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NEW YORK STATE BAR ASSOCIATION
Journal

Who's Who —
Researching Judicial Biographies

by William H. Manz

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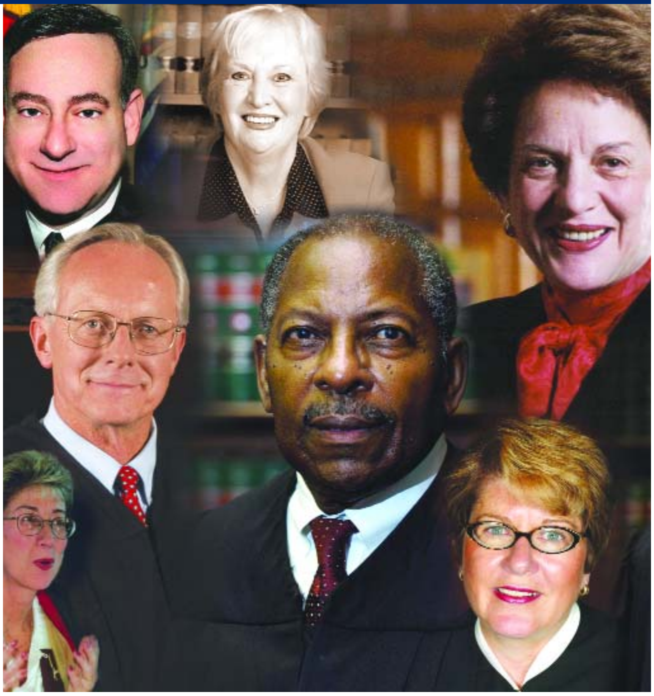

DEPARTMENTS

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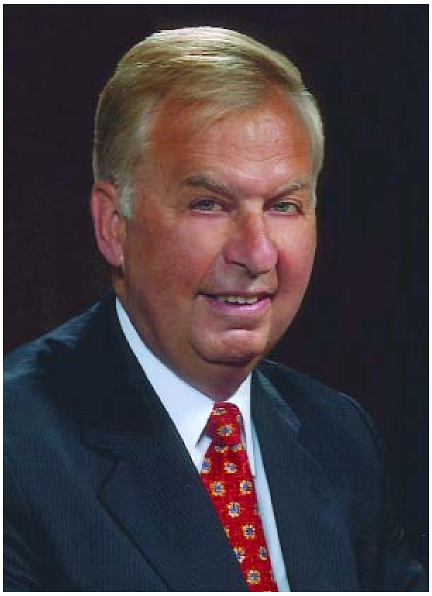
A. VINCENT BUZARD



Improving Public Understanding of the Legal System and the Lawyer's Role in It (A Status Report)

As I have repeatedly stated over the last several months, my fundamental belief is that public understanding of the legal system and the lawyer's role in it make up the foundation upon which the legal system functions, and our legal system in turn is the bedrock upon which our free society rests. Therefore, our role as a bar association and as individual lawyers is to find ways to educate the public about the legal system, because when the public understands that the law and the legal system make sense, much of the mystery and animosity are removed.

During the summer and fall I worked with CLE Director Terry Brooks to develop a "People's Law School" program to educate the public on the legal topics which are most likely to affect them in their daily lives. We convened our "fall semester" in November and December 2005 at the Bar Center in Albany. In a series of two-hour sessions on Tuesday afternoons, we discussed matrimonial law, civil lawsuits, wills and estate planning, you and your lawyer, and criminal law and traffic violations. Additionally, I gave an introductory segment intended to dispel some of the myths about the legal system as well as explain the system in general terms. With Terry's assistance we secured some of our most distinguished members and experienced CLE presenters as speakers who lectured before live audiences at State Bar headquarters.

We are preparing audio and video recordings of the sessions and the lectures will be available online as well. When the programs are ready for distribution in early February, we will launch a major publicity campaign. We received a great deal of favorable publicity in Albany announcing the live programs, so my expectation is that the public will recognize that we are attempting to make the law more accessible. Also as part of the course materials, and with the permission of The New York Bar Foundation, we updated the layperson's guide to the law under the title *The People's Law School – What Everyone Needs to Know* as a companion to the live programs. We plan to distribute these materials to members of the public and to libraries at a nominal cost.

A related initiative is our "Ask a Lawyer" column, which we are distributing to newspapers across the state and answering questions from readers about legal issues. I asked our substantive Sections to prepare questions and answers for the column and they have responded enthusiastically. The initial material has now been distributed to every member of the New York State Publishers' Association. So far, a number of newspapers have shown an interest and as of this writing our columns are being carried in 15 newspapers across the state, including weeklies such as the *Long Island Press*, and major dailies such as *The Syracuse Post Standard*, the *Middletown Times Herald-Record*, the *Saratogian*, the *Kingston Daily Freeman*, and the *Rochester Daily Record*. The thrust of the columns parallels the People's Law School as we seek to answer people's legal questions in areas that affect their everyday activities. Going forward, members of the public will submit their own questions and the appropriate Sections will respond in print. We have also found that business weeklies are interested in printing the column, so we are developing special questions and answers on business issues for distribution.

Over the past several years, the State Bar Association has cooperated with the New York State Broadcasters Association to prepare and release to radio stations, for a modest fee, a series of brief public service announcements regarding the law and the legal profes-

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sion. This year, I decided to try an experiment by having me, as President, serve as spokesperson for the Association and record the messages. I drafted the messages on such topics as how to find a lawyer without relying on advertising, the myth of the litigation explosion, and the pride that we should have in our legal system. The messages were then ably edited and refined by Brad Carr, our outside PR agency, and Paul Hassett, Chair of the Committee on Public Relations. People around the state have heard the messages and have commented favorably, and I expect to use the same approach in a spring series. Our arrangement with the Broadcasters Association provides us with air time equivalent to over $600,000 if we had to purchase advertising time instead of using public service announcements, for which the actual stipend was $30,000.

Another important way for people to better understand the legal system and what lawyers do is to actually see us in action in court. Although the Court of Appeals has upheld the current statutory limitations in New York on audio-visual coverage of trial court proceedings, the ban does not apply to appellate court proceedings. Unfortunately, there is very little appellate court coverage, and this is a missed opportunity. Therefore, I have appointed a Special Committee on Cameras in the Appellate Courts, chaired by Carolyn G. Nussbaum of Nixon Peabody LLP in Rochester. The Task Force is evaluating the reasons for the present lack of coverage and will be issuing a report on the steps we should be taking to promote greater media coverage at the appellate level as a further means of fostering public understanding.

Part of our efforts must, of course, include the President's use of the bully pulpit to speak out for the profession and the legal system. I have tried to use important legal issues as a basis for explaining the legal system to the public and raise the visibility of the Association. Every week, I participate in a number of radio and newspaper interviews around the state, and we offer op-ed pieces on key issues on a regular basis for publication in newspapers in all regions of New York.

The Katrina Disaster Relief is another example of doing good and letting the public see that we care about people. We raised over $45,000 for the restoration of the legal systems in Mississippi, Alabama and Louisiana, and received favorable national coverage for these efforts.

As one of our initiatives is to help the public recognize that lawyers care about people, I asked to have compiled a "Best Projects" book of public outreach projects successfully performed by local bar associations. That book is now ready and being distributed to local bar leaders so that when they want to start a new program, they need not start from scratch.

The issue of the taking of private property by eminent domain for economic development, raised in *Kelo v. City of New London*, 545 U.S. __ (2005), has provided an excellent vehicle for addressing misunderstanding of the law, responding to court-bashing statements and explaining how law affects citizens at every level. Again, I have given radio and newspaper interviews and have had op-ed pieces published defending the Supreme Court and explaining that the decision was not some radical and misguided departure from existing law. Additionally, I appointed a Task Force on Eminent Domain chaired by Albany Law School Associate Dean Patricia E. Salkin; the members are distinguished practitioners in eminent domain from around the state. The purpose of the task force is to review the many proposals for legislative and regulatory change and to make appropriate recommendations for constructive resolution of the issues surrounding the *Kelo* decision.

The effort in Congress to strip the federal courts of jurisdiction to hear most habeas corpus claims filed by state prisoners is another example of an issue that is extremely important to the administration of justice and the public understanding of the justice system. In November, our House of Delegates unanimously voted to oppose this measure which would strip away long-standing rights under the Constitution. I have sought, through numerous broadcast appearances and newspaper articles, to convey our concerns to the public while we vigorously oppose action by Congress. In furtherance of this effort, I was fortunate enough to have a letter on habeas corpus published in the Sunday *New York Times*.

The whole issue of Congress now meddling in the rights of states to determine their own substantive laws is another area in which we can oppose ill-advised legislation and at the same time educate the public about how the system works. The so-called "Lawsuit Abuse Reduction Act," which would impose a newly revised Rule 11 on state courts, is an excellent vehicle for explaining to people why Congress should not be telling the states how to run their own court systems.

Attempting to bring lawyer advertising under additional control is another issue that has a critical impact upon public understanding. Misleading, intemperate and unseemly advertisements lower the image of attorneys in the eyes of the public. We can take all of the steps to improve public understanding that are available, but unless we limit lawyer advertising within the bounds of the First Amendment, our efforts will be badly diluted. Dignified, factual advertising serves a legitimate purpose in aiding the selection of counsel. However, false, deceptive or sensational advertising reinforces the myth that there's a litigation explosion and a runaway civil justice system. Improper lawyer advertising affects not only personal injury practitioners, but all lawyers. Therefore, I appointed a task force, chaired by Bernice K. Leber of Arent Fox PLLC, New York City, to study the issues and make concrete recommendations concerning what can be done. Her singular effort and that of her task force has resulted

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Last February, attorneys seeking biographical information about New York State judges got a new resource: the Unified Court System posted a judicial directory on its Web site <**http://www.nycourts.gov/judges/directory.shtml**>**.** The directory includes the judges of the Court of Appeals and each of the Four Appellate Division Departments, executive officers of the Unified Court System, administrative and supervisory judges and judges of the state, city and county trial courts.

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Who's Who — Researching Judicial Biographies

By William H. Manz

The trial judge profiles are divided into six sections: judicial offices, other professional experience, admission to the bar, education, publications, and professional and civic activities. Photos are provided for the court system's executive officers, and the appellate, administrative, and supervisory judges, but for only a handful of trial judges. Just before the first of the year, trial court judges were contacted to check their entries and provide additional information. Plans for the future include editing the entries for consistency and expanding the amount of existing information. New judges are contacted for information when they assume office, and the names of judges who have died or who leave office are removed.

At the time the directory was posted, it listed about 90% of the judges. Since then more names have been added, and virtually every judge is now listed. For those judges who did not provide any information, the Court System used its records to provide phone numbers, addresses, and judicial history, resulting in at least some information on a judge's judicial offices, date of admission to the bar, and education, in contrast to the print counterpart of the directory. Although the directory provides generally comprehensive biographies for the appellate, administrative and supervisory judges, a significant minority of the trial judge listings contain only minimal information. For example, among the approximately 75 trial judges whose surnames begin with letter "D," for 32% the only information available was judicial office, date of admission, and education (often only the law school). In contrast, 29% also have entries for prior professional experience and activities.

The new online Court System directory was the product of requests from the public, the media, and the bar for more information. It was also the result of a recommendation made by the chief judge's Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission"), which alleged that 58% of voters did not vote in judicial elections because of a lack of knowledge about the candidates. The Feerick Commission concluded: "A State Judicial Directory would help establish a connection between the judiciary and the public by helping them understand who the people are that make up the state's judiciary."

A decade ago the Court System tried to put together a print judicial directory but encountered such strong opposition from some judges that the project was dropped. Although it was to contain no personal information, a major concern was the "potential consequences for judicial security and privacy" (a danger that was tragically demonstrated last February in Chicago, when the mother and attorney-husband of U.S. District Judge Joan Lefkow were murdered by a disgruntled man whom she had ruled against in a medical malpractice case).

As with the proposed print directory, no personal information – *i.e.*, date and place of birth, religion, marital status – is provided online. Ironically, few objections have been raised about the Internet project, although an online directory is far more accessible to the public than print directories, which are generally found only in law libraries.

While some judges objected strongly to a print Court System directory, biographical material for New York judges has been available in *The American Bench: Judges of the Nation* since 1977. This widely held reference work is published by Forster-Long, Inc., a Sacramento publisher which has been producing legal directories since 1918. Revised annually, *The American Bench* is now in its 16th edition, which appeared in September, and is current as of May 15, 2005.

The American Bench provides information on over 19,000 judges from all levels of federal and state courts nationwide, including retired judges who continue to serve. The 178-page New York section currently lists over 1,300 state and federal judges; biographical information is provided for over 450. Second Circuit judges are listed separately in the section on United States courts. *The American Bench* is the most comprehensive source for information on federal judges in New York, since the Unified Court System directory is limited to state judges, and among federal court Web sites only the Second Circuit <http://www.ca2.uscourts.gov>, Eastern District <http://www.nyed.uscourts.gov/General_Information/Court_Phone_Book/court_phone_book.html>, and the Northern District Bankruptcy Court <http://www.nynb.uscourts.gov/usbc/judgebio/judgebio.html> provide judicial biographies.

Each year, the editors receive updated lists of judges from court administrators. New or updated information is solicited annually, by letter, from each judge; additionally, the publisher accepts revisions to biographical data throughout the year via its Web site <www.americanbench.com>. The judges may provide additions to their entry, or can just approve their existing profile. If nothing has been received from a judge for several years, the editors may undertake outside research, generally focusing on judges from higher-level jurisdictions. The amount of information on each judge may vary widely. Some entries are quite extensive, taking up an entire column or a whole page, and may include education, current and previous judgeships, major decisions, publications, awards, civic activities, and military service. Some entries also include personal information, including date of birth, religion, and hobbies or interests. For those judges where no information was received, the entry consists of current position, an address, and telephone and fax numbers.

The new online Court System directory was the product of requests from the public, the media, and the bar for more information.

An additional feature of *The American Bench* is the descriptive information given on each court, including the method of selection of judges, jurisdiction and court location. Maps are provided that show judicial boundaries for United States circuit courts, United States district courts, and many state courts. There is also an alphabetical name index and a glossary. New with the latest edition is the gender ratio summary, outlining the distribution of male and female judges in the different jurisdictions. Information from previous editions is available from the publisher's research service.

A third source for judicial information is *New York Judge Reviews and Court Directory*, published annually by James Publishing, Inc., of Costa Mesa, California. The directory was first published in 1998, and the 2005–2006 edition appeared in June 2005. This 788-page work has listings for over 500 justices, acting justices, county and city judges, some judicial hearing officers, and federal district court and bankruptcy court judges. The number of listings for appellate judges is relatively small (the current edition includes Albert M. Rosenblatt of the Court of Appeals, Guido Calabresi of the Second Circuit, and 23 Appellate Division justices), but new names are slowly being added. The coverage of lower federal court judges is also limited, including only 13 federal district court judges and four bankruptcy judges. Some retired state judges are also included, but are not listed in the online directory and *The American Bench*.

Biographical information is provided for approximately 80% of the judges included in the alphabetical profiles section. As with the online directory and *The American Bench*, biographical information is provided by the judges themselves, and varies greatly in comprehensiveness. Biographical information categories include: appointment/election, honors and memberships, admission to the bar, education, recent and/or notable decisions, and date of birth. Where personal information is provided it may include date of birth, religion, marital status, interests and hobbies. Also included are a judge's special rules, if any, which are taken from handouts provided by court clerks, or from signs posted in or near the courtroom. If a judge does not respond, only basic information is provided. The profiles are revised annually after judges are sent a copy of their profile and asked for updates.

The names of judges for whom no biographical information or attorney reviews are available are listed in the individual county sections. These sections also provide information on county government and court clerks. For example, the section on Ontario County has listings for such positions as county administrator, district attorney, county attorney, sheriff, and records office administrator, and the clerks of the supreme court, county court, surrogate's court, county family court, and the Canandaigua City Court.

The unique feature of *New York Judge Reviews* is critical commentary by attorneys about the judges. These reviews are provided for approximately 82% of the judges listed in the profiles section. Categories here include Temperament/Demeanor, On the Bench, On Trial, Settlements, Adjournments/Continuances, Proclivities, and Suggestions.

Examples of comments for "Temperament/Demeanor" are: "very pleasant," "blasé," "very businesslike," "arrogant and condescending," "quirky," and "short tempered." The "On the Bench" section has such remarks as "never prepared," "can get side tracked," and "decisions are well reasoned." "On Trial" features such comments as "doesn't encourage attorneys to approach the bench," "trials move relatively quickly," and "will not be intrusive." "Settlements" comments include "tries hard," "does all he can," "strong, but not coercive," "anyone desiring a settlement will be on their own," while "Adjournments/Continuances" has remarks like "not very accommodating," "pretty flexible," and "generally easy." A review of the "Proclivities" section found comments like "very defendant oriented," "anyone can get a fair trial," and "hates both sides." The "Suggestions" for attorneys offers such advice as "be on time," "hates discovery motions," "don't get casual," and "don't fight with her."

The judicial reviews are prepared by Elizabeth Smith, a graduate of the University of Texas Law School, and an experienced writer and author. She compiles the profiles using comments obtained from five to eight attorneys. Attorneys whose comments are used were chosen randomly and have no affiliation with the publisher. To line up these reviewers, persons associated with the local bar are contacted, and presidents of local committees are asked for names of local lawyers who know the judges. Most of those contacted as potential reviewers are reportedly eager to help, but some are concerned about anonymity. The editor speaks with enough attorneys to achieve a balanced view. Reviewers should have been in front of the judge within the past few years.

Twenty new profiles were included in the latest edition, but reviews are not done until the judge has been on the bench for at least one year. However, more typically it is three to five years before a review is published. Reportedly, only two judges have ever contacted the editor regarding their review. One insisted on obtaining new comments, but these were slightly more negative than the originals.

It is suggested that those seeking judges' biographical information consult the online directory and both print directories since the amount of material on an individual can vary widely. For example, well-known Senior Judge Jack B. Weinstein of the Eastern District has an extensive entry in *The American Bench*, but only his address, phone and fax numbers appear in *New York Judge Reviews*, and only a phone number is posted at the Eastern District Web site.

In contrast, for Herkimer County Supreme Court Justice Michael E. Daley, *The American Bench* has only an address and phone number, while *New York Judge Reviews* provides comprehensive biographical information. Similarly, Oneida County Judge Barry M. Donalty does not appear in the *New York Judge Reviews* profiles section, has only his address, phone and fax numbers in *The American Bench*, but has his photo, educational and professional background, and professional and civic activities provided in the online directory.

Attorneys interested in a judge's prior decisions may also wish to make use of Westlaw or LexisNexis, because only a relatively small number of judges have such information listed in the online and print directories. By using the judge search feature provided by these databases, one can easily find a judge's reported cases, and can also add additional terms to the search if only decisions in a particular type of action are desired. Finally, if a judge has been the subject of an article in the *New York Law Journal* or one of the state's major newspapers, these will also be available on the Westlaw and LexisNexis news databases. ■

BY DAVID PAUL HOROWITZ

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"Dying to Get to the Courthouse . . ." Accelerated Disclosure Under CPLR 3407

My time to get this column out this month is short, and space in this issue is at a premium, making this the appropriate point at which to discuss accelerated disclosure and expedited trials under CPLR 3407. This statute mandates accelerated disclosure for certain terminally ill plaintiffs, and further provides that the trial of their lawsuit take place within one year of the date of the preliminary conference. With a terminally ill plaintiff, the proverbial "race to the courthouse" becomes a matter of life and death.

CPLR 3407 is limited by its title to personal injury actions. Providing the statutory predicates are met, CPLR 3407 provides accelerated disclosure in an action where a terminally ill party alleges that the illness is the result of the culpable conduct of another party to the action – in other words, where the plaintiff is dying as a result of the negligence of one or more of the defendants. Although the statute refers to a "party" making the application, it would appear that only a plaintiff would be in a position to make this application. This type of action most often arises in the medical malpractice arena, where, for example, a plaintiff alleges both that a defendant failed to timely diagnose a cancer and, as a result of the delay in diagnosis, the plaintiff is now terminally ill.

In order to obtain the benefits of the statute, a party should carefully follow the steps outlined in CPLR 3407(a).

First, the party must "assert in a pleading in such action that such terminal illness is the result of the culpable conduct of another party in such action." This is accomplished by simply inserting language into the body of the complaint used to commence the action.[1] Where eligibility for accelerated disclosure arises subsequent to commencement, an amended pleading should be utilized.[2]

Second, the party seeking accelerated disclosure requests an expedited preliminary conference by filing the request, in writing, with the clerk of the court. The request must be accompanied by a physician's affidavit[3] "stating that the party is terminally ill, the nature of the terminal illness, and the duration of the life expectancy of such party, if known."[4]

The court is required to hold the preliminary conference within 20 days of the filing of the request.[5] At the preliminary conference, the court is required to issue an order "establishing a schedule for the completion of all discovery proceedings, to be completed within ninety days after the date of the preliminary conference, unless it can be demonstrated for good cause that a longer period is necessary."[6]

It is crucial to make certain that the court includes in the preliminary conference order all of the required directives set forth in CPLR 3407(a):

1. That all disclosure be completed within 90 days;
2. That a note of issue and certificate of readiness be filed by or on a date certain;
3. That the action is granted a special preference; and
4. That the trial of the action commence within one year of the date of the preliminary conference.

It is axiomatic that the party obtaining an order granting accelerated disclosure should be very careful to comply with all orders, demands, and requests for disclosure so as to avoid any claim that the plaintiff is responsible for the delay in completing disclosure. Delay on the part of the plaintiff was one of the factors leading the court

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in the one reported case on CPLR 3407 to find "good cause" why disclosure could not be completed in 90 days. The second factor was the complex nature of the case.[7]

There is no automatic stay of disclosure as a result of the service or pendency of a motion brought pursuant to CPLR 3211, 3212, or 3213.[8]

While attorneys traditionally extend one another courtesy adjournments, it is not advisable to do so in a case where the court has directed accelerated disclosure, unless the adjournment is very brief, allows disclosure to be completed within the 90-day period, and you are confident in your adversary's good-faith intention to complete disclosure in a timely manner.

