NEW YORK STATE BAR ASSOCIATION

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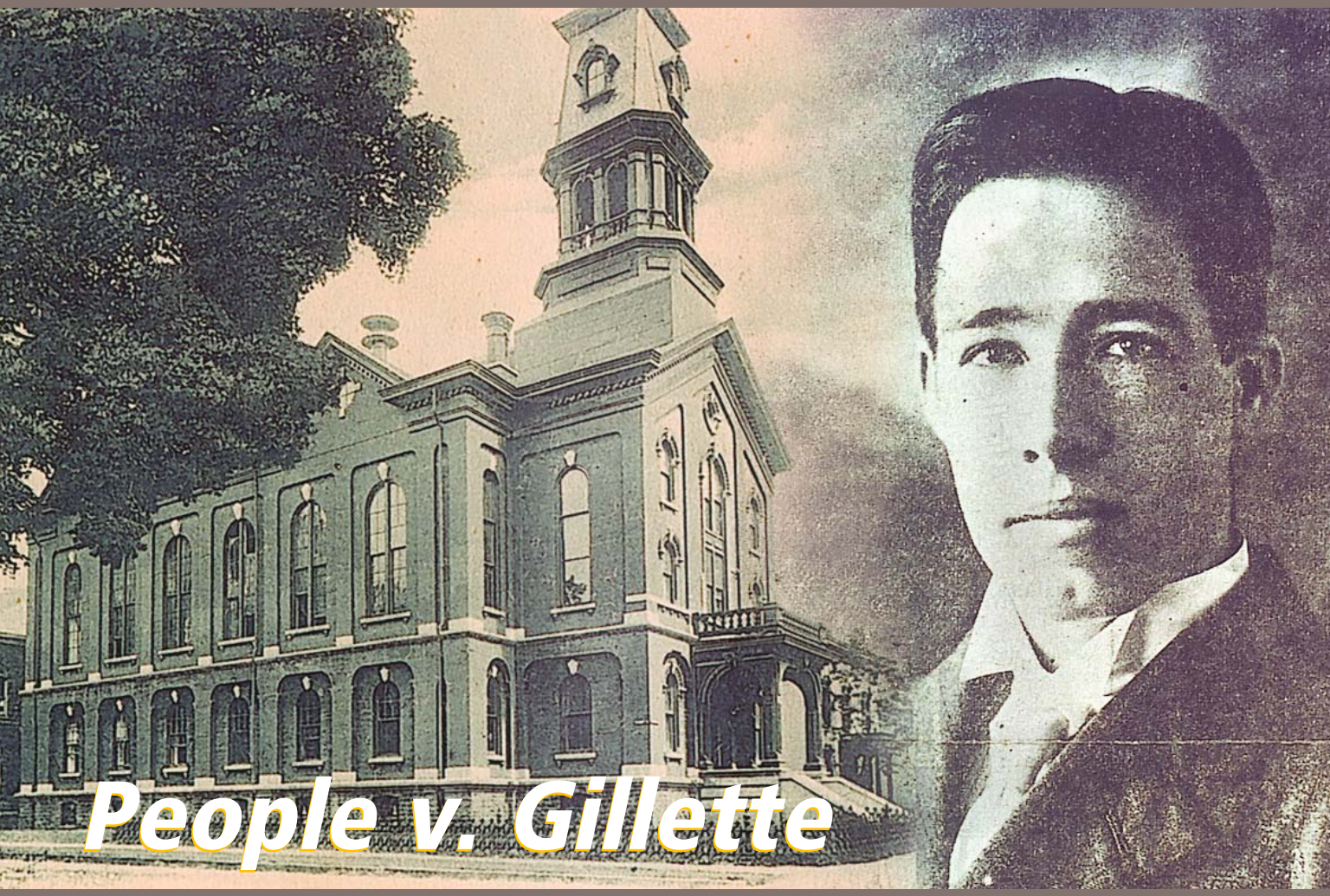

People v. Gillette

The Trial of the 20th Century Lives on in the 21st

by Thomas G. Smith

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July/August 2006

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BY THOMAS G. SMITH

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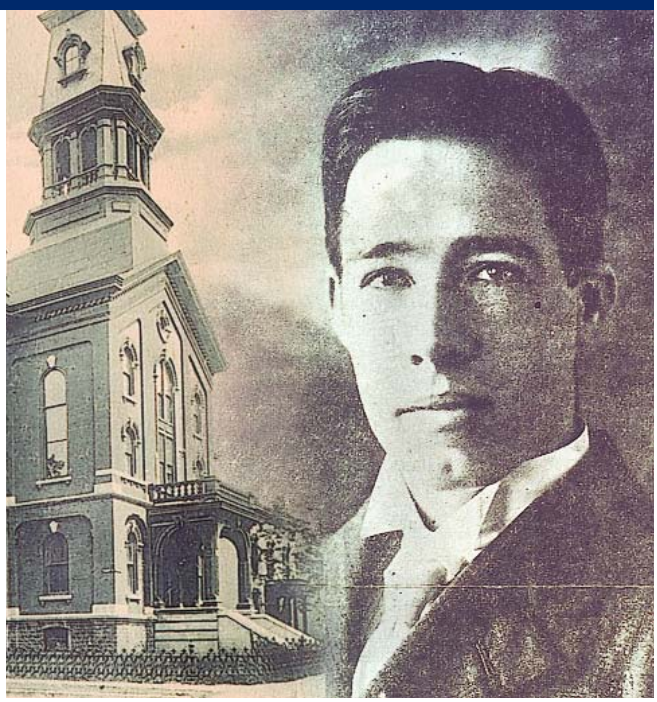

DEPARTMENTS

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PRESIDENT'S MESSAGE

MARK H. ALCOTT

Taking the Initiative

My first day as the Association's 109th President was an occasion for more than celebration. Do not misunderstand: the day certainly was festive. But, to me, it also presented a premier opportunity to take as my first presidential initiative a cause that is so important. On that day, providing civil legal services to the poor was at the forefront of my mind and the center of my agenda.

As noted in my first message, my themes for the year are: defend and strengthen core values; promote and implement needed reform; advance the rule of law; enhance the practice of law. Access to justice for the poor is a core value of our profession and our Association, but studies show that more than 80% of the civil legal needs of the poor go unmet. These needs relate to health care, housing, domestic violence, immigration and a range of other areas that are vitally important to the lives of real people. Society as a whole must provide the ultimate safety net for the indigent. However, lawyers play a special role in meeting the legal needs of the poor by giving them free legal services. We must provide honors and incentives to lawyers who do so.

Accordingly, at 9 a.m. on my first day as President, in my first act as President, I convened a special meeting of the Association's Executive Committee and launched the Empire State Counsel program, which the Executive Committee enthusiastically endorsed.

Under this initiative, all lawyers who voluntarily self-certify to the Association that they have rendered 50 hours annually of free legal services to the poor will be awarded the official, honorific title "Empire State Counsel," which they can use on business cards, letterheads and in biographical reference books. Individuals earning this distinction will receive a certificate and recognition at a public ceremony and will be listed in Association publications.

The program is already up and running on our Web site. It has generated a great deal of enthusiasm, and I even have received inquiries from other states that are interested in replicating it. By celebrating lawyers who serve the public good, we will reinforce their efforts, inspire others to do likewise and elevate the reputation of our profession.

Moreover, I have made a personal commitment to achieve this level of service and to become an Empire State Counsel during my presidency. The day before I took office, I started on that road by providing free legal services at a clinic located on the Lower East Side of New York City and run by one of New York's great voluntary provider organizations, Legal Services for New York City. It is my hope that lawyers statewide will take the same initiative. Through such efforts, the momentum harnessed on June 1 will continue and intensify throughout the year, and we will defend and strengthen one of our core values.

With my first initiative well under way, I am moving forward on my second theme, to promote needed reform: specifically, an end to age discrimination in our profession, including the archaic practice of mandatory retirement. This is the prime time to address these issues because, as the numbers show, America is turning "gray." One in every eight Americans is age 65 or older. And, by 2025, it is projected that one in every five Americans will be in that age group. Interestingly, the membership of our Association reflects this trend. Twenty-six percent of our members are age 56 and over, and 9% are age 66 and over.

Not only are we getting older, we are living longer. In the 1900s, the

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

human life expectancy was 47 years. That number jumped to 68 by the 1950s. Today, that average is 77 years. Due to the 30-year increase in life expectancy, many Americans are waiting until later in life to marry, start a family and, consequently, retire. Indeed, many members of the boomer generation, babies no more, who are approaching retirement, are stuck in the so-called "sandwich generation" – raising their own children while caring for aging parents. For some of these individuals, despite incentives, retirement may not be a viable option.

Regrettably, however, many gray lawyers in our profession are not given a choice, but face mandatory retirement, an unreasonable and inequitable practice that deprives law firms, the courts and our society of seasoned talent. In particular, our Court of Appeals judges must leave the bench at the relatively young age of 70. This requirement, which does not exist in the federal court system, lacks a rational basis and adversely affects otherwise qualified judicial candidates in their late 50s and early 60s.

Further, law firm partners are often urged or obliged to retire as early as the age of 62. This practice is especially pernicious in the law firm setting when combined with non-compete clauses that prevent the prematurely, forcibly retired from engaging in a profession they love and at which they are so skilled.

Similarly, we must take a hard look to determine whether age discrimination exists in our profession in law firm hiring and firing, the staffing of cases, the retaining of counsel, the fixing of time charge rates or other practices. Gray lawyers are the last group against whom discrimination is socially acceptable and, to a great extent, legally permissible. The fair-minded, tolerant partner or client who would never request that a matter be staffed with or handled by a male lawyer or a white lawyer or a straight lawyer often does not perceive the unfairness in requesting a younger lawyer or refusing a gray lawyer.

Ending age discrimination and mandatory retirement will require more than a change in law or policy. It will require a different mindset, a change in culture. The time has come to end mandatory retirement and age discrimination in both the public and private sectors of our profession. Our Association is the voice of our profession and the advocate for the public, and we must lead the way.

Accordingly, I am appointing a Task Force on the Mandatory Retirement of Judges, which will be chaired by the Honorable E. Leo Milonas. This body will examine and make recommendations as to whether New York's policy of mandatory retirement for judges should be retained, modified or eliminated. Further, I am creating the Special Committee on Age Discrimination in the Profession, which will be chaired by Mark Zauderer, Esq. This committee will examine and submit a report on practices in the profession that disadvantage lawyers because of age, including mandatory retirement, up-or-out policies and age-based hierarchical staffing of cases.

Moreover, whether the departure of senior attorneys from our law firms and legal institutions is voluntary or mandatory, we are left with a void upon their absence. We must consider how to harness their still considerable energy and provide a professional outlet for their experience, talent and devotion to public service. We must find and provide pro bono opportunities, board memberships, social outlets, bar association positions, job opportunities and networking for gray lawyers. Accordingly, I am creating the Emeritus Lawyers Committee, which will be chaired by Justin Vigdor, Esq., to provide such advice and opportunities to lawyers who are in or approaching retirement from full-time lawyering or are facing a career transition related to age.

Reform is also needed in another area: the end product of our criminal justice system. Just before taking office, I spent a full day with the Corrections Association, visiting Greenhaven Correctional Facility, a maximum security prison. While there, I met with the superintendent, the staff and, of course, the inmates. As might be expected, the inmates had numerous complaints, which will be reviewed; but they also had praise for the educational and vocational facilities at the prison.

During my visit, I observed that these facilities were spacious, well-lit, well-equipped and run by dedicated, idealistic instructors. In particular, I was struck with the prison's barbershop. The instructor had taught there for many years. When I asked him why he stuck with such a challenging job, he replied, "Everyone else has given up on these men, but I haven't." The inmates in the class learn a viable skill, practice it while incarcerated and receive a certificate attesting to their competence.

But, here is the irony, the tragedy – and the point – of my story. When the inmates are finally released, after very long sentences, they will not be able to earn a livelihood with their newly acquired skill. An individual with a criminal conviction cannot obtain a license to work as a barber, because a criminal history is deemed to indicate a lack of the good moral character and trustworthiness required for licensing. It is no wonder that 60% of people formerly incarcerated are unemployed within a year after their release.

This is only one of many often overlooked collateral consequences of criminal convictions. More than 650,000 people emerge from America's prisons each year. Reform is needed to reduce the obstacles they face when attempting to return to society and their families. Such barriers include the inability to secure employment, reunify with their children, purchase property or reside in certain areas. The consequences of these barriers are far-reaching, affecting New York's families and communities, and ultimately contribute to recidivism that undermines the safety of all. Moreover, these conse-

CONTINUED ON PAGE 55

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Partial Schedule of Fall Programs *(Subject to Change)*

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September 8	Melville, LI
November 2	Buffalo
November 30	Albany

†Gaining an Edge: Effective Writing Techniques for the New York Attorney
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September 8	Canton

Henry Miller—The Trial
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September 8	New York City
September 29	Uniondale, LI
October 20	Tarrytown
November 17	Albany

†The New Regime in Medicaid Planning
(video replay)

September 14	Jamestown

†Using Mediation: What You Need to Know to Make the Process Successful
(one-hour program)

September 21	Telephone Seminar

Managed Care
(half-day program)

September 29	New York City

Ethical Marketing Skills for Lawyers
(half-day program)

October 3	Syracuse
October 4	New York City
October 5	Albany

Practical Skills Series: Basic Matrimonial Practice

October 11	Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

†Ethical Issues in Matrimonial Cases: What's the Good Lawyer to Do?
(video replay)
(half-day program)

October 13	Canton

Best Practices for New York Not-For-Profit Organizations

October 18	Albany
October 25	Syracuse
November 1	New York City
November 8	Buffalo

Shared Parenting and Child Support; Real Problems and Real Solutions in the 21st Century
(half-day program)

October 20	Albany
November 3	New York City
November 17	Long Island
December 1	Buffalo
December 8	Syracuse

Practical Skills Series: Probate and Administration of Estates

October 24	Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

The Keys to Effective Trial Advocacy with James McElhaney
Fulfills NY MCLE requirement for all attorneys (7.0): 7.0 skills

October 25	New York City
October 26	Syracuse

Risk Management for Attorneys
(half-day program)

November 14	Buffalo
December 4	New York City

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

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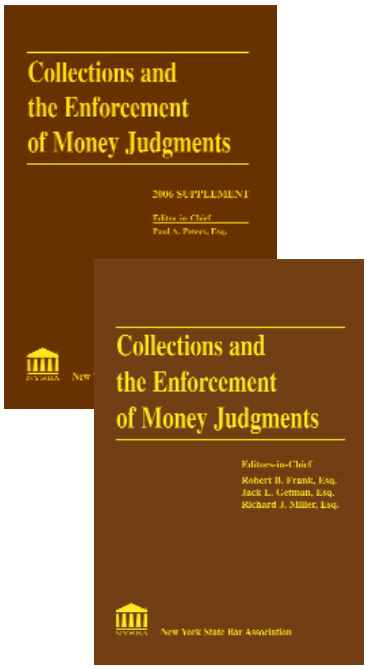

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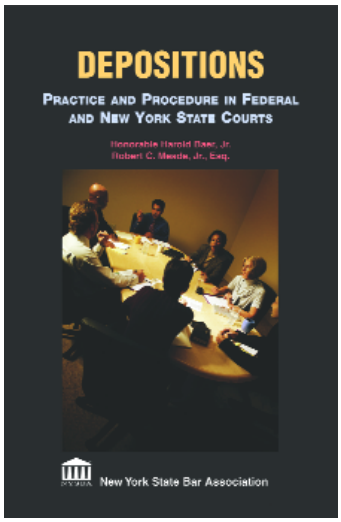

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People v. Gillette

The Trial of the 20th Century Lives on in the 21st

By Thomas G. Smith, Esq.

Prologue: *The sad saga of Chester Gillette, and the 1906 murder trial in Herkimer County, New York, that led to his death by electrocution, continues to fascinate Americans 100 years later. In December 2005, the opera "An American Tragedy," based on Theodore Dreiser's adaptation of the Gillette story in his novel of the same name, had its premiere at the Metropolitan Opera. And, on April 1, 2006, the Herkimer County Historical Society opened a new exhibit entitled "An American Tragedy – The Murder That Will Never Die."[1] This article examines the actual evidence and arguments presented in the Gillette murder trial in light of 21st century standards of justice, as recently applied in the factually similar murder trial of Scott Peterson in*

Scott Peterson as Chester Gillette Redux

Thomas G. Smith (tsmith@hselaw.com) is a partner in the Rochester-based law firm of Harter, Secrest & Emery LLP, where he practices in the Litigation Group, concentrating on resolving business disputes, particularly representing health providers.

> Freedom is what he wanted. . . . This is the life that Scott Peterson wanted. The reason he killed Laci Peterson was that Conner Peterson was on the horizon. Things were going to change. No more of this running around, living this double-life thing.
>
> He wants to live the rich, successful, freewheeling bachelor life. He didn't want to be tied to this kid the rest of his life. He didn't want to be tied to Laci for the rest of his life. So he killed her. There's no big secret there.[2]

In these words, on November 1, 2004, District Attorney Richard Distaso summed up the People of California's murder prosecution against Scott Peterson. Eleven days later, after seven days of deliberation, the San Mateo County jury returned a guilty verdict of murder in the first degree, finding that Peterson had intentionally drowned his pregnant wife, Laci, thereby freeing him to pursue another woman and a more exciting lifestyle. And, on December 13, 2004, after 11 hours of sentencing deliberations, the same jury unanimously voted "to fix the penalty at death."

While the *Peterson* trial captured the attention of the media in this country and abroad, and seemed to reflect a decidedly modern-day penchant for narcissism and moral bankruptcy, the evidence leading to Scott Peterson's conviction and the media circus surrounding his trial bear a striking resemblance to the murder trial of Chester Gillette in Herkimer County, New York, just 100 years ago, at the turn of the 20th century. Like Scott Peterson, Chester Gillette was convicted by a 12-member jury of first-degree murder in the drowning death of a pregnant young woman based on wholly circumstantial

In 2006, the Court of Appeals initiated a lecture series on subjects relating to courts and the community. The second lecture in the series focused on the *Gillette* case, in recognition of its 100th anniversary, and the Court's role in its final adjudication. Susan Herman, a professor at Brooklyn Law School, and Francesca Zambello, director of Tobias Picker's opera, based on Theodore Dreiser's novel, were the featured speakers at the lecture titled *Dreiser's An American Tragedy: The Law and the Arts*. As Chief Judge Judith Kaye noted, this is a story that never grows old; its drama and intrigue continue.

evidence. In Gillette's case, the young woman whose pregnancy threatened to thwart his ambition to lead the life of a carefree socialite, was his fiancée, Grace Brown.

The story surrounding the Gillette case is now legendary, thanks to the sensational news coverage by the tabloids of the time, and to Theodore Dreiser's adaptation of the story in his acclaimed 1926 novel *An American Tragedy*. The saga of Chester Gillette was also retold in a 1931 film by Josef Von Sternberg, starring Sylvia Sidney and Frances Dee, and again later in a 1951 Academy Award-winning film called *A Place in the Sun*, directed by George Stevens and starring Montgomery Clift, Shelley Winters and Elizabeth Taylor. Most recently, Tobias Picker adapted Dreiser's novel as an opera, also named *An American Tragedy*, that premiered at the Met in New York City on December 2, 2005.

Just as the Scott Peterson case raises questions about 21st century American social values and the influence of the media in high-profile criminal cases, the tale of Chester Gillette's demise – and the criminal prosecution that led to his murder conviction – reveals much about social values at the start of the 20th century and the workings of the criminal justice system in the face of a sensationalistic press.

Chester Gillette's Ill-Fated Rise From Poverty to Social Status

Chester Gillette was born in the Montana hills in 1883, and raised by parents who had abandoned their worldly possessions to become born-again, itinerant street preachers for the Salvation Army.[3] During his youth, Chester's family traveled throughout the Pacific Northwest, living off the meager donations they received for their missionary work. From the outset, Chester abhorred this vagabond life of religiously driven poverty.

During his teenage years, well-to-do relatives of the Gillette family, including millionaire Uncle Lucien Warner, owner of the Warner Brothers Corset Co., took pity on him and arranged for the boy to enter the prestigious Oberlin College Preparatory Academy in Ohio. While he captained the school's basketball team, Chester neglected his studies and was expelled for failing grades.

After a series of blue-collar jobs in the Midwest, including work as a railroad brakeman, Chester arrived in the upstate New York community of Cortland in 1905, where he obtained an entry-level job in his Uncle Noah Gillette's thriving skirt factory, overseeing the young women who performed much of the menial work. Rather handsome and bearing the upper-crust Gillette family name, Chester became a prize catch for the young factory girls. In violation of company rules banning intimate employee relationships, he began a secret, then-illicit affair with an uneducated but bright and attractive farm girl from Chenango County named Grace Brown. She was said to have come to Cortland primarily in search of a husband, and to have had "a Victorian flair for the dramatic."

While his amorous relationship with Grace satisfied Chester for a time, his status as a Gillette eventually provided him an entrée to the far more glamorous lifestyle of the wealthy class of upstate New York. He soon began fantasizing about becoming accepted into that alluring, never-before-seen world. As the New York Court of Appeals later stated in its opinion, Chester "sought the society of young ladies belonging to what would be regarded as a more pretentious social grade," while hiding his association with Grace from public observation.[4] Unfortunately, when Grace Brown revealed that she was pregnant with his child, Chester's dream of entering high society seemed no longer possible, and Grace returned to her home in Chenango County to plan their wedding trip to the Adirondacks.

The Death of Grace Brown

But no wedding ever occurred. Instead, Chester secretly began planning Grace's demise and his own escape from social and moral responsibilities. Reading about an accidental drowning of a boater on a local lake, he conceived

of recreating that event with Grace as the victim. On July 11, 1906, using a false name and phony address for himself, and employing other clumsy devices, Chester took the unwitting Grace on that planned trip to the Adirondacks,

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traveling by train from DeRuyter to Utica to Tupper Lake, and finally to the Glenmore Hotel overlooking Big Moose Lake near Eagle Bay, New York. On the afternoon of July 11, Chester and Grace embarked on a picnic using a rented rowboat, purportedly intending to visit scenic points on the lake and to discuss their future plans.

What happened next is still unclear. However, in what the Court of Appeals later described as "the closing scene of their unhappy association," the boat overturned, Grace suffered blows to the head, and her body sank to the lake bottom, after which Chester managed to swim safely to shore.[5] Then, instead of reporting the tragedy, Chester traveled to the nearby town of Inlet where he spent two days in various "amusements" with young ladies, apparently ready to start a new life free from his embarrassing ties to Grace Brown. Unfortunately for him, his crude planning had left a trail of evidence that led authorities to arrest him just three days after the fatal outing.

The scandalous story – "Nephew of Wealthy Upstate Business Tycoon Murders Pregnant Factory Girl" / "Man Kills 'Miss Poor' to Marry 'Miss Rich'" – received immediate front-page coverage in the New York City tabloids, hungry to cover a murder story involving widely divergent social classes. In that age of yellow journalism, utterly fanciful news abounded in the press after Chester's arrest concerning nocturnal visits to his jail cell by an undisclosed socialite woman; Chester's secret confession of guilt; his reenactment of the crime for police; and Chester's failed suicide attempts in jail. It was also reported that a vigilante lynch mob had formed, ready to storm the Herkimer County jail where Chester was held and forgo the legal process.

While extraordinary, Chester's story was not entirely implausible.

While none of these headline stories happened to be true, they whetted a public feeding frenzy in upstate New York and beyond. Further intensifying this media blitz was the ambitious District Attorney of Herkimer County, George W. Ward, who not only personally prosecuted the criminal case, he was also the chief law enforcement investigator, who had tracked down and arrested Chester Gillette. The District Attorney (and then-candidate for county judge) purportedly leaked love letters between Chester and Grace, as well as other evidentiary tidbits, to the big city media.

