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The EPA's New Clean Air Rules

Mixed Results for Air Quality

by Mark D. Sullivan and Christine A. Fazio

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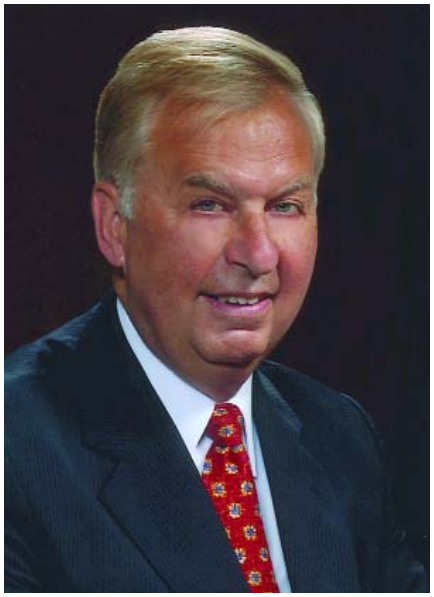
PRESIDENT'S MESSAGE

A. VINCENT BUZARD



More "New Federalism" From Congress

In my October 2005 President's Message, entitled "Whatever Happened to a Limited Federal Government?," I discussed the alarming trend of Congress legislating in areas previously reserved to the states and pointed out the hypocrisy of congressional leaders speaking in favor of states' rights, yet legislating in total contravention of those rights. Unfortunately, now that trend has taken an even more alarming form.

The House of Representatives has passed the so-called Lawsuit Abuse Reduction Act. The legislation would amend Rule 11 of the Federal Rules of Civil Procedure to require federal courts to impose sanctions on lawyers for filing frivolous lawsuits and would remove current "safe harbor" provisions, taking the system back to the discredited days when there was no such provision. Even worse, the legislation would also make the amended rule applicable to state civil actions where the state court determines, upon motion, that an action affects interstate commerce, which can be almost any case. Thus, the proposal is to take a badly amended Rule 11 and impose it upon the states.

The Lawsuit Abuse Reduction Act is alarming for a number of reasons. Obviously, imposing mandatory Rule 11 sanctions on individual state courts violates principles of federalism. This "states' rights" Congress is saying that it can usurp the role of state legislatures and courts regarding sanctions and impose a "one size fits all" law. The passage of the legislation would set an extraordinarily dangerous precedent for congressional meddling with state courts and would also disrupt state court proceedings.

At the federal level, there has been no demonstrated need to amend Rule 11 and return to the draconian days before there was a safe harbor. As is too often the case with Congress, there has been no study, no careful consideration, no opportunity for the states to be heard. The amendments to Rule 11 are also being proposed without following the time-tested procedures of the Rules Enabling Act (enacted in 1932), which provides that the judiciary has a central role in initiating judicial rulemaking and that there should be an opportunity for public comment, including from the bench, the bar, legal scholars, and the public, as well as Congress.

The amended Rule 11 would create a whole new cottage industry of ancillary litigation as to what conduct fits within the federal rule and what actions are sanctionable. Furthermore, the amendment is not addressed simply to particular types of actions, such as personal injury cases, but to all litigation. Historically, commercial litigation has been a source of novel legal theories that break new ground, so businesses could be adversely affected in the protection of their rights, as much as or more than personal injury plaintiffs. The legislation would prevent the kind of creative, cutting-edge, groundbreaking role lawyers and the legal system have played over the years. Some have said – correctly – that there is a great likelihood that the plaintiffs would not have prevailed in *Brown v. Board of Education* if revised Rule 11 had been in effect.

At my request, the Federal and Commercial Litigation Section prepared a report analyzing the Lawsuit Abuse Reduction Act. The report was considered by the House of Delegates at the November meeting, and the House unanimously opposed the proposed amendment of Rule 11. We are doing what we can to prevent this incredible intrusion into the rights of states.

Congress is moving on another front to pass legislation – without ade-

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quate study – that also would interfere with the balance between the federal and state system. Both houses of Congress are considering the so-called Streamlined Procedures Act of 2005. The legislation should be named "The Habeas Corpus Stripping Act," because it would strip the federal judiciary of jurisdiction to consider many claims of serious constitutional error arising from state court convictions.

In 1996, Congress adopted the federal Anti-Terrorism and Effective Death Penalty Act (AEDPA), overhauling the nation's habeas laws and generally narrowing when habeas corpus was available. There are no studies demonstrating that any additional restrictions are necessary, and the only available data show that there are no unreasonable delays under the current law.

The Streamlined Procedures Act would deprive federal courts of jurisdiction over habeas cases in myriad ways. It would prevent federal courts from reviewing virtually all claims that a state court refused to entertain because of procedural error and would require federal courts to dismiss with prejudice virtually all claims that have not been exhausted in state post-conviction proceedings. In addition, the proposed legislation would allow a petitioner to amend his petition only once; prohibit any amendment after the state's answer or the running of the statute of limitations, whichever is sooner; and eliminate the relation-back doctrine. It would also prohibit any equitable tolling of the one-year limitations period.

The proposed law would eliminate federal court jurisdiction over virtually every sentencing claim in capital cases. Federal courts would also be effectively deprived of jurisdiction to consider claims in state death penalty cases if the U.S. Attorney General certified that the relevant state provided competent counsel to indigent capital defendants in state post-conviction proceedings. Having the nation's chief prosecutor make such a determination obviously raises separation of powers concerns. There are a number of other egregious provisions, but you get the idea. These consequences would be particularly onerous for indigent defendants in New York State, which does not provide a right to counsel for collateral attacks upon a conviction. All of this comes at a time when exonerations of wrongly convicted persons make headlines every day. Justice would not have been attainable for many of them under the Streamlined Procedures Act.

Opposition to the legislation has been strong and diverse. Among the long list of those who have taken a stand against it are the National Conference of Chief Justices, the Conference of State Court Administrators, the Judicial Conference of the United States, and the American Bar Association. The issue has also been aggressively and effectively pursued by Norman Reimer, President of the New York County Lawyers' Association, who encouraged our own Criminal Justice Section to look at the issue. The result was a joint report, opposing the legislation, presented to the House of Delegates at our November meeting. The resolution in opposition passed unanimously. We are now urging Senators Schumer and Clinton to oppose the legislation, because the best chance of defeat is in the Senate.

All of this demonstrates the need for the Association to seek to influence federal legislation trampling on states' rights or adversely impacting the administration of justice. In that connection, we are developing a key contacts program to communicate with members of Congress. For my part, I am working to establish personal contacts with key members of our state delegation in Congress through our Governmental Relations office. If you have a relationship with any Senator or Representative and wish to help, please contact me at President@Nysbar.com.

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March 24	Albany, Buffalo
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Automobile Litigation: Update and Strategies

April 7	Buffalo, Westchester
April 21	Long Island
May 12	Albany
May 19	New York City

Representing Physicians and Dentists in the Disciplinary Process
(half-day program)

April 7	Long Island
April 28	New York City
May 5	Albany
May 19	Rochester

Ethics and Civility in Litigation: Introductory Lessons for 21st Century Litigators
(half-day program)

April 21	Albany, New York City
April 28	Buffalo
May 5	Long Island

Ethical Dilemmas in Matrimonial Cases
(half-day program)

April 28	Westchester
May 12	Long Island
May 19	Rochester
June 2	Albany
June 16	New York City

DWI on Trial—The Big Apple VI
(two-day program)

May 4–5	New York City

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May 5	Buffalo
May 12	New York City, Syracuse
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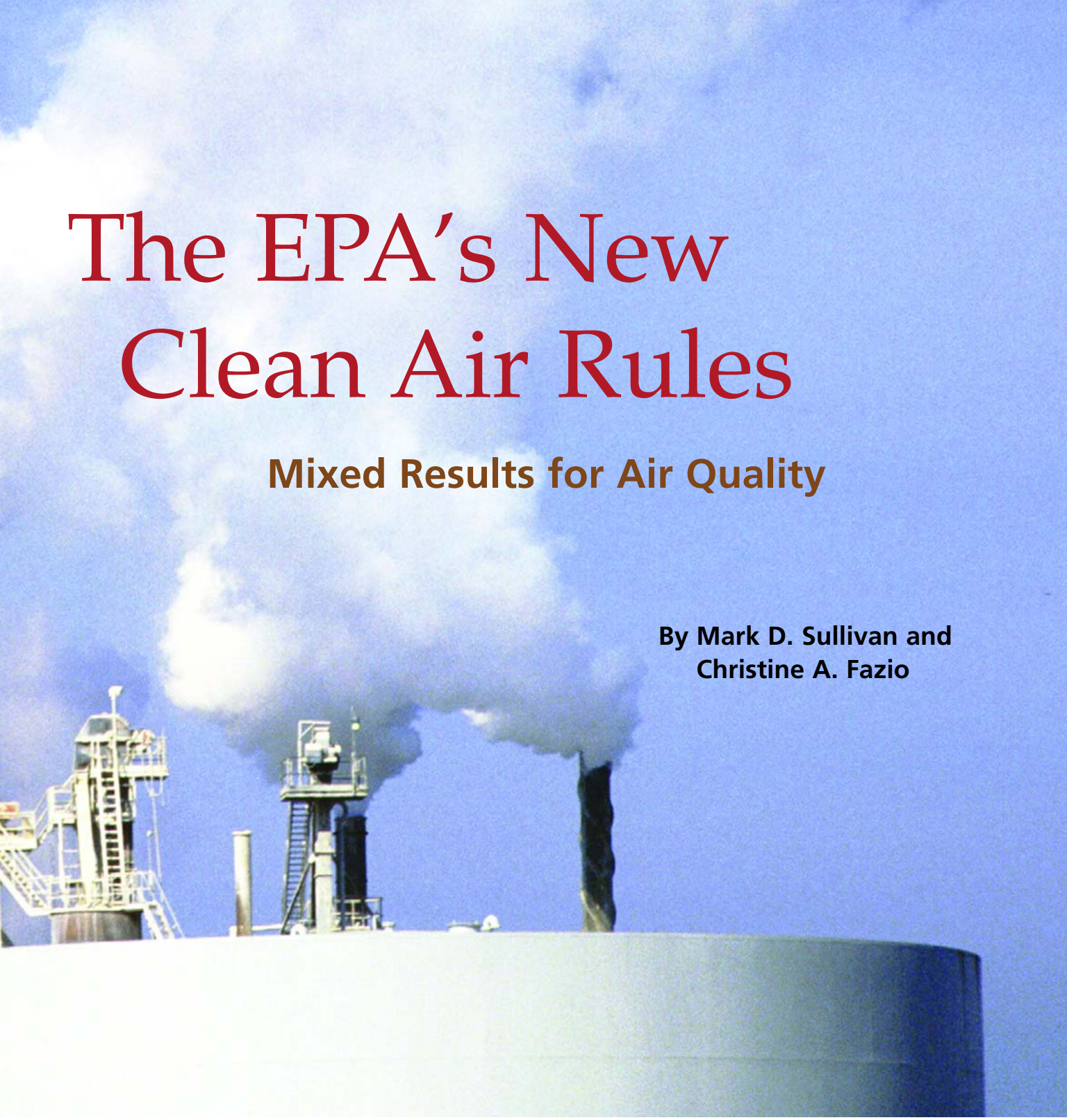

The EPA's New Clean Air Rules

Mixed Results for Air Quality

By Mark D. Sullivan and Christine A. Fazio

There is good news and bad news on the clean air front for New Yorkers. The good news is that the U.S. Environmental Protection Agency's new Clean Air Interstate Rule (CAIR), issued on March 10, 2005, will result in substantial reductions in fine particulate matter (often referred to as "PM2.5"), which has been shown to cause asthma and shorten lives, as well as other pollutant precursors that form smog and acid rain.[1] CAIR should result in major health benefits for New Yorkers – cleaner lakes and rivers and clearer air – and its costs will largely be borne by out-of-state power generators that contribute significantly to the air quality problems that plague the East Coast. CAIR will help many East Coast areas reach attainment for PM2.5 and ozone levels, which might not otherwise be possible by local action alone. CAIR has been praised by environmentalists and some industry groups as well; it has unquestionable and significant benefits for New Yorkers.

The bad news is that five days later the EPA relieved coal- and oil-fired generators from a requirement to install maximum achievable control technology (MACT) to reduce emissions of mercury, a dangerous neurotoxin now found in many eastern water bodies that are consequently subject to fish consumption advisories. In place of that rule, the EPA promulgated the Clean Air Mercury Rule, which will defer mercury emissions reductions for a decade or more.[2] The Mercury Rule has been severely criticized by public health advocates and environmental organizations alike. A coalition of states' attorneys general and a group of environmental organizations have separately challenged the rule in federal court.

This article will address the new emissions cap-and-trade program under CAIR, its benefits to regional air quality and its relationship to existing New York nitrogen oxide and sulfur dioxide cap-and-trade programs. This article then discusses EPA's Clean Air Mercury Rule and its shortcomings.

CAIR: NO_X and SO_2 Cap and Trade

CAIR recognizes that if New York and other eastern states are ever to solve their ozone and fine particulate matter problems, they cannot do so by acting alone. Because these are regional pollutants, midwestern and southern states must do more to reduce emissions, particularly from power plants.

CAIR will result in substantial reductions in the emissions of sulfur dioxide (SO_2) and nitrogen oxides (NO_x) in the eastern half of the United States.[3] SO_2 and NO_x contribute to the formation of PM2.5 and NO_x contributes to ground-level ozone. Both PM2.5 and ozone are responsible for thousands of premature deaths and illnesses each year; they also reduce visibility. SO_2 is one component of acid rain, which has plagued northeastern states, in particular the lakes in New York's Adirondacks, for many years.

CAIR covers 28 states and the District of Columbia, areas that the EPA determined "significantly contribute" to downwind non-attainment of EPA standards.[4] According to EPA estimates, CAIR will result in substantial reductions in air pollutants, as follows: (1) CAIR will reduce SO_2 emissions by 4.3 million tons by 2010 across the states covered by the rule, resulting in emissions 45% lower than 2003 levels, and by 5.4 million tons by 2015, resulting in emissions 57% lower than 2003 levels; (2) CAIR will reduce NO_x emissions by 1.7 million tons in the states covered by the rule by 2009, resulting in emissions 53% lower than 2003 levels; and by 2 million tons by 2015, resulting in emissions 61% lower than 2003 levels.[5]

CAIR's cap-and-trade program will be similar to the highly successful Acid Rain program, Title IV of the Clean Air Act (the "Act"). Under CAIR, EPA will allocate NO_x and SO_2 allowances to each state. Each affected state may either participate in the cap-and-trade program or implement a program of its own choosing to meet its emissions budget. For states that participate in the cap-and-trade program, as EPA anticipates, each state will distribute its allowances to the affected sources, typically power plants within the state. The power plants can then either install necessary emissions controls devices or buy allowances from other sources. The cap will be "tiered," with the first cuts required in 2009/2010 and then deeper cuts in 2015. As the program tightens, more sources will need to install controls. Sources will also need to comply with stringent emissions monitoring and reporting requirements, and will face automatic penalties for failure to meet their individual caps.[6]

Based on EPA's assessment of the emissions that contribute to interstate transport of air pollution and available control measures, CAIR will impose emission reduction requirements, for each state, that are "highly cost effective." That is, if states choose to regulate their power sector under the rule, and use the cap-and-trade approach, CAIR should be relatively painless. EPA believes that CAIR may result in $85 billion to $100 billion in annual health savings by 2015, annually preventing 17,000 premature deaths, millions of lost work and school days and tens of thousands of non-fatal heart attacks and hospital admissions.[7] The value of these benefits, EPA

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estimates, will exceed the cost of compliance and retrofit technology by 25 times.[8]

New York State is a designated non-attainment area for ozone, and the New York City metropolitan area, including Long Island, has recently been designated as non-attainment for fine particulate matter. Acid rain also continues to be a problem, particularly in the Adirondack region of the state. While New York has many rules in effect to address ozone, particulate matter and acid rain issues, New York needs help from its western neighbors. CAIR was developed in recognition of the need to address regional air quality problems on an interstate, multi-pollutant basis, and will significantly improve New York's chances of reaching attainment. Critics contend that deeper cuts can and should be made, and indeed deeper cuts surely will be required to bring many areas into attainment. However, CAIR is indeed a significant step forward for cleaner air in New York.[9]

Relationship With Other New York Programs

According to the New York State Department of Environmental Conservation (NYSDEC),

> [a]pproximately 26 percent of Adirondack lakes surveyed have completely lost their ability to neutralize acid and more than 70 percent of the sensitive lakes are at risk of episodic acidification. Based on the best available computer model projections, and assuming full implementation of the federal acid rain program, the number of acidic waters in the Adirondacks is still predicted to increase rather than decrease.[10]

While CAIR does not commence until 2009, utilities located in New York State must now comply with two recently promulgated state cap-and-trade rules intended, in part, to address this problem: 6 N.Y.C.R.R. Part 237, Acid Deposition Reduction (ADR) NO_x Budget Trading Program, and 6 N.Y.C.R.R. Part 238, ADR SO_2 Budget Trading Program. The two regulations are intended to reduce acid deposition in New York State by limiting emissions of NO_x during the non-ozone season and SO_2 year-round from fossil-fuel-fired electric generating units.[11]

The market could be very tight for utilities that depend on the purchase of allowances to comply with the regulations.

These two regulations would require utilities to reduce SO_2 emissions from New York sources to 50% of the levels provided under the federal Acid Rain program and would extend the existing NO_x Budget Program under 6 N.Y.C.R.R. Part 204 through the entire year.[12] New York's cap-and-trade program is comparable to CAIR in that the state will allocate NO_x and SO_2 allowances to power plants, and the power plants can comply either by installing emissions controls or by purchasing allowances from another in-state power plant that has over-controlled. The same strict monitoring and reporting requirements that will apply to CAIR sources apply under these two New York regulations as well. While the effective date of these two regulations was delayed because of ongoing litigation, the Appellate Division has recently held that the regulations are now properly adopted and thus are in effect.[13]

Under Parts 237 and 238, NYSDEC can award supplemental allowances for NO_x and SO_2 reductions (one ton of allowance for every three tons of reduction) achieved at an upwind source, which can be an out-of-state source if that particular state has an approved NO_x Budget State Implementation Plan program. NYSDEC will limit such awards by a percentage of the total number of allowances for a given year; facilities that achieve upwind reductions should file applications with NYSDEC promptly, as NYSDEC will award such allowances in the order in which a complete and approvable application is received.[14]

The market could be very tight for utilities that depend on the purchase of allowances to comply with the regulations, because Parts 237 and 238 apply only to New York State sources. (Under CAIR, the expectation is that most of the 28 states will choose to join and implement the cap-and-trade program and not enact their own command and control equivalent rule. Thus, more allowances should be available for purchase under CAIR.) It is questionable whether a market-based program that covers New York only will actually have a market for the purchase and sale of allowances, given the small number of power plants located within the state.

Nonetheless, New York is to be commended for recognizing the continuing problem caused by acid rain precursors and taking the lead in addressing the problem. The two regulations are also expected to have ancillary benefits by significantly reducing PM2.5 and mercury emissions.[15]

NYSDEC had budgeted 39,908 tons of NO_x for the 2004 control period and 197,046 tons of SO_2 for the 2005 through 2007 control periods.[16] Under CAIR, New York will be budgeted 45,617 tons of NO_x in 2009 and 38,014 tons in 2015.[17] During the ozone season, however, the NO_x allowances under CAIR are further reduced to 20,632 tons in 2009 and 17,193 tons in 2015. Under CAIR, New York will be allocated 135,139 tons of SO2 in 2010 and 94,597 tons in 2015.[18] Thus, New York utilities will need to make significant cuts once the CAIR rule takes effect, even after implementation of New York's ADR programs.

Most utilities will ask, what happens if they have excess NO_X emissions under CAIR but no excess emissions under Part 237? Can they sell the excess NO_X allowances under CAIR to out-of-state sources? Because NYSDEC must allocate allowances under both programs each year, the answer will likely be no, as it is expected that NYSDEC will allocate only allowances that comply with both programs. Nonetheless, by complying early with the New York standards, most utilities will be ready when CAIR takes effect.