Once disclosure is completed, plaintiff's counsel should not lose sight of the fact that the purpose of accelerated disclosure is to get the client his or her day in court while the client is still alive. Accordingly, every calendar tool and device available to advance the date of trial should be utilized, and action should be taken aggressively to obtain a trial as soon as possible. The direction in CPLR 3407(b)(2) that the trial be commenced within one year from the date of the preliminary conference order is intended to set an outside date, and is not intended to make the one-year anniversary the trial date. On the rare occasions when the statute applies, CPLR 3407 provides a humane way of increasing the likelihood that certain terminally ill plaintiffs will live to get their day in court. ■

1. CPLR 3407(a).

2. It is not clear whether a bill of particulars is an appropriate vehicle for interposing the statutory claims where eligibility arises post-commencement.

3. A physician licensed in New York may affirm pursuant to CPLR 2106.

4. CPLR 3407(a).

5. *Id*.

6. CPLR 3407(b).

7. *Anonymous v. N.Y. Blood Ctr., Inc.*, 257 A.D.2d 517, 682 N.Y.S.2d 588 (1st Dep't 1999).

8. CPLR 3407(b)(3).

BY ELIZABETH A. MARCUCCIO & ALBERT B. KUKOL

Creditors' Claims — Do They Die With the Debtor?

Probate assets of a decedent-debtor are generally available to creditors. Probate systems developed to gather the decedent's assets, pay creditors' claims out of these assets, and distribute what is left to the designated beneficiaries. These systems are in alignment with one of New York's more important policies: creditors should be paid. However, this policy sometimes conflicts with an equally important policy: the right of decedents to dispose of their property as they see fit. The purpose of this article is to examine what rights creditors have in the assets of a decedent-debtor.

Estates, Powers and Trusts Law 13-1.3 (EPTL) makes it clear that both the real and personal property of a decedent, if subject to probate, are chargeable with the payment of the decedent's debts. However, more and more people are opting out of the probate system to avoid the delays and expenses of probate administration. Creditors need to be aware of this shift and, more important, know what nonprobate assets are available to pay their claims.

Joint Accounts

Jointly held stocks, bonds, mutual funds, and bank accounts are very common, and are established for a variety of reasons. When a deposit of cash, securities or other property is made in the name of a depositor and another person in a joint account, it is presumed that the depositor intends to establish a joint tenancy with survivorship rights.[1] So when a father opens a joint account in his name and the name of his daughter, it is presumed that he intends a joint tenancy, and the daughter thereby receives a gift of a moiety, or one-half, of the value of the property on deposit.[2] Although one-half of the value of the account is considered "vested" in the daughter, or gifted to her, at the time the account is opened, the other moiety clearly remains the father's property and is subject to attachment by his creditors during his lifetime. But the question remains: To what extent is this account available for the payment of creditors after the father's death?

"The test used by the New York courts to determine creditors' access to non-probate assets is whether the decedent maintained the power to dispose of the asset during his or her lifetime."[3] Thus, the father is regarded as absolute owner of his half until he dies because he has unrestricted power to dispose of his moiety during his lifetime. This allows creditors to reach his one-half interest in the joint account after his death, even though he had named his daughter to succeed to his interest.[4]

Under certain circumstances, creditors can reach the entire balance of a joint account. This would be the case if our depositor was rendered insolvent either when he initially opened the joint account with his daughter, or if upon his death his estate was ultimately rendered insolvent by the establishment of the joint account.[5] Any creditor having a claim against the father's estate can maintain an action to set aside the conveyance as fraudulent, regardless of whether the father actually intended to defraud his creditors.[6]

What if the father opened the joint account solely to give his daughter easier access to the funds? If there is clear and convincing evidence that the father did not intend to make a gift to his daughter, but added her as a signatory for his own convenience, the opening of a joint account does not affect title.[7] Again, the entire account is available to creditors.

Totten Trust Accounts

When a father opens a savings account "in trust" for his daughter, there really is no trust, merely a bank account that is payable to the daughter upon the father's death. A tentative trust exists that is revocable at the will of the

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father until he dies or completes the gift during his lifetime. There is only a presumption that an absolute trust will arise in favor of the daughter upon the father's death. As a result, when probate assets of the father are insufficient to pay his valid debts, the presumption is rebutted to the extent necessary to make up the deficiency.[8] The estate representative has the authority, and maybe even the duty, to set aside Totten trust accounts to the extent necessary to protect creditors when probate assets are insufficient to pay their claims.[9]

U.S. Savings Bonds

Let's turn to the situation where the father purchases a U.S. savings bond and designates his daughter as either the co-owner or beneficiary of the bond. In this case, even if the father's probate assets are insufficient to pay his obligations, the bond may not be used to pay the father's creditors.[10] The estate representative is entitled to recover from the daughter only the ratable amount of estate tax imposed as a result of the bond being included in the father's taxable estate.[11] The creditors of this insolvent probate estate can look to the savings bond for payment only if the father purchased the bond with the actual intent to defraud his creditors.[12]

Life Insurance

The primary purpose of life insurance is to protect the dependent beneficiaries of an insured by providing them with funds to live on after the insured's death. The insurance law clearly recognizes this purpose, even though life insurance is purchased for many different reasons.[13] If a father names his daughter as the beneficiary of the death benefit payable under his life insurance policy, these proceeds are exempt from the claims of the father's creditors.[14] Only if the father actually intends to defraud his creditors at the time he names his daughter as the beneficiary can the creditors reach these proceeds.[15] What if the father does not want the death benefit paid directly to his daughter, but instead wants these proceeds to be poured into a testamentary trust established for her benefit?

Whether or not the father's creditors can attach these proceeds depends on the specific language used by the father on the beneficiary designation form. If the father names "my estate" as the beneficiary, the proceeds are treated like any other probate asset and are available to pay his creditors' claims.[16] However, if the father names "the Trustee of the trust established under Article X of my Last Will and Testament" as the beneficiary, these proceeds remain exempt from the claims of the father's creditors to the same extent as if the proceeds were payable directly to his daughter.[17] This would also be the result if the father named the trustee of an inter vivos trust as the beneficiary, with one very important exception.

When the father names the trustee of his testamentary trust as the beneficiary, it does not matter whether the will containing the trust is executed before or after this designation is made.[18] However, if the beneficiary is the trustee of an inter vivos trust, the trust agreement naming the trustee must be in existence on the date that the beneficiary designation is made and the trust agreement must be identified in the designation.[19]

Retirement Plans

Many employers provide retirement and death benefit plans for their employees. Additionally, many employees who do not have employer-provided plans, as well as self-employed individuals, set up their own retirement plans. The Employee Retirement Income Security Act (ERISA) is the federal law governing most plans.[20] ERISA supersedes all state laws that "relate to any employee benefit plan" governed by ERISA in an effort to provide protection to employees.[21]

The primary purpose of a pension is to ensure that the retired employee will have enough money to live on, free from creditors' claims. Under ERISA, retirement plans must have an "anti-alienation" clause, prohibiting assignment of the interest under the plan.[22] This makes it clear that these plans are protected from creditors while in the hands of the plan administrator. But are the monies protected once they are paid out to the beneficiary?

Let's assume that a retired father names his daughter as the beneficiary of his pension plan. During his lifetime the father receives periodic payments from this plan. It is clear that once these funds reach his hands, they are subject to attachment by his creditors.[23] But can his creditors reach the pension plan proceeds upon his death? The daughter is entitled to the proceeds and the benefits are exempt from the claims of her father's creditors because he designated his daughter as the third-party beneficiary of the plan benefits.[24] This is true even though her father retained all incidents of ownership and could change the beneficiary at any time during his life.

What if the father had conveyed assets into his retirement plan with the intent to defraud his creditors? Can his creditors reach the plan benefits when they pass to his daughter upon his death? Even though ERISA states that it preempts "all state laws" related to employee benefit plans, it does not preempt EPTL 7-3.1(b), which allows creditors to reach fraudulent conveyances into such plans.[25] Because the plan assets are no longer exempt from creditors' claims, creditors can continue to look to these assets for payment when they pass to the daughter upon the father's death.[26]

ERISA does not apply to plans sponsored by state or local governments. However, "either by statute or case law, virtually every type of retirement plan is exempt from claims of the decedent's creditors."[27] New York State employees' retirement plans, New York State teachers' retirement plans, Individual Retirement Accounts (IRAs), 403(b) retirement annuities and the Federal Thrift Savings Plan are all exempt from the claims of the employee's creditors after the employee's death.[28] In addition, because the Federal Thrift Savings Plan is similar to 401(k) plans offered by private employers, there is no logical reason why 401(k) plans should not be protected from creditors' claims after the employee's death.[29]

Probate avoidance has increased dramatically in recent years, and the law concerning creditors' rights in nonprobate assets remains fragmented and underdeveloped.[30] Creditors' claims will continue to be examined on a case-by-case basis because there is no comprehensive statute setting forth the rights of creditors in nonprobate assets. ■

1. N.Y. Banking Law § 675(a).
2. *See In re Granwell*, 20 N.Y.2d 91, 95, 281 N.Y.S.2d 783 (1967).
3. *In re Trust of Gallet*, 196 Misc. 2d 303, 307, 765 N.Y.S.2d 157 (Sur. Ct., N.Y. Co. 2003).
4. *See Granwell*, 20 N.Y.2d at 96.
5. *See id.* at 95, 97; *see also* N.Y. Debt. & Cred. Law § 273 (providing that a conveyance made without fair consideration is fraudulent as to creditors if the transferor is or will be rendered insolvent).
6. Debt. & Cred. Law § 273.
7. *See In re Estate of Johnson*, 7 A.D.3d 959, 960, 777 N.Y.S.2d 212 (3d Dep't 2004).
8. *See In re Estate of Halbauer*, 34 Misc. 2d 458, 460, 228 N.Y.S.2d 786 (Sur. Ct., Suffolk Co. 1962), *aff'd*, 18 A.D.2d 966, 238 N.Y.S.2d 511 (2d Dep't 1963).
9. *Id.*; *see also In re Estate of LaPine*, 1 Misc. 3d 384, 768 N.Y.S.2d 797 (Sur. Ct., Dutchess Co. 2003), *rev'd in part*, 18 A.D.3d 552, 795 N.Y.S.2d 294 (2d Dep't 2005).
10. *In re Estate of Satnick*, 142 Misc. 2d 268, 269, 537 N.Y.S.2d 464 (Sur. Ct., Bronx Co. 1989).
11. *Id.*
12. *Id.*
13. *See* N.Y. Ins. Law § 3212(b)(1).
14. *See In re Estate of King*, 196 Misc. 2d 250, 252, 764 N.Y.S.2d 519, 521 (Sur. Ct., Broome Co. 2003).
15. *Satnick*, 142 Misc. 2d at 269.
16. *In re Will of Knoedler*, 140 N.Y. 377, 35 N.E. 601 (1893).
17. 7-13 Patrick J. Rohan & R. Mark Davis, New York Civil Practice, at EPTL 13-3.3(c) (2005).
18. Rohan & Davis, note 17 *supra*, at EPTL 13-3.3(a)(2).
19. Rohan & Davis, note 17 *supra*, at EPTL 13-3.3(a)(1).
20. *See generally* 29 U.S.C. § 1002.
21. 29 U.S.C. § 1144(a).
22. 29 U.S.C. § 1056(d)(1).
23. *See Robbins v. DeBuono*, 218 F.3d 197, 203 (2d Cir. 2000).
24. *See In re Estate of King*, 196 Misc. 2d 250, 252, 764 N.Y.S.2d 519 (Sur. Ct., Broome Co. 2003).
25. *Id.* at 254–55.
26. *Id.*
27. *Id.* at 255.
28. *Id.* (citing Retire. & Soc. Sec. Law § 110; Educ. Law § 524; CPLR 5205(c); *In re Trust of Gallet*, 765 N.Y.S.2d 157, 163 (Sur. Ct., N.Y. Co. 2003)).
29. *See id.*
30. McCouch, *Will Substitutes Under the Revised Uniform Probate Code,* 58 Brook. L. Rev. 1123, 1183 (1993).

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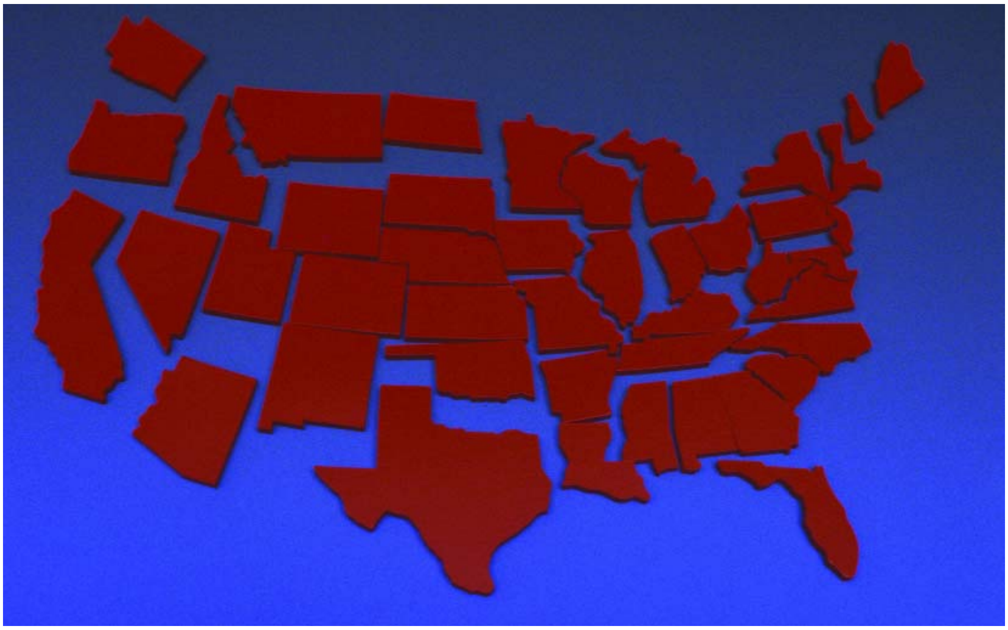

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Planning for Forum Selection in Commercial Transactions

By John G. Powers

Parties negotiating commercial agreements frequently focus their efforts toward the business objectives or "upside" of the anticipated business venture. In the positive spirit in which these transactions are approached, the negotiating parties sometimes give short shrift to the possibility that the deal, purchase or transaction might eventually sour and lead to litigation. Litigators occasionally therefore operate at a jurisdictional and procedural disadvantage because of the initial failure to consider the tactical and strategic procedural implications in the event that litigation does arise.

One such implication – forum selection, or the lack of one – can have disastrous consequences on a commercial party's ability to efficiently resolve a typical commercial dispute. Apart from the obvious advantages of litigating a dispute in a party's "home court," the vagaries of personal jurisdiction, venue, and filing precedence can often force local businesses to incur the prohibitive expense of litigating cases in distant courts around the country, sometimes doubling or tripling the cost of litigation.[1] By comparison, forum selection is a litigation variable that is easily controlled with the insertion of a properly drafted forum selection provision in the relevant contract documents so long as this is within the bargaining power of either of the parties to the transaction.

A well-drafted contractual forum selection provision forces out-of-state litigants to bring their litigation in the contractually chosen venue because most state and federal courts will enforce a mandatory venue provision by transferring the improperly venued action to the forum specified in the contract[2] or by dismissing the action outright for improper venue, failure to state a claim, or otherwise in the interest of justice.[3]

A good forum selection provision has, at the very least, three essential components: (1) express consent by the parties to personal jurisdiction in the selected forum; (2) express designation of the venue (and court, if desired) where any dispute must be litigated, utilizing mandatory and exclusive language and a broadly phrased triggering provision; and (3) express designation of the source of state substantive law that is to be applied in the event of a dispute.

Consent to Personal Jurisdiction

In today's commercial environment, where business is transacted by mail, telephone, facsimile, Internet or even e-mail, there is no guarantee that an out-of-state business will be subject to the jurisdiction of the local courts of your client regardless of the existence of a contractual relationship.[4] Because of businesses' increased ability to conduct transactions across states lines without any actual face-to-face contact, companies cannot necessarily count on contractual activities alone to provide the requisite jurisdictional contacts.[5]

The concept of personal jurisdiction, of course, places a limit on the courts' authority to exercise jurisdiction over a foreign defendant. This concept, which is grounded in concerns of fairness, revolves around whether the defendant, based on its activities, could reasonably have expected to be drawn or "haled" into court in the chosen state.[6] It makes sense therefore that where parties to a transaction have expressly consented in advance to the jurisdiction of the courts of a particular state, that both parties can reasonably anticipate being haled in the courts of that state for disputes arising out of the transaction. Accordingly, courts routinely uphold contractual provisions consenting to personal jurisdiction.[7]

And in fact, most courts hold for the same reason that a contractual selection of a forum constitutes an *implied* waiver of personal jurisdiction,[8] making consideration of the traditional personal jurisdiction test unnecessary.[9] It is therefore well worth it to specify in relevant contract documentation, whether it be a quote, purchase order, franchise agreement, license agreement, or the like, that each of the parties to the transaction consents to personal jurisdiction in the state of choice.

A cautionary note is necessary. A clause consenting to personal jurisdiction *alone* provides no guarantee that the forum of choice can be enforced. Depending on the language used, a consent to the jurisdiction of one state does not rule out other states asserting jurisdiction over a particular dispute.[10]

For example, in *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distributors Inc.*, the plaintiff ("Boutari") was a Greek corporation in the business of producing and exporting wines and spirits.[11] Boutari entered into a written distribution agreement with the defendant ("Attiki"), a New York corporation, to distribute wines and spirits in the United States.[12] Following a contract dispute, Boutari brought a contract action in federal district court in New York. The court, however, dismissed the lawsuit based upon a provision in the agreement that specified, in relevant part:

> Any dispute arising between the parties hereunder *shall come within the jurisdiction of the competent Greek Courts*, specifically of the Thessaloniki Courts.[13]

On appeal, the Second Circuit reversed, holding that the plain meaning of this provision indicated that while the parties did agree in their contract that the appropriate Greek courts would have jurisdiction over contract disputes, the provision did not *exclude* exercise of jurisdiction by other courts.[14] The court cited with approval Judge Weinfeld's statement of the rule in *City of New York v. Pullman, Inc.*:

> an agreement *conferring* jurisdiction in one forum will not be interpreted as *excluding* jurisdiction elsewhere unless it contains specific language of exclusion.[15]

John Boutari & Son instructs that forum selection provisions, like other contract clauses, must be drafted with care, and with particular attention to the choice of wording used. Other cases present additional examples of forum selection clauses that failed in their intended purpose and did not limit the jurisdictional venue:

- "The Courts of California, County of Orange shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract."[16]
- "This agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York."[17]

It is evident that contractual consent to personal jurisdiction provision alone, without an attendant *mandatory* venue selection provision will not accomplish the intended result of providing certainty to forum selection when contracts result in litigation.

Mandatory and Exclusive Venue

Venue selection fulfills several important functions, including specifying the county or city within a given state where litigation may be commenced, foreclosing discretionary venue transfers, selecting between federal and state courts, and, if desired, preventing removal to federal court. Parties have the opportunity to consider and choose the specific location, down to the county or city, in which any resulting litigation will occur when drafting agreements or transactional standard terms and conditions. To this end, in addition to a consent to personal jurisdiction, a contractual forum selection provision should always include language specifying the venue again, carefully drafted using *mandatory* language. The provision, by its terms, should *exclude* all but the chosen venue.

In a case that illustrates the pitfalls of imprecise drafting, the Ninth Circuit discussed the difference between a mandatory versus permissive venue selection provision in *Northern California District Council of Laborers v. Pittsburg-Des Moines, Steel Inc.*[18] There, the forum selection clause at issue read:

> [a] decision of the Board of Adjustment . . . or the decision of a permanent arbitrator shall be enforceable by a petition to confirm an arbitration award filed in the Superior Court of the City and County of San Francisco, State of California.[19]

After the plaintiff brought an action in San Francisco Superior Court to confirm an arbitration award, the defendant removed to federal court. Upon the plaintiff's motion to remand, the district court remanded the action, in part because it found that the parties' forum selection clause vested exclusive jurisdiction with the superior court for actions to confirm arbitrations.[20]

Even a preference of state over federal court can be enforced in a correctly drafted venue selection provision, regardless of the presence of concurrent jurisdiction.

On appeal, the Ninth Circuit disagreed, holding that the language used in the clause was *permissive* rather than *mandatory*.[21] In other words, while the clause did vest jurisdiction with the superior court, it did not exclude jurisdiction in other courts. The Ninth Circuit counseled that if the intent of the provision is to designate a specific venue, then it must contain language that excludes other venues.[22] The lesson learned is that if the intent is to specify a particular court or venue, the provision must be both mandatory and *exclusive* in its wording. Below are some examples of venue selection provisions held by the courts to be mandatory:

- "Licensee hereby agrees and consents to the jurisdiction of the courts of the State of Virginia. Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia."[23]
- "This agreement shall be governed and construed by the laws of the State of Illinois and all actions involving this agreement must be brought in the State of Illinois."[24]

Generally, use of the words "may" and "should" signify permissive venue clauses, while "must," "will" and "shall" signify mandatory clauses. The use of these words, however, is not enough. Care must be given to the context used and the selection of surrounding words and phrases. The provision at issue in *Northern California District Council of Laborers*, discussed above, was found to be permissive even though it used the word "shall," because it employed the phrase "shall be enforceable in," which did not exclude other venues.

Had the drafter of the provision merely changed the tense of the word "enforceable" to "enforced," the provision would have been mandatory and exclusive, instead of permissive. An additional reason why care must be taken in selecting the language utilized in such provisions: courts will routinely interpret the forum selection provision against the drafter in the event of any ambiguity.[25]

Even a preference of state over federal court can be enforced in a correctly drafted venue selection provision, regardless of the presence of concurrent jurisdiction.[26] However, any provision that is designed to preclude the use of federal court must expressly specify the jurisdiction or "sovereignty" of the designated court rather than merely describing the "geography" of the court.[27] Thus, a venue selection provision that requires disputes to be venued "in courts in the State of Ohio" or "in the courts located in the City and State of New York" will be held to include both federal and state courts sitting within those geographic designations.[28]

On the other hand, a properly drafted provision which specifies the jurisdiction or sovereignty of the designated court can preclude litigation in federal court and operate as a waiver of the statutory right to removal.[29] For example, provisions which designate that disputes shall be commenced "in the Supreme Court of the State of New York"[30] or "in the Courts of the Commonwealth of Pennsylvania,"[31] or "shall be adjudicated exclusively in the Courts of the State of New Jersey"[32] specify not geographic location but rather identify the specific sovereign court that shall hear the dispute.