When Chester was indicted and arraigned on August 31, 1906 (a month and a half after his arrest), his two wealthy uncles, apparently more interested in avoiding notoriety than helping their nephew's criminal defense, refused to lend him any assistance. As a result, the court appointed two lawyers, Albert M. Mills, a respected former state Senator, and a young attorney named Charles Thomas, to defend him.

The Conduct of the Murder Trial

The criminal prosecution of Chester Gillette, at what was called an Extraordinary Trial Term of Supreme Court, Herkimer County, thereafter proceeded with amazing speed by today's standards. Trial was set for November 12, 1906. With just two months to prepare a defense, Chester's lawyers faced a media-tainted jury, an impassioned, well-prepared, and publicity-hungry district attorney, and an enraged public eager to see this greedy, irresponsible rich fellow put to death. The trial court denied defense requests to postpone the trial "until the tide of popular excitement and animus subsided."[6]

At trial, the prosecutor's case against Chester was incredibly thorough in its detail, with more than 100 witnesses testifying and more than 100 pieces of evidence introduced. However, as in the Scott Peterson trial a century later, the evidence against Gillette was entirely circumstantial. While Chester had been caught in a tangle of lies and deceptions – and the motive, the opportunity and the means to commit the murder plainly existed – he never confessed to the crime and there was no other eyewitness.

Chester took the witness stand and maintained that Grace's death, in the end, was actually a suicidal drowning. He testified that while they were drifting in the rowboat, he decided not to carry out his plan. Instead, he told Grace that he was not going to marry her and she would have to return to her parents' home and live as an unwed mother. Chester claimed that Grace became emotionally unglued, stood up suddenly in the boat, and literally threw herself into the water, shouting "I will end it here."

While extraordinary, Chester's story was not entirely implausible. Several defense witnesses, as well as Grace's own letters to Chester, established her despondency in the weeks preceding her death, when she repeatedly threatened to kill herself, and dramatically told co-workers that she "wished she would die and hoped to never see the sunrise again." The defense claimed that, as a result of her emotional outburst, she caused her own demise by falling from the boat, striking her head and drowning before Chester could save her.[7]

Because forensic medicine was largely undeveloped in 1906, particularly in Herkimer County, there was little scientific evidence available to establish how the death had occurred. Complicating matters was the conduct of Isaac Coffin, the aptly named local coroner, who was wholly inexperienced in cases of this magnitude. Inexplicably, Coffin released Grace's body to the undertakers before any timely autopsy could be conducted. By the time an autopsy was finally performed, the body had already

been embalmed, making most conclusions about the cause of death speculative at best.

While District Attorney George Ward attempted to use the autopsy results to show that Grace had been struck fatal blows before she drowned, the prosecution's physician witnesses admitted on cross-examination that she could well have died as Chester claimed. These medical experts also conceded that the evidence of blows found on her head during autopsy could have occurred when she fell from the boat, or even when investigators dragged her lifeless body from the lake.

In the end, however, after more than three weeks of trial, the 12-man jury deliberated just six hours before returning a guilty verdict of first-degree murder on December 4, 1906. A death sentence was immediately imposed and the execution scheduled for just three weeks later. After delays caused by unsuccessful appeals to the courts and a poignant last-minute plea by Chester's mother directly to Governor Charles Evans Hughes, Chester Gillette was electrocuted in the Auburn State Prison on March 20, 1908.

Plainly Rough, But Still Fair, Justice?

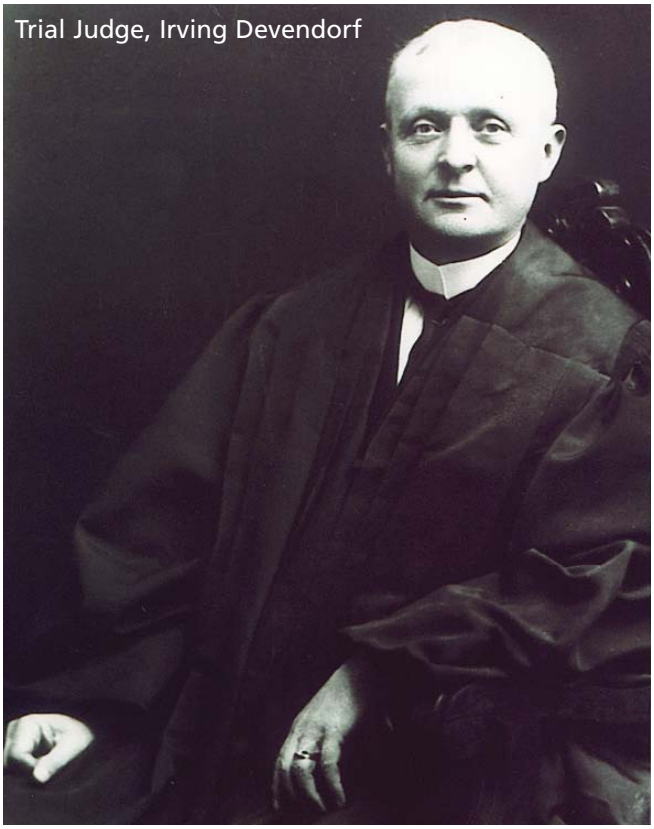
Did Chester Gillette receive a fair trial in 1906 in Supreme Court, Herkimer County?

Under today's standards, probably not. By all accounts, the trial judge, Irving Devendorf, seemed overwhelmed by the carnival atmosphere inside and outside the courtroom. More important, his tolerance of the prosecutor's theatrics and win-at-any-cost conduct appears beyond the pale under current law.

In their brief to the Court of Appeals, Chester Gillette's attorneys presented a remarkably detailed and impressive attack upon the rulings of the trial court, raising 13 separate points of law.[8] The overriding theme of the appeal was that Gillette had been denied a fair trial due to prosecutorial misconduct. The defense argued that the prosecutor's animus toward Chester had created a "tide of indignation . . . exciting prejudice and presenting a gruesome spectacle to the jury."

For instance, over the objection of defense counsel at trial, Judge Devendorf permitted the district attorney to introduce into evidence the lifeless body of the three-month-old fetus along with Grace Brown's uterus, both contained in a partially covered glass jar. The court admitted this inflammatory evidence even though it was undisputed that Grace Brown was pregnant at the time of her death.

Defense counsel also heavily attacked Prosecutor Ward's summation to the jury, contending that the argument was "exceedingly bitter and vicious," and was designed "to inspire the jury's sympathy for the deceased and indignation against the defendant, and to lead the jurors to say: 'No matter what the facts are, he maltreated the girl and we will punish him for that.'"


Trial Judge, Irving Devendorf

Specifically, Ward's summation repeatedly likened Chester Gillette to "a fiendish wolf with raving fangs who comes to you and looks out of those wolf eyes." The prosecutor also described Chester as "a scoundrel who ravished Grace Brown" employing "force and rape." In actuality, there was no evidence whatsoever at trial that Chester Gillette and Grace Brown's intimacy was anything but consensual. Moreover, no sexual assault or rape was ever charged.

The defense also challenged the trial court's decision to allow District Attorney Ward to introduce into evidence several heart-rending love letters written by Grace shortly before her death, which his investigators had seized in a warrantless search of Chester's residence and private desk without his knowledge or consent.

Despite these improprieties in the trial, the New York Court of Appeals unanimously affirmed Chester Gillette's murder conviction and death sentence. The prosaic opinion written by Judge Frank H. Hiscock begins as follows:

> No controversy throws the shadow of any doubt or speculation around the primary fact that at about six o'clock in the afternoon of July 11, 1906, while she was alone with the defendant, Grace Brown met an unnatural death and her body sank to the bottom of Big Moose Lake. But the question which is bitterly disputed, and which is of such supreme importance to this defendant, is whether this tragedy was the result of suicidal drowning or of violence inflicted by his hand under such circumstances as constituted deliberate murder. The jury, after a long and arduous trial, have adopted the latter theory, and, therefore, the serious responsibility comes to us of determining whether

> their conclusion is infected with any such error, either of fact or of law, as requires the judgment based thereon to be reversed and the defendant to be relieved from that sentence to the extreme penalty of law which now hangs over him.[9]

In the end, after thoroughly reviewing the evidence and the many claims of reversible error, the Court of Appeals recognized the existence of, but excused, the prosecutorial excesses, finding that the circumstantial evidence of guilt was so overwhelming that "no other result reasonably could have been expected in this case than that which has overtaken the defendant."[10]

But that was 1908. How would the Court of Appeals address the contentions of Chester Gillette's defense counsel in 2006? Probably with considerably less tolerance for the prosecutorial misconduct.

Respecting Grace's love letters, the New York trial courts today, following a *Mapp* hearing, would be required to exclude such unlawfully seized evidence unless consent or exigent circumstances had existed to justify the invasion of Chester's legitimate expectation of privacy under the Fourth Amendment.[11] Of course, because the exclusionary rule – prohibiting the introduction of evidence seized in violation of a defendant's Fourth Amendment rights – had not yet been adopted by the courts, the 1908 opinion of the Court of Appeals never even discussed the legality of the warrantless searches conducted by police at Chester's apartment.

The trial judge's admission of the fetus-in-a-bottle as evidence would also certainly be deemed unduly prejudicial under modern-day jurisprudence if, as it appears, the sole reason for producing this gruesome spectacle was to arouse the jury's emotions to the prejudice of Chester Gillette.[12]

And, the District Attorney's false insinuation in his summation that Chester Gillette had forcibly ravished and raped Grace Brown clearly would violate the standards established by the New York Court of Appeals in its 1976 ruling in *People v. Ashwal*.[13] In that decision, the Court held that a defendant is deprived of the right to a fair trial where the prosecutor suggests during summation that the defendant might have been responsible for other uncharged crimes, but where no evidence was ever presented regarding such other crimes.

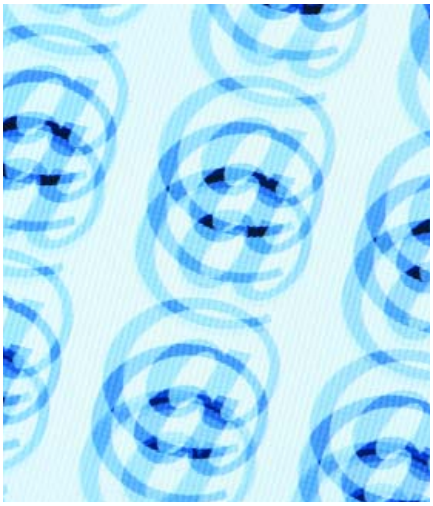
The *Ashwal* court did recognize the possibility that some prosecutorial misconduct may be cured by a trial judge's prompt intervention and instruction to the jury to disregard the prejudicial remarks. However, no such cure occurs where the trial court fails to correct these improprieties, and thereby gives standing to the prosecutor's statements as legitimate argument for the jury to consider. In *People v. Gillette*, the record shows that Judge Devendorf overruled most defense objections during summation and failed to adequately instruct the jury to disregard the prosecutor's overreaching oratory.

In the end – a century apart – both Chester Gillette and Scott Peterson were convicted of remarkably similar murders of their pregnant partners, based on powerful inferences drawn from voluminous, but wholly circumstantial, evidence. Interestingly, jurors in each case reportedly stated afterward that the defendant's stoic demeanor at trial, and apparent lack of emotion over the death of his former lover, weighed heavily in their decision.

While the outcome in each trial was the same, it is notable that the prosecutorial excesses that were tolerated by the Court of Appeals as inconsequential in the *Gillette* case 100 years ago would likely be held wholly unacceptable and unjust today, requiring a new trial. However, as the *Peterson* verdict demonstrates, eliminating such prosecutorial overkill in favor of a fair trial conducted under stringent constitutional standards need not prevent the government from obtaining a guilty verdict in a high-profile capital murder case. ■

1. The Herkimer County Historical Society is actively promoting the 100-year anniversary of the criminal trial of Chester Gillette through its exhibit "An American Tragedy – The Murder That Will Never Die" and a series of other interesting events. The Chester Gillette-Grace Brown Anniversary Committee of the Herkimer County Historical Society will host an ambitious centennial commemoration of the Gillette case this summer of 2006. The planned activities include:
   - Trial re-enactments of the case beginning in June 2006.
   - Theodore Dreiser Society Conference at Herkimer County Community College on June 22–24, 2006.
   - A dramatic reading of Grace's and Chester's letters to each other in July 2006.
   - A special commemoration on July 11 at Big Moose Lake with boat tours, an author book signing, stamp cancellation, and wreath-laying ceremony in honor of Grace.
   - The Ilion Little Theater Club is performing *Chester & Grace* on November 3–5 and 9–11, 2006.
   - Special exhibits at the Herkimer County Historical Society and Town of Webb Historical Association.
   - Bus trip to Cortland and South Otselic on August 26, 2006.
2. <www.courttv.com/trials/peterson/110104_closings_ctv.html>.
3. Much of the detail of this story is taken from two prime sources, both accessible on the Internet. The first is the Web site of The Historical Society of the Courts of New York at <www.courts.state.ny.us/history/gillette.html>. This site presently contains the appellate briefs submitted to the Court of Appeals both by defense counsel and the prosecutor, as well as the Court's decision in *People v. Gillette*, 191 N.Y. 107 (1908). The Historical Society intends to publish the full trial transcript in the future. The second site is Craig Brandon's, entitled "Murder in the Adirondacks," *at* <www.craigbrandon.com/ MITAhome.html>. Prof. Brandon's Web site summarizes his nonfiction book of the same name, published in 1986 by North Country Books, and contains a comprehensive FAQ section regarding the Gillette story and trial.
4. *Gillette*, 191 N.Y. 107.
5. *Id.*
6. Appellant's Points of Counsel, *People v. Gillette*, The Historical Society of the Courts of New York, On-line Book, <www.courts.state.ny.us./history/elecbook/gillette.html>.
7. *Id.*
8. *Id.*
9. *Gillette,* 191 N.Y. 107.
10. *Id.*
11. *Mapp v. Ohio*, 367 U.S. 643 (1961).
12. *People v. Pobliner*, 32 N.Y.2d 356, 345 N.Y.S.2d 482 (1973).
13. 39 N.Y.2d 105, 383 N.Y.S.2d 204 (1976).

BY DAVID PAUL HOROWITZ



David Paul Horowitz (dh15@nyu.edu) practices as a plaintiff's personal injury litigator in New York City. Mr. Horowitz teaches New York Practice at New York Law School, is a member of the Office of Court Administration's CPLR Advisory Committee, and is a frequent lecturer and writer on the subject.

Small Shocks & Lots of Static: Developments in Electronic Disclosure

When you open your office mail, nestled among the motions for summary judgment, 90-day notices, and letters from the Grievance Committee are usually a slew of brochures for CLE programs. At least half are for programs in electronic discovery. A great deal of time, energy, and newsprint has been devoted to the topic of electronic disclosure in recent years. Reading the alerts of some of the purveyors of services in electronic disclosure, one cannot help but be reminded of the weeks and months leading up to Y2K.

The federal courts have seen significant litigation in the area of electronic disclosure, sparking an outpouring of thoughtful, and often lengthy, decisions. By now, most attorneys in New York have heard of the *Zubulake* decisions by Southern District Judge Shira A. Scheindlin,[1] except for those who consider an IBM Selectric to be cutting-edge technology. The Federal Rules of Civil Procedure are being amended to address electronic data. Law firms now have electronic discovery practice groups.

Against this riptide of federal cases, touching on issues of data preservation, recovery, and conversion, there has been a trickle of trial court decisions in the New York state courts. Though small in number, read together, one can discern the beginning of a paradigm for electronic disclosure in New York state court practice.

The cases pay homage to the general disclosure scheme in New York, acknowledging the breadth of disclosure,[2] along with specific limitations. They also acknowledge that parties seeking production of disclosure in New York bear the cost of that production.[3]

Lipco Electrical Corp. v. ASG Consulting Corp.

Lipco Electrical Corp. v. ASG Consulting Corp.,[4] penned by Justice Leonard B. Austin, arose from a commercial dispute between one of the electrical contractors participating in a joint venture, Lipco, and ASG, a consultant retained by Lipco to prepare bids. After work was performed, ASG asserted that Lipco changed the method of compensating ASG, and there was a dispute about both the rate and the method of computing ASG's fee. At some point ASG became a part of the joint venture, although the parties disagreed about when this occurred. Not surprisingly, litigation ensued.

Before addressing the electronic disclosure issues, the court first analyzed a number of disclosure requests under traditional case law (the court's analysis in this regard is worth reviewing).

Turning to the electronic disclosure issues before it, the court examined four demands. The first sought the joint venture's electronic files containing the cash disbursement book; the second requested electronic files "relating to records of costs, expenses, income, payments receipts and all journals, ledgers, accounting records and timekeeping records [to be] reproduced on a disk or hard drive with identification of the software needed to run the data." The third demand sought the backup of the electronic files for the joint venture. Finally, the fourth demand sought electronic data for concurrent projects that ASG was involved in, other than the joint venture. ASG objected to the four demands.[5]

The court had its work cut out for it. "Electronic discovery raises a series of issues that were never envisioned by the drafters of the CPLR. Neither the parties nor the Court have been able to find any cases decided by New York State Courts dealing with the issue of electronic discovery."[6]

The court contrasted paper and electronic disclosure:

> With electronic discovery, totally different issues arise. Some of the questions presented include: are the documents still on the hard drive or are they on some form of back-up; have the documents been deleted, what software was used to create and store the documents; and is that software commercially available or was the software created and/or licensed specifically for the user.[7]

Starting with the issue of whether the matter sought was material and

necessary to a claim or defense in the action, it was conceded by ASG that the first three categories of the disclosure sought were material and necessary.[8] ASG's objection to the production of these items was that, having provided Lipco with a hard copy of the information sought, "extracting this information from its computer hard drive or back-up tapes would be extremely difficult, time consuming and expensive,"[9] due to problems with old and/or customized software. It would be impossible to run or extract the data without retaining the services of a computer consultant, because the data was not stored in an easily extractable manner.

ASG contended:

> In order to provide the data sought by Lipco/Action and Action, a separate program would have to be devised to search for and extract each individual table of data which would allegedly require the services of a computer consultant. A relational data base would then have to be created to store the extracted data and a program devised to transfer the data on to a disc or hard drive. Once this is done, a compatible version of Emque would have to be acquired and installed in order to read and collate the data. Then, the attorneys for ASG would have to review the data to determine whether it is subject to discovery. ASG asserts that this process would take hundreds of man hours to perform.

Citing *Zubulake*, the court held that "raw computer data or electronic documents are discoverable."[10] First the court addressed the issue of which party bore the cost of discovery. Compared with paper documents, "electronic records are not stored for the purposes of being able to retrieve an individual document. Rather, they are retained for emergency uploading into a computer system to permit recovery from catastrophic computer failure."[11]

> Further, computer discovery presents issues that are not faced in traditional paper discovery. Once a paper document has been destroyed, it cannot be produced. "Deleted" material is not expunged from a computer's hard drive. "Deleted" material can be retrieved by a person with sufficient computer savvy. [*See* federal cases], all of which hold that deleted e-mails are discoverable. Furthermore, computer experts can allegedly determine if data has been altered and reconstruct the originally entered data.[12]

Concluding that the material sought was subject to disclosure, the court turned next to the issue of cost. The court first reviewed federal court decisions on who bore the cost of disclosure, having as their starting point the Federal Rules of Civil Procedure, which initially place the cost burden on the producing party, and which permit cost-shifting. The court concluded that this was the opposite of the rule in New York state courts, and, because of this, "the analysis of whether electronic discovery should be permitted in New York is much simpler than it is in the federal courts. The court need only determine whether the material is discoverable and whether the party seeking the discovery is willing to bear the cost of production of the electronic material. This is especially true in this case where Lipco/Action has been provided with hard copies of the electronically stored data."[13] Before the court would order the disclosure, "[t]he parties must provide the Court with an appropriate and detailed analysis indicating whether the material is on the hard drive or back up tape, the actual procedures involved in extracting this material and the costs that will be incurred."[14] Only after Lipco agreed to bear the cost of production would the court make a further order directing the exchange.[15]

The court, on its own motion pursuant to CPLR 3104(a), appointed a referee to oversee all issues arising from the motion, together with any other disclosure issues.

The court first reviewed federal court decisions on who bore the cost of disclosure, having as their starting point the Federal Rules of Civil Procedure, which initially place the cost burden on the producing party.

Etzion v. Etzion

Etzion v. Etzion[16] arose from a matrimonial dispute and involved allegations that the husband engaged in assorted shenanigans to hide assets from the wife. The wife moved by order to show cause seeking, *inter alia*, to impound and clone the husband's computers, have the local sheriff accompany the wife's computer experts to inspect the husband's computers, and direct the husband to pay $15,000 to the wife's computer expert. Finally, the wife sought an order directing the husband to "cease the rotation, alteration and/or destruction of electronic media that would result in the inability to recover the sought over (*sic*) computer data."[17] After the trial court denied the relief sought in the order to show cause, the appellate division modified the order, granting the relief sought to preserve the ability to recover the computer data. Thereafter, the wife moved to compel disclosure, and the husband cross-moved for a protective order.

The trial court cited *Lipco*: "Material demanded through discovery that can be used as evidence-in-chief, for rebuttal or for cross-examination must be produced. . . . In cases in which it is suggested that some files may have been deleted or altered, the services of a computer expert are required to

The court ruled that communications between the husband and his attorneys were privileged, and that there had been no waiver of the privilege.

insure complete and accurate discovery of relevant data."[18] The court also acknowledged that "[s]ome files may need review by the court or by a referee to determine if they contain privileged data."[19] The court ruled that communications between the husband and his attorneys were privileged, and that there had been no waiver of the privilege. The court also ruled that personal e-mails between the husband and "third parties, unrelated to any business matter, are also not discoverable."[20]

The court directed the husband to identify and disclose the location of computers containing business records. The court then appointed a referee to supervise disclosure, and directed that both sides' experts, accompanied by the referee, go to the location of each computer, whereupon the wife's expert would clone a copy of the hard drive, with the cloned hard drive immediately turned over to the referee. Thereafter, at a location jointly agreed upon, the hard drives would be examined by the referee; hard copies of documents deemed to be business records would be distributed to both parties. The referee was directed to maintain control of the cloned hard drive until the conclusion of the litigation, at which time the cloned drive was to be returned to the husband for disposal.

The court next addressed the wife's demand that the husband pay for her attorney and computer expert. The court held that the CPLR requires the party seeking disclosure to bear the costs associated with production of discovery material, "subject to any possible re-allocation of costs at trial."[21] The costs of the attorney referee were to be allocated according to the court's appointment order.[22] Finally, the court denied the husband's demand that the wife post a bond to cover any data loss, holding that the presence of the husband's expert was sufficient protection from any such loss.[23]

Bill S.

Bill S. v. Marilyn S.[24] also arose in a matrimonial action where the husband served four subpoenas *duces tecum* seeking certain phone and e-mail records from four non-parties who were allegedly the wife's paramours. The wife moved to quash the subpoenas, and the court agreed, without having to delve into the electronic disclosure issues, holding that parties were not entitled to pre-trial disclosure on issues of marital fault and, additionally, that the disclosure was not to be had against non-parties without "showing special circumstances, i.e., that the information sought to be discovered is material and necessary and cannot be discovered from other sources."[25]

Weiller v. New York Life Insurance Co.