The Clean Air Mercury Rule

On March 15, 2005, five days after issuing CAIR, the EPA issued its final Clean Air Mercury Rule, proclaiming it the first-ever rule governing emissions of mercury and asserting that it "builds on" CAIR and will reduce the utility emissions of mercury from 48 tons per year to 15 tons per year, a 70% reduction.[19] The Mercury Rule establishes "standards of performance" limiting mercury emissions from new and existing coal-fired power plants and creates a market-based cap-and-trade program that will be implemented in two phases.[20] The first phase cap, which enters into force in 2010, is 38 tons. Emissions reductions required by this first phase will be achieved by taking advantage of the "co-benefit" reductions that will be achieved under CAIR. The second phase cap, which would enter into force in 2018, is 15 tons.[21]

At the same time, the EPA "revised" a Clinton-era, December 2000 ruling that listed coal- and oil-fired generating units as a source category subject to § 112 of the Clean Air Act, which then would have required deep, technology-based cuts in mercury emissions from such sources.[22] Under § 112, each facility that emits mercury beyond the major source threshold would have been required to install emissions controls that meet MACT to reduce mercury emissions.[23] Under the "revision," coupled with the Mercury Rule's cap-and-trade approach, which was promulgated under § 111 of the Act instead of § 112, many plants will not have to install any controls at all, but rather will be able to purchase allowances from other sources.

Critics were outraged, and the lawsuits soon followed. Eleven states, led by New Jersey Attorney General Peter Harvey, sued the EPA in federal court, and a coalition of environmental and public health advocacy groups followed shortly thereafter, led by the Ohio Environmental Council, the U.S. Public Interest Research Group, the Conservation Law Foundation and the Waterkeeper Alliance.

Critics point to several serious shortcomings of the Mercury Rule. First, they assert that the Rule will delay mercury emission reductions.[24] MACT controls, which they argue are readily available and cost-effective, would have reduced mercury emissions by as much as 90% by 2008, while the Mercury Rule defers reductions until 2018

Critics argue that the Mercury Rule will create hotspots near facilities that elect to purchase allowances rather than install control technology.

or later, and its cuts are not as deep. EPA, however, in promulgating the Mercury Rule, contends that mercury controls that meet 90% are not yet available and that the very limited number of studies that showed that some coal-fired plants with add-on controls could meet 90% mercury reductions demonstrated such reductions for a short time period only; no control has yet lasted for an extended time period.[25] However, EPA's rulemaking ignores the fact that newer standards can drive technology, and three years for technology to meet a 90% reduction should be sufficient.

Second, critics argue that mercury is not suited to a cap-and-trade approach, and that the Mercury Rule will create hotspots near facilities that elect to purchase allowances rather than install control technology. In addition to perpetuating health concerns in those areas, they argue, this raises possible environmental justice concerns because it may leave many poor and urban areas exposed to higher levels of mercury emissions.

Finally, critics argue that the MACT controls that would have been required under the § 112 approach would have also addressed other hazardous air pollutants, such as cadmium and arsenic, resulting in additional health and environmental benefits.

A number of groups also petitioned the EPA to reconsider certain aspects of the Mercury Rule. In response, on October 21, 2005, the EPA published a notice of reconsideration of final rule and a request for public comment. The EPA agreed to reconsider, and sought public input regarding, seven aspects of the rule, including the method to be used to apportion the national caps to the individual states, certain definitions, and the subcategorization of particular types of units.

Conclusion

With the enactment of CAIR and the Mercury Rule, the EPA has demonstrated that it is not willing to burden the energy sector with significant costs to achieve emissions reductions. While CAIR will surely result in significant air quality improvements in the eastern United States, it requires only "highly cost effective" controls for NO_x and SO_2. The Mercury Rule uses the "highly cost effective" requirement to defer any additional mercury controls until at least 2018, relieves the nation's dirtiest power plants of the obligation to install the best possible pollution control equipment to reduce emissions of a serious neurotoxin, and thus perpetuates a longstanding public health problem. ■

1. 40 C.F.R. pts. 51, 72–74, 77–78, 96. Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call; Final Rule, 70 Fed. Reg. 25162 (May 12, 2005).

2. 40 C.F.R. pts. 60, 72, and 75, Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units; Final Rule, 70 Fed. Reg. 28606 (May 18, 2005).

3. U.S. Environmental Protection Agency Fact Sheet, *Clean Air Interstate Rule Basic Information*, <http://www.epa.gov/CAIR/basic.html>.

4. Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 70 Fed. Reg. at 25167.

5. U.S. Environmental Protection Agency Fact Sheet, *Clean Air Interstate Rule Basic Information*, <http://www.epa.gov/CAIR/basic.html>.

6. *Id.*

7. *Id.*

8. *Id.*

9. *See, e.g.*, Environmental Defense, *Big Victory for Clean Air: A Look Behind the Scenes – New EPA Rule Trumps So-Called 'Clear Skies,'* Solutions, May-June 2005, at 1 ("'The new rule will deliver the biggest reductions of smog – and particulate-forming pollution from U.S. power plants in 15 years . . . preventing 17,000 premature deaths a year, according to EPA, as well as 2.2 million missed school and work days a year."); Phil Brown, *EPA Cuts Pollution, But Is It Enough?*, Adirondack Explorer, May/June 2005, at 47 ("[T]he Adirondack Council contends that the cuts under CAIR are deep enough to stop the damage from acid rain to lakes and forests.").

10. NYSDEC, *Commissioner Crotty: DEC Adopts Emergency Rules for Acid Rain, Action Will Ensure Timely Reductions of Harmful Pollutants*, NYSDEC News, Aug. 17, 2004 <http://www.dec.state.ny.us/website/press/pressrel/2004/200495.html>.

11. NYSDEC, Adopted Parts 237 and 238 ADR Budget Trading Programs, Summary of Express Terms, <www.dec.state.ny.us/website/dar/em237_238xptsum.html>. New York State, like all other states in the Ozone Transport Region, also already has in effect a NO_x Budget program for the ozone season. *See* 6 N.Y.C.R.R. pt. 204.

12. NYSDEC, Adopted Parts 237 and 238 ADR Budget Trading Programs.

13. *NRG Energy, Inc. v. Crotty*, 18 A.D.3d 916, 795 N.Y.S.2d 129 (3d Dep't 2005). The utilities may, however, decide to bring another lawsuit under a theory that Title IV of the Clean Air Act preempts New York from establishing its own more stringent acid rain program.

14. NYSDEC, Adopted Parts 237 and 238 ADR Budget Trading Programs, Summary of Express Terms, <www.dec.state.ny.us/website/dar/em237_238xptsum.html>.

15. NYSDEC News, Aug. 17, 2004.

16. *Id.*

17. Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 70 Fed. Reg. at 25231.

18. *Id.*, 70 Fed. Reg. at 25233.

19. *See* <http://www.epa.gov/air/mercuryrule/basic.htm>.

20. Standards of Performance for New and Existing Stationary Sources, 70 Fed. Reg. at 28606 (May 18, 2005).

21. *Id.*

22. *See* 40 C.F.R. pt. 63, Revision of December 2000 Regulatory Findings on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List, Final Rule, 70 Fed. Reg. 15994 (Mar. 29, 2005); *see id.*, Corrections, 70 Fed. Reg. 33000 (June 7, 2005).

23. It should be noted that while the Clinton Administration added coal- and oil-fired generating plants to the list of sources subject to § 112 of the Act, that Administration never actually established a MACT standard for such units.

24. *See, e.g.*, Clean Air, Public Health Advocates: EPA Mercury Rule Leaves Public Health at Risk, Violates Law, Common Dreams Newswire, May 17, 2005, *available at* <http:www.commondreams.org/news2005/0517-11.htm>; U.S. Mercury Rule Lets Hazardous Air Pollutants Off the Hook, Env. Sci. & Tech. Online News, May 11, 2005, *available at* <http://pubs.acs.org/subscribe/journals/esthag-w/2005/may/policy/cc_mercuryrule.html>.

25. Standards of Performance for New and Existing Stationary Sources, 70 Fed. Reg. at 28614.

BURDEN OF PROOF

BY DAVID PAUL HOROWITZ

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

"Note to File . . . Obey Court Orders!"

The July/August 2005 "Burden of Proof" column[1] contained the following warning:

> In three Court of Appeals decisions, each addressing a different area of attorney non-compliance with court orders and rules, the Court has demonstrated an impatience both with attorneys' failure to comply, and courts' willingness to excuse non-compliance. Read together, the cases suggest that careful compliance with court orders and rules is more crucial today than ever before.

Although I was looking forward to leaving the depressing topic of dismissals behind, current events have delayed my departure for one month. On October 27, 2005, the Court of Appeals decided *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects and Landscape Architects, P.C.*,[2] an appeal arising from a trial court's denial of a defendant's motion to dismiss a new action, previously dismissed and recommenced pursuant to CPLR 205(a). The dismissal of the original action resulted from the failure of the plaintiffs' class action counsel to comply with four prior disclosure orders. Along the road to the dismissal, the trial court had also sanctioned the plaintiffs' counsel and awarded attorneys' fees to defense counsel.

CPLR 205(a) provides:

> If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.[3]

In moving to dismiss the new action, the defendant argued that the dismissal of the original action was due to the plaintiffs' neglect to prosecute, one of four statutory exceptions to the otherwise generous provisions of CPLR 205(a). The trial court disagreed. As the Court of Appeals explained, "Supreme Court rejected the argument that CPLR 205(a) was inapplicable because the previous actions were dismissed for neglect to prosecute; Supreme Court said that 'it was never this Court's intention to dismiss the prior actions for failure to prosecute.'"

Despite this specific finding by the trial court, the Appellate Division reversed, dismissing the new action, and the Court of Appeals affirmed the reversal:

> Our decisions make clear that the "neglect to prosecute" exception in

The Court of Appeals went on to make clear its displeasure with litigants who ignore court orders and rules.

CPLR 205(a) applies not only where the dismissal of the prior action is for "want of prosecution" pursuant to CPLR 3216, but whenever neglect to prosecute is in fact the basis for dismissal. In *Carven*, as in this case, the prior action "had been dismissed for [plaintiffs'] willful and repeated refusal to obey court-ordered disclosure." We held that dismissal to be within the "neglect to prosecute" exception.[4]

So how does the Court of Appeals substitute its determination for the finding of the trial court? "[W]here, as here, the record does make clear the basis for the prior dismissal, the question of whether it was a dismissal for neglect to prosecute is a question of law on which we need not defer to Supreme Court's judgment."

Having explained the rationale behind its decision, the Court of Appeals went on to make clear its displeasure with litigants who ignore court orders and rules. Citing the three decisions discussed in the prior column, the Court of Appeals concluded:

> Supreme Court was of course correct in thinking it undesirable to punish plaintiffs for the failures of their counsel. But what is undesirable is sometimes also necessary . . . deadlines. Litigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated.[5]

It is worth repeating the stern warning the Court of Appeals issued in its 1999 decision in *Kihl*:[6]

> [W]hen a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint [citation omitted].
>
> Regrettably, it is not only the law but also the scenario that is all too familiar. If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a "court may make such orders * * * as are just," including dismissal of an action (CPLR 3126). Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully.[7]

Those attorneys who believed the jury was still out on the present Court of Appeals's stance towards non-compliance with court orders should make an immediate note to file: obey court orders! ■

1. Ironically, this was the first of a three-part series titled "How Do I Dismiss Thee . . . ?" addressing various types of case dismissals.

2. 2005 WL 2777555 (2005).

3. CPLR 205(a).

4. *Andrea*, 2005 WL 2777555, citing, among other cases, *Carven Assoc. v. American Home Assur. Corp.*, 48 N.Y.2d 927, 620 N.Y.S.2d 812 (1994).

5. *Andrea*, 2005 WL 2777555. The three decisions cited are: *Slate v. Schiavone Constr. Co.*, 4 N.Y.3d 816 (2005); *Brill v. City of N.Y.*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004); *Kihl v. Pfeffer*, 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999).

6. 94 N.Y.2d 118.

7. *Id.* at 122. (citations omitted).

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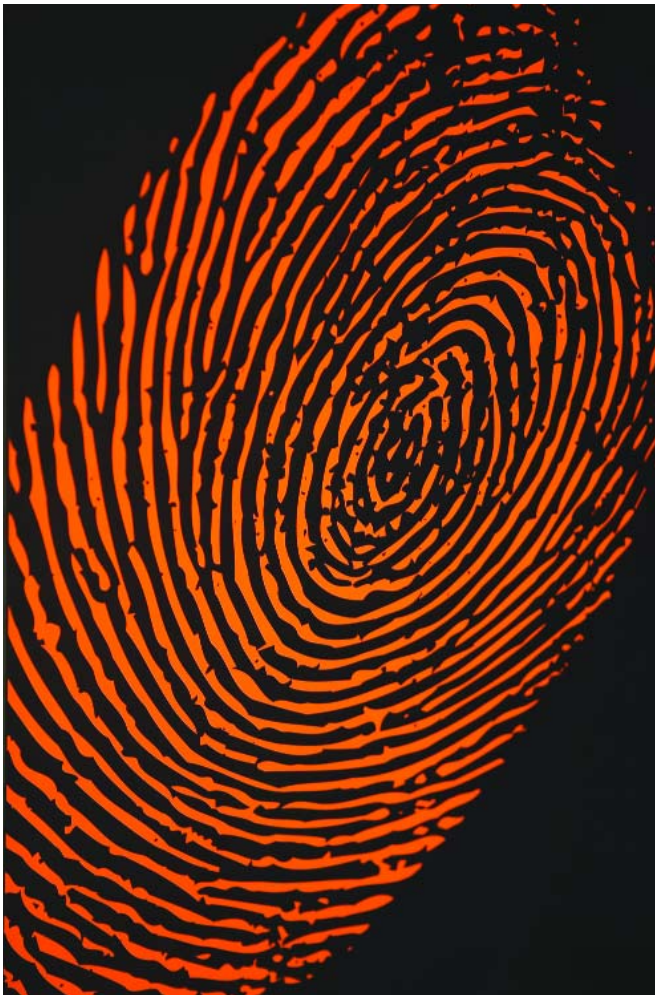

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2005 Legislation Affecting the Practice of Criminal Law

By Barry Kamins

This article will review changes in the Penal Law, Criminal Procedure Law, and several related statutes that were enacted in the last session of the Legislature and signed by the Governor. Some changes that are viewed as minor or technical will not be discussed.[1] The reader should review the new laws carefully because this article will distinguish between legislation that has already been signed by the Governor and proposed laws not signed as of the time this article went to press. Of course, the reader should determine whether any proposed legislation has been signed before citing it as "law."

Vasean's Law

One of the most decisive and swift actions taken by the Legislature was its response to public outrage over an increasing number of hit-and-run vehicular accidents as well as an increasing number of deaths caused by intoxicated drivers. As a result, the Legislature enacted "Vasean's Law" named after Vasean Alleyne, an 11-year-old boy who was killed by an intoxicated motorist. While the motorist was intoxicated, he had not committed any additional traffic infractions that would support a theory of criminal negligence such as running a red light, speeding, or similar conduct.

Because the motorist could not be prosecuted for any crime more serious than intoxicated driving, the media waged a campaign against the prosecutor's "rule of two" that required an aggravating factor in addition to the act of intoxication. The Legislature responded and, under the new law, prosecutors no longer need to establish any factor other than the act of intoxicated or impaired driving in order to convict a person of vehicular assault or vehicular manslaughter.[2] Thus, the law eliminates criminal negligence as an element of these crimes and, by doing so, creates a direct causal link between the act of intoxication and the injury or death. In addition, the law also creates a rebuttable presumption that permits the accused to rebut the causal link and present evidence that tends to show that a separate intervening factor caused the physical injury or death.

A second related law increases the penalties for drivers who leave the scene of an accident. The law corrects an anomaly that had existed for many years. Previously, a person who was intoxicated and caused an accident resulting in death and who then remained at the scene,

faced a more serious charge than an intoxicated driver who was arrested after leaving the scene but who sobered up before being arrested. The new law remedies this by elevating penalties for crimes in which a motorist leaves the scene of an accident. A first violation for leaving the scene of an accident resulting in personal injury will now be an A misdemeanor (elevated from a B misdemeanor);[3] a second violation will now be an E felony (elevated from an A misdemeanor).[4] A first violation for leaving the scene of an accident resulting in serious physical injury will now be an E felony (elevated from an A misdemeanor).[5] Finally, leaving the scene of an accident resulting in death will now constitute a D felony (elevated from an E felony).[6]

Sex Offenders

In the last session, the Legislature enacted a substantial number of laws addressing sex offenders. These laws will prohibit offenders from engaging in an increasing number of activities and expand the information that communities will receive about individual offenders. Sex offenders are prohibited from entering community service programs while serving a sentence as an inmate in a correctional institution, pursuant to new laws already signed by the Governor.[7] Employers at summer camps are now required to cross-reference job applicants with New York's sex offender registry.[8] In addition, law enforcement agencies may disseminate a sex offender's alias as part of the information posted on the sex offender registry.[9] The Department of Corrections is now required to notify a local social services agency 30 days before a sex offender is to be released to a homeless housing facility.[10] A new law requires law enforcement agencies to maintain and update a listing of vulnerable organizational entities in its jurisdiction to whom sex offender notification could be disseminated.[11] Finally, sex-offender-level determination hearings may now proceed even if the offender does not appear, as long as the offender had previously been notified of the determination hearing.[12] This conforms with prior case law, in which courts had held that an offender who voluntarily fails to appear for a hearing waived the right to participate and could not later overturn the result based upon that ground.[13]

Other laws awaiting the Governor's signature, would prohibit sex offenders from working on ice cream trucks because these jobs normally bring people into regular, close contact with children.[14] In addition, a new law would prohibit level-three sex offenders who are on probation from entering school buildings, playgrounds, athletic fields, and day care centers while minors are present.[15]

New Crimes Created

Operating a Methamphetamine Laboratory

As usual, the Legislature has created several new crimes. One new law creates crimes and penalties that target individuals who operate or assist in the operation of clandestine methamphetamine laboratories.[16] Over the past five years, New York police have seen evidence of a dramatic rise in the number of these laboratories, which use controlled substance "precursors" that are not currently illegal to possess. The law is designed to curtail these laboratories in which the drugs are produced even if the lab operators are not caught with the finished product. In addition, the laboratories store large amounts of anhydrous ammonia that is a critical ingredient in the produc-

tion of methamphetamine. This chemical is often stolen from farmers and when it is stored and used, the toxic gas can be unintentionally released, causing injuries to emergency responders, law enforcement personnel, the public and the criminals themselves.

Under the new law, four new crimes are created that address the "meth" epidemic. First, the possession of methamphetamine manufacturing materials now constitutes an A misdemeanor (the first conviction) and an E felony (the second conviction within five years).[17] Manufacturing material is defined as a "precursor" (ephedrine, pseudoephedrine, or any derivative) or any "chemical reagent," "solvent" or "laboratory equipment" that can be used to manufacture methamphetamine.[18]

Second, the possession of "precursors" of methamphetamines as well as a "solvent" or "chemical reagent," with the intent to use such items to manufacture methamphetamines, constitutes an E felony.[19] Third, the unlawful manufacture of methamphetamines is divided into three classes of felonies, beginning with a class D felony and rising to a class B felony.[20] The class D felony is committed when an individual possesses the following: two or more items of laboratory equipment and two or more precursors, chemical reagents or solvents; or one item of laboratory equipment and three or more precursors, chemical reagents or solvents; or a precursor mixed together with either a chemical reagent or solvent or with two or more reagents and/or solvents mixed together.[21] When an individual found in such possession has a prior conviction for manufacture of methamphetamines within the past five years, it becomes a C felony; and when methamphetamine is manufactured in the presence of a person under the age of 16, the crime is elevated to a B felony.[22]

The fourth new crime related to "meth" is the unlawful disposal of methamphetamine laboratory material. This crime is committed when a person disposes of a "hazardous or dangerous material" in the furtherance of a methamphetamine operation, under circumstances that create a substantial risk to human health or safety or a substantial danger to the environment.[23] A "hazardous or dangerous instrument" means any substance that results from or is used in the manufacture of methamphetamine. This crime is a class E felony.

