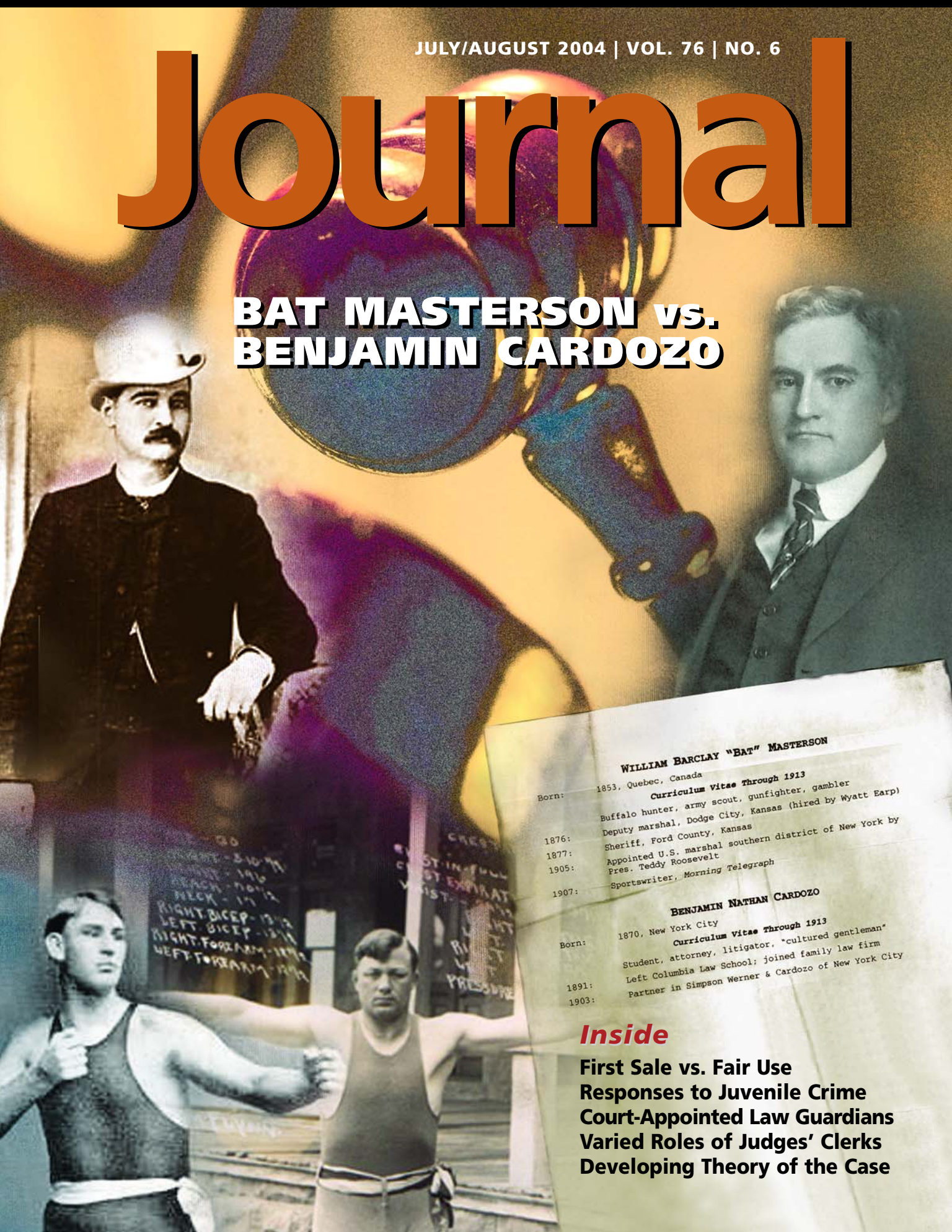
NEW YORK STATE BAR ASSOCIATION

JULY/AUGUST 2004 | VOL. 76 | NO. 6

Journal

BAT MASTERSON vs. BENJAMIN CARDOZO



Inside

BESTSELLERS

FROM THE NYSBA BOOKSTORE

July/August 2004

Business, Corporate, Tax

Limited Liability Companies

This practical guide, written by Michele A. Santucci, enables the practitioner to navigate the Limited Liability Company Law with ease and confidence. You will benefit from numerous forms, practice tips and appendixes.
(PN: 41243/**Member $55**/List $75)