In *Weiller v. New York Life Insurance, Co.*,[26] the plaintiff in a class action filed a motion for preservation of evidence. There were related federal court actions and the defendant was already bound by orders in the federal actions requiring that certain electronic evidence be preserved. The plaintiff had requested that the defendant stipulate to a document preservation order, which was a duplicate, and the defendant had agreed to preserve documents while declining to stipulate to the order. The court characterized the preservation motion as a motion for a preliminary injunction. The plaintiff conceded that the defendant was already bound by the federal court orders, and the court noted that the defendant was also bound by document preservation requirements under the Private Securities Litigation Reform Act (PSLRA) of 1995. The court said, however, that it "could not independently enforce a breach of the obligation to preserve" under the PSLRA.[27]

Despite the protection already in place through the federal orders and the PSLRA, the court granted the motion for a preservation order:

> The court can envision one or more scenarios in which the federal preservation orders might not be sufficient protection for plaintiff in this state action. For example, if the federal court did not require the production of certain materials or documents, and this court did require such production. A separate preservation order in this court might then be necessary as to those materials. Similarly, the allegations in this action might well diverge from those in the federal actions, causing a divergence in the scope and details of discovery, thus requiring a separate order.[28]

After addressing issues involving the scope of the preservation order, the court turned to the defendant's cost argument, where the defendant claimed that the cost of complying with the federal order would exceed $1 million. The court concluded:

> The court is not insensitive to the cost entailed in electronic discovery, and would, at the appropriate juncture, entertain an application by defendants to obligate plaintiff, the requesting party, to absorb all or a part of the cost of the e-discovery it seeks, or will seek, herein (*e.g.*, *Schroeder v. Centro Pariso Tropical*, 233 A.D.2d 314 [2d Dept 1996]; *see*, CPLR 3103[a] ["The court may . . . make a protective order . . . regulating the use of any discovery device. Such order shall be designed to prevent unreasonable annoyance, expense, . . . or other prejudice to any person . . . ."]; *see also*, *Zubulake*, *supra*). However, the court will not constrain the production of possibly relevant evidence on account of the later need to allocate the cost.[29]

Conclusion

It is not clear to me that the paucity of reported decisions in New York reflects a corresponding lack of activity

between litigants involving electronic disclosure. Nonetheless, the small number of reported cases is surprising.

Although the New York state case law is sparse, it is clear; and, until such time as there are appellate rulings to the contrary, *Lipco*, *Etzion* and *Weiller* provide sound procedural guidance on a number of electronic disclosure issues. Although there is a strong push toward e-filing in New York state courts, there are no rules that specifically address electronic disclosure. Interestingly, in the recently revised commercial division rules, governing the types of cases where electronic disclosure issues are perhaps most likely to arise, electronic disclosure received no mention.

Despite the guidance provided by the cases in this article, many other facets of electronic disclosure have not yet been addressed. New York appellate courts have not yet weighed in on electronic disclosure.[30] Until they do, read the advance sheets and *New York Law Journal* for trial decisions, and maybe even take in one of those alarmingly titled CLE courses. ■

1. *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).

2. *Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968).

3. *Schroeder v. Centro Pariso Tropical*, 233 A.D.2d 314, 649 N.Y.S.2d 820 (2d Dep't 1996); *Rubin v. Alamo Rent-A-Car*, 190 A.D.2d 661, 593 N.Y.S.2d 284 (2d Dep't 1993).

4. 4 Misc. 3d 1019(A), 798 N.Y.S.2d 345 (Sup. Ct., Nassau Co. 2004).

5. *Id.*

6. *Id.*

7 *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* (citing *Rowe Entm't, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002); *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001)).

12. *Id.* (citing *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645 (D. Minn. 2002); *Simon Props. Group, L.P. v. mySIMON, Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000); *Playboy Enters. v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999)).

13. *Id.*

14. *Id.*

15. *Id.* The court determined that the payroll records and cash disbursements made, for other jobs were irrelevant, and, therefore, overbroad and palpably improper.

16. 7 Misc. 3d 940, 796 N.Y.S.2d 844 (Sup. Ct., Nassau Co. 2005).

17. *Id.* at 942.

18. *Id.* at 943.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. 8 Misc. 3d 1013(A), 801 N.Y.S.2d 776 (Sup. Ct., Nassau Co. 2005).

25. *Id.*

26. 6 Misc. 3d 1038(A), 800 N.Y.S.2d 359 (Sup. Ct., N.Y. Co. 2005).

27. *Id.*

28. *Id.*

29. *Id.*

30. The First Department in *Atrium Condo. v. W. 79th St. Corp.*, 17 A.D.3d 108, 792 N.Y.S.2d 444 (1st Dep't 2005), denied one lawyer's request for electronic disclosure of another lawyer's computer hard drive as part of a quest to prove the second lawyer had backdated a document, finding the request was academic.

Jonathan A. Dachs, a member of the firm of Shayne, Dachs, Stanisci, Corker & Sauer, in Mineola, New York, is the author of "Uninsured and Underinsured Motorist Protection," 4 *New York Insurance Law*, Chapter 51 (LexisNexis/Matthew Bender), and of a chapter on UM/UIM and SUM (Pre- and Post-Regulation 35-D), in *Weitz on Automobile Litigation: The No-Fault Handbook* (New York State Trial Lawyers Institute). A graduate of Columbia University, he received his law degree from New York University Law School.

2005 Update on Uninsured, Underinsured and Supplementary Uninsured Motorist Law – Part II

By Jonathan A. Dachs

Developments from 2005 with respect to general issues pertaining to the areas of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law from 2005 were discussed in the June 2006 issue of the *Journal*. Part II will discuss several additional general issues addressed by the courts that year, as well as other issues more specific to these separate categories of coverage.

Arbitration Awards – Scope of Review

In *Cardeon v. New York Central Mutual Fire Ins. Co.*,[1] the court held that although the arbitrator kept the record open so the respondent could submit the supplemental report of a doctor it retained to review the claimant's medical records, this did not establish "actual bias or the appearance of bias from which a conflict of interest may be inferred."

In *State Farm Mutual Automobile Ins. Co. v. Gutkin*, the court observed that "[a]s a general rule, the extent of an insurer's liability and the availability of offsets in a Supplemental Uninsured Motorist arbitration proceeding are matters to be determined by the arbitrator, whose decision will not be disturbed so long as it is rational and not arbitrary or capricious."[2] Here, an error of law was made by the arbitrator when he failed to allow evidence of, or to take into consideration in making his award, the amount recovered by the claimant in settlement with the third-party insurer. This was a "fundamental error" that, in the court's view, "rendered the award irrational as a matter of law (CPLR 7511[d])."

Conflicts of Law

In *Santiago v. State Farm Indemnity Co.*,[3] the court was called upon to determine the choice of law to be applied by the arbitrator – New York, or New Jersey. The claimant, a resident of New York, was a passenger in a car owned by a New Jersey resident, which was involved in an accident in New York. The host vehicle was insured by a New Jersey insurance carrier. The offending vehicle was owned by a New Jersey company and operated by a New

Jersey resident, and was uninsured as defined by the policy. Pursuant to Stipulation, and the terms of the policy, the parties agreed that the UM arbitration was to take place in New York City, the claimant's place of residence. The policy contained a provision stating that "state court rules governing procedure and admission of evidence shall be used." The policy also provided that "[t]he written decision of any two arbitrators shall be binding on each party unless the amount of the damages awarded exceeds the minimum limit of liability specified by the financial responsibility law of New Jersey."

Focusing on this latter provision, and the fact that "the policy specifies that a certain law of New Jersey is to be applied as concerns the amount of the award," it was "logical to assume" that "because the policy clearly specified New Jersey law in this context, in other contexts where New Jersey's law is not specified, but only 'state' law, the policy means to apply the law of the state in which the arbitration is conducted." Applying a choice of law analysis to the facts of this case "does not lead to a different conclusion." Under the "interest analysis," the court concluded that New York had a greater interest in regulating the conduct of drivers within its borders and distributing the loss after the accident and, thus, New York's law should apply.

Scotland v. Allstate Ins. Co.[4] also concerned an accident that occurred in New York. The claimant sought to recover UM benefits under a policy written in Virginia. In an action commenced by the claimant against the UM carrier, the defendant insurer raised as an affirmative defense that the action was barred or limited based upon plaintiff's failure to sustain a "serious injury" as defined by New York's Ins. Law § 5102(d). The plaintiff argued that he was not obligated to demonstrate a "serious injury" because there was no such requirement under Virginia law or in the Virginia policy.

The court noted that this action, involving a claim by an insured against his insurer for benefits to which he claimed entitlement under the policy, is a contract action, and not a tort action. The court added that "claims for uninsured motorist benefits by an insured against an insurer present issues which are actually a mixture of contract and tort" because "payment of benefits under the contract terms depends upon the uninsured motorist's tort liability to the insured."

Analyzing the specific terms of the Virginia statute pertaining to uninsured motorist coverage, the court observed that the carrier is obligated thereunder to pay all sums that the insured is "legally entitled to recover," which, in the court's view, requires the insured "to prove fault and damages just as if he or she proceeded against the uninsured motorist instead of the carrier"; in other words, the insured must prove entitlement in the venue in which he chooses to commence the action. The court concluded that New York law should apply insofar as the accident location and situs of the loss are in New York, and "strong public policy considerations underlie New York's serious injury threshold requirement."

In *State Farm Mutual Automobile Ins. Co. v. Williams*,[5] the underlying motor vehicle accident took place in New York; the offending vehicle was owned and operated by a New Jersey resident, and insured under a policy issued in New Jersey. The tortfeasor's insurer disclaimed coverage based upon a livery exclusion in the policy. At a framed issue hearing to determine the validity of the disclaimer, the court performed a conflicts-of-law analysis and determined as follows:

> [A]lthough the underlying action arose from a motor vehicle accident in New York, a tort action, the court is now faced with an issue that arises out of the language of a contract and an exclusionary clause within that contract. The contract is a New Jersey automobile insurance policy between an insured, a New Jersey resident, and the insurer, a company licensed to do business in New Jersey. After applying a "grouping of contacts" analysis, it is plain that this dispute overwhelmingly centers on New Jersey[,] . . . the place where the contract was negotiated and made. The parties to the contract are both New Jersey entities. The subject matter of the contract, a vehicle, does not have a fixed location, but is registered in New Jersey. Thus, most of the factors plainly point to New Jersey law.

Then, finding that there is no conflict between New York and New Jersey law regarding the definition of a "taxi" or "for hire" vehicle, the court held that under either state's law, the tortfeasor's vehicle was "used indiscriminately in conveying the public, without limitation to certain persons or particular occasions or without being governed by special terms," and was, therefore, a livery vehicle within the meaning of the exclusionary clause. The court thus upheld the disclaimer.

Statute of Limitations

The court in *Jenkins v. State Farm Ins. Co.* held that "claims made under the uninsured motorist endorsement of automobile insurance policies are governed by the six-year statute of limitations applicable to contract actions. The claim accrues either when the accident occurred or when the allegedly offending vehicle thereafter becomes uninsured."[6]

Moreover, the court noted, in cases where more than six years has elapsed between the date of the accident and the assertion of a claim for UM benefits, the claimant has the burden of showing that an accrual date later than the date of the accident is applicable.

Uninsured Motorist Issues

Provision of UM Coverage – Self-Insureds

In *State Farm Mutual Automobile Ins. Co. v. Olsen*,[7] the court held that Suffolk County Fleet Services, which exist-

ed as part of the self-insured municipality, was required to provide mandatory UM coverage to employees who operated municipal motor vehicles. Moreover, the court held that a statutory arbitration proceeding to resolve a coverage dispute concerning an uninsured motorist claim is *not* a claim founded upon a tort; consequently, there is no requirement that a notice of claim be served as a condition precedent to the commencement of the proceeding under General Municipal Law § 50-e(1)(a).

The insurer had adequately explained the delay, which was caused by its diligent efforts to obtain the information and independent legal advice necessary to determine whether a disclaimer would be proper.

Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer (Ins. Law § 3420(d))

Insurance Law § 3420(d) requires liability insurers to "give written notice as soon as is reasonably possible of . . . disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." The statute applies when an accident occurs in the state of New York, and the insurer will be estopped from disclaiming liability or denying coverage if it fails to comply with this statute. The timeliness of an insurer's disclaimer or denial is measured from the point in time when it first learns of the grounds for the disclaimer or denial. A failure by the insurer to give notice of disclaimer as soon as is reasonably possible precludes effective disclaimer or denial.[8]

In *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*,[9] the court noted that the disclaimer statute, Ins. Law § 3420(d), requires the liability insurer to give prompt written notice of disclaimer of liability or denial of coverage not only to the insured but also to "any party that has a claim against the insured arising under the policy." As explained by the court:

> The purpose of section 3420(d) is "to protect the insured, the injured person, and any other interested party who has a real stake in the outcome, from being prejudiced by a belated denial of coverage."
>
> . . .
>
> It is clear that the notice requirement of section 3420(d) is designed to protect the insured and the injured person or other claimant against the risk, posed by a delay in learning the insurer's position, of expending energy and to recover damages from an insurer or forgoing alternative methods for recovering damages until it is too late to pursue them successfully.[10]

The court noted in *Republic Franklin Ins. Co. v. Pistilli*[11] that "the obligation to provide prompt notice under Insurance Law § 3420(d) is triggered when the insurer has a reasonable basis upon which to disclaim coverage, and cannot be delayed indefinitely until all issues of fact regarding the insurer's coverage obligations have been resolved." The court went on to advise that "[w]hen in doubt, an insurer should issue a prompt disclaimer and then seek a declaratory judgment concerning its duty to defend or indemnify, rather than seeking such a judgment in lieu of issuing a disclaimer."[12]

In *Bovis*, the court observed that "[i]n most cases, the timeliness of an insurer's notice of disclaimer 'will be a question of fact, dependent on all of the circumstances of a case that make it reasonable, or unreasonable, for an insurer to investigate coverage.' However, where the basis for the disclaimer was or should have been readily apparent before the onset of the delay, any explanation by the insurer for its delay will be insufficient as a matter of law, and where the basis was not readily apparent, an unsatisfactory explanation will render the delay unreasonable as a matter of law."[13]

The *Bovis* court held that a commercial general liability insurer's delay of at least 36 days in issuing a written notice of disclaimer was not reasonable, and was not excused by the fact that its assigned claims specialist unexpectedly resigned during the applicable period; the insurer's staffing problem was not an external factor beyond its control.

In *Pennsylvania Lumbermans Mutual Ins. Co. v. D & Sons Construction Corp.*,[14] the court held that where the insurer, instead of promptly disclaiming, chose to consult with counsel, and then commence an action 47 days after receipt of late notice, the disclaimer was untimely as a matter of law.

The court held in *American Express Property Casualty Co. v. Vinci*[15] that a delay of 48 days from the time the insurer was aware of the facts necessary to support its disclaimer for material misrepresentation was unreasonable as a matter of law.[16]

On the other hand, in *McGinley v. Odyssey Re (London)*,[17] the court held that a delay of 39 days in disclaiming based upon an exclusion from coverage after receipt of notice of the claim was not unreasonable. The insurer had adequately explained the delay, which was caused by its diligent efforts to obtain the information and independent legal advice necessary to determine whether a disclaimer would be proper.

In *Halloway v. State Farm Ins. Cos.*,[18] the plaintiff was a passenger in a vehicle insured under a policy that excluded coverage for liability arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for a fee. The initial notice to the insurer, on December 7, 2001, included a copy of the police report, which stated, *inter alia*, that immediately after the acci-

dent the owner of the vehicle/insured informed the plaintiff and another alleged passenger "that there would be 'no charge' for [the] fare." The police report and the vehicle owner, however, simultaneously indicated that there were no passengers in the vehicle.

This prompted the insurer to conduct an investigation, and upon its completion the insurer disclaimed coverage based upon the livery vehicle exclusion in its policy. The court concluded that in view of the contradictory factual allegations, it was reasonable for the insurer to investigate to determine if the exclusion applied. Moreover, the disclaimer, issued contemporaneously with the completion of the insurer's investigation, was timely as a matter of law.

In *St. Charles Hospital & Rehabilitation Center v. Royal Globe Ins. Co.*,[19] the court held that a delay in disclaiming of "just over one month" after the insurer first received a late notice of claim was not unreasonable.

The New York courts have repeatedly held that for the purpose of determining whether a liability insurer has a duty to promptly disclaim in accordance with Ins. Law § 3420(d), a distinction must be made between (1) policies that contain no provisions extending coverage to the subject loss, and (2) policies that do contain provisions extending coverage to the subject loss, and which would thus cover the loss but for the existence, elsewhere in the policy, of an exclusionary clause. It is only in the former case that compliance with Ins. Law § 3420(d) may be dispensed with.

As the court stated in *City of New York v. St. Paul Fire & Marine Ins. Co.*:

> A disclaimer is unnecessary when a claim falls outside the scope of a policy's coverage portion since "requiring payment of a claim upon a failure to timely disclaim would create coverage where it never existed." Conversely, a timely disclaimer pursuant to Insurance Law § 3420(d) is required when a claim falls within the coverage terms but is denied based on a policy exclusion.[20]

In *Allstate Ins. Co. v. Massre*,[21] the court held that Ins. Law § 3420(d) did not require the insurer to issue a disclaimer of coverage where the collision that caused the claimant's injuries was intentional, and not the result of an accident. Such a denial is based upon a lack of coverage and not a policy exclusion. Similarly, in *GEICO v. Spence*,[22] the court held that since the insurer was endeavoring to adduce evidence of fraud – *i.e.*, a staged accident – which may have established that the occurrence or collision was not covered, there was no need for it to disclaim in a timely fashion. And, in *Eagle Ins. Co. v. Davis*,[23] the court observed that "[a] collision caused in the furtherance of an insurance fraud scheme is not a covered accident under a policy of insurance" – and, therefore, no timely disclaimer was required.[24]

Lack of cooperation by the insured was at issue in *Liberty Mutual Ins. Co. v. Roland-Staine*.[25]

> When an insured deliberately fails to cooperate with its insurer in the investigation of a claim as required by the policy, the insurer may disclaim coverage. However, to prevent innocent injured parties from suffering the consequences of a lack of coverage based upon "the imprudence of the insured, over whom he or she has no control," courts strictly scrutinize the facts and will allow a disclaimer due to lack of cooperation only where, inter alia, the insured's actions are deliberate. . . . Mere inaction by the insured . . . is an insufficient basis for disclaimer.

When an insurer obtained two addresses for the insured from Department of Motor Vehicles (DMV) records and another database, its investigator went to these locations and attempted to find the insured. He was not at either place, and there was no evidence that the investigator spoke to anyone at the scene to verify the insured's address. There also was no indication that the insured received any of the letters mailed to him, or left for him, at the two addresses. Under these circumstances, the court held that the evidence was insufficient to support an inference that the insured's failure to cooperate was deliberate and willful.[26]

Cancellation of Coverage

One category of an "uninsured" motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident. Generally speaking, in order to cancel effectively an owner's policy of liability insurance, an insurer must strictly comply with the detailed and complex statutes, rules and regulations governing notices of cancellation and termination of insurance. These can differ depending upon whether, for example, the vehicle at issue is a livery or private passenger vehicle, whether the policy was written under the Assigned Risk Plan and/or paid for under a premium financing contract.

In *Chubb Group of Ins. Cos. v. Williams*,[27] the court noted that pursuant to Vehicle & Traffic Law § 313 (VTL), a canceling insurer is required to file the notice of cancellation with the DMV. In *Williams*, the cancellation was not filed because, during the time period involved, the DMV had imposed a "blackout" period for electronic transmissions, including cancellations.[28] However, even after the old electronic system was converted to a new system and the "blackout" period ended (in September 2000), the insurer never notified the DMV of the cancellation during the nearly two-year period preceding the accident at issue. Thus, the court held, the termination of coverage was not effective as to the injured claimant. In another case involving electronic filings, *Progressive Northern Ins. Co. v. White*,[29] the court held that if an insurer failed to complete the initial load of its New York State automobile policyholders into the new system between June 12, 2000 and September 12, 2000, it was not relieved "of any ongoing reporting requirement."[30] The court also noted that a cancellation will be ineffective against third parties unless it is filed with the DMV within 30 days of the cancellation.

The court in *Colonial Penn Ins. Co. v. New York Central Mutual Ins. Co*.[31] stated that "where replacement insurance is actually obtained so as to continue coverage from the expiration date of the previous policy, the superseded insurer is relieved of the risk despite failure to notify the commissioner of termination of coverage."

American Transit Ins. Co. v. Hinds[32] concerns the distinction between cancellations under VTL § 313 and those governed by VTL § 370. Although the cancellation at issue would have been invalid under § 313 because the Notice of Termination was filed with the DMV prior to the termination date, § 313 did not apply because the policy involved covered a vehicle for hire.

VTL § 321 exempts policies covering such vehicles from the notification provisions under § 313; cancellations of policies for vehicles for hire are governed by VTL § 370. According to § 370, the insurer is required to file a Certificate of Cancellation with the Commissioner of Motor Vehicles; the DMV then sends the notification to the owner. Here, the plaintiff had complied with § 370 by sending the Commissioner notice that it intended to cancel the policy. Since the policy was effectively canceled when the subject accident took place, the plaintiff insurer had no liability for any actions brought as a result of that accident.

Stolen Vehicles/Non-Permissive Use

Automobile insurance policies generally exclude coverage for damages caused by drivers of stolen vehicles and/or drivers operating without the permission or consent of the owner. In such situations, the vehicle at issue is considered "uninsured" and the injured claimant will be entitled to make an uninsured motorist claim.[33]

In *State Farm Mutual Automobile Ins. Co. v. Fernandez*, the court reiterated that "Vehicle & Traffic Law § 388(1) creates a presumption that a driver uses a vehicle with the owner's express or implied permission, which may be rebutted only by substantial evidence sufficient to show that the vehicle was not operated with the owner's consent."[34] In that case, the court held that the affidavit of the vehicle owner was insufficient to rebut the presumption of permissive use because she admitted therein that she left the car keys in the vehicle at the time the vehicle was stolen – thus raising a question as to whether VTL § 1210(a), the "keys in the ignition statute," was implicated.

The defendants in *Tuchten v. Palazzola*[35] sought summary judgment dismissing the complaint against them on the ground that their vehicle was stolen at the time of the accident. In support of their motion, the defendants submitted the affidavit of the vehicle owner, and a report of a lost, stolen or confiscated motor vehicle, stating that at the time of the accident his vehicle was stolen and operated without his permission.

In denying defendants' motion for summary judgment, the court stated that "this document does not conclusively dispose of this action, particularly in view of the fact that the report was filed approximately five hours after the occurrence of the accident, and the keys to the vehicle that defendant alleges to have misplaced, were found in the ignition of that vehicle at the site of the accident." In addition, there were allegations that the description of the person seen running away from the vehicle matched that of the defendant. Moreover, the court held that the issue of whether the vehicle was stolen or being used without permission at the time of the accident was within the scope of the order of reference to the Judicial Hearing Officer to hear and determine the issue of "insurance coverage." The petition affirmatively alleged that the vehicle owned by its insured was stolen at the time of the accident, and the petitioner raised no objection at the hearing to the admission of evidence on the issue of permissive use.

In *State Farm Mutual Automobile Ins. Co. v. Roach*,[36] the court held that where the insured's son, who had permission to drive the insured vehicle, gave the keys to a friend for the limited purpose of allowing him to sit in the car until his "ride" picked him up from school, the presumption of permissive use was rebutted. As stated by the court, "The transfer of possession of the keys to a vehicle does not alone establish permission to drive the vehicle absent the grant of express or implied permission to the holder of the keys to drive the vehicle."