Riot in the First Degree

A new crime, already signed into law by the Governor, creates the crime of Riot in the First Degree as it relates to conduct in correctional facilities.[24] Previously, the crime of Riot in the First Degree required proof that the riotous conduct caused public alarm. Under the old law, a riot in prison could only satisfy the statute if a prosecutor could prove that the conduct inside the prison also caused alarm in the surrounding community. The narrow statutory language precluded prosecutors from filing charges in 1998 against inmates at Mohawk Correctional Facility. The new law, in contrast, provides that when an individual in a prison incites a riot, he or she may be prosecuted without the prosecutor having to establish that the riot caused public alarm in the surrounding community outside of the prison.

Of the new laws that will have an impact on sentencing, the most important measure expands last year's Drug Law Reform Act by authorizing discretionary resentencing of class A-II drug offenders.

Compelling Prostitution

A third new crime is Compelling Prostitution, a class B felony.[25] This crime was the Legislature's reaction to the increasing publicity about child prostitution and the number of runaway and abducted children forced into a life of prostitution by adults who prey on their vulnerability. A person is guilty of this crime when, being 21 years of age or more, he or she knowingly advances prostitution by compelling a person less than 16 years of age, by force or intimidation, to engage in prostitution.

Effects on Sentencing

The Legislature enacted several laws that will have an impact on sentencing. The most important measure expands last year's Drug Law Reform Act by authorizing discretionary resentencing of class A-II drug offenders.[26] Earlier this year the Legislature enacted a similar procedure for those inmates convicted of A-I drug offenses. The new bill will affect 513 inmates serving A-II sentences and will apply to those who are more than three years from a parole eligibility date (and 12 months from work release eligibility) and who are eligible for merit time. The law does not require that the inmate *earn* the merit time allowance before being able to apply for resentencing – it only requires that he or she be eligible to earn it. The procedure for resentencing is identical to the process created for A-I offenders.

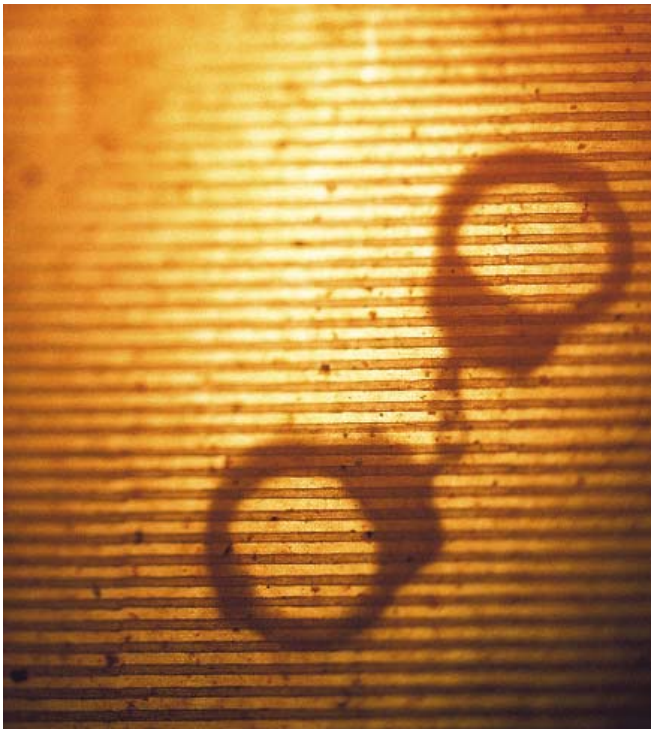
The new statute creates a range of determinate sentences that may be imposed by a court upon resentencing the A-II drug offender. For a first offense, the range is between three and 10 years. For a second felony offender with a prior non-violent conviction, the range is between six and 14 years. For a second felony offender with a prior violent offense, the range is between eight and 17 years. All sentences include five years of post-release supervision.[27] A second new law affecting sentencing expands

the pool of inmates eligible to earn merit time. The law expands the program options available for earning merit time to include successful employment in a continuous temporary release program.[28]

Victims of Crime

Each year the Legislature enacts measures addressing concerns of crime victims, and this year was no exception. Under these new laws, victims of violent felonies must be informed of the final disposition of their case and victims of all crimes must be informed of how to obtain updated information regarding an inmate's incarceration status.[29] In addition, a health services plan administrator will now be prohibited from disclosing information about an insured who has been injured when the insured provides an order of protection.[30] This will prevent a spouse from learning the address and phone number of the other spouse who has been injured in a domestic violence incident.

One new law permits crime victims to be reimbursed for relocation expenses,[31] while another expands monetary awards by the Crime Victims Board to cover victims of a crime who have a preexisting disability or condition that has been exacerbated by a crime.[32] Finally, a new law increases protection of crime victims when the offender petitions a court to change his or her name. Pursuant to a



law enacted in 2000, crime victims must be notified when certain convicted felons petition a court to change their names. However, offenders convicted prior to the effective date of the law were not subject to the law. The new law will make the notification requirements applicable to

One law changes the rules of evidence in the grand jury to accommodate an increasing number of individuals who are the victims of credit card fraud.

offenders who were convicted before the effective date of the law and who have petitions pending in a court on or after such date.[33]

Procedure

Some new laws will effect certain procedural changes. One law changes the rules of evidence in the grand jury to accommodate an increasing number of individuals who are the victims of credit card fraud. Under current law, a person whose credit card has been physically stolen may submit an affidavit in lieu of testifying before a grand jury. The affidavit alleges that the individual is the owner of the credit card and the person who stole it did not have permission or authority to use or possess it. However, a person whose credit card number was illegally used (without the actual theft of the card) must physically appear to testify. The new law also permits this person to submit an affidavit.[34]

A second procedural change will significantly increase the ability of individuals to make payments by the use of credit cards. Over the past 20 years, the Legislature has authorized the use of credit cards to pay traffic fines, to post bail in traffic cases, and to pay certain court fees, as well as fines in criminal cases and certain surcharges and administrative fees. The law has been expanded to permit individuals to use credit cards to pay court fees, fines, surcharges, and bail in all cases.[35] The law also permits the imposition of an administrative fee for the use of the credit card.

Increased Penalties, Expanded Authority, and Sunset Extensions

The Legislature enacted two laws that will enhance penalties of existing crimes. First, the crime of cruelty to animals is elevated from an unclassified misdemeanor to an A misdemeanor.[36] This would require the arrestee to be fingerprinted and photographed upon arrest and would enable law enforcement officials to track an individual's history of this crime. Second, violations of child labor laws are elevated to an unclassified misdemeanor, providing for 60 days in jail for a first offense and up to one year in jail for subsequent violations.[37]

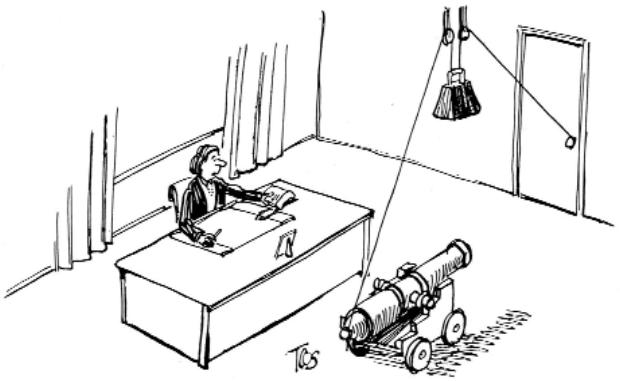
As usual, the Legislature expanded the authority of certain classes of law enforcement personnel. Under one proposed law, the Legislature would grant police officer status to forest rangers in the service of the Department of Environmental Conservation.[38] A new law, already signed by the Governor, allows court officers to issue traffic summonses for parking violations in and around court buildings.[39]

Each year the Legislature extends the expiration (or "sunset") of various laws by enacting "sunset extenders." In an omnibus sunset extender, the Legislature extended the following: Jenna's Law, until September 1, 2009;[40] the Sentencing Reform Act until September 1, 2009;[41] the SHOCK incarceration program, until September 1, 2007;[42] Temporary Release Programs, until September 1, 2007;[43] mandatory surcharges, until September 1, 2007;[44] and various fees related to inmates, until September 1, 2007.[45]

The Legislature extended a law requiring a six-month suspension of the driver's license of any person convicted of a misdemeanor or felony drug offense, including juvenile and youthful offender adjudications.[46] In addition, the Legislature extended a law requiring suspension of a parent's driver's license for failure to pay four or more months of child support.[47] Finally, a new law would extend the use of closed circuit television for the testimony of child witnesses in sex crime prosecutions.[48] ■

1. A technical change in the Criminal Procedure Law will permit the statewide non-personal service of appearance tickets for zoning or building violations, Criminal Procedure Law § 150.40(2) (CPL), Chapter 642, effective August 30, 2005. Another change will permit a Jefferson County town or village justice to preside over arraignments in any location in the county, Uniform Justice Court Act § 106(10); Chapter 607, effective August 30, 2005.
2. Penal Law §§ 120.03, 120.04, 125.12, 125.12; Chapters 39, 92, effective June 8, 2005.
3. Vehicle & Traffic Law § 600(2)(c); Chapters 49, 108; effective June 17, 2005.
4. *Id.*
5. *Id.*
6. *Id.*
7. Correction Law § 851(2) ("Corr. Law"); Chapter 252, effective July 19, 2005.
8. Public Health Law § 1392-a (PHL); Chapter 260, effective August 18, 2005.
9. Corr. Law § 168-1(6)(b)(c); Chapter 318, effective October 24, 2005.
10. Corr. Law § 72-c; Chapter 410, effective October 1, 2005.
11. Corr. Law § 168-1(6)(b), (c); Chapter 680, effective November 1, 2005.
12. Corr. Law § 168-d(2); Chapter 684, effective October 4, 2005.
13. *See, e.g., People v. Brooks*, 308 A.D.2d 99, 763 N.Y.S.2d 86 (2d Dep't 2003).
14. Corr. Law § 168-v; S.2795, effective immediately upon the Governor's signature.
15. Penal Law § 65.10(4-a); A.8894, effective September 1, 2005, upon the Governor's signature.
16. While the new laws address the problem of a "meth epidemic," some observers have questioned whether the problem is as serious as the police allege. *See, e.g., Debunking the Drug War*, N.Y. Times, Aug. 9, 2005, p. A19. Others however point to a nationwide survey that established that "meth" is law enforcement's biggest problem. *See Letters to the Editor*, N.Y. Times, Aug. 11, 2005.
17. Penal Law §§ 220.70, 220.71; Chapter 394, effective October 9, 2005.
18. Penal Law § 220.00(16); Chapter 394, effective October 9, 2005.
19. Penal Law § 220.72; Chapter 394, effective October 9, 2005.
20. Penal Law §§ 220.73, 220.74, 220.75; Chapter 394, effective October 9, 2005.

21. Penal Law § 240.06(2); Chapter 294, effective November 1, 2005.
22. Penal Law § 220.73; Chapter 394, effective October 9, 2005.
23. Penal Law §§ 220.74, 220.75; Chapter 394, effective October 9, 2005.
24. Penal Law § 240.06(2); Chapter 294, effective November 1, 2005.
25. Penal Law § 230.33; Chapter 450, effective November 1, 2005.
26. Chapter 643, effective October 29, 2005.
27. *See* CPL § 70.71.
28. Chapter 644, effective August 30, 2005.
29. Executive Law § 646-a(2)(g) ("Exec. Law"); CPL § 440.50(1); Chapter 186, effective September 1, 2005.
30. Insurance Law § 2612(e), (f); Public Health Law § 4406-c(5-c); Chapter 246, effective November 16, 2005.
31. Exec. Law § 621(23); Chapter 377, effective August 2, 2005.
32. Exec. Law § 626(1); Chapter 408, effective August 2, 2005.
33. Civil Rights Law, Exec. Law; Chapter 613, effective August 30, 2005.
34. CPL § 190.30(3)(g); Chapter 690, effective October 4, 2005.
35. Judiciary Law § 212(2)(j); CPL § 420.05, 520.10(1)(i); Chapter 457, effective August 9, 2005. However, the provision for payment of bail will take effect on January 1, 2006. The entire law will expire five years after the effective date.
36. Agriculture & Markets Law § 353(1); Chapter 523, effective November 1, 2005.
37. Labor Law § 145; S 3250; Chapter 660, effective December 15, 2005.
38. CPL § 1.20(u); A 7608, effective immediately upon the signature of the Governor.
39. CPL § 2.20(j); Chapter 685, effective October 4, 2005.
40. Chapter 56.
41. *Id.*
42. Chapter 56 (Corr. Law art. 26A).
43. Chapter 56 (Corr. Law §§ 851, *et seq.*).
44. Chapter 56.
45. Chapter 56 (inmate filings, parole supervision fee, weekly incarceration fee).
46. Chapter 60 (extended from October 1, 2005–October 1, 2007).
47. Chapter 60 (extended from June 30, 2005 to June 30, 2007).
48. CPL art. 65; S.5280, effective immediately upon the Governor's signature (extends law from September 1, 2005 to September 1, 2007).



"I'm too personally involved to accept a settlement? Of course not. Send their lawyer in."

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Paradigm Shift in No-Fault "Serious Injury" Litigation

By Joseph D. Nohavicka

For the past three decades, the New York Court of Appeals has sought to formulate the standards for proving the different "serious injury" categories in order to guide the lower courts and create a predictable litigation climate. But cases commenced pursuant to Insurance Law § 5102(d),[1] which defines serious injury, continue to inundate the court system.

To recover for non-economic loss in a motor vehicle accident under New York law, the injury must be "serious."[2] The New York threshold statute specifically defines "serious injury" as an injury described in one of its nine statutory categories. Current case law indicates that in New York a plaintiff need only prove that the injury fits into one of its nine statutorily defined categories to be deemed serious and to vault the threshold.[3]

Since 1982 the Court of Appeals has reminded the lower courts that the legislative intent of New York's no-fault law was to "significantly reduce the number of automobile personal injury cases litigated in the courts,"[4] and to "weed out frivolous claims and limit recovery to significant injuries."[5]

On April 29, 2005, a critical pronouncement regarding Insurance Law § 5102(d) serious injury litigation was delivered by the Court of Appeals in *Pommells v. Perez*.[6] *Pommells* augments, and perhaps crystallizes, the directives of *Toure v. Avis Rent A Car Systems, Inc.*,[7] requiring the lower courts to view the facts of automobile injury cases through a more acute lens.

The *Pommells* Court addressed the impact of the following factors even in the case where objective evidence is extant: gaps in medical treatments, pre-existing injuries, and intervening medical conditions. Like *Toure*, the *Pommells* decision comprises three decisions, two affirming summary judgment and one reversing.

Anatomy of *Pommells*

The Court's introduction to its *Pommells* decision is four paragraphs long. The Court begins with a brief summary of the general legislative purpose of the no-fault law. It then, notably, injects fraud into the mix, citing *Medical Society of the State of N.Y. v. Serio*,[8] and the recent decision of *State Farm Mutual Automobile Insurance Co. v. Mallela*.[9] The Court further notes that from 1992 to 2000, reports of no-fault fraud rose more than 1,700%,[10] and then makes the following admonishment: "[F]ailure to grant summary judgment even where the evidence justifies dismissal,

burdens court dockets and impedes the resolution of legitimate claims."

In the final paragraph of its introduction, the Court accepts the challenge to "articulate criteria to enable serious injury claims to proceed yet prevent abuses that clog the courts and harm the public." This paragraph also contains the core directive of the Court's decision:

> [E]ven where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury – such as a gap in treatment, an intervening medical problem or a pre-existing condition – summary dismissal of the complaint may be appropriate.

Pommells v. Perez

In *Pommells v. Perez*, the lead case, summary judgment was granted at trial in favor of the defendant, dismissing the complaint on the ground that the plaintiff had not sustained a serious injury within the meaning of Insurance Law § 5102(d). This was affirmed by the First Department.[11] The facts are as follows.

The plaintiff was in a three-car accident on March 15, 1998. Days later, on his lawyer's referral, the plaintiff went to the hospital where he had a neurological exam and began a course of daily physical therapy, which he continued for six months while he remained out of work. In the course of his deposition, the plaintiff revealed that more than two years after the accident he experienced severe pain in his back and side, sending him to a hospital emergency room where doctors inserted a stent in his kidney. After four weeks doctors determined that surgery was necessary. The plaintiff's kidney was removed on August 18, 2000, and he again was out of work for six months.

The plaintiff sought no further medical treatment or review of his auto-accident injury for more than three years, when he consulted with the physician who furnished a report in this case.

In its affirmance of the Appellate Division's decision, the Court of Appeals noted that the plaintiff failed to provide a reasonable explanation for a gap in treatment from 1998 to 2001 (first criterion), and failed to address a presumably non-related kidney disorder (second criterion).

Brown v. Dunlap

In the second case, also arriving from the First Department, summary judgment was granted by the trial court and affirmed by the Appellate Division, and then reversed by the Court of Appeals.

The Court of Appeals noted that the two *Pommells* criteria were not present. The two-and-a-half-year gap in treatment in this case was adequately explained when the plaintiff's own expert stated that further treatment would have been merely palliative and home treatment would suffice. As to the second criterion, the Court found that the defendant's claim of a pre-existing condition was speculation.

Carrasco v. Mendez

In the third case of the *Pommells* trilogy, this one emerging out of the Second Department, summary judgment was granted by the trial court and then affirmed by the Second Department, and, finally, affirmed by the Court of Appeals. In *Carrasco*, the defendant presented evidence that the plaintiff had a pre-existing condition. The plaintiff failed to rebut the defendant's allegation and failed to produce a competent analysis regarding causation. Moreover, even the plaintiff's expert noted that the plaintiff's pain was related to a prior condition.

Toure – Refresher

In *Toure*, the Court reversed three Appellate Division decisions, two of which dismissed plaintiffs' cases; the Court dismissed the plaintiff's case in the third action. The core holding is:

> When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact.[12]

It should be noted, however, the Court maintains that

> an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily-insignificant injuries or frivolous claims.[13]

"Qualitative assessment" in addition to "quantitative assessment" is now, in the aftermath of *Toure*, analyzed on threshold motions. *Toure* explains what these assessments are.

Quantitative: To prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable.

Qualitative: An expert's qualitative assessment of a plaintiff's condition is probative, provided that: (1) the evaluation has an objective basis; and (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system.

The *Toure* Trilogy

The plaintiff in *Toure v. Avis Rent A Car Systems, Inc*. submitted his own affidavit; an affirmation from a neurosurgeon, which included observations of muscle spasms; an MRI; and a CT scan. The neurosurgeon's medical assessment was that the plaintiff's condition was a natural and expected medical consequence of his injuries. The Supreme Court and the Appellate Division dismissed the plaintiff's complaint on a motion for summary judgment.

The Court of Appeals ruled that the expert opinion of a doctor, when supported by objective medical evidence such as an MRI or CT scan, along with a doctor's observations of muscle spasms during physical examinations, was sufficient to defeat a motion for summary judgment.

In *Manzano v. O'Neil*, at trial, the plaintiff testified to having pain in her lower back and restrictions on her physical activities. The plaintiff's doctor reviewed an MRI taken of the plaintiff and determined that the plaintiff had two herniated discs in her cervical spine, and that the plaintiff's injury was permanent. A jury awarded the plaintiff $70,000 in damages. The Appellate Division reversed, holding that the plaintiff had failed to establish a serious injury as a matter of law. The Court of Appeals reversed, finding the doctor's opinion to be supported by objective medical evidence in the form of an MRI and the qualitatively described limitations on the plaintiff's normal functioning.

In *Nitti v. Clerrico*, the plaintiff's doctor testified at trial that he had detected a spasm in the plaintiff's spine during an examination, and that she had restricted movements. On cross-examination, the doctor conceded that his tests were subjective in nature and depended at least in part on the plaintiff's complaints of pain. The doctor reviewed an MRI taken of the plaintiff's spine, but the MRI was not admitted into evidence. The jury awarded the plaintiff $45,000, which the Appellate Division affirmed.

The Court of Appeals reversed, stating that there must be objective medical evidence introduced under the "90/180" category of the statute in order for the plaintiff to have legally established her injuries and her right to damages. The Court observed that the spasm detected was not objectively ascertained and the range of motion tests were subjective; the MRI was not introduced into evidence. The MRI therefore could not be scrutinized on cross-examination. The Court concluded that this did not constitute objective medical evidence.

