NEW YORK STATE BAR ASSOCIATION

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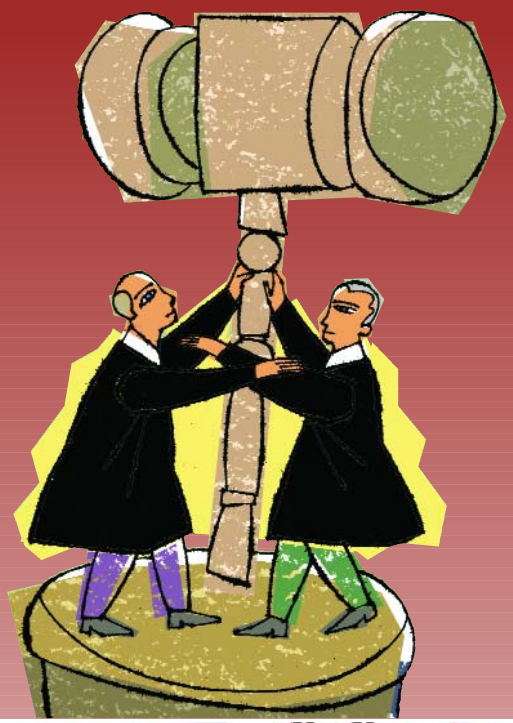

A Fine Line

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By Gerald Stern

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January 2005

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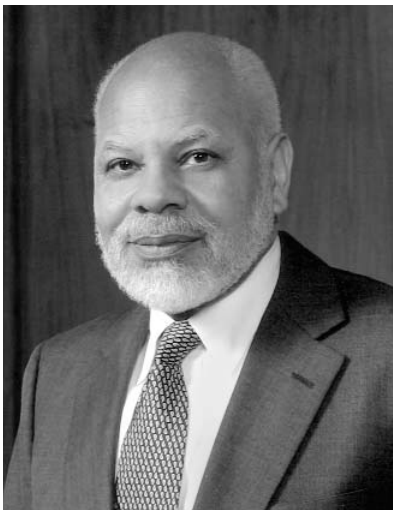

KENNETH G. STANDARD

All Views Considered

I decided on the subject of this message as I reviewed issues for the meeting of the House of Delegates in January. The agenda is heavy, reflecting the work of our Association's many volunteers in examining and making recommendations on matters affecting the practice of law and the justice system. The topics before us in January range from assuring that adequate public defender systems are available, to planning for law practice continuity when a practitioner becomes unable to continue in the practice, to examining the legal issues affecting same-sex couples.

Lawyers have the talent, training and commitment to find answers to difficult problems. To often daunting tasks, our Association brings a breadth of voices and views; that is our strength, but also a challenge in developing positions. As readers of this message, you may be interested in how matters come to our attention, how positions are reached, and what role the House of Delegates performs.

I have spoken with you through this column, at House meetings and elsewhere about the importance of ensuring that our Association fosters opportunity, inclusiveness and an environment that embraces the sharing of knowledge and experience, cultivates varied ideas and encourages the candid airing of questions, different views and different approaches.

The 248-member House of Delegates for some 30 years has been our principal forum and policy-making body. The House includes delegates from communities and bar associations across the state, section representatives, district delegates, and others. The House exists to hear from the bar of New York State and to learn of the conditions and concerns that you have and to draw on your experiences. In advance of each House meeting, we circulate agenda items to interested sections, to committees, local bars and others for comments, which are distributed to delegates to help them as they weigh the issues. Clearly, it would be easier to adopt positions by presidential directive or that of a handful of officers. However, it would be our loss not to hear and understand the varying perspectives of our diverse membership as the Association determines positions.

We have had many healthy debates on the floor of the House. Delegates have told me that points raised by their colleagues during House discussions have, at times, caused them to see an issue in a new light and, as a result, to modify the vote that they thought they would make when they entered the room.

In this spirit of open discussion, sections, committees and local bars may request placement of reports and recommendations on House agendas. In 2003 during our Annual Meeting, The Association of the Bar of the City of New York presented a report that recommended adoption of legislation to provide full marriage rights or, at least, civil unions to same-sex couples in committed relationships. The discussion was extensive, with delegates expressing views on the specific recommendations of the report, other approaches, and whether the issue was within the purview of the Association or was primarily a question of public policy for consideration by the Legislature. When all was said and done, the House, in a standing vote of 74 to 66, directed that consideration of the question be postponed and that the Association create a Special Committee to Study Issues Affecting Same-Sex Couples to explore legislative or private legal solutions to the problems raised in the report.

The House directed that the Committee be formed with a membership reflecting different backgrounds and perspectives, and that it examine the legal issues affecting same-sex couples and make recommendations, for House consideration, as to whether we as an Association should take action on any of these issues and, if so, what. The result of the Committee's work is a comprehensive report on the state of the law and developments in New York and other jurisdictions that in and of itself is informative and a contribution to the scholarship on this issue.

As set forth in the conclusions and as discussed in preliminary presentations at the House meeting in November, within the Committee membership there are three different approaches urged. Nine members concluded that, because of the differences in how the law treats same-sex and opposite-sex couples and the inability of same-sex couples to remedy those differences, the

KENNETH G. STANDARD can be reached by e-mail at president@nysbar.com.

Legislature should enact comprehensive legislation to extend to same-sex couples the rights now extended to opposite-sex couples. Of the nine, four members contended that selection of a particular option, such as domestic partnership, civil union or marriage, is a matter of public policy and should be considered by the Legislature, while five recommended adoption of legislation expressly authorizing same-sex couples to marry under New York's civil marriage statute. Three members of the Committee dissented, stating that the Association historically has avoided taking positions on questions of social or public policy and should not do so here. They urged the Association to call upon the Legislature to determine the appropriate public policy with respect to whether and to what extent such relationships should have legal recognition.

The report and these approaches have been sent out for comment to sections, committees, local bars and other interested parties. The scheduling resolution adopted by the House in November calls for debate at its January meeting and then voting in April. I do not know what action the House ultimately will take. The report is available on the Association's Web site – www.nysba.org. We encourage you to write to us with your thoughts in advance of the House's vote on this issue.

I do know that this is not the first time that questions have been raised in the course of considering issues – from the death penalty, to environmental justice, to biotechnology, among others – as to whether there were legal concerns appropriate for our Association to address or whether the issues entailed social/public policy better left to lawmakers. In some cases, we have chosen to take positions on the legal aspects of such matters, and in other situations, we have declined to comment.

I know that in the future we will be challenged to consider whether our expertise should be applied to other problems. I also know that in all cases – past, present and future – we are the better for examining these significant issues and in doing so, seeking the views of as many of our members as may wish to comment.

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Benefits, Health Care and the Workplace	March 30 April 1 April 6	New York City Albany Rochester
A Primer on Civility and Ethics in Litigation (half-day program)	April 8 April 15	New York City; Rochester Albany; Uniondale, LI
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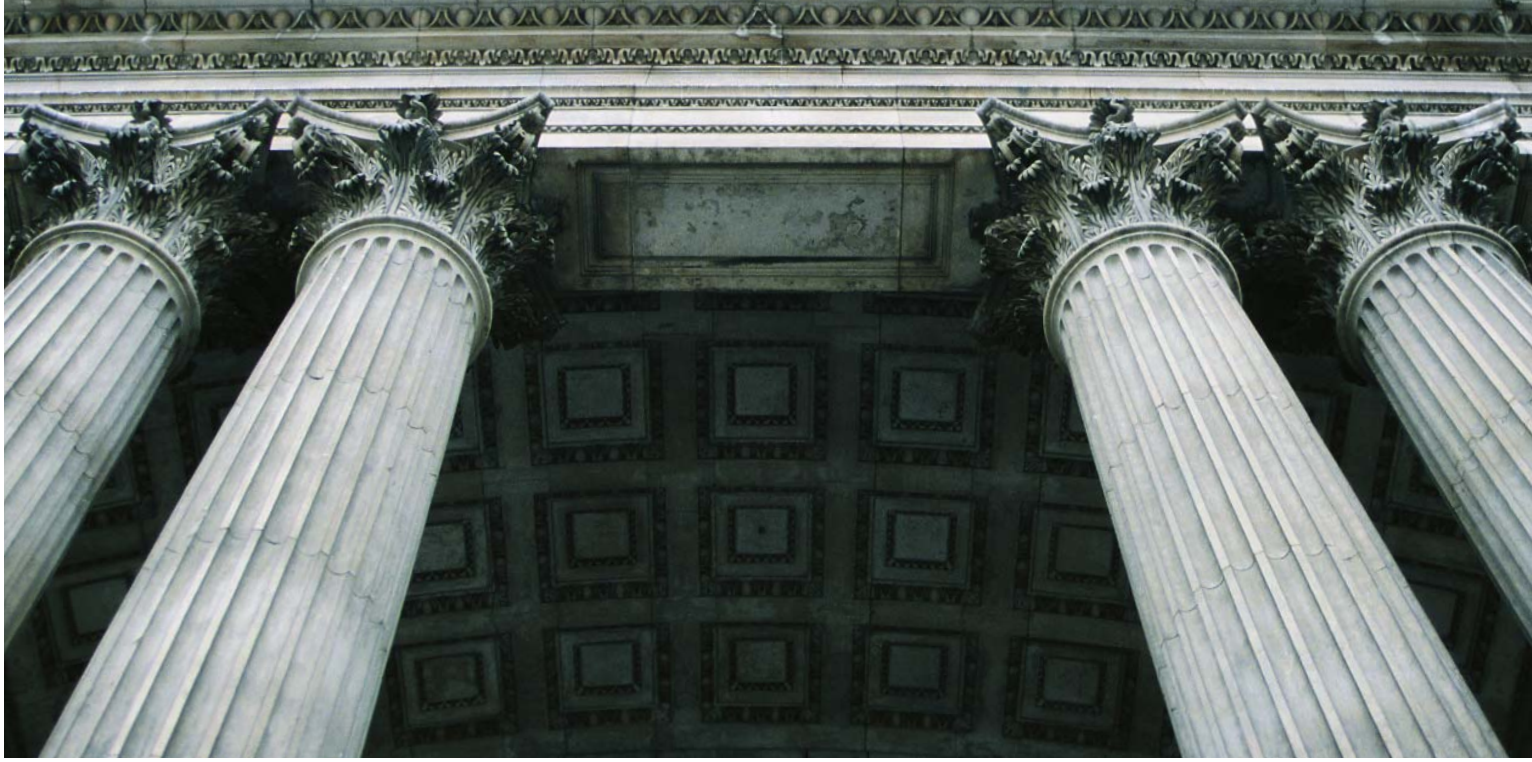

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Kenneth G. Standard
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A Fine Line

The First Amendment and Judicial Campaigns

By Gerald Stern

Judicial candidates are far more restricted in what they can say and do than candidates for other public offices. Yet, in New York they run for office within a partisan political system with political party endorsements, just as candidates do for other public office and, like other candidates, ordinarily must generate support and funding to be successful.

Judicial candidates designate committees to raise campaign funds, distribute mailings, meet supporters and voters, set up signs, and attract party workers to do what is necessary to run a political campaign. In many areas of the state, it is also a fact that obtaining the nomination of a particular political party virtually assures the nominee of victory.

Although success within the political system, either for the nomination or general election, may place pressures on judicial candidates to play the game of politics, most seem to balance those pressures with the standards set by the rules. For the most part, the political parties respect the candidates' need to abide by the rules that restrict them. Thus, judicial candidates may pay their fair share of expenses incurred by political parties and organizations on their behalf, but may not endorse any other candidates or work for political organizations. They may not personally solicit contributions, although they often designate committees to raise funds for them. Lawyers who regularly appear in court commonly make financial contributions to judicial campaigns, especially to candidates who are likely to win.[1]

The Rules Governing Judicial Conduct permit candidates for elective judicial office to attend and speak at gatherings on their own behalf, appear in advertisements and promotional literature in support of their candidacy, appear both in person and in advertisements with other candidates, attend politically sponsored functions, and purchase two tickets to such functions even when part of the purchase price exceeds the cost of the function and is used for political purposes.[2] Otherwise, a judicial candidate may not make a contribution to a political party or club or to the campaign of another candidate for any office.

In seeking constituencies, non-judicial candidates are prone to making promises that voters want to hear. If judicial candidates were permitted to make campaign promises as to how they will decide cases, it is reasonable to assume that they too would take positions that appeal to voters, at an unacceptable cost to the fair administration of justice. Defendants in criminal proceedings, landlords in large urban areas, and controversial real estate developers would have a legitimate reason to feel uncomfortable appearing before judges who had campaigned against them.[3]

In the 1990s, as controversy raged in other states over the constitutionality of special restrictions on judicial campaigns, few questions were raised about the limitations imposed on candidates running for judicial office in New York. The relatively few judges whose campaign

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rhetoric exceeded the conservative standards governing the extent of what a judge should say in a campaign, were lightly disciplined.[4] In some parts of the country where restrictions have been relaxed, judicial races have been marked by rancor, criticism of incumbents' decisions, and strong suggestions as to how the outspoken candidates would rule.[5] Such departures from the traditional limitations on judicial campaign speech have been the direct result of court challenges that were based on the First Amendment right of candidates to solicit votes and the position that elections without campaign promises are a farce.

This article will discuss the question of whether special restrictions on judicial races unconstitutionally deprive the candidates and voters of information that is an inherent part of elections to public office. One particular issue raised, following a United States Supreme Court decision striking down a Minnesota rule, is whether restrictions on a candidate's campaign activity other than what the candidate *says* to the electorate may properly be governed by special rules. Although in recent decisions the New York Court of Appeals has addressed these issues, some commentators argue that the federal courts may have the last word.

Republican Party of Minnesota v. White

Minnesota holds nonpartisan judicial elections. In addition to adopting rules similar to those in New York, the State of Minnesota retained a rule prohibiting judicial candidate**s** from announcing views on disputed legal or political issues that are likely to come before the court. A candidate for the Minnesota Supreme Court challenged the rule in federal court.

After the Eighth Circuit Court of Appeals upheld the constitutionality of Minnesota's "announce clause" – finding two compelling state objectives: preserving impartiality and the appearance of impartiality of Minnesota's judiciary – the case was appealed to the United States Supreme Court.[6] Applying the "strict scrutiny" test, the Supreme Court held that the rule violates the judicial candidate's First Amendment rights. The Court held that the "announce clause" was so broad that it would chill discussion of issues that should be protected, even though the discussion of some issues, such as those that reflect bias against future parties in court, might not be protected under a narrowly tailored rule. The Court reasoned that the "announce clause" must have been intended to cover more than a judicial candidate's promise to rule in a specified way in future cases because Minnesota already had a rule barring "pledges and promises."

Campaign speech deserves the highest protection, said the Court, because it deals with "the qualifications of office" and with candidates' desire to advise voters of their views so that they can distinguish themselves from other candidates. Minnesota failed to show that it used a narrowly tailored means to prevent speech that the state had a compelling interest to prevent.

Critics of restrictions on judicial campaigns say voters have no way of determining whom to vote for.

Justice Scalia analyzed the three possible values to be served by a rule that prohibits a judicial candidate from announcing his or her views on disputed legal or political issues: (1) preserving open-mindedness, (2) being free of any preconceived views on issues, and (3) ensuring that the judge presiding is not biased against parties. The Court held that the first two are not compelling state interests. Because judges have preconceptions about issues and have at one time or another expressed those views, and because announcing views "covers much more" than giving assurances that the candidate would "decide an issue a particular way," the clause does not meet the strict scrutiny test. "The question is not whether the announce clause serves this interest *at all*, but whether it is *narrowly tailored* to serve this interest," the Court wrote.[7]

The First Amendment, the Court held, does not permit the states to

> leav[e] the principle of elections in place while preventing candidates from discussing what the elections are about. "[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles."[8]

Critics of restrictions on judicial campaigns argue that candidates have no effective way of distinguishing themselves from their opponents and, worse, voters have no way of determining whom to vote for. Proponents of expanded speech rights state that because the states have chosen to elect judges rather than appoint them, the voters have a right to hear the views of those who run for political office; likewise, candidates have a First Amendment right to speak freely to the voters and to take whatever activity is permitted by state election laws to attract political support.

This latter point of view does not necessarily support the election of judges as a wise means of selecting them.

In her concurring opinion in *White*, Justice Sandra Day O'Connor condemned the election of judges, but observed that when candidates are selected by elections, they should have the same right to campaign as candidates do for other public offices.[9] The states can fix the problem, she noted, by appointing all judges, as the federal government does. But, she maintained, so long as states retain the electoral process of selecting judges, candidates should not be denied the right to speak and the voters the right to hear them.

In a separate concurring opinion, Justice Kennedy stated that "content-based speech restrictions that do not fall within the traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests."[10]

Although New York eliminated the "announce clause" when it amended its present set of rules, the *White* decision still has implications in New York.

The Court distinguished "pledges and promises" of future conduct from a candidate's "viewpoints."

The New York State Court of Appeals Decides Three Speech Cases

In re Shanley

A few days after the U.S. Supreme Court decided *White*, the New York Court of Appeals decided *In re Shanley*.[11] There, the Court admonished a town justice for exaggerating her educational background in campaign literature but dismissed a charge that, by describing herself in campaign circulars as a "Law and Order Candidate," the judge had improperly promised voters that she would decide criminal cases with a prosecutorial slant. Since the judge had not raised a First Amendment issue, the Court of Appeals made its decision solely on whether the slogan constituted either a pledge or promise or commitment as to how she would decide criminal cases. The Court held that the Commission had failed to show

> that the phrase carries a representation that compromises judicial impartiality. "Law and order" is a phrase widely and indiscriminately used in everyday parlance and election campaigns. We decline to treat it as a "commit[ment]" or a "pledge[ ] or promise[ ] of conduct in office."[12]

Although the Court of Appeals did not apply *White* in rendering its decision in *Shanley*, the Court's ruling reached a result that would probably have been dictated by *White* had Judge Shanley raised a First Amendment issue. Under a more specific rule, however, it still may be possible, consistent with *White*, to restrict statements that manifest bias against a class of parties such as defendants in criminal proceedings. This is discussed at greater length in the conclusion of this article.

In re Watson

The case *In re Watson*[13] concerned William J. Watson, a successful candidate for the office of city court judge in Lockport, New York. As a self-described "tough" prosecutor, he told the voters that they had a real choice between him and the two other candidates, one the incumbent Lockport City Court judge and the other the acting judge. The three candidates ran against each other for nominations in five primaries. Mr. Watson, adopting a tough-on-crime platform, conducted an effective campaign with undeniable appeal: he was a judicial candidate who finally would give voters assurances about how he would handle criminal defendants. Not surprisingly, he won four primaries, including those for the Republican and Democratic parties.

Watson linked the increase of arrests with rising crime, and he told the public that as a "Real Prosecutor," he could do something about the problem. He sent a campaign flyer to police department personnel stating that they should tell their friends, neighbors and relatives to "Put a Real Prosecutor on The Bench," one who would work with the police to clean up the city's streets.[14] He blamed the incumbents – specifically in their bail and sentencing decisions[15] – for making the city a good place for non-resident criminals, who, he implied, were telling each other about Lockport as an attractive place for criminals.[16] If elected, he would make it "unattractive" for those who were "flocking" to the city from other areas.[17]

In censuring Judge Watson, the Court of Appeals distinguished "pledges and promises" of future conduct from a candidate's "viewpoints" and held the latter to be acceptable campaign speech. Judge Watson had maintained to the Court that his campaign statements were not pledges or promises since he never told voters that he promised to take certain actions as a judge. The Court made the important observation that a candidate could violate the rule against making pledges or promises without explicitly promising to take action, and that was what Judge Watson had done:

> A candidate's statements must be reviewed in their totality and in the context of the campaign as a whole to determine whether the candidate has unequivocally articulated a pledge or promise of future conduct or decisionmaking that compromises the faithful and impartial performance of judicial duties.[18]

Another defense raised was that Judge Watson had not implemented his views on crime and that he was fair and evenhanded from the time he took office. Even unkept promises, said the Court, "damage the judicial system because the newly elected judge will have created a perception that will be difficult to dispel in the public mind."[19] The Court observed that litigants and lawyers should not have to be concerned that the judge's earlier campaign statements will prevent the judge from considering the issues with an open mind.[20]

The Court distinguished its decision in *Shanley* (pertaining to use of the term "Law and Order Candidate," which it said was not a pledge or promise) to make it clear that the "pledges and promises" rule should not be used to limit statements that do not constitute actual pledges or promises:

> The rule precludes only those statements of intention that single out a party or class of litigants for special treatment, be it favorable or unfavorable, or convey that the candidate will behave in a manner inconsistent with the faithful and impartial performance of judicial duties if elected.[21]

Rejecting the argument that the rules are not sufficiently narrow in scope to serve a compelling state objective and therefore do not withstand strict scrutiny analysis, the Court held:

> New York's pledges or promises clause – essential to maintaining impartiality and the appearance of impartiality in the State judiciary – is sufficiently circumscribed to withstand exacting scrutiny under the First Amendment.[22]

The Court reasoned that there were two compelling interests in support of the "pledges or promises" rule, "both related to the preservation of impartiality and the appearance of impartiality in the judicial branch." The Court noted that Judge Watson could not dispute the Commission's position "that the rule promotes the State's interest in preventing party bias and the appearance of bias, as well as furthering open-mindedness . . . in the state judiciary."[23]

In re Raab

The events leading up to *In re Raab*[24] began in 1995, when Judge Raab ran for Supreme Court as a nominee of the Democratic Party. After obtaining the nomination, he had paid the Nassau County Democratic Party $10,000 to cover expenses in promoting the party's candidates. Because his payment was not intended to reimburse the party solely for expenses incurred on his behalf, it was a contribution, and contributions by judicial candidates are prohibited in New York.

Before he was nominated again in 2000, Judge Raab participated in a screening meeting of candidates who were seeking the nomination of a minor political party for non-judicial office. He asked each candidate whether they would publicize the party's endorsement on their campaign literature. He subsequently explained that his reason for doing so was that if he later obtained the party's nomination, he would be helped by any publicity the other candidates gave to the party. His question to each candidate was a highly charged, partisan inquiry, exacerbating the impropriety of his presence at the interview session.

Additionally, Judge Raab participated in a telephone bank soliciting support for a candidate for the county legislature. He called voters urging them to vote for the candidate, but did not disclose that he was a judge. Judge Raab's conduct constituted political activity on behalf of another candidate, which was specifically prohibited by the rules.

Judge Raab made no improper campaign speeches, and funded his own campaign because he believed it

was inappropriate to seek financial support from attorneys who would appear before him. The Commission censured Judge Raab for both his improper political activity and for a single incident of extreme rudeness as a judge.

Judge Raab's defense before the Court of Appeals was that the charges pertaining to his political activity violate the First Amendment because the rules "are not sufficiently narrow in scope to serve a compelling state objective and therefore do not withstand strict scrutiny analysis."[25] Rejecting that argument, the Court found that the rules were narrowly tailored to further compelling state interests, "including preserving the impartiality and independence of [the] State judiciary and maintaining public confidence in New York State's court system."[26]

The Court noted further that prohibiting candidates' contributions to political parties ensures that political parties cannot "extract" payments from potential nominees "in exchange for a party endorsement."[27] It prevents candidates from trying "to buy," and political parties from trying "to sell," judicial office; also, it "diminishes the likelihood" that such payments would be perceived by the public as being the purchase of a judgeship.