The court in *Correa v. City of New York*,[37] held that the presumption of permissive use was not rebutted as a matter of law by the owner's and the driver's sworn statements denying permission to use the vehicle, as the plaintiffs submitted evidence in the form of traffic tickets issued by the police to the driver (the owner's son) on three occasions in the four months prior to the subject accident(s) – thus raising a triable question of fact regarding implied permissive use.

Hit-and-Run

One of the requirements for a valid uninsured motorist claim based upon a hit-and-run is "physical contact" between an unidentified vehicle and the person or motor vehicle of the claimant.[38] Where a factual issue exists as to whether there was the requisite "physical contact," a framed issue hearing is required.[39]

Another requirement for a valid hit-and-run claim is the filing of a statement under oath concerning the details of the claim. In *New York Central Mutual Fire Ins. Co. v. Aguirre*,[40] the court held that the insured/claimant's failure to file a sworn statement with the SUM carrier after an alleged hit-and-run accident vitiated coverage. Moreover, the fact that the insurer received some notice of the accident did not negate the breach of this policy requirement.

Vicarious Liability

NOTE: By amendment to subchapter 1 of chapter 301 of title 49, United States Code, signed by President George W. Bush and effective August 10, 2005, states were prohibited from holding leasing or rental companies vicariously liable for accidents involving their leased or rented vehicles. The effect of this federal provision is to nullify N.Y. Vehicle & Traffic Law § 388 as it applies to leasing companies or rental agencies. Specifically, the new law provides that "[a]n owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if – (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner."

In *Allstate Ins. Co. v. Aziz*,[41] the court reiterated that a condition precedent to UM coverage is the filing of a sworn statement by the claimant, within 90 days of the occurrence, that he or she has a cause of action arising out of an accident with a hit-and-run vehicle. Where the UM endorsement contains ambiguous notice of claim provisions, a failure to file the sworn statement does not necessarily vitiate coverage when the insurer otherwise receives adequate notice of the hit-and-run claim within the 90-day period. However, the claimant in this case was not saved by the notice of claim letter notifying the petitioner of a claim for UM/SUM benefits, or the "Notice of Intention to Make Claim" forms and applications for no-fault benefits submitted to the petitioner, since none of those documents indicated that an unidentified/hit-and-run vehicle was involved in the accident.

The claimant in *Hereford Ins. Co. v. Frota*[42] was a passenger in the petitioner's insured's cab, and was injured in a hit-and-run accident. The cab driver never called the police and did not stop the other vehicle from leaving the scene; nor did he ask the claimant whether he needed medical attention. A few blocks from the scene, the claimant requested the cab driver to pull over and let him out. After visiting the hospital, and within 24 hours after the accident, the claimant went to the local police precinct and reported the incident. Instead of making out a police report, he was handed a blank accident report and told to return after he had completed the forms, which he did at some subsequent date.

The petitioner sought to stay arbitration on the ground that the claimant failed to provide it with a sworn statement within 90 days of the hit-and-run accident, or as soon as practicable. The court rejected that contention and excused the claimant's failure to file the sworn statement because the claimant was neither the owner nor the driver of the vehicle, nor the insured under the policy and, therefore, did not know of the existence of the 90-day provision.

Finally, it should be noted that in *Allstate Ins. Co. v. Albino*,[43] the court held that the failure to seek a stay of arbitration based on the absence of physical contact results in a waiver of that claim.

Insurer Insolvency

The SUM endorsement under Regulation 35-D includes within the definition of an "uninsured" motor vehicle a vehicle whose insurer "is or becomes insolvent."

In Eagle Ins. Co. v. Hamilton,[44] the court held that where an insured policyholder is entitled to UM coverage, as opposed to SUM coverage, from his or her own insurer, and the alleged tortfeasor's insurer has paid into the Public Motor Vehicle Liability Security Fund ("PMV Fund") but has been declared insolvent after the underlying accident, the injured policyholder's recourse is not against his or her own insurer for UM coverage, but against the PMV Fund.

The court then discussed the question of what is to occur if the Superintendent of Insurance, as administrator of the PMV Fund, denies the claimant recovery from the fund. Specifically, the court inquired whether this would be a denial of coverage within the meaning of Ins. Law § 3420(f)(1), thereby triggering the claimant's right to UM coverage from his own insurer. The only evidence in the record on the issue of whether the Superintendent was denying the claim was a letter from the Superintendent, stating that coverage from the PMV Fund was being denied "at this time" due to "financial strain." The court directed a hearing to determine whether the denial of recovery from the PMV Fund constituted a denial of coverage; the Superintendent was to be joined as a party.

Actions Against the Motor Vehicle Accident Indemnification Corporation (MVAIC)

In *Lesley v. MVAIC*,[45] the court noted that Ins. Law § 5218(b) provides that the court may summarily make an order permitting an action against MVAIC when, after a hearing, it is satisfied that: (1) the applicant has complied with the requirements of Ins. Law § 5218; (2) the applicant is a "qualified person"; (3) the injured or deceased person was not at the time of the accident operating an uninsured motor vehicle in violation of an order of suspension or revocation; (4) the applicant has a cause of action against the operator or owner of the motor vehicle; and (5) all reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and operator, but the identity of the motor vehicle, the owner or the operator of the motor vehicle cannot be established.

Underinsured Motorist Issues

Consent to Settle

The Regulation 35-D SUM endorsement requires that the claimant obtain consent from his or her insurer to any settlement with the tortfeasor(s) as a condition precedent to an underinsured motorist claim.

For example, in *Prudential Property & Casualty Ins. Co. v. Ambeau*,[46] the court held that the petitioner was entitled to a stay of arbitration since it established that the respondents violated the terms of their policy by failing to obtain the insurer's written consent to settle with the tortfeasor prior to asserting claim for SUM/underinsured motorist benefits.

Offset Provision

In *State Farm Mutual Automobile Ins. Co. v. Bigler*,[47] the court noted that where the declarations page of the policy contains a single, combined limit of uninsured/underinsured motorists coverage, the offset provision (for the amount received from the offending tortfeasor[s]) is valid and enforceable. Moreover, where the amount of the offset is equal to the limit of SUM coverage available, the SUM arbitration should be permanently stayed.

Priority of Coverage – Non-Stacking

In *MetLife Auto & Home v. Leonorovitz*,[48] the claimants/insureds were involved in an accident with a hit-and-run vehicle. A SUM claim was made to the insurer for the vehicle occupied by the claimants/insureds, and the full $300,000 limit of that $100,000/$300,000 policy was paid for SUM benefits. Claimants/insureds then sought additional SUM benefits under a $100,000/$300,000 policy issued to one of the claimants/insureds covering a vehicle that was not involved in the accident.

The SUM endorsement in the policy provided that "[i]f an insured is entitled to uninsured motorist coverage or supplementary uninsured/underinsured motorists coverage under more than one policy, the maximum amount such insured may recover shall not exceed the highest limit of such coverage for any one vehicle under any one policy." The court rejected the attempt to "stack" coverage, saying "the fact that the [claimants/insureds] are claiming SUM benefits from two different policies issued by two different carriers does not mean that the SUM coverage from each policy may be 'stacked' to provide additional SUM coverage." ■

1. 17 A.D.3d 1037, 794 N.Y.S.2d 194 (4th Dep't 2005).

2. 9 Misc. 3d 1103(A), 806 N.Y.S.2d 449 (Sup. Ct., Richmond Co. 2005) (citations omitted).

3. 7 Misc. 3d 1018(A), 801 N.Y.S.2d 229 (Sup. Ct., N.Y. Co. 2005).

4. 10 Misc. 3d 127(A), ___ N.Y.S.2d ___ (App. Term, 2d & 11 Jud. Dists. 2005).

5. 7 Misc. 3d 1029(A), 801 N.Y.S.2d 242 (Sup. Ct., Kings Co. 2005).

6. 21 A.D.3d 529, 530, 801 N.Y.S.2d 42 (2d Dep't 2005) (citations omitted).

7. 22 A.D.3d 673, 802 N.Y.S.2d 725 (2d Dep't 2005).

8. *See Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, ___ A.D.3d ___, 806 N.Y.S.2d 53 (1st Dep't 2005); *Halloway v. State Farm Ins. Cos.*, 23 A.D.3d 617, 805 N.Y.S.2d 107 (2d Dep't 2005); *Gregorio v. JM Dennis Constr. Co., Corp.*, 21 A.D.3d 1056, 803 N.Y.S.2d 678 (2d Dep't 2005); *City of New York v. St. Paul Fire & Marine Ins. Co.*, 21 A.D.3d 982, 801 N.Y.S.2d 389 (2d Dep't 2005); *Brighton v. Cent. Sch. Dist. v. Am. Cas. Co. of Reading, Pa.*, 19 A.D.3d 528, 800 N.Y.S.2d 415 (2d Dep't 2005); *Am. Express Prop. Cas. Co. v. Vinci*, 18 A.D.3d 655, 795 N.Y.S.2d 329 (2d Dep't 2005); *Danna Constr. Corp. v. Utica First Ins. Co.*, 17 A.D.2d 622, 794 N.Y.S.2d 72 (2d Dep't 2005).

9. 27 A.D.3d 84, 806 N.Y.S.2d 53 (1st Dep't 2005).

10. *Id.* at 90–92. The court then went on to hold that "another insurer does not fall within the specified categories," "section 3420(d) was never intended to apply to another insurer," and "section 3420(d) is not applicable to a request for contribution between insurers." *See also AIU Ins. Co. v. Investors Ins. Co.*, 17 A.D.3d 259, 260, 793 N.Y.S.2d 412 (1st Dep't 2005).

11. 16 A.D.3d 477, 791 N.Y.S.2d 639 (2d Dep't 2005).

12. *See also Vinci*, 18 A.D.3d 655; Peter L. Janoff, *Attorney for Carrier That Disclaimed Coverage: Corollary Caution*, N.Y.L.J., Dec. 28, 2004, p. 4, col. 4.

13. *Bovis*, 27 A.D.3d at 88 (citing *First Fin. Ins. Co. v. Jetco Constr. Corp.*, 1 N.Y.3d 64, 69, 70, 769 N.Y.S.2d 459 (2003).

14. 18 A.D.3d 843, 796 A.D.3d 122 (2d Dep't 2005).

15. 18 A.D.3d 655, 795 N.Y.S.2d 329 (2d Dep't 2005).

16. *See also Danna Constr. Corp. v. Utica First Ins. Co.*, 17 A.D.3d 622, 794 N.Y.S.2d 72 (2d Dep't 2005) (78-day delay unreasonable); *Banuchis v. GEICO*, 14 A.D.3d 581, 789 N.Y.S.2d 221 (2d Dep't 2005) (62-day delay in disclaiming based upon late notice unreasonable as a matter of law); *City of New York v. St. Paul Fire & Marine Ins. Co.*, 21 A.D.3d 982, 801 N.Y.S.2d 389 (2d Dep't 2005) (delay of over four months unreasonable as a matter of law); *Brighton Central Sch. Dist. v. Am. Cas. Co. of Reading, Pa.*, 19 A.D.3d 1528, 800 N.Y.S.2d 415 (2d Dep't 2005) (delay of 5 months unreasonable as a matter of law).

17. 15 A.D.3d 218, 790 N.Y.S.2d 13 (1st Dep't 2005).

18. 23 A.D.3d 617, 805 N.Y.S.2d 107 (2d Dep't 2005).

19. 18 A.D.3d 735, 795 N.Y.S.2d 343 (2d Dep't 2005).

20. 21 A.D.3d 982, 801 N.Y.S.2d 389 (2d Dep't 2005).

21. 14 A.D.3d 610, 789 N.Y.S.2d 206 (2d Dep't 2005).

22. 23 A.D.3d 466, 805 N.Y.S.2d 625 (2d Dep't 2005).

23. 22 A.D.3d 846, 803 N.Y.S.2d 679 (2d Dep't 2005).

24. *See also Allstate Ins. Co. v. Guillaume*, 23 A.D.3d 379, 804 N.Y.S.2d 761 (2d Dep't 2005); *Shell v. Fireman's Fund Ins. Co.*, 17 A.D.3d 444, 793 N.Y.S.2d 110 (2d Dep't 2005); *Vacca v. State Farm Ins. Co.*, 15 A.D.3d 473, 790 N.Y.S.2d 177 (2d Dep't 2005).

25. 21 A.D.3d 771, 802 N.Y.S.2d 6 (1st Dep't 2005).

26. *Id.* at 772–73. *See also Eagle Ins. Co. v. Sanchez*, 23 A.D.3d 655, 805 N.Y.S.2d 103 (2d Dep't 2005); *Eveready Ins. Co. v. Mack*, 15 A.D.3d 400, 790 N.Y.S.2d 49 (3d Dep't 2005) (defendant failed to demonstrate that it met the requirements set forth in *Thrasher* to disclaim coverage on the ground of lack of cooperation). *Cf. Allstate Ins. Co. v. Guillaume*, 23 A.D.3d 379, 804 N.Y.S.2d 761 (2d Dep't 2005) (non-cooperation defense upheld); *Utica First Ins. Co. v. Arken, Inc.*, 18 A.D.3d 644, 795 N.Y.S.2d 640 (2d Dep't 2005) (non-cooperation defense upheld); *Allstate Ins. Co. v. United Int'l Ins. Co.*, 16 A.D.3d 605, 792 N.Y.S.2d 549 (2d Dep't 2005) (non-cooperation disclaimer upheld – no need to show prejudice as result of non-cooperation); *Allstate Ins. Co. v. Ganesh*, N.O.R., N.Y.L.J., May 13, 2005, p. 20, col. 1 (Sup. Ct., Bronx Co. 2005). *See* Norman H. Dachs & Jonathan A. Dachs, *Thrasher Threshold Thriving*, N.Y.L.J., March 15, 2005, p. 3, col. 1. *See also Republic Franklin Ins. Co. v. Pistilli*, 16 A.D.3d 477, 791 N.Y.S.2d 639 (2d Dep't 2005).

27. 14 A.D.3d 561, 789 N.Y.S.2d 66 (2d Dep't 2005).

28. *See* 15 N.Y.C.R.R. § 34.7(a).

29. 23 A.D.3d 477, 808 N.Y.S.2d 108 (2d Dep't 2005).

30. *See* 15 N.Y.C.R.R. § 34.13(d).

31. 19 A.D.3d 532, 798 N.Y.S.2d 74 (2d Dep't 2005).

32. 14 A.D.3d 378, 788 N.Y.S.2d 346 (1st Dep't 2005).

33. *See State Farm Mut. Auto. Ins. Co. v. Roach*, 6 Misc. 3d 1036(A), 800 N.Y.S.2d 357 (Sup. Ct., Suffolk Co. 2005).

34. 23 A.D.3d 480, 481, 805 N.Y.S.2d 599 (2d Dep't 2005) (citations omitted).

35. 10 Misc. 3d 732, ___ N.Y.S.2d ___ (Sup. Ct., Queens Co. 2005).

36. 6 Misc. 3d 1036(A), 800 N.Y.S.2d 357 (Sup. Ct., Suffolk Co. 2005).

37. 18 A.D.3d 418, 794 N.Y.S.2d 408 (2d Dep't 2005).

38. *See Newark Ins. Co. v. Caruso*, 14 A.D.3d 613, 787 N.Y.S.2d 892 (2d Dep't 2005).

39. *Allstate Ins. Co. v. Hayes*, 17 A.D.3d 669, 794 N.Y.S.2d 85 (2d Dep't 2003). *Cf. Allstate Ins. Co. v. Albino*, 16 A.D.3d 682, 792 N.Y.S.2d 518 (2d Dep't 2005).

40. 20 A.D.3d 538, 797 N.Y.S.2d 916 (2d Dep't 2005).

41. 17 A.D.3d 460, 793 N.Y.S.2d 138 (2d Dep't 2005).

42. 9 Misc. 3d 1124(A), ___ N.Y.S.2d ___ (Sup. Ct., N.Y. Co. 2005).

43. 16 A.D.3d 682, 792 N.Y.S.2d 518 (2d Dep't 2005).

44. 16 A.D.3d 498, 791 N.Y.S.2d 605 (2d Dep't 2005). *NOTE*: This decision was rendered after granting the Superintendent's motion to reargue or clarify the court's prior Order, reported at 4 A.D.3d 355, 773 N.Y.S.2d 68 (2d Dep't 2004).

45. 8 Misc. 3d 1030(A), 806 N.Y.S.2d 445 (Sup. Ct., Kings Co. 2005).

46. 19 A.D.3d 999, 796 N.Y.S.2d 294 (2d Dep't 2005).

47. 18 A.D.3d 878, 796 N.Y.S.2d 368 (2d Dep't 2005).

48. 24 A.D.3d. 675, 808 N.Y.S.2d 310 (2d Dep't 2005).

Gary M. Fellner (gmfellner@pbnlaw.com) is counsel to Porzio, Bromberg & Newman, in Morristown, New Jersey, and a member of the firm's Business Litigation Department. Mr. Fellner received a BBA degree from Pace University, and his law degree from New York Law School.

E-Discovery: 2005 Update

By Gary M. Fellner

Courts and legislatures across the country tackle a variety of issues concerning pre-trial discovery of electronic data. They consider whether sanctions are appropriate where one of the litigants allows relevant electronic data to become lost or frustrates its timely production and, if so, what sanction should be imposed; the fair allocation of costs between parties when one party is required to retrieve or restore a large quantity of electronic data; and whether the inadvertent disclosure of privileged e-communications in the course of discovery results in a waiver of the privilege. This article discusses these issues and some recent cases addressing them, as well as modifications to the Federal Rules of Civil Procedure (FRCP) that were recently approved.

Sanctions

The notion that a party may not destroy or conceal relevant evidence is not new. Spoliation of evidence was discussed by the United States Supreme Court in the early 19th century.[1] "Spoliation" is defined as the "destruction or significant alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[2] Today this issue often arises when a litigant deletes relevant e-mails or stands by as they become irretrievably lost after a lawsuit has been filed. Sanctions for such conduct may range from dismissal of the pleadings or judgment by default, to preclusion of evidence, an adverse inference charge, or an assessment of fees and costs. The appropriate sanction will depend upon the actor's state of mind, the degree of loss, and the resulting harm.

In *Zubulake v. UBS Warbus, LLC*,[3] a watershed case recently heard in the Southern District of New York, the facts were relatively straightforward. Laura Zubulake filed a charge of sexual discrimination against her employer, UBS Warbus, with the Equal Employment Opportunity Commission. After filing the charge, she was fired. She then brought suit for sexual discrimination and retaliatory termination. What made the case unusual were Judge Shira A. Scheindlin's four comprehensive decisions addressing some of the many technical electronic discovery issues emanating from a litigant's failure to preserve, and produce, relevant e-mails. Ms. Zubulake had demonstrated that UBS's backup tapes were likely sources of relevant evidence and should be restored in readable format for use in the case. She discovered that several backup tapes were inexplicably missing,[4] and that several e-mails had been deleted.

As a result, the district court addressed Ms. Zubulake's motion for sanctions in two of its decisions.[5] The court examined, among other things, the remedy for UBS's loss of relevant e-mail and the litigants' and counsel's obligations to help prevent such loss.

> [W]hile a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.[6]

Thus, the court held that once a party reasonably anticipates litigation, it should suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.

UBS had breached its duty to preserve relevant e-mails and the court held that an adverse inference instruction

charge to the jury was warranted. Pursuant to such charge, the jury was permitted to infer that, had the lost e-mails been produced, they would have been favorable to Zubulake. The court observed that "[i]n practice, an adverse inference instruction often ends litigation – it is too difficult a hurdle for the spoliator to overcome."[7] The court proved right: On April 6, 2005, the jury awarded Ms. Zubulake $29.1 million – $20 million of which was for punitive damages.

In *Chan v. Triple 8 Palace, Inc.*,[8] a group of waiters and busboys sued the owners of a restaurant in New York's Chinatown for violations of the Fair Labor Standards Act. The plaintiffs filed a motion for sanctions after learning that records kept in the restaurant's ordinary course of business regarding employee earnings had been thrown out (even after the action had been filed) and that the destruction continued through the time of the defendants' depositions. They moved to strike the defendants' answer or, alternatively, to obtain an order of preclusion, an adverse inference charge at trial, and an award of all costs and attorney fees. The defendants' primary argument in opposition to the motion was that the restaurant normally throws out the records in question, and they did nothing to deliberately frustrate the plaintiffs' right to discovery. The court rejected the argument, because, while a party may not have a duty to *create* evidence, it may not *destroy* evidence normally created. This, it said, is the "essence of spoliation."[9] The court noted that counsel never bothered to inform the defendants of the duty to preserve, resulting in their continued, routine destruction of relevant records.

The court concluded that, although the defendants' conduct did not amount to bad faith or purposeful concealment of evidence, they were "grossly negligent." However, the court also stated that the plaintiffs did not suffer severe prejudice, as they were able to discover other evidence to support their claims. Consequently, striking the answer and issuing an order of preclusion were deemed "too drastic." Instead, the "most appropriate sanction is to allow the finder of fact to consider the gravity of the defendants' conduct, the materiality of the evidence that was lost, and the import of the remaining proof, and to draw an adverse inference against the defendants."[10] The court also awarded the plaintiffs all fees and costs, deferring the amount until the end of the case.

In *Quinby v. WestLB AG*,[11] by contrast, the court did not find that sanctions were warranted. During the discovery phase of Ms. Quinby's gender discrimination action, she moved for sanctions against the defendant and its attorneys in connection with requests for the defendant's e-mail. Ms. Quinby asked that 17 current and former WestLB employees' e-mail accounts be searched. She also requested that WestLB provide e-mails reflecting evidence of discrimination against other women at WestLB and of men being paid more than women. WestLB asserted that the requests were overbroad and would result in an undue burden.

The parties sought the court's intervention. The defendant argued that the e-mails were not readily available because they were on backup tapes and would be very expensive to retrieve and convert to readable form. The court ordered the defendant to provide an affidavit addressing the technical issues raised by the plaintiff's discovery requests. The defendant was directed to produce a witness who could testify at a deposition regarding the relevant e-discovery issues and to restore sample backup tapes that contained e-mails and convert them into a readable, searchable format.

The defendant provided two affidavits, one from its chief information officer and one from an electronic evidence consultant hired by the defendant to assist in restoring and searching the backup tapes. The affidavits provided detailed information about the defendant's backup system and revealed that there were approximately 3,700 backup tapes that covered the relevant time frame. During depositions in July 2005, the plaintiff first learned that a large quantity of the e-mails requested were readily accessible and readable on active servers, without the need to retrieve the e-mails from backup tapes. Consequently, the plaintiff argued that the affidavits were incomplete and contained "outright false statements" because they improperly focused on backup tapes and did not address the costs of searching other, more readily accessible sources. The plaintiff said that the defendant and its attorneys "should have disclosed that the vast quantities of the e-mails were in fact readily accessible and did not reside solely on exclusive backup tapes."

In denying sanctions, Magistrate Judge Pitman observed that WestLB had three sources of stored e-mail: two on-line servers, and backup tapes. The court found that the servers were not a complete resource because WestLB had a two-year rolling deletion policy for e-mail, pursuant to which e-mails older than two years were automatically deleted. In addition, individual users could access e-mail from individual accounts and delete them. Under the circumstances, the court found that WestLB and its counsel acted appropriately in focusing on backup tapes "as the most complete source for the e-mails."[12] In fact, the court observed, the defendant estimated that it faced costs of $500,000 to retrieve and restore the data from backup tapes, so it was logical to presume that WestLB would have saved that expense if it thought that retrieval of active data was sufficient. The court also refused to impose sanctions against WestLB "for converting data from an accessible to inaccessible format, even if [it] should have anticipated litigation."[13] Significantly, the court said that, while a duty to preserve exists, a company is not required to preserve the evidence in a readily accessible format.[14]

WestLB illustrates that a "litigation hold" does not necessarily mean that the routine archiving process must

come to a halt. If the e-mails are archived and preserved on backup tapes, they can still be turned over at a later date, albeit at much greater cost. The case also demonstrates the wisdom of pursuing what the Judicial Conference, discussed below, has referred to as the "two-tiered" approach: Counsel should explore the extent and form of data that exists in easy-to-retrieve storage places first, *and then*, if needed, undergo the more costly and time-consuming exercise of determining whether restoring backup tapes is necessary.