Of Fraud and Frivolity

In *Toure*, the Court of Appeals reminded attorneys that the legislative intent underlying the no-fault law was *to weed out frivolous claims* and limit recovery to significant injuries. The word "frivolous" is not even mentioned in the *Pommells* decision.

The word "fraud," however, is mentioned. In fact, after citing to *Medical Society of the State of N.Y. v. Serio*, and *State Farm Mutual Automobile Insurance Co. v. Mallela*, both cases addressing the prevalence of fraud in the no-fault arena, *Pommells* states as follows: "There is, similarly, abuse of No-Fault Law in failing to separate 'serious injury' cases, which may proceed in court, from the mountains of *other* auto accident claims, which may not."[14]

Moreover, the *Pommells* Court pointed out that in addition to an attorney referral to a health care provider in the lead case, the 17-year-old plaintiff in *Brown v. Dunlap* was referred to a health care provider one week after the accident, also by his attorney. The fact would not be relevant in a frivolous case; it would, however, be relevant in a fraud case.

The *Pommells* decision is a directive from the Court of Appeals for the lower courts to implement a paradigm shift in summary judgment practice.

The reasons for a referral to a health care provider vary: For example, the plaintiff may not understand how no-fault benefits are triggered and his or her attorney explains that the plaintiff will not have to pay for needed health care that he or she cannot afford out-of-pocket. Or, the client may be suffering from a delayed reaction to the injuries. Or, the attorney knows the mills that will provide unnecessary or contraindicated treatment required to build up a fraudulent case.[15]

The difference in the meanings of frivolous and fraud is not just semantic. A frivolous suit is a suit having no merit. It is the result of improper investigation and absence of reasonable inquiry by the attorney handling the matter. It involves negligence, nonchalance or insouciance. Fraud involves deception. It is the result of design and strategy. It involves intent, aforethought, and mens rea.

The *Pommells* decision is a directive from the Court of Appeals for the lower courts to implement a paradigm shift in summary judgment practice. The verbiage selected by the Court in *Serio* and *Mallela,* and echoed by *Pommells*, requires the lower courts to acknowledge the prevalence of fraud when determining whether summary judgment is appropriate. The lower courts should consider fraud indicators such as little or no property damage, health care build-up, timing of treatment, multiple claimants with similar soft-tissue injuries and treatment, and lawyer referrals of clients to providers.

In the aftermath of *Pommells*,[16] the lower courts are charged with a new function in Insurance Law § 5102 litigation: weeding out fraudulent "serious injury" cases that burden court dockets and impede the resolution of legitimate claims. ■

1. N.Y. Insurance Law § 5102(d) ("Ins. Law") defines a serious injury as a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of fetus; permanent loss of use

of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

2. Ins. Law. § 5104.

3. *See, e.g.*, *Pommells v. Perez*, 4 N.Y.3d 566, 571 n.1, 797 N.Y.S.2d 380 (2005) (explaining that "only in the event of 'serious injury' as defined in the statute, can a person initiate suit against the car owner or driver for damages caused by the accident" and that Ins. Law § 5102(d) defines "serious injury" as one of nine statutorily defined categories). Decided with *Pommells* were *Brown v. Dunlap* and *Carrasco v. Mendez*.

4. *Licari v. Elliott*, 57 N.Y.2d 230, 236, 455 N.Y.S.2d 570 (1982) (case involving a limitation of movement in the back and neck, summary judgment affirmed where plaintiff failed to offer evidence as to the *extent* of the limitation of movement).

5. *Dufel v. Green*, 84 N.Y.2d 795, 798, 622 N.Y.S.2d 900 (1995).

6. 4 N.Y.3d 566.

7. 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002). Decided with *Toure* were *Manzano v. O'Neil* and *Nitti v. Clerrico*.

8. 100 N.Y.2d 854, 768 N.Y.S.2d 423 (2003) (upholding Regulations promulgated by Superintendent of Insurance to combat fraud in no-fault).

9. 4 N.Y.3d 313, 794 N.Y.S.2d 700 (2005) (answering certified question from Second Circuit Court of Appeals whether a medical corporation that was fraudulently incorporated under N.Y. Business Corporation Law §§ 1507, 1508, and Education Law § 6507(4)(c), is entitled to be reimbursed by insurers, under Ins. Law §§ 5101 *et seq.* and its implementing regulations, for medical services rendered by licensed medical practitioners, in the negative).

10. *See Metroscan Imaging P.C. v. GEICO Ins. Co.*, 8 Misc. 3d 829, 797 N.Y.S.2d 737 (Civ. Ct., Queens Co. 2005) (Siegal, J.) ("As recently as April 25, 2005, the Court of Appeals chose to use these statistics and their import – abuse of the entire No Fault Insurance scheme – in reiterating the tests courts should employ to determine 'which claims may proceed in court' in personal injury cases arising from motor vehicle accidents under No-Fault." (citing *Pommells*)).

11. *Pommells v. Perez*, 4 A.D.3d 101, 772 N.Y.S.2d 21 (1st Dep't 2004).

12. *Toure*, 98 N.Y.2d at 351.

13. *Id.*

14. 4 N.Y.3d 566 (emphasis added).

15. *See Serio*, 100 N.Y.2d 854.

16. *See Vallejo v. Builders for the Family Youth, Dioc. of Brooklyn, Inc.*, 18 A.D.3d 741, 795 N.Y.S.2d 712 (2d Dep't 2005) (order denying summary judgment reversed, 4½-year gap in treatment); *Khan v. Hamid*, 19 A.D.3d 460, 798 N.Y.S.2d 444 (2d Dep't 2005) (order denying summary judgment reversed, 3-year gap in treatment); *Teodoru v. Conway Transp. Serv., Inc.*, 19 A.D.3d 479, 798 N.Y.S.2d 466 (2d Dep't 2005) (order granting summary judgment affirmed, 2½-year gap in treatment); *Gonzalez v. Castellanos*, 7 Misc. 3d 135(A), 801 N.Y.S.2d 234 (App. Term 1st Dep't 2005) (order granting summary judgment affirmed, 3-year gap in treatment); *Fonrose v. Winter*, 7 Misc. 3d 1019(A), 801 N.Y.S.2d 233 (Civ. Ct., Kings Co. 2005) (Matos, J.) (summary judgment granted, 2½-year gap).

BY BRUCE J. BERGMAN

(True) Purchase Money Mortgage and Usury

The twain doesn't meet on this one. Experienced real estate practitioners will immediately observe that there is no possibility of usury upon a true purchase money mortgage, so why bother with this column? Two reasons: not everyone was born knowing every established aphorism and, more significantly, this particular maxim has begotten two aberrant decisions that threaten the legal neatness we all strive to enjoy.

As to the basics, usury generally is one of the more elusive subjects in the real estate arena. But one bedrock concept to be understood is that there can be no usury in the absence of either a loan or a forbearance. That is why usury has no application to interest on default on a mortgage, or to a joint venture investment, or to an advance of funds against recovery in a lawsuit. Payment in the latter instance is uncertain, so it cannot be a real loan.

When a lender lends money to a borrower to purchase a property, it is a purchase money mortgage. But such a loan is not removed from the purview of usury. *Whether* usury might apply in any particular case is a far different question, subject to a number of variables we needn't explore here: among them, the nature of the lender (federally related? licensed mortgage banker?); the nature of the borrower (individual or corporation?); the priority of the mortgage (first or subordinate?); the character of the property (residential or commercial?); the amount of the loan (above $250,000 or $2,500,000?).

The case of a true purchase money mortgage, however, is different, and here the definition is critical: it is a mortgage executed at the time of purchase and contemporaneous with acquisition of title, or afterward, but as part of the same transaction to secure an unpaid balance of the purchase price. Because some cases have missed what should be an apparent distinction, an example in more graphic terms should be helpful. Buyer wants to purchase seller's house for $600,000. Buyer has $100,000 of his own money and has secured a $400,000 purchase money first mortgage from a lending institution, leaving a shortfall of $100,000 to complete the transaction. Buyer asks Seller to "take back" a $100,000 mortgage. Seller reluctantly agrees, but only if the interest rate is 17%. *That* is a *true* purchase money mortgage which by definition[1] is not a loan. Therefore, the 17% interest rate which exceeds the legal rate of 16% (civil usury) applicable to a loan from one person to another becomes irrelevant. There is no loan and so there can be no usury.

This should close the issue and perhaps this is a nice primer for those who may have not yet encountered the concept. Ah, but there is reason to go on. While this subject has been closed since 1968 – with inevitable nuance receiving attention from time to time over the years – a 2004 decision, *Babinsky v. Skidanov*,[2] declares that *criminal* usury can yet apply to a purchase money mortgage. Putting aside the practical consideration of charging interest in excess of 25% (the threshold of criminal usury), we ask, can such a ruling be correct?

We say no, not a chance. But if the Appellate Division says yes, that controls and so we face some variety of conundrum, and a conspicuously unfortunate one.

> We posit that there is no valid basis to hold that criminal usury can apply to a true purchase money mortgage.

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Mindful of the law outlined to this point, what could be the basis for this challenge to such a well-established principle? It seems that casual research has led to a glaring misconception. The offending *Babinsky* decision proclaims the availability of a claim of criminal usury upon a purchase money mortgage based upon citation of earlier authority: *C&M Air Systems, Inc. v. Custom Land Development Group II.*[3] In turn, *C&M* is founded upon a host of cases, all of which support the proposition that there is no usury for a purchase money mortgage and none of which cite retained applicability of criminal usury. Even *C&M*'s mention of Penal Law § 190.40 offers no authority because criminal usury by the very terms of the cited statute requires a loan or forbearance. Since the true purchase money mortgage is not a loan (as the Court of Appeals has consistently so ruled), the Penal Law plays no role.

There can be some recondite speculation as to the source of the First Department's miscue here but it is too lengthy to fit and too obscure to be very helpful. Suffice to say, we posit that there is no valid basis to hold that criminal usury can apply to a true purchase money mortgage. Where this leaves the topic is in the philosophical dilemma mentioned earlier. It can't be so, but the Appellate Division says it is; hardly helpful for real estate practitioners. ■

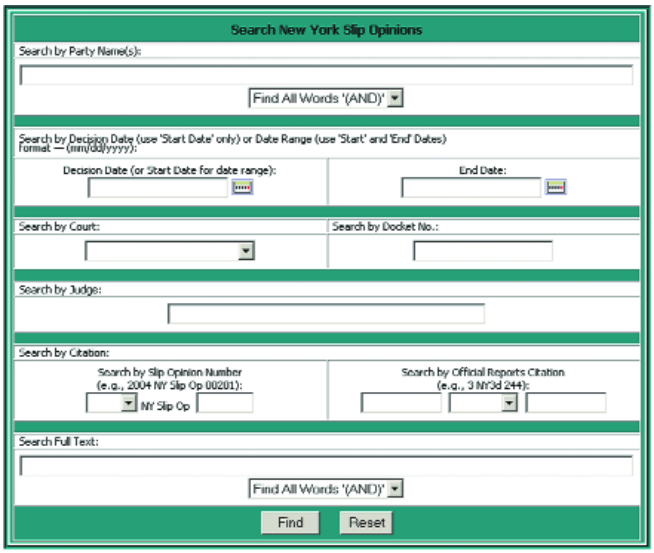
1. Certainly by case law: see, among other cases, *Mandelino v. Fribourg*, 23 N.Y.2d 145, 295 N.Y.S.2d 654 (1968).
2. 12 A.D.3d 271, 784 N.Y.S.2d 540 (1st Dep't 2004).
3. 262 A.D.2d 440, 440–41, 692 N.Y.S.2d 146 (2d Dep't 1999).

"In my opinion, the flimsy construction of their homes indicates the pigs' desire to be eaten."

Public Access to Court Decisions Expanded

By Gary D. Spivey

The Law Reporting Bureau "Decisions" page provides access to the *Slip Opinion Service* and *Official Reports Service*.



A form for searching decisions in the *Official Reports Service*.

Expanded free public access to New York State court decisions is now available on the New York State Law Reporting Bureau (LRB) Web site.

All decisions published or abstracted in the Official Reports from January 1, 2000, to date may be accessed by the public at no charge by visiting the LRB site at <www.courts.state.ny.us/reporter/decisions.htm>.

The LRB is the agency of the Court of Appeals responsible for preparing New York court opinions for publication in the Official Reports. The agency is headed by a State Reporter, an office that I have filled since 1999.

The LRB Web site provides decisions through two coordinated services:

- The *New York Slip Opinion Service* provides access to recently released decisions prior to publication in the Official Reports, together with the official electronic citation for each decision. All motion decisions of the appellate courts also are provided.
- The *New York Official Reports Service* provides access to the text of all decisions published or

Gary D. Spivey is the 25th individual to serve as State Reporter since the office was created in 1804. He began a career in legal publishing more than 35 years ago, following graduation from the Indiana University School of Law. In 1990, he served on a committee that assisted the Supreme Court of the United States in the first electronic dissemination of its opinions. Mr. Spivey acknowledges the leadership of the Law Reporting Bureau's Chief Legal Editor, Michael S. Moran, in the creation of the LRB Web site.

abstracted in the Official Reports from January 1, 2000, through the latest Advance Sheet, together with the official permanent citation for each decision.

While the *Slip Opinion Service* has been available in some form since 2000, it has been continually expanded and only recently has been enhanced with powerful new search capabilities, developed with the aid of the Office of Court Administration's Division of Technology. The *Official Reports Service* is new as of May 2005, having been developed with the assistance of Thomson/West under a competitively bid publishing contract.

All decisions of the Court of Appeals and Appellate Division are included. Additionally, the services include all Appellate Term and lower court decisions that have been selected for publication in full text or abstracted form in the Miscellaneous Reports. Under a program authorized by the Court of Appeals in 2001, some 2,400 Appellate Term and lower court opinions are published annually as one-paragraph abstracts in the Miscellaneous Reports and in full text in the online Official Reports. This new program allows the LRB to publish all Appellate Term decisions and essentially all lower court opinions of precedential value or public importance.

The LRB Web site also provides a link to the Unified Court System's E-Court's service <https://iapps.courts.state.ny.us/caseTrac/jsp/ecourt.htm>, where other lower court opinions, court calendars and additional useful information can be found.

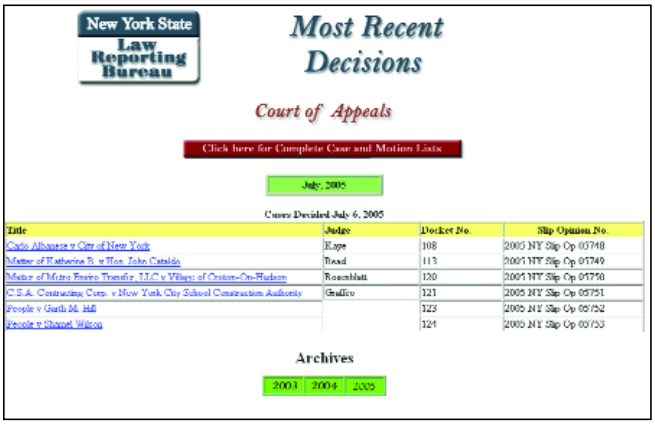
While all decisions are revised to incorporate any court-approved textual changes that may occur after the initial release of the decision, copyrighted features of the Official Reports – such as headnotes, abstracts, summaries and points of counsel – are not included in these services. Those features are available only in the books or in the fee-based electronic services.

The *Slip Opinion Service* and *Official Reports Service* are not intended to replace the books or commercial services, both of which provide value-added features designed for lawyers, but rather are intended to open up the work product of the courts to a wider audience, including academics, journalists and the general public. Nor do these free services lessen the need for members of the public to seek professional guidance in determining what the law is and how it is applied to particular circumstances.

Providing free public access to court decisions is consistent with the recommendations of Chief Judge Judith S. Kaye's Commission on Public Access to Court Records. In its 2004 report, the commission recommended expanded access through the Internet to a broad range of court records, including judicial opinions. It supported Internet access to court records as a means "to shed greater light on the functioning of the courts and thus to promote greater accountability of the judicial process." Court of Appeals Judge Victoria A. Graffeo, the Court's liaison to the LRB, served on the commission and joined in its recommendations, as did I.

We plan to continue to expand and improve the coverage of court decisions and other information on the LRB Web site. Please visit us often and provide any feedback to us at <reporter@courts.state.ny.us>. ■

The form for searching opinions in the *Slip Opinion Service*.



A list of the most recent slip opinions from each court can be browsed on the *Slip Opinion Service*.

What's in Your Wallet?

Attorney Designations in New York

By Daniel C. Brennan

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The statutes and court rules of New York State offer a surprising array of status to its attorneys, most of which affect the scope of an attorney's ability to practice law. This article lists and describes the various attorney status designations,[1] some of which will be quite familiar to the reader and others less well known.

Attorney and Counselor-at-Law

The Appellate Division admits an individual "to practice as [an] attorney and counselor-at-law in all the courts of this state."[2] All admitted lawyers take an oath of office declaring that they will faithfully discharge the duties of attorney and counselor-at-law of the State of New York.[3]

Most admitted New York State attorneys have passed the New York State Bar examination.[4] A smaller number of attorneys are admitted on motion by the Appellate Division. Instead of passing the Bar exam, these attorneys must show that they meet the requirements for admission on motion, which are set forth in the rules of the Court of Appeals,[5] and which include admission in a reciprocal jurisdiction[6] and practice for five of the seven years immediately preceding the application in one or more jurisdictions in which the applicant has been admitted to practice. All attorneys, whether admitted on examination or on motion, must also go through the character and fitness review process before admission by the Appellate Division.[7]

Absent a subsequent change of status or order, the scope of practice available to an attorney admitted by the Appellate Division on examination or motion is unrestricted.

All admitted attorneys should be aware of at least two obligations[8] of membership in the New York State Bar. They must register with the Office of Court Administration every two years and pay the biennial attorney registration fee, which is now $350,[9] and they must comply with continuing legal education requirements.[10]

Law Intern

The rules of the Appellate Division, Third Department provide for the designation of "law intern."[11] Law interns are law students who have completed at least two semes-

ters of law school and eligible law school graduates who are hired by state agencies or legal aid organizations. The application is made by the employer. The rules authorize law interns to engage in specified legal services that are limited according to the court, the degree of supervision of the intern, and the kind of activity. The intern's supervising attorney assumes personal professional responsibility for the intern's work. A law intern may provide legal services under the rule until admitted to the Bar or notified that he or she failed the New York State Bar exam given immediately following law school graduation. An intern who fails that exam but applies to take the next exam may be redesignated as a law intern by the Presiding Justice.

Pro Hac Vice Admission

The rules of the Court of Appeals provide for admission pro hac vice ("for this turn; for this one particular cause"[12]) to attorneys from other jurisdictions. The application is made to a court of record and permits the attorney to participate in any matter in which the attorney is employed.[13] However, the attorney may not participate in pretrial or trial proceedings unless he or she is associated with an attorney admitted in New York State, who shall be attorney of record in the matter.[14]

Admission pro hac vice is also available to certain attorneys for a period of "no longer than 18 months" upon application to the Appellate Division.

An 18-month pro hac vice admission is available to an attorney from another jurisdiction who is a graduate of an approved law school or who is a graduate student or graduate assistant at an approved law school in New York State and who is employed by a legal aid organization,[15] a District Attorney, a Corporation Counsel, or the Attorney General. An attorney so admitted pro hac vice may advise and represent clients and participate in any matter during the continuance of the attorney's employment. In the case of a graduate student or assistant at a New York State law school, the admission pro hac vice continues while the attorney is so enrolled or during his or her employment as a law school teacher in an approved law school in New York State.[16]

The rules of the four Departments of the Appellate Division vary slightly. In the First Department,[17] an attorney from another jurisdiction who is a graduate student or graduate assistant enrolled in a law school in the First Department, or who is a teacher employed by such a law school, may apply for admission pro hac vice to advise and represent clients or participate in the trial or argument of any case while so enrolled or employed, if engaged to advise or represent such clients by a legal aid organization or during employment with a District Attorney, Corporation Counsel, or the Attorney General. The period of the pro hac vice admission is set forth in the order granting the application. An 18-month pro hac vice admission is available to an attorney from another jurisdiction who is a graduate of an approved law school while employed by a legal organization in the First Department or during employment with a District Attorney, Corporation Counsel, or the Attorney General. The Second Department's rules mirror those of the First Department except that they do not authorize such admission while employed by a District Attorney, Corporation Counsel or the Attorney General.[18] The Third Department specifies the contents of an application pro hac vice by an attorney who is a graduate of an approved law school and specifies the contents of the order granting the application.[19] In addition, the Third Department has the special "law interns" rule described above.

