable Than Most Recognize</i> , Teff, J.,	June 2004 38	<i>New Era for Estate Administration in New York Has Reduced Estate Tax But Many Requirements Still Apply</i> , Peckham, E.,	Sept. 2000 30
<i>Changes in Practice and on the Bench – Days of Conviviality Preceded Specialization and Globalization</i> , Hancock, S., Jr.,	Jan. 2001 35	<i>Notable Changes Affecting Estates in the Year 2000 Reformed Wills and Trusts for Tax Purposes</i> , Rubenstein, J.,	Feb. 2001 37
<i>Class Warfare: Aggregating and Prosecuting Consumer Claims as Class Actions – Part I</i> , Dickerson, T.,	Jul./Aug. 2005 18	<i>Planning Ahead – A New Weapon for Objectants? Probate Contests & Waiver of the Attorney-Client Privilege</i> , Cooper, I.; La Ferlita, J.,	Oct. 2006 46
<i>Class Warfare: Aggregating and Prosecuting Consumer Claims as Class Actions – Part II</i> , Dickerson, T.,	Oct. 2005 36	<i>Planning Ahead – Creditors' Claims – Do They Die With the Debtor?</i> , Marcuccio E.; Kukol, A.,	Feb. 2006 18
<i>CLE Insights: Current Trends on Rules for Hearsay</i> , Barker, R.,	May 2003 28	<i>Planning Ahead – Domicile – Estate Planning Issues for the Mobile Client</i> , Michaels, P.; Twomey, L.; Brown, L.,	Jul./Aug. 2006 37
<i>CLE Insights: Evidence – Effective Techniques for Impeaching Witnesses</i> , Meagher, W., Jr.,	Mar./Apr. 2003 28	<i>Planning Ahead – Estate Planning in the Face of Divorce</i> , Freidman, G.,	June 2005 39
<i>CLE Insights: Pretrial Expert Disclosure in State Court Cases</i> , Horowitz, D.,	Sept. 2003 10	<i>Planning Ahead – Everyone Needs a Will</i> , Schlesinger, S.,	May 2005 30
<i>Daubert Debacle, The</i> , Miller, H.,	Mar./Apr. 2005 24	<i>Planning Ahead – Revocable Trusts: Fact or Fiction</i> , Whitaker, G.,	Jul./Aug. 2005 44
<i>Experts in Low Speed Impact Litigation</i> , Maguire, R.,	Jan. 2005 43	<i>Planning Ahead – The Deductible New York Estate Tax</i> , Rothberg, R.,	Feb. 2006 44
<i>Is It Junk or Genuine? Precluding Unreliable Scientific Testimony in New York</i> , Schwab, H.,	Nov./Dec. 2004 10	<i>Proposed Amendment to EPTL 4-1.4</i> , Cooper, I.; Graber, S.,	June 2005 34
<i>Is It Junk or Genuine? Part II</i> , Schwab, H.,	Jan. 2005 25	<i>Qualified Personal Residence Trusts Offer Helpful Planning Options for Potentially Large Estates</i> , Michaels, P.; Twomey, L.,	Nov./Dec. 2003 10
<i>Jury Nullification</i> , Haskel, M.,	Jan. 2005 31	<i>Special Procedures for Victims of the World Trade Center Tragedy Provide Expedited Access to Assets</i> , Leinhardt, W.,	Oct. 2001 8
<i>Jury Trial Innovations in New York State</i> , Krauss, E.,	May 2005 22	<i>State Budget Shortfall in 2003 Was Impetus Behind Many Changes Affecting Trusts and Estates</i> , Rubenstein, J.,	Jan. 2004 26
<i>Litigation Strategies: Dissecting the Deposition: More Than Just a Set of Questions</i> , Glick, R.,	Jul./Aug. 2003 10	<i>Surrogate's Court Discovery – Recent Cases Illustrate Changes Under Provisions of SCPA</i> , Bashian, G.; Yastion, J.,	Nov./Dec. 2004 20
<i>Psychological Testimony on Trial – Questions Arise About the Validity of Popular Testing Methods</i> , Erickson, S.,	Jul./Aug. 2003 19	<i>Trust Glossary – Trusts Provide Variety of Options to Manage and Protect Assets</i> , Mariani, M.,	Jan. 2003 38
<i>Real Case, A – Learning to Love: The Trial Lawyer's 14 Challenges</i> , Miller, H.,	Sept. 2001 8	<i>Uniform Principal and Income Act Will Work Fundamental Changes in Estate and Trust Administration</i> , Groppe, C.,	Jan. 2002 8
<i>Survey of Practice Before Administrative Law Judges Finds Counsel Are Often Poorly Prepared</i> , Poppell, B.,	Mar./Apr. 2002 20	<i>When the Baby Boom Boomerangs: Elder Law Section Publishes Long-Term Care Report</i> , Angione, H.,	Jul./Aug. 2005 28
<i>Trial Strategies – Quick Voir Dire: Making the Most of 15 Minutes</i> , Cole, A.; Liotti, T.,	Sept. 2000 39	<i>Wills and Estate Plans Require New Flexibility to Reflect Tax Changes and Uncertain Future</i> , Keller L.; Lee, A.,	Nov./Dec. 2002 19
<i>View From the Bench – Lawyers Need Detailed Knowledge of Rules for Using Depositions at Trial</i> , DiBlasi, J.,	Oct. 2001 27	Women in Law	
<i>View From the Bench – Preparing an Expert Witness Is a Multi-Step Process</i> , DiBlasi, J.,	May 2003 22	<i>Large Firm Practice – Women and Minorities Joined Firms as Rivalry Opened for Business</i> , Gillespie, S.H.,	Jan. 2001 43
<i>View From the Bench – The Role of Trial Court Opinions in the Judicial Process</i> , Nesbitt, J.,	Sept. 2003 39	<i>Woman's Reflections, A – Difficulties Early in the Century Gave Way to Present Openness</i> , Spivack, E.,	Jan. 2001 60
<i>View From the Bench – Thorough Trial Preparation Is Vital for Courtroom Success</i> , DiBlasi, J.,	May 2002 21		
Trusts and Estates			
<i>All in the Family: A How-to Guide on Lending to Family Members</i> , Michaels, P.; Twomey, L.,	Feb. 2005 38		

INDEX TO AUTHORS 2000–2006

The following index lists the authors of all articles that have appeared in the *Journal* since the January 2000 edition. Below each author's name is the general classification category used for the article. The headline describing the content of the article appears under that classification category in the Index to Articles that begins on page 38.