Broadly Phrased Triggering Language

One of the most common litigation tactics employed to defeat a forum selection clause is the use of "artful pleading" to frame or characterize a legal claim in a way that avoids the application of a contractual venue selection provision. Often this gambit is attempted by clothing contract claims in terms of tort. The court's determination of whether a particular claim or action falls within the scope of a venue selection provision is resolved by reference to the triggering language of the provision. These are the portions of the provision that define the scope of the provision, and generally involve language such as: "any claim or controversy *arising out of or relating to* the agreement";[33] any "legal suit or action *for enforcement of any obligation contained herein*"[34] or "any litigation *upon any of [the contract] terms* . . . shall be maintained."[35]

Courts interpret this triggering language as being "broad" or "narrow," a determination that then governs which types of claims will be subject to the contractual choice of forum.[36] Generally speaking, the "arising out of

The potential litigation advantages associated with choosing a forum make planning for forum selection an essential activity.

or relating to" language is preferable as it is interpreted to be "the paradigm of a broad clause."[37] Use of this triggering language will generally be found to encompass tort claims related to or "touching upon" the agreement or the obligations under the agreement.[38] More narrow provisions may not be interpreted to encompass even tort or statutory claims that might otherwise relate to the agreement or its performance.[39] Care should therefore be taken in drafting the triggering language of the clause in a sufficiently broad manner to encompass all related claims and pre-empt attempts to "artfully plead" to avoid the contractually agreed-to forum.

Substantive Law to Be Applied

The final essential element to a proper forum selection provision is a designation of the substantive law to be applied. Regardless of whether personal jurisdiction is waived and venue is fixed in a particular state or county, the court may still be constrained to apply the substantive law of a different state if it is left unspecified in the contract. Depending on the type of action and the substantive choice of law standard in your given jurisdiction, you may end up in the forum of your choice applying another state's substantive law, with which neither you nor the judge may be familiar. Accordingly, specify as part of any forum selection provision that any dispute must be governed by the state substantive law of your choice.

Additional Considerations

A contracting party is still not guaranteed the specified forum even with a well-drafted forum selection provision that employs the suggestions in this article. Courts may still consider whether enforcement of the provision would be "unjust" or whether the provision was the result of fraud or overreaching.[40] In addition, while the majority of courts will enforce a well-drafted forum selection provision, a minority of federal courts merely consider the presence of such a clause as one of many factors relevant in the courts' otherwise discretionary authority to transfer venue under 28 U.S.C. § 1404(a).[41]

Moreover, the enforceability of a contractual forum selection provision may be put at risk depending on the law of the state of the other contracting party. Certain states such as North Carolina and South Carolina have enacted statutes voiding forum selection provisions as a matter of express state public policy.[42] Others have enacted statutes that void forum selection provisions utilized in certain types of contracts, such as franchise agreements or employment contracts.[43] In an applicable state court action, such statutes would necessarily nullify enforcement of a forum selection provision. In federal court, such statutes may not bar enforcement of a forum selection provision, but their presence nevertheless makes transfer more unlikely.[44] In any event, the existence and effect of such state statutes is the exception rather than the rule and should not discourage the regular use of properly drafted forum selection provisions by contracting parties.

Planning for forum selection as part of any commercial transaction can save clients money in litigation costs, and in some cases provide intangible substantive litigation advantages flowing from geographic proximity and familiarity with local courts, judges, and substantive law. When drafting a contractual choice of forum provision, remember these key points:

- indicate the parties' consent to personal jurisdiction in the chosen state
- specify the venue and specific court, if desired
- use mandatory and exclusive language, rather than permissive language
- use broadly phrased triggering language to defeat artful pleading
- specify the jurisdiction/sovereignty of the selected court, not its geography, if you desire to exclude federal courts
- specify the substantive law to be applied

The potential litigation advantages associated with choosing a forum make planning for forum selection an essential activity in negotiating any contract or setting the terms of any transaction.[45] ■

1. Likewise, a business can gain a significant intangible advantage by ensuring that its disputes are resolved in a local forum where it, and its counsel, are likely to be recognized and familiar to both the court and jury pool.

2. *See, e.g.*, *Solvaara ex rel. S. St. Leveraged Corp. Recovery Fund, L.P. v. Jackson Nat'l Life Ins. Co. et al.*, 246 F.3d 289, 299 (3d Cir. 2001) ("We acknowledge that, as a general matter, it makes better sense, when venue is proper but the parties have agreed upon a not-unreasonable forum selection clause that points to another federal venue, to transfer rather than dismiss. . . . But when a defendant moves under Rule 12, a district court retains the judicial power to dismiss notwithstanding its consideration of [28 U.S.C. § 1404); *Kerobo v. Sw. Clean Fuels Corp.*, 285 F.3d 531 (6th Cir. 2002) (holding that § 1404(a) balancing is the proper analysis when dealing with a forum selection provision). *But see Kerobo*, 285 F.3d at 539 (Bertelsman, J., dissenting) ("The majority seems to hold that if venue is proper under federal venue statutes, a motion to dismiss based on a valid forum selection clause will not lie. This is contrary to the decisions of the Supreme Court of the United States") (citations omitted)); *Lexington Inv. Co. v. Sw. Stainless, Inc.*, 697 F. Supp. 139, 143 (S.D.N.Y. 1988).

3. *See, e.g.*, *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 387 (1st Cir. 2001) ("a motion to dismiss based on a forum selection clause is treated as one alleging a failure to state the claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6)"); *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 719 (2d Cir. 1982) (upholding a district court's grant of a 12(b)(3) motion); *Int'l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112 (5th Cir. 1996); *Cont'l Ins. Co. v. M/V Orsula*, 354 F.3d 603, 606 (7th Cir. 2003) ("A lack of venue challenge, based upon a forum-selection clause, is appropriately brought as a Rule 12(b)(3) motion to dismiss"); *K & V Scientific Co. v. BMW*, 314 F.3d 494, 497 (10th Cir. 2002) ("A motion to dismiss based on a forum selection clause frequently is analyzed as a motion to dismiss for improper venue under Fed. R. Civ. P. 12(b)(3)") (quoting *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992)); *see also Silverman v. Carvel Corp.*, 192 F. Supp. 2d 1, 8 (W.D.N.Y. 2001).

4. *See, e.g.*, *Digi-Tel Holdings, Inc. v. Proteq Telecomms., Ltd.*, 89 F.3d 519, 523 (8th Cir. 1996) (letters, faxes, and phone calls into the forum state not alone sufficient to confer personal jurisdiction).

5. *See id.*

6. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980).

7. *See e.g., Danka Funding, L.L.C. v. Page, Scrantom, Sprouse, Tucker & Ford, P.C.*, 21 F. Supp. 2d 465, 473 (D.N.J. 1998).

8. *St. Paul Fire & Marine Ins. Co. v. Courtney Enters., Inc.*, 270 F.3d 621, 624 (8th Cir. 2001) (holding that an agreement in an insurance policy to arbitrate disputes arising out of that policy in St. Paul Minnesota constituted implied consent to personal jurisdiction in Minnesota); *UnionMutual Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 527 (1st Cir. 1985); *Richardson Greenshields Secs., Inc. v. Metz*, 566 F. Supp. 131, 133 (S.D.N.Y. 1983).

9. *Elec. Realty Assocs., L.P. v. Vaughn Real Estate, Inc.*, 897 F. Supp. 2d 521, 523 (D. Kan. 1995).

10. *See, e.g., Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs., Inc.*, 22 F.3d 51, 53 (2d Cir. 1994); *see also K&V Scientific Co. v. Bayerische Motoren Werke Aktiengesellschaft*, 314 F.3d 494, 499 (10th Cir. 2002); *Paper Express, Ltd. v. Pfankuch Maschinen Gmbh*, 972 F.2d 753, 757 (7th Cir. 1992).

11. *Boutari*, 22 F.3d at 52.

12. *Id.*

13. *Id.* (emphasis added).

14. *Id.*

15. *Id.* at 53 (citing *City of N.Y. v. Pullman, Inc.*, 477 F. Supp. 438, 442, n.11 (S.D.N.Y. 1979)).

16. *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 76 (9th Cir. 1987).

17. *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 957 (5th Cir. 1974).

18. *N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034 (9th Cir. 1995).

19. *Id.* at 1036.

20. *See id.*

21. *See id.*

22. *See id.* at 1037.

23. *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 763 (9th Cir. 1989).

24. *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 386, 388–89 (1st Cir. 2001).

25. *See Citro Fla., Inc. v. Citrovale, S.A.*, 760 F.2d 1231, 1232 (11th Cir. 1985); *Keaty*, 503 F.2d at 956; *Unity Creations v. Trafcon Indus., Inc.*, 137 F. Supp. 2d 108, 111 (E.D.N.Y. 2001); *Links Design, Inc. v. Lahr*, 731 F. Supp. 1535, 1536 (M.D. Fla. 1990).

26. *See, e.g., Koch Erecting Co. v. N.Y. Convention Ctr. Dev. Corp.*, 838 F.2d 656, 659 (2d Cir. 1988).

27. *See Cronin v. Family Educ. Co.*, 105 F. Supp. 2d 136, 138 (E.D.N.Y. 2000) (quoting *City of N.Y. v. Pullman, Inc.*, 477 F. Supp. 438, 443 (S.D.N.Y. 1979)).

28. *See id.* at 138–39.

29. *See id.*; *Unity Creations, Inc.*, 137 F. Supp. 2d at 110.

30. *Koch Erecting Co.*, 838 F.2d at 659.

31. *Cronin*, 105 F. Supp. 2d at 138 (quoting *Spatz v. Nascone*, 364 F. Supp. 967, 969 (W.D. Pa. 1973)).

32. *Id*. (quoting *Arkay Packaging Corp. v. W.R. Chestnut Eng'g, Inc.*, No. 97 Civ. 1187, 1997 WL 1068673, at *1 (E.D.N.Y. July 21, 1997)).

33. *Collins & Aikman Prods. Co. v. Bld'g Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995).

34. *S-Fer Int'l, Inc. v. Paladion Partners, Ltd.*, 906 F. Supp. 211, 213 (S.D.N.Y. 1995).

35. *Crescent Int'l, Inc. v. Avatar Cmtys., Inc.*, 857 F.2d 943, 944 (3d Cir. 1988).

36. *See, e.g., Omron Healthcare, Inc. v. Maclaren Exports Ltd.*, 28 F.3d 600, 603 (7th Cir. 1994); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513–14 (9th Cir. 1988).

37. *Collins & Aikman Prods. Co.*, 58 F.3d at 20.

38. *Omron Healthcare, Inc.*, 28 F.3d at 603 ("all disputes the resolution of which arguably depend on the construction of an agreement 'arise out of' that agreement").

39. *See, e.g., S-Fer Int'l, Inc.*, 906 F. Supp. at 213.

40. *See Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 510 (2d Cir. 1998).

41. *See Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 538 (6th Cir. 2002).

42. *See* N.C. Gen Stat. § 22B-3 (voiding all forum selection provisions); S.C. Code Ann. § 15-7-120 (providing that South Carolina courts remain a proper venue notwithstanding provisions to the contrary); Ala. Code. § 6-3-1; Mont. Code Ann. § 18-1-403 (voiding every stipulation which restricts party from enforcing his rights).

43. *See e.g.*, Ark. Code Ann. § 23-112-403(b) (referring to franchise agreements); Cal. Bus. & Prof. Code § 20040.5 (referring to franchise agreements); Colo. Rev. Stat. § 12-6-122.5 (motor vehicle franchise); Fla. Stat. ch. 47.025 (contractors); Ga. Code Ann. § 10-1-623 (franchises); Idaho Code § 29-110 (void as to franchise agreement); 815 Ill. Comp Stat. 705/4 (void as to franchise agreements); Ill. Comp Stat. 665/10 (void as to construction contract); Ind. Code § 23-2-2.7-1(10) (it is unlawful for a franchise agreement to limit "litigation brought for breach of the agreement in any manner whatsoever"); Iowa Code § 523H.3 (void as to franchise agreements); La. Rev. Stat. Ann. § 32:1256.1 (void as to franchises); La. Rev. Stat. Ann. § 23:921 (void as to employment agreements); Miss. Code Ann. § 63-17-119 (void as to motor vehicle franchises); Nev. Rev. Stat. 482.3638 (void as to motor vehicle franchises); N.J. Stat. Ann. § 56:10-7.3 (void as to motor vehicle franchises); N.Y. Veh. & Traf. Law § 463 (void as to motor vehicle franchises); 77 Pa. Cons. Stat. § 1 (workers' compensation title interpreted to void forum selection clause in employment contract); R.I. Gen. Laws § 19-28.1-14 (void as to franchise agreements); S.C. Code Ann. § 36-2A-106 (voiding forum selection in consumer leases); S.D. Codified Laws § 32-6B-49.1 (void as to motor vehicle franchises); S.D. Codified Laws § 37-5A-51.1 (voiding restrictions on venue for all brand name franchises); Wash. Rev. Code § 46.96.240 (venue selection void as to motor vehicle franchises); Wash. Rev. Code § 49.48.160 (venue selection void in sales representative contact); Wis. Stat. § 779.135 (clauses void in construction contracts).

44. *See id.*

45. With respect to the purchase and sale of goods, properly drafted forum selection language should be employed as part of the standard terms and conditions printed on every purchase order, invoice, warranty document, or the like.

BY DAVID P. MIRANDA

Supreme Court Permits Internet Wine Sales

States may no longer prevent consumers from receiving direct shipment of wine from out-of-state wineries following a U.S. Supreme Court ruling that holds such laws in violation of the Commerce Clause.[1] The Supreme Court held, in *Granholm v. Heald*, that differential treatment discriminates against interstate commerce by limiting the sale of wine directly to consumers by out-of-state wineries. Several states, including New York and Michigan, developed regulatory schemes requiring separate licenses for wine producers, wholesalers and retailers; these regulations permitted in-state, but not out-of-state, wineries to make direct sales to consumers.

The showdown at the Supreme Court between the Commerce Clause and the Twenty-first Amendment was fueled by disparate decisions among the circuits, namely, the Sixth Circuit Court of Appeals holding that Michigan's regulatory scheme was unconstitutional, and the Second Circuit's holding that New York's similar prohibitions were constitutional.[2]

In Michigan, in-state wineries could ship directly to consumers, subject only to a licensing requirement; out-of-state wineries, even if licensed, could not sell directly to consumers, but were required to go through a wholesaler or retailer. The resulting price differential caused by this requirement, as well as the difficulty for small wineries to secure a wholesaler, effectively barred small wineries from Michigan's market. New York also permitted in-state wineries to ship directly to consumers, but required out-of-state wineries to have a physical presence in New York, which also inflated costs and served as an impediment to small wineries. Both states contended that the Twenty-first Amendment, repealing prohibition laws, transferred to the states the authority to regulate the transport, import, and use of alcohol within its borders.

The Second Circuit affirmed the New York statutory scheme because, in the court's view, "New York's desire to ensure accountability through presence is aimed at the regulatory interest directly tied to the importation and transportation of alcohol for use in New York."[3] As such, New York direct shipment laws were "within the ambit of the powers granted to states by the 21st Amendment."[4] The states (and the dissent by Justice Stevens) argued that an exception to the Commerce Clause had been carved out with respect to regulation of alcohol and that the Twenty-first Amendment was intended to return "absolute control" of liquor traffic to the states, free of all restrictions that the Commerce Clause might impose.

The states argued that their regulations, even if discriminatory, advanced a local purpose that could not be adequately served by reasonable nondiscriminatory alternatives, claiming that their regulations addressed legitimate concerns, such as minors purchasing wine over the Internet and the potential for tax evasion from out-of-state Internet sales. Justice Kennedy, writing the majority opinion, found the states provided little evidence in support of their claim that purchasing wine over the Internet is a problem that cannot be addressed by less restrictive steps such as requiring an adult signature on delivery; he further noted that the potential for tax evasion as a result of Internet sales is not greater for out-of-state wineries.

The Court found that the discriminatory regulations substantially limited the direct sale of wine to consumers, an

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emerging and significant business under the Commerce Clause. The Court noted that, for the five-year period ending in 1999, consumer spending on direct wine sales doubled, reaching $500 million per year. This expansion of direct wine sales was influenced by several related trends. First, the number of small wineries in the U.S. tripled over the last 30 years, currently exceeding 3,000. At the same time, the wholesale market consolidated, with the number of licensed wholesalers now approximately one-third of what they were in 1984. These changing conditions mean that many small wineries do not produce enough wine, or have sufficient consumer demand for their wine, to make it economical for wholesalers to carry their products; thus they rely on direct shipping.

In particular, the ability of small wineries to sell wine over the Internet has helped make direct shipments more attractive. Although approximately 26 states allowed some direct shipment of wine, only 13 of those states had reciprocity laws permitting direct shipment from wineries outside the state. The Federal Trade Commission found that state bans on interstate direct shipping represent the single largest regulatory impediment to expanded e-commerce in wine.

The Supreme Court stated that its ruling is consistent with the prior interpretations of the Commerce Clause holding that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[5] This principle dates back to the formation of our system of government said the Court, noting that the public policy behind the Commerce Clause provision reflects

> a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.[6]

The Court found that laws of the type at issue "deprive citizens of their right to have access to the markets of other States on equal terms."[7] The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity that the Constitution, and in particular, the Commerce Clause were designed to avoid.[8]

Pursuant to the Supreme Court's ruling the states may regulate or even prohibit Internet wine sales; however, they must do so in a manner that does not discriminate between in-state and out-of-state businesses. Following this decision, New York State revised its Alcohol Beverage Control Laws to permit licenses for out-of-state wine sales for an annual fee of $125. The new law requires the wineries to impose and pay sales tax, obtain the signature of a resident at least 21 years of age upon delivery, and limits shipments to 36 cases of wine, per resident per year.[9] It is unclear whether our founding fathers believed in a constitutional right to more than 36 cases of wine per year. ■

1. *Granholm v. Heald*, 125 S. Ct. 1885 (2005); U.S. Const. Art. I, § 8, cl. 3.
2. *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004).
3. *Swedenburg*, 358 F.3d 238.
4. *Id.* at 239.
5. *Granholm*, 125 S. Ct. at 1895.
6. *Id.*
7. *Id.*
8. *Id.* at 1896.
9. Alcoholic Beverage Control Law § 79-c (eff. Aug. 11, 2005).

BY MICHAEL A. HASKEL

New York State's Medical Malpractice Plan: Unfunded, Unworkable, and Unconstitutional

Unless New York State government acts quickly to address problems associated with the Medical Malpractice Insurance Plan (MMIP or the "Plan"), a state-created program affording coverage to high-risk health care providers, a tremendous burden may soon befall New York's admitted[1] medical malpractice carriers. With an estimated deficit of $233 million as of June 30, 2004,[2] the Plan may result in the financial ruination of its members, which by regulation are responsible for the Plan's losses. This article will explore the history that led to the creation of the Plan; address the question of whether the Plan is constitutional; and explore proposals for dealing with the looming catastrophe.

Historical Background

The Legislature enacted the Medical Malpractice Reform Act ("Act")[3] to meet the crisis brought about by increasing losses and severity of claims. This crisis had led to withdrawal from the market in 1975 of Employers Insurance Co. of Wausau ("Wausau"), then the state's largest medical malpractice carrier, and to the insolvency of another large carrier. To deal with the problem, the Act created the Medical Malpractice Insurance Association (MMIA), a carrier whose membership was composed of each of the domestic insurers licensed to write direct personal injury liability insurance in New York, with the exception of assessment cooperative fire insurers.[4] The MMIA was formed for the express purpose of providing medical malpractice insurance to health care providers, including both doctors and hospitals.[5]

The MMIA was a temporary measure whose existence was periodically extended by the Legislature over the course of a quarter century. During this time, the MMIA accumulated substantial reserves, but as a state-created entity, the MMIA's funds were subject to appropriation. From 1992 to 1999, approximately $1 billion was appropriated by the state from the MMIA's accumulated reserves.[6] Legislation dissolving the MMIA was passed and approved in 2000.[7]

The Medical Malpractice Insurance Plan

Although the Medical Liability Mutual Insurance Co. (MLMIC) assumed the contractual obligations of the MMIA, there remained the problem of providing continuing coverage to MMIA insureds, which included physicians, dentists, podiatrists, certified nurse-midwives, certified registered nurse-anesthetists, and hospitals.[8] The issue of insuring high-risk medical practitioners resurfaced some 25 years after Wausau's exit. The marketplace had changed, but by 2000 it had adjusted to the reforms enacted in 1975.[9] Severity and frequency of medical malpractice claims had steadily risen since 1975, yet no new legislation was passed to address the problem.[10]

That quarter century saw significant increases in the costs of health care. This fact is offered as one explanation for increases in verdicts and in the cost of medical malpractice insurance.[11] In contrast to the entrepreneurial market of 1975, all of the major health care liability insurers were owned directly or indirectly by their insureds by 2000, with the exception of Frontier Insurance Co. ("Frontier"), which became insolvent in 2001.[12]

In 2000, there were primarily six admitted carriers insuring health care provider risks. In addition to Frontier and MLMIC, there was Hospital Underwriters Mutual Insurance Co. (HUM), formed in 1976, providing coverage to hospitals, adult care facilities, physicians and dentists. The Hospital Association of New York State Trust (HANYS), created in July 1985 to provide excess coverage for doctors, dentists and member hospitals, was replaced by HANYS Insurance Co. (HIC) in 1987.[13] Physicians Reciprocal

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Insurers (PRI) and Academic Health Professionals Insurance Association ("Academic"), licensed as reciprocals[14] in 1982 and 1990 respectively, have been affording coverage to their member-insured physicians and dentists.

With HUM's merger with MLMIC in 2001, and Frontier's liquidation, HIC, PRI, MLMIC and Academic now constitute most of the admitted medical malpractice market in New York. All of these carriers have established underwriting guidelines that render their coverage selective. *Perforce*, another notable difference between 1975 and 2000 is that what remained in the involuntary market at the time of MMIA's dissolution was even less favorable than the risks once insured by Wausau.[15]

The issue of how to treat uninsurable risks[16] was addressed by Insurance Law § 5502(c)(2)(D), which directed the Superintendent of Insurance of New York State ("Superintendent") to "promulgate regulations prescribing a plan for the equitable distribution [of uninsurable risks] to authorized medical malpractice insurers." The orphaned insureds of the MMIA, left at the doorstep of the Superintendent, were thereby wrapped in a state insurance blanket. In response to the Legislature's mandate, the Superintendent promulgated 11 N.Y.C.R.R. Part 430, which provides that all admitted medical malpractice carriers be MMIP members.[17]

The Superintendent divided responsibility for uninsurable risks among medical malpractice carriers on the basis of such carriers' direct medical malpractice premiums in proportion to aggregate medical malpractice premiums written in the state.[18] Under the compulsion of 11 N.Y.C.R.R. § 430.4(b)(4)(ii), MMIP members have entered into a state-mandated contract of adhesion, pursuant to which "members agree to participate in an independent pooling mechanism, subject to the approval of the Superintendent" ("Pool"). Although Insurance Law § 5502 does not directly address potential losses from the so-called "equitable" distribution of uninsurable risks,[19] § 430.4(b)(4)(ii) provides that "writings, expenses, fees, and losses will be shared proportionately among members."