In *Lava Trading, Inc. v. Hartford Fire Insurance Co.*,[15] Magistrate Judge Michael H. Dolinger addressed the situation where one party is not facing sanctions for spoliation of e-mails but, rather, inordinately delays their production, and that delay prejudices the other side's ability to prepare its case. There, the plaintiff brought suit for breach of business interruption insurance policies issued by Hartford Fire Insurance Co., covering the plaintiff's premises at the World Trade Center. The central issue in the case was when after September 11th the plaintiff's business operations resumed.

In the course of pre-trial discovery, Hartford served a document request, seeking to discover the plaintiff's finances and communications during the relevant time period. The plaintiff produced its records in piecemeal fashion, which Hartford characterized as a "wave" approach of incomplete records. For example, after depositions, or on the eve of a court conference, the plaintiff would suddenly produce thousands of e-mails.

Hartford moved for sanctions and argued that the plaintiff had been dilatory in producing relevant records, violated a series of court orders directing it to produce documents, and greatly prejudiced the defendant's ability to question witnesses about pertinent documents at depositions and prepare its defense. Hartford asked that the court dismiss the complaint, or, in the alternative, issue an order: (1) precluding the plaintiff from presenting evidence on a series of specific topics; (2) authorizing the defendant to place in evidence a quantity of e-mails the plaintiff produced in an untimely fashion; and (3) requiring the plaintiff to reimburse the defendant for costs and fees.

The court found that the plaintiff had engaged in an "excruciatingly slow and disjointed disclosure of documents" and never offered a coherent justification for its actions. While the court concluded that the plaintiff's actions were not deliberate, it found that there was "considerable indifference to its discovery obligations." Withholding a large quantity of relevant and damaging e-mails until the very end of fact discovery "unquestionably had repercussions for the defendant's preparation of its case," including added burdens and expenses that the defendant "should not have been required to bear."[16] Thus, in view of the expected date of trial, a combination of sanctions was warranted to remedy the infractions. This included an order directing payment of all of Hartford's attorney fees incurred in connection with the motion for sanctions, and the submission of certain fact and expert witnesses to further depositions on dates Hartford selected and at the plaintiff's full expense, including attorney fees. The court also observed that the plaintiff should be precluded at trial from introducing the newly discovered documents.[17]

Cost Allocation: Who Pays to Produce the Data?

A significant issue is the costs associated with retrieving and producing the electronic data. Given the low cost of storing data, it is not surprising that vast quantities of information are recoverable. The question then becomes: Who pays to unearth the large amount of material stored in electronic form and found on local hard drives, external servers, and recycled backup tapes, parts of which may or may not be relevant?

In answering this question, courts must balance the competing interests of a party's right to discover potentially relevant electronic evidence against the burden incurred by another when making it available. Under the federal rules, the courts have held that the cost of complying with discovery requests generally rests upon the *responding* party.[18] For a responding party to "shift" the cost to the requesting party, the responding party must file a motion for a protective order under FRCP 26(c) and show "undue burden or expense." On such an application, federal courts will consider "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[19]

In *Zubulake*, the district court issued two decisions (in addition to those regarding sanctions, discussed above) addressing how a court should allocate costs between parties in retrieving electronic data. The first decision, written in May 2003, discussed the standard to be used when allocating costs between parties engaged in e-discovery ("*Zubulake I*").[20] UBS estimated that the cost of restoring e-mails on its backup tapes, a time-consuming process, would be approximately $170,000, plus attorney and paralegal review time. Three months after *Zubulake I*, the court applied the standard it had articulated and determined that, because Ms. Zubulake demonstrated that UBS unreasonably failed to maintain all relevant information, UBS should bear 75% of the cost of retrieving the data contained on its backup tapes ("*Zubulake III*").[21]

In *Zubulake I*, the court drew a distinction between production of accessible electronic data, such as active data on a computer hard drive, and non-accessible electronic data, such as data on backup tapes or residual data ostensibly "deleted." Because Ms. Zubulake sought to discover UBS's backup tapes containing e-mails that she knew once existed but were no longer readily accessible

on the company's hard drives, the court focused on how to allocate between the parties the costs of retrieving such data. When dealing with readily accessible data, the presumption that the responding party pays the cost of its retrieval is not affected. But when a litigant seeks to discover non-accessible data, a weighted, seven-factor test should be applied to the cost-shifting issue: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the cost of production compared to the amount in controversy; (4) the cost of production compared to the parties' resources; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.[22]

Notably, Judge Scheindlin observed in *Zubulake III* that UBS could have shifted all of its discovery costs to Zubulake by making an offer under FRCP 68. That rule permits a defendant to serve an offer upon an adverse party to allow judgment to be taken for a stated sum. If the judgment finally obtained is less favorable, the plaintiff will effectively be punished for not accepting the offer and must pay all costs, which, in the civil rights context, include attorney fees.

New York state courts do not follow the federal cost-shifting model. In *Lipco Electrical Corp. v. ASG Consulting Corp.*,[23] the court held that New York courts adhere to the rule that the expense of production falls on the party seeking it. *Lipco* concerned electrical contractors who brought claims over fees allegedly due them for electrical work performed on a public contract. In a discovery motion concerning e-mail production, the court held that, while federal courts "discuss factors to be considered in regard to cost shifting in connection with electronic discovery . . . , cost shifting of electronic discovery is not an issue in New York since the courts have held that, under the CPLR, the party seeking discovery should incur the costs incurred in the production of discovery material." The court, after citing Second Department precedent,[24] stated that "the analysis of whether electronic discovery should be permitted in New York is much simpler than it is in the federal courts. The court need only determine whether the material is discoverable and whether the party seeking the discovery is willing to bear the cost of production of the electronic material."

Following this principle, in *Etzion v. Etzion*,[25] the court addressed the plaintiff–ex-wife's motion to permit her and her computer expert to "impound, clone and inspect" the servers and hard drives of her former husband's computers to see if he was scheming to deprive her of her fair share of marital assets. In her supporting affidavit, the ex-wife recited the history of her former husband's "past fraudulent conduct, including the diversion of eight or nine million dollars in money and real estate," compelling her to seek "a preemptive strike to clone the computer records."

If the judgment finally obtained is less favorable, the plaintiff will effectively be punished for not accepting the offer and must pay all costs, which, in the civil rights context, include attorney fees.

The court granted the plaintiff's application, observing that full financial disclosure is warranted in matrimonial actions, and

> in cases in which it is suggested that some files may have been deleted or altered, the services of a computer expert is required to insure complete and accurate discovery of relevant data. . . . Some files may need review by the court or by a referee to determine if they contain privileged data.

Following the traditional rule in New York on costs, the court held that the "plaintiff shall bear the cost of the production of the business records she seeks . . . and expenses of her experts, including the cost of hard copy production."[26]

In *Weiller v. New York Life Insurance Co.*,[27] the trial court was more equivocal on the costs issue. The plaintiff filed a class action charging New York Life Insurance Co. and other insurers with a scheme to deny meritorious disability claims filed by policyholders. Justice Herman Cahn, citing *Zubulake I*, stated that the court "will not constrain the production of possibly relevant evidence on account of the later need to allocate the cost." Consequently, the court did not adhere to the traditional rule in New York, at least not at the outset of the production but, instead, wrote that it is "not insensitive to the cost entailed in electronic discovery, and would, *at the appropriate juncture*, entertain an application by defendants to obligate the plaintiff, the requesting party, to absorb all or a part of the cost of the e-discovery it seeks, or will seek herein."

Waiver of the Attorney-Client Privilege?

If e-mails mistakenly produced to an adversary contain privileged communications, and the receiving party wants to use the e-mails in the litigation, can the producing party insist that, because of the mistake, the e-mails be returned and not used?

Some courts hold that any disclosure to the adversary, whether inadvertent or deliberate, is a waiver of the privilege because the proverbial cat is out of the bag. Others opine that inadvertent disclosure never operates as a waiver because waiver, by definition, means the intentional relinquishment of a known right. Still other courts find that whether an inadvertent disclosure is a waiver should be decided on a case-by-case basis.[28] The Southern District of New York, adopting the latter approach, con-

siders four factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the overall volume of discovery versus the extent of inadvertent disclosures; and (4) overall issues of fairness.[29]

In *Atronic International GMBH v. SAI Semispecialists of America, Inc.*,[30] Atronic brought suit for breach of contract concerning graphic processors ordered from the defendant SAI Semispecialists. During discovery, SAI filed a motion to permit it to retain and use two e-mails produced by Atronic. The e-mails had been exchanged between Atronic's management and its international lawyer in Nevada. Atronic mistakenly produced the e-mails because its designated lawyer, assigned to review the production, did not know that the person in Nevada was a lawyer. Atronic argued that the e-mails were produced in error and should be returned.

Magistrate Judge Michael L. Orenstein, hearing the case under diversity jurisdiction, stated that New York privilege law applies. Nonetheless, the court applied the four-part waiver test used in the Southern District regarding inadvertent disclosures. The court examined each factor and concluded that Atronic had waived the privilege. First, Atronic had not taken reasonable precautions to protect the privilege. Counsel had not labeled the e-mails "confidential" or "privileged," thus failing to put others on notice. There was also no evidence that any reasonable procedure was employed to weed out privileged communications – as demonstrated by the fact that the attorney overseeing the production was unaware of counsel's identity. Second, although Atronic did attempt to correct the error, it waited six days after discovering the error before giving the defendant notice. Third, the large volume of material produced – urged by Atronic as a mitigating factor – was irrelevant to the mistake, as Atronic had conceded that it was due to the reviewing attorney's incomplete information. Finally, both e-mails went "to the heart of this breach of contract litigation," containing admissions that "differ markedly from the factual position plaintiff has taken in this action." Thus, the court found that fairness considerations tipped the scales in SAI's favor:

> Inasmuch as plaintiff's precautions in preventing the inadvertent disclosure of the two protected documents constitutes inexcusable carelessness, and the protected information at issue is vital to the factual claims and defenses plaintiff has advanced in this action, the Court concludes that the inadvertent production of the two e-mails has resulted in a waiver of the claim of privilege.[31]

Atronic filed objections to the magistrate's decision, arguing that New York law does not recognize a waiver of the attorney-client privilege through inadvertent disclosure. The district court disagreed. Although the law of waiver in New York is "worded differently" than the federal standard, the "distinction is without a meaningful difference," as New York recognizes a waiver through inadvertent production, except where: (1) the party asserting the privilege intended to maintain confidentiality and took reasonable steps to prevent its disclosure; (2) the party asserting the privilege promptly sought to remedy the situation after learning of the disclosure; and (3) the party in possession of the materials will not suffer undue prejudice if a protective order is granted.[32]

The court found that ABS had waived any potential privilege due to the lack of procedures for privilege review and the delay in seeking judicial intervention.

In *Reino de Espana v. American Bureau of Shipping*,[33] another district court also found that inadvertent disclosure resulted in waiver of the privilege. The plaintiff brought suit against American Bureau of Shipping (ABS) for casualty loss as a result of a ship sinking off the coast of Spain. ABS discovered in March 2005 that its October 2004 production of 8,300 pages of documents included several privileged e-mails regarding its potential liability. ABS immediately notified the plaintiff and requested the documents' return or destruction. In May 2005, compounding the error, ABS inadvertently produced duplicates of the same e-mails. It notified the plaintiff of the inadvertent production the next day. In July 2005, the plaintiff responded by asserting that the e-mails concerned non-legal, business-related communications, and thus, the attorney-client privilege did not apply. In November 2005, ABS finally filed a motion for an order to direct the plaintiff to return or destroy the documents.

The court found that ABS had waived any potential privilege due to the lack of procedures for privilege review and the delay in seeking judicial intervention:

> Admittedly, a vast number of documents had to be reviewed by ABS in this litigation. ABS maintains that during the review of documents for production, counsel distinguished privileged and non-privileged documents, and supervised the manual and electronic segregation of the documents. ABS does not provide any additional information to support its contention that it exercised reasonable precautions to prevent inadvertent disclosure. ABS produced duplicate copies of documents previously inadvertently disclosed, failed to include the documents in its privilege log, and did not mark the documents as privileged. The procedure ABS used to safeguard the confidentiality of the

> materials was inadequate, and effects a waiver of any privilege otherwise applicable. . . . ABS's inordinate delay in seeking judicial intervention [also] supports a finding of waiver.[34]

These cases demonstrate the need to employ adequate privilege procedures. Identifying the names of all counsel who communicated with the company, using technology to run comprehensive searches, and expressly marking the document as privileged at the earliest instance will militate in favor of the privilege's protection in the event of inadvertent disclosure.

Proposed Amendments to the Federal Rules

After substantial debate over the need to codify the FRCP to deal with electronic discovery issues, the United States Judicial Conference approved various amendments on September 20, 2005.[35] The new Rules will soon be addressed by the United States Supreme Court, and are expected to take effect December 1, 2006.[36]

In recognizing the ever-present and difficult issues that litigants face as a result of electronic discovery, the Judicial Conference observed:

> The discovery of electronically stored information raises markedly different issues from conventional discovery of paper records. Electronically stored information is characterized by exponentially greater volume than hard-copy documents. . . . Computer information, unlike paper, is also dynamic; merely turning a computer on or off can change the information it stores. Computers operate by overwriting and deleting information, often without the operator's specific direction or knowledge. A third important difference is that electronically stored information, unlike words on paper, may be incomprehensible when separated from the system that created it.[37]

The proposed amendments seek to provide a framework within which to address e-discovery issues early in the litigation. Federal practitioners are familiar with the Rule 26 meet-and-confer requirements in advance of a scheduling conference with the court and the rule's automatic discovery obligations before formal discovery begins. The amendments under consideration will require the parties to address e-discovery issues at such initial stages so as to minimize litigation over them later in the case. The topics to be reviewed include the form of producing the electronic information (in paper, PDF, TIFF, etc.); appropriate preservation of electronic information; and whether the parties can agree on privilege claims in the event of any inadvertent disclosures.

Proposed Rule 37(f) has drawn much attention because of the proliferation of sanctions for spoliation in recent years. Under the proposed rule, a party will not be sanctioned for loss of electronically stored information if the loss occurs in the course of "good faith" operations. The rule recognizes that suspending routine functions of an operating system can create an undue burden in and of itself, and, as such, may be considered in the event of a loss of data. However, the routine loss of information is not the test; rather, it "must also be shown that the routine operation was in good faith." Whether this good faith test under the proposed rule will constitute a departure from existing case law remains to be seen. Courts examine the issue under all of the facts involved, and invariably give significant weight to the overall reasonableness involved.

The proposed rules also seek to codify the distinctions among potential electronic evidence made in *Zubulake I.* Under proposed Rule 26(b)(2), a party is not required to produce information that is not "reasonably accessible" because of "undue burden or cost." As the committee report confirms, lawyers are developing "two-tier" practices so that they must first obtain information that can be easily accessed, such as active data on a hard drive, and then determine whether it is necessary to search more difficult sources such as backup recovery tapes that are generally not accessible.

Proposed Rule 26(b)(5) contains a "clawback" provision to address inadvertent disclosure and potential waiver issues. Under this proposed rule, if a producing party later learns that privileged information was produced, that party can notify the receiving party of the inadvertent disclosure, at which point the receiving party must return, sequester or destroy the information. This rule would seemingly be more forgiving to litigants who inadvertently disclose confidential communications than the courts that have been examining multiple factors.

Conclusion

In the years ahead, technology may advance to the point that electronic storage devices will have enormous capacities, and searches and retrieval of electronic data, no matter how old, will be done quickly, at little expense, and will eliminate unintended mistakes. For now, however, attention to ongoing technological advances and the developing case law in this area remains essential to help clients avoid the sanctions, huge costs, and dire consequences that can flow from spoliation and unintended disclosures. ■

1. *The Fortuna*, 15 U.S. (2 Wheat.) 161 (1817).

2. *Chan v. Triple 8 Balance, Inc.*, No. 03CIV6048, 2005 WL 1925579 (S.D.N.Y. Aug. 11, 2005) (citing *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107 (2d Cir. 2001)).

3. 217 F.R.D. 309 (S.D.N.Y. 2003).

4. Backup tapes are used to store large amounts of data and are often recycled after a prescribed time period. By way of comparison, a CD holds 625 MB of data; a DVD holds 4.7 GB, and a backup tape can hold 200 GB in compressed form. New York County Lawyers' Ass'n, *Advising Clients Regarding Retention*, Feb. 2005.

5. *See, e.g.*, *Zubulake v. UBS Warbus, LLC (Zubulake IV)*, 220 F.R.D. 212 (S.D.N.Y. 2003) (all costs and fees awarded to plaintiff re-depose individuals about newly discovered e-mails); *Zubulake v. UBS Warbus LLC (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004) (jury empanelled to hear the case will be given an adverse inference instruction).

6. *Zubulake IV*, 220 F.R.D. at 217 (citing *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991)).

7. *Id.* at 219.

8. No. 03CIV6048, 2005 WL 1925579 (S.D.N.Y. Aug. 11, 2005).

9. *Id.* at 5.

10. *Id.* at 10.

11. No. 03CIV7406, 2005 WL 3453908 (S.D.N.Y. Dec. 15, 2005).

12. *Id.* at 5.

13. *Id.* at 8 n.10.

14. However, one court recently disagreed with the conclusion in *Quinby* that data need not be kept in accessible form. In *Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006), Magistrate Judge James C. Francis IV wrote that permitting the downloading of data to less accessible form violates a party's preservation obligation, because a party should do nothing that hinders access to relevant information, even if it does not cause the loss or destruction of evidence. *Id*. at n.4 (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 110 (2d Cir. 2002)).

15. No. 03CIV7037, 2005 WL 459267 (S.D.N.Y. Feb. 24, 2005).

16. *Id.* at 14.

17. *Id.* at 15.

18. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) ("presumption is that the responding party must bear the expense of complying with discovery requests, but he may invoke the district court's discretion under Rule 26 (c) to grant orders protecting him from 'undue burden or expense' in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery").

19. *See* FRCP 26(b)(2)(iii).

20. 217 F.R.D. 309 (S.D.N.Y. 2003).

21. 216 F.R.D. 280 (S.D.N.Y. 2003).

22. 217 F.R.D. at 322.

23. 4 Misc. 3d 1019(A), 798 N.Y.S.2d 345 (Sup. Ct., Nassau Co. 2004) (Austin, J.).

24. *Id*. (citing *Schroeder v. Centro Pariso Tropical*, 233 A.D.2d 314, 649 N.Y.S.2d 820 (2d Dep't 1996)).

25. 7 Misc. 3d 940, 796 N.Y.S.2d 844. (Sup. Ct., Nassau Co. 2005).

26. *Id.* at 945.

27. 6 Misc. 3d 1038(A), 800 N.Y.S.2d 359 (Sup. Ct., N.Y. Co. 2005).

28. Cohen & Lender, Electronic Discovery, Law and Practice § 7.05 (2004).

29. *United States v. Rigas*, 281 F. Supp. 2d 733 (S.D.N.Y. 2003); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985).

30. 232 F.R.D. 160 (E.D.N.Y. 2005).

31. *Id.* at 166.

32. *See AFA Protective Sys. v. City of N.Y.*, 13 A.D.3d 564, 565, 788 N.Y.S.2d 128 (2d Dep't 2004).

33. 2005 WL 3455782 (S.D.N.Y. Dec. 14, 2005).

34. *Id.* at 10–11.

35. *See* <http://www.uscourts.gov/judconf.html>.

36. *E-Mail to Lawyers: E-Discovery Rules on the Way*, ABA J. Rep., Oct. 7, 2005.

37. Report of the Judicial Conference, Committee on Rules of Practice and Procedure 23, Sept. 2005.

BY PHILIP J. MICHAELS, LAURA M. TWOMEY, AND LINDSAY H. BROWN

Philip J. Michaels is a partner at Fulbright & Jaworski L.L.P. He is a Fellow of the American College of Trust & Estate Counsel and an adjunct professor at New York Law School. A graduate of the University of Notre Dame, he received a J.D. from New York Law School and an LL.M. in taxation from New York University School of Law.

Laura M. Twomey is a partner at Fulbright & Jaworski L.L.P., specializing in estate planning and taxation. She received both her bachelor's degree and a J.D. from Boston College, and an LL.M. in taxation from New York University School of Law.

Lindsay H. Brown is an associate at Fulbright & Jaworski L.L.P., where her concentration is on estate planning and taxation. She received her bachelor's degree from Boston College and a J.D. from Fordham University.

Domicile: Estate Planning Issues for the Mobile Client

Do you or your New York clients have a summer house on the New Jersey Shore, or a weekend retreat in Connecticut? Are your clients "snowbirds" who spend winters down south and summers in New York? Did your client come to New York for an employment opportunity with intentions of returning to her home state in a few years? It is fairly common for an individual in today's complex world to have ties to more than one state.

In preparing a will and estate plan, these multistate connections should be discussed and the client's "domicile" should be ascertained. In general, "domicile" is your permanent home – the place to which you always intend to return no matter where you may temporarily reside.[1] A person may thus be a New York domiciliary even though she spends winters in Florida. A Maryland native currently living in New York could be domiciled in Maryland if he or she intends to move back to Maryland after graduate school or after working for a few years.

Domicile is a subjective concept that is based on the individual's intent. Because it is subjective, it may be hard to determine a person's domicile after death unless the individual has taken steps to make his or her intentions clear. If your client dies and domicile is unclear, you will not know where to probate the will, or which state's law of intestacy will apply. Additionally, the elective share of a disinherited spouse may be 30% in one state and 33% in another state. Unclear domicile may therefore leave the surviving spouse's share of the estate in limbo (*e.g.*, New York laws allows for the greater of $50,000 or one-third of the estate[2]). The lack of clarity on these issues is not only an administrative burden, it can also cause controversy among the beneficiaries. For example, when it is unclear which state's right of election and intestacy laws will apply, competing beneficiaries will be motivated to try to establish the decedent's domicile in the state where the law is most advantageous to them.

Domicile should not be confused with the concept of residence. While domicile is a subjective, fact-based concept, residence is a mechanical one. Your client is a statutory resident of New York, even if the client is not a New York domiciliary, if he or she maintains a permanent place of abode in New York as well as a presence in the state for more than 183 days.[3] New York considers any portion of a day spent in the state as a full day counted toward the 184 that make a person a statutory resident. Conversely, your client can be a New York domiciliary but not a resident of the state during a given tax year. This can happen in two scenarios for persons whose domicile is New York: if they spend 30 days or fewer in New York during the year, do not maintain a permanent place of abode in New York and instead maintain one elsewhere during the tax year, or if they were in a foreign country for at least 450 days out of any consecutive period of 548 days and they spent 90 days or fewer in New York during the 548-day period.[4]

Domicile has a significant impact on estate taxation. While nearly all states claim that a person can have only one domicile, each state has the right to apply its own definition of domicile. To complicate matters, federal tax law does not alleviate the problem with a definition of its own. For example, when Howard Hughes died, multiple states wanted to tax his estate. The U.S.