> Needless to say, the State's interest in ensuring that judgeships are not – and do not appear to be – "for sale" is beyond compelling. The public would justifiably lose confidence in the court system were it otherwise and, without public confidence, the judicial branch could not function.[28]

Significantly, the Court applied the strict scrutiny test without holding that in all such cases (concerning political activity) that test had to be applied:

> In sum, [R]ules 100.5(A)(1) and 100.5(A)(1)(c), (d), (e), (f), (g), and (h) survive petitioner's constitutional challenge because they are narrowly constructed to address the interests at stake, including the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary.[29]

In re Farrell and *In re Campbell*

In re Farrell

In June 2004, Mark G. Farrell, a town justice in Erie County and candidate for his political party's nomination for Supreme Court, was publicly admonished by the Commission[30] for making a financial contribution to his political party and making telephone calls to members of his town's Democratic Committee on behalf of the chairman of the Erie County Democratic Committee, to help secure support for the chairman's nomination. When the county chairman of the political party that might nominate Judge Farrell to run for higher judicial office asked him for a favor, as a political reality it was not something he could easily ignore.

Judge Farrell conceded that he knew the rules prohibiting judges from making campaign contributions to other candidates and assisting other candidates to get votes. Both of Judge Farrell's transgressions, and the rules barring them, were directly covered by the New York Court of Appeals's decision in *Raab*, where the judge made both a financial contribution and telephone calls in which he did not identify himself as a judge. Although Judge Farrell also did not identify himself as a judge, according to the Commission's determination he knew that at least some of the town committee members he called would recognize him as the town's justice.[31]

The *Farrell* Determination generated a three-member concurring opinion that was critical of the Court's *Raab* decision – a first for any Commission determination or opinion. Equally unprecedented was the concurring opinion's unequivocal prediction that a federal court will "strike down Rule 100.5 as unconstitutional."[32]

The concurring opinion was written by Richard D. Emery, a lawyer-member of the Commission whose law firm had represented Judge Raab. Mr. Emery, who was not a member of the Commission when his firm represented Judge Raab, made it clear that he would prefer to have dissented, but was constrained to accept the *Raab* decision. Whether Mr. Emery intended to include the entire Section 100.5 in his prediction as to future court decisions, including, for example, the prohibition against a candidate making "pledges and promises," is not clear. His focus was on actions taken by candidates to promote themselves as successful candidates and to achieve the backing of political parties.

Mr. Emery relied on the *White* decision, which on its face dealt with campaign oratory, but which he and other commentators believe "has legs" and affects restrictions on judicial candidates in general. He maintains that because the *White* Court held that only bias against parties could justify a restriction on campaign speech, and because a judge's campaign contributions do not reflect bias against parties in court, the prohibition is unconstitutional. He adds that the Court of Appeals did not address that issue sufficiently in *Raab*. To the contrary, the *Raab* decision addresses the strong public policy against judges making payments to political parties that nominate the judges, when such payments are not intended to reimburse the political party for expenses incurred on behalf of those judges. It appears to be a payoff, and the system need not tolerate judgeships being bought or sold or even the appearance of such transactions. The *Raab* Court was particularly descriptive in calling attention to the evils of such con-

duct and the strong, compelling state interests in prohibiting it.[33]

Two other Commission members – one of whom had voted in favor of disciplining Judge Raab, and the other of whom was relatively new on the Commission – joined in Mr. Emery's concurring opinion. Interestingly, the concurring opinion states that New York should keep all judges out of politics, and the only way to do that constitutionally is to appoint judges. The point made by the opinion is that if the state wants to elect judges, it must allow candidates to do what is necessary to get elected.

The concurring opinion adopts the rationale of Justice O'Connor in noting that New York could have adopted a different judicial selection process, but chose instead to elect most of its judges within a partisan election system. Having done so, Mr. Emery asserts, New York "cannot now complain . . . that it is entitled to forbid its judges from engaging in core political expression on the theory that doing so would allow judges to be too 'political.'"[34] Stating that "this is precisely what the Supreme Court held in *White*," the concurring opinion draws from the majority opinion in *White* that

> [i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.[35]

In support of Mr. Emery's contention that the decision in *White* explicitly permits engaging in all kinds of political activities that are typical for non-judicial office, the United States Court of Appeals for the Eleventh Circuit stated that the standard restriction against judicial candidates directly soliciting funds contravenes their First Amendment right in light of *White*.[36] Remarkably, the Eleventh Circuit interpreted *White* to mean that in all respects "the standard for judicial elections should be the same as the standard for legislative and executive elections."[37] Obviously, that rationale would render the special rules on judicial campaign conduct unenforceable, and if that becomes the norm, judicial campaign practices would be markedly changed.

It is possible that a United States district court in New York might interpret *White* the way Mr. Emery does, which would not be the first time a court in New York has done so.[38] The question is whether such a decision would withstand the scrutiny of the appeals process. Contrary to the decision by the Eleventh Circuit Court of Appeals and to the position taken by the *Farrell* concurring opinion, *White* can also be interpreted on the facts addressed in that case – pertaining to the validity of any rule that punishes the discussion of issues. The U.S. Supreme Court did not address all restrictions on the conduct of judicial candidates.

Indeed, Justice Scalia stated that the constitutional problem with the "announce clause" is that it led to "state-imposed voter ignorance."[39] The reference to "voter ignorance" suggests that the Court was focusing on what candidates say to voters, not whether the candidates make contributions to the political parties that nominate them. And Justice Kennedy, stating that "content-based speech restrictions"[40] are unconstitutional, also seemed to be addressing limitations on the views of candidates. A strong case can be made that the Court did not address conduct that got Judge Raab and Judge Farrell into trouble, especially because the emphasis seems to be on permitting voters to hear from candidates who seek their votes.

In re Campbell

In *In re Campbell*,[41] the Commission admonished a lawyer and town justice who had endorsed two town

board candidates in a 2003 primary election, and specifically opposed the nomination of another town board candidate and disparaged his candidacy. He also asked voters to "support our entire ticket." The Commission reasoned:

> When a judge voices support for other candidates or public officials, the judge not only puts the prestige and integrity of the court behind the endorsement but may also convey the impression that the judge is engaging in political alliances with individuals who might influence the judge in future cases.

One Commission member, Richard Emery, concurred because of the controlling *Raab* decision, but argued that the majority failed to explain "exactly" how Judge Campbell had created the appearance of "political bias or corruption," a phrase that the Commission had used in another context. Mr. Emery argued that the rule fails the "strict scrutiny test that applies under *Republican Party of Minnesota v. White*." Under that test, the issue would be whether the restriction is narrowly tailored to serve a compelling state objective. He reiterated the point that Section 100.5 does not "survive the searching inquiry that the Court in *White* indisputably held applies to *all* restrictions on the political activities of judicial candidates."[42]

That the U.S. Supreme Court "indisputably" held that the strict scrutiny test applies to "all restrictions on the political activities of judicial candidates" is very much in dispute as the Court discussed only content-based speech, which was the sole campaign conduct before the Court. Others, in addition to Mr. Emery and the Eleventh Circuit Court of Appeals, would extend the Court's holding to all campaign activities, and if it turns out that the "strict scrutiny" test must be applied to all campaign activity, some restrictions – but not necessarily all – would be invalidated. In *Raab*, the Court of Appeals left open the issue of whether "strict scrutiny" applies to Judge Raab's political activities, but held that the restrictions in that case meet the "strict scrutiny" test.

The Law in the Aftermath of *White*, *Shanley*, *Watson* and *Raab*

Campaign Oratory

New York's rule against making pledges or promises in a campaign is not directly affected by *White*, at least at the moment. As the Court of Appeals stated in *Watson*, judicial candidates may express "viewpoints," but may not escape discipline if their statements constitute explicit or implicit pledges or promises of future action pertaining to how they would rule on cases. Under New York rules, candidates may not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before them, although the constitutionality of that provision has not been tested in the courts.[43]

The *Shanley* decision, dismissing a charge against a judge who ran as a "Law and Order candidate," may encourage candidates to announce views that could reasonably be interpreted to reflect a point of view on criminal cases or on other matters that are likely to come before the court. That would be a victory for the exercise of the First Amendment but a defeat for the due process rights of unpopular defendants – a clear net loss for the administration of justice. How much such views could be tolerated would depend on whether they will be seen as constituting an implicit pledge or promise. A self-described "Law and Order" candidate does not violate the pledges and promises rule in New York, but the candidate may come close to doing so and ought not to build on that theme. The interesting question will be whether other vague references that reflect a "tough" attitude on crime, which surely will not hurt judicial candidates in their quest to become judges, will come under the *Shanley* umbrella.

The most general of the restrictions in New York, that judicial candidates must "maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary,"[44] is less apt to withstand scrutiny as to political speech. While the standard of conduct sought by the restriction is surely a laudable goal, it may not meet the strict scrutiny test requiring that a prohibition at the core of campaign speech be narrowly tailored. It could be viewed, for example, as chilling criticism of an opponent's views or of an incumbent judge's decisions.

Restricting a candidate's "pledges and promises" that reveal bias against future parties would be on strong constitutional footing under *White* because the restriction seems to be narrowly tailored. However, the Seventh Circuit Court of Appeals, striking down the provision, ruled that it does not on its face relate solely to assurances to decide cases in a certain way and therefore is too broad in its sweep.[45]

On its face, the New York "pledges and promises" rule is specifically and narrowly tailored to speech that would sacrifice a judge's impartiality; it does not chill other speech (as the Minnesota "announce clause" did) that deserves First Amendment protection. Accordingly, it appears to meet the exacting scrutiny test from the *Watson* case. The "commit" clause would be tested by the same standard, and if interpreted narrowly would also meet the strict scrutiny standard. But it is more vulnerable than the "pledges and promises" clause because it deals with discussion of issues, and the Supreme Court gave short shrift to the position that a judge who discusses issues may reveal a disqualifiable bias. In accordance with the Court's reasoning, a restriction on a

statement that commits a candidate to a position reflecting bias against parties would meet the exacting scrutiny test. Arguably, any commitment by a candidate on an issue would reflect bias against a party or class of parties who would assert an opposing position on that issue in court.

Judge Watson had been charged with making campaign statements that violated both the "pledges and promises" clause and the "commit" clause, but the Court of Appeals censured the judge solely on the "pledges and promises" clause. This might signal that the "commit" clause is problematic. It is still an open question whether the "commit" clause meets the exacting scrutiny test.

Campaign Activity

Restrictions on political activities are based on the belief that being a judge should not be mixed with partisan politics. The rules in New York are strictly enforced. Judges have been advised that they may not even attend a political debate if it is sponsored by a political organization.[46] One judge was publicly admonished for attending political functions despite his claim that he was present either to accompany or pick up his wife who was active in local politics.[47]

Fifteen years before the *White* decision, a town justice was removed from office for doing no more than candidates for other public offices do routinely. In *In re Maney*,[48] a town justice, in preparation for his campaign for re-election nearly 18 months in the future, met with supporters and planned strategy to defeat a political leader who had no intention of supporting his re-election. Judge Maney conceded that he had known that his actions were contrary to the rules, which barred all political activity, but explained that unless he took steps to defeat the political leader in his campaign to retain his political office, the judge would not get the party's endorsement. The judge acknowledged his conduct and admitted that it was improper; but, despite the Commission staff's recommendation that he be censured, the Commission removed the judge, and the Court of Appeals accepted the Commission's determination.

Conclusion

The New York Court of Appeals has upheld state restrictions on both the contents of speech and political activity such as making contributions to political parties and clubs and endorsing other candidates. The Court also held that a candidate may run as a "law and order" candidate, which suggests that other slogans may be acceptable as well as long as they do not commit the candidate or constitute pledges or promises. Unseemly criticism of a candidate's opponent that does not constitute a pledge or promise to rule for or against parties would be covered by a less specific rule, requiring candidates to "maintain the dignity" appropriate to judicial office, which may not meet the exacting scrutiny test.

It may be that judicial candidates will avoid expressing controversial views. But if they campaign on issues of appeal to voters, they will likely make statements that will generate both action by the Commission and further challenges of the existing rules. In the final analysis, if the logic of *White* is as comprehensive as some commentators have maintained, or if *White* is extended to cover all campaign statements, as Justices O'Connor and Kennedy would, it could mean the end of judicial elections. Judicial elections can be maintained only if there are restrictions on candidates' conduct, and especially on what the candidates say to the electorate. Due process of law and a litigant's right to an impartial judiciary are far more important than the public's selection of judges by elections.

A persuasive case can be made that the present restrictions strike a proper balance between keeping candidates out of partisan politics while permitting them to run for judicial office. Although the concurring opinions in *Farrell* and *Campbell* assume that the rigorous strict scrutiny test applies to what candidates do to obtain partisan political support, such as making campaign contributions and working for or endorsing other candidates, this is by no means settled. Under a more traditional constitutional test, the present restrictions on activity such as making contributions and endorsing other candidates should be upheld. But the one strong message of the *Raab* decision is that some present restrictions on campaign conduct can be upheld even under the strictest standard. The Court of Appeals was especially critical of the appearance created when a candidate, upon receiving a political party's nomination, makes a $10,000 contribution to that party. Whatever test is used, such conduct must be condemned.

Another Reform Is Needed

There is a gap in the law. In New York, judges can run as "Law and Order candidates" as long as other campaign statements do not amplify that description to the point of it becoming a "pledge or promise." It appears likely that similar statements of tough-on-crime philosophy will be used in campaign literature and in television ads. That would be a sorry development.

The "pledges or promises" rule may be an inadequate safeguard against campaign oratory that hints, but does not declare, how the candidate will decide cases. Only the strongest suggestions may be subject to discipline as an implied pledge or promise.

The majority opinion in *White* discussed a hypothetical situation, raised in Justice Stevens's dissenting opinion, of an appellate judge who, in a reelection campaign,

states that he or she has an unbroken record of affirming rape convictions. Assuming the accuracy of the campaign statement, which clearly is intended to convince voters that the candidate would not be prone to reverse a rape conviction, would the rules now proscribe such a truthful but biased campaign statement? If the statement is not a pledge or promise, it would be permitted under present rules, notwithstanding its biased undertones. Justice Scalia stated that such a biased comment could not be covered by the "announce" clause because that clause covers so much more than biased comments.[49]

Biased statements about parties or about issues that directly prejudice parties should be prohibited even when they do not constitute "pledges or promises" of future conduct. A narrowly tailored rule against campaign statements that manifest bias against parties should pass the exacting scrutiny test based on Justice Scalia's rationale on behalf of the majority in *White*.

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1. There is no rule against a judge seeing the records of contributions. In decades past, a commentary to the Code of Judicial Conduct encouraged candidates not to see such lists, but that commentary was unenforceable. When the rules were changed to permit candidates to attend their own fundraisers, it was obvious that it was impractical to maintain such a standard. Although some judges maintain that they do not see lists of contributions, lawyers who contribute typically believe that the candidates often know who contributed.
2. Rules Governing Judicial Conduct, N.Y. Comp. Codes, R. & Regs. tit. 22, § 100.5(A)(2) (N.Y.C.R.R.) (hereinafter "Rules").
3. Section 100.5(A)(4)(d) of the Rules directs that a candidate may not:

   > (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
   >
   > (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court; or
   >
   > (iii) knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent.

   Section 100.5(A)(4)(a), the most general of the restrictions in New York, states that judicial candidates must "maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary."
4. *See* NY Comm'n on Jud. Conduct (hereinafter "Commission"), Ann. Reps. *In re Hafner*, Ann. Rep. NY Comm'n 113 (2001) (admonition) (candidate ran a print ad that asked voters whether they were "tired of seeing criminals get a 'slap' on the wrist," and then said, "So am I"; he also approved an ad by the Conservative Party chair that attacked his opponent's record of dismissing cases; the ad said: "Soft judges make hard criminals!"); *In re Polito*, 129 (1999) (admonition) (candidate ran TV ads that stated: "Violent Crime in our Streets" and portrayed a masked man attacking a woman outside her car; the ad urged voters to vote for him and "crack down on crime"; a second ad assured voters that he would stop the "revolving door of justice" and that he would not experiment with alternative sentences or send convicted child molesters home for the weekend); *In re Maislin*, Ann. Rep. NY Comm'n 113 (1999) (admonition) (candidate spoke to a reporter about two cases that had been remanded to him from a higher court and stated that he stood by his original ruling; he ran campaign ads that purported to show tough action in criminal cases and assured voters that he would send criminals to jail; and he used as his campaign slogan: "Do The Crime – Do The Time"); *In re Herrick*, Ann. Rep. NY Comm'n 103 (1999) (admonition) (candidate told voters in a televised ad that they needed to know what judges "would be like when they put the robe on," and stated that when defendants who violated orders of protection come before him, he would send them to jail; one Commission finding was that matters concerning orders of protection would rarely come before him in the court of general jurisdiction).
5. Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. Times, Oct. 24, 2004, p. 1, col. 5.
6. *Republican Party v. White*, 536 U.S. 765 (2002).
7. *Id.* at 777, n.7.
8. *Id*. at 788 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshal, J., dissenting)).
9. *See id.* at 787 (O'Connor, J., concurring).
10. *Id.* at 793.
11. 98 N.Y.2d 310, 746 N.Y.S.2d 670 (2002).
12. *Id*. at 313. The Commission tried to show in its brief that the phrase "law and order" is uniformly used to mean pro-prosecution and pro-police, which the Commission urged was an implicit pledge or promise to act in that manner.
13. 100 N.Y.2d 290, 763 N.Y.S.2d 219 (2003).
14. *Id.* Record on Appeal at 196a, *Watson*, 100 N.Y.2d 290. He also said that the court should not be a "revolving door, where criminals are caught and released day after day," and he urged voters to "put an end to this now." *Id*.
15. *Id*. at 196h. Ironically, he maintained at the hearing that his real purpose was to set forth administrative changes he would implement, but he believed he was ethically obligated not to address those concerns – the kind of speech that would be protected. *Id.* at 89–93, 99, 100.
16. *Id*. at 196g. The judge maintained that the factual basis for the statement that criminals were "flocking" to the city was that it was "generally known." *Id*. at 126.
17. *Id*. at 126.
18. *Watson*, 100 N.Y.2d at 298.
19. *Id.* at 302.
20. *Id.*
21. *Id*. at 303.
22. *Id.*
23. *Id.* at 301.
24. 100 N.Y.2d 305, 763 N.Y.S.2d 213 (2003).

25. *Id*. at 312.
26. *Id*.
27. *Id*. at 315.
28. *Id*. at 315–16.
29. *Id*. at 316.
30. *In re Farrell*, Comm'n Determination, June 24, 2004.
31. It is hard to conceive that any members of the Amherst Democratic Committee would not know that Mark Farrell, one of two town justices in Amherst, was a town justice in Amherst.
32. Section 100.5 of the Rules embodies all of the restrictions on political activity, including campaign oratory.
33. *Raab*, 100 N.Y.2d at 315–16.
34. *Farrell*, *see supra* note 30, Emery, concurring opinion, at 5.
35. *Republican Party v. White*, 536 U.S. 765, 788 (2002) (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshal, J., dissenting)).
36. *Weaver v. Bonner*, 309 F.3d 1312, 1322–23 (11th Cir. 2002).
37. *Id*. at 1321. The Supreme Court in *White* did not assert that position, and specifically stated that it was not doing so. *White*, 536 U.S. at 783.
38. A district court did so interpret *White* in *Spargo v. Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003). The district court's decision was set aside by the Second Circuit Court of Appeals on abstention grounds. *Spargo v. Comm'n on Jud. Conduct*, 351 F.3d 65 (2d Cir. 2003).
39. *White*, 536 U.S at 788.
40. *Id*. at 793.
41. *In re Campbell*, Comm'n Determination, Nov. 12, 2004.
42. *Id.* (emphasis in original).
43. Rules § 100.5(A)(4)(d)(ii). The Court in *Watson* stated that it was unnecessary to consider that section, although it had been charged. *In re Watson*, 100 N.Y.2d 290, 763 N.Y.S.2d 219 (2003).
44. Rules § 100.5(A)(4)(a). There are other general standards in the rules that should withstand scrutiny when applied to non-election situations, where the exacting scrutiny test would be inapplicable. It is only in judicial campaigns for elected office when the restriction must be narrowly tailored to further a compelling state interest.
45. *Buckley v. Ill. Jud. Inquiry Bd*., 997 F.2d 224, 228–29 (7th Cir. 1993).
46. NY Ad. Comm. Jud. Ethics, Op. 90-177 (1990). Judges may attend political functions when they are candidates for elective judicial office.
47. *In re Rath*, Ann. Rep. NY Comm'n 150 (1990). Other judges have been publicly disciplined in New York for attending political meetings or engaging in political activities. *See In re Crnkovich*, Ann. Rep. NY Comm'n 99 (2003) (endorsed a candidate for another judicial office); *In re Gloss*, Ann. Rep. NY Comm'n 81 (1989) (attended political meetings and helped raise funds).
48. 70 N.Y.2d 27, 517 N.Y.S.2d 443 (1987).
49. *Republican Party v. White*, 536 U.S. 765, 777 (2002).

Burden of Proof

Objections & Objectionable Conduct at Depositions

EDITOR'S NOTE: With this issue we are pleased to introduce Burden of Proof, a new column in the Journal *covering issues in discovery and evidence.*

BY DAVID PAUL HOROWITZ

Interposing and responding to objections are skills that take time and practice to master. There is a fair amount of disagreement over what constitutes a proper objection under particular circumstances, and what effect interposing an objection has on the witness's obligation to answer the question. There is also disagreement about what types of behavior and demeanor are appropriate for attorneys questioning and defending depositions, and what conduct on the part of the witness may be objectionable.

Counsel may seek to have sanctions imposed for the failure of a party or witness to appear at the deposition, and may raise objections to the form or substance of questions posed. Objections may also be raised regarding the qualifications of the person officiating, the competency of a witness or the behavior of adverse counsel.

A court will not rule on the propriety of a particular question in advance of a deposition. Instead, the question must be posed, objection taken, and then the court may rule on the question.

It is possible, and indeed desirable, to aggressively represent a client or question a witness at a deposition, while operating within the bounds of proper and ethical practice. Demonstrating courtesy and professionalism are signs of neither weakness nor inexperience.

Raising Objections at Depositions

It is important for an attorney whose client or witness is being deposed to be alert to improper questions and to raise objections to them promptly and properly. Questions may be improper as to the form of the question itself or as to the substance of the testimony the question seeks to elicit. Misleading, argumentative, ambiguous or multiple questions are improper as to form. Objections as to form are generally waived unless made when the question is asked, while other objections, such as hearsay, are generally preserved until trial.

A court will not rule on the propriety of a particular question in advance of a deposition. Instead, the question must be posed, objection taken, and then the court may rule on the question.[1]

Delaying Objections Until Trial

CPLR 3115(a) provides that ''objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.'' This rule preserves the right to make general, substantive objections, even where the court has previously ruled that the question must be answered at the deposition, and the objection may be raised at trial even though not made at the deposition.[2]

For example, hearsay, while excludable at trial, is nonetheless within the legitimate scope of pretrial dis-

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closure. Thus, a ruling during the pretrial examination that a question must be answered does not preclude the trial court from ruling that the answer to the question may not be received in evidence.

Some attorneys will persist in making objections, on the record, that are preserved for trial. When this happens, the attorney who is posing the questions must decide whether the objections are interfering with the deposition. If they are, a statement on the record, followed by a call to the court if the conduct persists, should eliminate the problem. If the objections are infrequent, or are not interfering with the examination, ignoring the objections is often the best course.

If the attorney making objections that are deemed preserved takes the additional step of directing the witness not to answer the question, counsel conducting the deposition should take immediate steps to compel answers to the questions, either by contacting the court during the deposition or making a motion to compel immediately afterwards.

Attorneys will occasionally take the position that they are not agreeing to the ''usual stipulations'' and claim that all objections must be made at the deposition. Declining to agree to the ''usual stipulations'' does not, in any way, impact on the applicability of the CPLR to a deposition, and all objections preserved for time of trial in the statute will be preserved, regardless of counsel's position.