In adopting this method of allocating responsibility, the Superintendent did not consider the issue of equity in a broader context: Should admitted medical malpractice carriers be burdened with the financial problem of uninsurable medical malpractice risks?

Although 11 N.Y.C.R.R. Part 430 inauspiciously ignores the need for a durable, financially sound, and comprehensive solution to the problem, it contemplates that the MMIP will be a permanent measure. However, in contrast to MMIA, which was initially capitalized by surcharges upon MMIA's insureds, the MMIP was not capitalized at its inception. As a consequence, the MMIP never had a substantial base for generating investment income, and had no cushion to offset losses due to the upward trend of the severity and frequency of medical malpractice claims.

Instead of addressing these fundamental concerns, 11 N.Y.C.R.R. Part 430 focuses primarily upon administrative issues. The regulation provides for the organization of the MMIP[20] and its board.[21] Although ministerial matters are assigned to Plan members, the regulations neither address how the MMIP is to maintain financial viability nor how it can be implemented in a manner that is fair.[22] The insurance carrier representatives are powerless to make decisions of real importance, such as those concerning rates.[23]

With respect to the MMIP, 11 N.Y.C.R.R. § 430.3 provides that the Superintendent shall set rates for physicians and surgeons pursuant to § 40 of chapter 266 of the Laws of 1986 as amended, which is the statutory provision that delegates authority to the Superintendent to set medical malpractice rates for the entire market. Following the directive contained in Insurance Law § 5502(c)(2)(D), 11 N.Y.C.R.R. § 430.3(c) provides that upon the initial distribution of insureds of the dissolved MMIA, rates should be "at least as favorable" as they would have been if the MMIA had not been dissolved.[24] Thereafter, the Superintendent is to set rates for the MMIP by promulgating regulations which address both primary and excess level rates,[25] with excess rates being set, as they are for the entire market, as a percentage of primary level rates.[26]

The MMIP has now been in existence for five years. During this time, its members, supported by their own actuary's projections, have in each year requested rates higher than those ultimately set by the Superintendent for the insureds in the Pool. As evinced by the loss of $233 million through June 30, 2004, it is now clear that the Superintendent's rate setting has been entirely inadequate.

This results from the Superintendent's disregard of the rule that medical malpractice insurance rates be set conservatively and with due regard for their long tail, the likely escalation of frequency and severity of claims, and the difficulty in projecting the future concerning such claims.[27] However, as to MMIP rates, a cautionary approach conflicts with the state's objective of setting the lowest rates possible. Those set for the MMIP do not provide for a margin of error, and this has become a recipe for disaster in times of increasing claim severity and frequency. As a result, each year an impending crisis in the medical malpractice insurance market is temporarily deferred, and the underlying problem steadily grows because it has been left untreated.

Unconstitutional Imposition of Losses

The question of whether the MMIP is constitutional involves several interrelated issues that are subject to both federal and state laws, including questions concerning the way in which the MMIP is organized and the manner of its administration. Although this article primarily addresses the takings clauses of the federal and New York State constitutions, other relevant rights include substantive and procedural due process, which will also be addressed.

A Taking

The Fifth Amendment of the U.S. Constitution, which is applied to the states by virtue of the Fourteenth Amendment, contains a specific prohibition against governmental taking of private property for "public use, without just compensation." Article I, § 7 of the New York State Constitution mirrors this prohibition.[28] Under both the federal and state constitutions the government can appropriate private property provided the action is taken for a public purpose, and there is fair compensation.[29] Although the first of these considerations also involves due process issues, it has often been discussed in the context of a takings clause analysis,[30] as discussed below.

The MMIP Involves State Action

A threshold issue under both the federal and state constitutions is whether the alleged taking involves state action. This requirement has clearly been satisfied with respect to the MMIP. New York State government's active involvement includes: (1) the enactment of Insurance Law § 5502,[31] (2) the promulgation of 11 N.Y.C.R.R. Part 430, and (3) the state's inadequate rate setting.[32]

Regulatory Activities Can Constitute Unconstitutional Takings

The Fifth Amendment and Article I, § 7 of the New York State Constitution have been applied to a variety of takings, including physical takings, which involve a loss of title and the right of possession, and regulatory takings, which involve significant governmental interference with a private party's use and enjoyment of property.[33] Because implementation of 11 N.Y.C.R.R. § 430.4 invites scrutiny as a regulatory taking, this section will deal with the relationship between the takings clauses and the nature, scope and extent of governmental interference of the subject regulation.

Regulatory actions, which are deemed *per se* takings when they completely deprive an owner of beneficial use of his or her property,[34] are otherwise evaluated according to the criteria set forth in *Penn Central Transportation Co. v. City of New York*,[35] which requires the courts to consider (1) the regulation's economic impact on the plaintiff, (2) the extent to which the regulation interferes with the plaintiff's investment-backed expectations, and (3) the character of the governmental action.[36] At its outer boundary, a government regulation cannot require a business to incur a loss, even in part of its operations.[37] *A fortiori*, government regulation cannot require a business to sustain overall losses.

While state regulations do not have to guarantee there will be a "reasonable rate of return,"[38] they certainly cannot lead to a situation where the regulated property has no resale value.[39] A taking occurs where inadequate rates deny the economic viability of property.[40] Courts have stated the constitutional limitations in terms of regulations that render continuation of a business "commercially impractical."[41] Regulations that lead to losses over a period of years clearly fall within this class.[42]

A leading case which upheld the manner in which regulations were implemented against constitutional challenges actually supports the application of the takings clause to situations in which a regulated carrier is forced to sustain losses due to inadequate rates. In *California State Automobile Ass'n Inter-Insurance Bureau v. Maloney*,[43] which involved a statute requiring insurers to accept assigned automobile risks, the Supreme Court held that selective insurers could be forced to insure less favorable risks.[44]

In upholding the constitutionality of the assigned risk program, the Court noted that, under the program, "premiums chargeable can be commensurate with the greater risk of the new business."[45] This language indicates that there may be a taking when rates are set at levels that do not take into account the greater risk attending the state-compelled acceptance of the assigned business. While the rate-setting parameters for greater risks are left undefined by the Court, the rate-setting process clearly necessitates allowing the regulated carriers to charge adequate premiums. This conclusion is further supported by the Court's dicta that a regulated business "may of course be less prosperous as a result of regulation."[46] This language indicates that at least some profitability is required. Otherwise, the reference to the carrier's "prosperity" would have been unnecessary and misleading.

Because *California State* indicates that there is a constitutional tradeoff between rate adequacy and regulatory compulsion that forces insurance carriers to accept assigned risks, it is useful to consider the shortcomings in the Superintendent's approach to setting medical malpractice rates, which have proven grossly inadequate. As noted above, the Superintendent sets medical malpractice rates, both at the primary and the excess level, with the latter rates being set as a percentage of the

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While state regulations do not have to guarantee there will be a "reasonable rate of return," they certainly cannot lead to a situation where the regulated property has no resale value.

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former.[47] This rate-setting methodology fails to take into account the disproportionate risks of MMIP at the excess level, because claims against uninsurable risks more frequently penetrate the excess level and go more deeply into that level, than is reflected in the percentage of the primary rates used by the Superintendent to set excess rates.

Although the infirmities of the MMIP are more pronounced than those of its predecessor, it is useful to consider the constitutional challenges asserted by the MMIA and its members. In *Alliance of American Insurers v. Cuomo*,[48] insurance companies and trade associations sought a declaration that the due process and takings clauses of the federal and state constitutions were violated by §§ 8 and 40 of chapter 266 of the Laws of 1986. These provisions imposed a moratorium on medical malpractice insurer insolvencies and attempted to stabilize medical malpractice rates at an allegedly inadequate level. The insurance companies, which were plaintiffs as members of the MMIA, were potentially responsible for losses of the MMIA, and they argued that the subject legislation could result in a deficit for which they might be responsible. The court agreed that the question was ripe for a decision and reversed the district court's dismissal of the complaint, remanding for findings on federal constitutional issues.[49]

An Article 78 proceeding[50] concerned the MMIA, which like the MMIP was compelled to insure high-risk health care providers at rates set by the Superintendent. The MMIA alleged, *inter alia*, that the Superintendent had set rates too low, causing the MMIA to operate at a loss, in violation of statute and of the takings clauses of the state and federal constitutions. The plenary court and the Appellate Division held that the Superintendent had set impermissibly low rates, and opined that had the Legislature written the Insurance Law with the intent of prohibiting a reasonable return on the MMIA's members' investment, "there would be a serious question as to the constitutionality of the Legislation."[51] However, the Court of Appeals reversed, finding that the Superintendent had set reasonable rates,[52] and that the imposition of legislatively authorized surcharges over time could preserve the MMIA's liquidity.[53] Rejecting arguments that § 40 was an unconstitutional taking as to the MMIA, the Court noted that as a creature of statute, the MMIA could be forced to run at a deficit.[54] The Court expressly reserved judgment upon the issue of whether the individual insurers who were members of the MMIA could challenge the regulation as confiscatory, as those members were not parties to the proceeding.[55]

Financial Expectations of MMIP Members Frustrated

The reasonable expectations of the regulated companies are also a factor in determining whether there has been a taking.[56] While the insurance industry is highly regulated, admitted medical malpractice carriers were licensed under the premise that they would be self-governing and selective, and would address the needs of a particular submarket. In the case of some carriers, capital was advanced in anticipation that the insurance carriers' fortunes would be based on the profitability of their more stable member-insureds, not subject to the uncertainties of a high-risk market.

The MMIP's members would not have expected to be forced to become part of a mechanism that compelled them to assume losses from the very market risks that they were seeking to avoid when the MMIP was formed at great expenditure of capital, time, and expertise. These carriers committed substantial resources to developing their own underwriting guidelines, education programs, and claims systems. When this background is considered, it supports a holding that imposition of the MMIP losses upon such carriers would be a violation of the takings clause, notwithstanding the fact that the insurance industry is highly regulated.

The MMIP's Burden Is Unjustly Imposed on a Very Small Class of Entities

Under the takings clause, the government is prohibited from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[57] When government does so, it must compensate the property owner under the takings clause. Whether economic injury caused by government action is "'disproportionately concentrated on a few persons'" is an inquiry which "is essentially *ad hoc* and fact intensive."[58]

The New York Court of Appeals has found that when a small segment of the public is required to shoulder the entire burden of addressing a public problem, the takings clause is violated. In *Seawall Associates v. City of New York*,[59] a challenge by property owners to a New York City ordinance that prohibited owners of single-room-occupancy apartments from demolishing their buildings, and required them to refurbish or rent the apartments, the Court concluded that the local law denied the property owners the economic benefit or use of their land, while failing to advance substantially a legitimate state interest.[60] The City insisted that the ordinance's public purpose was to prevent homelessness, which the Court acknowledged to be a goal "of the greatest societal importance."[61] Nevertheless, the Court reasoned that "the nexus between the obligations placed on [single-room-occupancy] property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural. Such a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem."[62]

New York's appellate courts have also found unconstitutional takings to exist in the form of statutes that require one small group to provide a substantial benefit to another, without any benefit to the first group. In *Manocherian v. Lenox Hill Hospital*,[63] the Court of Appeals addressed a modification of the rent stabilization laws that would have allowed a hospital to rent apartments at stabilized rates, and then sublease them to selected employees, without relinquishing the statutory right to tenancy renewal under rent stabilization law as did all other renters not occupying their rental units as their primary residences.[64] The Court found that the modification did not serve the general purpose of the rent stabilization laws, which was to decrease incidents of tenants having to move due to rent increases and to alleviate housing shortages. Striking down the modification, the Court found that its purpose was "to subsidize the non-profit hospital," which was using the apartments as a fringe benefit for special health care employees.[65] Imposition of this burden on a small group, the owners of "a tiny number of dwelling units," was impermissible.[66]

In *Hospital Ass'n of New York State v. Axelrod*,[67] a case decided by the Appellate Division for the Third Department, hospitals were forced to purchase excess insurance for affiliated private physicians and dentists. This cost was supposed to be passed on to the hospitals' patients, but the federal Medicare program regulations did not allow for the payment of charges associated with New York's excess medical malpractice insurance program.

This left a funding gap equal to the portion of the costs that were intended to be recovered from Medicare beneficiaries receiving care at New York hospitals. This shortfall was imposed upon the hospitals that were required to pay for the excess insurance.[68] The court found that imposing such costs upon the hospital in the absence of reimbursement might constitute a taking because the losses to the hospital, which would have been substantial, were not directly related to the hospital, and the beneficiaries of the law were private parties, *i.e.*, physicians who were neither employees nor agents of the hospital.[69] The appropriation of the hospital's property would be absolute and would be unduly burdensome.[70] Thus, the court construed the Medical Malpractice Reform Act of 1985 so as to require hospitals to purchase the insurance only if they were fully reimbursed therefor.

To determine whether it is fair to impose the MMIP's burden solely on the admitted carriers, one must first consider the MMIP's purpose. One goal is to stabilize medical malpractice insurance premiums. At first glance, government concerns about the rising cost of medical malpractice insurance coverage seem to center upon the public's access to health care.[71] Another possible aim may be to ensure that adequate funds are available to pay victims of medical malpractice who obtain judgments in their favor.

Concerning the MMIP, there is at best a tenuous relationship between these goals and the state-conceived solution of burdening existing admitted medical malpractice carriers with the cost of subsidizing losses associated with covering uninsurable risks. MMIP members are not responsible for the problems the MMIP seeks to address.

The reasons proffered for the existence of uninsurable medical malpractice risks are vigorously debated. Some consumer organizations and members of the plaintiffs' trial bar have claimed that "bad doctors" are the cause of the increase in the cost of insurance.[72] To the extent this may be true, the dilemma is clearly not of the making of admitted medical malpractice carriers who do not insure and are not run by such physicians.[73] Protection of the public would best be served by finding the root causes of the inability to obtain insurance in the voluntary market. To the extent the cause is poor quality health care, the solution is to eliminate health care providers that provide substandard care, rather than to subsidize them to enable victims to collect judgments for injuries caused by improper medical care.

On the other hand, there are health care providers that attribute the cause of the problem to the increasing cost of medical care. This proffered basis, too, is not attributable to MMIP members. Yet another reason ascribed to the problem is high-risk specialties, such as obstetrics, with respect to which verdicts appear to be more related to the public's desire to provide financial compensation to those affected by devastating physical injuries than to whether there has been a deviation from the good and accepted practice of medicine.[74] If this reason be true, the admitted medical malpractice carriers have not caused it. Indeed, this proffered reason is not related even to the uninsurable risks themselves, but to jury sympathy.

Finally, there are those who claim that the loss of investment income of liability and casualty carriers is the cause of rising rates.[75] This does not apply to MMIP members because any decline in financial markets is beyond the control of such insurers, whose investment decisions are limited by statute to conservative choices.[76] Moreover, considering the fact that all medical malpractice carriers are member-owned, their desire to earn profits is counterbalanced by the effect that such higher rates would have on members' personal finances.

Regardless of the cause of rising premiums, it is debatable whether, without a subsidized insurance program, MMIP insureds would withdraw from the health care market in appreciable numbers. It is even more questionable whether health care providers remaining in the voluntary market could not address such withdrawal.

The MMIP benefits uninsurable risks at the expense of the insureds of admitted medical malpractice carriers, who ultimately lose out as they must absorb MMIP losses through either higher premiums or reduced equity in those carriers. This forced subsidization compels one class of private parties to absorb the expenses of another such class, whose situation is not the first class's fault. In these ways, the MMIP situation resembles those in *Seawall Associates*, *Manocherian*, and *Axelrod*.

Perforce, to the extent the inability of certain high-risk health care professionals to obtain malpractice insurance constitutes a public problem, requiring the handful of admitted carriers to bear the full burden of its correction is an unconstitutional taking.

Unconstitutional Burden on Admitted Medical Malpractice Carriers

In *Lingle v. Chevron U.S.A., Inc.*,[77] the Supreme Court observed that challenges to the rationality of a regulation as violative of the due process clause are "distinct from the question of whether the regulation effects a taking."[78] The Court went on to opine that if a regulation fails to meet the "public use" requirement or is irrational so as to violate due process requirements, "[n]o amount of compensation can authorize such action."[79]

Arbitrary government regulation that does not compensate a business owner for disproportionately concentrated economic loss may be struck down under the due process clause.[80] The inquiry is primarily one of rationality.[81] An economic regulation will fail a substantive due process challenge if it is not rationally related to a legitimate state purpose.[82]

Hospital Ass'n of New York State v. Axelrod[83] is an illustration of the application of substantive due process under the New York State Constitution, and of the overlap of rights under the takings and due process clauses. In addition to its takings clause holding, *Axelrod* found that if hospitals were not reimbursed for the excess insurance coverage they were required to purchase for affiliated physicians, that requirement would also constitute a violation of substantive due process.[84]

To determine whether it comports with substantive due process to impose the MMIP's burdens on the admitted carriers, one must first determine the MMIP's purposes. As discussed above, the purposes appear to be ensuring the public's access to health care, and ensuring that adequate funds are available to pay victims of medical malpractice who obtain judgments in their favor. However, as discussed above, MMIP members are not responsible for increases in health care costs or for defects in the quality of medical care. Thus, requiring them to fund the MMIP is not a rational manner of fulfilling the MMIP's goals. Moreover, in not addressing the root causes of the occurrence of malpractice, the MMIP's treatment of the problem would appear irrational by virtue of its enabling the continued substandard practice.

It would therefore appear that a due process challenge against the MMIP might be successful in light of the apparent disconnect between the MMIP's goal and the method by which it seeks to achieve that goal.

Proposals

There are essentially four admitted carriers involved in the MMIP: MLMIC, PRI, Academic and HIC. These carriers are not directly affected by the existence of uninsurable risks.[85] What is clear is the potential direct and substantial injury that the imposition of MMIP losses upon these carriers would cause. These insurers could be deprived of reserves needed to pay their own claims if forced to absorb the MMIP's losses. This could lead to a lack of coverage of even their own insureds, who are favorable risks. In turn, some health care providers might be discouraged from practicing in New York. Ironically, the MMIP could well be the cause of the problem it presumably seeks to avoid. To avert this disastrous situation, a thoughtful public solution, not a regulatory scheme that forces admitted carriers to fund an unfair and costly measure, is desperately needed.

The Governor has recently signed a bill to prohibit the Superintendent from taking action against admitted medical malpractice carriers on the basis of insolvency.[86] This act, in part, recognizes that MMIP losses may well create a situation where the admitted medical malpractice carriers that are made responsible for MMIP losses by regulation are unable to maintain sufficient reserves and would therefore be subject to an action under Insurance Law § 7402. However, this act is, at best, an insufficient and partial solution. A long-term answer to the crisis is necessary.

It is submitted that the $1 billion in MMIA reserves taken earlier by the state should be transferred to the MMIP from the state's general fund. The MMIA addressed the same problems as does the MMIP, and its funds were derived in large part from the same classes of uninsurable risks, and in some cases even the same insureds. The state's appropriation of such funds should be viewed as an improvident and inequitable exercise of the state's police power. In fairness, the uninsurable health care providers that were covered by the MMIA, and contributed the funds that enabled the MMIA to accumulate the appropriated reserves, should have had these funds made available for their benefit as part of the MMIP, which now insures them. By seizing these funds, the state acted without an appreciation of the long-term problem of rising medical malpractice insurance costs. This state-created problem invites a state-created solution.

This alone does not solve the problem of the rising cost of insurance – although, after payment of current losses, a fund of $1 billion would enable the MMIP to generate investment income to partially offset rate increases. Nevertheless, adequate rates are required or this fund would be depleted. It is important that rates be sufficient not only to maintain solvency, but also to provide for a margin of error. If insolvency is threatened, it should be the state that is responsible for making up the difference. Alternatively, the MMIP should not be subject to the Superintendent's rate setting, but to the rates set by MMIP's members. In this way, a rate more "commensurate" with the risks involved will be established. If the state wishes to subsidize those rates, it should come from the public coffers because the MMIP would be solving a public problem. ■

1. An admitted carrier is licensed by the state to issue policies covered by the state's guaranty fund.

2. Greater N.Y. Hosp. Ass'n, Medical Malpractice Insurance Costs and Coverage 20–21 (Jan. 2005), *available at* <http://www.gnyha.org/pubinfo/medmal/ 2005_GNYHA_Med_Malpractice.pdf>.

3. 1975 Laws of N.Y. ch. 109.

4. N.Y. Insurance Law § 5502 ("Ins. Law").

5. Neil D. Levin, Superintendent of Insurance, The Status of the Primary and Excess Medical Malpractice Market and the Future Need for the Medical Malpractice Insurance Association 3 (Dec. 1, 1997), *available at* http://www.ins.state.ny.us/acrobat/medmal2.pdf.

6. Authorized appropriations of MMIA reserves were pursuant to Ins. Law §§ 5516–5516-f to various state funds.

7. 2000 Laws of N.Y. ch. 147.

8. Ins. Law § 5501(b).

9. *See* 1975 Laws of N.Y. ch. 109.

10. Greater N.Y. Hosp. Ass'n, *supra* note 2, at 27–29.

11. *See, e.g.,* Thomas D. Rowley, *High Insurance Premiums Jeopardize Rural OBs*, Rural Health News, Spring–Summer 2002, *available at* <http://www.nal.usda.gov/ric/richs/rhnsp-su02.pdf>.

12. In August 2001, Frontier was placed in rehabilitation (SEC Form 8K, Frontier Insurance Group, Inc.).

13. Elsaid Elbially, Report on Examination of the HANYS Member Hospital Self-Insurance Trust as of December 31, 1994, *available at* <http://www.ins.state.ny.us/acrobat/hanhos94.pdf>.