An attorney admitted pro hac vice pursuant to the rules of the Court of Appeals is required to abide by the standards of professional conduct imposed upon members of the New York State Bar and is subject to the jurisdiction of the courts of New York State with respect to any acts occurring during the course of the attorney's participation in the matter.[20]

Legal Consultant

The rules of the Court of Appeals authorize the Appellate Division to license legal consultants.[21]

A legal consultant license is available to a lawyer admitted in a foreign country who has practiced law in the foreign country for three of the past five years, who possesses the necessary moral character and general fitness, who is over 26 years old, and who intends to practice and maintain an office as a legal consultant in New York State. A legal consultant may also be a member of the New York State Bar.[22]

The governing statute[23] and the rules of the Court of Appeals set forth limitations on the legal services a legal consultant may provide but do not attempt to set the parameters of the practice in which a legal consultant may engage. For example, Judiciary Law § 53(6) states that a legal consultant shall not practice in the courts of this state but may render legal services in New York State within limitations prescribed by the rules of the Court of Appeals. The rules of the Court of Appeals regarding legal consultants are captioned "scope of practice," "rights and obligations," and "disciplinary provisions." The legal consultant statute and rules are designed to facilitate transnational legal practice.[24] In general, a legal consultant license authorizes the foreign attorney to provide advice and legal services pertaining to the law of the foreign country of admission.

Censured Attorney

The state Supreme Court has power and control over attorneys and all persons practicing or assuming to practice law, and the Appellate Division is authorized to censure, suspend from practice or remove from office any

attorney admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice.[25]

A censured attorney may continue to practice law. However, the censure will appear as part of the attorney's public disciplinary record.

Suspended Attorney

An attorney suspended from practice by the Appellate Division may not practice law in New York State. Indeed, by statute, the Appellate Division is required to insert in each order of suspension or disbarment a provision which commands the attorney thereafter "to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another" and forbids the performance of any of the following acts, to wit: "the appearance as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority" and "the giving to another of an opinion as to the law or its application, or of any advice in relation thereto."[26]

Attorney Practicing Under Provisions of Stayed Suspension

Decisions that suspend attorneys from practice occasionally stay the suspension on conditions. In general, such a decision will not limit the scope of the attorney's practice but will impose conditions on his or her continued practice designed to protect the attorney's clients and the public. Stayed suspensions have been used especially by the Third Department. Typical conditions have included submitting to the Court, or its Committee on Professional Standards, semiannual reports written by a CPA confirming that the attorney is maintaining an escrow account and preserving client funds in accordance with the applicable provisions of the attorney disciplinary rules;[27] submitting periodic reports from a psychiatrist or employing law firm;[28] making a refund to a client;[29] participating in the New York State Bar Association's Lawyer Assistance Program,[30] or showing compliance with the statutes and rules regulating attorney conduct; not being the subject of any further disciplinary action, proceeding or application by the Committee on Professional Standards; and completing six extra hours of continuing legal education in ethics and professionalism.[31]

A decision that places an attorney on a stayed suspension usually permits the attorney to apply to terminate the suspension period, which continues until further order of the Appellate Division, after passage of one or two years.[32] Such an application is distinguishable from an application for reinstatement (see below) since the attorney has never actually ceased practice. On occasion, when an attorney has been suspended from practice for an indefinite period and the suspension has been stayed on conditions, the decision permits the attorney to apply for termination of the suspension after expiration of a specified period – *e.g.*, two years.[33] A decision imposing a censure may also condition an attorney's continued practice. For example, the Third Department has censured an attorney and directed the attorney to complete, within one year, six credit hours of CLE in ethics and professionalism in addition to the CLE required of all attorneys.[34]

Disbarred Attorney

An attorney disbarred by the Appellate Division is prohibited from practicing law. Whereas a suspension usually carries a specific time period, disbarment lasts for at least seven years.[35] An attorney convicted of a felony "ceases" to be an attorney or competent to practice as such by operation of statute but the Appellate Division will nevertheless thereafter strike the attorney's name from the roll of attorneys, *i.e.*, disbar the attorney.[36]

An attorney may admit disciplinary charges and proffer his or her resignation. If the Appellate Division accepts the resignation, it will enter an order removing or disbarring the attorney or striking the attorney's name from the roll of attorneys.[37]

A censured attorney may continue to practice law. However, the censure will appear as part of the attorney's public disciplinary record.

Revoked License

The Appellate Division is authorized to revoke the admission of an attorney to practice for any misrepresentation or suppression of any information in connection with the attorney's application for admission to practice.[38]

Reinstated Attorney

An attorney who has been suspended or disbarred from practice may be reinstated to practice by the Appellate Division. Unless otherwise stated in the decision, the attorney may then engage in the unrestricted practice of law. To be reinstated, an attorney must show compliance with the decision and order of suspension or disbarment, possession of the character and general fitness to resume the practice of law, and that he or she passed the Multistate

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Professional Responsibility Examination (MPRE) during the period of suspension or disbarment.[39] The decision which imposed discipline may also set forth specific reinstatement prerequisites, such as client refunds[40] or medical opinion that the attorney has the capacity to resume the practice of law.[41] Practice upon reinstatement may be under certain conditions. For example, reinstated attorneys may be required to associate with another attorney as a condition of practice[42] or submit semiannual reports by their psychiatrist assessing their continuing capacity to practice law[43] or submit annual CPA reports regarding their escrow account and client funds.[44] It should be noted that there may be a presumption against the reinstatement of a disbarred attorney and that a disbarment may be considered the Appellate Division's conclusion that an attorney has engaged in professional misconduct that so endangered the public or so dishonored the profession that removal from office was warranted and that the disbarment is not just a form of lengthy suspension.[45]

Retired Attorney

The attorney registration rules[46] permit an attorney to register as retired. An attorney so registering does not have to pay the biennial registration fee. An attorney is retired from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law. For purposes of registration, judges are considered retired.

The rules define the practice of law to mean the giving of legal advice or counsel to, or providing legal representation for, a particular body or individual in a particular situation in either the public or private sector in the state of New York *or elsewhere* and shall include the appearance as an attorney before any court or administrative agency.[47]

The registration rules do not provide for an inactive status allowing an attorney to pay a lesser or no registration fee and the retired status is not meant to be an inactive status.

The Fourth Department's rules specify the notices a retiring attorney shall make to clients, other attorneys, and the Office of Court Administration.[48]

Resigned Attorney

The Appellate Divisions permit attorneys to resign from the Bar voluntarily for non-disciplinary reasons. Attorneys who so resign are usually located outside New York State and resign because they no longer wish to pay the biennial attorney registration fee. Some are older attorneys who are retiring from practice while others are attorneys who are admitted and practice elsewhere but no longer need to be admitted to practice in New York State. According to the Third Department's Web site, an application to resign will set forth the attorney's admission to practice information, whether any disciplinary matters are pending against the attorney, whether he or she has clients in New York State, the attorney's reasons for making application to resign, and a statement that the attorney is aware that if he or she later seeks readmission, the attorney may be required at that time to demonstrate possession of the qualifications and character and fitness for admission and to pay any attorney registration fee arrears owed at the time the attorney submitted his or her voluntary resignation.[49] The rules of the Fourth Department require similar information, but not the readmission statement, and add that if the attorney resides out-of-state and is resigning to avoid paying the attorney registration fees the attorney must state that he or she does not intend to return to New York to resume the practice of law.[50] If the Appellate Division accepts the resignation application, it issues an order.

Readmitted Attorney

On occasion, an attorney who resigns voluntarily for non-disciplinary reasons changes his or her mind and wants to be a member of the New York State Bar again. Upon application, the Appellate Division can readmit the attorney to practice. The Fourth Department rules[51] allow for such an application "for reinstatement" upon a showing of changed circumstances. If the attorney has been off the rolls for more than one year, the Fourth Department may require him or her to pass the MPRE or the Bar examination and the attorney must personally appear before the Appellate Division. An application must state, among other things, the attorney's admission and disciplinary status in other jurisdictions and show payment of the attorney registration fees due when the attorney resigned and the fees which accrued during the period when the attorney was resigned.

Official Documents

The New York State courts do not issue Bar cards or similar documentation that would verify an attorney's status. For a $5 fee, the Appellate Divisions will issue a certificate stating that the attorney was admitted to practice, is in good standing, and is in compliance with the attorney registration requirements.[52]

The attorney registration unit of the Office of Court Administration assigns attorney registration numbers to registered attorneys.

The Unified Court System will also issue a "secure pass" photo identification card to attorneys to ease their entry into court facilities. On the application form (UCS-334), attorneys must list their name as it appears in the

attorney registration directory[53] and include their attorney registration number. A small fee is charged.

Multi-jurisdictional Practice

In 2002, the American Bar Association made recommendations on multi-jurisdictional practice[54] which, if adopted in New York State, would add to and alter the above statuses of attorneys. For example, the recommendations would legitimize the provision of temporary legal services, in-house corporate counsel employment, and federal practice in New York State by attorneys admitted in other jurisdictions. The recommendations also cover pro hac vice admission, motion admission, the licensing of legal consultants, and temporary practice by foreign attorneys. ■

1. As a caveat to the discussion that follows, the reader is advised to consult the exact language of the cited rules and statutes and to note that the Appellate Division has wide discretion to formulate decisions and orders affecting attorneys' licenses. The discussion is mostly limited to published statutes and rules and information readily available on Appellate Division Web sites.

2. *See* Judiciary Law § 90(1)(a), (b).

3. *See* Judiciary Law § 466.

4. Eligibility to take the Bar exam can be shown by study of law in an "approved" law school, or a combination of law school study and law office study, or a combination of law school study and the actual practice of law in another jurisdiction, or a combination of the study of law in a foreign country with other requirements (*see* 22 N.Y.C.R.R. § 520.2(a)(3)).

5. *See* 22 N.Y.C.R.R. § 520.10.

6. The Rules of the Court of Appeals require an applicant to show that he or she is currently admitted to the bar in a jurisdiction which would similarly admit an attorney admitted to practice in New York State to its bar without examination (*see* 22 N.Y.C.R.R. § 520.10(a)(1)(iii); *see also* Judiciary Law § 90(1)(b); 22 N.Y.C.R.R. § 840.7).

7. *See* CPLR art. 94; 22 N.Y.C.R.R. §§ 602.1, 690.5–690.18, 805.1, 1022.34.

8. By administrative resolution of the Administrative Board of the Courts, attorneys are also encouraged to provide pro bono services. In addition, under certain circumstances when performing legal services in New York State, an attorney may be required to have an office in the state (*see* Judiciary Law § 470).

9. *See* Judiciary Law § 468-a; 22 N.Y.C.R.R. pt. 118.

10. *See* 22 N.Y.C.R.R. pt. 1500.

11. *See* 22 N.Y.C.R.R. § 805.5.

12. Black's Law Dictionary.

13. The rules of the First and Second Departments specify that the attorney applies for admission pro hac vice to the court in which the cause is pending to participate in the trial or argument of a particular cause (*see* 22 N.Y.C.R.R. §§ 602.2(a), 690.3(a)). The rules of the Third Department state that the application shall be made to the court in which the action or proceeding is pending (*see* 22 N.Y.C.R.R. § 805.3(a)).

14. *See* 22 N.Y.C.R.R. § 520.11(a)(1), (c). The Second and Fourth Departments have specific rules for such pro hac vice admission before their courts (*see* 22 N.Y.C.R.R. §§ 670.6(e), 1000.13(*l*), 1022.9(a)).

15. The rule refers to an organization described in Judiciary Law § 495(7). The described organizations are organizations which offer prepaid legal services; non-profit organizations whether incorporated or unincorporated, organized primarily for a purpose other than the provision of legal services and which furnish legal services as an incidental activity in furtherance of their primary purpose; and organizations which have as their primary purpose the furnishing of legal services to indigent persons.

16. *See* 22 N.Y.C.R.R. § 520.11(a)(2), (b).

17. *See* 22 N.Y.C.R.R. § 602.2(b)(c)(d).

18. *See* 22 N.Y.C.R.R. § 690.3(b), (c), (d).

19. *See* 22 N.Y.C.R.R. § 805.3(b).

20. *See* 22 N.Y.C.R.R. § 520.11(d).

21. *See* 22 N.Y.C.R.R. pts. 521, 610, 692, 805.4, 1029.

22. *See* Engel, *New York's Rules of Licensing of Foreign Legal Consultants*, N.Y. St. B.J. (Mar./Apr. 1994), pp. 36–37.

23. *See* Judiciary Law § 53(6).

24. *See* Engel, note 22 *supra*.

25. *See* Judiciary Law § 90(2).

26. *Id*.

27. *See In re DiMaggio*, 5 A.D.3d 856, 773 N.Y.S.2d 466 (3d Dep't 2004).

28. *See In re Donohue*, 248 A.D.2d 740, 672 N.Y.S.2d 141 (3d Dep't 1998).

29. *See In re Doling*, 254 A.D.2d 620, 679 N.Y.S.2d 168 (3d Dep't 1998).

30. *See In re Canale*, 209 A.D.2d 816, 620 N.Y.S.2d 1013 (3d Dep't 1994).

31. *See In re Davis*, 269 A.D.2d 732, 703 N.Y.S.2d 576 (3d Dep't 2000).

32. *See In re Dudley*, 262 A.D.2d 864, 692 N.Y.S.2d 769 (3d Dep't 1999); *Doling*, 254 A.D.2d 620.

33. *See Donohue*, 248 A.D.2d 740.

34. *See In re Harris*, 279 A.D.2d 694, 719 N.Y.S.2d 172 (3d Dep't), *appeal dismissed*, 96 N.Y.2d 820, 729 N.Y.S.2d 431 (2001).

35. *See* Judiciary Law § 90(5)(b); 22 N.Y.C.R.R. §§ 603.14(a)(2), 691.11(a), 806.12(a), 1022.28(a)(1).

36. *See* Judiciary Law § 90(4)(a) (b), 22 N.Y.C.R.R. §§ 806.7, 1022.21(a).

37. *See* 22 N.Y.C.R.R. §§ 603.11(d), 806.8(b), 691.9, 1022.26(a).

38. *See* Judiciary Law § 90(2); *In re Canino*, 10 A.D.3d 194, 781 N.Y.S.2d 686 (2d Dep't 2004).

39. *See* 22 N.Y.C.R.R. §§ 603.14(b), 691.11(b), 806.12(b), 1022.28. If an attorney was suspended solely for non-payment of the attorney registration fees, he or she might be reinstated solely upon payment of the fees owed (*see, e.g.*, *In re Eisenberg*, 5 A.D.3d 944, 774 N.Y.S.2d 836 (3d Dep't 2004)). The First and Fourth Departments provide an expedited reinstatement procedure for attorneys suspended for a period of less than six months (*see* 22 N.Y.C.R.R. §§ 603.14(a)(1), 1022.28(b)(3)) and may require certain attorneys to take the Bar examination prior to reinstatement (*see* 22 N.Y.C.R.R. §§ 603.14(i), 1022.28(a)(1), (b)(1)). The First Department imposes a fee on an application for reinstatement (*see* 22 N.Y.C.R.R. § 603.14(l)).

40. *See In re Wojcik*, 179 A.D.2d 868, 578 N.Y.S.2d 675 (3d Dep't 1992).

41. *See In re Dworsky*, 287 A.D.2d 780, 731 N.Y.S.2d 672 (3d Dep't 2001).

42. *See In re Hoffmann*, 254 A.D.2d 518, 678 N.Y.S.2d 537 (3d Dep't 1998).

43. *See In re Winsor*, 290 A.D.2d 876, 737 N.Y.S.2d 308 (3d Dep't 2002).

44. *See In re Joseph*, 259 A.D.2d 945, 687 N.Y.S.2d 758 (3d Dep't 1999).

45. *See* ABA Standards for Imposing Lawyer Sanctions (February 1986), 2.10 Readmission and reinstatement, Commentary, p 24, cited in *In re Feldman*, 252 A.D.2d 733, 675 N.Y.S.2d 673 (3d Dep't 1998).

46. *See* 22 N.Y.C.R.R. § 118.2(g).

47. *Id*.

48. *See* 22 N.Y.C.R.R. § 1022.25.

49. *See* Form Letter on Web site of Appellate Division, Third Department, *at* <www.nycourts.gov/ad3>.

50. *See* 22 N.Y.C.R.R. § 1022.26(b).

51. *See* 22 N.Y.C.R.R. § 1022.28(d).

52. *See* 22 N.Y.C.R.R. §§ 600.15(a)(2), 670.22(b)(6), 800.23(c)(2).

53. The directory can be found at <www.courts.state.ny.us>.

54. Report of the Commission on Multijurisdictional Practice, *Client Representation in the 21st Century*, American Bar Association Center for Professional Responsibility (2002).

Same-Sex Marriage Under New York Law

Advising Clients in a State of Uncertainty

By Derek B. Dorn

Same-sex marriage has become a dominant issue of our times, particularly as the law relating to this subject has developed in recent years. Several states have opened quasi-marital institutions to same-sex couples, chief among these being Vermont's and Connecticut's civil union laws. Most significant, in May 2004, Massachusetts became the first state to sanction the creation of same-sex marriages. And same-sex marriage has advanced on the global stage, with Belgium, Canada, the Netherlands and Spain granting equal marriage rights to same-sex couples.

To assist attorneys in advising clients on these issues, this article maps the present state of the law and highlights planning considerations. At the outset, a caveat is necessary: The legal status of same-sex marriage is evolving rapidly, with new case law being issued and statutes being enacted on what seems like a daily basis.

Indeed, over the past year, New York has emerged as one of the next battleground states. As this article goes to press, the First and Third Departments of the Appellate Division are considering whether New York must grant marriage rights to same-sex couples; it is likely that the issue ultimately will be decided by the Court of Appeals. Meanwhile, an independent issue before New York courts is whether same-sex marriages validly created in other jurisdictions are entitled to recognition under New York law. If so, marrying abroad or (if possible) in Massachusetts, or entering a civil union in Connecticut or Vermont, might offer same-sex couples a more expeditious route to accessing spousal benefits under New York law.

But irrespective of whether New York sanctions the creation of same-sex marriages or accords recognition to same-sex marriages created in other jurisdictions, the Defense of Marriage Act (DOMA),[1] enacted by Congress in 1996, prohibits *any* federal-level recognition of same-sex marriages. Nor are same-sex marriages "portable" to any of the 40 states that have enacted their own such bans.

This complex and rapidly shifting landscape presents a challenge for New York same-sex couples. In considering the question of marriage, these couples must ask not only the familiar (and personal) "if," but also the legal questions of "when" and "in what jurisdiction." Moreover, because their marriages will not be recognized universally, same-sex couples must plan carefully for marriage. In particular, they must be aware of difficulties in obtaining a future divorce and the fact that accessing certain state-level spousal benefits could result in adverse federal tax consequences. Until addressed by the New York Court of Appeals or the Legislature, the rights of same-sex couples under state law will be clouded by uncertainty.

Out-of-State Developments

New York attorneys need to be familiar with out-of-state developments for several reasons. First, many New York

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same-sex couples have traveled, or will travel, to other jurisdictions for the purpose of marrying or becoming civilly united. Second, same-sex couples may become domiciled in New York after having married elsewhere. Third, for the New York same-sex couple that owns property in another jurisdiction, marrying, becoming civilly united or creating a "quasi" marriage might enable the couple to access transfer tax benefits from the other jurisdiction. Finally, these out-of-state developments inform the spectrum of paths that New York's courts or legislature might choose to take.