Supreme Court refused to settle the problem, ruling that each state had the authority to impose its estate tax on its own domiciliaries.[5] Similarly, in *Hill v. Martin*, the Supreme Court allowed both New Jersey and Pennsylvania to assess the decedent's domicile and ultimately to tax the estate.[6] As a result, each state collected about $17 million in state inheritance taxes from the estate of the Campbell Soup Company founder.[7] To avoid such double taxation, your clients must clearly establish their domicile.

Generally, real or tangible property (such as homes, cars, jewelry, etc.), will be subject to tax in the state where the property is located, regardless of domicile, but intangible property (such as stocks, bonds, and bank accounts), will generally be taxed only in the client's state of domicile. That means portions of your client's estate may necessarily be taxed in multiple states, depending on the location of his or her various real or personal property, but a clearly established domicile can at least avoid any unnecessary imposition of multiple state estate or inheritance taxes. For example, a person deemed a Connecticut domiciliary who owned a condominium apartment in New York would pay New York estate taxes on the value of the New York apartment, and Connecticut estate tax on the value of his or her worldwide assets, reduced by a credit for estate taxes paid to New York.[8] If domicile had been unclear, however, both states would have attempted to tax the estate on all assets.

Careful planning can not only avoid double taxation but can potentially reduce or eliminate state estate taxes generally. For example, if a decedent deemed a Florida domiciliary owned a condominium apartment in New York, the estate would pay New York estate tax only on the value of the New York apartment, and would not be liable for any Florida estate tax. In comparison, if the same person were deemed a New York domiciliary, the estate would pay New York estate taxes on all real and tangible property in New York, as well as on all intangible property wherever located, but would pay no estate taxes in either state on the real and tangible property located in Florida.

As stated above, "domicile" is the fixed home to which one always intends to return, wherever one may temporarily be located, and it is a subjective concept. If your clients have changed domicile, or if they have multiple residences and unclear domicile, their estate will have the heavy burden of proving which state is the actual and proper state of domicile.[9] Therefore, if your clients are "snowbirds" and spend part of their year in another state, like Florida, then it is especially important for them to take proper steps so their estate will not face complications upon their death. To help your clients avoid such complications, and to help them clearly and convincingly establish their domicile, you should advise them to take action using the factors below as guidelines.

When determining domicile, New York looks first to a person's primary ties to the state, encompassing the following factors:[10]

- *Time*. The amount of time spent in each location is important to New York. Your client should try to spend more time in the state of domicile than in any other state.
- *Value*. The size, value and nature of your client's various residences, as well as the nature of the use of each residence, will be considered. Thus, it is helpful when a client's most valuable real property is located in the desired state of domicile.
- *Active Business Involvement*. New York will look at employment/business scenarios in all applicable locations.
- *Location of Tangible Assets*. New York will look at the physical location of items with significant sentimental value. Advise your clients to keep a large majority of valuable tangible personal property in their desired state of domicile (*i.e.*, jewelry, art, etc.).
- *Family Ties*. New York will look at your client's close family ties in the various locations in which your client has established residences. If all else is equal, determine your client's domicile to be where his or her family lives.

Generally, real or tangible property will be subject to tax in the state where the property is located, regardless of domicile, but intangible property will generally be taxed only in the client's state of domicile.

In addition to the five main factors above, there are other secondary actions you should encourage your clients to take so they can more clearly establish their intended domicile.

- File a Declaration of Domicile in the appropriate state.
- Use the address in the domicile state on all legal documents, such as deeds, leases, contracts, securities, etc.
- File a homestead exemption application with the appropriate county (only applicable in some states, such as Florida and Texas).
- Obtain a driver's license in the state.
- Register as a voter and vote in that state. Cancel all other voter registrations.
- Register cars, boats and other vehicles in the state.
- File a state income tax return (in Florida, file a Florida intangibles tax return).

- Open personal checking, savings and brokerage accounts in appropriate states; your client's major bank and brokerage accounts should be in the state of domicile and all others should be closed, if possible.
- Receive bills, magazines and other personal mail at the domicile address.
- Revise wills, health care proxies and powers of attorney to reflect the state of domicile.
- Subscribe to local papers.
- Make sure client terminates or has "non-resident" status in any out-of-state churches, social clubs, etc. Have them establish memberships in the appropriate state.
- Open a safe deposit box in the state and transfer valuables to that state.
- File federal income taxes with the appropriate IRS regional service center, and have your appropriate domicile address as your residence address.

Generally, domicile is a subjective and factual determination. New York and other states will take an expansive look at a person's associations and connections to determine whether or not your client is in fact domiciled in their state. Advising your clients to plan and keep proper records to clearly establish their domicile will help them avoid the tax and other costly risks outlined above. ■

1. Surrogate's Court Procedure Act 103(15).
2. Estates, Powers & Trusts Law 5-1.1-A.
3. N.Y. Tax Law § 605(b)(1)(B).
4. Tax Law § 605(b)(1)(A).
5. *Cory v. White*, 457 U.S. 85 (1982).
6. 296 U.S. 393 (1935), *aff'g Dorrance v. Martin*, 12 F. Supp. 746 (D.N.J. 1935).
7. *Id.*; *see In re Dorrance's Estate*, 115 N.J. Eq. 268, 170 A. 601 (1934), *aff'd*, 13 N.J. Misc. 168, 176 A. 902 (1935), *aff'd*, 116 N.J.L. 362, 184 A. 743 (1936).
8. Conn. Gen. Stat. § 12-391; Conn. Public Act No. 05-251 § 69; Tax Law § 960.
9. *See, e.g.*, *Bodfish v. Gallman*, 50 A.D.2d 457, 378 N.Y.S.2d 138 (3d Dep't 1976).
10. New York State Dep't of Taxation and Finance, Pub. No. 90 (Nov. 2004).

Paul Bennett Marrow (pbmarrow@marrowlaw.com) is an attorney and arbitrator practicing in Chappaqua, New York. He is a member of roster of arbitrators for the American Arbitration Association, National Arbitration and Mediation, National Arbitration Forum and the Board of Arbitrators, NASD. He is Member of the Charter Institute for Arbitrators, London, England, holding the title of MCIArb. He serves on the Dispute Resolution Committee of the American Bar Association and the Committee on Alternate Dispute Resolution of the New York State Bar Association.

Coming to New York?

An Unconscionable Mediation Agreement

By Paul Bennett Marrow

How can an agreement to mediate be unconscionable? That just doesn't sound right. What can be unfair about a private agreement requiring parties simply to discuss their dispute with a neutral? After all, mediation is a non-binding process and an agreement to mediate lacks any substantive force. And indeed there is nothing about requiring mediation that is *per se* unconscionable. In spite of that common-sense assumption, the draftsman should be wary of the terms and conditions *surrounding* the contractual obligation to engage in mediation. These can be onerous and some may even achieve what seems otherwise impossible and be found unconscionable.

This article explores some examples of terms and conditions that are problematic and then considers whether the regulatory provisions of the Uniform Mediation Act (UMA), currently under review by the Legislature in New York, will change anything.

Keep in mind that in New York mediation is by and large an unregulated process. While there are statutory programs that include procedures for mediation, these schemes are limited to specific types of disputes and have no application whatsoever to private agreements calling for mediation. Sometimes the draftsman engages in overreaching when setting conditions and terms for mediation. Because of the lack of statutory regulation, control over the process is left to the courts. The judicial response is to evaluate these agreements through the filter of unconscionability. As we shall see, New York is attempting to enact a scheme to begin to regulate private contracts calling for mediation, but the proposal is insufficient to address the possibilities presented by *substantive* unconscionability.

First, a Case Finding Mediation Terms Unconscionable

Consider this fact pattern: Employer hires W as a waitress. After she begins working she is asked to sign an agreement that provides for mandatory mediation as a gateway to binding arbitration, and she does so. The agreement requires the employee to select a mediator from a list created by the employer. W isn't entitled to go elsewhere if she finds the list to be inadequate or inappropriate for any reason. The agreement also provides that

neither Employer nor W is entitled to have counsel present during the mediation and that the situs for the mediation is an office 200 miles away from the place of employment. W is dismissed after she becomes pregnant and refuses to wear a maternity uniform approved by Employer. Rather than follow the dictates of the agreement, W takes her case to the federal courts claiming that, in its entirety, the agreement is unconscionable.

This is what *Garrett v. Hooters-Toledo*[1] is about. It was decided by a federal court applying Ohio law. To date, it's the only reported case to suggest that an agreement to mediate can be tainted by unconscionability.

The *Garrett* court found this particular scheme for mandatory mediation to be unconscionable and unenforceable. The ruling emphasized the court's perception that the overall purpose of the scheme was to frustrate the employee by encouraging unwarranted acceptance of recommendations by the mediator before binding arbitration became necessary. In the words of the court, the agreement was *substantively* unconscionable because "the mediation requirement . . . as a whole [is] written to discourage potential claimants from pursuing their claims."[2] The court looked to the entirety of the impact of the clause and from that deduced the motivation of the employer.

A Careful Look at the *Garrett* Reasoning

The agreement specified that the mediators were to be selected from a list prepared exclusively by Hooters. Of course, Hooters had reason to provide names of people who were not necessarily impartial, and in fact, the *Garrett* court reached that conclusion: "The likelihood that a claimant would have any basis on which to choose a mediator who might be open to her contentions is slight, if nonexistent."[3]

In addition, the agreement provided that even though the site of employment was in Toledo, the mediation would be conducted in Louisville, Kentucky. Garrett claimed the costs associated with the travel and child care were prohibitive. The court agreed.

> In the instant case, there appears to be little justification for the requirement that mediation . . . be conducted in [Louisville], Kentucky. If the term "the parties" were to be given a limited meaning, and include only the plaintiff and the defendants, no reason appears not to have the mediation conducted in Toledo.[4]

Finally, the agreement provided that at the mediation hearing neither side could be represented by counsel. The mutuality notwithstanding, the court still found this to be unconscionable, giving favor to the defendant. "Though defendants likewise forgo representation, an imbalance may arise if the participants include company representatives, such as human relations personnel, who have experience in dealing with claims of unfair or improper treatment."[5]

Unfortunately, the *Garrett* court made a subjective determination about fairness of the agreement and missed the real objective of the mediation procedure. The court was convinced that the mediation provisions in total were intended to discourage the claimant from pursuing her right to seek binding remediation. But, arguably, the court's position was mere speculation about the motivation of one of the parties. The prohibition involving the right to counsel at the mediation had objective consequences never considered by the court. Stripped of the right to a lawyer, the claimant could have made unwarranted and inappropriate disclosures that could then be used against her in the subsequent arbitration proceedings. This impropriety might well not be understood by an arbitrator or be deemed unimportant. The potential for unfairness by a binding determination is a concern that far outweighs speculation as to the motivation for a non-binding finding and should thus be the grounds for a finding of substantive unconscionability.[6]

Unfortunately, the *Garrett* court made a subjective determination about fairness of the agreement and missed the real objective of the mediation procedure.

Garrett, the View From New York

Garrett of course was decided in Ohio and under Ohio law. New York, like Ohio at the time *Garrett* was decided,[7] has no statutory scheme regulating these agreements. At most, New York has a few statutory provisions calling for mediation under the terms of the enabling legislation, and none of these schemes attempts to address private agreements. In addition, there are no reported cases specifically dealing with circumstances like those discussed in *Garrett*. This doesn't mean that mediation agreements are beyond the reach of the law. It's only a matter of how and when.

The Uniform Mediation Act

The UMA is an attempt to regulate private agreements prescribing mediation. First approved and recommended by the National Conference on Uniform State Laws in 2001, it has been adopted by a handful of states. As of this writing New York is considering the UMA. On the assumption that it will be enacted in New York at some point in the near future, let's look at the UMA and see if it addresses the concerns raised in *Garrett*.

To start with, it is a mistake to assume that the UMA is far-reaching. Unfortunately, in its present form, it is shallow and leaves many issues for determination by the courts.[8] More to the point, the UMA wasn't drafted with

unconscionability in mind. Indeed, in no place in the model act or in the accompanying commentary and notes is there any mention of unconscionability. So, it shouldn't be surprising that of all the terms and conditions discussed in *Garrett*, the UMA addresses only the right to an attorney.

This should be a warning to anyone drafting a mediation clause. Matters involving *substantive* unconscionability – *i.e.*, operation of a contract term on a party to the agreement – are for the most part left to the exclusive domain of the courts.[9] The UMA has yet to be reviewed by the courts in any state other than New Jersey (none of those decisions touches on unconscionability), so the impact that it will have on other terms and conditions provided for in contracts mandating mediation has yet to be determined. It is even possible that the UMA wasn't intended to apply at all to agreements such as the one described in *Garrett*.

Consider this line of reasoning: The UMA may not apply to mediation schemes that fall outside of the UMA's stated *scope.* That's not as preposterous as it may seem. The drafters of the UMA were clearly concerned about scope, as is evidenced by Section 3, entitled "Scope." Section 3 states that the UMA is triggered (made applicable) by only three specific conditions,[10] suggesting that if a given agreement isn't within these triggering provisions, it isn't subject to the UMA.

The UMA applies to private agreements in which "[t]he *mediation parties* use as a mediator an individual *who holds himself or herself* out as a mediator or the mediation is provided by a person that holds itself out as providing mediation."[11] Suppose that the parties allow for a mediator who doesn't hold himself or herself out as a mediator? Arguably, that is what appears to have happened in *Garrett*. Remember, only Hooters had a say about whether or not people on its list were actually providing mediation services. Moreover, Section 9(g) of the UMA (it must be read in conjunction with Section 3, according to the Reporters Notes[12]) imposes on regulated mediators the requirement of impartiality *subject to waiver after disclosure*.

To be meaningful, a waiver must involve a choice between a mediator who is impartial and one who is not. That wasn't possible in *Garrett* because the agreement called for both parties to select a mediator from a list of candidates provided by Hooters. This restriction made waiver meaningless because the only other option was to select yet another name from the Hooters list. Thus the agreement defined a mediator as someone who was, no matter what, *potentially partial* and thus beyond the purpose of the waiver provided for in Section 9(g). This suggests that the entire agreement was also beyond the operation of the UMA.[13] From this it is possible to conclude that the UMA might not apply because the mediators so designated either were not or may not have been holding themselves out as providing mediation services within the meaning of Section 3(a)(3).

Setting aside the issues of impartiality and meaningful choice, let's assume that the UMA would apply to the *Garrett* agreement. By its expressed terms the UMA would probably address only the issue of the right to counsel. But even here, the UMA fails to address the full reach of the issues presented by *Garrett*.

Nowhere in the UMA is there any provision addressing the effect of a requirement that mediation take place in an inconvenient location.

Section 10 of the UMA grants any party the right to have counsel at mediation and anyone who waives that right before the mediation has the power of rescission.[14] The commentary explains that this power was granted because of the possibility that "the party may not have understood the implication at that point in the process."[15] Such an inability suggests the impossibility of a voluntary meeting of the minds, a hallmark of *procedural* unconscionability. Agreements tainted by procedural unconscionability are normally not voidable absent a showing of some substantive taint. The UMA serves to overcome this technicality by permitting rescission as of right for a waiver made prior to mediation.

But note that the UMA's right to rescission isn't absolute. Waivers given once mediation commences are enforceable and presumably conclusive, absent judicial intervention. The circumstances surrounding a waiver given during mediation may be problematic within the framework of unconscionability and thus appear to be open to judicial review because of the UMA's silence on the issue. For example, suppose one party induces the other to waive the right to counsel. Depending on the details, that might be grounds for a claim of unconscionable conduct, independent of any violation of the UMA.

Finally, nowhere in the UMA is there any provision addressing the effect of a requirement that mediation take place in an inconvenient location. This condition involves *substantive* unconscionability; as such it is beyond the scope of the UMA and remains an issue to be regulated by the courts.

Conclusion

From this discussion it is safe to conclude that the courts in New York will need to resolve the many issues raised by *Garrett* and the UMA. But in the meantime, the draftsperson must take note and proceed with caution. It is likely that if a term has been found unconscionable within the framework of arbitration, it will meet the same fate within the framework of mediation. So the first step would be to check to see whether courts have struck a clause being considered within the framework of arbitration.

Caution about how to proceed extends to the domain of the litigator. Because of the possibility that courts will find the UMA limited in scope, those seeking to challenge a particular agreement or term should plead in the alternative, *i.e.*, a claim arising under the UMA and a claim that the agreement or term is otherwise unconscionable. ■

1. 295 F. Supp. 2d 774 (N.D. Ohio 2003).

2. *Id.* at 783.

3. *Id.*

4. *Id.*

5. *Id.* at 782.

6. For more on *Garrett*, see Comment: *Unconscionable Mediation Clauses*, 10 Harv. Negot. L. Rev. 383 (2005).

7. Ohio recently adopted the Uniform Mediation Act. *See* Ohio Rev. Code §§ 2710.01–2710.10.

8. *See* Committee on Alternate Dispute Resolution, New York State Bar Association, *The Uniform Mediation Act and Mediation in New York*, at 24 (2002) ("Report"):

> Significantly, New York lags behind other states that have years of experimentation with and development of mediation standards and statutes. Unlike some states, New York case law and statutory law related to mediation are just beginning to be developed. New York is only starting to define the parameters of acceptable mediation practice. It is unclear whether New York has enough experience with mediation across all areas and in all venues even to evaluate whether the UMA is beneficial for New York.

9. An example of an issue with substantive overtones is privilege. The Act makes provision for a privilege against disclosure. *See* UMA §§ 4–6. But even in these sections much is left undefined. "The UMA defines a privilege, but leaves the parameters of confidentiality generally to the parties." Report at 28.

10. UMA § 3(a) states:

> Except as otherwise provided in subsection (b) or (c), this [Act] applies to a mediation in which:
>
> (1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;
>
> (2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or
>
> (3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator, or the mediation is provided by a person that holds itself out as providing mediation.

11. UMA § 3(a)(3) (emphasis added).

12. UMA, Reporters Notes, § 2(3) at 20.

13. This analysis is consistent with the commentary accompanying UMA § 3(a):

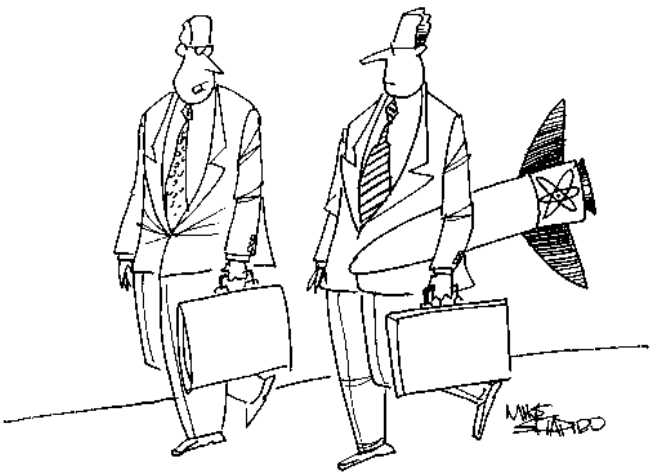
> The third triggering mechanism, Section 3(a)(3), focuses on individuals and organizations that provide mediation services and provides that the Act applies when the mediation is conducted by one who is held out as a mediator. For example, disputing neighbors who mediate with a volunteer at a community mediation center would be covered by the Act, since the center holds itself out as providing mediation services. Similarly, mediations conducted by a private mediator who advertises his or her services as a mediator would also be covered, since the private mediator holds himself or herself out to the public as a mediator. Because the mediator is publicly held out as a mediator, the parties may reasonably expect mediations they conduct to be conducted pursuant to relevant law, specifically the Act.

In connection with the provisions of UMA § 9:

> "Impartiality" has been equated with "evenhandedness" in the Model Standards of Practice "approved by the American Bar Association, American Association of Arbitrators, and the Society of Professionals in Dispute Resolution (now Association for Conflict Resolution). The mediator's employment situation may present difficult issues regarding impartiality. A mediator who is employed by one of the parties is not typically viewed as impartial, especially if the person who mediates also represents a party. In the representation situation, the mediator's overriding responsibility is toward a single party. For example, the parties' legal counsel would not be an impartial mediator. Ombuds often are obligated by ethical standards to be impartial, although they are employed by one of the parties.
>
> . . .
>
> One may reasonably anticipate many situations in which parties are willing to waive a conflict of interest; indeed, depending upon the dispute, the very fact that a mediator is familiar to both parties may best qualify the mediator to mediate that dispute. That choice, however, properly belongs to the parties after informed consent, and in preserving this autonomy, this provision not only confirms the integrity of the individual mediator, but also supports the integrity of the mediation process by providing a visible, fundamental, and familiar safeguard of public protection.

14. "An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded." UMA § 10.

15. UMA, Reporters Notes at 62.



"I was sure the nuclear defense was only a metaphor."

BY ROBERT W. WOOD

Robert W. Wood practices law with Wood & Porter, in San Francisco (www.woodporter.com), and is the author of *Taxation of Damage Awards and Settlement Payments* (Tax Institute 3d ed., 2005 & Supp. 2006).

Structuring Attorney Fees When You're Not a Solo

These days, plaintiffs' lawyers are beset by lots of controversy, lots of attention in Washington and, whether or not you view the phrase as a misnomer, lots of "tort reform." Consequently, lawyers are under considerable financial pressures, and have more than the usual uncertainty about their income. Now, more than ever, there are tax, asset protection, and financial reasons why many plaintiffs' lawyers are finding that leveling out what can be an erratic and unpredictable income makes sense.

How do you do this? You may be able to do a bit of leveling by controlling when cases settle, but most lawyers find that pretty difficult to control. A far more certain method by which plaintiffs' attorneys are leveling out their income is by structuring their contingent fees. Fee structures are increasingly being considered as a way to meet a lawyer's income-leveling goals, plus achieve tax savings, establish asset-protection strategies and meet even estate-planning goals. I'm finding attorney fee structures to be dramatically increasing in popularity.

Buying Some Insurance

Plaintiffs' attorney fee structures are facilitated in large part by insurance companies. In lieu of taking agreed-upon contingent fees at the time the case is resolved, an attorney fee structure involves the attorneys agreeing to defer their fees. Fortunately, the attorney need not rely on the plaintiff, or even the defendant to pay the outstanding fees. Instead, the attorney will receive a stream of guaranteed payments from an insurance company. In this manner, plaintiffs' attorneys obtain the benefits of income leveling, asset protection, tax deferral, estate planning, and more.

Attorney fee structures are an outgrowth of the structured settlement industry. Most plaintiffs' lawyers have some experience with plaintiffs taking their recovery over time via annuities. Such structures were originally devised for serious personal injury cases, where the plaintiff got the security and tax advantages of a stream of payments over many years. Today, even in non-personal injury cases, plaintiffs often want to structure part or all of their recovery.

Although structured settlements are still quite popular in personal injury cases, and have morphed into employment litigation and other contexts, plaintiffs themselves aren't the only ones interested in security and tax efficiency. Today, increasingly, it's the lawyer's turn.

Sometimes both lawyer and client structure, sometimes only the client, and sometimes only the lawyer, depending on their respective needs and desires. Insurance companies are generally willing to structure lawyers' fees, even if the plaintiffs don't want to structure their recovery. This willingness creates tremendous flexibility for plaintiffs' attorneys to decide when and how to receive their fees.

Ultimate Flexibility

Fee structures allow a pre-tax accumulation of wealth, so attorneys can defer fees until they need them. Attorneys can convert a contingent fee into payment streams of every shape, size, and flavor imaginable. A structure can provide a stream of income of virtually any duration. Payments can be made over the life of the attorney, can be issued as a joint and survivor annuity with the attorney's spouse, or can call for a plain balloon payment. There is even flexibility in increasing or decreasing payment amounts over time, including having interim lapses in payments or multiple payment streams, covering college costs for children, and so on.