14. Reciprocals are subscriber-owned insurers.

15. Since 2000, the situation has been further deteriorated because admitted carriers have stopped writing the less-profitable business, particularly adult home facilities, and have discontinued providing insurance to a proportion of the excess coverage market.

16. "Uninsurable risk" shall mean a risk that the voluntary insurance market will not cover.

17. 11 N.Y.C.R.R. § 430.2(b).

18. This method of calculating a carrier's share of MMIP responsibility is not even "equitable" among the carriers *inter se* because smaller carriers rely on reinsurance so that their portion of the market is overstated. Reinsurance involves ceding or transferring a portion of premiums to a reinsurer in exchange for that carrier's assuming a portion of the insurance risk of the underlying policy.

19. Ins. Law § 5502(c)(2)(D) only speaks of the "equitable distribution" of uninsurable risks, not the sharing of losses.

20. 11 N.Y.C.R.R. § 430.0.

21. 11 N.Y.C.R.R. § 430.4.

22. 11 N.Y.C.R.R. § 430.4(b)

23. *See* 1986 Laws of N.Y. ch. 266, § 40 (empowering the Superintendent to set medical malpractice rates, both at the primary and at the excess levels).

24. Ins. Law § 5502(b) provided that all MMIA rates shall be on an actuarially sound basis, be calculated to be self-supporting, be based upon reasonable standards, the premiums shall be fixed at the lowest possible rates consistent with the maintenance of solvency of the MMIA and of reasonable reserves and surplus therefor.

25. 11 N.Y.C.R.R. §§ 70.10 *et seq.*

26. *See, e.g.*, 11 N.Y.C.R.R. § 70.22, setting the primary and excess rates for 2000. The percentage for the first layer of excess coverage purchased by physicians was set at 9.4% of the primary rate, and the second excess layer was 5% of the primary rate.

27. 11 N.Y.C.R.R. § 70.7(b)(1), which the Superintendent promulgated, acknowledges the difficulty in setting medical malpractice rates: "Medical malpractice experience demonstrates that, on average, the more severe claims take longer to resolve. Average medical malpractice claim payments are made several years after the occurrence of the claim. Very severe cases may take decades to resolve. Experience demonstrates that the rate of increase and severity (*i.e.*, cost per claim) has been escalating at a double digit annual rate."

28. Article I, § 7 could be interpreted to afford greater protection than that under federal courts' interpretation of the takings clause of the Fifth Amendment. However, a review of New York cases suggests that the New York state courts' approach is similar to that taken by the federal judiciary, so this potentiality is theoretical.

29. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231 (2003); *see generally Seawall Assocs. v. City of N.Y.*, 74 N.Y.2d 92, 544 N.Y.S.2d 542 (1989).

30. The United States Supreme Court has recently opined that the approach of the judiciary to takings clause issues has often been flawed. *See infra* note 77.

31. There is absolute legislative immunity from suit for the passage of any act. However, depending on a host of circumstances, the implementation of the Act may involve state activity which give rise to liability.

32. To be sure, MMIP members have entered into an agreement that implements the Pool and provides for their responsibility for its losses. However, the MMIP membership contract was compelled by 11 N.Y.C.R.R. § 430.4(b)(4)(ii). Under the circumstances, the MMIP contract is hardly voluntary, and any attempt to enforce it by a private party would involve state action.

33. *Smith v. Town of Mendon*, 4 N.Y.3d 1, 9, 771 N.Y.S.2d 781 (2004); *Friedenburg v. N.Y. State Dep't of Envtl. Conservation*, 3 A.D.3d 86, 93, 767 N.Y.S.2d 451 (2d Dep't 2003).

34. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

35. 438 U.S. 104 (1978).

36. *Id.* at 124.

37. *Brooks-Scanlon Co. v. R.R. Comm'n*, 251 U.S. 396, 399 (1920).

38. *See Rent Stabilization Ass'n v. Dinkins*, 805 F. Supp. 159, 163 (S.D.N.Y. 1992) (citing *Park Ave. Tower Assocs. v. City of N.Y.*, 746 F.2d 135, 140 (2d Cir. 1984)), *aff'd on other grounds*, 5 F.3d 591 (2d Cir. 1993).

39. *Id.*

40. *Id.* at 162.

41. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414–15 (1922).

42. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 484–85 (1987).

43. 341 U.S. 105 (1951).

44. *Ca. State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 108 (1951).

45. *Id.*

46. *Id.* at 111.

47. See text accompanying *supra* notes 24–26.

48. 854 F.2d 591 (2d Cir. 1988).

49. *Id.* at 604–605.

50. *MMIA v. Superintendent of Ins.*, 137 Misc. 2d 785, 520 N.Y.S.2d 501 (Sup. Ct., N.Y. Co. 1987), *aff'd for reasons stated by court below*, 141 A.D.2d 475, 531 N.Y.S.2d 503 (1st Dep't), *rev'd*, 72 N.Y.2d 753, 537 N.Y.S.2d 1 (1988).

51. *MMIA*, 137 Misc. 2d at 787; *MMIA*, 141 A.D.2d at 475 (1st Dep't) (affirming for reasons stated by plenary court). The plenary court cited *Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396 (1920), which held that a regulated business cannot be required to run at a loss, even in one of its parts. *MMIA*, 137 Misc. 2d at 792 & n.3 (citing *Brooks-Scanlon*, 251 U.S. at 399).

52. *See MMIA*, 72 N.Y.2d at 761–63.

53. *Id.* at 764–66.

54. *Id.* at 766–67.

55. *Id.* at 767. The Court of Appeals also cited *Brooks-Scanlon*, noting that "[i]t is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfill an obligation imposed by the charter, even though fulfillment in that particular may cause a loss." *Id.* at 766 (quoting *Brooks-Scanlon*, 251 U.S. at 399). However, this holding does not affect the rights of members of the MMIP, because none of them operates pursuant to a state charter that imposes Pool membership upon it as a condition of its operations. Rather, their membership derives from regulatory action taken well after the formation of the insurers which are now MMIP members.

56. *Penn Cent. Trans. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

57. *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2080 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)) (internal quotation marks omitted); *see also Brooks-Scanlon*, 251 U.S. 396, 399 (1920); *Seawall Assocs. v. City of N.Y.*, 74 N.Y.2d 92, 544 N.Y.S.2d 542 (1989).

58. *Eastern Enters. v. Apfel*, 524 U.S. 498, 523 (1998) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

59. 74 N.Y.2d 92.

60. *Id.* at 107–113.

61. *Id.* at 111 & n.10.

62. *Id.* at 112.

63. 84 N.Y.2d 385, 618 N.Y.S.2d 857 (1994).

64. *Id.* at 389–91.

65. *Id.* at 393–96.

66. *Id.* at 396.

67. 113 A.D.2d 9, 494 N.Y.S.2d 905 (3d Dep't 1985).

68. *Id.* at 10–12.

69. *Id.* at 15.

70. *Id.* at 15–16.

71. *See, e.g.,* "Senate Passes Extension of Excess Medical Malpractice Insurance," available on the New York Senate Web site, <http://www.senate.state.ny.us> (noting that legislation extending the excess medical malpractice liability insurance program for two years was approved in order to "help control malpractice premiums and maintain access to physician care in New York State." Senator Hannon (R-Garden City), Chairman of the Senate Health Committee, stated "the additional coverage provided through this program will keep the cost of insurance premiums under control. Without it many physicians would be driven out of business and even out of our state." The purpose of the excess medical malpractice insurance program, created in the 1980s, was to help "stabilize overall liability premium costs and preserve[] access to essential health care services"). Ironically, however, the MMIA was disbanded and privatized because state government felt that it was "no longer necessary to ensure health care access for New Yorkers." *See* "Governor: New Budget Continues New York's Historic Comeback," *available at* <http://www.ny.gov/governor/press/99/aug03_14_99.htm>. While the Superintendent did not articulate the concerns mandating keeping medical malpractice insurance coverage at the lowest possible rates for MMIP insureds, one can speculate it is a product of renewed concerns about New Yorkers' access to care. New York has been identified by the American Medical Association (AMA) as a state in which the high cost of medical malpractice insurance seriously threatens patient access to care. *See, e.g.*, Health Care Litigation Reform: Does Limitless Litigation Restrict Access to Health Care?: Hearing Before the House Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary, 107th Cong. (statement of Dr. Donald J. Palmisano, Secretary-Treasurer, AMA) (June 12, 2002), *available at* <http://commdocs.house.gov/committees/judiciary/hju80193.000/hju80193_0f. htm>; Blue Cross & Blue Shield Ass'n, The Malpractice Insurance Crisis: The Impact on Healthcare Cost and Access 2 (citing AMA study finding New York to be one of a dozen states in a crisis situation due to rising medical malpractice insurance premiums), *available at* <http://www.bcbs.com/coststudies/reports/Malpractice_Ins_Crisis0127.pdf>. New York is also one of nine crisis states identified by the American College of Obstetricians and Gynecologists where liability for Ob/Gyns was becoming prohibitively expensive or unavailable, increasing consumer health care costs and decreasing access. *See* Blue Cross & Blue Shield Ass'n, *supra*, at 2, 3.

72. *See, e.g.,* Medical Malpractice Referral Network, *Medical Malpractice Crisis Contrived, available at* <http://www.medical-malpractice-lawyers-attorneys.com/medical_malpractice_crisis.html>.

73. An often-cited study found that doctors with past malpractice claims against them are substantially more likely to face future malpractice claims than are doctors who do not have past malpractice claims. The study found that within each medical specialty, 3% to 8% of the doctors were responsible for 75%–85% of payments of awards and settlements. *See* F.A. Sloan et al., *Medical Malpractice Experience of Physicians: Predictable or Haphazard?*, 262 JAMA 3291 (1989). While the study showed a positive correlation between past and future claims, it did not definitively determine the cause of that correlation. Surveys of the National Practitioner Databank public files, conducted by various public research organizations, confirm that a few doctors seem to be responsible for the majority of claims. One survey found that, from Sept. 1990 to 2003, 5.4% of doctors were responsible for 56.2% of claims. To the extent that the correlation between past claims history and future claims indicates that poor medical practice by a relatively few doctors causes the majority of malpractice claims, requiring professional liability insurers to in effect subsidize premiums for these providers does not assist in solving the public problem of consumer access to quality health care. It could be argued that the public would be better served if the increased costs of malpractice insurance for these "bad doctors" drove them out of the marketplace.

74. "[E]mpirical evidence indicates that damage awards are more a function of injury severity than quality of care." Vice Chairman Jim Saxton (R-NJ), U.S. Congress Joint Economic Committee, Liability for Medical Malpractice: Issues and Evidence 10 (May 2003), *available at* <http://www.house.gov/jec/tort/050603.pdf>; *id.* at 11 n.45 (citing as support Henry S. Farber & Michelle J. White, *Medical Malpractice: An Empirical Examination of the Litigation Process* (Nat'l Bureau of Econ. Research, Working Paper No. 3428, Sept. 1990)).

75. Greater N.Y. Hosp. Ass'n, *supra* note 2, at 30.

76. *Id.*

77. 125 S. Ct. 2074 (2005). *Lingle* abrogated the theory of takings clause liability, previously established in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), that "application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests." *Lingle*, 125 S. Ct. at 2082–85. *Seawall Assocs. v. City of N.Y.*, 74 N.Y.2d 92, 107, 544 N.Y.S.2d 542 (1989) and *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 392, 618 N.Y.S.2d 857 (1994) relied upon this theory of liability. Nevertheless, even under *Lingle*, *Seawall Assocs.* and *Manocherian* would still be good law, to the extent New York's constitution provides greater protection than its federal counterpart.

78. *Id.* at 2083–84.

79. *Id.* at 2084.

80. *Hosp. Ass'n of N.Y. State v. Axelrod*, 113 A.D.2d 9, 16, 494 N.Y.S.2d 905 (3d Dep't 1985).

81. *Lingle*, 125 S. Ct. at 2083, 2084.

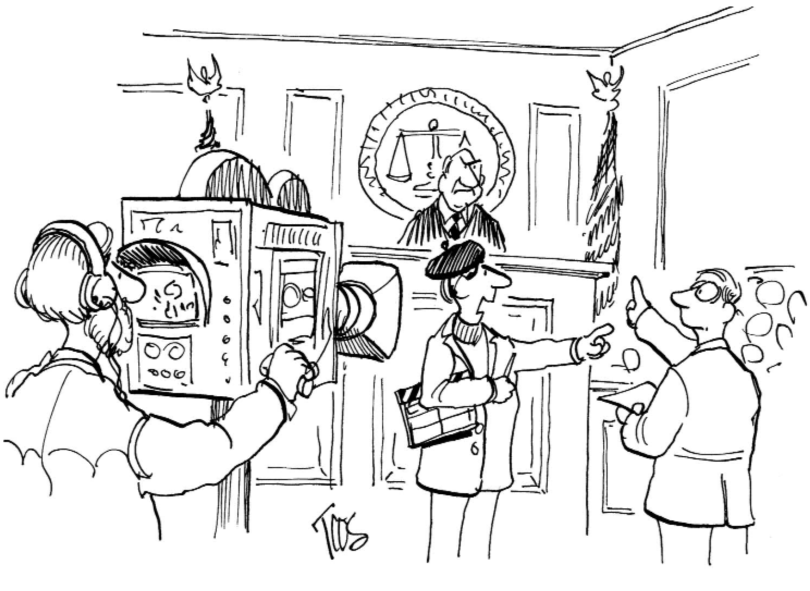
82. *See, e.g.*, *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96, 107 (1978).

83. 113 A.D.2d 9.

84. *Id.* at 16.

85. There appears, however, to be an indirect effect. Assuming a lack of insurance would result in an absence of these uninsurable risks from the market, this absence might increase the volume of the business of the insureds of admitted medical malpractice carriers, which would presumably be of some financial benefit to them although there are a number of offsetting considerations.

86. This bill amended Ins. Law § 2343(c), prohibiting liquidation of a domestic medical malpractice carrier under certain circumstances.



"Okay, hold that cogent legal point until we're back from commercial."

Nelson E. Timken is Principal Law Clerk to Justice Janice A. Taylor. Any views expressed herein are solely those of the author.

The "No-Prejudice" Rule Survives, Somewhat

By Nelson E. Timken

Traditional contract law states (1) the breach of a condition by one party does not excuse performance by the other unless the breach causes actual prejudice, and (2) a contractual duty requiring strict compliance ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition.[1] The "no prejudice" rule carved out an exception: when a contract of primary insurance, as a condition precedent to coverage, requires that "in case of an accident or occurrence, the insured shall . . . give written notice to us or our agent as soon as it is practical," the absence of timely notice of that occurrence, as a matter of law, vitiates the contract and absolves the carrier of its obligations.[2]

The theory behind the rule requiring strict compliance with the notice provision is that it protects the carrier from fraud or collusion, gives the carrier an opportunity to investigate claims while evidence is still fresh, allows the carrier to make an early appraisal of the insured's prospective exposure and to set its reserves accordingly, and provides an opportunity for the carrier to make an early assessment of the claim, thereby facilitating the potential for settlements.[3] Thus, in cases where the timely notice provision is breached, no showing of prejudice is required, hence the genesis of the moniker "no-prejudice" rule.[4]

Exception to the Exception

In *Security Mutual Insurance Co. v. Acker-Fitzsimons Corp.*,[5] the Court of Appeals held that a "limited exception" to this general rule exists for breaches of notice provisions in insurance contracts.[6] The exception exists insofar as the insured's delay or failure to give timely notice may be excused where the insured had a reasonable belief that it would not be liable for the accident.[7] At issue is not whether an insured believes that he or she will ultimately be found liable for the injury, but whether the insured has a reasonable basis for a belief that no claim will be asserted against him or her.[8] It is generally held that whether there exists a good-faith belief that an injured party will not seek to hold the insured liable and whether the belief is reasonable under the circumstances are questions of fact reserved for the fact finder.

With regard to the issue of a delay in providing notice where required, the insured bears the burden of proving that the delay in reporting the incident to the defendant was excusable.[9] While "a good-faith belief of nonliability may excuse or explain a seeming failure to give timely notice," the insured bears the burden of demonstrating that the delay in giving notice was reasonable under the circumstances.[10]

Courts have held that such notice must be provided within a reasonable time in view of all the facts and circumstances of the case, including the reasonable possibility of the policy's involvement. Precisely what constitutes a "reasonable" time has been the subject of numerous appellate decisions.[11] Conversely, an insurer must give timely notice of a disclaimer "as soon as is reasonably possible" after it first learns of the accident or the ground for the disclaimer of liability.[12] It is the insurer's burden to explain the delay in notifying the insured of its disclaimer; the reasonableness of the delay must be determined from the time the insurer was aware of facts sufficient to disclaim.[13]

Decisions such as the one issued by the First Department in *Great Canal Realty Corp. v. Seneca Insurance Co.*,[14] and the Court of Appeals in *In re Brandon (Nationwide Mutual Insurance Co.)*,[15] created some conjecture that New York would soon abandon the "no-prejudice" rule, as have a majority of states, and would instead require insurance companies to demonstrate actual prejudice emanating from the failure of an insured to comply with the timely notice conditions of their policies. Support for this notion is best demonstrated by the concurring opinion of Justice James Catterson in *Great Canal Realty Corp.*, in which he wrote:

> Ultimately, we see no reason to extend the "no-prejudice" exception to allow insurers to disclaim coverage on the basis of late notice of claim where "lateness" is an arbitrary temporal standard applied to a lapse between occurrence and notice, and where contractual rights favor just one party, the insurer. In any event, in jurisdictions which have struck down the no-prejudice exception the insurer may still prevail by demonstrating it was prejudiced by the late notice.[16]

In *In re Brandon*,[17] the Court of Appeals declined to hold that an insurer need not demonstrate prejudice to rely on the defense that the insured forfeited Supplemental Uninsured/Underinsured Motorists (SUM) coverage by failing timely to submit the tort action summons and complaint. Because the insurer already enjoyed the protection of a notice of claim requirement and contractual clauses governing settlement, the Court held that when relying upon the late-notice-of-legal-action defense, an insurer must be required to demonstrate prejudice.[18]

In two decisions, New York's highest court laid to rest any speculation that the "no-prejudice" rule would no longer be followed in New York.

In two decisions issued by the Court of Appeals on April 5, 2005, New York's highest court laid to rest any speculation that the "no-prejudice" rule would no longer be followed in New York within the context of coverage under primary liability insurance policies, while holding that, in a SUM context, where an insured previously gave timely notice of the accident, the carrier must establish that it is prejudiced by a late notice of the SUM claim before it may properly disclaim coverage.[19]

In *Rekemeyer v. State Farm Mutual Automobile. Insurance Co.*,[20] the Court of Appeals held that a SUM carrier that receives timely notice of a claim must show prejudice before disclaiming SUM benefits based on late notice of a legal action, even where the plaintiff does not submit her notice of SUM claim as soon as practicable. This holding follows logically from the Court's pronouncement in *Brandon*,[21] in which the Court of Appeals held that a SUM carrier that received timely notice of a claim must show prejudice before disclaiming SUM benefits based on late notice of a legal action.

Notwithstanding the fact that it found that a plaintiff's notice of her SUM claim, which was filed six months after she was informed that the defendant's insurance was insufficient to provide full compensation for her injuries, was untimely, the Court of Appeals in *Rekemeyer* held that:

> The facts of the current case, while different from *Brandon*, also warrant a showing of prejudice by the carrier. Here, plaintiff gave timely notice of the accident and made a claim for no-fault benefits soon thereafter. That notice was sufficient to promote the valid policy objective of curbing fraud or collusion. Moreover, the record indicates that State Farm undertook an investigation of the accident. It also required plaintiff to undergo medical exams in December 1998 and February 2000. Under these circumstances, application of a rule that contravenes general contract principles is not justified. Absent a showing of prejudice, State Farm should not be entitled to a windfall.

> Additionally, State Farm should bear the burden of establishing prejudice "because it has the relevant information about its own claims-handling procedures and because the alternative approach would saddle the policyholder with the task of proving a negative." Thus, we hold that where an insured previously gives timely notice of the accident, the carrier must establish that it is prejudiced by a late notice of SUM claim before it may properly disclaim coverage.[22]

By contrast, in *Argo Corp. v. Greater N.Y. Mutual Insurance Co.*,[23] on January 2, 1997, the claimant, plaintiff's tenant, slipped and fell on ice on the sidewalk adjacent to the plaintiff's premises. On February 23, 2000, the claimant brought suit for personal injuries against plaintiff Argo by serving a summons and complaint on the New York Secretary of State, receipt of which was acknowledged by the plaintiff. On November 10, 2000, the plaintiff was served with a default judgment. On February 13, 2001, the plaintiff received a notice of entry of the default judgment and of the scheduling of a hearing on that judgment. On February 21, 2001, the plaintiff received service of a note of issue for trial readiness.

The plaintiff first notified its commercial liability insurance carrier on May 2, 2001. On June 4, 2001, the insurer disclaimed coverage because of the late notice of the lawsuit and occurrence, which was a condition precedent to coverage under the insurance policy. Thus, the plaintiff did not notify the defendant of the claimant's suit until 14 months after service of the complaint upon the Secretary of State as their agent, until six months after service of the default motion upon the plaintiffs, until more than three months after default was entered, and until almost three months after service of the note of issue upon the plaintiff.

On these facts, the Court of Appeals in *Argo* held:

> *Brandon* did not abrogate the no-prejudice rule and should not be extended to cases where the carrier received unreasonably late notice of a claim. The facts here, where no notice of claim was filed and the first notice filed was a notice of lawsuit, are distinguishable from *Brandon* where a timely notice of claim was filed, followed by a late notice of lawsuit, and distinguishable from *Rekemeyer*, where an insured gave timely notice of the accident, but late notice of a SUM claim.
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> * * *
>
> The rationale of the no-prejudice rule is clearly applicable to a late notice of lawsuit under a liability insurance policy. A liability insurer, which has a duty to indemnify and often also to defend, requires timely notice of lawsuit in order to be able to take an active, early role in the litigation process and in any settlement discussions and to set adequate reserves. Late notice of lawsuit in the liability insurance context is so likely to be prejudicial to these concerns as to justify the application of the no prejudice rule. Argo's delay was unreasonable as a matter of law and thus, its failure to timely notify GNY vitiates the contract. GNY was not required to show prejudice before declining coverage for late notice of lawsuit.[24]

The recent Court of Appeals pronouncements in this area underscore the fact that the "no-prejudice" rule, while extant, will be treated as an elastic standard that will be applied only in cases where it serves to promote the longstanding policy goals of protecting the insurance carrier against fraud or collusion, allowing the carrier to investigate early, establish proper reserves, and exert early control over the claims process with an eye towards settlement.