- Abrams, Steven M.
Computers and the Law Feb. 2003 8
- Adler, David N.
Trusts and Estates June 2005 42
- Akohona, Rachel A.
Labor and Employment Oct. 2002 47
- Alcott, Mark H.
Books on Law Jul./Aug. 2005 52
- Altreuter, William C.
Evidence Jul./Aug. 2002 40
- Aman, John J.
Family Law Jan. 2000 12
- Andersen, Richard E.
Tax Law Mar./Apr. 2006 30
- Angione, Howard
History Sept. 2002 8
Trusts and Estates Jul./Aug. 2005 28
- Armstrong, Denise
Law Practice Mar./Apr. 2006 40
- Attorney Professionalism Committee
Attorney Professionalism, Forum
May–Nov./Dec. 2003;
Jan. 2004–Nov./Dec. 2006
- Ayres, Ian
Commercial Law May 2006 26
- Baird, Edmund C.
Courts May 2002 32
- Bamberger, Phyllis Skloot
Courts Oct. 2006 24
- Bandler, Brian C.
Bankruptcy Jul./Aug. 2000 28
- Barasch, Amy
Courts Feb. 2002 27
- Barken, Marlene
Commercial Law Mar./Apr. 2002 27
- Barker, Robert A.
Trial Practice May 2003 28
- Barrasso, Diane S.
Computers and the Law Sept. 2006 22
- Barrer, Robert A.
Law Practice Nov./Dec. 2005 35
Torts and Negligence Oct. 2006 34
- Bashian, Gary E.
Trusts and Estates Nov./Dec. 2004 20
- Bauchner, Joshua S.
Civil Procedure Mar./Apr. 2000 26
- Beane, Joy
Courts Nov./Dec. 2006 10
- Beane, Leona
Arbitration/ADR June 2002 27
- Beha, James A., II
Arbitration/ADR Sept. 2002 10
Civil Procedure Jan. 2003 22
Torts and Negligence June 2002 32
- Bellacosa, Joseph W.
History Oct. 2000 5
- Bennett, Mark W.
International Law Mar./Apr. 2003 36
- Bennett, Philippe
Intellectual Property Mar./Apr. 2006 34
- Bennett, Steven C.
Arbitration Nov./Dec. 2005 26
Legal Writing Feb. 2000 48
- Bergman, Bruce J.
Real Property Law Jul./Aug. 2001 19
Real Property Law Nov./Dec. 2002 29
Real Property Law Sept. 2003 43
Real Property Law Mar./Apr. 2005 47
- Real Property Law Sept. 2005 46
Real Property Law Jan. 2006 30
Real Property Law May 2006 34
- Berman, Greg
Courts June 2000 8
- Bernstein, Michael I.
Books on Law Mar./Apr. 2000 51
- Bersani, Michael G.
Civil Procedure Oct. 2002 24
- Billy, Michael, Jr.
Torts and Negligence Jan. 2004 40
- Binsky, Mark Ian
Torts and Negligence Oct. 2003 24
- Birnbaum, Eve D.
Law Practice Jul./Aug. 2003 42
- Block, Gertrude
Legal Writing, Language Tips
Jan. 1999–Nov./Dec. 2000;
Feb. 2001–Nov./Dec. 2001;
Jan. 2002–Nov./Dec. 2002; Jan.–May,
Jul./Aug., Sept. 2003; Feb., May–Jul./
Aug., Oct.–Nov./Dec. 2004; Jan. 2005–
Nov./Dec. 2006
- Blum, Ronald G.
Courts June 2003 44
- Boehm, David O.
Books on Law June 2000 51
History Oct. 2001 33
- Bogart, Valerie J.
Labor and Employment Jan. 2003 8
- Bohorquez, Fernando, A., Jr.
Government and the Law Feb. 2005 24
- Borsody, Robert B.
Point of View Mar./Apr. 2002 54
- Bramhandkar, Alka
Real Property Law June 2006 30
- Brennan, Daniel C.
Courts Jan. 2006 34
- Brennan, Kerry A.
Computers and the Law
Nov./Dec. 2004 23
- Brodsky, Stephen L.
Commercial Law Mar./Apr. 2001 16
- Brown, Lindsay H.
Trusts and Estates Jul./Aug. 2006 37
- Burns, Michael S.
Intellectual Property Mar./Apr. 2006 34
- Calabrese, Alex
Arbitration/ADR June 2000 14
- Calareso, John P., Jr.
Torts and Negligence Mar./Apr. 2003 20
- Campolo, Joseph N.
Legal Writing Feb. 2003 26
- Card, Skip
History Mar./Apr. 2005 10
History Sept. 2005 10
Legal Writing Sept. 2006 10
- Carr, Francis T.
Intellectual Property Jan. 2001 58
- Cavallaro, John D.
Real Property Law Oct. 2005 10
- Cavanagh, Edward D.
Antitrust Law Jan. 2000 38
- Centone, Anthony J.
Torts and Negligence May 2003 36
- Cilenti, Maria
Labor and Employment Nov./
Dec. 2001 10
- Clauss, William
Criminal Law June 2000 35
- Clemens, Jane F.
Health Law June 2002 37
- Coffey, James J.
Torts and Negligence Mar./Apr. 2001 8
- Cohen, Daniel A.
Evidence Sept. 2000 43
- Cole, Ann H.
Trial Practice Sept. 2000 39
- Collins, Thomas G.
Legal Writing June 2003 10
- Connelly, Chris
Courts Oct. 2006 19
- Cooper, Ilene S.
Trusts and Estates June 2005 34
Trusts and Estates Oct. 2006 46
- Craco, Louis A.
Attorney Professionalism Jan. 2001 23
- Crane, Stephen G.
Civil Procedure May 2000 36
- Crick, Anne
Family Law May 2001 41
- Cundiff, Victoria A.
Computers and the Law Oct. 2002 8
- Dachs, Jonathan A.
Torts and Negligence Jul./Aug. 2000 18
Torts and Negligence Sept. 2001 26
Torts and Negligence Jul./Aug. 2002 20
Torts and Negligence June 2003 32
Torts and Negligence May 2004 38
Torts and Negligence May 2005 38
Torts and Negligence June 2005 24
Torts and Negligence June 2006 34
Torts and Negligence Jul./Aug. 2006 22
- D'Antoni, Anthony
Torts and Negligence Oct. 2003 10
- DaSilva, Willard H.
Family Law Feb. 2002 8
- David, Reuben
Family Law May 2003 33
- Davidowitz, Edward M.
Courts Nov./Dec. 2006 10
- Davis, Wendy B.
Legal Writing Jan. 2000 50
- Del Gatto, Brian
Torts and Negligence June 2002 23
- Desnoyers, Dale
Environmental Law Oct. 2004 10
- Diamond, Shari Seidman
Courts Oct. 2006 23
- DiBlasi, John P.
Trial Practice Oct. 2001 27
Trial Practice May 2002 21
Trial Practice May 2003 22
- Dickerson, Thomas A.
Consumer Law Sept. 2004 10
Real Property Law June 2006 22
Trial Practice Jul./Aug. 2005 18
Trial Practice Oct. 2005 36
- DiLorenzo, Louis P.
Attorney Professionalism Mar./
Apr. 2003 8
- Di Lorenzo, Vincent
Banking/Finance Law Oct. 2000 36
- Disner, Eliot G.
International Law Mar./Apr. 2000 35