Vermont Civil Unions

In the first U.S. breakthrough with enduring implications, the Vermont Supreme Court ruled in 1999 that denying same-sex couples the benefits of marriage violates the Vermont Constitution's Common Benefits Clause.[2] The court directed the legislature to modify Vermont's marriage statute, either by opening marriage to same-sex couples or by crafting "some equivalent statutory alternative." The legislature chose the latter and created the "civil union."[3] Because civil unions were intended to be "separate but equal," the civil union statute defines "marriage" as "the legally recognized union of one man and one woman," while also providing that parties to a civil union shall be "spouses" and "have all the same benefits, protections and responsibilities under [Vermont] law . . . as are granted to spouses in a marriage."[4] Thus, under Vermont law, the sole distinction between a civil union and a marriage is the nomenclature.

Vermont imposes no residency requirements for entering a civil union. Consequently, thousands of non-Vermont couples, the greatest number of them from New York, have traveled to Vermont to become civilly united.[5] But Vermont is presently one of only two states to solemnize civil unions, which has clouded "portability" – that is, the extent to which civil unions will be recognized in other jurisdictions. Because of strict residency requirements to file for civil union dissolution in Vermont court,[6] this question has been brought to bear in the dissolution context. While trial courts in Iowa and West Virginia have each recognized a Vermont civil union in order to dissolve it,[7] appellate courts in Connecticut and Georgia have refused to do so.[8] As discussed below, in 2003, the New York Supreme Court for Nassau County became the only non-Vermont court that has extended affirmative rights to civilly united spouses. That decision was overturned by the Appellate Division, Second Department in October 2005.

Massachusetts Marriage

Nearly four years after the Vermont Supreme Court's historic decision, the Massachusetts Supreme Judicial Court took the further step, ruling that "[l]imiting the protections, benefits and obligations of civil marriage to opposite-sex couples violates the basic premise of individual liberty and equality under law protected by the Massachusetts Constitution."[9] On May 17, 2004, Massachusetts town clerks became required to issue marriage licenses to same-sex couples. Same-sex couples who marry are entitled to *all* benefits that Massachusetts extends to married couples.

Presently, however, same-sex couples are unable to marry in Massachusetts unless both parties reside, or manifest an intention to reside, in Massachusetts. The limitation stems from an obscure 1913 statute, which provides that "no marriage shall be contracted in [Massachusetts] by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in [Massachusetts] in violation hereof shall be null and void."[10] Based on that statute, Massachusetts town clerks have been ordered to "cease and desist" from granting marriage licenses to out-of-state same-sex couples. In late 2005, the Massachusetts Supreme Judicial Court heard oral arguments in a lawsuit that challenges the statute's constitutionality;[11] as of this writing, no decision has been rendered.

Several state legislatures have created quasi-marital institutions, affording same-sex couples certain rights previously reserved for married spouses.

An initial effort to amend the Massachusetts Constitution failed to gain sufficient support in the legislature. Opponents of equal marriage rights now seek to place an amendment before voters on the November 2008 ballot.

Connecticut Civil Unions

In April, Connecticut became the first state to enact civil unions without court mandate.[12] The law, which took effect on October 1, extends to civil union "partners" "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage." Unlike its Vermont analog, however, the Connecticut statute does *not* define the parties to a civil union as "spouses."[13]

Quasi-Marital Institutions

Additionally, several state legislatures have created quasi-marital institutions that make available to same-sex couples certain rights that state law had previously reserved for married spouses. The benefits associated with these institutions vary widely; at a minimum, each grants registrants hospital visitation and healthcare decision-making rights. California's statewide domestic partnership registry extends all *non-tax* rights that are available to married spouses under California law.[14] New Jersey's domestic partnership law extends certain rights

as next of kin but not intestate inheritance or elective share rights.[15] Domestic partners are not treated as spouses for income and estate tax purposes, but the law does exempt transfers to a surviving domestic partner from New Jersey inheritance tax.[16] Couples who register as domestic partners in Maine or as "reciprocal beneficiaries" in Hawaii are entitled under those states' laws to (among other benefits) the intestate inheritance preference and right to elect against a partner's will.[17]

In other states, legislative efforts are underway to extend various levels of relationship recognition to same-sex couples. Alongside this activity, a number of lawsuits pending in state courts challenge the inability of same-sex couples to marry. Trial courts in California and Washington have held that their respective state constitutions require equal marriage rights for same-sex couples;[18] both of the decisions are on appeal. Lawsuits are also pending in Connecticut, Florida, Maryland, New Jersey and, as discussed below, before the New York Appellate Division (First and Third Departments).[19]

Finally, dozens of U.S. municipalities, including nine in New York State, offer domestic partnership registries.[20] While statutory rights associated with these municipal registries generally are few, registration could enable a couple to access certain third-party benefits. For instance, many employers make registration a prerequisite to accessing employment-related domestic-partner benefits. Moreover, entering a municipal registry could enable couples to access rights under the laws of other jurisdictions. Registration of a domestic partnership could also provide prima facie evidence of a couple's relationship, which could prove essential in a variety of legal contexts.

Developments Abroad

In 2001, the Netherlands became the world's first jurisdiction to grant full marriage equality to same-sex couples. Subsequently, Belgium, Canada and Spain have opened marriage to same-sex couples. Among these countries, Canada is alone in imposing no nationality or residency requirement, and many U.S. same-sex couples have already traveled to Canada to marry.[21]

New York Marriage Law

New York's marriage law is codified in the Domestic Relations Law (DRL), which facially imposes only two substantive requirements to create a marriage: a minimum age requirement[22] and the "consent of parties capable in law of making a contract."[23] Although neither requirement is phrased in gender-specific terms, New York courts consistently have held that as a matter of statutory interpretation, the DRL does not authorize the creation of same-sex marriage.[24] At the same time, however, there has never been a New York statute or constitutional provision that expressly *prohibits* the state from sanctioning the creation of same-sex marriages or from recognizing such marriages created in other jurisdictions. Based on this absence, Attorney General Eliot Spitzer concluded in a March 2004 advisory opinion that while the DRL probably does not authorize the creation of same-sex marriages, the exclusion of same-sex couples from marriage "presents serious constitutional concerns" under the New York State Constitution.[25]

There has never been a New York statute or constitutional provision that expressly prohibits the state from sanctioning the creation of same-sex marriages or from recognizing such marriages created in other jurisdictions.

Following the Attorney General's pronouncement, five separate lawsuits that challenge the exclusion were filed in New York courts. Each lawsuit asserts that denying same-sex couples the right to marry violates the state's constitution, which, as the Court of Appeals has acknowledged in another context, "affords the individual greater rights than those provided by its federal counterpart."[26] In particular, the plaintiffs argue that New York's Due Process Clause grants a fundamental right to marry a person of one's choice, and that under New York's Equal Protection Clause, restricting marriage to opposite-sex couples cannot survive the heightened scrutiny that applies to deprivations of fundamental rights and to classifications based on sex and (possibly) sexual orientation.[27] Two of the lawsuits also raise a statutory argument, claiming that the DRL's facial gender neutrality requires permitting same-sex couples to marry.

The Supreme Courts for Albany, Rockland and Tompkins Counties all have rejected such challenges. As to the due process claim, these courts have declined to find a fundamental right to enter a *same-sex* marriage. As to the equal protection claims, these courts have denied that the ban on same-sex marriage is tantamount to a sex-based (*i.e.*, suspect) classification, and have rejected the claim that heightened scrutiny applies to classifications that implicate sexual orientation. Having dispensed with these arguments, the courts have held that the state has a rational basis for limiting marriage to opposite-sex couples.[28]

In February 2005, the Supreme Court for New York County reached the opposite conclusion, holding that the

New York State Constitution requires the state to permit same-sex couples to marry. Without determining if heightened scrutiny is applicable, the court applied the rational basis test, concluding that the defendant City of New York "has not presented even a legitimate State purpose that is rationally served by barring same-sex marriage."[29] On these grounds, the court held that the DRL must be interpreted to permit same-sex marriage. The court's decision has been stayed pending the City of New York's appeal.

Because the New York Court of Appeals has declined to entertain a direct appeal to these decisions, the First and Third Appellate Departments must first rule on the appeals. Both appellate courts heard oral arguments in late 2005.

Recognition by New York of Out-of-State Same-Sex Marriages

The "Place-of-Celebration" Rule and *Langan v. St. Vincent's Hospital*

As the issue of whether same-sex couples can *create* a marriage in New York moves through state courts, an independent issue is whether New York will *recognize* a same-sex marriage that has been solemnized by another jurisdiction.

To determine if an out-of-state marriage is legally recognizable, most states, including New York, apply the "place-of-celebration" rule: The marriage will be recognized as long as the marriage (1) is valid in the jurisdiction where it was created and (2) does not violate an important public policy of the forum state.[30] Historically, New York courts have given this rule a broad application. The mere fact that New York law would not permit the creation of a marriage has never been equated with a public policy against the marriage.[31] Rather, marriages have been found to contravene New York public policy only if New York statute expressly prohibits recognition or if recognition would be "offensive to the public sense of morality to a degree regarded generally with abhorrence."[32] As to the former, no New York statute expressly prohibits the recognition of same-sex marriage. As to the latter, only "polygamy or incest in a degree regarded generally as within the prohibition of natural law" has risen to such level.[33] Thus, even though New York law prohibits the creation of a common-law marriage,[34] a common-law marriage that is lawfully created in Pennsylvania will be recognized in New York.[35] Similarly, while an uncle and niece cannot marry in New York,[36] such a marriage lawfully created in Italy will be recognized in New York.[37]

In 2003, the Supreme Court for Nassau County became the first New York court to apply the place-of-celebration rule in the context of a same-sex spousal relationship. In *Langan v. St. Vincent's Hospital*, the court concluded that the place-of-celebration rule requires New York to recognize the parties to a Vermont civil union as spouses.[38] *Langan* arose in the context of the Wrongful Death Act, codified in the Estates, Powers & Trusts Law (EPTL).[39] The Act extends standing in a wrongful-death action to a decedent's distributees,[40] a class defined elsewhere in the EPTL to include, among others, a decedent's "spouse."[41] The question presented was whether the decedent's civil-union partner qualified as his spouse, and thus as a "distributee" with standing under the Act. As to the first prong, the court noted that Vermont law calls the parties to a civil union "spouses," and concluded that "[a] civil union under Vermont law is distinguishable from marriage only in title." As to the public policy exception, the court found that recognizing same-sex unions would actually be *consistent* with the public policy of New York, a state that already has extended a panoply of legal protections to same-sex couples. On these bases, the court concluded that the survivor of a civil union is a distributee of the decedent and, as such, has standing under the Act.

In October 2005, a divided panel of the Appellate Division, Second Department reversed the trial court decision. The majority considered the "civil union" label dispositive: "In essence, this court is being asked to create a relationship never intended by the State of Vermont in creating civil unions or by the decedent or the plaintiff in entering into their civil union." However, the Appellate Division left open the question of whether a *marriage* lawfully created in another state would be entitled to recognition under New York law: "The fact that since the perfection of this appeal the State of Massachusetts has judicially created such right for its citizens is of no moment here since the plaintiff and the decedent were not married in that jurisdiction."[42]

An appeal is expected in *Langan*. If the Court of Appeals agrees with the trial court's reasoning, then same-sex partners who lawfully create a spousal relationship in another jurisdiction, whether by entering a civil union or marriage, will be entitled to *all* rights that New York law extends to spouses. Attorney General Spitzer's March 2004 advisory opinion gave the *Langan* trial court decision such an interpretation, stating, "New York law presumptively requires that parties to [same-sex unions created in other jurisdictions] must be treated as spouses for purposes of New York law."[43] Following the Attorney General's lead, New York Comptroller Alan Hevesi announced that the New York State and Local Retirement System, over which his office has jurisdiction, will "recognize a same-sex Canadian marriage in the same manner as an opposite-sex New York marriage, based on the principle of comity."[44] The City of New York, as well as the municipal governments of Brighton, Buffalo, East Hampton, Ithaca, Nyack, and Rochester, have also announced that they will recognize for all municipal purposes any validly created same-sex marriage. Several pri-

vate employers and insurance providers have also indicated that they will recognize New York same-sex couples' marriages that are valid where created.[45]

Still, given Governor Pataki's stated opposition to same-sex marriage, it appears that state executive-branch agencies will not recognize out-of-state same-sex marriages. A spokesman for the New York Department of Taxation and Finance has indicated that because New York taxpayers generally are required to use the same filing status on their New York income tax returns as on their federal tax returns,[46] same-sex couples who have married elsewhere are not able to file New York income tax returns as married.[47]

Federal Non-recognition of Same-Sex Marriage

Notwithstanding these state-level developments, the DOMA has frozen federal law.

Historically, the federal government has recognized any marriage that is valid under the laws of any state. But DOMA renders this principle inapplicable to same-sex couples. DOMA defined, for all federal purposes, "marriage" as "a legal union between one man and one woman as husband and wife" and "spouse" to "refer[] only to a person of the opposite sex who is a husband or wife."[48] As such, same-sex couples – even if recognized as married by one of the 50 states – are denied access to all 1,138 federal benefits, rights and privileges that are contingent upon marital status, including 179 provisions of federal tax law.[49]

Besides denying federal-level recognition of same-sex marriage, DOMA purports to authorize – but not require – each state to refuse to "give effect to any public act, record or judicial proceeding concerning a relationship that is treated as a marriage . . . or a right or claim arising from such relationship."[50] For additional measure, 40 states have enacted their own "mini-DOMAs" – constitutional or statutory provisions that prohibit the creation or recognition of same-sex marriages.[51] Thus, the portability of a same-sex couple's spousal relationship is severely limited as the couple travels across the country, and especially outside the Northeast. While many scholars have questioned DOMA's constitutionality,[52] gay rights organizations, believing that a constitutional challenge would fuel efforts to amend the U.S. Constitution, have been discouraging any challenge to the statute.

Planning for Marriage

New York same-sex couples are faced with a patchwork of legal rights and uncertainties. They are already able to marry in Canada or to become civilly united in Connecticut and Vermont. New York may itself soon (or may not) solemnize same-sex marriages. New York law may (or may not) require the state to recognize same-sex marriages that are validly created in other jurisdictions. The federal government unambiguously (though perhaps unconstitutionally) denies any recognition of same-sex spousal relationships. Thus for New York same-sex couples who want to marry, careful planning is key.

Choice of Jurisdiction

Thus, for New York same-sex partners planning to marry, the threshold question is *where* to marry. Canada probably is the best option. New York precedent suggests that the place-of-celebration rule applies equally to marriages created in other countries as to marriages created in other U.S. states. The case for Canada is not unassailable, however, because of Canada's one-year residency requirement for divorce. Thus, if for some reason New York courts were to deny recognition to a same-sex marriage created in Canada, to obtain a divorce might require one of the spouses to establish residency in Canada.

Marrying in Massachusetts is not presently a viable option for most New York resident couples. Massachusetts's marriage application form requires the couple to affirm that both applicants reside or intend to reside in Massachusetts. It is not entirely clear how such intent is demonstrated. Couples who marry in violation of the statute will be committing perjury and their marriages will be void *ab initio*.[53] Moreover, because New York's recognition of an out-of-state marriage will hinge on the marriage having been lawfully created, same-sex couples who marry in violation of the statute will have dubious legal status in New York.

As between a Canadian marriage and a Vermont or Connecticut civil union, Canadian marriage is preferable. The Appellate Division's *Langan* decision suggests that even if being *civilly united* spouses is not sufficient, *married* spouses might still be able to access the rights that New York extends to married opposite-sex spouses. Moreover, other states that might be willing to recognize a same-sex marriage might agree with the Appellate Division's conclusion that the "civil union" title is not inconsequential. At the federal level, if DOMA were to be overturned or repealed, marriage would surely have federal effect, while civil unions might not.

Now or Later?

A second question is *when* to marry. Marrying today will immediately enable New York same-sex couples to access benefits from those public and private institutions that have already announced a policy of recognition of all lawfully created same-sex marriages. These benefits could be significant for some couples – for instance, if one spouse is a participant in the New York State and Local Retirement System. Even without such benefits, couples still might choose to marry today, for doing so would put them in a strong position to access spousal rights if the *Langan* plaintiff prevails or if New York marriage were opened to same-sex couples. Other couples may choose to wait for New York law to become clearer. There are, of course, significant non-legal reasons that many couples would decide against marrying in another state or country. In the meantime, these couples may wish to consider registering as domestic partners, in order to ensure a minimum baseline of government recognition of their relationship.

Planning Measures

Same-sex couples must plan carefully for marriage, especially because it is not clear that a same-sex marriage can be dissolved as easily as an opposite-sex marriage and because accessing state-level benefits could have federal tax consequences.

Prenuptial agreements. Same-sex couples must be aware of the state-level obligations associated with marriage, such as the support obligation[54] and the spousal elective share.[55] As is true for opposite-sex couples, prenuptial agreements are advisable both to limit the applicability of such obligations and to establish a baseline for asset distribution if the marriage should end.

For same-sex couples, prenuptial agreements take on added importance because of the difficulty the couple might encounter in obtaining a divorce. Whereas opposite-sex married couples generally can divorce in their state of residence (regardless of whether the marriage was created in that state), such access is not clear for same-sex couples. As of yet, no New York court has ruled as to whether it has authority to dissolve a same-sex marriage or civil union created in another jurisdiction. Moreover, if the couple were to move to another state, it is not clear the other state would dissolve the relationship. For these couples, returning to the jurisdiction that solemnized the relationship might become the only means of obtaining a divorce. But Canada and Massachusetts each require one spouse to satisfy a one-year residency requirement before the spouses can avail themselves of the courts to divorce, and Connecticut and Vermont each impose the same requirements to dissolve a civil union. If a marriage or civil union cannot be dissolved, the parties probably would not be able to marry or become civilly united again.

Same-sex couples must plan carefully for marriage, especially because it is not clear that a same-sex marriage can be dissolved as easily as an opposite-sex marriage.

A prenuptial agreement can address such hurdles. The agreement could stipulate that if the spouses decide to dissolve their relationship, one or both spouses will become resident of a jurisdiction that will sanction dissolution. Alternatively, the agreement can provide that if dissolution cannot be obtained in New York, the prenuptial agreement should be construed as a contractual domestic partnership agreement, upon which an arbitrator shall rely to allocate the spouses' assets.

For same-sex couples, prenuptial agreements also take on added importance because transfers incident to divorce could trigger federal transfer and income taxes. The Internal Revenue Code provides for no gain or loss recognition to the recipient of a transfer incident to divorce.[56] But DOMA renders this provision inapplicable to same-sex couples. Thus, a transfer pursuant to dissolution of a same-sex marriage or civil union might be treated as a gift for federal gift tax purposes, triggering tax liability (or an erosion of the transferring party's $1 million lifetime exclusion) to the extent the transfer exceeds the annual gift-tax exclusion amount ($12,000 in 2006). A prenuptial agreement might anticipate this consequence by stipulating that upon divorce, any asset held prior to the marriage will be returned to the spouse who owned it and that assets acquired during marriage would be divided between the spouses in accordance with consideration furnished.

Wills, health care proxies and powers of attorney. In certain states, but not New York,[57] if a testator executes a will prior to marrying, his or her subsequent marriage will serve to revoke or modify the will, unless the will was executed "in contemplation" of marriage.[58] At a minimum, therefore, parties to a same-sex marriage should evaluate and perhaps revise or republish their wills. In addition, each party to a same-sex marriage will need to confirm that a spousal claim to the elective share will not defeat the party's desired scheme for distribution of probate and non-probate assets.

Individuals who will have taxable estates might also consider revising their wills in anticipation of state-level opportunities for tax deferral or savings. (In 2006, all gross estates exceeding $1 million are subject to the New York estate tax; all gross estates exceeding $2 million are subject to the federal estate tax.) The New York estate tax generally tracks federal estate tax determinations of a decedent's marital status.[59] But if New York law were to require recognition of same-sex marriages or civil unions, the New York tax law would have to be read in a manner that extends equal rights to same-sex spouses. As such,

the marital deduction from New York estate tax would be available for transfers at death to a surviving same-sex spouse if the transfer is made outright or, presumably, in a "QTIP-able" trust (under which income is paid to the surviving spouse and, upon death of the surviving spouse, the assets are distributed in the manner directed by the decedent).[60] But in planning for these potential opportunities at the state level, the estate plan should also take account of a surviving spouse's immediate cash needs, as such needs could be impacted by the federal estate tax.[61]

Additionally, because same-sex couples who marry will face uncertainty as to whether their marriages will be recognized if something were to happen to one of them as they travel outside of New York State, the couples should maintain powers of attorney and health care proxies.