> Where an insured previously gives timely notice of the accident, the carrier must establish that it is prejudiced by a late notice of SUM claim.

In cases in which the carrier had prior notice of the occurrence or claim before the action was commenced, such as in the SUM context, the "no-prejudice" rule does not serve this purpose, and will likely not be applied, requiring the carrier to establish actual prejudice. While New York's highest court has yet to address the issue, it would appear to logically follow that actual notice to the insurer by a third party, particularly the claimant or other potential third-party beneficiary of the policy of insurance, of the event, occurrence or claim would also justify a departure from the "no-prejudice" rule because the aforementioned policy goals would have been satisfied by such notice.

Conclusion

While not fully abrogated, it is this author's opinion that the "no-prejudice" rule has been pruned by the Court of Appeals, using a common-sense approach to avoid a windfall to insurers who have acquired notice of the underlying claim.

1. *See Restoration Realty Corp. v. Robero*, 58 N.Y.2d 1089, 1091, 462 N.Y.S.2d 811 (1983); *see also Am. Home Assurance Co. v. Int'l Ins. Co.*, 90 N.Y.2d 433, 440, 661 N.Y.S.2d 584 (1997).

2. *Sec. Mut. Ins. Co. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440–43, 340 N.Y.S.2d 902 (1972); *see In re Brandon (Nationwide Mut. Ins. Co.)*, 97 N.Y.2d 491, 496, 743 N.Y.S.2d 53 (2002); *see also Am. Transit Ins. Co. v. Sartor*, 3 N.Y.3d 71, 781 N.Y.S.2d 630 (2004).

3. *Unigard Sec. Ins. Co. v. N. River Ins. Co.*, 79 N.Y.2d 576, 582, 584 N.Y.S.2d 290 (1992).

4. *Id.*

5. 31 N.Y.2d at 440–43.

6. *See Unigard Sec. Ins. Co.*, 79 N.Y.2d at 581.

7. *See Paramount Ins. Co. v. Rosedale Gardens, Inc.*, 293 A.D.2d 235, 239, 743 N.Y.S.2d 59 (1st Dep't 2002) (citing *875 Forest Ave. Corp. v. Aetna Cas. & Sur. Co.*, 37 A.D.2d 11, 12, 322 N.Y.S.2d 53 (1st Dep't 1971), *aff'd*, 30 N.Y.2d 726, 332 N.Y.S.2d 896 (1972)).

8. *See SSBSS Realty Corp. v. Pub. Serv. Mut. Ins. Co.*, 253 A.D.2d 583, 584, 677 N.Y.S.2d 136 (1st Dep't 1998) (citing *White v. City of N.Y.*, 81 N.Y.2d 955, 957, 598 N.Y.S.2d 759 (1993)).

9. *See Winstead v. Uniondale Union Free Sch. Dist.*, 201 A.D.2d 721, 608 N.Y.S.2d 487 (2d Dep't 1994); *White*, 81 N.Y.2d at 957; *Acker-Fitzsimons Corp.*, 31 N.Y.2d 436; *Eveready Ins. Co. v. Levine*, 145 A.D.2d 526, 536 N.Y.S.2d 87 (2d Dep't 1988).

10. *Acker-Fitzsimons Corp.*, 31 N.Y.2d at 441; *see Vradenburg v. Prudential Prop. & Cas. Ins. Co.*, 212 A.D.2d 913, 622 N.Y.S.2d 623 (3d Dep't 1995); *Winstead*, 201 A.D.2d 721.

11. *See generally Metro. N.Y. Coordinating Council on Jewish Poverty v. Nat'l Union Ins. Co.*, 222 A.D.2d 420, 634 N.Y.S.2d 730 (2d Dep't 1995); *Interboro Mut. Indem. Ins. Co. v. Fatsis*, 279 A.D.2d 450, 718 N.Y.S.2d 95 (2d Dep't 2001); *Paramount Ins. Co. v. Rosedale Gardens, Inc.*, 293 A.D.2d 235, 743 N.Y.S.2d 59 (1st Dep't 2002) (unexplained 7-1/2 month delay); *Zadrima v. PSM Ins. Cos.*, 208 A.D.2d 529, 616 N.Y.S.2d 817 (2d Dep't 1994) (lack of reasonable excuse for delay of four months vitiates coverage); *see also Winstead*, 201 A.D.2d 721 (unexplained four-month delay); *Khan v. Convention Overlook, Inc.*, 253 A.D.2d 737, 677 N.Y.S.2d 377 (2d Dep't 1998) (unexplained year and four-month delay); *Sayed v. Macari*, 296 A.D.2d 396, 744 N.Y.S.2d 509 (2d Dep't 2002) (almost three-month delay unreasonable); *1700 Assocs. v. Pub. Serv. Mut. Ins. Co.*, 256 A.D.2d 456, 681 N.Y.S.2d 795 (2d Dep't 1998) (over six-month delay unreasonable); *Interboro Mut. Indem. Ins. Co. v. Mendez*, 253 A.D.2d 790, 677 N.Y.S.2d 615 (2d Dep't 1998) (delay of over one year unreasonable); *Travelers Indem. Co. v. Worthy*, 281 A.D.2d 411, 721 N.Y.S.2d 400 (2d Dep't 2001) (one-year-and-three-month delay unreasonable).

12. *See* Insurance Law § 3420(d); *Pawley Interior Contr., Inc. v. Harleysville Ins. Cos.*, 11 A.D.3d 595, 782 N.Y.S.2d 660 (2d Dep't 2004); *Moore v. Ewing*, 9 A.D.3d 484, 781 N.Y.S.2d 51 (2d Dep't 2004); *Halali v. Evanston Ins. Co.*, 8 A.D.3d 431, 779 N.Y.S.2d 119 (2d Dep't 2004); *79th Realty Co. v. Wausau Ins. Cos.*, 7 A.D.3d 507, 776 N.Y.S.2d 96 (2d Dep't 2004); *Hartford Ins. Co. v. Nassau County*, 46 N.Y.2d 1028, 416 N.Y.S.2d 539 (1979); *see also Mount Vernon Hous. Auth. v. Pub. Serv. Mut. Ins. Co.*, 267 A.D.2d 285, 699 N.Y.S.2d 905 (2d Dep't 1999).

13. *See Mount Vernon Hous. Auth.*, 267 A.D.2d 285; *Ward v. Corbally, Gartland and Rappleyea*, 207 A.D.2d 342, 615 N.Y.S.2d 430 (2d Dep't 1994).

14. 13 A.D.3d 227, 787 N.Y.S.2d 22 (1st Dep't 2004), *rev'd*, 5 N.Y.3d 742, 800 N.Y.S.2d 521 (2005).

15. 97 N.Y.2d 491, 493, 743 N.Y.S.2d 53 (2002).

16. *Great Canal Realty Corp.*, 13 A.D.3d at 235–36.

17. 97 N.Y.2d at 493.

18. *Id.* at 491.

19. *Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 794 N.Y.S.2d 704 (2005); *Rekemeyer v. State Farm Mut. Auto. Ins. Co.*, 4 N.Y.3d 468, 796 N.Y.S.2d 13 (2005).

20. 4 N.Y.3d 468.

21. 97 N.Y.2d 491, 494–95, 498, 743 N.Y.S.2d 53 (2002).

22. 4 N.Y.3d at 475–76 (citations omitted).

23. 4 N.Y.3d 332.

24. *Id.* at 339–40.

BY RICHARD S. ROTHBERG

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The Deductible New York Estate Tax

Beginning with deaths on or after January 1, 2005, the federal estate tax law permits a deduction, under Internal Revenue Code (I.R.C.) § 2058, for state death taxes, in lieu of the credit under I.R.C. § 2011, which was phased out gradually between 2002 and 2004. This deduction is decidedly a mixed blessing and requires careful planning to deal with the side effects, which estate practitioners began to see on October 1, 2005, when estate tax returns first became due for estates eligible for the new deduction.

For illustration, assume a New York decedent, all of whose property is in New York, with an estate of $1.5 million, no history of taxable gifts, and no spouse. For federal purposes, there is no estate tax because the applicable credit amount, $1.5 million in 2005, is sufficient. New York will assess an estate tax of $64,400. The tax arises because two elements of New York estate tax law do not conform to federal law. First, under Tax Law § 951(a), the "unified" credit allowable under federal law, and thus entitled to be considered in computing the New York estate tax, does not permit a "shelter" of more than $1 million. Second, under Tax Law §§ 951(a) and 952(a), New York assesses an estate tax on a fictional federal credit for state death taxes as the law stood on July 22, 1998, not as it exists today. The federal credit for state death taxes on a New York decedent dying before the enactment of the "phase out" of such credit and having a taxable estate of $1.5 million would have been $64,400. New York therefore assesses a tax in that amount, even though there is no "real" credit and no federal tax.

The deduction for the New York estate tax is worthless for federal estate tax purposes because there is no federal tax. How about for New York estate tax purposes? May the tax be deducted from the tax base for the purpose of computing the New York tax? If yes, an interrelated computation would be required to determine the tax, because deduction of the tax reduces the tax base, and thus the tax itself. Happily for the mathematically challenged, but unhappily for the families of decedents, the New York Department of Taxation and Finance (NYDTF) has announced that, at least in their opinion, the answer is no. (This is NYDTF's announced position on the issue as stated on its official Web site.) Apparently, NYDTF believes that the frozen cross-reference to the Internal Revenue Code contained in Tax Law § 951(a) requires that the amendment allowing the deduction be ignored, along with the amendments disallowing the state death tax credit and increasing the unified credit.

More complex issues are presented if the estate is large enough to generate a federal estate tax. Take, for example, a gross estate of $3 million – again with no spouse – net after other deductions (such as funeral expenses, professional fees and commissions). Such an estate would generate a (fictional) state death tax credit of $182,000. This amount will be assessed as a New York estate tax. Since this tax is deductible for federal estate tax purposes, it will reduce the federal taxable estate by $182,000. For deaths in 2005 the marginal bracket in such an estate is 47%, so the deduction will reduce the federal estate tax by $85,540. Here again, it is apparently the position of NYDTF that the deduction must be disregarded for the purpose of computing a hypothetical federal taxable estate, from which a fictional state death tax credit is derived, and in turn from which the New York estate tax is computed. New York thus penalizes its estates in three ways by refusing to recognize post-1998 amendments to the federal estate tax: first, by not recognizing the § 2058 deduction in computing the taxable estate; second, by using a fictional, rather than the real, state death tax credit to compute a tax based on the artificially augmented taxable estate; and third, by not recognizing the increased unified credit, causing the fictional state death tax credit to "kick in" at a lower value.

Now consider the effect of the New York estate tax on the estate of a married decedent. Three different cases should be considered: first, the testator wishes to reduce all estate taxes to zero by maximum use of the marital deduction; second, the testator wishes to reduce the federal estate tax to zero but is willing to allow payment of the New York estate tax in order to maximize the "credit shelter"; and third, the testator wishes to leave the spouse a non-formula benefit (such as a one-third elective share).

For simplicity, this analysis will consider all three cases in the context of a decedent dying in 2005 with a gross estate of $3 million, consisting entirely of New York property, in which deductions other than state death taxes and the marital deduction are ignored.

In the first case, the intent is to claim a marital deduction of $2 million, leaving a credit shelter of $1 million, which is permitted for both New York and federal purposes. Here, there is not even a fictional federal credit for state death taxes (which would cause a New York estate tax) because the "unified" credit is applied first, and thus there is no New York estate tax. Since there is nothing to deduct on the federal return, the analysis stops there. In order to get this result, an estate planner who wishes to define the allocation with a formula must be sure that the credit shelter formula clause directs the reduction of all death taxes to zero. A formula referencing only the federal estate tax won't accomplish the intended goal, because a federal taxable estate as high as $1.5 million will not generate a federal estate tax but will generate a New York estate tax.

In some states, but unhappily not in New York, all taxes may be reduced to zero without reducing the credit shelter to $1 million, by making an "independent" state QTIP election for the extra $500,000. In such a state, there will be no state estate tax on a federal credit shelter of $1.5 million, and thus no state estate tax. (At this writing, New Jersey, Massachusetts and Pennsylvania, among others, permit such an election.)

In the second case, a New York estate tax is generated. This is the price to be paid for augmenting the credit shelter. How much is the tax, and by how much is the credit shelter augmented? The answer requires an inter-related computation. By definition, the federal taxable estate, computed for federal purposes, is $1.5 million (which is the maximum value available without generating a federal tax). To reduce the federal gross estate from $3 million to $1.5 million, there must be deductions totaling $1.5 million. Since the New York estate tax is deductible for federal purposes, a formula that directs the reduction of the federal estate tax to zero will result in a marital bequest and New York estate tax, the sum of which is $1.5 million. It turns out that a direction to maximize the credit shelter while still reducing the federal estate tax to zero has only one mathematical solution, regardless what tax apportionment is chosen. That solution is a marital bequest of $1,431,197, a New York estate tax of $68,803, and a credit shelter of $1.5 million.

It should be noted that the above solution has resulted in apportioning the New York estate tax against the marital bequest. Any marital bequest higher than $1,431,197 will reduce the federal taxable estate to less than $1.5 million, because the New York estate tax will decrease by less than the increase in the marital deduction. A formula which seeks to maximize the credit shelter, while still reducing the federal estate tax to zero, will automatically apportion the tax against the marital bequest. It is inconsistent with that formula to apportion the New York estate tax against the credit shelter. A will which simultaneously directs the creation of a maximum credit shelter and directs apportionment of the New York estate tax against that credit shelter is expressing a contradiction in terms and should be changed. Otherwise it will contain an ambiguity as to whether the intention is a credit shelter of $1.5 million (which maximizes the credit shelter but forces the marital bequest to absorb the tax) or $1,431,197 (which apportions the tax against the credit shelter but, for federal purposes, wastes the value of the § 2058 deduction). A corollary of this analysis is that a will which is silent about tax apportionment will also contain this ambiguity, because the default apportionment rule, Estates, Powers & Trusts Law (EPTL) 2-1.8(c)(1) and (2), apportions the tax against the taxable dispositions. Careful drafting is therefore critical to achieving the desired result.

A formula which seeks to maximize the credit shelter, while still reducing the federal tax to zero, will automatically apportion the tax against the marital bequest.

In the above analysis, nothing is assumed about how the credit shelter is used, only that the federal credit shelter is maximized. If, in the above example, the $1.5 million credit shelter bequest is left to a trust substantially benefiting the surviving spouse, but for which a marital deduction is not claimed, the allocation of burden of the New York estate tax will not have a significant economic effect. The only consequence of requiring the credit shelter to absorb the tax burden is to waste the benefit of the § 2058 deduction and increase the amount (that is, the marital bequest) which is (or may be) subject to estate tax at the second death.

In the third case, the testator desires to leave a marital bequest that is not tax-driven. An example of such a case is a bequest of the minimal spousal share required by EPTL 5-1.1-A. What is that minimal spousal share, taking into account the federal deductibility of the New York estate tax? EPTL 5-1.1-A(a)(2) says it is one third of the net estate, and also says that "all estate taxes shall be disregarded, except that nothing contained herein relieves the surviving spouse from contributing to all such taxes the amounts apportioned against him or her under 2-1.8." EPTL 2-1.8 provides that, in general, the surviving spouse gets the benefit of the marital deduction. In the above example, the net estate is $3 million (because estate taxes are disregarded), so the spousal share is $1 million. The taxable estate for New York estate tax purposes is $2 million; the fictional "credit," and thus the New York estate tax, is $99,600. Nothing in the above example will result in the apportionment against the surviving spouse of any part of the New York estate tax. (The surviving spouse would be required to absorb an apportionment of estate taxes if, for example, a benefit received by the spouse satisfies the elective share but does not receive a marital deduction for estate tax purposes. One such case is a bequest to a non-citizen spouse.)

The above examples, complex as they are, ignore many factors which are frequently present and which will significantly complicate the analysis. Such factors might include property taxable in another state, which may or may not permit consideration of the § 2058 deduction in the computation of its tax; a history of adjusted taxable gifts; and administration costs for which an election must be made whether to claim an estate tax deduction or an income tax deduction. These elements are beyond the scope of this column but may vastly complicate estate planning and the administration of estates in the era of the "deductible" state estate tax. ■

This column is not intended or written to be used, and it cannot be used by any taxpayer, for the purpose of avoiding tax penalties. This notice is provided pursuant to U.S. Treasury Regulations governing tax practice.

President's Message
Continued From Page 6

in the preparation of an extensive and well-reasoned report which was presented to the House of Delegates preliminarily in November and will be considered for action in January 2006. We are grateful to Bernice and her task force for their work. While we cannot eliminate lawyer advertising – nor should we, as reasonable advertising can be a constructive information source for the public – we as a profession have a duty to advocate for effective controls within the First Amendment to ensure that advertisements are in keeping with our image as a profession.

I pledge to continue the effort of improving public understanding of the legal system during the remainder of my term. But complete success is not an overnight occurrence. Rather, a sustained effort over the long term is required. We are building on the work of my predecessors, and I am confident that my successors will continue. My sincere thanks to everyone who has noticed these efforts, because that means the message is being received.

I am pleased that much of what we have undertaken is in place or well along. But there is much yet to be done. My deep appreciation to all who have been involved as we continue to pursue these and other initiatives.

As always, your thoughts and suggestions would be much appreciated. ■

EDITOR'S NOTE

In our January 2006 issue, we published Derek B. Dorn's article "Same-Sex Marriage Under New York Law: Advising Clients in a State of Uncertainty." The author has submitted the following update:

After this article was on press, the Appellate Division (First Department) overturned the *Hernandez v. Robles* trial court decision. The majority held that the trial court judge had "usurped the Legislature's mandated role to make policy decisions as to which type of family unit works best for society and therefore should be encouraged with benefits and other preferences" and that the state has "a strong interest in fostering heterosexual marriage as the social institution that best forges a linkage between sex, procreation and child rearing." The plaintiffs are expected to appeal to the Court of Appeals.

BY LAURA LEE MANNINO

Supreme Court Rules on Tax Treatment of Attorneys' Contingent Fees

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A recent decision of the U.S. Supreme Court has resolved a split among the circuits on the issue of contingent attorney fees.[1] Specifically, the issue was whether a client can exclude from gross income the portion of recovery in litigation used to pay the client's attorney pursuant to a contingent fee agreement. Some circuits, including the Second Circuit, had previously held that the proper tax treatment turned on relevant state law. Other circuits had determined that the entire recovery was taxable to the client, regardless of state law. The issue, which was partially addressed by recent legislation, stems from interpretations of income and exclusions and has Alternative Minimum Tax implications.

Background

Income

The Internal Revenue Code of 1986, as amended ("Code" or I.R.C.) defines gross income as "all income from whatever source derived."[2] This definition has historically been interpreted broadly so that Congress may exercise its taxing authority provided by the U.S. Constitution. One expansive interpretation is a judicial doctrine known as anticipatory assignment of income. Generally, under this doctrine, a person cannot assign or shift his or her income to another person and thereby avoid income tax. The assignment of income is effectively ignored for tax purposes. When the assignee receives the income, the person who actually earned the income must include it in gross income for tax purposes.

The assignment of income doctrine was created by the Supreme Court in *Lucas v. Earl* in 1930.[3] In *Lucas*, a husband assigned one-half of his future earnings to his wife. In litigation, the husband argued that he did not have to include the income that was paid to his wife because he never actually received it. The Court disagreed, noting that he was the person who had earned the income, and thereby created the right to receive it, and he could not avoid tax by creating arrangements which would prevent his actual receipt of the income. The case is often cited for the proposition that one cannot attribute fruits "to a different tree from that on which they grew."[4]

Damages

The Code provides an exclusion from gross income for certain types of proceeds received as a result of litigation or settlement. Pursuant to I.R.C. § 104(a)(2), any damages (other than punitive) received "on account of personal physical injuries or physical sickness" can be excluded. For example, assume a taxpayer is injured in an automobile accident and as a result, she suffers medical damages, lost wages and pain and suffering. If the taxpayer is awarded damages for these claims, all of the damages will be considered to be "on account of personal physical injuries" and would be excludable under I.R.C. § 104(a)(2). Compare this example to one where the taxpayer is unlawfully terminated and brings a suit for lost wages. Although lost wages could be excluded in the prior example, here damages for lost wages must be included in the taxpayer's income because the damages result from a tort committed by the defendant, rather than from physical injuries to the plaintiff.[5]

Contingent attorney fees are not an issue where the proceeds from litigation or settlement can be excluded. Rather, the issue arises when the damages are not within I.R.C. § 104(a)(2) and therefore must be included. In these circumstances, taxpayers have argued that the portion of a recovery paid to an attorney as a contingent fee should not be included in income.

Alternative Minimum Tax

Ordinarily, expenses relating to attorneys' fees paid by an individual in connection with the determination, collection or refund of any tax is deductible by the individual as a miscellaneous itemized deduction under I.R.C. § 212.[6] However, this general rule is modified by the Alternative Minimum Tax (AMT), a special tax enacted to ensure that taxpayers with tax preference items pay at least a minimum amount of taxes despite such preference items.[7] Taxpayers are required to calculate their regular tax liability and AMT, and pay AMT to the extent it exceeds the regular tax. Several deductions that are allowed for regular tax purposes are subject to different rules or simply disallowed for purposes of calculating

AMT. Among those disallowed are the miscellaneous itemized deductions. Accordingly, a client cannot deduct the costs of attorneys' fees when computing AMT.

It should be noted that even where a deduction under I.R.C. § 212 is allowed (*i.e.*, the AMT does not apply), the deduction is limited. Miscellaneous itemized deductions are deductible to the extent that the total of all miscellaneous items exceeds 2% of the taxpayer's adjusted gross income. Where a taxpayer receives a large recovery that must be included in income, this 2% floor is substantially higher, limiting the amount of the deduction available under I.R.C. § 212.

New Legislation

Recently enacted legislation allows for the deduction of certain attorneys' fees in arriving at a taxpayer's adjusted gross income. The American Jobs Creation Act of 2004 (AJCA) created a deduction for attorneys' fees and court costs incurred in civil rights suits.[8] Although this new "above-the-line" deduction was an attempt by Congress to address the contingent fee issue, the new legislation only affects taxpayers involved in civil rights suits. Even after AJCA, the issue remained in other types of litigation where a taxpayer recovered taxable damages.