Family Law

Matrimonial Law

Written by Willard DaSilva, a leading matrimonial law practitioner, *Matrimonial Law* provides a step-by-step overview for the practitioner handling a basic matrimonial case. While the substantive law governing matrimonial actions is well covered, the emphasis is on the practical—the frequently encountered aspects of representing clients. (PN: 41213/**Member $65**/List $75)

General Practice

Attorney Escrow Accounts—Rules, Regulations and Related Topics

This book comprehensively covers the most common situations where attorneys handle client funds and clearly discusses the legal and ethics issues encountered in handling clients' funds.
(PN: 4026/**Member $38**/List $50)

General Practice Forms

Available on CD for your convenience. This new edition features over 600 forms used by experienced practitioners in their daily practice including numerous government agency forms in .pdf format.
(PN: 61503/**Member $180**/List $205)

School Law, 29th Ed.

School Law has been widely recognized for many years as an excellent school law reference for board members, administrators and attorneys.
(PN: 42272/**Member $65**/List $80)

Health Law

Legal Manual for New York Physicians

This landmark text is a must-have for attorneys representing anyone involved with the medical profession and practitioners whose clients have questions relating to the medical field. The information in this manual is primarily presented in an easy-to-use Q&A format.
(PN: 4132/**Member $80**/List $95)

Real Estate

Mortgages

The authors of this monograph provide a clause-by-clause analysis of the standard mortgage, introduce the recommended additional clauses most worthy of inclusion in a mortgage rider and provide a review of basic mortgage terms.
(PN: 41383/**Member $50**/List $60)

Real Estate Titles, 3rd Ed.

The third edition is an essential guide to the many complex subjects surrounding real estate titles. New practitioners will benefit from the comprehensive coverage by leading practitioners throughout New York State, and real estate experts will be able to turn to this book whenever a novel question arises.
(PN: 42101/**Member $130**/List $160)

Trusts and Estates/Elder Law

Estate Planning and Will Drafting in New York

Provides an overview of the complex rules and considerations involved in the various aspects of estate planning in New York State. Get practical advice from experts in the field to be able to better advise your clients, and have access to sample wills, forms and checklists used by the authors in their daily practice. Includes 2001 Supplement.
(Book PN: 4095/**Member $130**/List $160)
Estate Planning & Will Drafting Forms on CD in WordPerfect and Microsoft Word: Access commonly used forms and wills used by leading practitioners in their daily practice.
(CD PN: 60951/**Member $75**/List $90)

NEW!

General Practice

New York Lawyer's Deskbook, 2nd Ed.

Updated with 2003 Supplement

WINNER OF THE ABA'S CONSTABAR AWARD. The second edition consists of 25 chapters, each covering a different area of practice. Incorporating the 2003 Supplement, it updates the original text, features an expanded chapter on personal injury, and more!
(PN: 4150/**Member $200**/List $250)

New York Lawyer's Formbook, 2nd Ed.

Updated with 2003 Supplement

The *Formbook* is a companion volume to the *NY Lawyer's Deskbook* and includes 21 sections, each covering a different area of practice. This revised edition incorporates the 2003 Supplement. (PN: 4155/**Member $200**/List $250)

Real Estate

Commercial Leasing

Edited by Joshua Stein and sponsored by the Real Property Law Section of the NYSBA, this loose-leaf book, although it covers issues specific to New York, could apply to nearly every state. Written by leading experts, this comprehensive book will provide the link between practical issues and what attorneys experience in their daily practice.
(PN: 4041/**Member $130**/List $165)

Real Estate Practice Forms 2003 Edition

This loose-leaf and CD-ROM compilation contains over 175 forms used by experienced real estate practitioners in their daily practice. The 2003 edition adds valuable forms to the collection, including several government agency forms in .pdf format. An advanced installation program allows the forms to be used in Adobe Acrobat® Reader™, Microsoft Word® or Wordperfect®. In addition, the 2003 edition allows the user to link directly from the table of contents to the individual forms.
(PN: 61813/**Member $150**/List $175)

Coming Soon:

Preparing For and Trying the Civil Lawsuit, Second Edition

This loose-leaf volume updates and expands the extremely well-received first edition, by adding five new chapters. More than 20 of New York's leading trial practitioners, judges and professors reveal the techniques and tactics they have found most effective when trying a civil lawsuit. This book's 25 chapters cover all aspects of a civil lawsuit, from pretrial preparation to appeals.