- Donahoe, Diana Roberto
Legal Writing Mar./Apr. 2000 46
- Donlon, Elizabeth Pollina
Trusts and Estates Nov./Dec. 2003 27
- Dorn, Derek B.
Family Law Jan. 2006 40
- Dunham, Andrea Atsuko
Poetry Jan. 2000 53
- Effinger, Montgomery Lee
Torts and Negligence June 2000 41
- Ehlers, Stephen E.
Labor and Employment Oct. 2005 22
- Eldridge, J. David
Crossword Puzzle
Mar./Apr. 2003–June 2004
- Emery, Robert A.
History Jan. 2005 48
- Erickson, Steven K.
Trial Practice Jul./Aug. 2003 29
- Fantino, Lisa M.
Point of View Oct. 2002 52
- Fazio, Christine A.
Environmental Law Jan. 2006 10
- Feathers, Cynthia
Appeals Feb. 2004 36
- Fedorek, Thomas
Computers and the Law Feb. 2004 10
- Feinman, Paul G.
Criminal Law Feb. 2002 34
- Feldman, Howard
Banking / Finance Law Sept. 2005 23
- Fellner, Gary M.
Computers and the Law Jul./Aug. 2006 30
- Fidell, Eugene R.
Government and the Law Feb. 2001 44
- Fields, Marjory D.
Criminal Law Feb. 2001 18
Family Law June 2000 20
Family Law Feb. 2002 21
- Finch, Monica
Poetry Jul./Aug. 2005 10
History Oct. 2005 44
- Fisher, Steven W.
Courts June 2001 29
- Flora, Jonathan R.
Books on Law Jul./Aug. 2005 50
- Formato, Patrick
Health Law Jul./Aug. 2002 8
- Forte, Joseph Philip
Real Property Law Jul./Aug. 2001 34
- Freidman, Gary B.
Attorney Professionalism Nov./Dec. 2001 22
Trusts and Estates Jan. 2002 22
Trusts and Estates June 2005 39
- Friedman, Marcy S.
Evidence Nov./Dec. 2001 28
Evidence Jan. 2002 33
- Friedman Rosenthal, Lesley
Computers and the Law Sept. 2003 32
- Gaber, Mohamed K.
Torts and Negligence Mar./Apr. 2001 8
- Gabriel, Richard
Point of View Mar./Apr. 2004 5
- Gallagher, Stephen P.
Law Practice June 2000 24
Law Practice Sept. 2004 40
- Gerber, Daniel W.
Torts and Negligence Sept. 2006 18
- Gerhart, Eugene C.
Attorney Professionalism Nov./Dec. 2000 42
Books on Law Feb. 2000 59
Books on Law Jul./Aug. 2002 50
- Gershman, Bennett L.
Courts Oct. 2001 36
Criminal Law Mar./Apr. 2000 42
- Gesualdi, James F.
Books on Law Sept. 2000 54
- Gillespie, S. Hazard
Women in Law Jan. 2001 43
- Gillis, Margaret J.
Torts and Negligence Mar./Apr. 2003 20
- Giuliani, Peter A.
Law Practice May 2006 32
- Glendon, William R.
History Feb. 2002 46
- Glick, Robert A.
Trial Practice Jul./Aug. 2003 10
- Golden, Ben
Family Law Feb. 2003 16
- Golden, Paul
Civil Procedure Sept. 2002 18
Commercial Law May 2001 20
Commercial Law Oct. 2004 36
Constitutional Law Nov./Dec. 2001 34
- Goodman, Norman
Courts June 2001 32
- Graber, Staci A.
Trusts and Estates June 2005 34
- Grande, Robert J.
Torts and Negligence June 2002 23
- Grant, Tom
Arbitration/ADR June 2002 46
- Greenawalt, William S.
Point of View Nov./Dec. 2006 24
- Gregory, David L.
Commercial Law Oct. 2000 27
- Groppe, Charles J.
Trusts and Estates Jan. 2002 8
Trusts and Estates Nov./Dec. 2003 32
- Grumet, Louis
Point of View Mar./Apr. 2004 54
- Gutekunst, Claire P.
Courts June 2001 35
- Haas, Erik
Computers and the Law Sept. 2006 22
- Haelen, Joanne B.
Torts and Negligence Oct. 2002 35
- Hall, L. Priscilla
Point of View Nov./Dec. 2000 38
- Hancock, Stewart F., Jr.
Trial Practice Jan. 2001 35
- Hannaford-Agor, Paula
Courts Oct. 2006 19
- Hansen, Lorentz W.
Tax Law Oct. 2001 44
- Haskel, Michael A.
Point of View Feb. 2006 30
Trial Practice Jan. 2005 31
- Hayden, Douglas
Banking / Finance Law Sept. 2005 23
- Hayes, J. Michael
Torts and Negligence Nov./Dec. 2006 32
- Herbert, William A.
Labor and Employment Sept. 2002 24
Labor and Employment Feb. 2004 20
- Herrmann, Mark
Courts Oct. 2001 20
- Higgins, John E.
Labor and Employment Jan. 2004 32
- Hiller, Michael S.
Torts and Negligence Jul./Aug. 2002 32
- Holland, Brooks
Criminal Law Feb. 2002 34
- Holly, Wayne D.
Attorney Professionalism Jan. 2000 26
- Holzman, Lara A.
Intellectual Property Mar./Apr. 2006 34
- Holtzschue, Karl B.
Real Property Law Mar./Apr. 2003 31
- Horowitz, David Paul
Evidence Jan.–Oct. 2005; Jan.–Nov./Dec. 2006
- Point of View June 2006 42
Trial Practice Sept. 2003 10
- Hsia, Sarah C.
Intellectual Property Mar./Apr. 2006 34
- Hutter, Michael
Point of View June 2006 42
- Jalbert, Joseph R.
Evidence Nov./Dec. 2000 24
- Joseph, Gregory P.
Courts June 2001 14
- Kahn, Marcy L.
Courts Nov./Dec. 2006 10
- Kamins, Barry
Criminal Law Jan. 2006 20
- Kassal, Bentley
Appeals Jan. 2004 46
Appeals Nov./Dec. 2004 28
Appeals Nov./Dec. 2005 32
Appeals Oct. 2006 42
- Kassenoff, Jarred I.
Commercial Law Jul./Aug. 2003 32
- Kassoff, Mitchell J.
Commercial Law Feb. 2001 48
Commercial Law Jan. 2003 32
Commercial Law June 2004 22
- Kastner, Menachem J.
Commercial Law Jul./Aug. 2003 32
- Kaye, Judith S.
Attorney Professionalism Sept. 2000 50
Courts June 2001 8
Courts Oct. 2006 10
Torts and Negligence Nov./Dec. 2004 35
Trial Practice May 2005 20
- Keating, Robert G.M.
Attorney Professionalism May 2005 10
- Keller Lawrence P.
Trusts and Estates Nov./Dec. 2002 19
- Kinard, M. Lewis
Law Practice Jan. 2005 41
- Kirgis, Paul Frederic
Books on Law May 2000 50
Evidence Feb. 2000 30
- Klass, Gregory
Commercial Law May 2006 26
- Klein, Eve I.
Labor and Employment Nov./Dec. 2001 10
- Knipps, Susan K.
Courts June 2000 8
- Koenigsberg, David A.
Point of View Nov./Dec. 2006 24
- Korgie, Tammy S.
Attorney Professionalism Mar./Apr. 2000 11
Attorney Professionalism May 2001 5
- Kornstein, Daniel
Point of View May 2003 47
- Krane, Steven C.
Attorney Professionalism May 2005 28
- Krauss, Elissa
Courts Oct. 2006 16
Trial Practice May 2005 22
- Krauss, Sarah L.
Courts Feb. 2002 52
- Krehel, Greg
Law Practice Mar./Apr. 2005 40
- Kukul, Albert B.
Trusts and Estates Feb. 2006 18
- Kwieciak, Stanley, III
Family Law Feb. 2005 42
- La Ferlita, Joseph T.
Trusts and Estates Oct. 2006 46
- La Manna, Judith A.
Arbitration/ADR May 2001 10
Books on Law June 2000 52
Science and Technology Sept. 2000 8

- Landau, Harvey G.
Family Law Mar./Apr. 2006 46
- Landsman, Stephan
Courts Oct. 2006 21
- Lang, Robert D.
Books on Law Feb. 2001 57
Point of View Oct. 2004 48
Torts and Negligence Jul./Aug. 2000 10
Torts and Negligence Jan. 2003 17
- Lange, Michele C.S.
Computers and the Law Mar./Apr. 2004 18
- Lazer, Leon D.
Courts June 2001 37
- Lebovits, Gerald
Courts Mar./Apr. 2002 8
Courts Jul./Aug. 2004 34
Family Law May 2001 41
Law Practice Mar./Apr. 2005 30
Legal Writing Jul./Aug. 2001 8; Sept. 2001–Nov./Dec. 2006
- Lee, Anthony T.
Trusts and Estates Nov./Dec. 2002 19
- Leeds, Matthew J.
Commercial Law Jul./Aug. 2001 43
- Leinhardt, Wallace L.
Trusts and Estates Oct. 2001 8
- Leis, III, H. Patrick
Courts June 2006 10
- Leoussis, Fay
Torts and Negligence May 2006 36
- Leshner, Alan I.
Point of View Sept. 2000 53
- Levine, Arnold J.
Law Practice Jul./Aug. 2003 42
- Levine, Barbara Baum
Labor and Employment Oct. 2002 40
- Lewis, David
Courts Oct. 2004 42
- Liotti, Thomas F.
Books on Law Mar./Apr. 2003 46
Criminal Law Jan. 2003 29
Trial Practice Sept. 2000 39
- Little, Elizabeth E.
Real Property Law Mar./Apr. 2001 44
- Loftus, Kevin
Torts and Negligence Mar./Apr. 2006 22
- Loveless, John J.
Real Property Law Mar./Apr. 2006 10
- Lurie, Alvin D.
Labor and Employment May 2000 44
Point of View Mar./Apr. 2003 48
- Lustbader, Brian G.
Real Property Law Jul./Aug. 2001 51
- Lustig, Mitchell S.
Torts and Negligence June 2004 18
Torts and Negligence May 2005 33
- Lutz, Victoria L.
Courts Feb. 2002 27
- Maccaro, James A.
Law Practice May 2000 54
- Mack, Barrett D.
Tax Law Sept. 2005 32
- Magavern, James L.
Government and the Law Jan. 2001 52
- Maggio, Edward J.
Criminal Law Sept. 2006 30
History Feb. 2005 10
- Magner, Philip H., Jr.
Point of View Nov./Dec. 2003 39
- Maguire, Richard R.
Trial Practice Jan. 2005 43
- Mahler, Peter A.
Commercial Law Jul./Aug. 2001 10
Commercial Law June 2002 8
Commercial Law Oct. 2004 28
- Malone, Lawrence G.
Government and the Law Feb. 2004 40
- Mannino, Laura Lee
Tax Law Feb. 2006 47
- Manz, William H.
Computers and the Law Nov./Dec. 2000 26
Computers and the Law Feb. 2002 40
Computers and the Law Jan. 2003 42
Courts May 2002 8
Courts Feb. 2006 10
History May 2003 10
History May 2004 10
History Jul./Aug. 2004 10
History June 2005 10
Law Practice Mar./Apr. 2005 43
Law Practice Mar./Apr. 2006 49
- Marcuccio, Elizabeth A.
Trusts and Estates Feb. 2006 18
- Mariani, Michael M.
Trusts and Estates Jan. 2003 38
- Mark, Dana L.
Trusts and Estates Nov./Dec. 2002 26
Trusts and Estates Sept. 2001 37
- Marks, Patricia D.
Courts June 2001 40
International Law Mar./Apr. 2003 36
- Marlett, Karin
Legal Writing June 2003 10
- Marrow, Paul Bennett
Arbitration Nov./Dec. 2005 14
Arbitration Jul./Aug. 2006 40
Commercial Law Feb. 2000 18
Commercial Law Sept. 2003 16
Evidence Jul./Aug. 2002 46
Family Law Mar./Apr. 2004 26
- Marrus, Alan D.
Courts Jul./Aug. 2000 42
- Martin, Mia R.
Computers and the Law
Nov./Dec. 2004 23
- Martins, Cristine S.
Law Practice Oct. 2001 21
- Martins, Sophia J.
Law Practice Oct. 2001 21
- Massaro, Dominick R.
History Jan. 2000 44
- McAloon, Paul F.
Humor Mar./Apr. 2001 64
- McCarthy, James M.
Labor and Employment Oct. 2002 40
- McCloskey, Susan
Legal Writing Nov./Dec. 2000 31
Legal Writing Nov./Dec. 2001 39
Legal Writing Nov./Dec. 2002 8
Legal Writing Nov./Dec. 2003 18
Legal Writing Sept. 2004 30
- McGrath, Christopher T.
Courts Mar./Apr. 2004 10
Courts May 2004 28
- McGuinness, J. Michael
Constitutional Law Feb. 2000 36
Criminal Law Sept. 2000 17
Criminal Law Oct. 2003 29
- McQuillan, Peter J.
Criminal Law Jan. 2001 16
- Meade, Robert C., Jr.
Civil Procedure May 2000 36
- Meagher, Walter L., Jr.
Trial Practice Mar./Apr. 2003 28
- Michaels, Philip J.
Tax Law Oct. 2001 52
Trusts and Estates Nov./Dec. 2003 10
Trusts and Estates Feb. 2005 38
Trusts and Estates Jul./Aug. 2006 37
- Miller, Frederick
Point of View Feb. 2001 53
- Miller, Henry G.
Attorney Professionalism Oct. 2003 42
Books on Law June 2005 51
- Torts and Negligence Jan. 2001 26
Trial Practice Sept. 2001 8
Trial Practice Mar./Apr. 2005 24
- Miller, Richard E.
Commercial Law June 2002 18
- Miranda, David P.
Computers and the Law Jul./Aug. 2005 42
Computers and the Law Oct. 2005 34
Computers and the Law Feb. 2006 28
Computers and the Law Sept. 2006 44
- Monachino, Benedict J.
Environmental Law May 2000 22
- Mone, Jennifer M.
Arbitration/ADR Sept. 2000 35
- Mone, Mary C.
Courts June 2001 47
- Moore, James C.
Books on Law Mar./Apr. 2000 50
Books on Law Mar./Apr. 2001 52
- Morken, John R.
Attorney Professionalism Nov./Dec. 2001 22
Trusts and Estates Jan. 2002 22
- Mount, Chester H., Jr.
Courts June 2001 10
- Muldon, Gary
Family Law Jul./Aug. 2004 30
- Mulholland, Ellen M.
Books on Law Feb. 2000 59
Books on Law Sept. 2000 54
Books on Law Mar./Apr. 2001 53
- Munsterman, G. Thomas
Courts June 2001 10
- Murphy, Hon. Francis T.
Point of View Jan. 2000 54
Point of View Mar./Apr. 2000 57
- Nathan, Frederic S.
Point of View Jul./Aug. 2003 48
- Nesbitt, Hon. John B.
Trial Practice Sept. 2003 39
- Netter, Miriam M.
Attorney Professionalism May 2001 49
Attorney Professionalism Jul./Aug. 2002 52
- Neumark, Avery E.
Labor and Employment Mar./Apr. 2001 26
Labor and Employment Feb. 2003 38
- Nohavicka, Joseph D.
Torts and Negligence Jan. 2006 26
- Nolan, Kenneth P.
Attorney Professionalism May 2002 16
- Osterman, Melvin H.
Labor and Employment Jan. 2001 40
- Ovsiovitch, Jay S.
Criminal Law June 2000 35
- Ozello, James
Law Practice Mar./Apr. 2000 54
- Pajak, Gregory V.
Torts and Negligence Mar./Apr. 2006 22
- Palermo, Anthony R.
Books on Law May 2002 52
- Palewski, Peter S.
Environmental Law May 2000 8
- Peckham, Eugene E.
Tax Law Feb. 2000 52
Tax Law Oct. 2001 41
Trusts and Estates Sept. 2000 30
Trusts and Estates Mar./Apr. 2002 33
- Penzer, Eric W.
Legal Writing Feb. 2003 26
Real Property Law Sept. 2004 35
- Pixley, William G.
Torts and Negligence Oct. 2005 30
- Pollet, Susan L.
Family Law Feb. 2004 33
Family Law Jul./Aug. 2004 26
Family Law Sept. 2005 42