In *Lucas*, a husband assigned one-half of his future earnings to his wife. He argued that he did not have to include the income that was paid to his wife because he never actually received it.

Cases Consolidated on Appeal to the Supreme Court

***Commissioner v. Banaitis*[9]**

Facts

The underlying facts of *Banaitis* involved allegations of wrongful discharge from employment. Sigitas Banaitis was employed by the Bank of California from 1980 until 1987 as a vice president and loan officer. During these years, Banaitis gathered confidential and sensitive information from his clients, including financial, inventory, and profitability data. Aware of the private nature of this information, Banaitis and the Bank of California signed confidentiality agreements with their clients.

In 1984, while Banaitis was employed by the Bank of California, a controlling interest in the Bank of California was acquired by Mitsubishi Bank, a subsidiary of Mitsubishi Group, Ltd., which owned and controlled many companies that were in direct competition with the clients of Banaitis and the Bank of California. Even after Mitsubishi Bank obtained the controlling interest in the Bank of California, Banaitis remained faithful to the confidentiality agreements with his clients and refused to divulge any private information to employees of Mitsubishi Bank. This refusal caused Banaitis to receive poor employment evaluations, which described his business performance as dishonest, inadequate and improper. These evaluations caused Banaitis to be placed on work probation, and ultimately to lose his job at the end of 1987.

Prior Judicial History

In 1989, Banaitis retained a law firm with which he signed a contingent fee agreement. A suit was filed against Mitsubishi Bank and the Bank of California, in which Banaitis claimed that Mitsubishi Bank intentionally and willfully interfered with his employment with the Bank of California, causing his dismissal. Banaitis also claimed that he was wrongfully discharged by the Bank of California, and that the bank had attempted to influence him to breach the confidentiality agreements he had executed with his clients.

The parties ultimately settled during 1995. Banaitis, the Bank of California and Mitsubishi Bank executed a confidential settlement agreement, pursuant to which the total amount of damages paid by the two banks was $8,728,559. Of this amount, $3,864,012 was paid directly from the Bank of California to Banaitis's attorneys, pursuant to the settlement agreement.

Banaitis excluded all of the damages (*i.e.*, $8,728,559) from income in his 1995 federal income tax return. A disclosure statement attached to the return stated that although he received damages as a result of litigation, he was taking the position that compensatory damages, punitive damages, and damages used to pay attorneys' fees were excludable from gross income under I.R.C. § 104(a)(2). The Internal Revenue Service (IRS) disagreed and issued a notice of deficiency to Banaitis relating to his 1995 taxes. Inclusion of the damages caused the AMT to apply, and the IRS found that Banaitis owed additional taxes of $1,708,216 for 1995. Banaitis sought a redetermination of the deficiency in the United States Tax Court. The Tax Court held for the IRS, finding that no part of the damages was excludable from gross income. Banaitis then appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit's Opinion

The Ninth Circuit affirmed the Tax Court's finding that the economic and punitive damages must be included in Banaitis's gross income for 1995. Although Banaitis did suffer physical ailments such as headaches and insomnia, the damages were awarded as a result of his improper termination rather than his physical ailments. Accordingly, I.R.C. § 104(a)(2) was not applicable.

The Ninth Circuit departed from the Tax Court, however, on the issue of whether the damages used to pay attorneys' fees under a contingent fee arrangement should be included in Banaitis's income. The circuit court held that the outcome should be based on the treatment of such fees under the relevant state law. If as a result of state law, an attorney has property interests in the cause of action which are superior to those of the client, the portion of the client's damages which are used to pay the attorney pursuant to a contingent fee agreement should not be included in the client's gross income. However, if the attorney does not have such rights under state law, all damages – including that portion used to pay the attorney – must be included in the client's income. This "state-law-specific analysis," as the Ninth Circuit referred to it, was based on the theory that it would be improper to include all of the damages in the client's gross income if the attorney has rights and power over the suit or judgment.

In *Banaitis*, the relevant state law was that of Oregon, which gives an attorney "generous" property interests in his or her client's cause of action. Specifically, Oregon law grants attorneys the same rights and powers over proceedings and judgments to enforce their liens as their clients have.[10] Accordingly, the Ninth Circuit held that the attorneys' fees paid directly to Banaitis's attorney were not includable in Banaitis's income due to the attorneys' rights under Oregon law.

Commissioner v. Banks[11]

Facts and Prior Judicial History

John W. Banks was employed by the California Department of Education (CDOE) as an education consultant for 14 years. Following his termination from the CDOE in 1986, Banks retained an attorney with whom he entered into a contingent fee arrangement. Banks filed suit in federal district court claiming that he was the target of employment discrimination within Title VII of the Civil Rights Act of 1964. His original complaint also made other allegations, such as intentional infliction of emotional distress and slander.

After the trial commenced, the parties came to a settlement agreement whereby Banks agreed to CDOE's offer of $464,000 in satisfaction of his claims. However, Banks agreed to settle on the condition that the damages be characterized as compensation for personal injury in the settlement agreement, and the settlement agreement was executed as such in 1990. Of the $464,000 that Banks received, he paid $150,000 to his attorney in accordance with the contingent fee agreement. Banks filed his federal income tax return for 1990, excluding the full proceeds from the settlement.

Following examination of the 1990 return, the IRS determined that none of the proceeds from the settlement related to personal injuries, and therefore the full amount of the settlement proceeds should have been included in Banks's income. The IRS issued a notice of deficiency for the resulting tax liability, and Banks filed a petition for redetermination with the Tax Court. The Tax Court agreed with the IRS and held that the full recovery of $464,000 should have been included in Banks's income. Banks filed for appeal with the Sixth Circuit Court of Appeals.

The Sixth Circuit's Opinion

The Sixth Circuit found no relationship between the settlement and any personal injuries sustained by Banks, and accordingly affirmed the Tax Court's decision with regard to inclusion of the damages. The Sixth Circuit next reviewed its own precedent with regard to the issue of contingent attorneys' fees. Although it had previously adopted a state-law-specific analysis, it refused to do so in *Banks*, stating that "[g]iven the various distinctions among attorney's lien laws among the fifty states, such a 'state-by-state' approach would not provide reliable precedent . . . or provide sufficient notice to taxpayers as to our tax treatment of contingency-based attorneys fees paid from their respective jury awards."[12] Instead, the Sixth Circuit held that attorneys' fees are excludable from the client's gross income *regardless* of the attorneys' rights under the applicable state law.

In *Banaitis*, the relevant state law was that of Oregon, which gives an attorney "generous" property interests in his or her client's cause of action.

In addition, the Sixth Circuit noted that the assignment of income doctrine was not applicable. At the time a contingent fee agreement is signed, any potential recovery from the client's claim has not yet been earned by or vested in the client; it is merely an expectancy which depends in part upon the attorney's litigation skills. Since nothing exists which can be assigned to the attorney, the assignment of income doctrine is not applicable to the contingent fee situation. Instead, the litigation is more like a joint venture or partnership, where the client assigns part of the claim to the attorney. Referring to the fruit and tree metaphor used by the Supreme Court in *Lucas v. Earl*, the Sixth Circuit distinguished the contingent fee arrangement as a situation where the client "has transferred some of the trees in his orchard, not merely the fruit from the trees."[13] As such, the Sixth Circuit reversed the Tax Court and held that attorneys' fees paid by Banks pursuant to the contingent fee agreement were excludable from his gross income.

Split Among the Circuits

Most of the circuits had ruled on the contingent fee issue before it went to the Supreme Court, and a review of the relevant case law reveals that there had not been a uniform approach. As discussed above, the Sixth Circuit had held that the contingent attorney fees are *excluded* from the client's gross income regardless of state law. The Sixth Circuit was joined in this approach by the Fifth and Eleventh Circuits.[14] However, other circuits had explicitly stated that contingent attorney fees paid to an attorney are always *included* in the client's income, regardless of the attorney's rights under state law.[15] The Third, Fourth and Tenth Circuits had adopted this analysis. Finally, other circuits had applied a state-law-specific approach. Along with the Ninth, Seventh and Federal Circuits, this approach had also been adopted by the Second Circuit.[16]

The Second Circuit

The Second Circuit adopted an approach similar to that of the Ninth Circuit's in *Banaitis*. The issue arose under Vermont law in the case of *Raymond v. United States*.[17] *Raymond* involved a wrongful termination suit against IBM, in which the plaintiff agreed to pay his attorneys one-third of any recovery received. Raymond was successful in his suit against IBM, and was awarded approximately $900,000. IBM sent a check payable to Raymond to his attorneys. The law firm deposited approximately $300,000 as payment for services and forwarded the remainder to the plaintiff.

On his original 1998 tax return, Raymond included the entire amount of the recovery in gross income and took a deduction for the legal fees paid to the law firm. However, the large amount of the recovery caused Raymond to be subject to AMT, thereby disallowing his deduction for legal fees. Later in 1999, Raymond filed an amended return for 1998 in which the portion of the recovery used to pay his attorneys was excluded from his gross income. Due to the exclusion, Raymond was no longer subject to AMT, causing a lower tax liability for 1998 than his original return showed. Accordingly, Raymond sought a refund. The IRS denied the claim for refund on the ground that the entire amount of his recovery should have been included in gross income. Raymond filed suit in federal district court for the district of Vermont, which held that the portion of the recovery used to pay the contingent attorney fee was excludable from gross income. The IRS appealed to the Second Circuit Court of Appeals.

In approaching the issue, the Second Circuit focused on an attorney's rights in the client's recovery under Vermont state law. The court concluded that Vermont law does not give an attorney a proprietary interest in his client's recovery, and therefore Raymond must include the full amount of the recovery – including the portion used to pay the attorney fee – in gross income.

With regard to the effect of AMT, the Second Circuit stated:

> [T]he judgment flowing to Raymond is income to him, and the expense of producing that income – his attorney's fee – is a deductible expense. . . . That the Alternative Minimum Tax precludes Raymond from taking advantage of that deduction is unfortunate . . . but it is not a reason to create an artificial contingent-fee exception to the rule that one is taxable on income from a source over which one retains control.

Given the split among the circuits, it came as no surprise when the Supreme Court granted certiorari and agreed to review the *Banks* and *Banaitis* decisions.[18]

The Supreme Court's Opinion

Finding no proposition of law supporting exclusion, the Supreme Court unanimously reversed the decisions of the Sixth and Ninth Circuits and held that, "as a general rule, when a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee."[19] The opinion of the Court rested on the assignment-of-income doctrine. The Court agreed with the IRS that a contingent fee arrangement is an anticipatory assignment from the client to the attorney of the client's income from litigation. The Court noted that, in a typical situation, the relevant question in determining whether income has been assigned is whether the taxpayer had control over the income. However, in situations where the income has not yet been earned by the taxpayer – such as when entering into a fee agreement which is contingent on a future event – the relevant inquiry is whether the taxpayer has control over the income-generating asset. This inquiry follows from the idea that the person who controls the source of the income controls the disposition of the income. In the situation at hand, the income-generating asset was the client's cause of action and, at all times during litigation, control and dominion over the case remained with the client. Accordingly, all of the proceeds from litigation, including the portion used to pay a contingent attorney fee, must be included by the client. The Court further clarified that this rule of inclusion applies regardless of the rights given to attorneys under state law.

Conclusion

The Supreme Court has resolved the split among the circuits as to the treatment of contingent attorneys' fees in a manner that is consistent with the broad definition of gross income. Although the results may have been the same, many circuits must now change their approach to the issue. Courts that previously focused on the rights of the attorney under state law must abandon that method in favor of an absolute inclusion rule. For example, the Second Circuit's holding in *Raymond* was based on an analysis of Vermont law. Although the result of inclusion would be unchanged by the Supreme Court's decision in *Banks*, the Second Circuit must now adopt a position of inclusion, regardless of the applicable state law. Inclusion of the full recovery may cause a taxpayer to pay AMT, a result which will cause the taxpayer to lose the deduction for attorneys' fees. However unjust this seems, correction of the problem is not within the Court's power. Protection from such results could be remedied through allowance of an above-the-line deduction or alteration of the AMT – both of which are within the control of Congress, not the Supreme Court.

1. *Commissioner v. Banks*, 543 U.S. 426 (2005) (Chief Justice Rehnquist took no part in this decision).

2. I.R.C. § 61(a).

3. 281 U.S. 111 (1930).

4. *Id.* at 115.

5. *Commissioner v. Schleier*, 515 U.S. 323 (1995).

6. However, in order to prevent a double deduction, attorneys' fees relating to the recovery of damages that are exempt from tax under I.R.C. § 104(a)(2) may not be deducted. I.R.C. § 265(a)(1).

7. I.R.C. § 55.

8. The deduction is found in new I.R.C. § 62(a)(19).

9. 340 F.3d 1074 (9th Cir. 2003).

10. Or. Rev. Stat. § 87.840.

11. 345 F.3d 373 (6th Cir. 2003).

12. *Id.* at 385.

13. *Id.* at 384.

14. *Srivastava v. Commissioner*, 220 F.3d 353 (5th Cir. 2000); *Foster v. United States*, 249 F.3d 1275 (11th Cir. 2001).

15. *O'Brien v. Commissioner*, 319 F.2d 532 (3d Cir. 1963); *Young v. Commissioner*, 240 F.3d 369 (4th Cir. 2001); *see Campbell v. Commissioner*, 274 F.3d 1312 (10th Cir. 2001).

16. *Raymond v. United States*, 355 F.3d 107 (2d Cir. 2004); *Kenseth v. Commissioner*, 259 F.3d 881 (7th Cir. 2001); *Baylin v. United States*, 43 F.3d 1451 (Fed. Cir. 1995).

17. 355 F.3d 107.

18. *Commissioner v. Banks*, 541 U.S. 958 (2004) (*granting cert.*).

19. *Commissioner v. Banks*, 543 U.S. 426, __ (2005).

To the Forum:

While I was attending a cocktail party the other night, the host introduced me to another guest as an "employment lawyer." Before I could say a thing, this person started explaining to me that she was being sexually harassed at work and wanted to know if I could help her. Although I immediately tried to terminate the conversation, she persisted in relating a few of the details regarding her incipient claim.

I finally was able to explain to her that I really could not handle her case, because I represent only management in labor and employment matters. She then asked if I could recommend another lawyer who might be able to help her. As I was about to give her a name or two, she mentioned for the first time the name of her employer, who is one of my clients. With that news, I told her I wasn't sure if I could refer her to anyone else.

Knowing that she is interested in suing one of my firm's current clients, am I allowed to give her the name of another lawyer, even though that might be considered "adverse" to my client's interests? And whether I give her another lawyer's name or not, can I tell my client about this encounter?

Sincerely,
Cornered at a Cocktail Party

Dear Cornered:

Our sympathies! What started out as a pleasant social event has turned into a genuine ethical dilemma, requiring a fair amount of thought.

Let's begin with your referral question. It is not uncommon for lawyers to find themselves in a situation such as yours, where someone whose position is potentially, or even actually, adverse to a client asks for a referral. There is no specific New York guidance that might assist in resolving the issue. However, in December of 2004 the Legal Ethics Committee of the District of Columbia Bar tackled it, and concluded that it is ethically appropriate for a lawyer to make either a specific referral or to provide a list of possible referrals. DC Bar Op. No. 326 (2004).

The DC Committee's conclusion was based on two provisions of the DC Rules. The first was Rule 4.3, which is substantively identical to DR 7-104 of the New York Lawyer's Code of Professional Responsibility. This Rule provides that the only advice a lawyer may provide to an individual whose interests are adverse to the lawyer's client is the advice to secure counsel, even if it could be argued that the lawyer's own client might obtain a tactical advantage if the individual remained unrepresented.

Second, the DC Committee considered Rule 1.3 (equivalent to DR 7-101 and DR 7-102), which requires a lawyer to provide zealous representation to a client. The Committee noted that the obligation to zealously represent does not require a lawyer to press for every advantage for a client; for example, a lawyer may consent to an opponent's extension of time to respond in a matter. Further, there are times when zealous representation must be tempered by a lawyer's obligation to support the administration of justice (*e.g.*, a lawyer must reveal controlling authority to a court which is contrary to his or her client's best interests, even if the opponent misses it).

While the DC Committee's Opinion has spurred some robust debate among legal ethicists, it provides some degree of "safe harbor" to a lawyer who believes that a referral can be an appropriate response to the situation you have described. Our own State Bar Association Committee on Professional Ethics has not addressed the issue directly, but in other contexts has endorsed the same concepts that are the foundation of the DC Committee's conclusions.

For example, in NYSBA Formal Opinion 728, which has to do with the ethical obligations of government-employed attorneys, the New York Committee stated that the purpose of DR 7-104 was to "protect unrepresented people" and that "the legal system . . . functions best when persons in need of legal assistance . . . are represented by their own counsel." *See* EC 7-18. Based on these principles, the Committee concluded that advising an unrepresented adverse party of the need for counsel is not inconsistent with a government lawyer's duty of zealous representation, even if that lawyer might have been able to represent his or her own client more effectively if the adverse party did not hire counsel.

While the Committee was influenced to some degree by the fact that a government lawyer has a special responsibility to "seek justice," on balance Opinion 728 suggests that a lawyer – any lawyer – does not violate his or her duty to the client by advising an unrepresented adversary of the need to seek independent counsel. *See also* NYSBA Op. 477 (1977) (party's attorney may advise unrepresented person with adverse interests of specif-

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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ic legal issues which should be of concern to that person, and the need to consult an attorney with respect to those issues); N.Y. County Op. 708 (1995) (same). It should be noted, however, that the Opinion also states that a lawyer is not *obligated* to advise an unrepresented individual to seek independent legal advice, no matter how important doing so may be to that person. NYSBA Op. 728 (2000).

New York has recognized other limitations on the duty of zealous representation. For example, a lawyer who inadvertently receives an opponent's privileged information may have a duty to refrain from reviewing that material and to return it to her adversary, even if doing so might not be in her client's best interests. ABCNY Op. 2003-04 (2003). *See also* DR 7-106(B)(1) (lawyer has an obligation to advise a court of known controlling legal authority, if not disclosed by opposing counsel).

Accordingly, there is some basis to believe that if presented with this precise issue, ethics authorities in New York would reach a conclusion similar to that reached by the DC Committee.

The DC Committee's Opinion also offered some practical advice for lawyers, if confronted with this situation. Understanding that an existing client might not understand the propriety of a referral to an adverse party, and that a lawyer has no obligation to make such a referral, the Committee recognized that a lawyer might appropriately decline to make a referral as a matter of client relations. It also suggested that instead of recommending one particular attorney, the lawyer could provide the adverse party with a list of several possible referrals. The latter option may provide some "cover" to the referring lawyer in the event the attorney chosen by the adverse party does not work out, and might be found less problematic by the lawyer's own client.

The DC Opinion does not offer any guidance as to whether there is a need to advise adverse parties that you represent the person or entity with whom they have a dispute, enabling them to evaluate your referral with that factor in mind. It is not difficult to imagine the charge you may face if you do not make the disclosure, and the recommended attorney then does something like failing to act before the statute of limitations runs – or even if the referred individual is simply dissatisfied with the representation. Nonetheless, there does not appear to be any ethical obligation on your part to advise this person of your specific client connection.

Your second question – whether you can inform your client of this conversation – is a bit easier to answer. Pursuant to DR 4-101, a client "confidence" is defined as information protected by the attorney-client privilege. A client "secret" is any other information gained in the professional relationship that the client has asked be held inviolate, or the disclosure of which would likely be detrimental or embarrassing to the client. Whether it is a "confidence" or a "secret," information obtained by the lawyer cannot be disclosed without the client's consent. Therefore, the only question is whether the person who interacted with you at the party is a "client" who is entitled to the benefit of this duty of confidentiality. Although "no" may spring easily to the lips, it should be remembered that initially she did ask you about representing her, and a "client" can include a prospective client, even if an engagement does not result. Under such circumstances, confidentiality *may* attach to the information learned in an initial conversation, such as the one you had with her. *See, e.g.*, ABA Op. 90-358 (1990); ABCNY Op. 2001-01 (2001) (where a prospective client provides even unsolicited information to a lawyer (via the lawyer's Web site), and the lawyer has provided no disclaimer warning that such information will not be treated as confidential, the lawyer must treat it as confidential).

The specific dilemma posed by the social context of your contact was actually addressed in Formal Opinion 2003-161 issued by the California Bar Association Committee on Professional Responsibility and Conduct. Based on that Opinion, confidentiality may well depend on whether the individual had a reasonable belief that she was consulting you in your professional capacity. While the context of a conversation in a social setting certainly militates against such a conclusion, that alone may not be determinative. For example, if a guest introduced to you immediately launches into her story upon learning that you are a lawyer, a timely statement letting her know that you really cannot talk to her about it may be sufficient to undermine any claimed expectation of confidentiality. On the other hand, if your host introduces you to the guest as a "labor and employment lawyer who might be able to help" and you then politely listen to the entire story, the social setting alone may not be enough to overcome the guest's expectation that she was consulting you in your professional capacity; as a result, confidentiality may attach.

In your case, the guest made it clear that she was interested in your help, and so to be on the safe side anything she told you after that should not be disclosed – at least up to the point that you let her know that you could not represent her, and any other statement of yours to the effect that you could not be expected to treat what she said as confidential.

Finally, while it sounds as though you handled your initial contact with this individual about as well as it could have been handled, your inquiry illustrates just how important it can be to receive as little information as possible from a prospective client before deciding if a conflict exists, and, relatedly, whether to take the case. Even an initial, brief conversation with a prospective client can prevent a lawyer from representing someone else adverse to that person if "too much" information is obtained and/or adequate disclaimers and consents are not secured in advance. If a lawyer meets initially with a prospective client and secures her whole story, but later discovers that a conflict exists and declines the representation, the lawyer may be precluded from representing even a pre-existing client in a matter adverse to that prospective client, if it is related to the initial conversation. *See* ABCNY Op. 2001-01 (2001); Nassau County Op. 98-9 (1998).