Expand your professional knowledge

NEW YORK STATE BAR ASSOCIATION

1.800.582.2452 www.nysba.org/pubs

Mention Code: CL2201

NYSBA

Editorial Offices
One Elk Street
Albany, NY 12207
(518) 463-3200
FAX (518) 463-8844

Advertising Representative
Network Publications
Sheri Fuller
Executive Plaza 1, Suite 900
11350 McCormick Road
Hunt Valley, MD 21031
(410) 584-1960
e-mail: sfuller@networkpub.com

ON THE WORLD WIDE WEB:
http://www.nysba.org

Contents

Departments

Special Pull-out Section: Annual Report to the Membership
The Report features the Association's efforts to expand access to justice, improve the legal process and protect the rule of law.

On The Cover

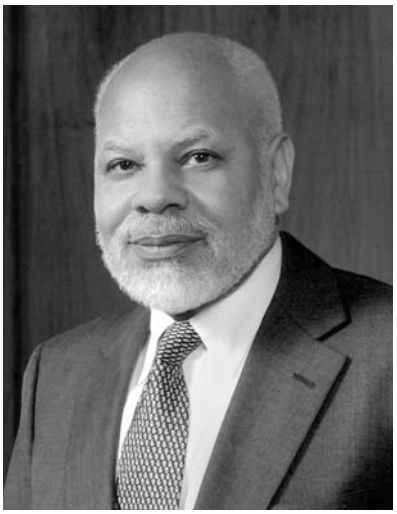
The cover for this issue shows the key players in a little-known slice of legal history described in the article that begins on page 10. On the left is Bat Masterson, wearing his trademark derby hat. He is looking toward Benjamin Cardozo, shown at the time of his candidacy for New York State Supreme Court justice in 1913. This unlikely pair met in a courtroom on opposite sides of a libel suit that was precipitated by a boxing match between the two men in the corner: Carl E. Morris on the left, and "Fireman" Jim Flynn on the right.

Photo credits: Benjamin Cardozo, courtesy of Louis H. Pollak, U.S. District Judge, Eastern District of Pennsylvania; Bat Masterson, courtesy of the Ford County Historical Society, Dodge City, Kansas; Carl Morris, courtesy of The Cyber Boxing Zone. We would like to thank Raven Shaffer, Antiquities of the Prize Ring, for help in obtaining the image of Jim Flynn.

Cover illustration by Erin Corcoran.

The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

President's Message



KENNETH G. STANDARD

Balancing Freedom And Security

As I write this, it is the Fourth of July and I am concerned. Celebration of the freedoms of this country comes this year with a question mark. In these times when the wounds of September 11 remain fresh and the fight against terrorism of necessity persists, each of us should think long and hard about our freedoms – our individual rights and responsibilities and carefully crafted checks and balances of government powers – and how these principles can be perpetuated while maintaining national security.

Tough times demand tough actions, we recognize, but it is in a climate such as this that our civil liberties and our system of justice can be at greatest risk. Where should the line be drawn and who has the power to draw it?

Giving impetus to these principles of freedom is the rule of law and giving voice to the law is an important role of the legal profession. Perilous times, when many are frightened, are when the lawyer's advocacy is needed – standing up for civil liberties, civil rights and due process in society and sounding the alarm of the danger of sacrificing rights "just this once." Who are better trained and suited to speaking out than lawyers? If not lawyers, then who? We have an opportunity to remind, to educate and to advocate what we have to lose and how easy it is for our freedoms to slip away.