- Popoff, Antonella T.
Computers and the Law Oct. 2002 19
- Poppell, Beverly M.
Books on Law Jul./Aug. 2002 50
Trial Practice Mar./Apr. 2002 20
- Powers, John G.
Commercial Law Feb. 2006 22
- Puscheck, Bret
International Law Mar./Apr. 2003 36
- Rachlin, Marvin
Elder Law Feb. 2001 32
Point of View June 2003 52
Point of View Sept. 2003 52
Point of View Sept. 2004 52
- Radigan, Hon. C. Raymond
Courts June 2003 19
- Ramos, William
Civil Procedure Sept. 2006 36
- Randall, Scott
Science and Technology Feb. 2005 36
- Redgrave, Jonathan M.
Civil Procedure Jan. 2004 18
- Reed, James B.
Science and Technology Feb. 2000 58
- Reibstein, Richard J.
Labor and Employment Oct. 2002 47
- Reinstein, Ronald
International Law Mar./Apr. 2003 36
- Reixach, Rene H., Jr.
Health Law Feb. 2000 8
- Richter, Roslyn
Courts June 2001 19
- Ritts, Geoffrey J.
Courts Oct. 2003 20
- Rizzo, Joseph B.
Civil Procedure Feb. 2001 40
- Rogak, Joyce Lipton
Torts and Negligence June 2003 28
- Rohan, Patrick J.
Real Property Law Oct. 2000 49
- Rose, James M.
Humor Jan. 2000 56
Humor Jul./Aug. 2000 64
Humor Sept. 2000 64
Humor Nov./Dec. 2000 64
- Rose, Joel A.
Law Practice Mar./Apr. 2006 42
- Rosenberg, Lee
Point of View Sept. 2004 50
- Rosenberg, Lewis
Books on Law Jan. 2000 58
- Rosenblatt, Albert M.
Courts June 2001 8
- Rosenhouse, Michael A.
Civil Procedure Feb. 2003 30
- Ross, David S.
Point of View Jul./Aug. 2000 46
- Rothberg, Richard S.
Tax Law May 2000 51
Trusts and Estates Feb. 2006 44
- Rubenstein, Joshua S.
Trusts and Estates Feb. 2001 37
Trusts and Estates Jan. 2002 30
Trusts and Estates Nov./Dec. 2002 15
Trusts and Estates Jan. 2004 26
Trusts and Estates Sept. 2005 28
- Ruderman, Terry Jane
Torts and Negligence Feb. 2002 30
- Sabino, Anthony M.
Commercial Law, Nov./Dec. 2005 20
- Salkin, Barry L.
Labor and Employment Jul./Aug. 2005 34
- Samansky, Art
Law Practice Nov./Dec. 2006 36
- Samansky, Eric
Law Practice Nov./Dec. 2006 36
- Schatz, Jill Lakin
Torts and Negligence May 2005 33
- Scheindlin Shira A.
Civil Procedure Jan. 2004 18
- Schelanski, Vivian B.
Point of View Jul./Aug. 2000 46
- Schlesinger, Sanford J.
Trusts and Estates Sept. 2001 37
Trusts and Estates Nov./Dec. 2002 26
Trusts and Estates May 2005 30
- Schnapf, Larry
Environmental Law Oct. 2004 10
- Schoppmann, Michael
Health Law Jul./Aug. 2002 8
- Schwab, Harold L.
Trial Practice Nov./Dec. 2004 10
Trial Practice Jan. 2005 25
- Sciolino, Anthony J.
Family Law May 2002 37
- Seagquist, Gwen
Commercial Law Mar./Apr. 2002 27
Real Property Law June 2006 30
- Sederbaum, Arthur D.
Tax Law June 2000 48
- Selkirk, Alexander M.
History May 2002 45
- Seymour, Whitney North, Jr.
Point of View Jan. 2003 50
- Sheldon, David P.
Government and the Law Feb. 2001 44
- Shoot, Brian J.
Courts Mar./Apr. 2004 10
Courts May 2004 28
- Short, Skip
Torts and Negligence Jan. 2004 40
- Siegel, David D.
Civil Procedure Jan. 2001 10
Civil Procedure Nov./Dec. 2005 10
Civil Procedure June 2006 46
- Sienko, Leonard E., Jr.
Law Practice Sept. 2004 40
- Silbermann, Jacqueline W.
Courts Feb. 2004 30
- Silver, Mark S.
Criminal Law Mar./Apr. 2004 32
- Siskin, Michael A.
Commercial Law June 2002 18
- Siviglia, Peter
Point of View Sept. 2002 34
- Slater-Jansen, Susan B.
Labor and Employment Mar./Apr. 2001 26
Labor and Employment Feb. 2003 38
- Smith, Thomas G.
History Jul./Aug. 2006 10
- Spivack, Edith I.
Women in Law Jan. 2001 60
- Spivey, Gary D.
Courts Jan. 2006 32
- Starr, Stephen Z.
Bankruptcy Jul./Aug. 2000 28
- Stein, Joshua
Banking/Finance Law Jul./Aug. 2001 25
- Steinberg, Harry
Courts Mar./Apr. 2001 39
- Stern, Gerald
Government and the Law Jan. 2005 10
- Stern, Robert A.
Torts and Negligence Oct. 2003 35
- Sullivan, Mark D.
Environmental Law Jan. 2006 10
- Sussman, Edna
Point of View May 2006 43
- Taller, Y. David
Torts and Negligence Sept. 2000 27
- Taylor, Patrick L.
Criminal Law Feb. 2000 41
- Teff, Justin F.
Trial Practice Jul./Aug. 2003 27
Trial Practice Mar./Apr. 2004 42
Trial Practice June 2004 38
- Thomsen, Kimberly S.
Family Law Mar./Apr. 2004 26
- Timken, Nelson E.
Torts and Negligence Feb. 2006 40
- Timkovich, Elizabeth Troup
Computers and the Law Mar./Apr. 2002 40
- Tripoli, Lori
Books on Law June 2002 55
- Turano, Margaret V.
Books on Law Oct. 2000 12
- Turro, Andrew J.
Courts June 2003 44
- Twomey, Laura M.
Tax Law Oct. 2001 52
Trusts and Estates Nov./Dec. 2003 10
Trusts and Estates Feb. 2005 38
Trusts and Estates Jul./Aug. 2006 37
- Vidmar, Neil
Courts June 2001 23
- Vitullo-Martin, Julia
Courts June 2001 43
- Wagner, Lorraine
Books on Law Jul./Aug. 2003 47
- Wagner, Richard H.
Books on Law Feb. 2001 56
- Warmund, Joshua H.
Intellectual Property Nov./Dec. 2002 34
- Ward, Ettie
Civil Procedure Oct. 2000 18
- Wechsler, Michael M.
Computers and the Law Mar./Apr. 2004 18
- Weinberg, Philip
History June 2004 10
Point of View Feb. 2000 55
Real Property Law Oct. 2000 44
- Weinberger, Michael
Evidence Jul./Aug. 2000 38
- Weiner, Gregg L.
Point of View Oct. 2003 46
- Weinstein, Hon. Jack B.
Point of View Feb. 2003 55
- Weis, Philip C.
Computers and the Law Feb. 2003 8
- Weiss, Richard
Health Law Jul./Aug. 2002 8
- Wesley, Richard C.
Books on Law Jul./Aug. 2006 50
- Whisenand, Lucia B.
Family Law Jan. 2001 49
- Whistler, Kimberly E.
Torts and Negligence Sept. 2006 18
- Whitaker, G. Warren
Trusts and Estates Jul./Aug. 2005 44
- Wicks, James M.
Arbitration/ADR Sept. 2000 35
- Wilcox, Elliott
Law Practice Sept. 2006 46
Law Practice Nov./Dec. 2006 30
- Wilcox, John C.
Point of View June 2002 54
- Wild, Robert
Health Law Jul./Aug. 2002 8
- Wilkes, David C.
Real Property Law Mar./Apr. 2002 48
Real Property Law Oct. 2005 10
- Wilkins, Steven
Torts and Negligence Jul./Aug. 2004 42
Torts and Negligence Nov./Dec. 2004 31