Federal Tax Traps

Same-sex couples should be aware that accessing state-level benefits could trigger adverse federal tax consequences. For instance, numerous states, including New York, permit married couples to take title to property as a tenancy by the entirety, a form that historically has offered greater creditor protection than other forms of joint tenancies.[62] Upon creation, a tenancy by the entirety vests equal property rights in both spouses, regardless of the manner in which consideration was furnished.[63] As a tax matter, however, if both spouses do not furnish equal consideration, the creation of a tenancy by the entirety will be considered a gift for federal purposes.[64] For opposite-sex couples, the gift would qualify for the federal gift tax marital deduction; but for same-sex couples, on account of DOMA, the gift would be deductible only to the extent valued at an amount not greater than the annual gift-tax exclusion amount.

DOMA's flip side, of course, is that same-sex couples, including those who marry, are not subject to any of the federal rules governing intrafamily wealth transfer. Nevertheless, it may be advisable for same-sex married couples to avoid taking advantage of such "opportunities," in order to "prevent others from using the designation of 'single' [for tax purposes] to argue or prove that a person is not really married when that issue arises in other legal contexts."[65] The same considerations suggest that same-sex married couples act as though they are bound by federal tax code provisions limiting intrafamily wealth transfers. Opting into such requirements would also avoid the need for "emergency planning" if DOMA were to be overturned or repealed and same-sex marriages were to become recognized for federal tax purposes.

Conclusion

Nearly six years after civil unions became available in Vermont and almost two years after Massachusetts began creating same-sex marriages, considerable uncertainty remains. Among the states, New York seems most likely to recognize out-of-state relationships; it is also a probable contender to become the next state to authorize the creation of same-sex marriages. Yet, in this climate of uncertainty, there are many reasons why same-sex couples should evaluate their options. ■

1. Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C).
2. *Baker v. State*, 170 Vt. 194, 197, 744 A.2d 864 (1999); Vt. Const. ch. 1, art. 7.
3. An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 (codified at Vt. Stat. Ann. tit. 15, §§ 1201–1207.
4. Vt. Stat. Ann. tit. 15, §§ 1201, 1204.
5. *See* Report of the Vermont Civil Union Review Commission, January 2002.
6. To file in Vermont court for civil union dissolution, one spouse must have been a resident of Vermont for the preceding six months; to obtain the dissolution, one spouse must have been a resident for one year preceding the final hearing. Vt. Stat. Ann. tit. 15, § 1206.
7. *In re Kimberly Brown and Jennifer Perez* (Iowa Dist. Ct., Woodbury Co. Nov. 14, 2003); *In re the Marriage of Misty Gorman and Sherry Gump*, No. 02-D-292 (W. Va. Fam. Ct., Marion Co. Jan. 3, 2003).
8. *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (App. Ct. 2002); *Burns v. Burns*, 253 Ga. App. 600, 560 S.E.2d 47 (Ct. App. 2002).
9. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003).
10. Mass. Gen. Law ch. 207, §§ 10-13, 50.
11. *Cote-Whitacre v. Dep't of Public Health*, No. SJC-09436 (Mass. Sup. Jud. Ct.) (argued Oct. 6, 2005).
12. Civil Union Law, Conn. Pub. Act 05-10.
13. For background on Connecticut civil unions, see <http://www.glad.org/marriage/CivilUnionCT.pdf> (last visited Nov. 15, 2005).
14. Cal. Fam. Code § 297.5.
15. N.J. Stat. §§ 26:8A-1–26:8A-12.
16. N.J. Stat. § 54:34-2.
17. Haw. Stat. § 572C-6; Me. Rev. Stat. tit. 24-A, §§ 2741-A, 2832-A.
18. *See In re Coordination Proceeding, Special Title [Rule 1550(c)] (Woo v. Lockyer)*, No. 4365, 2005 WL 583129 (Cal. Super. Ct., San Francisco Co. Mar. 14, 2005); *Andersen v. Sims*, No. 04-2-04964-4 SEA (Wash. Super. Ct., King Co. Aug. 4, 2004).
19. For a summary of the pending lawsuits, see National Center for Lesbian Rights, *Marriage Equality Factsheet*, <http://www.nclrights.org/publications/pubs/marriage_equality0905.pdf> (2005).
20. The jurisdictions are the Cities of Albany, Brighton, New York and Rochester; the Towns of Eastchester and Greenburgh; and the Counties of Albany, Tompkins and Westchester. *See* New York State Bar Association, *Report and Recommendations of the Special Committee to Study Issues Affecting Same-Sex Couples*, Oct. 2004, at 238.
21. *See, e.g.*, Rona Marech, *Same-sex Couples Flock to Gay-Friendly Canada*, S.F. Chron., Mar. 9, 2004, at A1.
22. DRL § 15-a.
23. DRL § 10.
24. *Hernandez v. Robles*, 7 Misc. 3d 459, 794 N.Y.S.2d 579 (Sup. Ct., N.Y. Co. 2005).
25. Op. Att'y Gen. No. 2004-1, Mar. 3, 2004, at 6. Advisory Opinions are not binding but indicate how the Attorney General's office evaluates a particular issue.
26. *Esler v. Walters*, 56 N.Y.2d 306, 313–14, 452 N.Y.S.2d 333 (1982).
27. The Appellate Division, First Department has ruled that under the Equal Protection Clause of the New York Constitution, sexual orientation is a suspect classification, and that classifications based on sexual orientation are entitled to heightened judicial scrutiny. *See Under 21 v. City of N.Y.*, 108 A.D.2d 250, 488 N.Y.S.2d 669 (1st Dep't), rev'd on other grounds, 65 N.Y.2d 344, 492 N.Y.S.2d 522 (1985).
28. *See Kane v. Marsolais*, Index No. 3473-04 (Sup. Ct., Albany Co. Jan. 31, 2005); *Samuels v. N.Y. State Dep't of Health*, Index No. 1967-04 (Sup. Ct., Albany Co. Dec. 7, 2004); *Seymour v. Holcomb*, 7 Misc. 3d 530, 790 N.Y.S.2d 858 (Sup. Ct., Tompkins Co. 2005); *Shields v. Madigan*, 5 Misc. 3d 901, 783 N.Y.S.2d 270 (Sup. Ct., Rockland Co. 2004).

29. *Hernandez*, 7 Misc. 3d 459.

30. *In re Estate of May*, 305 N.Y. 486, 490 (1953). *See generally* Restatement (Second) Conflict of Laws § 283 (2) (1971).

31. *E.g.*, *Van Voorhis v. Brintnall*, 86 N.Y. 18 (1881).

32. *Estate of May*, 305 N.Y. at 490.

33. *Id*. at 491.

34. DRL § 11.

35. *Carpenter v. Carpenter*, 208 A.D.2d 882, 617 N.Y.S.2d 903 (2d Dep't 1994); *accord Black v. Moody*, 276 A.D.2d 303, 714 N.Y.S.2d 30 (1st Dep't 2000).

36. DRL § 5(3).

37. *Campione v. Campione*, 201 Misc. 590, 107 N.Y.S.2d 170 (Sup. Ct., Queens Co. 1951); *accord Estate of May*, 305 N.Y. 486 (1953) (Rhode Island uncle-niece marriage recognized).

38. *Langan v. St. Vincent's Hosp.*, 196 Misc. 2d 440, 765 N.Y.S.2d 411 (Sup. Ct., Nassau Co. 2003).

39. N.Y. Estates, Powers & Trusts Law 5-4.1 (EPTL).

40. EPTL 4-1.1.

41. EPTL 1-2.5, 4-1.1.

42. *Langan v. St. Vincent's Hosp.*, 802 N.Y.S.2d 476 (2d Dep't 2005).

43. Op. Att'y Gen. No. 2004-1, Mar. 3, 2004, at 6.

44. George S. King, Counsel to the New York State and Local Retirement System, to Mark E. Daigneault, Oct. 8, 2004.

45. *E.g.*, *Top Three Car Insurance Companies in New York Will Respect Gay Couples' Marriages*, <http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=1515> (July 6, 2004).

46. N.Y. Tax Law § 607(b). However, some exceptions are statutorily required, such as if one spouse is a New York resident and the other is not. Tax Law § 651.

47. *See* Andy Humm, *Gays Denied Married Tax Status; Attorney Gen. Eliot Spitzer Won't Intervene in State Finance Decision*, Gay City News, Jan. 31, 2005. Two petitions pending before the New York State Department of Taxation and Finance seek official guidance.

48. 1 U.S.C. § 7.

49. *See* General Accounting Office, Tables of Laws in the United States Code Involving Marriage Status, by Category, January 31, 1997; Dayna K. Shah, Associate General Counsel, Government Accounting Office, to The Honorable Bill Frist, United States Senate, Jan. 23, 2004.

50. 28 U.S.C. § 1738C.

51. In addition to New York, the states that have not enacted statutory or constitutional prohibitions on same-sex marriage are Connecticut, Maryland Massachusetts, New Jersey, New Mexico, Rhode Island, Vermont, Wisconsin and Wyoming. Nor has the District of Columbia done so.

52. For a summary of these arguments, see generally Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev. 1 (1997).

53. Mass. Gen. Law ch. 207, § 52.

54. N.Y. Fam. Ct. Act § 412.

55. EPTL 5-1.1-A.

56. I.R.C. § 1041(a)(2).

57. New York instead gives the spouse a right of election under EPTL 5-1.1-A.

58. *E.g.*, Ore. Stat. § 112.305; *see also* Unif. Probate Code § 2-102.

59. *See* Tax Law § 961.

60. Presently, there is no independent QTIP election for New York estate tax purposes. But the experience in Massachusetts suggests that if New York were to accord recognition to same-sex spousal relationships, the executor of the estate of a decedent who died married to a same-sex spouse would file a *pro forma* federal return, on which the executor would make a QTIP election that would be respected for New York purposes.

61. For a more thorough consideration of tax and estate planning strategies for New York same-sex couples, see Derek B. Dorn, *Navigating the Same-Sex Marriage Landscape: A Primer for the New York Private Client Attorney*, NYSBA Trusts & Est. L. Section Newsl., Fall 2005, pp. 16, 22–23.

62. 11 U.S.C. § 522(b)(2)(B); *see* EPTL 6-2.1(4).

63. *E.g.*, *In re Estate of Violi*, 65 N.Y.2d 392, 492 N.Y.S.2d 550 (1985).

64. 26 C.F.R. § 25.2512-2.

65. Gay and Lesbian Advocates and Defenders, *Navigating Income Taxes for Married Same-Sex Couples*, available at <www.glad.org/rights/taxes_for_married_ couples.html> (last visited Nov. 15, 2005).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a sole practitioner with a general practice. One area in which I practice is real property transactions and mortgage foreclosures for local banks. The mortgage foreclosure business is highly competitive and quite lucrative. However, keeping the business of the lenders requires aggressive litigation and quick results.

Recently a local bank for which I do a lot of this type of work asked me to become an "officer" of the bank, pursuant to a resolution of the Board of Directors, for the sole and expressly limited purpose of providing the affidavits of merit necessary to support applications in foreclosure actions. Foreclosures are frequently successful upon the default of the property owner. The courts are therefore adamant in requiring competent affidavits of merit from an officer of the plaintiff corporate lender. Obtaining such affidavits sometimes slows things down so the bank has devised this method of expediting the process.

I am a little uncomfortable with this proposal as I am also the attorney of record in these actions, and, of course, not an employee of the bank, but would not like to lose the client. Is it OK to go along with the bank's request under the Disciplinary Rules? Is there any other ethical problem with my agreeing to do this?

Thanks for your help.

Sincerely,
Concerned

Dear Concerned:

Under the ethical and professional guidelines of the New York Lawyer's Code of Professional Responsibility, it appears that you should not accept the bank's offer.

At first glance, taking on the role of a bank officer does not seem to be a problem. As the attorney of record, you already know all the facts necessary to issue or not issue an Affidavit of Merit on a particular foreclosure action. It is undoubtedly frustrating to the bank (and to you as well) that an independent officer must also research the facts of the case and review the file, only to make the same decision that you could have made earlier. Avoiding duplication of effort, and saving significant amounts of time, by making you an officer is certainly appealing. However, it is not that simple.

First, you would be placing yourself in a conflict-of-interest position, because your own interest – maintaining the bank as a client for foreclosure actions – may influence your view on the worthiness of a case's Affidavit of Merit. *See* DR 5-101 (Conflicts of Interest – Lawyer's Own Interests). You have stated in your question that the reason you are considering taking this offer is because the foreclosure business is highly competitive, and you do not want to risk losing the client. Your own words imply that you are considering this offer only because of your own interests.

In addition, DR 1-107(A) (Contractual Relationships Between Lawyers and Nonlegal Professionals) states, ". . . a lawyer must remain completely responsible for his or her own independent professional judgment . . ." As noted, you have stated in your question that the reason you are considering accepting this offer is because you would not like to lose the client by refusing. It appears that with its offer the bank is already influencing your professional judgment. As attorney for the bank on foreclosure actions, one of your responsibilities is to review Affidavits of Merit to insure that they are proper and based on fact. If you also are charged with the task of actually preparing these Affidavits, your independent judgment may be compromised, and you may be tempted to overlook procedural defects given your client's desire for "quick results."

Further, what would happen if you were called as a witness in a foreclosure proceeding to testify as to how you arrived at your decision to issue an Affidavit of Merit? That would be a violation of DR 5-102, "Lawyers as Witnesses." You might even be asked to divulge information you obtained as the attorney in the case, not as the bank officer, which otherwise would be privileged as an attorney-client communication.

A final concern, but by no means the least important, is found in DR 9-101, "Avoiding Even the Appearance of Impropriety." Not only could the issues mentioned above create the appearance of impropriety on your part, but you might also be placing your client, the bank, in a similar position. The New York State Banking Department may view your appointment as an officer as being questionable, because you are not an employee of the bank but rather the attorney of record – and this would involve both you and the bank as participating parties. The bank may be perceived by the

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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Banking Department as using such an appointment to circumvent the very system the bank is responsible to uphold. There is a reason the Banking Department requires an officer of the bank, not the attorney representing the bank, to sign the Affidavit of Merit – to avoid any appearance or actual prejudice in issuing an Affidavit for all the reasons mentioned herein.

Perhaps a solution is for you to suggest to your client that this position be offered to a trusted colleague who has practiced in this area of the law. This might be someone who is retired, and therefore available to accept the role. He or she could review findings and file information submitted by you on an ongoing basis as the case progresses, and thereby be prepared to issue an Affidavit of Merit as expeditiously as you could prepare it. In this manner, you are safely focused on continuing your work as the attorney of record and on servicing your bank client, without any questionable ethical matters looming overhead.

The Forum, by
Elaine D. Papas, Executive V.P. and General Counsel
Trump Mortgage, LLC
New York, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM 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

LANGUAGE TIPS

GERTRUDE BLOCK

Question: I have a question about the past tense of *plea*. I have seen the past tense *pleaded* used, for example, "The defendant pleaded guilty," but *pleaded* has always struck me as an incorrect substitute for *pled*.

Answer: Perhaps you thought that *pleaded* was incorrect because *pled* is more often used by lawyers and judges. See, for example, in *State v. Toliver*, 187 Wis. 2d 345: "Toliver pled guilty to the two counts . . . ."

Surprisingly, however, non-legal authorities prefer *pleaded*. For example, Wilson Follett, in his book *Modern American Usage*, 1984, flatly rejects *pled*. He writes, "*Pleaded* is educated; *pled* is not." *The Oxford English Dictionary* is not so arbitrary, but it also prefers *pleaded*, labeling *pled* "dialectical," and occurring only in the Scottish language and in American English.

The past tense *pleaded* is also older than *pled*, having entered English during the 16th century, when it replaced the original past tense *plead* (which was pronounced "pled," like the current past tense of *read*). Later, the past tense came to be spelled the way it was pronounced, *pled*, and was used along with the past tense *pleaded*.

Its wide acceptance in legal use may have been by analogy to the past tense of the verb *lead* (*led*). As you may have noticed, journalists now sometimes misspell the past tense of *lead* as *lead* instead of *led*, though they pronounce it *led* like the noun *lead* (the metallic element). That misspelling results in surprising sentences like, "At the end of the race, the Ethiopian runners lead ("led") all the other runners."

The etymology of so-called "weak" verbs like *plead* is interesting. Weak verbs add *-ed* to form the past tense; strong verbs change internally to form the past tense. In Old English – before about 1100 A.D. – there were many more "strong" verbs than "weak" ones. But during the centuries, weak verbs have come to greatly outnumber strong verbs. For example, in Old English, the verb *help* was a strong verb, its past tense being *holpen*. Some of the strong verbs still in existence are *catch/caught*, *drink/drank*, and *eat/ate*.

A few verbs retain both their strong and weak past tenses, depending on their meaning. Criminals were *hanged*, but pictures are *hung*. If you consider the past tense of *plead* to be *pled*, you are treating *plead* as a strong verb. People sometimes disagree about whether to treat a verb as weak or strong. Which do you prefer as the past tense of the following verbs: *wove* or *weaved*; *dove* or *dived*; *strove* or *strived*; *lit* or *lighted*? (My spell-check disapproves of only one past tense of those listed; it tells me that *weaved* is spelled wrong.)

The preference for *pled* over *pleaded* may be due to the tendency of legal writers to retain old formulas, copybook words and phrases. David Mellinkoff, in his 1963 book, *The Language of the Law*, says that in former times lawyers retained archaic language because of their "awestruck respect for the magic potency of words." He adds that currently, however, lawyers often use language no longer in general use as a mnemonic device: "[N]o longer for fear the law itself will be forgotten if the language changes, but that the lawyer might forget it." (p. 438). The result, says Mellinkoff, is "choking redundancies" like:

> null, void, and of no effect
> rest, residue, and remainder
> without let and hindrance

Lawyers have written asking whether "Further affiant sayeth naught," should be re-written "Further affiant sayeth nothing." Both expressions are archaic, and should be discarded. The word *naught* is almost never used except in an expression like, "My efforts came to naught," and sometimes in poetry. The word *further*, meaning "additional" is still in general use, but the syntax is out of date. Current usage would require, "The affiant says nothing further."

Readers have asked about the meaning of another anachronism: "Know all men by these presents." A New Jersey lawyer once polled his fellow lawyers to find out how many knew what that statement meant. Most had no idea. Those who thought they knew believed that *presents* meant "gifts." In fact, *presents* has nothing to do with gifts. It is a truncated form of the Medieval Latin phrase *presens scriptum*, which meant "present writing."

Errata:

In the September issue, writing about blends, I said that Roger Federer, after winning the third straight men's single final tournament at Wimbledon, "created" the blend *threepeat*. Attorney David A. Pravda set me straight. Although Federer used the word, it had already been created.

And from Stamford, Connecticut: Attorney Theodore J. Greene (referring to the same column) corrected my designation of the person credited with giving the hamburger sandwich its name as the German nobleman who was the "Earl" of Hamburg. But Mr. Greene informed me that the nobleman should have been identified as the "Landgrave" of Hamburg, a title combining the German *lant* ("land") and the German title *grave* ("count"). An "earl," it seems, ranks higher in the hierarchy of German nobility than a count.

Finally, a more egregious error: Attorney Clinton Neagley, of the University of California (Davis), pointed out that my reference to the "Lord's Prayer" in the October "Language Tips" should instead have been to the 23rd Psalm.

My thanks to these and to all other careful readers for their input. ■

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).

- An analysis section;
- A discussion of policy arguments; and
- A conclusion.

This structure delays the writer from getting to the point until page 20.[13] You can get to your point quicker by making your background or overview section brief and by adding some analysis and policy information into the body of your argument.[14] The goal is to avoid unnecessary or lengthy diversions.

Other scholarly writings include substantive-law articles and how-to guides. A substantive-law article focuses on a law's development and enforcement with emphasis on dividing the discussion into elements of the law and issues in controversy. A how-to guide explains the step-by-step actions that someone would follow to do something. Both are typically designed for a practitioner who needs quick answers with citeable research.