This concern is not new, but has been expressed each time after this country has seen conflict. The banner in the Great Hall of the Bar Center in Albany sets out George Washington's words urging Edmund Randolph to accept the nomination of United States Attorney General – "The due administration of justice is the firmest pillar of good government." We can take lessons from the suspension of habeas corpus in the Civil War and the treatment of Americans of German and Japanese descent in the world wars. We can open the pages of our Association's Annual Meeting proceedings more than half a century ago and, in so doing, join the 1,100 members who heard Judge Charles W. Froessel of the Court of Appeals state:

> It is the task of the lawyer and the judge to insure that in thus preparing ourselves to meet exterior aggression and interior menace we do not in the meantime, as Webster put it in his matchless eulogy on Washington, demolish the "well-proportioned columns of constitutional liberty." The courts will, I am confident, do their very best, but they cannot perform the task alone. In every fight for freedom the lawyer has been in the front line.

How can we serve on this "front line"?

We, as an Association and as individual members of the bar, must speak up for the rule of law, for the presumption of innocence and the right of the accused to counsel and a prompt and fair public trial. We must continue to analyze legislation, executive orders and other measures, as the Association did in a 2002 report on the presidential order on military tribunals. This report, prepared by our Coordinating Committee on Federal Anti-Terrorism Measures and approved by our House of Delegates, contended that military tribunals should be used only in narrowly defined circumstances and with appropriate due process. In 2003, our Task Force to Review Terrorism Legislation analyzed State legislation that would create new terrorist crimes and broaden law enforcement authority for investigations and prosecutions of suspected terrorists, recognizing the purpose of providing law enforcement officials with appropriate and effective tools to combat terrorism, but also citing the profession's responsibility to ensure that individual rights are preserved.

The U.S. Supreme Court concluded its term in June calling for access to the courts and counsel, with its decisions involving a U.S. citizen captured in Afghanistan in one case and non-citizen detainees at Guantánamo in another. Beyond giving emphasis to maintaining due process protections, these decisions also are serving to help clear the air and open dialogue. The freedoms of this country include candid discourse, analysis, criticism and disagreement about issues of the day, legislative proposals and other matters in the news. Yet, we have witnessed concern that expressing reservations about the Patriot Act, for example, could be construed as unpatriotic; likewise raising an issue about the proposed Civil Liberties Restoration Act or other such legislation should not be deemed as opposition to the concept of civil liberties.