Raising Objections That Must Be Made at Deposition

CPLR 3115(b) provides:

> [e]rrors and irregularities . . . in the form of the questions or the answers . . . and errors of any kind which might be obviated or removed if objection were promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

Accordingly, the non-questioning attorneys must be alert to make these objections, on the record, at the time the question has been posed and, preferably, prior to the answer being given by the witness.

When an objection to form is made, the questioner has the choice of

1. asking what is objectionable about the question and then reformulating the question based upon the objection, or

2. standing by the question as posed.

The attorney who is posing the questions must decide whether the objections are interfering with the deposition.

Disputes arise over whether the witness must answer a question to which a form objection has been made, and whether sufficient particularization of the objection has been made.

CPLR 3115(b) also provides that any other types of errors that may be obviated by prompt objection are waived if they are not promptly raised. For example, a party's failure to object to a deposition proceeding in the absence of an interpreter has been deemed a waiver of the party's claim that he or she did not understand the questions asked.[3]

Objecting to Qualifications of Person Before Whom Deposition Taken

If there is a basis for objecting to the qualification of the person taking the deposition, CPLR 3115(c) requires that an objection is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence. Timely objection will preclude the use of the transcript at trial.[4]

Objecting to Competency of Witness

CPLR 3115(d) provides that objections to the competency of a witness or to the admissibility of testimony are not waived by the failure to object ''unless the

ground of the objection is one which might have been obviated or removed if objection had been made at that time.''

Failure to object to unresponsive answers at the deposition, which would have permitted the objection to be cured with a responsive answer, may result in the admission of the otherwise objectionable testimony.[5] This is the ''move to strike as non-responsive'' objection.

Recognizing Improper Objections and Directions

The most contentious area of deposition practice involves improper objections and directions to the witness. Improper objections come in a number of forms:

1. Improper speaking objections.
2. Objections designed to coach the witness.
3. Objections to impede or break up the questioning.
4. Objections designed to harass or embarrass the questioning attorney.

Improper directions generally consist of the attorney directing the witness not to answer a question posed at the deposition for which no claim of privilege or other legitimate basis for not answering has been asserted.

One unintended consequence of* Spatz *is the habit of some attorneys to "advise" their clients not to answer, rather than directing them.

Responding to Improper Objections

When attorneys agree to the ''usual stipulations'' at the commencement of a deposition, they agree that all objections, except as to form, are preserved until the time of trial. Of course, in agreeing to the ''usual stipulations,'' attorneys are, among other things, agreeing to follow the CPLR provision preserving most objections, while requiring that those as to form must be made. This means that the non-questioning attorney should simply state for the record that he or she ''object[s] to the form'' when a form objection exists, and need not say anything when other objections, such as hearsay or the dead man's statute, are applicable.

Very often, the defending attorney will make these objections anyway, sometimes claiming to be ''marking the record.'' This may have the effect of suggesting to the witness that the questioner does not know the rules for conducting the examination. Other attorneys will interject, after a question and before the witness answers, ''if you know,'' or words to that effect. Of course, this behavior has the effect of suggesting to the witness that the answer should be ''I don't know.'' These and other comments voiced at the deposition that communicate the alleged basis for the objection or suggest answers are referred to as ''speaking objections,'' and are disfavored. CPLR and Uniform Court Rule amendments, modeled on federal practice, have been proposed to bar such speaking objections.

Where there is ''a clear pattern on the part of defendant's counsel to intentionally disrupt the natural flow of the questioning, to obstruct and to frustrate the orderly disclosure process, and to prevent full discovery of the facts,'' the court may order the party to ''appear for another deposition, at the party's own expense, and to answer those questions objected to.''[6]

Responding to Improper Directions

The often quoted case of *Spatz v. Wide World Travel Service Inc.*, stands for the proposition that an attorney at a deposition is ''without authority'' to direct a witness not to answer a question.[7] However, *Spatz* obviously does not account for questions involving a privilege or attorney work product, and its limitless pronouncement must be considered in light of these and other permissible limitations on disclosure at a deposition. It may be that one unintended consequence of *Spatz* is the habit of some attorneys to ''advise'' their clients not to answer questions, rather than directing them not to answer. Frankly, this is a distinction without a difference if the net effect is that the witness does not answer an otherwise proper question.

As the court in *Orner v. Mount Sinai Hospital* wrote, when faced with objections at a deposition, ''the proper procedure is to permit the witness to answer all questions subject to objections in accordance with CPLR 3115.''[8] The court further noted that ''it was not plaintiff's questions, but rather the defense counsel's instructions to the witnesses not to respond and his otherwise inappropriate and excessive interference, which were improper. . . . [T]he evidentiary scope of an examination before trial is at least as broad as that applicable at the trial itself.''[9]

The witness should be permitted to answer all questions subject to objections in accordance with CPLR 3115.[10] CPLR 3113(b) contemplates that the deposition shall proceed subject to the right of a person to apply for a protective order, and provides that the deposition shall be taken continuously.

However, a party objecting on the basis of relevancy, and directing a witness not to answer, may be acting properly, such as when the questioner is trying to elicit facts that cannot be proven at trial.[11]

Questions that should not be answered include those that

1. infringe upon a privilege, or

2. are so improper that to answer them will substantially prejudice the party, or

3. are grossly irrelevant or unduly burdensome.

Objecting to Obstreperous Conduct

There are attorneys who conduct depositions in an aggressive and combative manner, which, when exceeding permissible boundaries, is referred to by the courts as ''obstreperous'' conduct. Unfortunately, what constitutes obstreperous conduct is often in the eyes of the beholder, and conduct on one day that draws a serious penalty from a court may, the next day, and before a different judge, draw no penalty whatsoever.

Unartful or otherwise imperfect questions do not give counsel defending the deposition license to react impatiently. When confronted with an obstreperous opponent, instruct the court reporter that you will not agree to go ''off the record'' at any time. This makes certain that a complete record of what transpires at the deposition will be available for a reviewing court, and frustrates the ability of an obstreperous attorney to act outrageously at the deposition when the reporter is not transcribing, and maintain decorum and good behavior when the reporter is transcribing. In addition, make certain to note, on the record, the attorney's departure from accepted practice, and caution the attorney that judicial relief, including sanctions, will be sought. Most important, after making these statements to your opponent, make certain to follow up and make the appropriate motion.

Recognizing Causes of Failure to Appear at Deposition

Two major reasons depositions do not go forward on the scheduled date are

1. unavailability of the witness, and

2. scheduling issues among one or more of the attorneys scheduled to participate.

Where the witness is unavailable, the court will inquire into the reason for the unavailability, and may excuse the appearance, or order an alternate method of disclosure where the failure to appear is not willful. However, where the failure to appear is found to be willful, the court may impose a sanction, including dismissal of the action or defenses.

Seeking Sanctions Where Party's Failure to Appear Is Willful

If a person fails to comply with a notice or order to appear for a deposition, the party seeking disclosure may move to compel compliance under CPLR 3124.

CPLR 3126, which needs to be read in conjunction with CPLR 3124, authorizes the imposition of penalties or sanctions for the failure to comply with disclosure in certain instances. CPLR 3126 describes three types of penalties that may be imposed:

1. The court can issue an order deeming that the issues on which the disclosure was sought are resolved in the action in favor of the party who has obtained the order;

2. The court can issue an order prohibiting the recalcitrant party from ''supporting or opposing'' designated claims or defenses. An order of this sort may preclude a party from introducing certain testimony or other items in evidence, or from using certain witnesses; and

3. The court can issue an order striking out pleadings or parts thereof or staying the action until a prior order compelling disclosure is obeyed.

Where the party's failure to appear for deposition is willful, courts will impose sanctions, including the ultimate sanction of striking the offending party's pleading.[12] Where a defendant willfully fails to appear for a deposition the court may strike the answer, but will generally do so only as to liability, permitting defenses on damages to stand. ''Only those portions of the pleading concerned with the suppressed evidence should normally be stricken.''[13] Willfulness may be inferred from repeated non-compliance with court orders for deposition.[14]

Furthermore, a party whose deposition has been scheduled and who neglects to appear, with the resulting waste of the other party's time, may be penalized by an order requiring the payment of the other party's reasonable attorneys fees.

Generally, courts sanction the attorney and do not penalize the party where the failure to provide discovery was the fault of the attorney. However, although courts are often reluctant to penalize a party as a result of an attorney's failure to appear, this reluctance, across the board, appears to be diminishing.

Opposing Sanctions Where Party's Failure to Appear Is Not Willful

When a party's failure to appear for deposition is a result of legitimate circumstances beyond the party's control, the failure to appear may be excused. Medical problems are a common reason for a party's failure to appear for deposition. Where international political issues prevent attendance of a party at a deposition, courts may fashion an alternative to the oral deposition so as not to unfairly penalize the party prevented from attending the deposition.[15]

Where an attorney has lost touch with a client and is unable, with due diligence, to locate the client, it has been deemed an abuse of discretion to preclude the party from offering any testimony at trial, in an order obtained far in advance of trial, since the failure to produce at trial was not willful or deliberate.[16] It has like-

wise been deemed an abuse of discretion to strike a defendant's answer for failure to produce a certain employee with knowledge of the facts for deposition, absent a demonstration that the failure to produce that person, who was no longer employed by defendants, was willful and contumacious.[17]

1. *Eliali v. Aztec Metal Maint. Corp.*, 287 A.D.2d 682, 682, 732 N.Y.S.2d 98 (2d Dep't 2001) (''[r]ulings on the propriety of deposition questions should only be made once a specific question has been asked and its answer refused'').
2. *Johnson v. N.Y.C. Health & Hosp. Corp.*, 49 A.D.2d 234, 374 N.Y.S.2d 343 (2d Dep't 1975) (reversing trial court's denial of plaintiff's motion to compel answers to questions posed at deposition to doctor in medical malpractice action, who was directed by counsel not to answer certain questions, because, among other things, the deposition was conducted pursuant to a stipulation referencing the CPLR's preservation of the right to object).
3. *Sheikh v. Sinha*, 272 A.D.2d 465, 707 N.Y.S.2d 241 (2d Dep't 2000) (plaintiff's attempt to amend his deposition answers in opposition to defendant's summary judgment motion was rejected, since plaintiff failed to object at the time of the deposition to proceeding without an interpreter).
4. *Wilkinson v. British Airways*, 292 A.D.2d 263, 740 N.Y.S.2d 294 (1st Dep't 2002) (the trial court precluded the introduction of the videotaped deposition testimony where plaintiff's counsel administered the oath to the witness after being cautioned by defendant's counsel, who objected that the procedure was improper).
5. *Saturno v. Yanow*, 58 A.D.2d 968, 397 N.Y.S.2d 250 (4th Dep't 1977) (testimony was properly admitted at time of trial under spontaneous declaration exception to the hearsay rule, where counsel taking the deposition of deponent, who died prior to trial, failed to object to the unresponsive answer, and thus the objection was obviated or waived).
6. *Lewis v. Brunswick Hosp.*, No. 507/92, 2001 N.Y. Misc. LEXIS 407 (Sup. Ct., Queens Co. 2001) (''An examination of the entire transcript of the initial deposition of Dr. McIvor, however, reveals a clear pattern on the part of defendant's counsel to intentionally disrupt the natural flow of questioning, and to obstruct and to frustrate the orderly disclosure process and to prevent full discovery of the facts, as well as expert medical opinion, of the witness.'').
7. *Spatz v. Wide World Travel Serv. Inc.*, 70 A.D.2d 835, 836, 418 N.Y.S.2d 19 (1st Dep't 1979) (class action plaintiffs who were directed not to answer certain questions were directed to appear for further depositions in New York).
8. *Orner v. Mount Sinai Hosp.*, 305 A.D.2d 307, 309, 761 N.Y.S.2d 603 (1st Dep't 2003) (plaintiff moved to compel defendants to answer certain questions propounded at deposition, and defendants cross-moved to deny the depositions, claiming that questions to which objections were raised and to which the direction not to answer was given were palpably improper or not in proper form).
9. *Id.* at 309.
10. *White v. Martins*, 100 A.D.2d 805, 805, 474 N.Y.S.2d 733 (1st Dep't 1984).
11. *See Monica W. v. Milevoi*, 252 A.D.2d 260, 685 N.Y.S.2d 231 (1st Dep't 1999) (ratifying attorney's direction to witness not to answer questions where defendants did not establish that the line of inquiry pursued would produce any relevant useful information).
12. *See Pierre v. Delish Bakery & Rest., Inc.*, 294 A.D.2d 417, 742 N.Y.S.2d 842 (2d Dep't 2002) (where plaintiff's failure to appear for three court-ordered depositions was deemed willful, the complaint was dismissed).
13. *See Diane v. Ricale Taxi, Inc.*, 291 A.D.2d 320, 321, 739 N.Y.S.2d 8 (1st Dep't 2002) (witness whom defendant failed to produce would have provided testimony relevant solely to the issue of liability).
14. *See Caccioppoli v. Long Island Jewish Med. Ctr.*, 271 A.D.2d 565, 566, 706 N.Y.S.2d 145 (2d Dep't 2000) ("This [willfullness] can be inferred from the appellant's continued adjournment of its deposition over the course of several years, its repeated failure to comply with stipulations and orders directing that the deposition be completed by a date certain, and the inadequate excuses offered to explain its noncompliance.").
15. *See Estate of Ah Wah Lee v. Corona Equip. Co.*, no. 570876/02, 2003 N.Y. Misc. LEXIS 180 (1st Dep't 2003) (plaintiff who was denied travel visa for appearance at deposition in New York was permitted to be deposed abroad on written questions, with cost of translation shifted from examining defendants to plaintiffs).
16. *Cianciolo v. Trism Specialized Carriers*, 274 A.D.2d 369, 711 N.Y.S.2d 441 (2d Dep't 2000) (if witness is not deposed before trial, the appropriate remedy would be to preclude testimony at trial).
17. *Mohammed v. 919 Park Place Owners Corp.*, 245 A.D.2d 351, 665 N.Y.S.2d 435 (2d Dep't 1997).

Is It Junk or Genuine? Part II

Precluding Unreliable Scientific Testimony in New York – A Look at the Last 10 Years in the Wake of Frye *and* Daubert

By Harold L. Schwab

One cannot undertake an analysis of recent New York applications of *Frye v. United States*[1] without eventually considering the role played by *Daubert v. Merrell Dow Pharmaceuticals*.[2] This article is the second of a two-part review and analysis of significant cases in New York over the last 10 years that reference either *Frye* or *Daubert*. The first part examined *People v. Wesley*[3] and its progeny. It concluded by asking whether, if novel science is a prerequisite, there may be an ever-present risk of precluding expert witnesses simply because enough votes do not exist to form a statistically valid basis, indicating general acceptance of the theory at issue. More important, what defined parameters exist or should exist to evaluate the admissibility of expert testimony in cases where the subject is neither novel nor scientific? Answers to these and related questions inevitably lead one to *Daubert v. Merrell Dow Pharmaceuticals, Inc*.

The Court in *Daubert* was called upon to decide whether proffered expert evidence that the drug Bendectin could cause birth defects, was admissible under the Federal Rules of Evidence (FRE) even though the testimony did not meet the "general acceptance" standard of *Frye* (discussed in detail in Part I). The Court held that although the *Frye* test had been superseded by the FRE, there were nevertheless four non-exclusive factors that a trial court should consider in determining whether expert testimony was reliable. These are:

1. Whether the theory or technique has been subjected to peer review and publication;

2. The known or potential rate of error;

3. Whether a theory or technique can be (and has been) tested; and

4. Whether there has been "general acceptance" of the opinion or technique in the relevant scientific community.

Although initially viewed as taking a more relaxed approach than *Frye* to the admissibility of expert testimony, *Daubert* is itself demanding. *Daubert* requires the trial judge to be a "gatekeeper" for what is offered as expert evidence; the fourth factor is but a restatement of the general acceptance requirement of *Frye*. Indeed, the Supreme Court invited trial judges to view techniques and theories with skepticism if they were only minimally supported by the relevant scientific community.

Often overlooked is the fact that the U.S. Supreme Court remanded *Daubert* to the Ninth U.S. Circuit Court of Appeals, where Judge Kozinsky added yet another factor for consideration:

> [W]hether the experts are proposing to testify about matters growing naturally and directly out of research independent of litigation, or whether they have developed their opinions expressly for purposes of testifying.[4]

Subsequent federal cases have identified nine additional reliability factors that a court may consider when acting as "gatekeeper," particularly in matters involving proffered engineering evidence.[5] These factors are: federal design and performance standards; independent standards organizations; relevant literature; industry practice; product design and accident history; charts and diagrams; scientific testing; feasibility of suggested modifications; and risk utility of suggested modification.

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The Daubert *Criteria Plus 10*

One New York court identified 10 factors in addition to the four *Daubert* criteria that could aid in the determination of whether proffered testimony is reliable. In all, one might consider:

1. Whether the theory has been tested.
2. Whether the theory has been subject to peer review.
3. The known error rate of the theory.
4. The extent to which the theory has widespread acceptance.
5. The existence and maintenance of standards and controls.
6. The existence and maintenance of standards controlling the techniques operation (i.e., procedures to be followed in the design process of a product).
7. The relationship of the technique to methods that have been established to be reliable.
8. The qualifications of the expert witness testifying in relation to the methodology.
9. The non-judicial uses to which the methodology has been put.
10. Whether the underlying data may be untrustworthy for other reasons.
11. Whether one can be reasonably confident that the underlying data excludes other causes.
12. What the leading professional societies say about the specialty or this type of testimony.
13. To what extent the technique is based on the subjective analysis or interpretation of the alleged expert.
14. The judge's experience and common sense.

The U.S. Supreme Court decision in *Kumho Tire Co. Ltd. v. Carmichael*[6] is of especial significance in considering the application of *Daubert* in New York, especially for attorneys practicing in the product liability field. In *Kumho Tire*, plaintiff's tire failure analyst, Dennis Carlson, was prepared to testify that a defect in the tire's manufacture or design caused the blowout which resulted in the rollover of the minivan in which plaintiffs and the decedent were riding. Although the trial court granted summary judgment for defendants under *Daubert*, the Eleventh Circuit reversed, concluding that *Daubert* was limited to a scientific context and that *Daubert* factors did not apply to this expert's testimony. The U.S. Supreme Court, however, reversed the Eleventh Circuit, ruling that although *Daubert* referred only to "scientific" knowledge, *Daubert* imposed a special obligation upon a trial judge to perform the basic gatekeeping obligation on all expert testimony and not merely scientific testimony. After quoting FRE 702, Justice Breyer stated:

> This language makes no relevant distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. It makes clear that any such knowledge might become the subject of expert testimony.[7]

Justice Breyer noted that the trial court, after looking for a defense of Carlson's methodology as applied to the facts of the case, found no convincing evidence. None of the *Daubert* criteria were met. Indeed, the expert's use of a two-factor test and related use of visual and tactile inspection was not supported in any articles or papers, and there was no indication on the record that other experts in the industry used Carlson's two-factor test. By implication, although not referred to as such, the witness's only support for the legitimacy of his testimony was his own assertion that it was true, making him a so-called "ipse dixit" expert.

One of the earlier cases to apply *Daubert* in New York was *Wahl v. American Honda Motor Co.*[8] There, plaintiff claimed that his three-wheeled all-terrain vehicle was unstable and uncontrollable on turns, because the center of gravity was too high and because the vehicle was built using a solid rear axle rather than a differential as found on automobiles. The defense questioned the qualifications of plaintiff's expert, Robert Wright, Ph.D., and contended that his theory relating to the alleged faulty design of the vehicle was not generally accepted in the engineering community. The trial court held a hearing and concluded that because the case did not involve novel scientific evidence, *Daubert* was the standard to be applied rather than *Frye*. "Where, however, the evidence is not scientific or not novel," the court wrote, "the *Frye* analysis is not applicable." Relying on the fact that the testimony in *Wahl* was offered by an engineer and based upon "recognized technical or other specialized knowledge," the stricter "general acceptance" standard applied in *Frye* did not apply.[9]

The trial court found Dr. Wright to be qualified and that his prospective testimony fulfilled certain of the *Daubert* factors such as peer review of presented papers, lack of dispute after presentation of such papers by the relevant engineering community, and a small opportunity for a potential rate of error.[10]

Following his decision in *Wahl*, Justice Oshrin authored two *Daubert*-oriented opinions in *Giangrosso v. Association for Health of Retarded Children*.[11] Plaintiff, a mentally retarded adult, alleged that she was sexually assaulted and molested by an employee of the defen-

dant bus company while being transported to and from a workshop operated by the defendant association. The issue was whether plaintiff's expert, Dr. Dragan, an adjunct professor with substantial expertise in issues relating to children with disabilities, could properly testify regarding the hiring, screening, training, supervision and retention of bus drivers, the duty of schools or school districts to monitor transportation contractors, and the safety and supervision of plaintiff on the buses. In Justice Oshrin's first opinion in the case, *Giangrosso I*, he noted that all parties had submitted letters indicating essential agreement that the *Daubert* and *Kumho* reliability standard should be applied by the court. He concluded that Dr. Dragan's proposed testimony would be "of a professional nature rather than a scientific or technical nature." The *Frye* general acceptance standard was not appropriate, and the court referred to Chief Judge Kaye's dissent in *People v. Mooney*.[12] There, Judge Kaye stated that testimony offered by a qualified psychologist proposing to explain the manner in which certain factors could affect perception and memory, and thus the accuracy of identification testimony, should not be subjected to the *Frye* standard.

A litigant could be deprived of justice while waiting for the scientific community to "generally accept" a theory.

Dr. Dragan's report was contradicted by a report from the defense's expert. The court observed that Dr. Dragan's conclusions were buttressed in large measure by articles not made available and that under *People v. Sugden*[13] and *Hambsch v. New York City Transit Authority*,[14] written materials of that type must be of a kind accepted in the profession as reliable in forming a professional opinion. Given the dispute between the experts and the fact that the opinions and conclusions of plaintiff's expert were derived from articles and treatises, the court concluded that an evidentiary hearing was required to appropriately determine the reliability, and relevancy, of the proposed testimony of the witness.

In *Giangrosso II*, Justice Oshrin identified from articles and case law 10 factors to be considered in determining reliability of proffered expert testimony (see sidebar on p. 26) in addition to the four non-exclusive *Daubert* factors. The witness in that case testified that he was not aware of any New York State or federal statute that required that a matron be on the bus for a moderately retarded adult and acknowledged he was only aware of agencies in New Jersey that provided matrons as a matter of policy. An article he relied upon concerning sexual abuse of students by school personnel did not relate to mentally retarded students and he broadened the reading of the article to include agencies. He acknowledged that no book or article cited in his report directly supported his opinion that bus matrons should be provided in such a situation.

Justice Oshrin concluded that the proffered opinions of the expert were not sufficiently anchored in a reliable or trustworthy base, his personal experience and knowledge in various areas were limited, and there was no support found in peer review literature. The opinions were "nothing more than the subjective beliefs and unsupported speculation of Dr. Dragan, which is insufficient to form the requisite foundation."[15]

In *Clemente v. Blumenberg*,[16] Justice Maltese reasoned that there can be situations in which "general acceptance" is an inappropriate standard to apply but that even then the trial courts have an obligation to keep junk science out of the courtroom. Observing that "the accelerated pace at which science travels is today far faster than the speed at which it traveled in 1923 when *Frye* was written," the court recognized that scientific breakthroughs might be relevant and a litigant could be deprived of justice while waiting for the scientific community to "generally accept" a novel theory. But, the court wrote, "it is an inherent power of all trial court judges to keep unreliable evidence ('junk science') away from the trier of fact regardless of the qualifications of the expert. A well-credentialed expert does not make invalid science valid merely by espousing an opinion."[17]

As noted in the first part of this article, Justice Maltese had concluded that the expert's use of photographs and repair estimates did not meet the general acceptance standard of *Frye*. However, the court also concluded that the evidence was inadmissible under

Daubert because the data and methodology employed by the biomechanical engineer were not scientifically or technically valid. As such, the expert's testimony was found to be unreliable.