Generally, to lessen the risk of later disqualification in the traditional "initial consultation" context, an attorney involved in a discussion with a prospective client should: (1) initially advise the prospective client (and secure his or her consent) that information needed to check for conflicts and/or to determine whether to undertake the representation will not be treated as confidential in the event representation does not ensue (therefore, the prospective client needs to be circumspect in how much information to provide initially); (2) initially limit the information received to the minimum required to conduct a conflicts check; and (3) thereafter continue to limit information received to the minimum required to determine whether to undertake the representation. If a conflict is uncovered at a multi-attorney firm, the lawyer who obtained information from a prospective client should be screened from any involvement in matters that were undertaken on behalf of an existing client whose interests are or may be adverse to the prospective client's. While New York's Code of Professional Responsibility does not currently recognize screening as a method of avoiding a disqualifying conflict, there is judicial authority recognizing that it can be effective to avoid disqualification, particularly in federal court. *See Cummin v. Cummin*, 264 A.D.2d 637, 695 N.Y.S.2d 346 (1st Dep't 1999); *see also Interpetrol Bermuda, Ltd. v. Rosenwasser*, No. 86 Civ. 5631, 1988 WL 140801 (S.D.N.Y. Dec. 20, 1988).

However, your case is not the traditional "initial consultation" case, in which you invite the consultation. While, as noted above, this type of unsolicited communication may well be subject to a duty of confidentiality, it has been recognized in an analogous context that "to disqualify a lawyer who receives an unsolicited communication would transgress the boundaries of ethics or common sense." ABCNY Op. 2001-01 (2001) (arising in the context of an unsolicited email communication).

In sum, if you limited the conversation to the minimum and a dispute does later arise between this guest and your employer client, your firm should be able to handle the case. On the other hand, if you permitted the guest to continue her story without any attempt at cutting her off, all the while knowing that she was looking for counsel, it is possible that you could have "heard too much" and may have permitted an attorney-client relationship to develop. This could create a disqualifying conflict situation for both you and your firm. The fact is, being "too polite" in these settings can create some regrettable, yet avoidable, hazards.

The Forum, by
John Gaal, Esq.
Bond, Schoeneck & King, PLLC
Syracuse, New York

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a senior associate, hoping to soon become a partner, at a mid-size but very successful firm. The final challenge for all senior associates in my position is handling a case under the personal supervision of the firm's founding partner. The matter I describe below is that case, and thus is my big chance.

One of our large clients is a real estate brokerage firm. This client has informed us that a number of individuals who are members of minority groups suspect that the client steered them away from desirable homes. If this is true, it would be of course both tortious and illegal. No action has yet been filed, but the client has learned that a national civil rights organization plans to send "testers" into the areas where it conducts business, with the goal of creating a record that will support claims of discrimination.

Our client has obtained an impressively detailed summary and explanation of the organization's plans (as to how, I was told "don't ask"). The information includes the pseudonyms the testers will use and the dates on which they will contact our client, posing as homebuyers. The organization does not have the funds to purchase even one house, and therefore the testers will not make any offers; the strategy will be to show that members of minority groups were never even shown any desirable homes. The information in the client's possession also indicates that the testers will be encouraged to describe their experiences to prosecutors and to testify later in court in a "results-oriented" fashion.

The founding partner told the client that he considers the use of testers to be immoral, and that he believes it is not allowed under New York law. I have been assigned to hire "counter-testers": homeowners who will pose as sellers, whose homes the client will show to the testers so as to frustrate the testers' intent to produce a favorable record.

All this might be very interesting and even exciting, but for one hitch. A close friend of mine recently left the employ of this client, and, based on what she told me, I have little doubt that it does indeed engage in discrimination and "steering" of a most reprehensible nature.

What can I do? What should I do?
Sincerely,
Torn on the Partnership Track

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Attorneys Matthew Leeds, of Bryan Cave LLP, and Richard Bernstein, of Lowenstein Sandler P.C., submitted the following: Contracts often contain a provision mandating a choice of law. The sentence typically states, "This agreement shall be governed by the laws of the State of New Jersey without reference to conflicts of law provisions." Is "conflicts of law" correct as it is written?

Answer: Not if the statement means that the provisions are about conflicts of law. The rule is that whenever a compound modifier (two words or more expressing a single idea) precede the noun that they modify, the words are joined by hyphens. However, if the compound modifier follows the noun, omit the hyphens. Thus both of the following sentences are correct:

- This agreement shall be governed by the laws of the State of New Jersey without reference to conflicts-of-law provisions.
- This agreement shall be governed by the laws of the State of New Jersey without reference to provisions regarding conflicts of law.

Readers have sent other questions about compound modifiers. One reader wrote, "In my office, several secretaries and one attorney are going around and around about where to put the hyphen in the phrase "the above referred to document." I told the reader to stop the round dance and write "the above-referred-to document," because all three words modify the noun as a group. The same subject was addressed sometime ago by Florida attorney Christopher Quarles, who criticized yellow-page advertisements headed, "board certified criminal lawyers." He correctly argued that the phrase should be "board-certified criminal lawyers."

There is one exception to the hyphen rule: when one of the two modifying words is an adverb that ends in "ly," no hyphen is required. One reader asked about the phrase "wholly owned," as in, "ABC Inc. is a wholly owned subsidiary of XYX, Inc.," which is correct as written. Other such phrases include:

- An unusually hostile defendant
- An unusually heinous crime.
- An impeccably credentialed witness.

Modifiers are joiners, and as such they change meanings and clear up ambiguity. How about the difference between "a marriage of forty odd years," and "a marriage of forty-odd years." Notice, also, the difference a hyphen makes in the phrases below:

- A little used sailboat.
- A little-used sailboat.
- Extra judicial duties
- Extra-judicial duties
- Recovered furniture
- Re-covered furniture
- A reformed contract
- A re-formed contract

In speech the difference in these phrases is indicated by intonation, but in writing, a hyphen does the job. A reader once sent me a heading he'd seen on a statistical table presented by the National Center for Education, in which the lack of a hyphen made a big difference. The heading read: "Mean Teacher Turnover Rates."

When it comes to hyphenating pairs of nouns, usage becomes a factor. When the pair is first introduced, the two nouns are usually separate. As people use the pair more often, they write them as a hyphenated phrase to indicate their unity. Finally, with frequent use, the two nouns are written as one. The process is seen in the following pairs:

- ice box ice-box icebox
- ball park ball-park ballpark
- pass book pass-book passbook

That is why you tend to write as one word, phrases that you commonly use in your profession, while the layperson tends to write the words separately or hyphenated.

The decision about whether to hyphenate adjective-noun phrases is also flexible. Would you write *bright-line*, *longterm*, and *heavyduty* (all of which my word processor tells me I've misspelled)? Or would you hyphenate them? And choice also governs suffixes like *-less*. You would probably write *harmless*, *careless*, and *selfless*, but how about *ambitionless*, *brainless*, and *meaningless?*

My favorite quotation about hyphens is a Yogi-ism. When he signed on as vice president of Yoo-Hoo Chocolate Beverage Corp., a woman asked Yogi Berra, "Is that hyphenated?" He answered, "Lady, it ain't even carbonated."

From the Mailbag:

In response to another reader's comment in the November/December Mailbag, which criticized the use of prepositions to end sentences (discussed in the July/August *Journal*), New York City attorney Edmund R. Rosenkrantz quoted Prime Minister Winston Churchill's famous retort to a proofreader who had moved Churchill's terminal prepositions to the middle of his sentences: "That is arrant nonsense up with which I shall not put." And another New York City attorney provided this poem, which I had not previously read:

> The grammar has a rule absurd
> Which I would call an outworn myth:
> "A preposition is a word
> You mustn't end a sentence with!"
> "No Rule to Be Afraid Of,"
> (Stanza 1)
> Berton Braley, 1881–1966

Finally, from Scotia, New York, attorney Kathryn McCary commented that my analysis of the use of the verb *conflate* as an expansion of meaning was interesting but probably incorrect. She suggests that, instead, *conflate* was used by the "twenty-something" as an inappropriate synonym of *confuse*. (Attorney McCary may be right.) ■

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).

THE LEGAL WRITER
CONTINUED FROM PAGE 64

submitted. As Chief Justice Marshall wrote, "The past cannot be recalled by the most absolute power."[10]

It's difficult to edit your work. To overcome that difficulty, distance yourself from your work. Doing so will make you objective and allow critical self-editing.[11]

Myth #5. Creativity is the essence of good legal writing.

Reality: Except in hard cases, the law doesn't reward creativity. It rewards logic and experience. Justice Holmes once wrote that "[t]he law is not the place for the artist or poet. The law is the calling of thinkers."[12] Thinkers follow format; they adhere to court rules. They don't invent new methods of legal writing or argue positions that lack support.

Lawyers must rely on precedent. A scientist who invents a novel approach is an innovator. Not so the lawyer. Imagine, in response to a judge's question "What's your authority for that?" you say: "It's my invention. No one ever thought of that before I did." Your creativity will go unappreciated.

Legal writers gain nothing reinventing the wheel. The most they can do is urge a change in the law that only legal authority itself can justify.

Myth #6. Good legal writers write for themselves.

Reality: Good legal writers write for their readers: "[E]ffective writers do not merely express, but transform their ideas to meet the needs of their audience."[13]

Lawyers, who write different documents for different audiences, must identify their audience. In a brief, the audience is the judge, not the client or opposing counsel. To write persuasively, a lawyer must grab a judge's attention quickly, argue concisely, and express clearly the relief sought. Techniques that fail with judges are

- throwing in the kitchen sink instead of picking winning arguments and developing them;
- attacking opposing counsel and other judges (even when they deserve it);
- offering up a historical treatise instead of arguing an issue;
- writing facts in a conclusory way;
- using adverbs and adjectives instead of nouns and verbs;[14]
- using intensifiers and qualifiers;[15]
- shouting at readers with false emphatics like italics, underlining, bold, and capitals;[16]
- not applying fact to law;
- overstating anything, because understatement is a key to persuasion;
- using long quotations or, worse, misquoting and misciting;
- not opening with an orientation, or roadmap, to tell readers where they're headed; and
- dwelling on givens.

Dwelling on givens fails with nonjudges as well. An associate writing to a partner specializing in an area of law shouldn't include every step in the analysis. The partner will understand the writing in its legal context.[17]

If your audience is unknown, "assume that your readers will be generalists unversed in special technicalities."[18] That way you'll address not only lawyers and judges, who are familiar with legal technicalities, but also nonlawyers, who appreciate writing they understand.

Myth #7. Boilerplate is good.

Reality: Many legal-writing professors give students model briefs to imitate. That's fine if students will copy format and see which techniques work and which fail but counterproductive if they pattern ideas on them. Allowing imitation gives "the erroneous impression that the writing process is separate from the thinking process and divorced from the analytical process."[19] A lawyer's real work is researching and fact-gathering. Thus, "most of [the] writing effort . . . is done out of a sense of requirement on behalf of the client ('this needs to be in writing'), not of opportunity on behalf of the writer ('since I need to think this out clearly, I will write it out')."[20]

To communicate research and fact to a judge, a client, or another lawyer, the lawyer must excel in legal writing. Writing is linked to thinking: "As you draft a legal document, you will find that the process of putting your thoughts in writing will sharpen and deepen your understanding of the analysis . . . ."[21] Boilerplate forms speed mundane, routine work. They offer elements that a legal document must include. And they show required office or court format. But relying on them for an important or complex case can lead to malpractice.

> You'll never start, or you'll start the night before your brief is due, if you insist on knowing everything before you begin.

Myth #8. Writing a lengthy brief is harder and takes more time than writing a short one.

Reality: Writing something short, concise, and pointed is harder than writing something lengthy or rambling. Pascal noted this phenomenon in the seventeenth century: "I have made this letter longer than usual because I lack the time to make it shorter."[22] Although it's more difficult to write something short and concise, courts need short and concise writing.[23] A lengthy brief suggests that a lawyer didn't do "enough work on the finished product."[24]

Myth #9. If you have little to say about something, even something important, don't devote much space to it.

Reality: If you've nothing to say, or nothing good to say, don't say it. The same applies to writing. Consider James Russell Lowell's comment about the loquacious: "In general those who have nothing to say, contrive to spend the longest time in doing it."[25] But something that must be communicated will get lost if little space is devoted to it. Because many courts enforce page limits on lawyers' briefs, ensure that each word tells and that every sentence expresses something important. Expand your important points to give them the stress they deserve. And never take shortcuts at the expense of clarity.[26]

Myth #10. Know everything about your case before you begin to write.

Reality: Some argue that "[a]n effective brief is fully thought through before a word is set to paper."[27] But you'll never start to write, or you'll start to write the night before your brief is due, if you insist on knowing everything before you begin. The key is to know everything by the time you're done. You can always change focus in midstream, especially if you compose on a computer. Outlining in advance and constant editing will control your writing.

Lawyers and judges worry about different things. Judges don't stay up nights wondering how a lawyer should argue a case. Lawyers don't have to worry about deciding a case correctly. This means in a persuasive brief that you, as the advocate, should spot issues and apply and argue fact and law to those issues — and not think about stuff over which you've no control. If you argue issues and not case law or theory, you'll see that unless you're arguing before a high appellate court, you don't have to understand every nuance to get started and make your best case persuasively and ethically. Just pick your issues and figure out what facts, rules, and citations go with each issue.

Stay tuned for Part II of this column. Until then, turn myth into reality. ■

1. John D. Feerick, *Writing Like a Lawyer*, 21 Fordham Urb. L.J. 381, 381 (1994).

2. Tom Arnold & Jack C. Goldstein, *Persuasion in Brief and Oral Argument*, 350 Prac. L. Inst./Pat. 921, 925 (1992) (quoting Robert L. Simmons, Trials to the Court).

3. *See, e.g.*, Am. Bar Ass'n, Legal Education and Professional Development — An Educational Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 264 (1992) (MacCrate Report).

4. *See, e.g.*, Debra R. Cohen, Competent Legal Writing — A Lawyer's Professional Responsibility, 67 U. Cin. L. Rev. 491 (1991).

5. Frank E. Cooper, Writing in Law Practice 1 (1963).

6. Am. Bar Ass'n, Sect. on Jud. Admin., Comm. Rpt., *Internal Operating Procedures of Appellate Courts* 31 (1961).

7. Bernard E. Witkin, *Manual on Appellate Court Opinions* § 103, at 204-05 (1977) (emphasis in original).

8. John Lovell, *Literary Lawyers*, 17 Me. B.J. 217, 217 (2002).

9. Kent Haruf, Writers on Writing, *To See Your Story Clearly, Start by Pulling the Wool over Your Own Eyes*, N.Y. Times, Nov. 20, 2000, at E1, col. 1 (noting also that John Cheever wrote in his underwear and Thomas Wolfe over a refrigerator).

10. *Fletcher v. Peck*, 10 U.S. [6 Cranch] 87, 135 (1810).

11. For a self-critiquing method, see Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 J. Legal Writing Inst. 175 (1997).

12. Oliver Wendell Holmes, *quoted* in Case & Comment 16 (Mar./Apr. 1979).

13. Nancy Soonpaa, *Using Composition Theory and Scholarship to Teach Legal Writing More Effectively*, 3 J. Legal Writing Inst. 81, 91 (1997).

14. Peter D. Baird, *Persuasion 101*, 15 Experience 26, 28 (Fall 2004) ("Use nouns and verbs to show rather than adverbs and adjectives to tell because 'He raced his Cadillac at 98 miles per hour' is stronger than 'He drove his vehicle dangerously and at a reckless rate of speed.'").

15. Adverbial intensifiers like "certainly," "obviously," and "undoubtedly" weaken writing. As Stephen King explained, "I believe the road to hell is paved in adverbs, and I will shout it from the rooftops." Brendan T. Beery, *Some Particularly Useless Words*, 82 Mich. B.J. 56, 57 (2003) (quoting Stephen King, On Writing 125 (2000)). The same is true for adjectives that prop up nouns or even other adjectives: "*Rather, very, little, pretty* — these are the leeches that infest the pond of prose, sucking the blood out of words." *Id.* (quoting William Strunk, Jr. & E.B. White, The Elements of Style 73 (4th ed. 2000)). Adverbial qualifiers like "generally," "traditionally," and "usually" are similarly harmful. They show a hesitant and doubtful writer. Make definite assertions. It's better to be wrong than cowardly.

16. Jonathan Byington, *How To Make Your Appellate Brief More "Readable,"* 48 Advocate (Idaho) 17, 18 (2005).

17. Diane V. Pratt, Legal Writing: A Systematic Approach 210 (1989).

18. Bryan A. Garner, The Elements of Legal Style 177 (1991).

19. Pamela Lysaght & Christine D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Circular Implications*, 2 J. Ass'n Legal Writing Directors 73, 95 (2004) (footnote omitted). Of course, legal-writing teachers are damned no matter what. Some first-year students will complain if they get models. Others will complain if they don't. Still others will complain about the models they get if they get any.

20. George D. Gopen, *The Professor and the Professionals: Teaching Writing to Lawyers and Judges*, 1 J. Legal Writing Inst. 70, 80 (1991).

21. Charles R. Calleros, Legal Method and Writing 9 (4th ed. 2002).

22. Blaise Pascal, Provential Letters xvi (*quoted in Hayes v. Solomon*, 597 F.2d 958, 986 n.22 (5th Cir. 1979) (Hill, J.), *cert. denied*, 444 U.S. 1078 (1980)).

23. "An attorney should not prejudice his case by being prolix. . . . Conciseness creates a favorable context and mood for . . . judges." Joseph R. Nolan, Massachusetts Practice: Appellate Procedure § 24, at 11 (1991) (*quoted in Commonwealth v. Anguilo*, 615 N.E.2d 155, 169 n.17 (Mass. 1993) (Liacos, J.)).

24. Tom Goldstein & Jethro K. Lieberman, The Lawyer's Guide to Writing Well 157 (2d ed. 2002) (quoting New York City lawyer Richard Emery).

25. James Russell Lowell (*quoted in* William H. Ginsburg, Winning Strategies and Techniques for Civil Litigators, Prac. L. Inst./Ref-Civlit. § 7.6, at 231 (2001)).

26. Strunk & White, *supra* note 15, at 79.

27. Judith S. Kaye, *Effective Brief Writing* § 2:27.70, at 108, 109, *unpublished paper printed in* 1 John W. Cooley, Callaghan's Appellate Advocacy Manual (Lawyer's ed. 1992) (*quoted in* Albert M. Rosenblatt, *Brief Writing and Oral Argument in Appellate Practice*, 24 Trial Lawyers Q. 22, 22 (1994)). Truly talented writers like Judges Kaye and Rosenblatt are able to think through writing before beginning to compose. Mortals like me, and perhaps you, are better off just starting to write.

Gerald Lebovits, a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct at New York Law School, has written *Advanced Judicial Opinion Writing*, from which this column is adapted. He thanks New York Law School student Sakima Kelly for assisting in researching this column. Due to an editing error, last month's column, "Academic Legal Writing: How to Write and Publish," thanked Justin Campoli for research assistance. The credit for assisting Judge Lebovits in researching that column goes to Ledan Chen, a student at New York Law School. Judge Lebovits's e-mail address is GLebovits@aol.com.

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BY GERALD LEBOVITS

Legal-Writing Myths — Part I

Don't begin a sentence with "and" or "but." Never end a sentence with a preposition. Splitting an infinitive is always bad. And those are just some of the myths folks ask lawyers to generally put up with. This two-part column explores The Legal Writer's favorite fallacies.

Myth #1. Literary style isn't important in legal writing.

Reality: You can't be a great lawyer, whatever your other qualities, unless you write well. As Fordham Law School's ex-Dean Feerick explained, "Without good legal writing, good lawyering is wasted, if not impossible."[1] Imperfect writing leads to imperfect results: "[A]bout as many cases are lost because of inadequate writing as from inadequate facts."[2]

Legal educators agree on little. But they all agree that legal writing is the most important skill future lawyers must acquire.[3] Legal ethicists have their debates. But they all agree that legal writing must be competent.[4] From University of Michigan Professor Cooper: "One of the singular distinctions of the legal profession is that lawyers have but one tool — language."[5]

Style is important. If good legal writing is critical to effective client representation — and it is — style is critical to good legal writing. A brief that "presents a sound statement of the law will hold its own regardless of its literary style . . . . But, the fact that substance comes before style does not warrant the conclusion that literary style is not important."[6] Good style for lawyers is that writing "should be *constructed* with good words, not plastered with them."[7]

Those who assume that style is unimportant see legal writing as complicated do's and dont's. The rules confound us, although the toughest are rules of legal style and general usage, not rules of grammar. Anyone who can speak English, though, can write English. To compose effectively, you don't need to know every rule, which can be learned one by one anyway. Nevertheless, the sooner you learn the rules, the better. After legal style comes literary style, and "with some talent and practice, it's not hugely difficult for a master of legal style to get comfortable with literary style."[8]

You don't get experience until after you need it. But just as you can drive a car without knowing how an engine works, to write effectively you needn't know the difference between syntax — the order of words in a sentence — and the parts of speech. With study, practice, and the right attitude, you can write as comfortably as you drive. Experienced motorists drive without thinking about every part of an engine. To fret constantly about an engine is never to arrive at the destination, or never to be happy with the trip. To fret constantly about usage is never to finish a document, or never to be happy with it.

Myth #2. Legal writing is subjective. Lawyers see so much bad writing, they've little incentive to improve their own writing.

Reality: Objective standards determine whether legal writing is good. People disagree only about the less-important aspects of legal writing. Precisely because so much legal writing is poor, lawyers should strive to write well. Poor writing goes unread or is misunderstood. Good writing is appreciated. Great writing is rewarded lavishly.

Perfection in writing is impossible. But perfection should be the goal, so long as perfection doesn't interfere with a deadline. Poor legal writing might result in an injustice for a client: a judge might misunderstand what a lawyer is seeking; an adversary might seize on an ambiguity. To avoid these problems, strive for perfection.

Myth #3. Write in a comfortable setting. Then finish a section before you take a break.

Reality: These are matters of personal preference. But most people find writing difficult. You'll finish faster and more concisely if you write in an uncomfortable setting. Justice Holmes, who suffered from knee injuries, wrote standing at a high desk. He said, "If I sit down, I write a long opinion and don't come to the point as quickly as I could." Ernest Hemingway, who wrote to the bone, also often wrote while standing.[9]

Writers who take a break between sections become complacent. They find it hard to resume quickly. A writer who takes a break in the middle of a sentence has an unenjoyable break but returns to work quickly. However you do write, do so at a time and place with few distractions.

Myth #4. Reread your writing soon after you submit it.

Reality: The time to edit your writing is before you submit it.

Rereading what you've written months later helps measure progress. Rereading something right after you submit it leads to frustration. Lawyers' egos are wrapped up in their writing, and nothing can be improved after it is

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