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

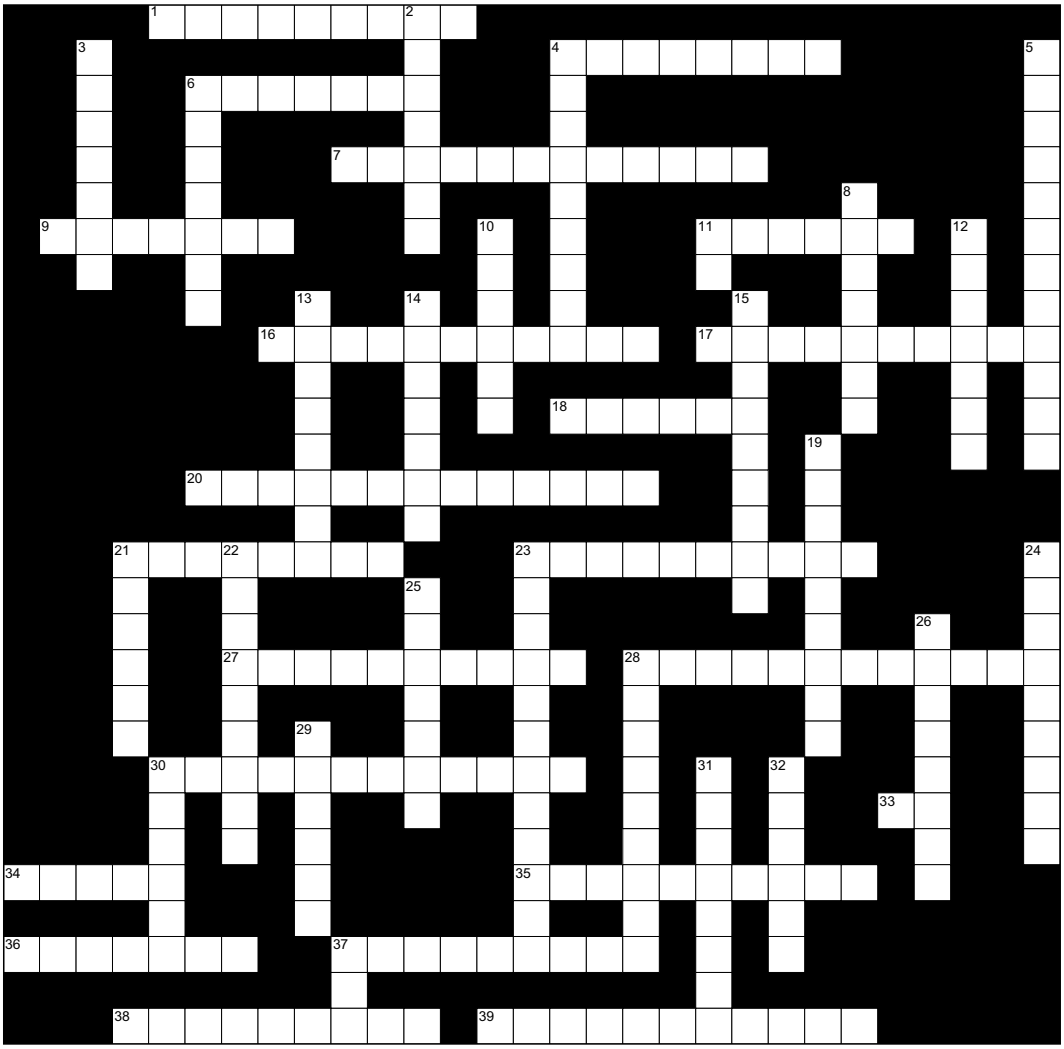
Our work, as lawyers, is not limited to measures specific to terrorism and homeland security. We also must maintain our ongoing efforts to make counsel accessible to the indigent, to the working poor, to the middle class, to the small-business owner – indeed, to all. We must educate younger generations of our profession that liberty and law cannot be taken for granted. We need to teach them to be sentinels for the values and principles of our legal process and for equality of rights and opportunity. Likewise, our role is to increase public understanding, through our visits in the classroom, talks in the community, and discussions with the media. I made many of these points when I addressed the New York Press Club annual dinner in late June in New York City.

Speaking at the "I Am an American Day" in 1944, Learned Hand described what is at risk in sacrificing freedoms and in failing to speak out: "Liberty lies in the hearts of men and women," he said. "When it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it."

What are we to do? In essence, we need to continue to epitomize the highest values of the profession in standing up for justice. I welcome hearing from you about your experience in these efforts and your thoughts on our further actions in these trying times.

CROSSWORD PUZZLE

The puzzles are prepared by J. David Eldridge, a partner at Pachman, Pachman & Eldridge, P.C., in Commack, NY. A graduate of Hofstra University, he received his J.D. from Touro Law School. (The answers to this puzzle are on page 59.)



The Ayes Have It, by J. David Eldridge

Across

1 *Lat.* among other things
4 Freedom or exemption from penalty, burden or duty
6 Against the law
7 The individual who forms a legal entity for business purposes
9 Access, entrance
11 A person under 18 years old
16 Lack of ability, knowledge, legal qualification or fitness
17 The grand jury's written accusation of a crime
18 To obstruct, hinder
20 Imprisonment, confinement
21 Needy, poor
23 Not essential or necessary
27 A court order prohibiting or requiring a specified act
28 Contrary to law
30 What evidence is when it cannot be admitted under established rules of law
33 "That is"
34 *Lat.* below, underneath
35 Want of legal, physical or intellectual ability
36 Contrary to standards of society; obscene
37 In evidence, a conclusion sought to be established as a consequence of other facts
38 Incapable of being placed out or hired
39 Evidence tending to establish guilt