The structure of a substantive-law article consists of

- An introduction;
- The law, including its development and passage;
- A discussion of the issues and elements of that law, discussing primary and secondary authority and questions in dispute;
- A discussion of practical consequences; and
- A conclusion.

The structure of a how-to guide (for appeals, for example) consists of

- An introduction;
- A description of what appeals are;
- A discussion on why you'd want to appeal;
- A discussion on which court to appeal to and its jurisdiction;
- A description of the necessary papers, forms, or fees;
- A discussion of the service of papers to opposing sides;
- A discussion on how to write the brief and argue orally; and
- A conclusion.

Drafting

Create an outline, list, diagram, or chart to keep your notes and research organized so that you can find them easily. After completing your initial research and an outline, start writing. This is usually when the dread sets in: you've done all the preparation but now must fill in the blank space on your page or screen. You might believe that the best approach is to begin at the beginning and write a perfect introduction. But your first draft will go smoothly if it's nothing more than a "brain-dump"[15] or a rough outline of the main ideas and how they link with your research. You can also write "zero drafts" in which you write down everything you know about your topic "without regard for order, grammar, or brilliance."[16] Or you can start with a fact section or a point clear in your mind.

Don't finish all your research before you start drafting — or you'll never start your draft. The goal isn't to know everything by the time you start but rather to know everything by the time you're done. If you get writer's block, force yourself to continue. Make a schedule and stick to it. As one writer put it, "honor, pride and guilt will motivate you into completing your task."[17] Writing is tough. But the end justifies the means. Nothing important is easy.

Writing

Strive for simplicity, clarity, and brevity so that your readers don't work too hard.[18] This isn't because your readers are lazy but because "[y]our industrious and smart readers are busy people . . . ."[19]

Other suggestions[20] for better writing:

- Use meaningful titles to introduce the article and each section;
- Write a strong introduction to get your reader's attention and to set the tone for the rest of the paper;
- Discuss your topic and sub-topics thoroughly yet briefly;
- Transition smoothly between issues to assure logical flow;
- Address respectfully the opposing arguments that others could make against your thesis;
- Don't personalize your arguments or insult those with whom you disagree; and
- Adopt a tone of measured rationality to convey respect for and credibility to your readers.

Some mechanical suggestions:

- Keep quotations short and pointed;
- Place periods and commas before footnote or endnote numbers and quotation marks; and
- Use one space between sentences in articles you want to publish.

Citing

Most law journals request that you use footnotes. Others, like the *New York Law Journal* and the New York State Bar Association *Journal*, request that you use endnotes. Most journals use Bluebook citation format or a Bluebook variant. Whichever citation style you use, write text and good citations at the same time.[21] That'll mean fewer revisions later.

Footnotes and endnotes provide authority for assertions and attribute borrowed material. They also get your name and paper into the stream of discussion. By quoting others, you'll get noticed by those you quoted. In turn, they'll quote you. Then you and your paper become immortal.

Editing

Edit after your first draft. Or edit as you go along. Or both. The point is to edit and re-edit. Depending on your deadline, leave time between edits. Many writers, including the greatest, must edit repeatedly. Each time you edit, focus on a different type of correction, including substance, grammar, and citation.

When editing for substance, focus on the quality of your arguments. Ask yourself whether your arguments lead logically to your conclusion and whether you've made each point clearly and persuasively. Watch for circular reasoning or arguments that beg a

Always consider suggestions and be grateful for them. Don't let your ego interfere.

point. Avoid legalese. Define terms of art.

Look for common grammatical and stylistic issues like:

- Passive voice. ("The evidence was admitted by the judge." *Becomes:* "The judge admitted the evidence.")
- Introductory phrases, or metadiscourse, especially those that qualify. ("It appears to be the case that the statute . . . ." *Becomes:* "The statute . . . .").
- Word choice. (Use "learn" instead of "ascertain.")
- Abbreviations in your text. (Use "for example" instead of "e.g.").
- Words that confuse. ("The police officer sectioned off a section of the protestors." *Becomes:* "The police officer sectioned off a group of the protestors.")
- Nominalizations, or nouns formed from verbs. ("She made an objection to . . . . " *Becomes:* "She objected to . . . .").
- Sentence length. (Use short sentences with some variety.)
- Paragraph length, which depends on the journal. (Use shorter paragraphs for legal magazines or newspapers and longer ones for scholarly journals.)

When editing citations, focus on whether you cited every source you used to make your arguments and whether you cited them correctly. You don't want to plagiarize. The profession doesn't care whether you plagiarized something inadvertently or intentionally. Then double check your citations and quotations to make certain they're accurate. Doing a full citation and substance (C&S) work-up will save you and your editor grief later. Another way to save your editor grief: Photocopy all your citations, highlight the relevant passages, organize them by footnote or endnote number, and offer to give them to your editor.

After completing your edits, give your paper to a peer or faculty advisor to review. A neutral opinion is important in any paper you want published. These edits are suggestions you may implement or discard. But always consider suggestions and be grateful for them. Don't let your ego interfere.

Publishing

Congratulations. You've completed your paper. Now, where to publish? The best — also the hardest — way to guarantee publication is to secure journal approval in advance. That way you won't write something that might not be published. If this isn't possible, expect to spend at least a month sending out your paper and waiting for an offer. You might also spend about $400 to make copies and buy stamps for paper submissions, if you submit to about 200 law reviews and journals.[22] The following is a discussion of various publications and how to submit your paper to them.

Law Reviews and Journals

You can submit your paper to all 450 or so American law reviews and journals, including specialty journals like the University of Houston's *Texas Electronic Ethics Reporter*, Pace University's *Pace Interactive Earth Law Journal*, and UCLA's *Ultra Cool Law Review*. You can also submit your paper to your first 25 or 50 choices. If you don't hear from your first choices within two to three weeks, submit to your next 25 or 50 choices. You can find a list of law reviews and their submission guidelines at http://www.law.suffolk.edu/library/lawrev/submission.cfm, or you can find a list of all law reviews and their subject areas on FindLaw at http://stu.findlaw.com/schools/usaschools/index.html.

You can also use the electronic submission services from The Berkeley Electronic Press Site for Legal Scholars (ExpressO) at http://law.bepress.com/expresso/, which charges $2.00 for electronic submissions to each law review and $6.50 for each paper submission. If your law school has an institutional account, the submission service is free, or your school or law firm might reimburse you for service charges. You can additionally use the free electronic submission services from the Social Science Research Network at http://www.ssrn.com.

The easiest way to submit electronically is to use the free submission form available on most journals' Web pages. Fill out your contact information, attach your paper, and click "Submit."

The best times to send your paper to law reviews are mid-March through April and mid-August through September, when student editors begin their tenure. The worst is from October through February. Student editors have made their offers by then and are busy publishing that year's volume.

Each law journal lists its submission guidelines on its Web pages. Some common things journals require are

- A cover letter with a brief abstract of the article and your contact information;
- WordPerfect or Word format;
- Times New Roman, 12 point;
- Page or word limits (the more academic the journal, the longer the article); and
- Copy on 3-1/2" floppy disk.

The law journal that wants to publish your paper will contact you with an offer. The editor will give you a deadline to reply, which may be "one week, 5 days, or 6.2 hours."[23] You can then request expedited review from more desirable journals. Doing so tells the more desirable journal's editors that your paper's worth a closer look.

New York State Bar Association *Journal*

To publish in the New York State Bar Association *Journal*, submit your paper in Word by e-mail to the Editor-in-Chief, David Wilkes, at dwilkes@huffwilkes.com, or to the Managing Editor, Daniel McMahon, at dmcmahon@nysba.org. The *Journal* requests that each writer send an initial proposal to the Editor-in-Chief. Your initial proposal should include topic

ideas or the article's opening paragraphs. To ensure that your paper hasn't strayed from the initial proposal, the *Journal* further requests a preliminary review of your paper's first eight to ten paragraphs before you finish writing. The *Journal* has a 5,000-word limit, including endnotes. Your article may be longer if you get the Editor-in-Chief's approval. It might be granted if the subject matter requires added length and if the text is well-written and to the point. Above all, read the *Journal*'s Submission Guidelines first; they can be found at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Bar_Journal/Article_Submission22/Article_Submission.htm.

Keep the format simple and avoid informality. Endnotes should be kept to an absolute minimum and be reasonable in length; include only those most essential to back up your points.

To submit to the New York State Bar Association's 20 section publications, such as the *New York Real Property Law Journal*, the *Trial Lawyers Section Digest*, and the *Government, Law and Policy Journal*, send your article to the section's editor-in-chief on a 3-1/2" floppy disk along with a hard copy and a brief biography. Although all editors-in-chief are professors or lawyers, some section publications are student-edited. You can find a list of all section publications and their editor-in-chief's name at http://www.nysba.org/Content/NavigationMenu/Sections_Committees/Section_Publications/Section_Publications.htm. You can also find the submission guidelines for all section publications in the *NYSBA Author Guidelines* at http://www.nysba.org/Content/ContentGroups/Section_Newsletters_Journals/author_guide/Author.pdf.

New York Law Journal

To publish in the *New York Law Journal's Outside Counsel* column, submit your paper, along with a brief biography, to Steve Homan, the Legal Editor of Outside Counsel Column, at shoman@alm.com. The *Law Journal* accepts submissions on a first-submitted, first-published basis. If accepted, papers are generally published six to eight weeks after submission. All *NYLJ* papers must be under 2,000 words, including endnotes. Avoid "*Id.*" footnotes; they'll disappear in the printed copy.

Write *NYLJ* columns in a formal tone. Avoid contractions. Cut the imperative tense and "you," "I," or "our." Authors should include the first name, middle initials, and suffixes of justices or judges and address individuals with the appropriate prefix, like "Ms. Smith."

No *NYLJ* column may have appeared in another publication. Authors cannot write about cases in which they or their firms are involved, unless the appellate process is over. Even then that discussion may not exceed 10 percent of the column, and the involvement must be disclosed in the author's biography line.

The *NYLJ* will accept submissions only from law firm partners, of counsel attorneys, judges, attorneys in public service, in-house counsel, solo practitioners, or law professors. It accepts submissions from associates only when the associate co-authors the paper with someone who may submit a paper alone. All submissions must include the author's digital or glossy color headshot, which must be either .tif or .jpg, with at least 300 resolution (dpi), or actual photographs.

The *NYLJ* reserves the right to make copy and stylistic changes without notice. It will consult the author about any substantive changes. Its editor will write headlines and subheadings, although the editor will consider the author's suggestions.

Post-Acceptance

After you accept an offer for publication, your journal's editor will edit your paper for citation format and style according to the journal's rules. Be open-minded about the editors' suggestions. But be skeptical because they won't know your topic as well as you do. Ask to see all changes before the article goes to print, even if the publication has a tight printing schedule. Most publications — the *New York Law Journal* is an exception — will try to accommodate you.

Copyright Protection

After your paper is accepted for publication, retain copyright and grant the journal only nonexclusive copyrights to the paper. By retaining the copyright, you may reuse or distribute your paper. If you give the publication exclusive copyright, you'll have to request permission to reproduce, use, or distribute any portion of your paper. Some journals will ask for exclusive rights. Most of the time, they'll ask only for nonexclusive rights, if you object.[24]

Getting Your Paper Read

Don't be afraid to promote your paper. The journal will give you a small number of copies to give to colleagues, family, and friends. You may also want to send a copy to former professors who teach in the same field, lawyers who work in the same field, legislators or civic groups interested in your topic, and the authors you've cited. Always write a courteous cover letter telling them who you are, your thesis, and why your paper will interest them.

Conclusion

Know what to expect when you choose to write and publish an academic legal paper. Then embark on your journey with joy! ■

1. N.Y. St. CLE Bd. Regs. & Guidelines 3(D)(8) (written materials for CLEs) and (10) (publications), *at* http://www.courts.state.ny.us/attorneys/cle/regulationsandguidelines.pdf (last visited July 21, 2005). Download the application from the Unified Court System's Web site http://www.courts.state.ny.us/attorneys/cle/application forms/shtml.

2. Eugene Volokh, Academic Legal Writing: Law Review Articles, Student Notes, Seminar Papers, and Getting on Law Review 24 (2d ed. 2003).

3. *Id.* at 9.

4. N.Y. St. Bar Ass'n, *Bar Journal Article Submission*, http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Bar_Journal/Article_Submission22/Article_Submission.htm (last visited July 21, 2005).

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5. Heather Meeker, *Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers*, 1996 Utah L. Rev. 917, 933 (1996).

6. *See* Legal Information Inst., *Wex*, http://straylight.law.cornell.edu/wex/index.php/Main_page (containing a search engine for legal information by area).

7. Volokh, *supra* note 2, at 14.

8. Pamela Samuelson, *Good Legal Writing: Of Orwell and Window Panes*, 46 U. Pitt. L. Rev. 149, 165–66 (1984).

9. *Id.*

10. *Id.* at 166.

11. *Id.*

12. Elizabeth Fajans & Mary R. Falk, Scholarly Writing for Law Students: Seminar Papers, Law Review Notes and Law Review Competition Papers 5-13 (2d ed. 2000)

13. Samuelson, *supra* note 8, at 154.

14. *Id.* at 152.

15. This term refers to writing everything you know on a scrap paper in the first five minutes of a final exam so that you won't lose information you've acquired just hours before taking the exam.

16. Fajans & Falk, *supra* note 12, at 65.

17. Christian C. Day, *In Search of the Read Footnote: Techniques for Writing Legal Scholarship and Having it Published*, 6 J. Legal Writ. Inst. 229, 250 (2000).

18. Volokh, *supra* note 2, at 73.

19. *Id.*

20. These suggestions are explained in Samuelson, *supra* note 8, at 155–61.

21. Day, *supra* note 17, at 248–49.

22. Kaimipono Wegner, *How to Publish Your Work in Law Reviews*, http://www.law.columbia.edu/careers/law_teaching/Law_Rev_Publish (last visited July 21, 2005).

23. C. Steven Bradford, *As I Lay Writing: How to Write Law Review Articles for Fun and Profit*, 44 J. Legal Educ. 13, 30 (1994).

24. Volokh, *supra* note 2, at 164–66.

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS
1/1/05 - 11/27/05 _____ 8,530

NEW LAW STUDENT MEMBERS
1/1/05 - 11/27/05 _____ 1,171

TOTAL REGULAR MEMBERS
AS OF 11/27/05 _____ 67,670

TOTAL LAW STUDENT MEMBERS
AS OF 11/27/05 _____ 3,340

TOTAL MEMBERSHIP AS OF
11/27/05 _____ 71,010

EDITOR'S MAILBOX

Dear Madam/Sir:

I have to respectfully disagree with Bar President Buzard's position on the Schiavo matter [President's Message, October 2005]. Mr. Buzard does not speak for me.

Congress is specifically authorized by the United States Constitution to pass the legislation it did (Amendment XIV, Section 5). In doing so, Congress violated neither the doctrine of federalism nor the doctrine of separation of powers.

Notably, Mr. Buzard does not criticize the federal district court. How come? Despite the clear language of the statute indicating Congressional intent that the court make a de novo finding, the court refused to do so. Ms. Schiavo deserved better and the federal district court failed her.

Sincerely yours,
Edwin R. Soeffing, Esq.
Severna Park, MD

NEW MEMBERS WELCOMED

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Avishai Meyer Adiv
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Denise Colon-greenaway
Joseph C. Colucci
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Rebecca Bain Cross
Eileen Mary Cunningham
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Leah Beth Davis
Matthew Harrell Davis
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Bryan Hurwitz Dayton
Yue Ting Deng
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Jeremy G. Epstein
Tatjana Alexandria Eres
Melissa Sue Erwin
Sandra Patricia Espinosa
Sheryl Ann Ewart Sorensen
Sean Michael Ewen
Ricardo Stuart Exantus
Jared Lee Facher
James Rodney Farrow
Lakeytria Windray Felder
Matthew Christian Ferlazzo
Joanna C. Fernandes
Lydia Ferrarese
Emily Pudan Feyrer
Betsy Suzanne Fiedler
Adrienne R. Fields
Michele Anne Filorimo
Emily Finn
Christopher Beleny Fischer
Golda M. Fleischman
Francesca Fleri
Spencer James Forhart
Mandie Rose Forman
Sarah Elizabeth Fowlkes
Karen Jennifer Francis
Annette Frankel
Alexander Gardner Fraser
Raul Fratantoni
Christopher James Fredericks
David James Friar
Andrew Harris Fried
Sara Esther Fuks
Vicky Fulop
Michael George Gabriel
John Cullinane Gallagher
Luis M. Garcia-Flores
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Boris L. Gelfand
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Jacqueline Christine Grant
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Christopher John Hamilton
Yale Han
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Joshua Harlan Harris
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Meghan M. Hart
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BY GERALD LEBOVITS

Academic Legal Writing: How to Write and Publish

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct at New York Law School. He thanks court attorney Justin J. Campoli for assisting in researching this column. Judge Lebovits's e-mail address is GLebovits@aol.com.

Few things are more challenging than writing an academic legal paper — even if you're an academic. For many of us, legal writing was the bane of law school. It's hard to imagine that we'd want to subject ourselves to that kind of punishment again. For others, scholarship is a highlight of their education and profession. For them, it's a way to get MCLE credit,[1] to explore an issue, to let out frustrations, to show the pros and cons of a law, to suggest solutions to debated problems, to learn, to teach, and to enrich their résumé. This column explains what to expect if you embark on academic legal writing, where to find help, and how to publish.

Finding a Topic— From Passion to Purpose

You can explain or summarize a substantive area of law or procedure (like small claims law) or author a how-to article (like how to sue in Small Claims Court). Or you can write a book review. You can also write about an unresolved problem or a solution to that problem. If you write about problems or solutions, your claim should be reasonable, or at least plausible. Your proposed solution should be concrete enough to offer guidance.[2]

Your interests should be your first place to find a topic. That'll fuel your drive when your project becomes rocky or tiresome. Balance your interests with your topic's usefulness to the profession. Whether your article is practical or theoretical, it must have value to the profession. Your topic should be a novel way to look at an issue or a novel way to solve a problem.[3] Keep in mind the market for your goods. If it's saturated with papers on the topic, your paper is less likely to be published. The publication to which you submit your paper will have criteria about publishable topics. For example, the New York State Bar Association *Journal* advises prospective writers to avoid "highly specialized" issues or summaries of court decisions that most lawyers will not find helpful.[4]

Other ways to find topics:

- Think back to law school and recall issues that might still be controversial;
- Read casebooks, comments, treatises, or digests to find conflicting case law or splits in authority, or go to Westlaw or LEXIS and enter as a query your legal topic and "split in circuits";
- Search for recent appellate decisions published online on emerging or controversial areas, perhaps with cases that have dissents or concurrences;
- Attend conferences, symposiums, and continuing-legal-education seminars to hear about hot topics in your field;[5]
- Read the journals in which you want to publish to find an article you disagree with or which doesn't explore a topic fully;
- Visit Web sites that describe an area of law and identify interesting topics;[6]
- Consider writing about an area on which you have recently worked;
- Seek advice from your colleagues about what would make an interesting topic; and
- Find mentors with good ideas — and co-author a piece with them.

Researching

After selecting a topic, determine whether other papers express your ideas. If someone has preempted your topic, find another angle or revise your conclusion. You can make your topic more nuanced by delving into complex issues or limiting your topic.[7]

> Keep in mind the market for your goods.

If your topic is unique, find support for your claim. Your research shouldn't lack depth.[8] It should include sufficient primary and secondary authority.[9] Your research should also not lack breadth.[10] It should include sources other than cases and law-review articles.[11] Find authority adverse to your claim. By addressing adverse authority, you build credibility with your reader.

Choosing a Structure

Three types of law-review articles are case comments, case notes, and competition papers.[12] A case comment examines one aspect of the law and traces its development or controversy. A case note evaluates one judicial opinion's reasoning and result. It doesn't just summarize a holding. A competition paper is similar to a case note, except that it's shorter, has a short deadline and requires less original research.

The standard structure of a law-review article consists of

- An introduction with a scope note, or a precise roadmap of your paper;
- A background or overview section;
- A discussion of statutes and court decisions;

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