Financial Expert Testimony

Proposed testimony of a certified public accountant regarding damages sustained by a corporation was the subject of a *Daubert* analysis in *Stanley Tulchin Assocs. v. Grossman*.[18] Defendant moved to exclude the report of plaintiff's expert and submitted in support of that motion an affidavit from its own expert. The court emphasized that under *Daubert* it was required to focus not on the substance of the expert's conclusions, but on whether those conclusions were generated by a reliable methodology. It appears that the affidavit of plaintiff's CPA expert detailed at length the methodology used and the reasons for that methodology. The movant's challenge was, rather, addressed to the conclusions of the report and not to the methodology. Denying defendant's motion, the court additionally noted that defendant failed through its experts to establish that plaintiff's proffered report did not meet the *Daubert* standard. The court faulted defendant's expert for failing to objectively consider the *Daubert* factors and for neglecting to show specifically the reasons why the methodology employed by plaintiff's expert was unreliable.

***Courts in New York have ordered preclusion of expert evidence without regard for, or resort to, either* Frye *or* Daubert.**

Daubert was also recently applied in the tobacco litigation case of *Frankson v. Brown & Williamson Tobacco Corp*.[19] There, the issue was the admissibility of a 50-year-old memorandum that summarized the opinions collected from scientists concerning smoking and health issues at that time. Defendants sought to prove their state of the art defense by virtue of this document. The trial court held that the memorandum was inadmissible because it did not meet any of the *Daubert* criteria. For the defense to show that their reliance upon the scientists was reasonable, the defense would need to do more than merely assert "that the scientists were brilliant or highly regarded, but would have to show that their work had been tested, peer reviewed and published in peer-reviewed journals."[20]

In a footnote to the *Frankson* case, Justice Kramer recognized that *Daubert* had not yet been formally adopted by New York's Court of Appeals:

> This Court is aware of the fact that the *Daubert* test has not been formally embraced by our Court of Appeals, however, it believes that it is within its discretion to apply it where, as here, the document contains the rankest of hearsay and its admission was sought on the ground that it provided a kind of "negative" notice to the defendants, that is, notice of the lack of a defect in their product excusing their vigilance in correcting any flaws.[21]

In the first part of this article we considered the result in *Saulpaugh v. Krafte*,[22] a medical malpractice case in which a *Frye* analysis was used to preclude the key causation testimony on the basis that general acceptance was not shown. Most interesting, especially when compared with *Saulpaugh*, is the medical malpractice case of *Tavares v. New York City Health & Hospitals Corp.*,[23] which involved similar medical theories. In *Tavares*, the court concluded that it had long been generally accepted in the medical community that compression of the brain brings about asphyxia and that hypoxia and ischemia can cause cerebral palsy. Thus, according to the court, there was nothing novel about the theory proposed by plaintiff's expert, Dr. Charash (one of the same experts testifying for the plaintiff in *Saulpaugh*), because defendant failed to show that the proffered testimony was novel and not generally accepted in the medical community. The court found that the more liberal *Daubert* standard would allow the testimony in as well, and looked to the Oklahoma federal case of *Koval v. Kincheloe*,[24] where numerous medical studies were allowed to be introduced to support the proposition that the deprivation of oxygen during labor is one of the known causes of cerebral palsy.

This raises multiple questions: was the standard to be applied that of *Frye*, *Daubert*, or something else, and if so, what? Are the results obtained by two different courts involving apparently similar issues and the same expert inconsistent and the product of application of different reliability standards?

Notwithstanding the many cases cited in this article, this author acknowledges that courts in New York over the years have ordered preclusion of expert evidence without regard for, or resort to, either *Frye* or *Daubert*. This is particularly true in the civil litigation arena. Courts have found a proffered expert to be unqualified in a particular discipline or matter although otherwise competent to testify. For example, in *Lessard v. Catepillar, Inc.*,[25] an expert who took introductory mechanical engineering courses in college and was generally familiar with heavy construction vehicles was found unqualified to testify as to the door-locking mechanism on a truck loader. There are reported cases in which a proper foun-

dation was found not to exist. In *Wagman v. Bradshaw*,[26] for example, the appellate court concluded that it was error for an expert to testify as to the contents of a written report interpreting magnetic resonance imaging films prepared by an individual who did not testify and where the films were not received in evidence. Similarly, in *Niagara Vest, Inc. v. Alloy Briquetting Corp.*,[27] plaintiff's expert could not properly testify to conclusions from data collected by defendant's expert during an assessment of the property where the data was itself not in evidence and reliability was not established. There are other cases where the methodology used was found to be lacking and there are also reported cases where courts have concluded for one reason or another that the proffered expert had engaged in speculation, although neither *Frye* nor *Daubert* was referenced in these cases.[28]

However, it is fair to say that for the numerous cases not involving novel scientific evidence, New York does not have a well-established and systematic criteria to assay expert evidence and thereby ensure reliability. We do not have the equivalent of FRE 702.[29] The rule, entitled "Testimony by Experts," embodies for the federal courts the reliability requirements of *Daubert* without codification of the non-exclusive criteria and, consistent with *Kumho Tire*, applies to all specialized knowledge. Equally unfortunate is the fact that lower courts do not have guidance as to whether *Daubert* or its equivalent applies and where the bright line exists, if there be one, for scientific evidence.

The potential unreliability of expert testimony and the compelling need for a set of *Daubert* guidelines applicable in New York was demonstrated in a recent study entitled "Comparison of 'B' Readers' Interpretations of Chest Radiographs for Asbestos Related Changes" from Johns Hopkins Medical Institutions."[30] ("B reader" is a certification offered by the National Institute for Occupational Safety and Health and is accepted widely as an expert witness qualification.) Chest X-ray films were obtained for the study from plaintiffs' attorneys involved in asbestos litigation. Each film had been read as positive for respiratory changes by any one of 30 readers selected by plaintiffs' attorneys. Those litigation experts on a single reading basis per film found abnormalities or other kinds of respiratory changes in 95.9% of the 492 cases. Six "B reader" independent consultants were retained for the study and individually shown each of the same films. The consultants were not told the source of the films or that they had already been used in litigation, and any identification on the films was concealed. The consultants interpreted the films as being positive in only 4.5% cases. Although up to a 30% variance in radiologic interpretations has been shown to exist in published studies over the past 50 years, nothing appears to have remotely approached this 96% differential.[31]

A coherent series of guidelines is needed for New York's trial courts to rigorously apply to the relevant facts on a consistent basis. If not from the legislature, the time has come for New York's Court of Appeals to address this issue in a non-*Frye* general acceptance context. Although New York remains a *Frye* state, this author submits that our highest court should identify a series of non-exclusive factors for the trial courts to use when evaluating expert testimony that does not involve novel scientific evidence. A laundry list of criteria approved by other courts has been enumerated in this article for initial consideration. Indeed, it may be that elimination of ipse dixit experts in certain disciplines may require peer review by a panel of consultants to establish reliability. Without doubt the overwhelming majority of civil cases involving expert evidence, whether in the fields of engineering design, accident reconstruction, warnings and communications, medical malpractice, economics, life care planning, and many others, do not involve novel scientific evidence. It is for these cases that more is required.

Jurors are not the gatekeepers of reliability; judges are the guardians of the integrity of the legal process. Potential abuse appears to be greatest in expert testimony. The need for heightened scrutiny and meaningful criteria is at its greatest in those instances where the general acceptance test does not apply. *Daubert*-style criteria are required in the quest for expert reliability. Determining reliability mandates affirmative judicial action in the first instance rather than leaving the matter to the jury and appellate review.

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1. 293 F. 1013 (D.C. Cir. 1923).
2. 509 U.S. 579 (1993).
3. 83 N.Y.2d 417, 611 N.Y.S.2d 97 (1994).
4. 43 F.3d 1311, 1317 (9th Cir. 1995).
5. *See* Michael Hoenig, *Gatekeeping of Experts: Admissibility Factors – Part IV*, N.Y.L.J., Sept. 14, 2001. Mr. Hoenig for convenience sake has coined the acronym "PETA" for the four non-exclusive admissibility criteria under *Daubert*, *i.e.*, peer review and publication, error rates, testability and acceptability in the scientific community.
6. 526 U.S. 137 (1999).
7. *Id.* at 147.
8. 181 Misc. 2d 396, 693 N.Y.S.2d 875 (Sup. Ct., Suffolk Co. 1999) (Oshrin, J.).
9. *Id.* at 399.
10. The linchpin of Justice Oshrin's *Daubert* analysis was two papers authored by the witness: "Stability and Maneuverability Problems of ATV's" and "A Safer ATV." These papers were published by SAE (the Society of Automotive Engineers) following peer review, and one of the papers was subject to a second peer review. Although not known at the time of the hearing, at trial it was established that Dr. Wright was chairman of the Education Department of SAE, whose duties included the assign-

ment of these papers for peer review. The lesson to be learned is that the mere fact an article was peer reviewed may not be sufficient. Analysis of the peer review process and the peer reviewers may be essential. It was also brought out that the alternative design by Dr. Wright, which he espoused in his paper and built, did not meet his own B/H standard notwithstanding the addition of weights which adversely affected maneuverability. The jury returned a defendant's verdict.

11. Index No. 14514/93 (Sup. Ct., Suffolk Co.). They have been referred to by various legal commentators as *Giangrosso I*, N.Y.L.J., Mar. 19, 2001, p. 21, and *Giangrosso II*, 2001 N.Y. Misc. LEXIS 472 (Sup. Ct., Suffolk Co. 2001).
12. 76 N.Y.2d 827, 560 N.Y.S.2d 115 (1990).
13. 35 N.Y.2d 453, 363 N.Y.S.2d 923 (1974).
14. 63 N.Y.S.2d 723, 480 N.Y.S.2d 195 (1984).
15. Justice Oshrin was the leading force behind the well-attended and highly regarded sessions on expert testimony at the Judicial Seminars (for Judges) for the years 2000, 2001 and 2002, where this writer had the privilege of being invited as a panelist. His untimely passing was a loss to the trial bar and the bench.
16. 183 Misc. 2d 923, 705 N.Y.S.2d 792 (Sup. Ct., Richmond Co. 1999).
17. *Id.* at 932.
18. 2002 N.Y. Misc. LEXIS 1424 (Sup. Ct., Nassau Co. 2002) (Austin, J.).
19. 2004 N.Y. Misc. LEXIS 849 (Sup. Ct., Kings Co. 2004) (Kramer, J.).
20. *Id*.
21. *Id.* at **5, n.3.
22. 5 A.D.3d 934, 774 N.Y.S.2d 194 (3d Dep't 2004).
23. 2003 N.Y. Misc. LEXIS 1217 (Sup. Ct., Kings Co. 2003) (Schmidt, J.).
24. No. CIV-99-1524-T (W.D. Okla. 2002).
25. 291 A.D.2d 825, 737 N.Y.S.2d 191 (4th Dep't 2002).
26. 292 A.D.2d 84, 739 N.Y.S.2d 421 (2d Dep't 2002).
27. 244 A.D.2d 892, 665 N.Y.S.2d 235 (4th Dep't 1997).
28. *See, e.g.*, *Cappolla v. City of N.Y.*, 302 A.D.2d 547, 755 N.Y.S.2d 100 (2d Dep't 2003) (opinion of expert held to be speculative); *Santiago v. N.Y.C. Transit Auth.*, 271 A.D.2d 65, 706 N.Y.S.2d 721 (2d Dep't 2000) (opinion of expert held to be speculative); *Aman v. Fed. Express Corp.*, 267 A.D.2d 1077, 701 N.Y.S.2d 571 (4th Dep't 1999) (opinion of expert held to be speculative).
29. FRE 702, as amended on April 17, 2000, and made effective December 1, 2000, states:

    > If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

    Unfortunately, New York does not have a comparable statute for courts to use in initially evaluating prospective expert testimony.
30. J.N. Gitlin et al., *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad. Radiology 843 (2004).
31. This study prompted a guest editorial in the same journal. M. Janover & L. Berlin, *"B" Readers' Radiograph Interpretations in Asbestos Litigation: Is Something Rotten in the Courtroom?*, 11 Acad. Radiology 841 (2004). *See* Michael Hoenig, *Report Disputes Radiology Experts' Opinions*, N.Y.L.J., Sept. 13, 2004, at 3.

Jury Nullification

Proposals for Reducing the Impact of External Circumstances Upon Civil Verdicts in New York

By Michael A. Haskel

Jury verdicts may be influenced by a host of "external circumstances" which, for the purpose of this article, will be defined as any factor that does not constitute relevant admissible evidence[1] but that nevertheless causes a jury to render a verdict contrary to the charge given by standards set by the trial court.[2] When a jury bases its verdict on external circumstances, it has engaged in "jury nullification," a term most commonly applied to criminal trials, although in its broadest application this conduct can occur in a civil trial.[3] Civil jury nullification has substantial consequences, not only for litigants, but also for their insurance carriers, and for the community at large.[4] The consequences are of particular concern to personal injury lawyers and their clients. The liability and damage components of civil verdicts may be influenced by a host of external factors, including sympathy, anger, disagreement with existing law, or racial, ethnic, or religious prejudice.[5] When any factor or host of factors causes jurors to consciously override their oaths to render a fair and impartial verdict based on the competent evidence, they have engaged in nullification.[6]

The vagaries of jury trials have always been a reason for this method of dispute resolution and even in the absence of jury nullification, jurors are influenced by their socio-economic, racial, ethnic, and religious backgrounds and beliefs, because jurors bring with them their own personal experiences, beliefs, and approaches to determining questions.[7] Individual jurors will evaluate witnesses' credibility from different perspectives, and follow different approaches in determining issues such as reasonableness, relative fault, and justification. Yet the dynamic triggered when each of six strangers provides input into a civic decision is a microcosm of the larger democratic institutions that function through checks and balances and depend upon compromise in reaching a consensus.[8] When jurors arrive at a verdict, they establish the community's sense of justice concerning a particular case, although the community is usually defined narrowly in civil cases, and the justice dispensed is unique to the facts of the controversy in question.[9] At some points, the jury's role may drift beyond the parameters set by the political system, which envisions that the jurors will follow the judge's instructions. When the hazy line that defines a jury's role has been crossed, the administration of justice is challenged.[10]

It is beyond the scope of this article to consider the myriad external circumstances that result in jury nullification, or to engage in a moral or philosophical discourse concerning this phenomenon. After a general discussion of the role that a jury is to play, this article will briefly discuss how external circumstances may subconsciously or consciously affect jury verdicts. There will follow proposals addressing how the influence of external circumstances can be reduced or addressed, both before and after verdicts.

The Role of the Jury

In *Abbot of Tewkesbury v. Calewe*, a 14th-century English jury was called upon to determine the issue of whether certain realty was "free alms" or "lay fee."[11] Being unable to answer the question, if they understood it at all, the jurors advised the judge that "we are not men of law," to which the judge responded, "say what you feel."[12] As has been pointed out, this interchange articulates the problem that arises when the court has not properly instructed the jury, leaving the jury confused as to how to render a decision.[13] However, the significance of the case goes beyond illustration of the jury's need for guidance. It reflects the historic role played by the jury, which was once given far greater freedom in reaching decisions.[14] Colonial American juries were judges of the law and the facts.[15]

After independence, however, jurists such as Associate Supreme Court Justice Joseph Story perceived a danger of a jury's disregarding the law and applying

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its own notion of mercy, thereby acquitting a defendant where the evidence required a conviction.[16] Of course, nullification can also occur in the reverse situation, as when a jury renders a punitive verdict that disregards the law but that satisfies some bias.[17] In either event, the nullification poses a threat to the process by which existing jurisprudence is vindicated. This threat was addressed by Justice Harlan in 1895 in *Sparf v. United States*.[18] There the Supreme Court held that it is the duty of a jury in a criminal case to apply the law as given to it by the trial court.[19] This decision set a precedent that has been followed to the present.

The issue of whether a jury could even be informed of its power to nullify was heard in the case of *United States v. Dougherty*,[20] which concerned protests arising out of the Vietnam War. In a decision which recognized that our democratic roots include many examples where juries had nullified the law on the basis of conscience, the District of Columbia Court of Appeals affirmed the trial court's refusal to charge the jury on its power and right to nullify. The court held that any instruction that the jury had the power to nullify would encourage lawless behavior.[21]

This is not to say that the jury has lost its power to disregard the law in rendering a verdict. Of course, this power remains.[22] Indeed, there is a vigorous debate over whether jury nullification, with its virtuous history, should continue to act as a bulwark against the community's outrage over flaws in the system.[23] The check upon potential abuses through the exercise of the power to nullify is promoted by the sanctity of the process by which the verdict is rendered. The New York State Bill of Rights[24] specifically provides that a jury cannot be subjected to any action, or be held liable for civil or criminal liability, for the verdict rendered, except when the verdict is the product of "corrupt conduct, in a case prescribed by law." Jury nullification does not constitute corrupt conduct under this section.

Regardless of the position that one takes on whether a jury should engage in nullification, there is no doubt that this practice has persisted, not only in criminal cases, but in civil ones as well.[25] Insofar as they have the raw power to render a verdict that is contrary to law, jurors have the power, although not the right, to nullify.[26]

In civil cases where juries have perceived some injustice in existing law, those juries have exercised this extra-legal power to arrive at verdicts to satisfy their own notions of fairness. This type of nullification is believed to have occurred in cases involving the now-repealed law of contributory negligence.[27] Faced with a situation where the plaintiff was only partially at fault, juries in the past would sometimes render verdicts reflecting no fault on the plaintiff's part – in essence, nullifying the law of contributory negligence to permit recovery. However, the jurors might then reduce the damages by a percentage of the plaintiff's liability. Thus, the comparative negligence standard that later went into effect was applied by such juries prior to the change in the law.[28] Other examples of such civil jury nullification abound. In medical malpractice cases where an infant has sustained a severe injury, the jury will sometimes ignore competent evidence that supports a finding of no liability against the defendants, and may impose damages well beyond any injury that may have been caused by the malpractice. Engaging in this form of nullification, the sympathetic jury imposes its personal social justice upon a society that may not adequately care for those who are suffering from severe injuries.[29] In acting in this manner, however, the jury exposes medical providers who are blameless, and their carriers.

The sympathetic jury imposes its personal social justice upon a society that may not adequately care for those who are suffering.

The Role of the Court

The power of juries to nullify is restrained in a number of ways. Long before reaching trial, a judge may dismiss a case for failure to state a cause of action,[30] or may grant summary judgment to one of the parties when there is no issue of fact.[31] During the trial, this court may direct a verdict as a matter of law.[32] A mistrial may also be declared when the court believes that the jury cannot reach a fair verdict, as for example, where trial counsel has engaged in misconduct that prejudices a jury, and which taint cannot be cured by a corrective charge.[33] Post-trial motions empower the judge to direct verdicts, set aside verdicts, and order new trials.[34] This judicial authority in civil cases avoids juries where a determination may be made as a matter of law and limits the powers of juries in cases where the court believes that the jury has not reached a fair verdict.[35]

Where a case is resolved as a matter of law by the court's directing a verdict, or where the court has set aside a verdict because the evidence so clearly preponderates against the jury's verdict, the jury's power to nullify has itself been checked.[36] However, this presumably leaves to the jury the closer cases where subtle biases may tip the scales. In cases where jury verdicts can go either way, the verdicts cannot be set aside as being

against the weight of evidence, although they can be set aside in the interests of justice.[37] It is here where the jury's susceptibility to external evidence may cause the most damage.

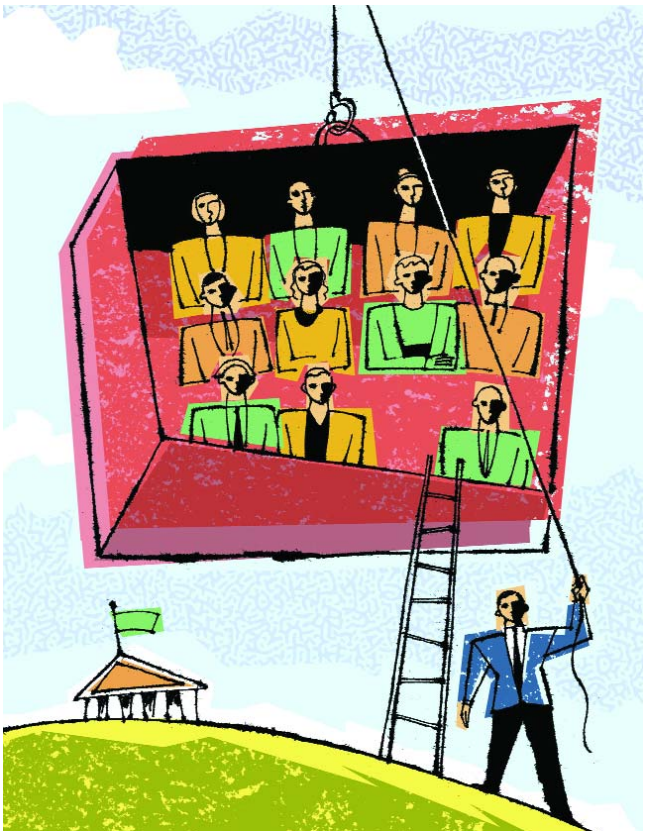
Before discussing how the influence of external circumstances upon a jury can be further reduced, it is well to consider some general aspects of the cognitive process to better appreciate how to treat those aspects of it which involve jury nullification.

Subconscious and Conscious Influences

The operation by which jury members process information and then engage in collective deliberations to arrive at a consensus has been the subject of numerous studies and articles.[38] Although there are conflicting views as to how the process works, two assumptions may be safely made. First, there will always be cases where a juror will be obstinate in his or her conscious disregard of the law.[39] Such jurors, which may be referred to as "obstinate jurors," will not be affected by the judge's instructions because the obstinate juror deliberately disregards those instructions.[40] Where the obstinate juror has allies on the jury in the form of other obstinate jurors, or is sufficiently persuasive in advancing his or her position without revealing the underlying basis for such position, the result may be nullification.[41]

Second there are those cases where the judge's instructions had an impact on the cognitive processes of members of the jury, who keep an open mind concerning evidence and follow the law. Such jurors may be defined as "reactive jurors." This is not to say that a reactive juror is free of prejudice and may not be influenced by external circumstances. Subconsciously, even conscientious jurors have a tendency to be influenced by external circumstances.[42] However, if reactive jurors come to appreciate that they are being influenced by factors outside the judge's instructions, they will either overcome such influences, in which case they remain reactive jurors, or they will consciously choose to allow the influence to play a role in their decision making. In the latter case, the reactive juror becomes an obstinate juror. The goal of the system should be to eliminate the obstinate juror from service, and to counteract subconscious influences upon reactive jurors so that they can render a verdict based upon competent evidence and apply the laws given to them by the court.

These two basic assumptions suggest that jury nullification in civil cases may be addressed in the following four ways: (1) by minimizing the effect of jury nullification before a jury is empaneled, through approaches that affect the pooling process and overall composition of the venire persons; (2) by dealing with the jury nullification issue during this selection process; (3) by reducing the influence of external factors during a trial; and



(4) by dealing with potential jury nullification after the trial.

In considering proposals to reduce the practice of nullification, bear in mind that the arguments that favor nullification in criminal cases do not apply to juries involved in civil cases.[43] Apart from the obvious difference that liberty is at stake only in criminal cases, the state is not prosecuting and the need for a check against tyranny, unpopular law, or overzealous prosecution is absent. To be certain, there are injustices in civil trial settings, and civil verdicts can have a significant impact on litigants, but the element of government oppression, with which jury nullification has been historically concerned, is not starkly present.[44]

Jury Composition

The goal of the jury selection process should not only be to provide a pool of prospective jurors, but also to draw widely from the "community," so that the jury is representative of the diverse groups that make up the population from which it is drawn.[45] Drawing from a broad spectrum of the population is important to achieve diversity.[46] The mechanics of jury selection involve the identification of prospective jurors on the basis of lists, including lists of motor vehicle operators, taxpayers, and utility customers.[47] Typically, prospective jurors on the lists are residents of the geographic area encompassed by the jurisdiction where the prospective jurors may be empaneled.[48]

Although the right to a jury trial may be waived, the New York State Constitution provides in article 1, section 2, that a jury trial is guaranteed and shall "remain inviolative forever." The constitution does not directly address the manner of jury selection, which is largely left to the state legislature.