Down

2 Prohibited; unlawful
3 Seize and take into custody of law or court
4 Absence of knowledge
5 Mutually contradictory, contrary to one another
6 A third-party action
8 Possible signs
10 A state of mind seeking a given result through certain action
11 Used to indicate the previous reference
12 To accuse; charge
13 Imperfect, partial, unfinished
14 When the court clerk makes list of jurors selected for trial
15 Written agreement issuing bonds and/or debentures
19 Disinterested, favors neither party
21 To disregard willfully
22 One who leaves a country to permanently settle in another
23 Disproved or rebutted evidence
24 To hold harmless, secure against loss or damage
25 To surround, fence or hem in on all sides
26 Near at hand
28 Dying without a will
29 To obtain delay for adjustment
30 To weaken, make worse, lessen in power
31 In chambers, in private
32 To arouse, urge, provoke
37 Invitation for Bids

Enhance your online legal research

NYSBA reference and form books online

Conveniently access NYSBA's comprehensive collection of reference books covering a full range of topics of interest to you from appellate and civil practice to entertainment, labor and zoning law.

Realize a tremendous savings by purchasing a subscription, through Loislaw, an Aspen Publishing Company, for **unlimited online access to more than 45 NYSBA titles**. Research **quicker, easier and more conveniently** because your subscription includes **– at no extra charge – links to the cases and statutes cited**.

NYSBA's top legal publications, written by leading attorneys and judges, include detailed indices, tables of authorities, practice guides, checklists and sample forms.

Get the information edge with NYSBA's online reference books – **Accurate. Convenient. Time and money saving**.

Special discounts are available for NYSBA members.

PREMIER MEMBER NYSBA BENEFIT

Subscribe Today!

Click **www.nysba.org/pubsonline**

Or, call **800-364-2512** to order.

Loislaw
An Aspen Publishers Company

Historical Perspective

Benjamin Cardozo Meets Gunslinger Bat Masterson

BY WILLIAM H. MANZ

Encounters between persons of widely different backgrounds are hardly unusual in the courtroom, but only occasionally, as in the William Jennings Bryan-Clarence Darrow confrontation at the *Scopes* "Monkey Trial," do they involve two famous figures in American history. A lesser-known and particularly incongruous meeting of this type, took place in a Manhattan courtroom in May 1913, involving future Supreme Court Justice Benjamin N. Cardozo and Bat Masterson, a legendary figure of the Old West.

Perhaps because the case, *Masterson v. Commercial Advertiser Association*,[1] a libel suit by Masterson against a New York City newspaper, lacks any legal significance, the meeting of the two men has gone unmentioned in major works on Cardozo.[2] A more unlikely meeting is hard to imagine, however.

William Barclay "Bat" Masterson was a former buffalo hunter, lawman, gunfighter, and gambler whose friends had included Wyatt Earp, Wild Bill Hickok, Buffalo Bill Cody, and a young rancher from New York named Theodore Roosevelt. In 1874, at age 20, Masterson had fought Indians at the Battle of Adobe Walls and then took part in an army campaign against tribes in the Texas Panhandle and Indian Territory. Later, he served as sheriff of Ford County, Kansas (1878–1879) and as marshal of Trinidad, Colorado (1882–1883). In the late 1880s, he briefly owned a Denver gambling house and then managed a large gambling establishment in Creede, a Colorado mining boomtown.

By the 1880s, Masterson's interests had also turned to boxing, and he attended the most notable matches of the 1880s and 1890s, including the epic 75-round bare-knuckle bout between Jake Kilrain and John L. Sullivan, and James J. "Gentleman Jim" Corbett's victory over Sullivan. He had also been active in boxing circles as a founding member of the Denver, Colorado, Athletic Club, and, after being forced out of that organization by fight promoter Otto Floto, he had founded the rival Olympic Athletic Club. In 1903, after taking up residence in New York City, Masterson was hired by the *Morning Telegraph* as a sports editor and columnist.[3]

In contrast, the scholarly Cardozo had a sheltered life as a youth, and went straight into law practice after attending college and law school at Columbia University. Described by contemporaries as a "cultured gentleman,"[4] he was not socially active, preferring to spend his evenings at home working on his memoranda and briefs. Within the courtroom milieu, however, Cardozo was every bit as formidable as Masterson had been in the wide-open frontier towns of the West. As Professor Andrew Kaufman has noted, he was "not the saintly man . . . associated with the elder Cardozo,"[5] and he "[d]id not shrink from personal attack on the opposition or its counsel if needed."[6] Just short of his 44th birthday, he was an accomplished and experienced attorney, known for his ability to cross-examine witnesses.