CONTINUED ON PAGE 58

CJC, but the CJC may still be a basis for discipline.

The Commission determines whether to admonish or censure judges publicly, remove them from office, or retire them for disability, subject to

undecided within 60 days after final submission and any undecided motion for interim maintenance or child support within 30 days after final submission.²⁰ In summary proceedings like matters in the New York City Civil Court's Housing Part, judges must resolve within 30 days after final submission cases involving nonhazardous

gated only recently and were loosely enforced.²⁷ Numerous courts have since disagreed with *Greenfield*.²⁸ Most commentators believe that judges who issue decisions late act unethically.

Today, the rules requiring judges to report cases are enforced strictly. Court administrators keep close track of undecided cases, remind judges about

An unethically written opinion is a black mark that defines a judge, while the honest, just, well-written opinion is celebrated.

review before the Court of Appeals at the judge's request. The Commission may also issue a confidential letter of dismissal and caution containing suggestions and recommendations after concluding an investigation and instead of a disciplinary proceeding. The Commission may send a confidential letter of caution to a judge when a disciplinary proceeding is sustained.

Lack of knowledge that an act or omission is improper is no defense.¹⁶ But guidance is available. New York advisory opinions can be accessed on Westlaw's NYETH-EO database. New York disciplinary determinations can be obtained from the NYETH-DISP database. New York advisory opinions are inaccessible on LEXIS, but New York disciplinary opinions can be obtained on LEXIS by clicking "States Legal — U.S.," "New York," "Agency & Administrative Materials," and "New York Commission on Judicial Conduct Opinions." Judges and the public may also access ACJE advisory opinions for free on New York's Unified Court System Web site¹⁷ and Commission information, including determinations, on the Commission's Web site.¹⁸

Timeliness

Judges should render justice, but not at the expense of making litigants wait. The RGJC requires judges to "dispose of all judicial matters promptly, efficiently and fairly."¹⁹ In New York, all judges must report to the Chief Administrator of the Courts all cases

or hazardous violations and within 15 days after final submission cases involving immediately hazardous violations or injunctions.²¹

Administrators must remind Supreme Court justices to resolve motions. The deputy chief administrative judge for courts inside and outside New York City must tell the justice that a motion "has been pending for 60 days after final submission."²² If a motion is "unusually complex," the justice may apply to the local administrative judge no later than 20 days after final submission to designate the motion "complex."²³ If the administrative judge agrees, the justice has 120 days to decide the motion.²⁴

In one case, *In re Greenfield*, a New York State Supreme Court justice delayed issuing opinions between seven months and nine years.²⁵ Some litigants were forced to begin proceedings against the justice to compel him to render decisions. Despite a strong dissent, the Court of Appeals declined to sanction him. The court noted that imposing sanctions under the RGJC would be appropriate if a judge purposely concealed delays or failed to cooperate with an administrative judge's efforts to assure that decisions are rendered timely.²⁶ The court found that the justice's actions were not a "persistent or deliberate" neglect of judicial duties that would warrant formal penalties. When *Greenfield* was decided, the rules requiring judges to report late decisions had been promul-

gated only recently and were loosely enforced. A judge uncomfortable with doing so should decide the case differently or on different grounds.²⁹ A judge who recognizes that the real reason for deciding a case is inappropriate should use the occasion to reconsider.

Candor

Candid judges give real reasons for their decisions. A judge uncomfortable with doing so should decide the case differently or on different grounds.²⁹ A judge who recognizes that the real reason for deciding a case is inappropriate should use the occasion to reconsider.

Our democratic process requires reasoned opinions.³⁰ But reasoned opinions aren't necessarily candid. Candid opinions help readers — litigants, lawyers, law students, appellate judges, and the public — understand precedent and outcomes and decide for themselves whether judges are doing their jobs.³¹ A lack of candor reveals a lack of integrity.³²

Candor has its limits, however. Precedent, collegiality, the lawyers' and litigants' personalities, and politics test those limits, and judges should avoid revealing their personal thoughts in the guise of candor.³³

An opinion isn't easy to write.³⁴ The result isn't always pleasant. The law can be complex. It can lead to peculiar results. A judge shouldn't talk about the opinion in the opinion. Judges shouldn't state how difficult the opinion was to write, how much the judge worked on the opinion, or the effort the judge made to ensure a

fair opinion. Justice Oliver Wendell Holmes made an ethical appeal to his readers when he wrote in his dissent in *Lochner v. New York* that “[t]his case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should study it further and long before making up my mind.”³⁵

Judges who say how deliberate, conscientious, hard-working, honest, or smart they are will leave readers unpersuaded. An opinion should resolve issues, not be a vehicle for self-congratulation.

Judges might also be unsure about the opinion’s result. A tentative opinion is a draft opinion that a judge issues seeking comment before the final decision.³⁶ In a dubitante opinion, a judge expresses findings of fact and conclusions of law with reservations.

The public expects judges to decide difficult controversies. Litigants know that one side will lose and the other will win. A judge must deal with the good, the bad, and the ugly. Judges must bring finality to disputes³⁷ and take responsibility for their decisions.³⁸

Humility and Humanity

Some judges get so caught up with their power that they lose sight of their goal: to “be both lawyer and philosopher of the highest grade, blessed with saving common sense and practical experience as well as sound comprehensive learning.”³⁹ Judges should write intelligent, honest, and clear opinions that adhere to ethical and moral principles. Harvard Law Professor Lon Fuller synthesized that rare quality of great judges: “[T]heir fame rests on their ability to devise apt, just, and understandable rules of law . . . [T]hey were able to bring to clear expression thoughts that in lesser minds would have remained too vague and confused to serve as adequate guideposts for human conduct.”⁴⁰ Some non-judges naively believe that judges have supernatural powers. Judges are lost souls when they take to heart the compliments

and honorifics they receive.⁴¹ Judges must never confuse the law’s power with its dignity.