Jury selection is addressed in two statutory bodies of law. The first is contained in Judiciary Law article 16, which is concerned with establishing the political framework and the procedures by which jurors can be pooled. There are provisions for appointing the persons responsible for overseeing the process, appointing those charged with administering the process,[49] identifying lists from which jurors can be drawn,[50] and addressing juror qualifications.[51] The geographic area from which jurors are to be pooled also comes under the Judiciary Law.[52]

The second major source of statutory jurisprudence concerning jury selection is the Civil Practice Law & Rules.[53] The CPLR is concerned with the procedure to be followed in jury selection, issue resolution by the jury, and the presentation of issues during jury trials, and with post-verdict motions.[54]

The cases addressing the constitutional requirements applicable to jury selection are legion. Two basic rights are involved: the right of litigants to an impartial trial, and the right of qualified citizens to serve on juries.[55] As noted above, the Judiciary Law – which is concerned with the first phase of the trial, which involves the pooling of venire persons for potential service – implements certain aspects of the constitution's broad guarantee of a jury trial. An integral part of this right includes the employment of random methods of selecting jurors, and the assurance that citizens are afforded the opportunity to serve, provided they are not exempted, disqualified or excused.[56] Case law clearly condemns discrimination against any segment of the community in the pooling of jurors.[57] While any given jury may not be representative of a cross-section of the community, where the composition of a jury is the product of deliberate, intentional or systematic discrimination, the selection process is unconstitutional.[58] Included in the prohibited selection practices is discrimination on the basis of race, ethnicity, religion, gender, or sexual preference.[59]

There is also a potential prohibition against excluding jurors because of their beliefs.[60] However, this constitutional line must be carefully drawn. Where a juror's belief is prejudicial, the verdict may be tainted, and a fair trial denied.[61] Courts usually address the problem by asking jurors whether they can be fair despite their beliefs. If the juror answers affirmatively, then the juror may be permitted to sit.[62] This approach would allow members of hate organizations such as the Ku Klux Klan to be empaneled, provided such prospective jurors swear that they can render a fair verdict.[63] However, such a juror's protestations that he or she can sit fairly may be no more than a subterfuge.[64] When general questions are asked of such a juror as to whether he or she can render a fair verdict, the answer "yes" may be truthfully given, because the juror's perception is that he or she can be fair.[65] Ironically, those jurors who are most honest about their own personal biases are most likely to be sensitive to potential problems of fairness, and of the subtle ways that prejudices are likely to influence their decisions; yet, because of their doubts, they are likely to be disqualified.[66]

The Right to a Fair Jury Trial

In the face of competing interests, choices have to be made. Courts stress the right to a fair trial and it would seem that this consideration would override the chilling effect that might follow from disqualifying jurors on the basis of their beliefs and their membership in various groups.[67] When those beliefs or memberships present potential dangers to a fair trial, they should lead to disqualification.[68] The artificial approach, where a juror is allowed to serve despite holding those beliefs, is based upon the questionable assumption that the juror's taking an oath to sit fairly will expurgate the influence of such beliefs. This ignores basic psychology.[69] It also ignores the dictates of fairness. A party that holds biases is likely to follow them, at least on a subconscious level, and therefore the danger of an unfair verdict is present. Disqualification does not deprive the prospective juror of the right to hold his or her beliefs or to sit on other juries where those beliefs will not play a role in rendering a verdict.

The proposals that follow are based upon the following premises: (1) that the current balancing of competing interests of a fair trial on the one hand, and the right of a prospective juror to sit on a jury despite having beliefs which indicate a potential for an unfair verdict, weigh in favor of disqualification; (2) that statutory provisions do not adequately address the problem of bias in either the selection process or in the questioning and qualifying of jurors; and (3) that existing procedures for insuring juror impartiality are underutilized.

Proposals

Jury Pooling to Assure Greater Diversity

Though Judiciary Law § 500 contemplates that jurors will be selected "from the community in the county or other jurisdiction where the court convenes," there appears to be no constitutional impediment to pooling jurors from counties outside the geographical area where the trial is to be conducted.[70] To be certain, there would be some inconvenience, and one would hardly expect potential jurors in Buffalo to report for jury duty

in Riverhead, but restricting jurors to service within the county where they reside appears too rigid. The benefit of a more extensive jury pool would be an increase in the diversity of prospective jurors. For example, jurors sitting in Queens could be drawn from Brooklyn, Nassau, and Staten Island, and vice versa.

By increasing the geographic area from which jurors are selected, the definition of "community" would be expanded to encompass a region of two or more counties. Assuming that there are significant differences between existing venire in terms of economic composition, racial and ethnic makeup, and concentrations of members of various religious groups, expanding the boundaries of the jury pool would assure greater diversity.[71] It would also increase the likelihood that jury verdicts would be more reflective of broader-based community values. Conversely, parochial determinations would be less likely.

By increasing the area from which jurors are selected, the definition of "community" would be expanded.

Greater Use of Jury Registration Questionnaires to Promote Impartiality

Judiciary Law § 513 formerly set forth the substance of the questionnaire which is to be filled out by prospective jurors. For the most part, the form of the questionnaire sought very general information along with other questions, the answers to which would reveal whether the venire person met the general qualifications of Judiciary Law § 510. After its amendment in 1996, Judiciary Law § 513 referred the form of the questionnaire to the Chief Administrator of the Courts, thereby promoting a greater degree of flexibility. It is suggested that the questionnaire be expanded to assist in determining if a venire person can ignore external circumstances. Questions could be asked as to whether the venire person had any racial, ethnic, religious, or sexual prejudices.[72] The wording of the language of any such questionnaire would have to be carefully drafted, to which purpose the services of psychologists may prove helpful.[73] The questionnaire would also have to avoid unduly intrusive questions. A balance would have to be struck between the juror's right to privacy, and the litigants' right to a fair trial.

Within the appropriate parameters, the questionnaire could seek to identify obstinate jurors. Insofar as such jurors might be qualified to sit in certain cases, but not others, this information should be made available to attorneys and can then be the basis for exercising a challenge for cause in the appropriate case.

As noted above, it is anticipated that certain jurors might give untruthful responses, both those that wanted to be disqualified to avoid service, and those who wish to serve regardless of biases.[74] Yet, the questionnaire would still serve a role with respect to those jurors who answer truthfully and who, on the basis of their candor, are determined should not serve.

Another possible way to increase the likelihood of fairness is to use the questionnaires to assure greater diversity. The requirements of Judiciary Law §§ 500 and 506 that jurors shall be selected at random, can be satisfied while assuring greater diversity in jury composition. For example, juries can be chosen by deliberately summoning jurors from subsets consisting of different neighborhoods, different socio-economic groups, different age groups, different degrees of education, or any other factors.[75] The selection can be made from a mass list based upon subsets and can be done on a computer to assure both randomness and appropriate representation of subsets, so as to assure that the venire persons represent a cross-section of the community.[76]

The Venue Statutes

CPLR 501–513 deal with the issue of the venue of a trial, which can be changed for a host of reasons. For the purposes of avoiding a biased venue, focus is upon CPLR 510 which provides, in pertinent part, that on motion, a court can change the place of trial where "there is reason to believe that an impartial trial cannot be had in the proper county." This section has the potential for addressing the effects of external circumstances upon jury verdicts.

An illustration of how the Civil Practice Law, a predecessor section to the CPLR, was employed is instructive. In *Althiser v. Richmondville Creamery Co.*,[77] foreign creamery companies were sued based on an alleged oral contract made with 126 dairy farmers and milk producers residing in the county where the action was brought. The court noted that the population in the county largely consisted of those who would be sympathetic to the plaintiffs, including other farmers, milk producers, friends and relatives. Therefore, the court granted a change in venue to eliminate bias.

Although demonstrating bias is often difficult, it has nevertheless been held that a party seeking to change venue must establish the grounds for such charge on the basis of convincing evidence, rather than speculation. In *Hayland Farms Corp. v. Aetna Casualty & Surety Co.*,[78] the plaintiff commenced suit in New York County, claiming

that, as a result of unfair publicity, its action against a fire insurance company could not be fairly tried in Monroe County, where the property was located. However, the court held that New York County was not a proper venue and concluded that the claim that a trial would be prejudicial in Monroe County was based upon "mere suspicion." In contrast, a lower standard was employed in *Burstein v. Greene*,[79] where the court held that a change of venue from Nassau County to Kings County was warranted because the plaintiff in a libel action was a spouse of a resident Supreme Court Justice of Nassau County.

Whether a court will order a change of venue based upon adverse pre-trial publicity, the prominence of one of the litigants within the community's court system, or the pecuniary interests of the community within the jurisdiction, such choice appears to be largely at the court's discretion.[80] However, the cultural, economic, or racial composition of juries within a particular venue is not a sufficient ground for transferring venue pursuant to CPLR 510. Indeed, a transfer of venue on this ground would constitute an admission that a fair trial could not be obtained in a county because the residents of the county are, on the whole, likely to consider external evidence. Such an admission is not likely to be made for a variety of reasons, including political ones, and would raise constitutional issues. Yet, it is beyond question that biases have played roles in jury trials, and the tendency to prejudge is presumably more widespread in particular venues.[81] While a change of venue should be considered whenever it is believed that there cannot be a fair trial within the subject jurisdiction, it should be recognized that changes in venue are not frequently granted. Absent the court shifting the burdens of showing that bias exists, which are now heavily against the movant, the focal point for practitioners should be to address effects of potential bias within the venue.

Voir Dire

The second stage of jury selection involves the process by which venire persons are seated for questioning by lawyers. During the *voir dire* of venire persons, lawyers ask questions designed to ascertain if jurors will be influenced by external circumstances. Often the process involves the verbal jockeying of litigation counsel based upon the counsel's perception of how law and facts, including external circumstances, may influence the way potential jurors perceive their clients.

During the voir dire of venire persons, lawyers ask questions designed to ascertain if jurors will be influenced by external circumstances.

Where it is clear that a juror cannot sit fairly, the juror may be challenged for cause pursuant to CPLR 4108.[82] Challenges for cause are not limited to those in CPLR 4110,[83] which sets forth reasons for disqualification, including pecuniary considerations and degree of consanguinity to a party. Case law deals with questions of bias, which can also be a basis for a challenge for cause.[84] Unfortunately, a number of decisions show that some jurists have a tolerance for jurors with potential biases.[85] Where the juror perfunctorily declares that he or she can sit fairly, some judges are satisfied.[86]

Where the juror cannot be challenged for cause, but the attorney for a party does not believe the juror would be favorably disposed to his or her client's position, the attorney can employ a peremptory challenge under CPLR 4109, although, under the Supreme Court's decision in *Batson v. Kentucky*,[87] peremptory challenges cannot be used on the basis of color. This prohibition extends to other forms of discrimination, such as use of peremptory challenges on the basis of religion or ethnic background.[88]

In general, the distinction between peremptory challenges and challenges for cause may come down to the question of whether a potential juror believes that he or she can put aside personal feelings and follow the court's instructions.[89] However, this professed ability, when misguided or disingenuous, is particularly pernicious if an issue of race, religion or national origin is likely to influence the verdict. Therefore, it is suggested that even a hint that such discriminatory considerations or influences would come into play should be a basis for disqualifying a juror.[90] To effectuate that ground for disqualification, CPLR 4110 could be amended to expressly provide for disqualification on the basis of probable racial, ethnic, religious, gender, or sexual preference bias.

The Juror's Oath

Pursuant to CPLR 2309, jury oaths are to be administered, but the statute does not spell out the form of such oath. Psychologists advise that the taking of an oath has particular significance.[91] The oath has a special significance in jury trials, and is presumably designed to impress upon jurors the significance of the role they are to play so that the jurors will discharge their duties in the serious manner intended.[92]

The standard oath is very general. In essence, the juror swears to render a fair and impartial verdict. An

oath based upon the assumption of such a general responsibility is insufficient because a ritualistic incantation of fairness hardly arouses a juror's consciousness of the duty to suppress tendencies to consider external evidence. In the abstract, most jurors believe that they can be fair.[93]

It is suggested that the oath contain specific language admonishing the juror not to consider external evidence and that the charge expressly describe what this entails. The form of this specific language should come from input from laypersons and psychologists. The phrasing of the oath could also be particularized with respect to the case in question.[94] For example, where the litigants are of different ethnic, religious, or racial backgrounds, the oath could be specifically framed in terms that caution the jurors to disregard these issue circumstances and base their verdict on the facts. (The element of sympathy could also be specifically tailored to the case in question.)

The Increased Role of the Judge

The trial judge has broad discretion in questioning possible jurors to avoid bias on the panel.[95] This discretion includes *voir dire* of the jury pool.[96] Because of the importance of a jury's ignoring external evidence, it is suggested that in those cases where there is a potential threat of nullification, the judge may speak to each juror separately, and out of the hearing of other jurors, to assure that the juror will exclude external evidence.[97] This separate treatment is likely to increase the juror's awareness of the importance of the subject, while encouraging the juror to express an inclination to consider external evidence.[98] Even if the juror fails to articulate doubts about being able to sit fairly, the process will reinforce the importance of impartiality, and an awareness of what psychologists call "cognitive dissonance," which occurs when there is a conflict between competing considerations. Cognitive dissonance might cause a juror to suppress biases that might compete with the juror's higher duty to render an impartial verdict.

Pre-trial Instructions

Judges usually instruct jurors as to their duties prior to the commencement of a trial. The standard instructions contained in the Pattern Jury Instructions address the issue of external evidence in a number of ways, chief of which are PJI 1:6 (admonishing that jurors are bound to accept the law as given by the court) and PJI 1:07 (instructing the jurors that they must consider only competent evidence).

It is believed that these pre-trial instructions are insufficient. Additional language should be employed to further impress on the jurors their duty of fairness. While the Pattern Jury Instructions address various circumstances that should not be considered in rendering a verdict, such as perceptions as to the court's personal views (PJI 1:6), and opening statements (PJI 1:3), specific instructions could be articulated to emphasize that the jury should make every effort to overcome any tendency to consider external circumstances or to allow biases to enter into the verdict.

Requests to Charge

Predicated upon the system's faith that a jury will apply the law to the competent evidence, the jury trial's defining moment is the court's charge, which is expected to confine the jurors' role to judging the facts of the case before them.[99] Pursuant to CPLR 4110-b, requests to charge include any appropriate matter. It is also clear that the judge is not restricted to the request to charge.

The request to charge has two aspects. The first includes general instructions, and the second encompasses the specific jurisprudence that governs the causes of action in the case. The general instructions may include admonitions against consideration of external evidence. The general language currently employed concerning the rendering of a fair and impartial verdict on the competent evidence may be insufficient in certain cases. Specific language addressing particular issues should be considered.[100]

The Use of Special Verdicts and General Verdicts in Interrogatories

It has been found that special verdicts and written interrogatories are more apt to reduce the jury's consideration of external circumstances.[101] When a jury is forced to focus upon specific factual details, there is less room for the conscious and subconscious influences that would otherwise affect the jury.[102] Particularly in cases where external circumstances are more likely to be considered by a jury, the court should utilize special verdicts under CPLR 4111(b) or general verdicts with interrogatories under CPLR 4111(c).

Post-trial Motions

Although CPLR 4404(a) provides, among other judicial alternatives, that verdicts which are contrary to the weight of evidence can be set aside, the same subsection also calls for setting aside a verdict "in the interests of justice." This discretion can certainly be exercised where external evidence, particularly bias on the basis of racial, religious or ethnic grounds, has come into play in a civil verdict. This option is available to the judge, even when the verdict is not against the weight of evidence. The paramount consideration is whether the trial has been fair. The court should freely utilize CPLR 4404(a) to set aside verdicts that were tainted, and direct a new trial.

Conclusion

There is no question that external circumstances influence the jury, and this is inherent to the jury

process. The consideration of external circumstances poses a serious threat to the system of justice. However, the effect of external circumstances in influencing jury verdicts can be substantially reduced. Three general ways have been suggested. The first, involves the jury selection process, which can be modified to assure greater diversity. This goal could be achieved not only by polling jurors from more than one county, but also by using questionnaires and computers to ensure that panels are diverse.

Second, the empanelment of the jury and the conduct of the trial can be executed in a manner that more strongly impresses upon the jurors the weight of their responsibilities. The oath could be modified, and tailored to address potential jurors and their sense of responsibility subject. The trial judge can take a more active role in combating the influences of external circumstances, including through greater participation in *voir dire*, more detailed instructions, and charges more sensitive to this topic.

Third, burdens of setting aside verdicts, and of changing venues, can be modified to reflect a greater appreciation of the subtle psychological effects of jurors' consideration of external circumstances.

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1. By way of illustration, external circumstances may include the personalities of the litigants and their attorneys, the demeanor of the judge, political and economic conditions, or the jury's personal notion of fairness when such notion conflicts with the court's charge of the law. Included within the term are also biases which influence the juror to disregard competent evidence. Such biases may be the product of prejudice or sympathy and may influence the juror to prejudge issues or parties. Horowitz et al., *Jury Nullification: Legal & Psychological Perspectives*, 66 Brook. L. Rev. 1207, 1230–37, 1244 (2001).
2. New York Pattern Jury Instructions – Civil 1:7 (3d ed.) coincides with this definition by requiring jurors to consider only the competent evidence before them.
3. Although the application for the term "jury nullification" may appear "problematic" to some scholars (*see* Horowitz, et al., *supra* note 1 at 1219–20) when jurors deliberately choose to ignore the law, the phenomena cannot be denied in the context of civil cases.
4. Cases involving torts, particularly those wherein personal injuries have been sustained, are susceptible to the influence of external factors as evidenced by jury nullification in tort cases. Landsman, *The Civil Jury in America: Scenes from an Unprecedented History*, 44 Hastings L.J. 579, 610 (1993).
5. *See United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (noting possible causes of nullification. It should be noted that nullification can also fail to occur if a jury fails to find liability). In *Joyce v. Rumsey Realty Corp.*, 17 N.Y.2d 118, 269 N.Y.S.2d 105 (1966), the court held that if the jury had rendered a no cause verdict under the facts of a Labor Law case, the jury would have engaged in nullification.
6. Nullification requires all jurors to disregard the facts, law and their oath. Finkel, *Commonsense Justice, Culpability and Punishment*, 28 Hofstra L. Rev. 669, 678 (2000).
7. For an interesting discussion of the mental processes which are involved in jury deliberations, see Thornburg, *The Power and the Process: Instructions in the Jury Trial*, 66 Fordham L. Rev. 1837 (1998).
8. Jurors tend to construct their own versions of events, then filter information in accordance with the stories they have constructed. *Id.* at 1860.
9. Weinberg-Brodt, *Jury Nullification and Jury-Control Procedures*, 65 N.Y. U. L. Rev. 825, 855–56 (1990).
10. *Thomas*, 116 F.3d at 614.
11. Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 Brook. L. Rev. 1081, 1082 (2001) (discussing *Abbot of Tewkesbury v. Calewe*).
12. *Id.*
13. Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev. 37 (1993).
14. Smith, *The History and Constitutional Context of Jury Reform*, 25 Hofstra L. Rev. 377 (1996).
15. *See* Horowitz, et al., *supra* note 1.
16. *Id.*
17. For a concise history of jury nullification, see *People v. Douglas*, 178 Misc. 2d 918, 680 N.Y.S.2d 145 (Sup. Ct., Bronx Co. 1998).
18. 156 U.S. 51 (1895).
19. *Id.* at 105.
20. 473 F.2d 1113 (D.C. Cir. 1972).
21. *Id.* at 1133, *discussed in* Horowitz et al., *supra* note 1, at 1215; *see United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir.), *cert. denied*, 488 U.S. 832 (1988).
22. Horowitz et al., *supra* note 1, at 1216–17.
23. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L. Rev. 677, 679 (1995).
24. Civil Rights Law art. 2, § 14.
25. Herman, *The Jury in the Twenty-First Century: An Interdisciplinary Conference*, 66 Brook. L. Rev. 971, 987 (2001).
26. Horowitz, et al., *supra* note 1 at 1216–17.
27. Thornburg, *supra* note 7 at 1858.
28. *Id.*
29. *Id.* at 1858–63 (discussing jury verdicts' reflection of community values).
30. CPLR 3211.
31. CPLR 3212.
32. CPLR 4401.
33. *Capitol Cab Corp. v. Anderson*, 194 Misc. 21, 85 N.Y.S.2d 767 (Mun. Ct., Bronx Co. 1949), *aff'd*, 197 Misc. 1035, 100 N.Y.S.2d 35 (Sup. Ct., App. Term 1950).
34. CPLR 4404.
35. Weinberg-Brodt, *supra* note 9.
36. *Id.*
37. CPLR 4404.
38. Horowitz et al., *supra* note 1 at 1210.
39. *Id.*
40. In *Wainwright v. Witt*, 469 U.S. 412 (1985), absolutist views concerning the death penalty were held to be grounds for

disqualification, *viz.*, views that would prevent or substantially impair the juror's performance of his or her duty in accordance with the judge's instructions and the juror's oath.