What happens if the client wants to structure, but the attorney does not? Conversely, what happens if the attorney wants to structure, but the client does not? Although the marketplace has answered this question by making structures available in any of these circumstances, the industry has had some concern over fee agreements.

For example, the California Bar announced that where a fee agreement is silent on the question of structuring, an attorney in California cannot collect fees upon the settlement of the case if the plaintiff will receive structured set-

tlement payments.[1] In other words, absent a contrary agreement in the fee contract between the lawyer and client, the lawyer must participate in the structured settlement in order to receive attorney fees.

Of course, this is generally only an academic issue, since plaintiffs often do structure. Moreover, even if the plaintiff doesn't structure, there's virtually no reason the plaintiff would object to the lawyer structuring. In fact, sometimes a plaintiff's tax problems can be significantly lessened when the lawyer structures, since it can reduce the attorney fees the client must deduct in one year.[2] I've seen a few attorney fee structures designed to help the plaintiff's tax situation, though doubtless the lawyer gets an advantage too.

From the Beginning

Structuring attorney fees has been widely accepted for more than 10 years. The lynchpin of such structures is the Tax Court opinion in *Childs v. Commissioner*.[3] In *Childs*, three lawyers practiced law through their professional corporation, Swearingen, Childs & Philips (SCP). In 1984, SCP took on two gas explosion cases. The firm settled both cases, and because they were big recoveries and the lawyers were cautious, they structured their legal fees. Yet, in each case the *firm* didn't receive the stream of payments. Instead, the plaintiffs directed payment to each attorney individually, bypassing SCP completely. Each attorney structured his portion of the contingent attorney fee separately in each settlement.

The SCP firm did not report any of the contingent fees from either settlement. After all, it hadn't actually received any of the payments. All three lawyers reported their annuity payments over time as they received them. The IRS challenged the tax returns of all three attorneys, arguing that each payment stream should be included in the attorneys' income in its entirety in the tax year when the first payment was received. Interestingly enough, as we'll discuss below, the IRS raised no issue about the fact that the money all went to the three individual lawyers, not to their firm.

In any case, the attorneys went to Tax Court, and the Tax Court sided with the attorneys.[4] Ten years ago, the Eleventh Circuit affirmed *Childs*, laying the groundwork for attorneys nationwide to structure their fees. Based on this authority, attorney fee structures have achieved a level of comfort.[5] Yet, in the decade following this seminal decision, a few issues surrounding attorney fee structures are rarely discussed. Perhaps the most interesting issue not expressly decided by *Childs* (and not addressed by any other legal authority since) is the lack of focus on the legal entity through which Childs and his partners practiced law.

The case draws no distinction between who actually received the attorney fees (the three lawyers) and who was legally entitled to the contingent fees (their professional corporation). The sole focus of the case is on timing. The case asks the question of whether the attorneys are taxable on the cash they *could* have received, or only on the annuity payments as they receive them over many years.

Maybe timing is everything. Yet, the clients hired the *firm*, and signed a fee agreement with the firm, not with the attorneys individually. The attorney fees were paid to each attorney individually. When each case settled, each attorney structured his own fees.

Childs Play

The Tax Court details how the three attorneys practiced law. They had a professional corporation, in which Childs and his "partners" were really shareholders. The three lawyers were not acting individually when they settled the underlying tort cases. Each attorney structured his fees *individually*, not as part of the professional corporation in which he was a shareholder. The professional corporation was apparently entitled to receive contingent fees in both settlements, yet neither the IRS nor the Tax Court mentioned it. More surprising, no court since has addressed this seemingly important issue.

Readers might be wondering why I'm making such a fuss over the lawyers' direct receipt of their fees. After all, lawyers are individuals, and the legal work they perform is based on their own legal judgments. Yet, a professional corporation (or other legal entity through which a law firm operates) is hard to ignore when it's entitled to receive contingent fees. The professional corporation provides numerous benefits to its shareholders which make it important. On a general level, a professional corporation provides a certain element of protection for its shareholders (*e.g.*, in tort, contract, bankruptcy, etc.).

Suppose I practice law in a professional corporation. If a delivery person slips and falls on the floor of my office, my personal assets should not be at risk. If the same delivery person wins a judgment against my firm for negligence, forcing my firm into bankruptcy, my personal assets should still be protected. This situation would be quite different if I was practicing through a general partnership, where my liability would extend not only to my interest in the firm, and to all firm assets, but to my personal assets as well.

If that slip-and-fall example seems silly, let's take another example. What if I'm sued for my own malpractice (or for the conduct of personnel whom I supervise)? Here, a professional corporation (or LLP) doesn't help. Yet, if I'm sued for the malpractice of a fellow shareholder (someone whom I colloquially call my "partner"), a professional corporation (or LLP) will shield my own personal assets from the lawsuit. There is a shield for what is usually called "cross-liability."

A professional corporation offers other benefits besides shareholder protection, such as deferred compensation. Some years ago, attorneys, as individuals, could not obtain certain pension benefits. These benefits were limited to professionals employed by corporations. Thus, attorneys often

took to self-incorporating to obtain those benefits. Some attorneys took this action even though they were a partner or an associate in a law firm partnership. That's the reason you still sometimes see law firm letterheads that proclaim the firm is a "partnership including professional corporations." I'm seeing less self-incorporating today, since the pension benefits playing field (as well as the entity choice playing field) has now been more or less equalized.

Choice of Entity

Some of the questions about disregarding the legal entity may be less important when attorneys operate through a pass-through entity, such as a general partnership, a limited liability partnership or an S corporation. There is still a nagging question: What if attorneys structure on an individual basis, but the client has engaged the law firm as a whole? In *Childs*, the fact that payments were made directly to the attorneys as individuals did not bother the Service.

There may be a couple of reasons for this. Perhaps the Service is considering the payments as first made to the law firm, and then deemed paid from the law firm to the individual attorneys. There is a certain amount of common sense to this. These fictional back-to-back payments would help respect the law firm as an entity, and would take into account the fact that the law firm is entitled to its contingent fee.

Of course, such deemed payments are not uncommon. The IRS uses this fiction in many areas. Still, attorneys may be able to prevent the IRS from implementing its own characterization by executing their own deemed payment agreements. Although it may not be an absolute necessity, I believe it is often appropriate for the periodic payments of the structure to be made directly to the attorneys. The law firm could account for the receipt of the payments as if it had actually received them, and then could account for the monetary transfer to the attorney. In effect, it should be a wash.

Beneficiaries

Aside from Mark Twain, most people do not like to discuss the subject of their untimely demise. Attorneys who are structuring fees are no exception. Many of them structure payments to plan for retirement, and the thought of not being around to enjoy their long-awaited retirement is anathema. Still, some thought must be given to survivor's benefits.

Structuring attorney fees usually entails the defendant (or its insurance company) assigning its obligation to make structured payments to an assignment company. Assignment documents frequently have standard beneficiary language such as: "any payments made after the death of the Claimant pursuant to the terms of this agreement will be made to the Estate of the Claimant." In my experience, attorneys like this language (or at least don't often ask to change it), and it remains in many assignments.

Even though attorneys may not frequently change the language, insurance companies usually do not mind changing the beneficiary. They are willing to accommodate the attorney, since their payment obligation is discharged upon making payment to whomever the attorney may direct. Changes to the standard language sometimes reflect a calculated desire to incorporate post-death payments into an existing estate plan. Attorneys sometimes have payments directed to a spouse or child. Alternatively, payments may be directed into a family trust.

Attorneys can change the standard language relatively easily. Yet, even small changes can complicate tax matters. Given the fact that there is some uncertainty about whether an attorney who is not a solo has the right to payments on an individual basis, one approach is to have the law firm deemed to continue to receive the post-death structured payments. The firm can have an agreement to make payments to the attorney's estate, spouse, family trust, etc.

It is possible that payments from the law firm to the attorney's beneficiary may be considered income in respect of a decedent, or IRD. In essence, IRD is income earned by the services of the decedent before death, but which is collected after death by the estate. IRD is a subject which even tax attorneys tend to avoid.

Perhaps the simplest method to avoid this complication is to liquidate the law firm. Upon liquidation, the right to receive future structured payments would be distributed to the attorney's estate. Of course, liquidating the firm may be appropriate for a small firm. A larger law firm may not be willing to liquidate just to accommodate a single deceased partner. In any event, there can be a huge problem if the law firm is a C (as opposed to S) corporation.

Before leaving this topic, let's consider how the IRS may treat structured attorney fee payments which are paid directly to a family trust, and not to the attorney's estate. As noted above, the law firm may be considered the proper recipient for tax purposes. If so, the law firm can still make a deemed payment to the attorney in the same manner as if the attorney were alive. These payments would presumably go to the attorney's estate.

Of course, this does not solve the question of how the money gets from the attorney's estate to his or her family trust. Perhaps this would be yet

Aside from Mark Twain, most people do not like to discuss the subject of their untimely demise.

another deemed payment. Perhaps it does not matter, as the IRS has not suggested that it cares about any of these subtleties. After all, *Childs* would have presumably given the IRS plenty of opportunity to complain about the mismatch between the party originally entitled to fees under the fee agreement (the professional corporation) and the parties who were the beneficiaries of the annuities once the fees were structured (the three individual lawyers).

Commutation

Some pundits say the untimely demise of an attorney is an oxymoron. Such quibbling aside, the untimely demise of an attorney who is receiving structured attorney fees can cause liquidity problems for the attorney's estate. Estate tax is due shortly after a taxpayer dies, and 2006 rates reach as high as 46%. Some insurance companies will help estates with this liquidity problem, allowing structured payments to be accelerated upon death. Mechanically, this can be accomplished by inserting a commutation clause into the assignment agreement.

Sensibly, the commutation clause has gained popularity in recent years. A typical commutation clause might provide that all (or a portion) of the present value of the remaining structured payments are payable to the attorney's beneficiary upon the attorney's death. The primary reason attorneys may want an express commutation clause is to ensure that their estate has sufficient resources to pay estate tax.

The good news is that the mere presence of a commutation clause under these circumstances doesn't spell constructive receipt.[6]

Presumably, death removes the acceleration from the recipient's control. Yet, I have not found many defendants who were keen to insert a commutation clause into a settlement agreement, since on its face, it appears contrary to the IRC § 130 no-acceleration requirement. Nevertheless, this is not stopping insurance companies from inserting the clauses into their assignment documents.

An alternative to using a commutation clause to access the cash is to enter into a factoring transaction.[7] Here, the recipient of the structured payments can assign the right to receive all or a portion of the future payments to a factoring company in return for a current lump-sum payment. Factoring should serve the good of averting a liquidity crisis caused by the estate tax, but it adds a layer of administrative complexity and cost.

Notably, the Tax Code provides in general that there is a 40% excise tax on certain factoring transactions of qualified assignments (*i.e.*, § 104 injury cases).[8] The excise tax can be avoided if the parties obtain a qualified court order. The order must find that the transaction is in the best interest of the payee, taking into account the welfare and support of the payee's dependents. Also, the order must not contravene any state or federal law, among other requirements. As a practical matter, these additional requirements now included in the Internal Revenue Code have legitimized the factoring industry.

Conclusion

The structuring of attorney fees has become more and more common. Most major insurance companies are in this line of business, and I rarely meet a plaintiff's attorney who hasn't at least heard of the concept. Yet, there seems to be only the most basic guidance from the IRS. The IRS lost the issue in *Childs*, and can't look back.

Attorney fee structures represent a very attractive payment alternative. There is no adverse case law and there is (in my opinion) no reason to think that will change. Perhaps the IRS's relative silence even may equate to administrative acceptance.

Yet, attorneys who are sole practitioners appear to have relatively less trouble in theory and in practice when it comes to structuring payments. Ask any insurance structured settlement broker. Non-solos can certainly structure too, but some attention to form is a good idea (if not downright necessary). If form has not been respected and the IRS decides to make an issue of the practical aspects of the structuring arrangement, there could be trouble.

Despite my own thoughts on this topic, both the Tax Court and the Eleventh Circuit in *Childs* tacitly approved structuring *without* any concern about respecting the professional corporation. That simple fact suggests this isn't much of a problem. The Service took no interest in this (seemingly big) issue. At least the IRS did not argue about it by the time the case reached the Tax Court and the Eleventh Circuit. The fact that this seems quite literally to be a sleeper issue does make me wonder.

Are these hairs so finely split that the courts and the IRS would not notice or care? Perhaps they are. Based on the *Childs* decision, the identity of the structuring party vs. the party earning the fees – let alone the argument of how post-death payments get to a family trust – may be too academic for taxpayers as well as the IRS. The IRS could revisit this issue, which causes me to want to plan around the potential problem.

Because of this, I favor an income allocation agreement that recognizes the separate status of the professional vehicle. Even without such an agreement, if the IRS does pursue this issue, the *Childs* case is a bulwark against which attorneys can take refuge. ■

1. *See* California Bar Ethical Op. 1994-135.

2. The attorneys fee deductibility point is discussed in Wood, *Supreme Court Attorney Fee Decision Leaves Much Unresolved*, Tax Notes (Feb. 14, 2005) p. 792.

3. 103 T.C. 634 (1994), *aff'd*, 89 F.3d 856 (11th Cir. 1996) (mem.).

4. For more details of the *Childs* decision, see Wood, *Structuring Attorney Fees: Kingdom of Heaven?*, Tax Notes (Aug. 1, 2005) p. 539, 2005 TNT 142-28.

5. *Id.*

6. *See* I.R.S. Priv. Ltr. Rul. 98-12-027 (Dec. 18, 1997).

7. *See* Wood, *Structuring Settlements & Factoring: Never the Twain Shall Meet*, Tax Notes (Mar. 14, 2005) p. 1278.

8. IRC § 5891.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a first-year litigation associate in a large law firm. Like other large firms, mine litigates on behalf of Fortune 500 companies and other very wealthy clients.

Yesterday something occurred that really made me uncomfortable. The partner in charge of a hotly contested civil case, in which our firm represents a very profitable high-tech company, directed me to engage in "file cleansing" so that certain electronic documents in the client's files will become "lost" and untraceable. Apparently, the purpose is to protect the client's in-house legal team; its General Counsel was responsible for retaining our firm to replace prior counsel in the case. Before our firm got involved, prior counsel had convinced her not to produce those documents – which are very damaging – based on a strained interpretation of the opposing party's document request. Last week, however, the Court issued an order which removes the ambiguity upon which prior counsel had based its advice. Now, the General Counsel is afraid that in view of her earlier refusal production of the documents will be very embarrassing to her and her in-house colleagues.

I do not know how to handle this situation. I want to act professionally, and do not want to sweep ethics violations under the rug. However, I also do not want to ruin my legal career by leaving my first job in acrimony, and be subject to the behind-the-scenes accusation that I am a "snitch."

What should I do?

Sincerely,

Sweating It Out

Dear Sweating It Out:

The answer to your question is simple: Your firm has a duty to produce the documents and you have an obligation to ensure such production. The real issue is how to carry out your obligation. In performing that duty, however, consideration must be given to the manner in which you take action.

There is little doubt that what you have been asked to do is improper under several sections of the Code of Professional Responsibility, and carries substantial risk for you, your firm, and the client's own legal staff.

The directive of the litigating partner that you are to engage in "file cleansing" – in reality, spoliation of evidence – would violate DR 1-102(a)(4). Such action also is barred under DR 1-102(a)(5) and DR 7-106(c)(7), which prohibits an attorney from intentionally violating any established rule of procedure or evidence.

The proposed misconduct also would violate DR 7-102(a)(3), (7), (8), and if committed, could lead to a malpractice lawsuit against you, your firm, the litigating partner, and/or a complaint with the Disciplinary Committee.

Further, under DR 1-102(a)(3) and (5) you must not engage in illegal activity or engage in conduct that is prejudicial to the administration of justice. Accordingly, if you were to accede to the coercive pressure of the partner and engage in spoliation of evidence, you would be violating DR 7-102(a)(3) because you would be concealing, or knowingly be failing to disclose, these documents, under what is now an unambiguous direction of the Court. Spoliation of evidence is not required for zealous representation of a client under DR 7-101. You would be held accountable since you are not permitted to forestall the production of, or deliberately hide, evidence favorable to the opposing party under the guise that you are zealously representing your client.

Moreover, lawyers who are found to have conspired or colluded to deceive the Court, and the parties, after the Court affirmatively acted to clarify an ambiguity that it recognized to exist, would expose themselves to personal treble damage liability, plus attorney fees, under the frequently overlooked provisions of section 487 of the New York Judiciary Law. Under this provision, you may be found to be guilty of deceit or collusion, or to have consented to deceit or collusion, with intent to deceive your adversaries or the Court. You may also be found to be guilty of willfully delaying the litigation with a view to your own gain.

Finally (and as if all of the foregoing were not enough), this proposed conduct may also violate criminal statutes: 18 U.S.C. § 1503; N.Y. Penal Law § 215.40; and N.Y. Penal Law § 215.35. Spoliation of evidence is a Class E Felony.

In view of the seriousness of the proposed action, and as noted above, the risks involved, it is incumbent on you to object to the litigating partner's directive and to take the matter up the hierarchy in your firm in order to make sure that there is compliance with your client's production obligations. Some suggestions follow as to how this may be accomplished.

First, your objection must be made clear, and reported to the litigating partner before the threatened misconduct takes place. Otherwise, the conse-

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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quences may be irremediable. The contemplated action might cause the client far more injury, in the long run, than the damaging evidence itself; for example, it could lead to the application of the adverse inference rule or, if discovered, even the striking of the client's pleading. This would increase, rather than reduce, the harm to the client's position in the litigation.

Second, you yourself must not engage in such misconduct. You also may find yourself becoming a scapegoat if the litigating partner later contends that you misunderstood his directions, and acrimony will surely result.

Third, in making your objection known to the litigating partner, you should utilize the most persuasive arguments possible to convince him that the bad judgment of prior counsel should not be allowed to prejudice the case. If you cannot convince your litigating partner, then you will need to speak to others in your firm who may be able to prevail on the litigating partner – the head of your firm's litigation department, your firm's ethics partner or committee, or even your firm's managing partner. Surely your firm has some powerfully placed lawyer who can be your ethical ally.

Finally, that person can help you determine how your firm should approach your client's General Counsel. It seems possible that the General Counsel can be convinced not to proceed with the threatened misconduct, particularly in view of the clarification resulting from the Court's new order that removes the ambiguity that previously existed.

If none of this is convincing, you should discuss the dangers involved. The General Counsel and the litigating partner should not assume that such misconduct would never come to light. In addition to being highly unethical, as discussed above, such an assumption would be extremely risky for themselves, as well as for their client. Prior counsel, of course, will not have forgotten about the existence of the evidence, even if the files have been "cleansed," and the prior firm undoubtedly will have within it a number of people who are unhappy about the change in litigating counsel that the General Counsel brought about. In addition, insurance coverage may be abrogated as a result.

We recognize that a decision by you to refuse to comply with the directions given by the litigating partner is certainly a difficult one to make. It could end any prospects of your becoming a partner with that particular law firm. In addition, the General Counsel may support the directions given by the litigating partner – perhaps on the basis that you are a mere novice – and you soon might be retaliated against in some way.

On the other hand, if you openly discuss your concerns with the litigating partner, he may see that you are not engaging in defiant behavior, but rather that you are acting as an officer of the court and in accordance with the best traditions of the legal profession – in addition to trying to protect his own personal interests, and those of the client.

If you are able to persuade your superiors that the right way is the best way, you may find that the potential problem with the litigating partner and/or General Counsel will disappear, and that you have the requisites for promotion in the firm.

The Forum, by
Joan C. Lipin
New York City

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I'm not sure if what follows is an appropriate question for the Forum, but I'll ask it anyway.

I think that many matrimonial lawyers are dissatisfied with their matrimonial law practices. I know I am. In my opinion the dissatisfaction is understandable, because we deal with clients who, for the most part, are unhappy, hurt, scared, vulnerable, insecure, angry and even vindictive.

I have taken an informal survey of my fellow matrimonial attorneys and find that many are unhappy as well. I heard one colleague say, "It wouldn't be a bad field, if I didn't have to deal with clients." Another example: A prominent attorney who was lecturing at a CLE program reviewed the rule that prohibits matrimonial lawyers from having sex with their clients. He then added, "Have sex with them? I don't even want to speak with them." You get the idea.

I know that there are some matrimonial lawyers – a minority, I believe – who profess to love their work. What is their secret?

Sincerely,
Dissatisfied

BOOK REVIEW

BY RICHARD C. WESLEY

Hon. Richard C. Wesley is a judge of the U.S. Court of Appeals, Second Circuit.

Business and Commercial Litigation in the Federal Courts, 2d Edition

Robert L. Haig, Editor-in-Chief

When Bob Haig calls you, it is like a call from the White House; well, not exactly like a call from the White House, but close. You know that it is quite likely that Bob is going to ask you to do something – almost always for the good of the profession – and that there is little or no chance that you can say no. Bob is so dedicated to the law that one feels almost selfish if one even thinks of saying, "Gee Bob I'm booked solid with golf and other serious stuff – just can't fit it in old boy." So, of course, I said yes when Bob called to ask if I'd do a review of his most recent effort: the second edition of *Business and Commercial Litigation in the Federal Courts*. And I'm glad I did.

This eight-volume set is a compilation of 96 chapters encompassing just about any topic one can imagine relating to commercial litigation in the federal courts. Bob Haig's list of co-conspirators (there is a chapter on RICO by Jerold Solovy and Douglas Rees of Jenner and Block) is extensive and star-studded. The treatise includes a chapter on electronic discovery authored by the Southern District's resident authority on the subject, District Judge Shira Scheindlin (a fellow Cornell Law School alum), and Jonathan Redgrave of Jones Day. There are chapters on procedural matters, such as multi-district litigation by John Strauch, Robert Weber, and Laura Ellsworth of Jones Day and removal to federal court by District Judge Roger Vinson of the Northern District of Florida. Other chapters are devoted to substantive areas of the law, such as punitive damages by Andy Frey, Evan Tager, and Lauren Goldman of the Mayer Brown gang and the theft or loss of business opportunities (a real favorite subject of mine) by Mark Alcott of Paul Weiss. Finally, a number of chapters focus on the practical side of commercial litigation in the federal courts. There is a chapter on civility – perhaps this could be made mandatory reading as an alternative to sanctions – and another on litigation avoidance authored by Mike Weaver and Bob Knaier (a former clerk of mine – had to mention him) from Latham and Watkins. What impresses me the most about this treatise is the wide range of subjects available for the reader and researcher in one place. For the novice and well-seasoned litigator alike, not to mention federal judges, this work serves as an essential reference.

When Bob Haig gives you a task, he always gives you some ground rules to follow. Bob told me I have only 750 words to describe this monster effort. (Good Lord, I couldn't charge probable cause back in state court with that paltry amount.) Thus, it seems to me that if I am going to give you, dear reader, any sense of the value of this work, I'll have to focus on one particularly worthy chapter and examine its merits. Given my current line of work, I have decided to pick Chapter 51: "Appeals to the Court of Appeals," by Stephen Rackow Kaye and Ronald Rauchberg. (Some of you are probably thinking that I picked this chapter because Stephen Kaye is an old friend, and, of course, you're right.)

Chapter 51 is a cornucopia of information for the appellate litigator. It even has the address and phone number for the clerk's office of each circuit. Kaye and Rauchberg have done an excellent job combining thoughtful, veteran litigator tips with information that is both practical and useful. For example, the authors stress the need for an "appellate game plan," "a clear strategic vision of just how success can be achieved" in the appeal. They include a lengthy and detailed discussion of the standards of appellate review and explain how an effective appellate litigator can sidestep difficult and perhaps fatal issues in a case by, for example, arguing the substantive errors of a trial judge's rulings rather than characterizing those "errors" as reflective of the judge's bias or prejudice (a pet peeve of mine).