An example of an immodest opinion is *Bianchi v. Savage*.⁴² The court treated the New York landlord-tenant issue in that case as if civilization itself depended on the court’s ruling. The judge’s lack of modesty is endless. He used the royal “we” and “us”; he used capitals, italics, italicized capitals, and exclamation marks. To emphasize, the

An opinion should resolve issues, not be a vehicle for self-congratulation.

judge used adverbs, adjectives, Latin, metadiscourse, and self-congratulatory phrases. Justice Holmes in *Haddock v. Haddock* used a more modest approach when he wrote, “I do not suppose that civilization will come to an end whichever way this case is decided.”⁴³

Judges must rely on their humanity to write opinions that offer just solutions to all. Judges who attempt to write literary masterpieces will lose sight of “the holy function of justice.”⁴⁴ Justice demands just solutions, not brilliant opinions or purple prose.⁴⁵ Judges must not use opinions to display their intelligence. Modesty, humility, and dignity are essential in opinion writing.

Dicta and Public Policy

Judges should be careful about creating or relying on dicta.⁴⁶ Dictum is “[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision.”⁴⁷ Overusing and misusing dicta lead readers to confuse dicta with findings and holdings. Public confidence in the judiciary isn’t promoted if the public doesn’t understand what the opinion holds and why.

Dictum arises when judges try to resolve too many contentions.⁴⁸ Some issues are more important than others. Some contentions are argued heatedly, but a judge will discover later that the contention isn’t relevant to the ultimate determination. A judge may resolve a somewhat minor issue in a short paragraph or two. Overly considering minor claims detracts from important issues and sounds defensive.⁴⁹

Courts should discuss all the separate grounds for an opinion’s holding. Doing so doesn’t create dicta.⁵⁰ It’s important for lawyers to argue in the alternative; they don’t know whether a judge will reach an argument. But judges who use alternative holdings, as opposed to separate arguments for a single holding, dilute opinions and perplex readers. Readers might mix up findings with ruminations when judges hold in the alternative.

Judges sometimes use dicta to lecture about policies ancillary to the issues before them. Judges may use public policy to supplement, but not supplant, existing legal rules.⁵¹ Judges who disagree with a rule should state why it’s unwise and may appeal to the legislature to change the law.⁵² They must not mislead the reader into believing that policy — not the law — is the basis for the holding.⁵³ To take a landlord-tenant example, a court that considers whether a tenant is entitled to remain in an apartment should decide the case on legal grounds. A judge who discusses homelessness or slumlordism risks letting the reader believe that the case was decided for personal or political reasons. The discussion might also reflect prejudice: It might imply that a party falls into a category not established in the particular case.

Next issue: This three-part column continues with tone, temperament, facts, claims, issues, and standards of review. ■

1. For an excellent review of ethical legal writing for New York practitioners and judges, see Gary D. Spivey & Maureen L. Clements, *The Ethics of Legal Writing*, an unpublished two-part manuscript for a Continuing Legal Education course the authors gave at the New York Court of Appeals in April

2002 and June 2003. Several citations in this article are taken from that manuscript.

2. See generally Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960).

3. See <http://www.uscourts.gov/guide/vol2/ch1.html> (last visited Aug. 4, 2006).

4. See <http://www.abanet.org/cpr/mcjc/toc.html> (last visited Aug. 4, 2006). In December 2005, the ABA issued its Final Draft Report to amend the Model Code. See <http://www.abanet.org/judicialethics/finaldraftreport.html> (last visited Aug. 4, 2006).

5. See http://www.abanet.org/cpr/mcjc/pream_term.html (last visited Aug. 4, 2006).

6. See McKinney's Vol. 29, *Judiciary, available at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Code_of_Judicial_Conduct/CJC.pdf (last visited Aug. 4, 2006).

7. N.Y. Const. art. VI, § 20(b)(4).

8. 22 NYCRR Part 100. The RGJC are also available at <http://www.courts.state.ny.us/rules/chief-admin/101.shtml#top> (last visited Aug. 4, 2006).

9. Ann. Rpt., N.Y. St. Comm'n on Jud. Conduct 56 (2005).

10. 22 NYCRR 100.6(E).

11. *Id.* Part 101.

12. Contact the Advisory Comm'n on Jud. Ethics, Office of Ct. Admin., 25 Beaver St., Rm. 1170, New York, N.Y. 10004.

13. Judiciary Law § 212(2)(l)(iv). A candidate who complies with an ACJE Judicial Campaign Ethics Subcommittee opinion is less protected than one who complies with a full ACJE opinion. The candidate is inculcated only for one election cycle from a Commission on Judicial Conduct investigation. For advisory opinions for judicial candidates, see Jud. Campaign Eth. Ctr., <http://www.nycourts.gov/ip/jcec/opinions-list.shtml> (last visited Aug. 4, 2006).

14. Ann. Rpt., *supra* note 9, at 55; N.Y. St. Comm'n on Jud. Conduct, *available at* <http://www.scjc.state.ny.us/General%20Information/general.htm> (last visited Aug. 4, 2006). For articles explaining judicial ethics and judicial discipline in New York, see Gerald Stern, *Judicial Error That is Subject to Discipline in New York*, 32 Hofstra L. Rev. 1547 (2004); Gerald Stern, *The Changing Face of Judicial Elections*, 32 Hofstra L. Rev. 1507 (2004); Gerald Stern, *Is Judicial Discipline in New York State a Threat to Judicial Independence?*, 7 Pace L. Rev. 291 (1987); Gerald Stern, *What Claiborne Did*, N.Y. Times, Oct. 20, 1986, at A27. For historical reasons, the Commission's jurisdiction extends to all New York judges but Housing Part judges, who may be disciplined only by the Chief Administrator of the Courts.

15. Ann. Rpt., *supra* note 9, at 56.

16. *In re Feinberg*, 5 N.Y.3d 206, 214-15, 800 N.Y.S.2d 529, 533-34, 833 N.E.2d 1204, 1208-09 (2005) (per curiam).

17. See http://www.courts.state.ny.us/search/ethics_opinions.asp (last visited Aug. 4, 2006).

18. See <http://scjc.state.ny.us> (last visited Aug. 4, 2006).

19. 22 NYCRR 100.3(B)(7).

20. *Id.* 4.1; accord CPLR 4213(c) (requiring judges to render decisions "within sixty days after the cause or matter is finally submitted or within sixty days after a motion under rule 4403, whichever is later, unless the parties agree to extend the time").

21. 22 NYCRR 208.43. Current protocol requires New York City Civil Court judges in the plenary and Housing Parts to submit reports every 30, 60, and 90 days informing administrators of any undecided case.

22. *Id.* 202.8(h)(1) (eff. Oct. 1, 2006).

23. *Id.* 202.8(h)(2)(i).

24. *Id.* 202.8(h)(2)(ii).

25. 76 N.Y.2d 293, 295-96, 558 N.Y.S.2d 881, 882-83, 557 N.E.2d 1177, 1178-79 (1990) (per curiam).

26. See *id.* at 298, 558 N.Y.S.2d at 883, 557 N.E.2d at 1179.

27. *Id.* at 299, 558 N.Y.S.2d at 884, 557 N.E.2d at 1180.

28. See, e.g., *In re Kilburn*, 157 Vt. 456, 457, 599 A.2d 1377, 1378 (1991) (collecting cases).

29. See generally Robert A. Leflar, *Honest Judicial Opinions*, 74 Nw. U. L. Rev. 721 (1979).

30. See generally John B. Nesbitt, *The Role of Trial Court Opinions in the Judicial Process*, 75 N.Y. St. B.J. 39 (Sept. 2003).

31. Nancy A. Wanderer, *Writing Better Opinions: Communicating With Candor, Clarity, and Style*, 54 Me. L. Rev. 47, 49 (2002).

32. For an uncandid opinion, see *People v. Evans*, 85 Misc. 2d 1088, 1093, 1097, 379 N.Y.S.2d 912, 917, 920 (Sup. Ct. N.Y. County 1975) (Greenfield, J.), in which the court, acquitting of rape a defendant who told his accuser "I could kill you; I could rape you; I could hurt you physically," wrote: "So bachelors, and other men on the make, fear not. It is still not illegal to feed a girl a line, to continue the attempt, not to take no for a final answer, at least not the first time."

33. For two melodramatic and perhaps overly candid opinions, see *Webster v. Reproductive Health Svcs.*, 492 U.S. 490, 537, 538 (1989) (Blackmun, J., concurring & dissenting) ("I fear for the future."); *People v. Davis*, 43 N.Y.2d 17, 39 n.*, 400 N.Y.S.2d 735, 747 n.*, 371 N.E.2d 456, 468 n.* (Breitel, C.J., dissenting) (explaining personal opposition to death penalty).

34. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 Cornell L.Q. 274, 278 (1929) ("[A]fter canvassing all the available material at my command, and duly cogitating upon it, [I] give my imagination play, and brooding over the cause, wait for the feeling, the hunch — that intuitive flash of understanding which makes the jump-spark connection between question and decision . . .").

35. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). For a discussion of Justice Holmes's ethical appeal in *Lochner*, see Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 Va. L. Rev. 1351, 1381 (1986).

36. For the pros and cons of writing tentative opinions, see Philip M. Saeta, *Tentative Opinions: Letting a Little Sunshine into Appellate Decision Making*, 20 Judges' J. 20 (Summer 1981).

37. See Mortimer Levitan, *Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?*, 43 A.B.A. J. 628, 630 & 666 (July 1957) (arguing that judicial opinions shouldn't vacillate).

38. Griffin B. Bell, *Style in Judicial Writing*, 15 J. Pub. L. 214, 218 (1966).

39. Cuthbert W. Pound, *Defective Law — Its Cause and Remedy*, 1 N.Y. St. B. Ass'n Bull. 279, 285 (Sept. 1929).

40. Lon L. Fuller, *An Afterward: Science and the Judicial Process*, 79 Harv. L. Rev. 1604, 1619 (1966).

41. Mortimer Levitan, *Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?*, 43 A.B.A. J. 628, 630 (July 1957).

42. 83 Misc. 2d 1007, 373 N.Y.S.2d 976 (White Plains City Ct. 1975). This opinion, written by an Acting City Judge, should be read in the unofficial version. The State Reporter charitably lowercased the capitals in the Official Reports.

43. 201 U.S. 562, 628 (1906) (Holmes, J., dissenting).

44. Piero Calamandrei, *Eulogy of Judges* 85-86 (1935) (John Clark Adams & C. Abbot Phillips, Jr., trans., 1942) (quoted with some changes in Robert A. Leflar, *Appellate Judicial Opinions* 109 (1974)).

45. For an extreme example of ostentatious writing, see *Goldin v. Artache*, N.Y.L.J., Aug. 26, 1986, at 6, col. 3 (Sup. Ct. N.Y. County) (Wright, J.).

46. Joyce J. George, *Judicial Opinion Writing Handbook* 242 (4th ed. 2000) ("[D]icta in opinions . . . are not encouraged.").

47. Black's Law Dictionary 485 (8th ed. 1999).

48. Robert G. Simmons, *Better Opinions — How?*, 27 A.B.A. J. 109, 111 (Feb. 1941).

49. Judges ought not be defensive. As the Supreme Court of California wrote long ago, "An opinion is not a controversial tract, much less a brief in reply to the counsel against whose views we decide. It is merely a statement of conclusions, and of the principal reasons which have led us to them." *Holmes v. Rogers*, 13 Cal. 191, 202 (1859) (Baldwin, J.) (petition for rehearing).

50. See *Woods v. Interstate Realty*, 337 U.S. 535, 537-38 (1949) (Douglas, J.).

51. See 1 John H. Wigmore, *Evidence in Trials at Common Law* § 8a, at 616 (Peter Tellers rev. ed. 1983) (stating that policy should supplement technical legal rules); James D. Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 Brook. L. Rev. 323, 323 (1971) ("To base a decision on the ground of public policy . . . brings into the case . . . the exercise of community control quite apart from statute, judicial precedent or doctrine.").

52. See *People v. Graham*, 55 N.Y.2d 144, 152, 447 N.Y.S.2d 918, 922-23, 432 N.E.2d 790, 794-95 (1982) (Fuchsberg, J.) (noting that parties may appeal to legislature if they're unhappy with statute).

53. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1409 (1995) (suggesting that judges refrain from commenting on "broader political and social policies" unless commentary is about conduct outside court affecting issues in court).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

We represent a large local corporation as sole outside counsel, and the fees generated are quite significant to our firm. I am the partner in charge, and responsible for the assignment of this client's matters. For the past two years, a senior associate in our firm (let's call him "Brad") has worked closely with me in serving this client. As time went by, Brad began to fill in for me at meetings held at the client's place of business. Nearly all of those sessions included the client's General Counsel/Vice President for Legal Affairs (I'll identify her as "Linda").

Brad has just informed me that Linda wants him to become the principal attorney on the client's account. According to Brad, we really have no choice in this matter. Should I refuse to go along with this "takeover," Linda will (again, according to Brad) begin using other law firms. In addition, our firm allocates credits in favor of the person who brings in a client's business. Under our system, I am now, as the lead attorney, receiving all the credit for billings that result from this client's matters. That credit will go to Brad if he becomes lead counsel.

As if this were not enough, Brad further advised me that Linda has told him that she will send her company's matters to his next firm (as long as no conflicts exist), should he be fired or choose to leave. However, he insisted that he is happy with our firm, and wants to stay.

Both Brad and Linda are single, and I suspect they are romantically involved. Aside from my own personal losses, I believe there are risks for the firm if the proposed change is made. His statements to the contrary notwithstanding, Brad could leave and take the client with him. Even if this does not happen, there could be a bad ending to the affair, which could also result in the loss of this important client.

This is a mess, but my initial reaction was that I have no choice but to go along. However, my own ego and wallet aside, I have started to feel that there is something unethical about all

of this. I have thus far avoided contacting Linda for verification of Brad's story, because I am still trying to decide how to handle things if he accurately reported her wishes. Any advice you can provide would be most appreciated.

Sincerely,
Partner With a Problem

Dear Partner:

There are essentially two ways to view your situation. If the facts are as described by Brad, then you and your firm are being complimented on having assigned such an able person to do the legal work for this client. It therefore may be that Brad is being chosen over you as principal attorney because of his legal talent, as well as for his personal compatibility with the General Counsel/VP for Legal Affairs, and those other client officers and employees with whom Brad interacts.

On the other hand, if Brad is having an affair with Linda, and is not being preferred based on legal merit, there are obvious difficulties. One immediate question would be whether Brad is billing his time for legal work only, and not for personal time being spent with Linda. More importantly, can Brad use his own best judgment, without undue influence from Linda, when advising the client? And what happens if or when Brad and Linda experience problems with or end their relationship?

Given the importance of the client to your firm, and assuming for the moment that you want Brad to stay on, you should evaluate the Disciplinary Rules to identify any violation that could cause difficulties for either you, the firm or for Brad.

To begin, DR 1-104(A) requires your law firm to make reasonable efforts to ensure that all lawyers in the firm conform to the Disciplinary Rules. And DR 1-104(B) specifies that a lawyer with direct supervisory authority over another lawyer must make reasonable efforts to ensure that the other lawyer conforms to the DRs. In the case of a

violation, DR-104(D) makes you, as Brad's supervising attorney, responsible for his conduct should you ratify that conduct, or fail to take remedial action at a time when consequences could be, or could have been, avoided or mitigated.

DR 5-111 covers "Sexual Relations with Clients." Subsections B(1) and B(2) might be applicable to Brad. B(1) precludes a lawyer from requiring or demanding sexual relations from a client incident to any professional representation. B(2) precludes a lawyer from coercing, intimidating or using undue influence in entering into sexual relations with a client. If you have reason to believe that there might possibly be such a DR violation by Brad, then you have an ethical obligation to inquire.

Under the circumstances, Brad is the only person you can ask about the relationship. Whether Brad denies or admits the existence of a sexual relationship with Linda, it would be appropriate to discuss the DRs and the dangers of such a relationship while it is ongoing, as well as what might happen at its end. Also, if there is such a relationship, Brad should know whether the client has any policy against an employee fraternizing with a vendor.

Above and beyond your discussion with Brad, and irrespective of his answers to your inquiries, you should confirm his information. In that regard, you should bear in mind that a general counsel does not always control the choice of attorney. If someone other than Linda engaged your services in the first instance, and that person is presently the CFO or CEO, you should verify with him or her that the other officers are aware of the choice of Brad as principal attorney in your stead. If Brad's information is confirmed, diplomacy is called for. Thank the client's officers (including Linda) for using your firm, say how much you appreciated working with the client, that you are, of course, always available for a particular matter or as a backup to Brad if needed, and that you are happy Brad has been so satisfactory

for the client's legal needs. As long as you want this client to continue with your firm, we recommend that you are perceived as a group of happy, cooperative professionals.

At least for the present time, we also recommend a review of Brad's billings, and a discussion of the work he is doing for the client (all without your billing the client for this supervisory time). Shadowing Brad without cost to client is prudent until you are comfortable that the transition is appropriate.

The Forum, by
Miriam Maccoby Netter
Delmar, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I work in a large law firm which recently hired a high-powered market-

ing 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 company 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

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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INDEX TO AUTHORS

CONTINUED FROM PAGE 50

Wilsey, Gregory S.

Attorney Professionalism Mar./Apr.
2000 10

Courts June 2001 50

Winfield, Richard N.

History Feb. 2002 46

Wise, David R.