41. The likelihood of this occurring is tempered by the need of five of six civil jurors in New York to share, for whatever reason, in the views of the obstinate juror. See CPLR 4113(a), requiring five-sixths of the jurors in a civil case to concur in the verdict.
42. Some jurors may honestly express a belief that they can sit fairly and later come to believe that they cannot be impartial, but it has been said that it is more likely that a juror's belief in his or her fairness is inversely proportional to actual bias. *People v. Williams*, 628 P.2d 869, 873 (Cal. 1981).
43. Horowitz et al., *supra* note 1.
44. See Weinberg-Brodt, *supra* note 9.
45. N.Y. Judiciary Law § 500 ("Jud. Law").
46. Adams & Lane, *Constructing a Jury That Is both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y. U. L. Rev. 703 (1998).
47. Jud. Law § 506.
48. Jud. Law § 510.
49. Jud. Law § 503.
50. Jud. Law § 506.
51. Jud. Law § 510.
52. Jud. Law §§ 510, 520; N.Y. Comp. Codes R. & Regs. tit. 22, § 128.7 ("N.Y.C.R.R."). Jud. Law § 513 also refers the form of the questionnaire to be filled out by each prospective juror to the Chief Administrator of the Courts.
53. 22 N.Y.C.R.R. implements the Judiciary Law.
54. *See* CPLR 4101–4113, 4401–4406.
55. *Ancrum v. Eisenberg*, 206 A.D.2d 324, 615 N.Y.S.2d 14, *motion denied*, 207 A.D.2d 1045, 617 N.Y.S.2d 640 (1st Dep't 1994), *appeal dismissed*, 85 N.Y.2d 853, 624 N.Y.S.2d 367, *appeal dismissed*, 85 N.Y.2d 1027, 631 N.Y.S.2d 283 (1995).
56. Jud. Law §§ 500–527.
57. *Superior Sales & Salvage v. Time Release Sciences*, 224 A.D.2d 922, 637 N.Y.S.2d 584 (4th Dep't), *supp. op.*, 227 A.D.2d 987, 643 N.Y.S.2d 291 (4th Dep't 1996).
58. *People v. Guzman*, 60 N.Y.2d 403, 469 N.Y.S.2d 916 (1983), *cert. denied*, 466 U.S. 951 (1984).
59. *Superior Sales & Salvage*, 224 A.D.2d 922. Although the cited case only dealt with race and sex, its rationale applies to other constitutionally protected categories.
60. *See* 63 A.L.R.3d 1052; *see also Young v. Johnson*, 123 N.Y. 226, 25 N.E. 363 (1890); Bader, Batson *Meets the First Amendment: Prohibiting Peremptory Challenges That Violate Prospective Juror's Speech and Association Rights*, 24 Hofstra L. Rev. 567 (1996) (discussing potential constitutional problems with such exclusions).
61. *People v. Blyden*, 55 N.Y.2d 73, 447 N.Y.S.2d 886 (1982).
62. Abramovsky & Edelstein, *Challenges for Cause in New York Criminal Cases*, 64 Alb. L. Rev. 583 (2000).
63. Where the juror unequivocally states that he or she could be fair, the law may ignore evidence of bias. In *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), the Supreme Court opined that the test is whether the juror's views prevent or substantially impair the juror's performance of his or her duties. Whether there should be differences in standard when the trial issue involves a degree of the nature of the crime (*e.g.*, anti-abortion defendant causing injury or property damage), the punishment (*e.g.*, death penalty), or the defendant (member of Bernardi), can be debated on several levels. *See* Weinberg-Brodt, *supra* note 9.
64. *People v. Williams*, 628 P.2d 869, 873 (Cal. 1981).
65. *Silverthorne v. United States*, 400 F.2d 627, 638 (9th Cir. 1968) (opining that merely going through the formality of obtaining assurances of impartiality is insufficient).
66. *Williams*, 628 P.2d 869.
67. Even while recognizing that jurors who engage in nullification violate their oath, the Supreme Court has warned against the threat to independence of the jury. *See Sparf v. United States*, 156 U.S. 51, 106 (1895), discussed in Weinberg-Brodt, *supra* note 9.
68. *People v. McQuade*, 110 N.Y. 284, 18 N.E. 156 (1888).
69. Abramovsky & Edelstein, *supra* note 62.
70. As discussed in Adams & Lane, *supra* note 46, a number of different approaches have been taken to make jury pools more representative. The steps, such as greater efforts to contact minorities in the stage where jurors are pooled, are among those constitutionally allowed. The authors propose an interesting method of selection akin to cumulative voting by minority shareholders.
71. Greater diversity in the pooling stage of jury selection, wherein summonses are sent to venire persons, promotes the constitutionally favored objective of increasing minority representations. *Id.*
72. Insofar as racial prejudice is a ground for disqualification, there should be vigorous efforts to uncover same. *See People v. Blyden*, 55 N.Y. 2d 73, 447 N.Y.S.2d 886 (1982); Brown, *A Challenge to the English-Language Requirement of the Juror Qualification Provision of New York's Judiciary Law*, 39 N.Y. L. Sch. L. Rev. 479, 494 (1994).
73. *See generally* Tiersma, *supra* note 13 (suggesting greater use of psycho-linguistic principles in drafting jury instructions. The same psycho-linguistic principles can be applied to questionnaires).
74. *See People v. Williams*, 628 P.2d 869, 873 (Cal. 1981).

"... and best of all, he accepts pats instead of a retainer."

75. As discussed in Adams & Lane, *supra* note 46, the Alabama plan for increasing the number of jurors in each venire involves creating subsets by race.
76. Jud. Law § 500.
77. 13 A.D.2d 162, 215 N.Y.S.2d 122 (3d Dep't 1961).
78. 89 A.D.2d 516, 452 N.Y.S.2d 62 (1st Dep't 1982).
79. 61 A.D.2d 827, 402 N.Y.S.2d 227 (2d Dep't 1978).
80. *Nicholas v. Brini*, 204 A.D.2d 194, 612 N.Y.S.2d 123 (1st Dep't 1994).
81. *See generally* Weinberg-Brodt, *supra* note 9; *see also Althiser*, 13 A.D.2d 162.
82. *Orange County v. Storm King Stone Co.*, 229 N.Y. 460, 128 N.E. 677 (1920) (discussing challenges for cause); There are two types of challenges for cause: (1) challenges for principal cause, which involves an objection to a juror who is unqualified as a matter of law, and (2) challenges for favor, which raises a question of fact. Where there is a question concerning whether a juror can be challenged for cause, under CPLR 4110, the court may determine the issue. *See* 8 Carmody Wait 2d § 55:34, 55:37.
83. *Johnson v. City of N.Y.*, 191 A.D.2d 216, 594 N.Y.S.2d 201 (1st Dep't 1993).
84. *People v. Blyden*, 55 N.Y.2d 73, 447 N.Y.S.2d 886 (1982).
85. *See Glessner v. Lafayette Post No. 37 of the American Legion*, 50 Misc. 2d 1059, 272 N.Y.S.2d 69 (Sup. Ct., Dutchess Co. 1966), *aff'd*, 28 A.D.2d 648, 282 N.Y.S.2d 664 (2d Dep't 1967) (placing burden upon attorney examining jurors to determine "sympathy adverse" to client, and to use peremptory challenge if this bias is uncovered).
86. *See* Abramovsky & Edelstein, *supra* note 62 (warning against acceptance of "hollow incantations" of fairness).
87. 476 U.S. 79 (1986).
88. *Superior Sales & Salvage v. Time Release Sciences*, 224 A.D.2d 922, 637 N.Y.S.2d 584 (4th Dep't), *supp. op.*, 227 A.D.2d 987, 643 N.Y.S.2d 291 (4th Dep't 1996).
89. *People v. Martell*, 138 N.Y. 595, 33 N.E. 838 (1893).
90. Abramovsky & Edelstein, *supra* note 62.
91. *Id.* at 599.
92. The importance of jury oaths is also repeatedly stressed by the courts. *See, e.g., United States v. Wedalowski*, 572 F.2d 69 (2d Cir. 1978).
93. *People v. Williams*, 628 P.2d 869, 873 (Cal. 1981).
94. At least in criminal cases, warnings have been sounded regarding too extensive use of prequalification of jurors, which process was viewed as a threat to the defendant's right to a fair trial. *See* Weinberg-Brodt, *supra* note 9. However, with respect to the jury oath, such intrusion would be minimal.
95. *People v. Parks*, 257 A.D.2d 636, 684 N.Y.S.2d 288 (2d Dep't 1999), *aff'd*, 95 N.Y.2d 811, 712 N.Y.S.2d 429 (2000).
96. *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981); *Ristaino v. Ross*, 424 U.S. 589, 594–95, (1976); *People v. Vargas*, 88 N.Y.2d 363, 377, 645 N.Y.S.2d 759 (1998).
97. Diamond, *Realistic Responses to the Limitations of* Batson v. Kentucky, 7 Cornell J. L. & Pub. Pol'y 77, 90 (1997) (discussing problems of jurors responding to inquiries in a public courtroom).
98. *Id.*
99. It has even been recognized that the charge may nullify the law. In *Cronjaeger v. City & Suburban Homes Co.*, 119 N.Y.S. 181 (Sup. Ct., App. Term 1909), the trial court's charge "practically nullified" the application of the doctrine of contributory negligence, taking this question away from a jury. Apparently, dissatisfaction with the doctrine of contributory negligence extended to some trial courts, as well as to juries. *See* Finkel, *supra* note 6 at 678.
100. Thornburg, *supra* note 7.
101. *Id.*
102. *Id.*

Law Practice Management

Integrating and Analyzing Intelligence: Benefiting from the Evolution of Practice Management Software

By M. Lewis Kinard

Imagine what your investment portfolio would be if you had a crystal ball. Now imagine what that glimpse at the future could do for your law practice. Unlike commercial enterprises that are often equipped with well-honed tools for measuring productivity, assessing market forces and projecting future trends, most law firms still rely on the traditional measures of success or failure: gross receipts, accounts payable and gross expenditure amounts. Presumably, growth metrics are left to the accountants, while managing partners and law office administrators must fill in the blanks for the future.

Traditional forecasts of law firm performance have relied solely on data and reports from the past because there has been no alternative. Without the proper forecasting tools, decisions are made based on the historical performance of the firm, and fail to adequately consider the direction in which the firm is heading. And, because this historical information is often maintained in multiple software programs and cannot easily be synthesized with relevant business analytics, the integrity of the projections is further compromised. We have been driving forward while looking only in our rear-view mirrors.

Lately, the business of maintaining profitability in a law firm has become serious business. Surveys show that law firms are increasingly being managed like other businesses, with unprecedented focus on the metrics that define today's bottom line and forecast tomorrow's financial strength. Managing partners and law office administrators are gaining influence in strategic planning for the firm, and such planning requires the right tools to make sound decisions.

Information or Intelligence?

Law firms collect many different layers of information, much of which cannot be readily meshed in a meaningful way. The first layer, for instance, includes the information contained in calendars, case files, e-mail in-boxes and time logs, which are disconnected and provide individual "reports." Gleaning useful intelligence from such disparate information sources is impossible.

Workload details add another dimension to the gross receipts data. The details show who did what, for how long and under what conditions. Unlike billable time

sorted by activity, our calendars give depth and detail to the work that generated those billings. Calendars also show which attorneys and support staff had extra capacity that may not have been tapped during a certain time period.

When this information is complemented by financial data such as time and expenses, electronic invoices, and client account information, and then combined with appointments and tasks, a clearer, more complex and insightful picture develops showing what the firm *really* has been doing. This is a more intelligent report, as more of the big picture is shown.

All of these layers yield their own metrics, yet most practice management systems are not capable of automatically processing all of the disparate information into a clear synopsis.

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Therefore, for example, managing partners have had to add up the income and projected income, discount by the write-off rate, and then subtract the overhead to get a picture of the firm's financial status. To estimate future changes in those numbers, they review the number of cases with billable work remaining, the number of new cases recently accepted, staff hiring plans, timesheets and collections. They plug those into a spreadsheet covering a period of time and compare the numbers. Some might even make a graph or pie chart to illustrate the data, neither of which provides a clear view of the firm's future.

Going Beyond Case Management

To harness information in your data systems, your firm requires good "handles." For cases and projects, budgets make great handles for financial information. Whether they are imposed by clients or used internally to manage resources, budgets help control costs and limit losses from write-offs. Yet budgets are simply ways to structure information.

For example, if a case budget is $25,000 for fees and $5,000 for expenses, then the actual incurred costs can be monitored to ensure adherence. Once the case is resolved, a budget-versus-actual comparison may show how the total actual costs compared against the budget. The next level of analysis, however, requires examining how this case compares to others like it. Still, this is historical *information.*

The *intelligence* – the meaning behind the numbers – includes other details. What measures were used to control costs that were different from those used in other similar cases? How much more likely is the client to pay the bill without dispute if it comes in at or under budget?

If you know what is going on inside your firm, you can look ahead. What staff resources will the firm need if it takes on a dozen similar matters in the next year? Will that picture change if those new matters come in all at once versus two per month? What if a specific client folds or goes into bankruptcy? If you raise hourly fees by $25 for one type of legal matter, how significant will that be to a client's total costs in one of those matters?

In a firm's quest for profitability, immediate answers are needed, not more questions. Look at your current system – can you quickly get the answers to these and similar questions?

A New Era

Some software vendors are gradually coming to the rescue – they recognize the need for evaluating resource utilization levels or growth forecasts. Now, the latest law practice management systems offer business intelligence tools that rival those used by managers in large corporations.

"Business intelligence" is seeing the significant patterns in the firm's historical data. The upside is that business intelligence helps the firm see more accurately where it has been. The downside is that it is like rowing a boat: the person responsible for navigating is facing backwards, giving only an occasional glance over the shoulder.

"Business analytics," on the other hand, are used to clearly project the changes that will occur based on the changes in the past. Using business analytics is more like driving a car: the driver faces the road ahead, but has several views of the road behind to confirm that everything is going well. Law firm management covers personnel, facilities, client development and security, in addition to technology and collections. Likewise, today's practice management software covers everything associated with the management of each case or project, but now adds the ability to analyze, predict and forecast what it takes to make a firm profitable.

Using the example above, and a full set of matter, budget and actual activity data, one can see and understand how the relative billings of partners, associates and support staff occurred. Firms can then modify future budgets based on actual experience and let their practice management software plot the course, showing relative workload and revenue predictions.

With the fundamental data already contained in matter and practice management software, the revenue and additional resource projections should be simple to run. Because the basis for these real-time projections is the actual, live historical data, rather than someone's best estimate or a previously summarized report, they are considerably more accurate.

Most of all, because these tools now exist inside many firms' practice management software, administrators and managing partners can quickly run the projections in real time. Staff can have their case and document management, conflict checking and CRM tools, while the stewards of the firm can plot its future direction using the very data stored in the tools that the firm lives by: calendars, time slips, invoices, and similar items. This method brings to law firm management the level of certainty and statistical reliability that business managers have long insisted upon.

An integrated system offers law firms many advantages, including a single system for data entry and analysis, a way to forecast future growth based on actual past performance, and information to aid in resource planning, marketing, internal resource allocation, firm/department development and overall internal budgeting. External economic conditions are tough; fortunately, new and affordable technology can assist law firms in planning in order to achieve and maintain profitability.

Experts in Low Speed Impact Litigation

By Richard R. Maguire

Expert testimony in all types of litigation is often controversial. Opinion testimony from engineers in motor vehicle litigation is no exception. Based upon an acknowledgment by trial attorneys that the outcome of a verdict may very well depend upon the use of experts, hotly contested disputes arise frequently relating to proposed expert testimony. This was illustrated in an article that appeared in the *New York Law Journal*, in which a well-regarded plaintiff's counsel from the Bronx described the testimony of a defense biomechanical engineer about a low speed impact (to establish that the plaintiff could not have sustained a serious injury) as testimony which "crossed the Rubicon of legitimate expert testimony into the morass of junk science."[1]

In either the representation of a plaintiff or a defendant, a lawyer must make the decision whether to retain one or more experts. Lawyers must now become well-versed in the laws of physics and other engineering and biomechanical principles to prosecute or defend such cases. The most common scenario for the use of expert testimony involves a low speed impact in which the plaintiff alleges a soft tissue injury as a result of the collision. Lawyers formerly relied almost exclusively upon medical experts in these cases. In addition to orthopedic surgeons, neurologists and radiologists, attorneys are now calling biomechanical engineers as experts as well.

Expert testimony may also be elicited, for example, from a biomechanical consultant with a specialty in injury mechanics and the way in which the human body responds to movement within a vehicle at the time of a crash. A mechanical engineer and vehicle accident reconstructionist can apply scientific engineering principles in the analysis of a motor vehicle impact. These principles include the equations of conservation of energy, conservation of momentum, restitution and change of speed, or "delta v." Based upon evaluation of the specific data pertaining to the facts of a case, the mechanical engineer will rely upon generally accepted methodologies to determine the acceleration force of gravity. This "g force" will be expressed as a value to assess the extent of the impact. Although the forces of gravity in a motor vehicle accident are not directly analogous to everyday experiences, studies have established average forces for activities such as a sneeze or a cough, which may subject the head to as much as three to three-and-one-half "g's"; or jumping off an eight-inch step and landing on both feet, which may subject the head to as much as eight "g's."[2]

The biomechanical engineer will then rely upon the calculations of the forces to determine the effect of those forces upon the human body. Then he or she will assess how that force is transferred to human tissue tolerances and look to related studies describing the way in which the body responds to such forces.

Although it is difficult to define a bright line test for involvement of engineering experts, a suggested rule of thumb is to consider using experts in cases in which the

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speed at impact is 10 miles per hour or less and that demonstrate minimal damage to the vehicles. Before an expert is consulted, an attorney, paralegal or investigator should gather basic information for evaluation.

Many items for investigation already exist at early stages of litigation. Photographs of the vehicles must be requested from the respective no-fault insurance carriers for each vehicle. Repair estimates and related documents will also itemize the location and extent of the impact. Police reports, photographs or statements from witnesses must be evaluated. These items, as well as litigation materials such as medical records, discovery responses and deposition transcripts, will be analyzed by an expert, once retained by counsel.

CPLR 3101(d) – Expert Discovery

Engineering experts will provide an analysis and a detailed engineering report outlining the application of the laws of physics to the facts of the case. Once counsel has such a report, along with other findings from the proposed experts, detailed expert witness responses must be drafted to comply with CPLR 3101(d).

Formulating or responding to expert witness disclosure is also challenging. An expert witness response from either party must reflect full compliance with CPLR 3101(d), describing in sufficient detail theories of what a party will advance at trial along with the basis for each opinion.[3] In *Cocca v. Conway*,[4] the plaintiff was involved in a motor vehicle accident in which he was the driver of a minivan that was struck on the right rear passenger side by the defendant's vehicle. The plaintiff suffered a herniated disc at C6–C7 as established by an objective MRI after the accident. Expert witnesses for the plaintiff at trial included a highly regarded orthopedic spinal surgeon who testified that the herniated disc was caused by the motor vehicle accident. Counsel for the defendant disclosed a mechanical engineer who testified at trial that the plaintiff's vehicle experienced a force of no more than 0.6 g's. A second expert for the defendant identified in the expert response was a biomechanical engineer who relied upon the 0.6-g force calculation and said that it was not possible to sustain enough energy to cause the herniated disc or any of the injuries described by the plaintiff.

The plaintiff moved to preclude during motions *in limine*. The trial court denied the motion and the plaintiff appealed. The Third Department addressed the claim by the plaintiff that the experts for the defendant should not have been permitted to testify, based upon the insufficiency of the expert witness responses from the defendant.[5] An initial expert discovery response from the defendant described general statements outlining the principles of, but without apparent reference to, the actual calculations. However, a supplemental expert witness response included specific computations, impact analysis of the forces upon the plaintiff and the effect of the impact upon the human body.[6] The expert response further revealed that the opinions were based on "studies well known in the industry," among other things.[7] No apparent reference was made in the expert response to any particular studies, authors or publications. The court ruled that the defense expert's responses reflected full compliance with CPLR 3101(d) and the plaintiff's motion to preclude was properly denied by the trial court.[8]

Although a diversity jurisdiction case in U.S. District Court would result in the required complete production of the entire expert witness report, counsel for the party who intends to use an expert at trial in state court is cautioned to provide specific details in the expert witness response to avoid an order of preclusion. When confronted with an expert response that fails to identify the studies and data upon which the expert relied, the adverse party should insist upon more complete disclosure.[9]

An expert witness response from either party must reflect full compliance with CPLR 3101(d), describing in sufficient detail, theories of what a party will advance at trial along with the basis for each opinion.

Insurance Law § 5102 – Serious Injury Threshold Motions

Another important use of expert engineering proof is in a motion for summary judgment on the serious injury threshold. Typical motions for summary judgment include expert affidavits from the plaintiff treating care provider compared to an examining physician retained by the defendant. Cases that involve low speed impact and engineering analysis should include an affidavit from such a biomechanical expert as well.

In support of a motion for summary judgment in *Anderson v. Persell*,[10] a defendant submitted proof not only from a radiologist and an orthopedist but also from a biomechanical engineer. The plaintiff opposed the motion with the submission of an affidavit from a neu-

rologist as well as a biomechanical engineer. The Third Department ruled that the motion for summary judgment was properly denied based upon a question of fact, which included the opinion from the plaintiff's biomechanical expert that the herniated disc was caused by the motor vehicle accident.[11]

However, an affidavit from an expert biomechanical engineer on behalf of the defendant was not rebutted by any similar expert proof from the plaintiff in *Gillick v. Knightes*.[12] The motion for summary judgment on the threshold was granted by the trial court, in which particular emphasis was placed upon the unrebutted affidavit in support from the defense biomechanical engineering expert. In a 4–1 decision, the Third Department concluded that the motion was properly granted and that the plaintiff failed to establish any serious injury. However, the dissenting justice commented that the plaintiff did refute the biomechanical engineer of the defendant, but not with a biomechanical engineering expert. In the dissent, Judge Lahtinen expressed the belief that the orthopedic surgeon's submission of an affidavit on behalf of the plaintiff should have been sufficient to result in the denial of the motion, based upon conflicting expert testimony between a biomechanical engineer and an orthopedic surgeon.[13]

Frye Hearing

Upon receipt of an expert witness response that describes engineering expert testimony, the adverse party is likely to consider a timely request for a *Frye* hearing.[14]

New York follows the *Frye* standard first described in 1923, permitting expert testimony when "the thing from which the deduction is made must be sufficiently established to have gained *general acceptance* in the particular field in which it belongs."[15]

Procedurally, a request for a *Frye* hearing must be made before the testimony is introduced. Although the plaintiff timely challenged the sufficiency of the expert responses in *Cocca v. Conway*,[16] the plaintiff was found to have failed to timely object and did not request a *Frye* hearing, which precluded further review.[17]

An interesting decision was rendered by Richmond County Supreme Court Justice Joseph Maltese in what appears to be the first published decision on the subject of the admissibility of testimony from a biomechanical engineer in a motor vehicle accident case.[18] Judge Maltese described not only the principles of physics but also a history of the court's role as a gatekeeper of evidence.

Deborah Clemente was the driver of a vehicle struck in the rear by a vehicle operated by the defendant. In addition to an orthopedic surgeon and a radiologist, the defense also identified an engineer. The plaintiff verbally moved *in limine* to preclude the testimony of the defense biomechanical engineer. After hearing defense counsel describe the expected testimony and after a judicial review of the report generated by the expert, a *Frye* hearing was conducted to assess whether the opinions and the methods were generally accepted in the engineering community.[19] Although the court found that the witness was qualified as an expert, the methods relied upon by the expert were deemed unreliable by the court. The expert apparently performed no calculations to assess g forces or in any way applied any scientific formulas. Instead, the expert apparently relied only upon photographs of the vehicle and repair estimates.[20] The studies relied upon by the expert which are specifically identified in the decision were described by the court as lacking independence and reliability.[21]

To prevent preclusion of expert testimony, counsel must ensure that a proposed biomechanical engineer relies upon more sufficient scientific studies and has a better method upon which to determine the forces and calculations. The *Clemente* decision is worthwhile and helpful to determine what is likely to be insufficient expert proof.

Clemente does not stand for the proposition that every biomechanical expert should be precluded because such testimony is "junk science."[22] *Clemente* apparently has not been followed by any appellate court

Changing the assumptions and thereby increasing the forces will likely result in a concession that the end result will be much different if the initial assumptions by the expert are incorrect.

since *Clemente* was decided in 1999, although other jurisdictions outside of New York State have referred to or followed *Clemente*.[23]

In a products liability action unrelated to motor vehicle accident testimony, a biomechanical engineer was also precluded under the *Frye* standard in a recent decision from Suffolk County.[24] In *Mulligan*, a biomechanical expert was prepared to testify that there was a relationship between carpal tunnel syndrome and the use of an IBM keyboard. Scientific journals, studies and other submissions by the defendants at a *Frye* hearing convinced the court that there was no general acceptance in the medical or scientific community concerning whether keyboard use caused carpal tunnel syndrome.