The chapter further provides a revealing look inside the minds of accomplished and well-respected appellate lawyers willing to share some of their artistry. Every appellate lawyer would do well, for example, to heed the authors' warning against crowding a brief with too many issues: "one or two good issues do not get better, but instead may get lost, when accompanied by two or three more." In addition to this expert advice, Kaye and Rauchberg provide a wide array of technical information on jurisdiction, costs, stays, and motions for rehearing and en banc consideration. The chapter concludes with a series of useful checklists, which serve as a guide for accomplishing difficult appellate tasks. Indeed, there is even a form showing

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: In the April "Language Tips" column you answered a question about when the relative pronouns *that*, *who*, and *whom* can be omitted from sentences. I would like to know whether it is ever correct to refer to persons with the relative pronoun *that*. For example, is it correct to say, "The person that asked the question," instead of "The person who asked that question"?

Answer: Grammarians allow you to use *that* to refer to one or more persons as a member of "a class, specie, or type," but require you to use *who* to refer to a specific person or persons. For example, "Those people *that* came to the rescue take charge of any situation." But, "She is the only person *who* agreed to help." However, it is always correct to use *who/whom* instead of *that* whenever referring to human beings.

People often use the pronoun *that,* however, even when *who* is proper, probably because the choice of *that* avoids the necessity of deciding whether to use *who* or *whom.* You can see the problem of case in the following two sentences:

- She is the person whom I most admire.
- John is the man who lost his umbrella.

If you chose *that* instead of *who* or *whom* in those sentences, you would avoid deciding about case, but you would not be correct. Note, however, that you can also, with propriety, delete the relative pronoun when it is the object of its own clause, as it is in the first sentence. "She is the person I most admire."

Question: When I read your column about the ambiguity of *next* (in the June "Language Tips"), it occurred to me the word *last* is in that category. When I say *last Thursday*, I mean the Thursday before the previous Thursday; that is, if I am saying this either on a Friday or a Saturday. But when I say *last Thursday* on any other day, I am referring to the closest previous *Thursday*. So far as I am aware, I haven't confused anyone by doing so. (Have I confused you?) And are you familiar with this ambiguity?

Answer: Thanks to your e-mail, I now am. When I told my daughter, who had lived in Japan for about 20 years, about the dilemma, she said that the Japanese do not encounter it because they do not use either *next* or *last* as we do. They refer to "the Friday of *this, last,* or *next* week."

In English, the verbs *bring* and *take* are similar to *that*, in that orientation decides which word to use. If I am at home and want a package delivered to me, I say, "Bring it to my home." If I am away from home and want it delivered to my home or to anywhere except where I am, I would say, "Take it to my home (or elsewhere)." As you have probably noticed, the distinction between *bring* and *take* is often ignored, young persons, especially, favoring *bring* in all contexts. But that distinction is still important.

The same distinction exists between *come* and *go*: "Come *to* or *with* me." "Come to my home" if I am there. If I am not there, "Go to my home."

Question: In the February issue of the *Journal*, you discussed hyphens. Would you kindly do a follow-up column on verb-phrases when they are used as modifiers; for example, the difference in the hyphenation of the following statements:

- The company laid off a number of employees.
- The company quickly re-hired all its laid-off employees.

Answer: When a verb-phrase commonly used without a hyphen is used as a modifier, you would hyphenate the modified form (as in the second sentence), but not the usual verb form. For example:

- The bank mailed out the statements late this month.
- The mailed-out statements will arrive in your mailbox soon.

The reader also asked whether the way that he hyphenates verbs when they are used as nouns is acceptable. For example:

- The company's lay-off was unexpected.
- With every fill-up you get a free wash.

The reader's hyphenation of the sentences above is correct. The rule that applies to verbs used as nouns is that, unless one of the pair is itself a noun, a hyphen is added: *go-fer, no-no, two-by-fours*. When one of the pair is a noun and the phrase is in common use, no hyphens: the phrase becomes a single word: *brainstorming, downloading, housewarming.*

But, as I said in the February "Language Tips," hyphenation is punctuation in transition. When I type air-conditioning without a hyphen, my spell-checker always announces that I need a hyphen. (So I add one, to please my spell-checker.) You can decide whom to please – yourself and the reader of your document – or your spell-checker.

Potpourri

Speaking of being pleased, I was recently not pleased to sign a document that began, "I, Gertrude Block, willfully and voluntarily make this declaration . . ." Not that I objected to the subject-matter. It was the language that grated on my nerves. I admit to being willful occasionally (*i.e.*, "obstinate, opinionated"), but the word is not applicable in the Living Will that I was signing. The correct word would have been "willingly." (And why add "voluntarily" when in this context the two adverbs have the same meaning?) ■

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

opinions about the facts for the argument section.

- Kill irrelevant details like people, places, and dates. They take up room, burn brain cells, and emphasize the wrong issues. Some writers include extra details because they're afraid of leaving something out. They should be more afraid that their readers will stop reading or, worse, misconstrue their point.
- Make your citations speak to save text.[9]
- Begin sentences with content, not with "*the court held* or *the court went on to say*."[10] Save text and persuade by arguing rules, not cases. Give the rule first, then the citation.
- Use appropriate amounts of authority with appropriate amounts of explanation. Predict how much authority a busy but skeptical reader needs. Then use the most authoritative citations: the highest court, the clearest statement of law. Avoid string citing except to give research necessary to understanding the outcome or the controversy, such as if there is a split in authority.
- Don't analyze cases in depth or give their facts unless you want to analogize your case to or distinguish your case from the case to which you are citing.
- Don't regurgitate the entire procedural history.
- Don't list the litigants' papers.[11]
- A legal argument isn't a mystery novel, with the conclusion at the end. Begin paragraphs and sections with your conclusion. That'll lessen the possibility of offering a long explanation before getting to the point. Legal argument should be structured like an inverted pyramid, with a broad conclusion that precedes justification.
- Don't dwell on givens, stress history, or impress with legal research.

Concision Techniques

Trash Tautologies. Tautologies repeat the same thought in different words. Don't be wordy, verbose, prolix, loquacious, long-winded, repetitive, chatterbox-like, and so on and so forth, etc.

Quibble Over Quoting. Limit the length of your quotations by quoting only the most pungent words and what you can't say better yourself. Don't use blocked quotations unless the blocked quotation of 50 words or more contains a critical test from a seminal case or quotes an important statutory or contractual provision. Even then, break up the quotation into manageable bits. Be careful not to quote unessential statutory or contractual provisions.

Obliterate the Obvious. Consider this, from President Calvin Coolidge: "When a great number of people cannot find work, unemployment results."[12]

Circumnavigate Circular Platitudes. Circular platitudes are logically fallacious, waste space, and stop the reader from reading further. Only the most obvious circular platitudes succeed, like Yogi Berra's home run: "It ain't over till it's over."

Say It Once, All in One Place. Avoid repeating ideas already expressed. A fact that applies to more than one legal point can be mentioned more than once. The point itself should be mentioned but once.

Sometimes Use Gerunds. A gerund is a verb form used as a noun. Gerunds end in "-ing." "The act of eviction will make the tenant homeless." *Becomes:* "Evicting the tenant will make her homeless."

Coordinating Conjunctions. Replace coordinating conjunctions ("and," "but," "or," "for," "nor," "so," "yet") with a period. Then start a new sentence: "I was walking down the street one day, and a man came up to me to ask me what time it was." *Becomes:* "I was walking down the street one day. A man came up to me to ask me what time it was."[13]

Embedded Clauses. Embedded clauses are parenthetical expressions: internal word groups with their own subjects and verbs. Transfer them to a second sentence. Doing so shortens your sentences and thus is concise, even though it might add text: "The judge's chambers, which has a hunter-green carpet, is at 100 Centre Street in Manhattan." *Becomes:* "The judge's chambers is at 100 Centre Street. Her carpet is hunter green." *But* compress childish writing: "The man was tall. He was fat. He had yellow teeth. He wore a green tie." *Becomes:* "The tall, fat man with yellow teeth wore a green tie."

Live for Line Editing. Experiment with cutting words from every paragraph that has only a few words on the last line. The cutting will make your writing tighter. This is one of the most successful techniques for lawyers who fear exceeding a page limit specified in a court rule.

Defy Defining and Quit Qualifying. Lawyers add unnecessary text by defining and qualifying whenever they can. Here's Dan White's satirical advice: "Do not stop with hundreds of useless definitions and qualifications. Go through it again and again, expanding clauses and inserting redundancies. This will enable you to avoid the perils of certain forms of punctuation — such as the period."[14]

Expunge Expletives. The word "expletive" comes from the Latin *expletus*, meaning "filled out." Expletives, which should be deleted, include the phrases "there are," "there is," "there were," "there was," "there to be," "it is," "it was." Some jargonmongers call expletives "dummy subjects."

Some examples: "*There are* two things wrong with almost all legal writing. One is its style. The other is its

"Let thy speech be short, comprehending much in few words." Ecclesiastes 32:8.

content."[15] *Becomes:* "Two things are wrong . . . ." "*There is* no rule *that* is more important." *Becomes:* "No rule is more important." "*There is* no case law *that* addresses the question." *Becomes:* "No case addresses the question." "The court found *there to be* a discovery violation." *Becomes:* "The court found a discovery violation." "*It is* the theory *that* lends itself." *Becomes:* "The theory lends itself."

A double expletive is double trouble. *It is* clear that *it* will cause problems.

There are some exceptions to avoiding "there are" expletives: First, expletives may be used for emphasis.[16] It's more concise to write, "Judge Jones wrote the opinion" than to write, "It was Judge Jones who wrote the opinion." But if the writer has a strong reason to emphasize Judge Jones's authorship — to correct a mistaken impression that Judge Smith wrote the opinion, for example — the expletive "it was . . . who" will serve that function. Like all techniques of emphasis, expletives should be used sparingly.

Second, expletives may be used for rhythm. Ecclesiastes 3:1 would be different if, instead of "To everything *there is* a season," the author wrote, "To everything is a season." Different, too, would be Robert Service's opening line in *The Cremation of Sam McGee*: "*There are* strange things done in the midnight sun" *rather than* the more concise "Strange things are done in the midnight sun."

Third, expletives may be used to climax or to write sentences that go from short to long, from old to new, or from simple to complex. Thus, the uninverted form, "There is a prejudice against sentences that begin with expletives," is better than the inverted form, "A prejudice against sentences that begin with expletives exists." The climax shouldn't be on "exists." The writer could have avoided the issue: "People are prejudiced against sentences that begin with expletives."

Prune the Passive Voice. Passives are wordy, not merely hard to read: "The passive voice is avoided by good lawyers." *Becomes:* "Good lawyers avoid the passive voice." Voila! The sentence, with two fewer words, is easier to read. "The following PREVIEW has been approved for ALL AUDIENCES by the Motion Picture Association of America." *Becomes:* "The Motion Picture Association of America has approved the following PREVIEW for ALL AUDIENCES." Huzzah! The sentence, with two fewer words, is easier to read.

As You Like It. Delete "as," if possible: "Some consider drinking *as* a defense to murder." *Becomes:* "Some consider drinking a defense to murder." "He was appointed *as* a court attorney." *Becomes:* "He was appointed court attorney."[17]

To Be or Not to Be. Delete "to be," if possible: "Some consider drinking *to be* a defense to murder." *Becomes:* "Some consider drinking a defense to murder." "The opinion needs *to be* lengthened." *Becomes:* "The opinion needs lengthening."

Don't Let It Come Into Being. Banish "being," if possible: "The attorney was regarded as *being* a persuasive advocate." *Becomes:* "The attorney was regarded as a persuasive advocate." And being that we are on the subject, don't substitute "being that" for "because": "The court reporter types quickly *being that* he has magic fingers." *Becomes:* "The court reporter types quickly *because* he has magic fingers."

In the Nick of Time. Toss "time," if you've got the time to do so: "The brief will be submitted in two weeks' time." *Becomes:* "The brief will be submitted in two weeks."

In That. Don't begin sentences with "in that" or use "in that" in an internal clause: "*In that* the judge's mother was a litigant, the judge recused herself." *Becomes:* "The judge recused herself because her mother was a litigant."

Relative Pronouns. Best not begin sentences or subordinate clauses with relative pronouns: "who," "whose," "whoever," "whichever," "whatever," and "which." Beginning that way adds unnecessary fat and is unnecessarily complex.

> Don't be wordy, verbose, prolix, loquacious, long-winded, repetitive, chatterbox-like, and so on and so forth, etc.

Rally Against Relative Clauses. Strike the nonstructural "who," "who are," "who is," "whoever," "whom," "whomever," "which," "which is," "which are," "which were," "that," "that is," "that are," and "that were." Structural example: "The attorney believed his client owed him $500." *Becomes:* "The attorney believed *that* his client owed him $500. (The attorney didn't believe his client.) Nonstructural example: "I hope that you will write concisely." *Becomes:* "I hope you will write concisely."

Excise nonstructural relative clauses in an appositive. Appositives rename or ascribe new qualities to a noun: "The judge, *who is* 44 years old, is a strong editor." *Becomes:* "The judge, 44 years old, is a strong editor." "Law clerks [remove *who are*] not averse to writing might find their words quoted and remembered." "Albany, [remove *which is*] a large city even though natives call it 'Smallbany,' is the state capital."

-Er & -Est. Add "-er" to one- or, depending on your ear, two-syllable words after "more": "More close" *becomes* "Closer." What do you think of the two syllable "often"? Massachusetts Supreme Judicial Court Justice Holmes, later of the Supreme Court, added the "er" in *Ryalls v. Mechanics' Mills*:[18] "General maxims are oftener an excuse for the want of accurate analysis than a help . . . ." This rule

doesn't apply to words having three syllables or more. Lewis Carroll's poetic "curiouser and curiouser" in *Alice's Adventures in Wonderland* is remembered because "curious" has three syllables and thus shouldn't have had the "-er" suffix.

Add "-est" to one- or two-syllable suffixes: "Most close" *becomes* "Closest." This rule doesn't apply to words that have three syllables or more.

Reduce "Fact" Phrases. Delete "in fact" (a trite formula that, if ever used, should in fact be restricted to facts, not opinions), "in point of fact," "as a matter of fact," "the fact is that," "given the fact that," "the fact that," "of the fact that," "in spite of the fact that" (meaning "although"), and "the court was unaware of the fact that."

"The fact that" can almost always be deleted. Other "fact" expressions should be replaced by something more concise, such as "actually."

A good rule: Don't confuse facts with rules. *Incorrect:* "The opinion relies on the fact [should be *on the rule*] that involuntary confessions are inadmissible at trial."

Vitiate Verbosity. Needless to say, of course, anything that is wordy or need not be written should not be written. (*Should be:* "Anything that need not be written should not be written.")

Verbose: "There can be no doubt but that [delete throat clearer] you should not use empty phrases [write in affirmative] despite the fact that [although] many writers would appear to [delete qualifier] register disagreement [fix nominalization—disagree]."

Verbose: "Plaintiff, Ms. A, filed a lawsuit against defendant, Mr. B, alleging that Mr. B. committed a breach of their contract of employment." *Becomes:* "Ms. A sued Ms. B for breaching their employment contract."

Next month: This column continues with concision techniques. ■

1. Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. Rev. 915, 923 (1961).

2. Most legal writing can be cut in half. *See* Mortimer Levitan, *Some Words That Don't Belong in Briefs*, (1960) Wis. L. Rev. 421, 421 ("A discussion of some words that don't belong in briefs could probably be condensed into this concise statement: about fifty percent of them."). Levitan went even further for judicial opinions: "This comment could not accurately be made in regard to judicial opinions; it would be necessary to omit 'fifty percent' and substitute 'sixty-five percent.'" *Id.*

3. This concept is discussed in Gerald Lebovits, The Legal Writer, *Legal-Writing Myths — Part I*, 78 N.Y. St. B.J. 64, 57 (Feb. 2006) ("Myth #9. If you have little to say about something, even something important, don't devote much space to it.").

4. Robert E. Keeton, Judging 142 (1990).

5. Bradley G. Clary & Pamela Lysaght, Successful Legal Analysis and Writing: The Fundamentals 87 (2003).

6. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), in Selected Speeches and Writings by Abraham Lincoln 405 (1st Vintage Books, Library of America ed., 1992).

7. Mortimer Levitan, *Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?*, 43 A.B.A. J. 628, 666 (July 1957).

8. David O. Boehm, View From the Bench, *Clarity and Candor are Vital in Appellate Advocacy*, 71 N.Y. St. B.J. 52, 54 (Nov. 1999) ("In setting forth the facts, avoid like the plague a witness-by-witness recital of testimony . . . . [C]ondense the testimony into a narrative that provides a concise and clear foundation for the legal argument.").

9. For an explanation of this concept, see Gerald Lebovits, The Legal Writer, *Write the Cites Right — Part I*, 76 N.Y. St. B.J. 64, 61 (Oct. 2004) ("Citing also condenses your writing. Unless you need to explain procedural history in your text, let your citation speak for you.").

10. Mary Bernard Ray & Jill J. Ramsfield, Legal Writing: Getting it Right and Getting it Written 96 (4th ed. 2005) (emphasis in original).

11. This rule doesn't apply to New York state judges. CPLR 2219(a) requires that orders that determine motions made upon supporting papers "recite the papers used on the motion."

12. Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 Mich. L. Rev. 465, 486 n.88 (1987).

13. Adapted from the Chicago Transit Authority song, *Does Anybody Really Know What Time It Is?* (Chicago I, Robert Lamm) ("As I was walking down the street one day / A man came up to me and asked me what the time was that was on my watch, yeah.").

14. D. Robert White, The Official Lawyer's Handbook 186 (1983).

15. From Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38, 38 (1936) (emphasis added), a legal-writing classic.

16. *See, e.g.*, *State v. Baker*, 103 Idaho 43, 43, 644 P.2d 365, 365 (Ct. App. 1982) (Burnett, J.) ("*It was* a shotgun blast in the early morning *that* killed Merardo Rodriguez.") (emphasis added).

17. Just as an aside, the direct object of "regard" should always be followed by "as." *Correct:* "She regards it *as* a heinous crime."

18. 150 Mass. 190, 194 (1889).

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at New York Law School. His publications include *Advanced Judicial Opinion Writing*, a handbook for New York State trial and appellate courts, from which this two-part column is adapted. Judge Lebovits's e-mail address is GLebovits@aol.com.

MEMBERSHIP TOTALS

New Regular Members
1/1/06 - 6/7/06 ____ **4,158**

New Law Student Members
1/1/06 - 6/7/06 ____ **337**

Total Regular Members
as of 6/7/06 ____ **64,149**

Total Law Student Members
as of 6/7/06 ____ **2,545**

Total Membership as of
6/7/06 ____ **65,694**

President's Message
Continued From Page 6

quences have a disproportionate impact on minorities.

The Association's Special Committee on Collateral Consequences of Criminal Proceedings, appointed by former Association President Kenneth G. Standard and chaired by Peter Sherwin, has studied these issues. At its June meeting in Cooperstown, the House of Delegates received and began to consider the committee's exceptional, ground-breaking report and recommendations. We will vote on the specific proposals at the next House meeting, and then present our recommendations to the Legislature.

In pursuing these initiatives, we will be building upon the important work already done by Chief Judge Kaye and the New York County Lawyers' Association in calling attention to the problem, and will be allied with the City Bar and its President Barry Kamins, our Vice President for the Second District, who has joined the call for action on this issue.

As was my intention, we wasted no time in addressing issues important to both the profession and the public. Now, with your help, we forge ahead, taking the initiative. ■

Book Review
Continued From Page 50

how to move to certify a "local law" question. (I wonder who suggested that to the authors?)

The bottom line is that Bob Haig and his gaggle of contributors have done it again. This anthology of legal research combined with practical advice is an indispensable resource for the commercial litigator or federal judge faced with the complexities of a commercial case. It is a reflection of our good friend Bob Haig's commitment to us as fellow lawyers. It is professional, thoughtful and, as always, well done. ■

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Judie Ju-hee Ahn
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ksuchocki@nysba.org
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cwallingford@nysba.org

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pstockli@nysba.org
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† *Delegate to American Bar Association House of Delegates*
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BY GERALD LEBOVITS

The Department of Redundancy Department: Concision and Succinctness — Part I

We've heard it before. Be concise: Use only necessary words. Be succinct: Use only necessary content. The goal of concision and succinctness is to get the most thoughts in the shortest space — to make every word and thought tell. Less is more in legal writing. Ecclesiastes 32:8 put it perfectly: "Let thy speech be short, comprehending much in few words." Brevity covers everything from the number of pages in a document to word size and number of syllables.

Why brevity? Everyone knows that writing must tell. Not everyone knows why. If you internalize the reasons, you'll learn the techniques to make every word tell. Brevity makes the written product easier to read and more likely to be read. Brevity adds power. Brevity reduces ambiguity and inconsistency. Fewer words mean fewer mistakes. Extra words make both reader and writer forget what came before. And verbosity is impolite: Legal readers "should not be addressed at undue length, in paragraphs wordy and windy, for the tone should imply two busy [people], writer and reader, both perfectly capable of following an argument that is succinct, and efficiently composed."[1]

Some legal writing is so flabby it can be cut by 50 percent.[2] This two-part column explores how to write concisely and succinctly — to make your writing 50 percent better by making it 50 percent shorter.

When Not to Be Concise or Succinct

Precision is more important than concision. "The ball was thrown by me to her." *Becomes:* "I threw her the ball." *Becomes:* "I threw the ball to her." The first example is passive. The second, with a miscue, suggests that "I threw her." In the second example, the reader doesn't know until the end that a ball was thrown.

Persuasion is more important than concision and succinctness. Which words can you cut in this example? "Fresh fish sold here today." Answer: Every word. But then you'd sell no fish. Amplification is better than concision and succinctness if your point is important and must be stressed.[3]

Articulation also is better than concision and succinctness: "Shorter is usually better, but not if it hides rather than exposes meaning."[4]

Interesting writing is better than concise writing. Prefer short words, sentences, paragraphs, and documents, but "[v]ariety is important."[5] In his Gettysburg Address, President Abraham Lincoln could have cut a few words by saying, "A people's government." He used, instead, a longer but more memorable variant: A "government of the people, by the people, [and] for the people."[6]

Succinctness in Law

- Don't waste time and space discussing obiter dictum from case law unless you've got nothing more authoritative or persuasive. This is what Mortimer Levitan advised lawyers to tell non-lawyers about dicta:

> Any lawyer who soberly — or otherwise — suggests to a non-lawyer that a single word in a court opinion is unimportant could imperil the entire judicial system. The non-lawyer might naively ask, "Why did the court write such a fantastically elongated opinion if all of it wasn't important?" Taking a hint from the courts, the lawyer should neither hear nor answer the question; but if an answer is coerced, it should be that courts are frequently so overburdened that they haven't time to write concise opinions. It takes more time to take off excess weight than it does to put it on . . . .[7]

- Define terms substantively, not procedurally. Incorrect procedural definition: "According to the courts, the statute of limitations applies *where* [use *when* or, much better, *if*] a court determines that a litigant proves to a preponderance that six years passed since a contract was signed." In defining the concept "statute of limitations," it's insignificant whether a court holds it to apply, how a court determines its application, and what is the standard of proof to which a litigant must prove it.
- Use only legally significant and emotional facts, without writing emotionally.
- Don't recite testimony witness by witness. Doing so is ineffective, not only space-wasting.[8]
- Cut from your brief's or memorandum's facts section any fact not discussed in your argument or discussion section when you apply law to fact. Similarly, don't raise in your argument section facts not in your facts section.
- Don't add your opinion about facts in your facts section. Save your

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