Labor and Employment Oct. 2005 22

Wishart, Lynn

Computers and the Law Sept. 2003 24

Wolf, Alan

Computers and the Law Sept. 2003 24

Wood, Robert W.

Tax Law Feb. 2004 52

Tax Law Jul./Aug. 2006 44

Yankelunas, Edward P.

Real Property Law Sept. 2005 36

Yastion, James D.

Trusts and Estates Nov./Dec. 2004 20

Young, Maureen W.

Labor and Employment Jan. 2000 30

Young, Sanford J.

Civil Procedure Jan. 2004 10

Civil Procedure June 2004 28

Civil Procedure May 2006 10

Younkins, Ronald

Courts Feb. 2001 12

Zoellick, Bill

Science and Technology Nov./Dec.

2000 10

Zullo, Emil

Courts June 2001 50

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: The associates in this office are involved in a debate about whether to use the singular or the plural verb in a sentence like the following, "He is one of those people who (refuse/refuses) to take 'no' for an answer." Each side is unwilling to accept the other's view, and we agreed to let you decide.

Answer: This is an easy question to answer because logic, grammar, idiom, and the "authorities" all agree that the plural verb *refuse* is correct. First, logic requires the choice of the plural verb *refuse* in the reader's question because the verb *refuse* refers to the plural noun-phrase, "those people," in the reader's question. The reader's meaning is that, besides the person he singles out, there are numerous people who will not take "no" for an answer.

Second, according to grammar, the verb *refuse* must be plural because of the grammatical rule that verbs agree in number with their closest antecedent noun or pronoun. In order for a singular verb to be correct, the sentence would have to be re-written: "The person refuses to take 'no' for an answer."

Third, the statement is idiomatic. If you ask people who speak English as their native language to fill in the blank in the sentence above, the majority would instantly choose the plural verb. Only if they scrutinized the sentence and then noticed that the word *one* appeared early in the sentence, would they conclude (as did some of your colleagues) that the words *who* and *that* referred to a single individual.

Fourth, authorities are virtually unanimous in their choice of the plural verb, so if you prefer to use the singular form of the verb, you'll have to ignore their advice.

Question: Have you noticed the new meaning for the word *robust*? It seems that *robust* has become a current favorite of politicians and journalists, but I am not sure of its meaning. Can you enlighten me?

Answer: I wish I could, but the currently popular adjective *robust* has not yet achieved any clear meaning.

Among those who use it most, it is a catch-all term whose meaning is vague at best. Still you will find it liberally scattered on the pages of your daily newspaper like the mushrooms that pop up daily in our front yard. Probably, the word *robust* will either eventually gain standard status with a consensus meaning or disappear from its current popularity as a fad word.

The adjective *robust* came from the Latin noun *robus*, which meant "oak." Because of the strength and power implied in that noun, it then became a Latin adjective *robustus*, meaning "powerful, strong, or oaken." It was borrowed into English around 1540 with the same meaning. Traditionally, and currently, *robust* combines ideas of "healthy, hearty, vigorous, strong," and "full of vitality." Traditionally, it has been used to refer only to humans and to other animate beings.

But advertisers have borrowed the adjective to market their products, personifying products like wine and even cologne (for men) with human "robust" qualities. Does "robust" wine have a flavor heartier than its competitors? Is a "robust" cologne more manly than other colognes? The computer industry has adopted the adjective *robust*, describing as robust "a system that can recover gracefully from the whole range of exceptional inputs and situations in a given environment."

So it is not surprising that politicians and journalists have also borrowed *robust* as an appropriate modifier, endowing it with new and equally vague meanings. For example, in a front-page article on September 25, *New York Times* reporter Michael Slackman wrote, "Security Council resolution 1701 was seen as the best way to halt the war . . . by giving Israel assurances that . . . a **robust** international force [would] prevent Hezbollah militants from attacking." And President Bush recently described the actions of the United Nations as **not robust**, during an interview in which he commented, in response to a question, "I'd like to see more **robust** United Nations action." (My emphasis.)

But the disadvantage of plucking from the dictionary a word that has an accepted meaning, and then adding to or changing that meaning, is that nobody is certain what the new meaning is. Sometimes that obscurity is intended. Then the disadvantage becomes an advantage.

For example, words like *outsource*, *rendition*, *earmark* and (most recently) *pretext* have traditionally been neutral, having no unpleasant connotation. Now, with their newly assigned meanings, those words have become euphemisms to conceal behavior that some people consider offensive.

So what did President Bush intend when he expressed a desire for more robust UN action? Did he mean more "powerful"? More "hearty"? Or perhaps, more "vital"? Or was he using the definition of *robust* as computer gurus use it, to mean "agile"? We may find out later.

Below are comments made by some people who used words well:

Justice Oliver Wendell Holmes: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." (*Towne v. Eisner*, 245 U.S. 418, 425 (1918))

Alexander Pope: "Words are like leaves; and where they most abound, Much fruit of sense beneath is rarely found."

Emily Dickinson: "A word is dead when it is said, some say. I say it just begins to live that day."

Benjamin Franklin: "If you would not be forgotten, As soon as you are dead and rotten, Either write things worth reading, Or do things worth the writing." (*Poor Richard's Almanac*) ■

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Ethical Judicial Writing — Part I

No judicial function is more important than deciding cases ethically.¹ Judges resolve disputes. They create, apply, and enforce rights and obligations.² Judges affect lives. Society trusts judges to rule fairly and impartially, irrespective of issue or litigant. Judges, who must behave with integrity, professionalism, and respect, must be ethical on and off the bench. Judicial ethics are scrutinized in written opinions. Judges leave their mark in written opinions. An unethically written opinion is a black mark that defines a judge, while the honest, just, well-written opinion is celebrated. This three-part article addresses ethical issues that arise in judicial writing, with a New York focus.

Codes, Rules, Commissions, and Beyond

Judges must write within the bounds of the law and the bounds of ethics. They must look for guidance to the law in the jurisdiction where they preside, but no code or rule addresses judicial opinion writing directly.

Federal judges have their own code of judicial conduct. United States Circuit, District, Court of International Trade, Court of Federal Claims, Bankruptcy, and Magistrate judges must comply with the Code of Conduct for United States Judges.³

The American Bar Association formulated the Model Code of Judicial Conduct in 1972.⁴ The ABA wrote the Model Code, as the preamble explains, so "that judges . . . respect and honor the judicial office as a public trust and strive to enhance and maintain confi-

dence in our legal system."⁵ The New York State Bar Association has adopted the Model Code, known as the New York Code of Judicial Conduct (CJC).⁶

The New York State Constitution provides that "[j]udges and justices . . . shall . . . be subject to such rules of conduct as may be promulgated by the chief administrator of the courts with the approval of the court of appeals."⁷ Pursuant to the State Constitution, Judiciary Law § 212(2)(b) directs the Chief Administrator of the Courts to "[p]romulgate rules of conduct for judges and justices of the unified court system with approval of the court of appeals." The Administrative Board of the Judicial Conference promulgated the Rules Governing Judicial Conduct (RGJC) in 1972.⁸ New York's Chief Administrator of the Courts adopted the RGJC with the Court of Appeals's approval.⁹

The RGJC and the CJC are nearly parallel. The CJC consists of canons and sections. The canons set out broad standards; the sections, delineated under each canon, set out specific rules. Commentaries after each section explain the purpose and meaning of the canons and sections. The RGJC consists of rules, not canons. The Chief Administrator of the Courts has not adopted the CJC's commentaries. Where inconsistencies arise between the RGJC and the CJC, the RGJC prevails, except that the CJC prevails regarding a non-judge candidate for elective judicial office.¹⁰

The Advisory Committee on Judicial Ethics (ACJE) advises New York judges who have ethical questions.¹¹ A

judge who telephones an ACJE member or staff attorney might get some informal, oral guidance, although the member or staff attorney will often recommend that the query be posed in writing. E-mailed inquiries are not accepted. A judge who writes to the ACJE will get a written answer from the full Committee.¹² The ACJE issues confidential opinions and publishes them without identifying information. A judge who follows the ACJE's written advice is presumed to have acted ethically if faced with a complaint to the New York State Commission on Judicial Conduct.¹³

The Commission on Judicial Conduct is the agency authorized "to receive and review written complaints of misconduct against judges, initiate complaints on its own motion, conduct investigations, file Formal Written Complaints and conduct formal hearings . . . subpoena witnesses and documents, and make appropriate determinations as to dismissing complaints or disciplining judges. . . ." ¹⁴ The Commission's staff investigates complaints about "improper demeanor, conflicts of interest, violations of defendants' or litigants' rights, intoxication, bias, prejudice, favoritism, gross neglect, corruption, certain prohibited political activity and other misconduct on or off the bench."¹⁵

The Advisory Committee interprets only the RGJC, not the CJC. The Commission currently considers alleged violations of the RGJC, not the

CONTINUED ON PAGE 51