The Second Department decided in 2001 that a biomechanical engineer should not have been precluded following the completion of a *Frye* hearing. In *Valentine v. Grossman*,[25] the court decided on appeal whether the trial court judge properly precluded the second of two proposed expert engineers on behalf of the defendant. Although the trial court judge ruled that the first expert would be permitted to testify, the second proposed engineer would not because that proposed testimony was not relevant. The plaintiff in *Valentine* suffered a herniated disc. The first defense expert was permitted to testify that the plaintiff was subjected to a 3.6-g force. The evidence at the *Frye* hearing established that the second biomechanical engineering expert was prepared to testify that he relied upon studies and data that described a similar g force upon live human subjects and a separate study involving dummies or cadavers. The trial court found that the testimony of the second expert was irrelevant because the data upon which the expert relied did not involve the identical g forces. The Second Department ruled that the testimony was clearly relevant and the preclusion was reversible error.[26] Because the expected testimony would have established proof that the accident was not severe enough to have caused the injuries sustained, the jury should have been permitted to hear that testimony and to accord it whatever weight the jury saw fit.[27]

Trial Testimony

Following arguments in motion practice concerning the sufficiency of expert responses and the conclusion of a *Frye* hearing, expert witnesses will often be permitted to take the stand for the plaintiff or the defendant. The direct examination of such a biomechanical engineering expert is a much more involved process than it is for most motor vehicle accident experts. Although medical experts are often questioned concerning their credentials and experience, it is not difficult to lay such a foundation, nor is there any great anticipation as to whether a physician will be entitled to render opinion testimony. In addition to the usual questions about education, training and experience, a foundation during a direct examination of a biomechanical expert must also include detailed explanations concerning the definitions of the terms and how the scientific formulas are applied to the vehicles and the occupants. Based upon the requirement in New York that the testimony from an expert be sufficiently "beyond the ken" of the ordinary juror so that the testimony would assist the trier of fact, a biomechanical engineering expert would certainly be entitled to provide expert testimony.[28] As with any expert who describes scientific or technical information, explanations to the jury should include everyday examples of the laws of physics. Such an illustration would include the way in which billiard balls react to each other when describing the principle of the conservation of momentum. Demonstrations should also include aids such as model vehicles and photographs.

Although the usual cross-examination would include bias and the frequency with which an expert testifies, a proper cross-examination should include a technical analysis to break down the premise upon which that expert testifies. Changing the assumptions and thereby increasing the forces will likely result in a concession that the end result will be much different if the initial assumptions by the expert are incorrect. Insistence upon complete disclosure prior to trial, including the identification of specific studies or data, will also permit the attorney to become familiar with the subject matter and the methods utilized within those studies. Data and studies should be analyzed to assess the appropriateness of the sample or population in the study, as well as any relationship between the volunteers and the organizers of the study.[29] Although an estimate concerning miles per hour observed by lay witnesses is something with which the expert will be familiar from deposition testimony or investigation, conflicting testimony from an opinion concerning these estimates may not be overly persuasive during cross-examination.

Post-trial Motions

Following a trial in which the plaintiff called various medical experts concerning the motor vehicle accident

as the cause of the injuries sustained by the plaintiff and conflicting testimony from the defense experts that the injuries were not caused by the motor vehicle accident, the Third Department in *Cocca*[30] commented upon the sufficiency of the testimony of the biomechanical engineering experts for the defense. Their expert testimony regarding the physical effects of the impact, was found to be a "fair interpretation of the evidence" such that "the jury could have well concluded that injuries alleged to be sustained by plaintiff from this accident were preexisting and that the accident did not make a preexisting asymptomatic condition symptomatic."[31] The court determined that the expert testimony from the defense was a part of the "sufficient credible evidence" to support a verdict by the jury that the negligence of the defendant was not a substantial factor in causing the plaintiff's injuries.[32]

The preclusion of a biomechanical engineering expert in a motor vehicle case concerning the critical issue of causation of the injuries was deemed so relevant, admissible and probative that exclusion of that evidence could not be deemed merely harmless such that the matter was remitted back to supreme court for a new trial.[33]

Conclusion

As with any expert testimony, biomechanical engineering experts must be sufficiently prepared to describe the methods and the basis for their opinions to make their testimony admissible and persuasive. An analysis of the judicial opinions rendered in New York referred to in this article should also be helpful to determine when such an expert should be retained, the appropriateness and completeness of the expert witness responses before trial as well as the presentation of the testimony during trial.

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1. Sheri Sonin & Robert J. Jenis, *Testimony of Biomechanical Engineers in Low-Speed Impact Cases*, N.Y.L.J., Sept. 30, 2002 (outside counsel) (hereinafter Sonin & Jenis).
2. M.E. Allen, et al., *Acceleration Perturbations of Daily Living: A Comparison to Whiplash*, Spine 19, no. 11, at 1285–90 (1994).
3. *Cocca v. Conway*, 283 A.D.2d 787, 725 N.Y.S.2d 125 (3d Dep't), *appeal denied*, 96 N.Y.2d 721, 733 N.Y.S.2d 373 (2001).
4. *Id.*
5. *Id.* at 787.
6. *Id.* at 788.
7. *Id.* at 787–88.
8. *Id.* at 788.
9. *Clemente v. Blumenberg*, 183 Misc. 2d 923, 927, 705 N.Y.S.2d 792 (Sup. Ct., Richmond Co. 1999).
10. 272 A.D.2d 733, 708 N.Y.S.2d 499 (3d Dep't 2000).
11. *Id.* at 735.
12. 279 A.D.2d 752, 719 N.Y.S.2d 335 (3d Dep't 2001).
13. *Id.* at 753–54.
14. *Frye v. United States*, 2893 F. 1013 (D.C. Cir. 1923).
15. *Id.* (emphasis added).
16. 283 A.D.2d 787, 725 N.Y.S.2d 125 (3d Dep't), *leave to appeal denied*, 96 N.Y.2d 721, 733 N.Y.S.2d 373 (2001).
17. *Id.* at 788.
18. *Clemente v. Blumenberg*, 183 Misc. 2d 923, 705 N.Y.S.2d 792 (Sup. Ct., Richmond Co. 1999).
19. *Id.* at 924.
20. *Id.* at 934.
21. *Id.* at 927.
22. *Cocca v. Conway*, 283 A.D.2d 787, 725 N.Y.S.2d 125 (3d Dep't 2001); *Valentine v. Grossman*, 283 A.D.2d 571, 724 N.Y.S.2d 504 (2d Dep't 2001).
23. *See* Sonin & Jenis, *supra* note 1.
24. *Mulligan v. IBM*, N.Y.L.J., Apr. 11, 2000, p. 30, col. 5 (Sup. Ct., Suffolk Co.).
25. 283 A.D.2d 571.
26. *Id.* at 573.
27. *Id.*
28. *People v. Johnston*, 273 A.D.2d 514, 709 N.Y.S.2d 230 (3d Dep't 2000).
29. *Clemente v. Blumenberg*, 183 Misc. 2d 923, 927, 705 N.Y.S.2d 792 (Sup. Ct., Richmond Co. 1999).
30. *Cocca v. Conway*, 283 A.D.2d 787, 725 N.Y.S.2d 125 (3d Dep't 2001).
31. *Id.* at 789.
32. *Id.*
33. *Valentine v. Grossman*, 283 A.D.2d 571, 573, 724 N.Y.S.2d 504 (2d Dep't 2001).

"He only learned to talk two weeks ago, and he's already won three cases."

"I do solemnly swear"

The Evolution of the Attorney's Oath in New York State

By Robert A. Emery

Every person admitted to practice law in New York State must take the "constitutional oath of office":

> I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of *attorney at law*, according to the best of my ability.[1]

This same oath (with the appropriate office inserted) is required of all public officers in New York.[2] Some other states have much more elaborate oaths, which are required specifically of lawyers. Massachusetts, for example, expects new lawyers to swear not to do falsehood, not to promote groundless suits, not to delay justice, but rather to conduct themselves "with all good fidelity as well to the Courts as your clients."[3] At one time, the New York lawyer's oath rivaled that of Massachusetts; but the New York oath has evolved from specific to generic, and from complexity to perhaps vacuous simplicity.

Lawyers' Oaths in Colonial New York

Little is known of oaths imposed on lawyers in early colonial New York; but by the time of the establishment of the provincial Supreme Court in 1691, an attorney had to swear to a formidable battery of them.[4] First, he had to take a series of loyalty oaths bearing this impressive title: "the Oaths appointed by Act of Parliament to be taken instead of the oath of Allegiancy and Supremacy as to the Test."[5] (These were imposed, in both England and its colonies, after the Glorious Revolution of 1688, to secure allegiance to King William and Queen Mary and their successors as the true monarchs of England, to abjure foreign sovereigns, and to assure adherence to the established Anglican Church.)[6]

Then, new lawyers had also to swear "the Oath for the due execution of their places and Trust."[7] This oath, traced at least as far back as 1402,[8] had long been imposed on attorneys in England.[9] By this oath, the attorney swore not to "do falshood," delay justice, suffer "Foraign Siuts unlawfully to hurt any man," or bring "false Suits"; to charge only traditional fees; and generally, to "use your self in the Office of an Attorny, within the Court according to your Learning and discretion."[10]

The combination of oaths, requiring loyalty to the state and fidelity to professional obligations, remained substantially the same throughout the colonial period.[11]

Lawyers' Oaths in Revolutionary and Early National New York

The Revolution brought no change in this colonial pattern of attorney oaths, but now the oath of fidelity to professional standards was combined with emphatic oaths of allegiance to a new sovereign, the State of New York.[12]

The oath of office: In 1778, the New York Legislature required new lawyers, as "ministerial officers of this State," to take a generic "oath for the faithful execution of office."[13] Nine years later, however, the oath was made more specific:

> I do swear, that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability.[14]

This oath was a simplified and shortened version of its colonial predecessor. In this form, it remained unchanged for many years.[15]

The loyalty oaths: In 1778 the state Legislature required all public officers to swear that they would "bear true faith and allegiance to the State of New-York as a free and independent State."[16] In 1781, this oath was also imposed on attorneys,[17] supplemented by a further "test oath" specifically renouncing allegiance to Great Britain.[18]

In 1779 a statute suspended all existing law licenses, and for renewal required an inquisition of freeholders, held before state Supreme Court, to find the attorney in question loyal to the state and neither "neutral" nor a Tory.[19] Only in 1786 were former Loyalist lawyers readmitted to practice, on condition that they "take the oath of abjuration and allegiance, and an oath for the faithful execution" of their office.[20]

In 1788 the Legislature unified the prior decade's developments by enacting a statute combining the loy-

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alty and test oaths into one.[21] In 1796 an oath to support the federal Constitution was added.[22] Failure to take these oaths was punished as a misdemeanor and by forfeiture of office.[23]

The dueling oath: The early 19th century brought one further addition to the attorney's oath obligation, in an attempt to abolish what Governor DeWitt Clinton described as a "besetting evil of the times": dueling.[24] In 1816 lawyers, as well as other public officers, were required to swear that they never had, and never would, participate in a duel.[25]

The Constitution of 1821

In 1822, New York adopted a new constitution, drafted the prior year. This instrument contained the present constitutional oath of office, to be taken by "all officers, executive and judicial." It further provided that "no other oath, declaration, or test shall be required as a qualification for any office or public trust."[26] The provision was drafted primarily to prevent the Legislature from imposing undesirable political or religious tests on public officers (the anti-dueling law was cited as an example).[27]

The End of the Attorney Oaths

Shortly before the 1821 constitutional convention began, the Legislature repealed the old oath of allegiance and abjuration.[28] A year after the constitution went into effect, the state Supreme Court held that attorneys were not "public officers" in the constitutional sense, as to be exempt from the anti-dueling oath,[29] but the Court of Chancery came to exactly the opposite conclusion.[30] The Legislature resolved the conflict by repealing the anti-dueling oath in 1824, on the stated grounds that it had been superseded by the constitution.[31]

The oath of office remained on the books, however, and Chancellor Sandford suggested that it had not been superseded by the constitutional oath.[32] The Legislature appears to have accepted this view, since in 1829 it required new lawyers to take both the old oath of office and the new constitutional oath.[33] While the oath-of-office requirement was not repealed until 1877,[34] as a practical matter it seems that it simply fell out of use. By 1870, the Supreme Court rules for the admission of attorneys required only the constitutional oath.[35] The Legislature finally gave this requirement specific statutory mandate in 1895, by enactment of section 59 of the revised Code of Civil Procedure.[36]

Conclusion

It is indeed constitutional to require applicants to swear the constitutional oath of office in order to gain admission to the bar.[37] It cannot be said, however, that this oath (unlike the specific lawyer oaths of certain other states) imposes any duties or responsibilities on attorneys, as members of a separate profession, other than the minimal obligations imposed on all public officers generally.[38]

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1. N.Y. St. Const. art. XIII, § 1; N.Y. Judiciary Law § 466.
2. N.Y. Public Officers Law § 10.
3. Stephen C. O'Neill, *The History of the Lawyer's Oath*, 5 Mass. Legal Hist. 91 (1999).
4. For colonial lawyers' oaths, see 1 Paul M. Hamlin and Charles E. Baker, Supreme Court of Judicature of the Province of New York 1691–1704 246–57 (1959). I use the words "attorneys" and "lawyers" to include attorneys-at-law, solicitors-in-chancery, and counselors (the equivalent of English barristers), all of whom were eventually subsumed into one unified profession after the Revolution.
5. *Id.* at 246; *see also In re Emmet*, 2 Cai. R. 386, 387 (N.Y. Sup. Ct. 1805).
6. G.M. Trevelyan, The English Revolution 1688–1689 78, 85–86 (1938; 1968 repr.).
7. 1 Hamlin & Baker, Supreme Court of Judicature, *supra* note 4, at 246.
8. Punishment of an attorney found in default, 4 Hen. IV, c. 18 (1402).
9. *In re Emmet*, 2 Cai. R. at 387.
10. 1 Hamlin & Baker, Supreme Court of Judicature, *supra* note 4, at 253–54.
11. *Id.* at 249. In the 1730s, for instance, admission as an attorney before the New York City Mayor's Court required the test and abjuration oaths (claiming membership in the established church, and abjuring foreign sovereigns), as well as the oath of office. *See* Select Cases of the Mayor's Court of New York City 1674–1874 66, 179 (Richard B. Morris ed., 1935); Courts and Law in Early New York 128 n. 77 (Leo Herskhowitz & Milton M. Klein eds., 1978).
12. *See generally* 2 Alden Chester, Courts and Lawyers of New York 652–53 (1925); J. Hampden Dougherty, *Constitutional History of New York State from the Colonial Period to the Present Time*, *in* 2 Legal and Judicial History of New York 39–40 (Alden Chester ed., 1911).
13. L. 1778, c. 7 (1st sess.). Alexander Hamilton took this oath in 1783 when admitted to the bar, 3 Papers of Alexander Hamilton 471–72 (Harold C. Syrett ed., 1962).
14. L. 1787, c. 35 (10th sess.); *see* William Wyche, Treatise on the Practice of the Supreme Court of Judicature of the State of New-York 5 (1794).
15. 1 Revised Laws c. 48, § IV, at 416 (1813).
16. L. 1778, c. 7 (1st sess.).
17. L. 1781, c. 13 (5th sess.). Hamilton also took this oath when admitted to the bar, 3 Papers of Alexander Hamilton, *supra* note 13, at 471.
18. L. 1781, c. 36 (4th sess.). Substantially the same oath was required as late as 1816. *See* Paul M. Hamlin, Legal Education in Colonial New York 130 (1939).
19. L. 1779, c. 12 (3d sess.). L. 1783, c. 14 (6th sess.), extended the time limit for qualification under the 1779 act.
20. L. 1786, c. 29 (9th sess.).
21. L. 1788, c. 28 (11th sess.). In 1805 the Supreme Court held that only the oath of office was required, and that an

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Attorney Professionalism Forum

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.

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

To the Forum:

I am a sole practitioner in a small town. About a year and a half ago a client came to me seeking representation in a property line dispute with his neighbor. My client previously had been using an attorney who had been less than diligent in moving the case forward, and my client had reported that attorney to the local disciplinary committee. His former lawyer had put the case in suit, and a settlement proposal had been sent to the neighbor's attorney. However, nothing further had been done for some time.

Shortly after I got involved, I contacted the neighbor's attorney to discuss the status of the case. Although our conversation was cordial, he didn't seem terribly well informed about the facts, so I offered to meet with him and attempt to work out a resolution of the matter. He indicated that he was interested in doing so, but would have to get back to me with dates. Several weeks elapsed without any communication from him, so I made attempts to contact him to arrange the meeting. After several more weeks went by it appeared to me that he was not interested in settling the case, and I served discovery demands on him.

The time to respond to the discovery came and went and I attempted to contact him to find out when I might receive responses to my demands. Once more those communications went unanswered. Following my obligations under the Uniform Rules, I began to create a record of my good-faith effort to resolve the discovery issues, but after several more weeks of silence I realized that my only recourse would be to contact the court. I did so and a discovery conference was scheduled. On the literal eve of the conference, the attorney called me and asked if I would consider arbitrating the case. Knowing that arbitration would likely lead to a resolution more quickly than waiting for a trial on our busy local docket, I accepted the offer and indicated that I would bring an arbitration agreement with me to the conference the next day.

My opposing counsel did not attend the conference, but instead sent a young associate from his office. The associate confirmed the understanding to arbitrate to the judge, but indicated that she had not been authorized to execute the agreement and that the attorney of record would arrange with me to have the document signed.

Several more weeks elapsed while I attempted to get opposing counsel's signature on the agreement. He fell completely out of contact. I have heard rumors in the local community that he is dealing with a serious personal situation involving a member of his family, but his office will not confirm that and he will not return any telephone calls or letters. I am now at a loss as to how to proceed. It has been several months since we agreed to arbitrate the matter, but the agreement to arbitrate has never been signed, and having taken the matter off the court's calendar I have no ability to move the matter forward in that forum.

My instinct is to bring an application to compel arbitration and for sanctions against my adversary because of his willful delay of this matter; my client has sustained unnecessary expenses because I have had to hound this attorney at every turn. My client also has been prevented from selling his property for nearly three years as a result of this unresolved litigation. Indeed, my client and I both believe that even his defendant neighbor is frustrated at the lack of progress. To make matters worse, my client's prior experience with the disciplinary committee has led him to urge me to report my opposing counsel for the delays.

I don't feel good about doing either of these things – I work in a small community and have always tried to maintain a cordial and civil relationship with the attorneys in the area. I feel particularly bad in light of the rumors I have heard about my opposing counsel's personal difficulties, but this case is important to my client and it needs to move forward. What should I do?

Sincerely,

Conflicted

Dear Conflicted:

Through no fault of your own, you have become involved in a very difficult set of circumstances. Your duty to zealously represent your client has come into conflict with your duty to treat your opposing counsel professionally, and with respect. The challenge now is to find a way to realize your

client's legitimate goals without harming the reputation of a colleague.

Your client already had a negative view of the legal profession by the time you took on the representation. His former attorney was less than professional in representing his interests, in that he appears to have neglected the case. This constituted a violation of the attorney's ethical responsibilities as outlined in DR 6-101(A)(3), which provides "A lawyer shall not: neglect a legal matter entrusted to the lawyer." Since time is of the essence to your client in this property line dispute, former counsel's failure to diligently move the matter forward demonstrated that he had not placed a proper emphasis on safeguarding the client's interests. EC 6-4.

Given your client's previous experience and the status of the case when you took over, you should be commended for your handling of the matter thus far. Upon taking on the case, you zealously moved it forward by first contacting opposing counsel to discuss a potential resolution. When several of your efforts to further discuss the matter went unanswered, you appropriately protected your client's interest by contacting the court. However, you did so only as a last resort, and only after complying with the good faith requirements under New York law. In doing so, you showed the utmost professionalism and courtesy to your adversary. *See generally* DR 7-101(A)(1); Standards of Civility II(A).[1] After getting the attention of opposing counsel by contacting the court, you then agreed to arbitrate the case, which you felt would inure to the benefit of your client because it would likely lead to a faster resolution.

Unfortunately, opposing counsel has failed to cooperate after verbally agreeing to submit the matter to arbitration. In fact, he has fallen completely out of touch, having not returned any of your letters or phone calls. Your adversary has also failed to sign the agreement to arbitrate despite an express agreement to do so. His behavior has been unprofessional, and in violation of several of the Standards of Civility. Specifically, Standard of Civility IV requires lawyers to promptly return telephone calls and answer correspondence, and Standard of Civility VIII indicates that lawyers should adhere to express promises and agreements with opposing counsel. Moreover, in reliance on opposing counsel's good will you removed the matter from the court's docket.

While you have indicated that you have reason to believe that opposing counsel is facing some personal difficulties, which may explain his failure to respond, your client's interests are being undermined. Ironically, because opposing counsel has effectively neglected his own client's matter, your client is once again the victim of a lawyer's neglect. DR 6-101(A)(3). Indeed, you have stated that your client believes that his neighbor also is frustrated by his attorney's lack of diligence. At this point, your client's respect for the legal profession is likely at an all-time low. It is hardly surprising that he wants to report opposing counsel to the disciplinary committee, just as he previously reported his own attorney.

As your client is "at the end of his rope," you must act. You do not want to go to the disciplinary committee, but first and foremost you need to resolve the case. Although there may be no "perfect" solution to this very difficult situation, your instinct is a good one. Bringing on a motion to compel arbitration is probably the only solution that allows you to continue your zealous representation of your client (*see*, DR 7-101(A)(1)), while not unnecessarily damaging the professional reputation of your adversary. In doing so you should also move the court for monetary sanctions, assuming the delays caused by opposing counsel have cost your client money. Such a course will properly safeguard his interests.

At this point your client may not be satisfied with anything less than the filing of a complaint with the disciplinary committee. However, you will have to convince him that his goal should be resolving his case expeditiously, rather than punishing your adversary – and that this goal will be better served by making a motion to the court. You can also stress your intention to ask for sanctions, if they are warranted.

If the client continues to insist on the alternative course of action, you should indicate to him that the decision is a matter of professional judgment and that, in your judgment, filing the motion is better. The ethical rules clearly support your position. DR 7-101(B) provides, "In representation of a client, a lawyer may: (1) Where permissible, exercise professional judgment to waive or fail to assert a right or position of the client." By insisting on your proposed course of action as a matter of professional judgment, you will also avoid inflicting needless harm on your adversary. *See,* EC 7-10. Assuming that you have built up a level of trust with your client, this approach should garner the desired result. However, if your client does not agree with your decision and insists that a disciplinary complaint be filed, you may have to consider withdrawing from the representation. DR 2-110(C)(1)(iii), (v).

If you are successful in convincing your client that the motion to compel arbitration is the better course, serving the papers on your adversary will almost certainly lead to re-establishment of contact. He will also likely prefer signing the arbitration agreement to having to explain his dilatory behavior to a judge. The case can then be arbitrated in a timely manner and brought to a conclusion. It is to be hoped that by acting as suggested above, you will achieve your client's goals without harming another attorney, and your sound representation may even begin to restore your client's faith in the legal profession.

The Forum, by
Steven J. Zaloudek
Law Offices of Steven J. Zaloudek
New York City

1. *See* New York State Standards of Civility, 22 N.Y.C.R.R. pt. 1200, app. A.

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LETTERS TO THE FORUM

We received the following letter in response to the Forum published in the November/December issue of the Journal. *The question is reprinted below.*

To the Forum:

I am a new (*i.e.,* lowly) associate in a large firm. We represent a large corporation that has been sued by a person injured on its property, and I have been assigned to the case. The injured person is represented by a law firm in another state. One of the members of the plaintiff's firm is admitted in New York, and he is the one who signs the pleadings and discovery documents in the matter. However, it is the firm's non-New York lawyers who contact me regarding case status, evaluation, scheduling, etc.

A few days ago I was working late, reviewing the plaintiff's responses to our discovery demands. The plaintiff had included a stack of documents (employment records, medical records, accident reports, etc.) as part of those responses. These documents were held together by rubber bands, and were not bound in any other manner.

The last two pages clearly got into that stack unintentionally, and just as clearly were not supposed to be disclosed. They constituted a letter from the plaintiff himself to his attorneys, and it was addressed to the attorney in the firm who is admitted in New York. The letter detailed the financial hardship the plaintiff was having resulting from his inability to work. He asked the New York attorney for an "additional" loan because he had exhausted the "first" loan made to him by another member of the firm (one who is not admitted in New York).

The contents of the letter shocked me. However, because it was late I could not find a partner to give me some guidance, and I had a client meeting scheduled for the first thing in the morning to discuss the plaintiff's responses. That meeting took place, and although I was not altogether comfortable in doing so, I decided not to tell the client's representative about the letter because I had not talked to one of my superiors first.

After the meeting I got a chance to discuss the matter with a partner in my firm. He told me not to tell the client. He also directed me to write a letter to the plaintiff's counsel in the near future, advising that we would report his conduct to the Ethics Committee unless he agreed to reduce the initial settlement demand that had been made some time before.

I am not comfortable with keeping the information from the client, nor am I comfortable with threatening the plaintiff's attorney in this manner. In addition, don't I have an individual obligation under the disciplinary rules to report unethical conduct to the Ethics Committee once I become aware of it? One other small matter: I am afraid I will be fired if I disobey a partner's directive. Some advice would be most welcome.

Signed,

Frustrated First-Year Associate

Dear Forum:

There can certainly be no quarrel with the opinion given to "Frustrated"; however, I believe a little more help could have been offered to this associate.

I would counsel the person to speak first to their superior. No one likes an "end run," certainly not litigating partners. One approach to the superior could be to point out that it may be personally satisfying to "stick" opposing counsel caught acting out of bounds, but litigation is seldom won in a stunning, surprise strike. The tactic proposed by the partner will have a negative impact on the litigation and redound to the detriment of the client. Even worse, defense counsel is compromising their own position, leaving them open to plaintiff's counsel responding by threatening them in the same way. In a word they are jumping into the same bad position themselves and exposing themselves to a complaint to the disciplinary committee. Indeed defense counsel has more to lose as a New York firm than the out-of-state firm does with its one New York partner. A little bit of imagination will quickly show how messy this could get. I urge you to help this young person before they burn bridges.

B. Dale Goodfriend
Retired IBM Senior Counsel
Rochester, Minnesota

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I have practiced general business law for many years. My practice focuses on business formation and general counseling to entrepreneurs and newly forming entities. For the most part, I represent a single member, partner, or shareholder in the negotiation and creation of various partnership, operating, and shareholder agreements. However, from time to time, I am asked by multiple parties to commit already-negotiated terms to paper, so an agreement can be formalized. Generally speaking, the major "deal" terms of these arrangements are settled before I become involved, and my job is simply to finalize the non-material terms. From time to time, however, the deal is still evolving when I begin drafting. In these situations, I always keep myself out of the negotiations and steadfastly refuse to counsel the parties individually until after the agreement is signed.

Recently, I was asked by two businesswomen to draft a partnership agreement for an import-export business that will have significant off-shore holdings. The material terms of the deal were all settled, and I was impressed by the parties' sophistication, demonstrated by the exhaustiveness of the terms they had outlined. My feeling was that it would be a simple matter to commit the partners' agreement to writing, given how thorough their negotiations had been. And, frankly, I saw the resulting business as a great potential client.

I began drafting the partnership agreement. However, I quickly discovered that, because of the nature and location of the business, there were several terms relating to ownership

CONTINUED ON PAGE 60

Language Tips

By Gertrude Block

Question: In your October 2004 "Language Tips" column, you ask how lawyers feel about being called attorneys. One thing I thought I knew about legal usage is that the two terms are not interchangeable. All law school graduates are lawyers; a person representing a party is an attorney, either "at law" or "in fact," and a lawyer advising a client is a counselor. The applicability of each title depends on fact, not entirely on personal preference.

Answer: The correspondent, Administrative Law Judge Rafael A. Epstein, is correct. The term *attorneys* is included in the term *lawyers*, but not all lawyers are *attorneys*. *The American Heritage Dictionary of the English Language*, (*AHD*) Fourth Edition, 2000, defines *attorney* as "a person legally appointed by another to act as agent in the transaction of business *specifically one qualified and licensed to act for plaintiffs and defendants in legal proceedings*" (emphasis added).

The title *attorney* is derived from Anglo-French *atorné*, "legal representative," from the past participle of the verb *atorner*, "to designate or appoint." *Merriam-Webster Dictionary of Law* (1996). *Webster's Revised Unabridged Dictionary* (1996) contains a note, quoted in part below, further defining the term *attorney*:

> An attorney is either public or private. A private attorney, or an attorney-in-fact, is a person appointed by another, by a letter or power of attorney, to transact any business for him out of court; but in a more extended sense, this class includes any agent employed in any business, or to do any act in pais, for another. A public attorney, or an attorney-at-law, is a practitioner in a court of law, legally qualified to prosecute and defend actions in such court, on the retainer of clients. (Bouvier)
>
> In Great Britain and in some states of the United States, attorneys are distinguished from counselors in that the business of the former is to carry on the practical and formal parts of the suit. In many states of the United States, however, no such distinction exists.

The term *lawyer* is more general, the *AHD* defining it as "one whose profession is to give legal advice and assistance to clients and represent them in court or in other legal matters." Courts have distinguished the two terms, as seen in the following two appellate decisions:

> *Words and Phrases* states that "a lawyer" is one versed in the laws, and when used in such manner, word "lawyer" is synonymous with word "attorney,"and therefore anyone advertising himself as a "lawyer" holds himself out as an "attorney," an "attorney at law," or a "counselor at law." *In re Page*, Mo., 257 S.W.2d 679, 684.
>
> A "lawyer" is one skilled in the law, while an "attorney" is an officer in a court of justice who is employed by a party in a cause to manage it for him. A law student fresh from his school and not a licensed officer of the court may well be termed a lawyer, but not an attorney. *Danforth v. Eagen*, 119 N.W. 1021, 1024.

However, as *Webster's* comment noted, the distinction between *lawyer* and *attorney* is often disregarded in this country. My thanks to Judge Epstein for an informative question and comment.

Question: The words *assume* and *presume* are given similar but not identical meanings in the two dictionaries we have checked. They seem to be used interchangeably, but we are not convinced that they are exact synonyms. I would enjoy reading your thoughts on this matter.

Answer: Justice George D. Marlowe and his son Joshua Marlowe, who is General Counsel for the Royal Bank of Canada, are correct that *assume* and *presume* are not exactly synonymous. The verb *assume* is much more general in meaning than *presume*. *Webster's Third* (1993) devotes more than half a column to the eight meanings of *assume*, and lists as its synonyms, "affect, pretend, simulate, feign, counterfeit, and sham." The only meaning synonymous with *presume* is the sixth: "to take for granted; suppose." The *AHD* (2000) uses the verb *assume* in the phrase "assumed that prices would rise." On the other hand, of the five entries listed for *presume*, the AHD lists first, "to take for granted as being true in the absence of proof to the contrary" and provides the context, "Every man is presumed innocent till he is proved to be guilty." (Blackstone)

The *AHD* also distinguishes between *presume* and similar verbs (*presuppose*, *postulate*, *posit*, and *assume*), listing as the meaning for *to assume*: "to accept something as existing or being true without proof or on inconclusive grounds." Although the *AHD* definition of *assume* hardly differs from its definition of *presume*, the latter is well-established in legal usage. Court opinions, however, sometimes use the two verbs synonymously, as in the following quotations:

> To "presume" is defined by Webster as "to assume" to be true, or entitled to belief without examination or proof. *Ferrari v. Interurban St. Ry. Co.*, 103 N.Y.S. 134, 136, 118 App. Div. 155.
>
> [The] word "presume" [means] to assume beforehand . . . *Com. v. Lavery*, 73 N.E. 884, 188 Mass. 13.
>
> The word "presume" is defined as meaning "to venture, go, or act by an assumption" . . . *Pearce v. State*, 132 S.W. 986, 987, 97 Ark. 5

The verbs are not true synonyms, however, so meticulous users would do well to distinguish them. My thanks to both correspondents for a helpful contribution.

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 forthcoming book is *Legal Writing Advice: Questions and Answers*.

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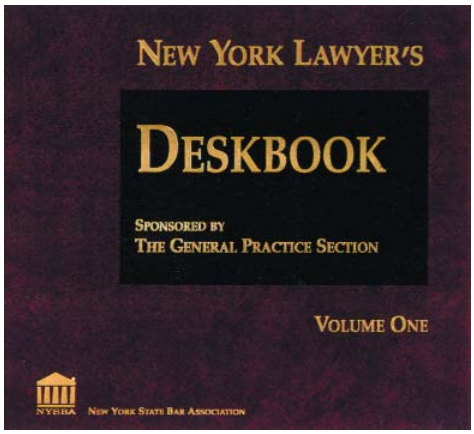

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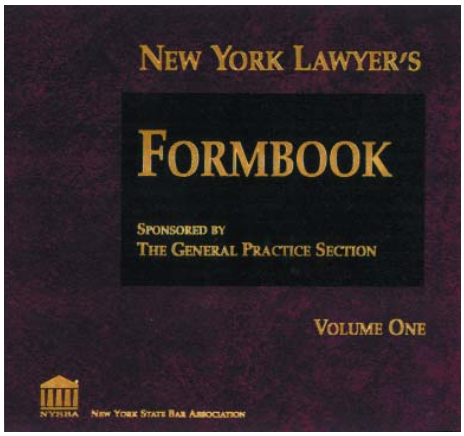

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Attorney Professionalism Forum
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and owner liability that could lead to negative tax consequences for the parties if certain, albeit unlikely, events occurred. I called both parties on a conference call, explained my discovery, and offered several solutions for avoiding the problem. It became clear that Partner A had suggested the terms at issue, but on the conference call, both partners agreed that I should choose language which would avoid the problem. I returned to drafting the agreement.

A short time later, Partner A called me back and explained that she had been thinking about the conference call. She told me she had changed her mind and wanted to stick with her original language. She told me she would explain the switch to Partner B prior to execution of the agreement. When I asked why, she explained that she was considering filing for personal bankruptcy and had been told by her bankruptcy attorney that the language she included would allow her to shield the partnership assets from the bankruptcy proceeding. She insisted that I not share this information with her partner because she "didn't want her worrying about something that may never happen."

I've been wringing my hands for days. I spoke to one of my law partners who not only insisted that I disclose the confidence to Partner B, but is irate that I had taken on the matter in the first place. He tells me that by acting as a "scrivener," as I have so many times in the past, I am violating disciplinary rules and ethics. What should I do? I know if I tell Partner B, my chance to sign up the business as a new client is probably gone. Further, is my partner right? I always thought I was doing these projects "by the book," but have I been wrong?

Sincerely,
Desperate Drafter

I do solemnly swear
Continued from page 49

alien could be admitted to practice without taking the oath of abjuration and allegiance, *In re Emmet*, 2 Cai. R. 386 (N.Y. Sup. Ct. 1805); but in 1806 the Court adopted a rule excluding aliens from bar membership; General Rule, 1 Johns. 528 (1806), 2 Cai. R. 261 note. By L. 1806, c. 3 (29th sess.) the Legislature readopted the oath at issue.

22. L. 1796, c. 56 (19th sess.).
23. *Id.*
24. 3 State of New York, Messages from the Governors 208 (Charles Z. Lincoln ed., 1909).
25. L. 1816, c. 1 (40th sess.). The oath was taken by applicants for the bar, 3 Alden Chester, Courts and Lawyers of New York 652–53 1199–1200 (1925).
26. N.Y. Const. of 1821, art. VI, § 1. This provision was slightly modified in 1874 and 1938; see Robert Allan Carter, New York State Constitution: Sources of Legislative Intent 162 (1988).
27. Reports of the Proceedings and Debates of the Convention of 1821, assembled for the purpose of amending the Constitution of the State of New-York 207–210 (1821).
28. L. 1821, c. 128 (44th sess.).
29. *In the Matter of Oaths to be Taken by Attorneys and Counselors*, 20 Johns. Ch. 492 (N.Y. Sup. Ct. 1823).
30. *In re Wood*, 1 Hopk. Ch. 7 (N.Y. Ch., 1823) (Sandford, C.J.). Chief Judge Savage, writing as a member of the Court of Errors (New York's then highest court), agreed with this conclusion in *Seymour v. Ellison*, 2 Cow. 3, 23–29 (1823).
31. L. 1824, c. 61 (47th sess.).
32. *In re Wood*, 1 Hopk. Ch. at 8.
33. 1 Rev. Stat. of 1829, pt. I, ch. v, art. 3, § 24 (constitutional oath); 2 Rev. Stat., pt. III, ch. iii, art. 3, § 66 (oath of office).
34. L. 1877, c. 417, § 1.
35. Supreme Court Rule Two: "What is required of Applicants" (1870), *reprinted in* William Wait, The Code of Procedure of the State of New York 822–23 (1876).
36. L. 1895, c. 946.
37. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 161 (1971).
38. *Cf. In re Cohen*, 7 N.Y.2d 488, 497, 199 N.Y.S.2d 658 (1960). On the moral implications of more specific lawyers' professional oaths, see Kent Greenawalt, Conflicts of Law and Morality 80–88 (1987).

The Legal Writer
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> importance, can in one fell swoop, shakily clip phrases out of the Constitution, substitute their manufactured voids with Scotch-taped rhetoric, and thus reverse hundreds of cases dimmed only by time and nature, but whose impressions indestructibly already indelibly had been linotyped on the minds of kids and grandkids who vowed and now would or will vow to defend, not only the institution of marriage and motherhood, but to reserve to the states a full budget of legitimate, time-tested mores incident to that doctorate.[6]

To make your sentences sharp and concise, lift the main subject, verb, and object. Then remove imprecise subject-verb combinations. Then revise for subject-verb-object order: who did what to whom. That's the active voice.

Keep subjects near their verbs and verbs near their objects. Northwestern School of Law Professor Helene Shapo, writing with Brooklyn Law School Professors Marilyn R. Walter and Elizabeth Fajans, explained the reason for this rule: "When you separate the subject and the verb with a series of interrupting phrases, you leave the reader in limbo."[7]

Feature the subject, but do not begin every sentence with a subject ("The court noted . . . ."; "The court found . . . ."; "The court held . . . ."). From time to time substitute subjects with subordinate clauses, subordinating independent clauses to assure flow and to rank ideas in order of importance. Then place the main idea in the main clause, after the dependent clause. For variety, begin sentences occasionally with "after," "although," "as," "as if," "as long as," "because," "before," "if," "though," "until," "when," "where," or "while."

Vary sentence structure. The simple sentence has one subject and one verb. It's no simpleton, though: "Simple declaratory sentences are the easiest to read."[8] Some believe that simple sen-

tences dumb down writing. These lost souls should read Hemingway. In his work they'll see the power of the simple sentence.

To make your sentences sharp and concise, lift the main subject, verb, and object. Then remove imprecise subject-verb combinations.

Not every sentence should be simple. A few should be compound, complex, or compound-complex. Compound sentences contain two independent clauses; the clauses are linked with a semicolon, or, they are linked with a coordinating conjunction. Complex sentences contain a main, independent clause and at least one dependent clause linked by a subordinating conjunction, as explained two paragraphs earlier. Compound-complex sentences contain at least two independent clauses, and at least one dependent clause, all somehow linked.

A tip: Coordinate to link independent clauses; subordinate to put the main idea in the main clause and the less important idea in the dependant clause.

Revisit sentences whose primary phrases are not prominent. Infinitive phrases: "File the brief with the clerk to avoid delay." *Becomes:* "Avoid delay by filing the brief with the clerk." Participial phrases: "Judge X picked up a pen, writing the opinion in two hours." *Becomes:* "Judge X wrote the opinion two hours after she picked up a pen."

Paragraphs

Paragraphs divide material into digestible bits, force the writer to develop separate themes, and make the writer's organization apparent.

Maximum length: Two-thirds of a page or 250 words, whichever is less, or one large thought.

Despite what you learned in sixth grade, paragraphs need not have exactly three sentences.

Reserve one-sentence paragraphs for those sentences that must have great emphasis. If you use too many one-sentence paragraphs, you will lose all emphatic effect.

Breaking up paragraphs isn't hard to do. It's visually helpful to the reader. But using too many short paragraphs in rapid order is distracting and angry-sounding. As with sentences, vary paragraph length.

Begin large ideas with a paragraph that starts with a topic sentence that introduces your topic. Every sentence in your large idea — which might take more than one paragraph to finish — must relate to and amplify your topic sentence. One way to have a topic sentence is to take the last sentence of a paragraph and put it at the start of the next paragraph.

Use transitional devices to divide paragraphs and to connect one paragraph to the next when a paragraph becomes lengthy. The best transitional devices join paragraphs seamlessly. Repeat something — a word, a concept — from the last sentence of one paragraph in the first sentence of the next paragraph.

Conclude your large idea with a thesis sentence, which states your thesis. Your thesis sentence should summarize and answer your topic sentence but should not restate it. If the topic sentence is "Defendant's testimony was incredible," the thesis sentence might be: "The court should reject defendant's version of the facts." Just as every sentence in the large idea should relate to and amplify the topic sentence, every sentence in the large idea should lead to the conclusion set out in the thesis sentence.

The Legal Writer will conclude this large idea with some revisionist philosophy. Few legal writers have the time to study every revision technique whenever they write. But they don't need to. They can acquire techniques to edit sentences and paragraphs one at a time until they program their mental computers.

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan. An adjunct professor at New York Law School, he has written *Advanced Judicial Opinion Writing*, a handbook for New York's trial and appellate courts, from which this column is adapted. His e-mail address is Glebovits@aol.com.

1. Charles W. Pierce, *The Legal Profession*, 30 The Torch 5, 8 (1957) (quoting Louis D. Brandeis, who in turn borrowed from Gustave Flaubert)).
2. A series of short, choppy sentences: "See Dick. Dick sees Jane. Dick sees Jane's purse. Dick takes Jane's purse. See Dick run."
3. Cathy Glaser *et al.*, *The Lawyer's Craft: An Introduction to Legal Analysis, Writing, Research, and Advocacy* 184 (2002) (urging writers to use only "one main thought in each sentence").
4. 482 U.S. 578, 637 (1987) (Scalia, J., dissenting).
5. 30 Utah 2d 27, 29–30, 542 P.2d 1028, 1029–30 (1973) (Henriod, J.).
6. In response to *Goalen*, the Utah Legislature allowed inmates to marry. The Supreme Court then denied certiorari for want of jurisdiction. *See* 414 U.S. 1148 (1974) (Stewart, J., dissenting from denial of petition for certiorari).
7. Helene S. Shapo *et al.*, *Writing and Analysis in the Law* 165 (3d ed. 1995).
8. James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 Trial Judges J. 49 (1969) (*reprinted in* Robert A. Leflar, *Quality in Judicial Opinions*, 3 Pace L. Rev. 579, 585 (1983)).

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Wolford, Michael R.

Eighth District
Aversa, John M.
Doyle, Vincent E., III
Edmunds, David L., Jr.
Evans, Sue M.
Flaherty, Michael J.
* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
* Hassett, Paul Michael
McCarthy, Jeremiah J.
Peradotto, Hon. Erin M.
Pfalzgraf, David R.
Saleh, David J.
Seitz, Raymond H.
Shaw, James M.

Ninth District
Bartlett, Mayo G.
Basso, John J.
Berman, Henry S.
Enea, Anthony
Fedorchak, James M.
Geoghegan, John A.
Goldenberg, Ira S.
Ingrassia, John
Johnson, Martin T.
Krooks, Howard S.
Marwell, John S.
Miklitsch, Catherine M.
* Miller, Henry G.
Murray, Conal E.
O'Leary, Diane M.
†* Ostertag, Robert L.
Plotsky, Glen A.
Riley, James K.
Seiden, Hon. Adam
† Standard, Kenneth G.
Sweeny, Hon. John W., Jr.
Walker, Hon. Sam D.
Zeltner, Peter P.

Tenth District
Asarch, Hon. Joel K.
* Bracken, John P.
D'Angelo, Frank G.
Duffy, James P., III
Fishberg, Gerard
Franchina, Emily F.
Fredrich, Dolores
Gross, John H.
Karson, Scott M.
Kossove, Scott E.
Labbe, Magdale L.
Lerose, Douglas J.
†* Levin, A. Thomas
Levy, Peter H.
Liotti, Thomas Francis
Millman, Bruce R.
Monahan, Robert A.
Perlman, Irving
* Pruzansky, Joshua M.
Purcell, A. Craig
Quinlan, Robert F.
* Rice, Thomas O.
Santemma, Jon N.
Shulman, Arthur E.
Smolowitz, Barry M.
Spellman, Thomas J., Jr.
Tell, M. David

Eleventh District
Fedrizzi, Linda F.
Hans, Stephen D.
James, Seymour W., Jr.
Lee, Chanwoo
Nashak, George J., Jr.
Nizin, Leslie S.
Rosenthal, Edward H.
Sperendi, Michael F.
Terranova, Arthur N.

Twelfth District
Bailey, Lawrence R., Jr.
Chavez, Daniel M.
Kessler, Muriel S.
†* Pfeifer, Maxwell S.
Price, Hon. Richard Lee
Schwartz, Roy J.
Summer, Robert S.
Weinberger, Richard

Out-of-State
* Fales, Haliburton, II
Peskoe, Michael P.
Smith, Prof. Beverly McQueary
* Walsh, Lawrence E.

The Legal Writer

Sentences and Paragraphs: A Revisionist Philosophy

By Gerald Lebovits

Revision is true vision. As Justice Brandeis observed, "there is no such thing as good writing. There is only good rewriting."[1] This column explores editing techniques to improve sentences and paragraphs.

Sentences

Short is better than long. Strive for an average length of 15 to 17 words. Too many short sentences in a row sound angry, clipped, and impatient.[2] Varying sentence length is best. Variety of length makes your legal writing less monotonous and more readable.

Maximum sentence length should be 25 words or three lines (whichever is less) for legal writing (20 words in other forms of writing) and one thought only. According to some experts from New York Law School, "a sentence that includes too many thoughts makes it difficult to follow the point . . . ."[3]

Begin your sentence with a short, simple idea. Save the complex, lengthy part for the end. If your one-thought sentence is still too cumbersome or complex, cut, chop, slice, and dice again.

Exception: Of the writers who use lengthy sentences for dramatic effect from time to time, Justice Scalia is a master, and his famous 202-word sentence in *Edwards v. Aguillard*[4] breaks some rules, although it is a linguistic tour de force because his sentence length poetically matches the point he illustrated — that legislators have many reasons to support or oppose legislation — and because he composed a readable sentence in which he controlled sprawl by counting syllables, by featuring his subject through parallelism (the 13 "he may haves"), by breaking up his sentence into units of between eight and 24 words, and by using 11 polysyndetons (the conjunction "or"). (Note: My preceding sentence contains 106 words, not including the citation.) Here's Justice Scalia's sentence:

> He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the majority leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly unmotivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations.

For an opinion that should win more than merely the Longest and Most Complex Sentences Award, see *In re Goalen*.[5] In that 1973 case, the Utah Supreme Court forbade a woman from marrying an inmate. Here are two incomprehensible sentences from that opinion, reprinted verbatim. The first is 158 words. The second is a 161-word fragment. With 161 words, the court should at least have written a full sentence. The two sentences are shocking, not only because of their grammatical errors and length:

> When and if the Supreme Court of the United States says the Fourteenth Amendment guarantees an unrestricted right for two persons of any character or status to marry — the 50 states to take it lying down — simply because citizens or resident aliens or felons, or syphilitics, etc. profess to have unlimited civil rights, and that a felon has the same constitutional right to marry, and perhaps become a behind-bars father without any semblance of parental control, — which also would deny to the states a right to prevent a couple of homosexuals, for example, from marrying, or condone the switch of wives by swingers, this country then will have switched to legalized indiscriminate sex proclivities with a consequent rising incidence of disease, poverty, and indolence, — but worse, to subject unwary citizens to the whim and caprice of the federal establishment, — not the states, — leading to a substitution of a bit of judicial legislation for plain ordinary, horse sense.

The simple sentence has one subject and one verb. But it's no simpleton.

However, this does not mean that the Constitution of the United States, which in no uncertain terms says the states are supreme in this country and superior to the philosophy of federal protagonists who deign to suggest that a coterie of 3 or 5 or even 9 federal persons immune from public intolerance, by use of a pair of scissors and the whorl of a 10 cents ball-point pen, and a false sense of last-minute confessional

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