Origins of the Case

The Cardozo-Masterson confrontation had its origins in a heavily promoted Madison Square Garden prize fight matching the latest "white hope," "Oklahoma Giant" Carl Morris, against "Pueblo Fireman" Jim Flynn. The contest between the largely unknown Morris and Flynn, known as a competent boxer, had attracted significant interest in New York City sporting circles. However, when Masterson learned that both fighters were being financed by Morris's manager, Frank B. Ufer, he questioned the integrity of the bout, charging that Flynn was being paid to "lie down" for Morris. In his

WILLIAM H. MANZ is senior research librarian at St. John's University School of Law. A graduate of Holy Cross College, he received a master's degree in history from Northwestern University and a J.D. from St. John's University School of Law.

He wishes to thank Ralph Monaco, formerly director of the New York County Lawyers' Association Library and now director of the New York Law Institute Library, for making available the association's copy of the record and briefs of the *Masterson* case.

September 10, 1911 column, he remarked, "There have been a good many cooked-up affairs pulled off in the prizering, as everybody knows, but hardly one quite so as daring or that smells so much like a polecat as the one between Flynn and Morris."[7] Two days later he wrote, "[T]he Flynn-Morris contest is a frame-up and should not by any means be permitted to go on."[8] Finally, on September 14, Masterson said, "As I've already stated in this column, 'the whole thing has a peculiar look.'"[9]

Ufer's answer to Masterson appeared on the day of the fight, September 15, 1911, included in an eight-paragraph front-page article in the *New York Globe and Commercial Advertiser*, entitled "Little Chance to Oust Garden Club." The article dealt almost entirely with the questionable validity of a lease on Madison Square Garden, but the final paragraph quoted Ufer's remark that Masterson had "made his reputation by shooting drunken Mexicans and Indians in the back."[10] Masterson was apparently most displeased with the publication of Ufer's remark. He promptly engaged the services of Benjamin Patterson, an experienced general practitioner with offices at 302 Broadway. On September 22, 1911, a summons and complaint were served on the Commercial Advertiser Association, the publishers of the *Globe and Commercial Advertiser*, charging that the article had libeled Masterson, and demanding $25,000 in damages.[11]

The lawsuit may have surprised the publishers as Masterson would have seemed an unlikely libel plaintiff. Heavily fictionalized versions of Masterson's career had appeared for years, greatly inflating the number of men he had killed, and sometimes containing such lurid falsehoods as the decapitation of two Mexicans.[12] When his old friend President Theodore Roosevelt appointed Masterson a deputy marshal for New York City in 1905, wildly exaggerated tales of his exploits, characterized by one writer as "insufferable rot,"[13] again appeared in the press. These accounts were generally positive, however, noting that Masterson had only killed men in self-defense or in the course of his official duties, and that his victims were lawbreakers. For years, Masterson had never really objected to such stories. In an 1890 letter written to Frank D. Baldwin, his former army commander, he once described coverage of his career as done with "recklessness" and an "utter disregard for the truth," but concluded that the writers could do him no harm.[14]

Simpson and Cardozo's practice usually consisted of contractual matters and commercial debt liquidation, but it did have some experience with libel cases.

Masterson had previously taken offense, however, when disparaged in the press by his enemies. In 1879, he wrote to the *Dodge City Times*, angrily denying a report by Bob Fry, editor of the *Speareville News*, that Masterson had threatened to lick "any s – of a b – that voted or worked against me at the last election," and stating that the "words s – of a b –" as applied to Ford County, Kansas, residents should be confined to the offending editor.[15] Masterson again responded in print in 1883, after the *Dodge City Times* editor, Nick Klaine, accused him of wrongfully using force to seize a prisoner from an Iowa peace officer. In a letter to the *Ford County Globe*, Masterson denied the charges, and claimed that the article "was evidently written with a view of doing me a malicious and willful injury."[16]

In the case of the *Globe and Advertiser* article, Masterson's reaction may have been influenced by the considerable abuse he had taken for his charges about the Morris-Flynn fight. In a post-fight column, he reported receiving "a number of anonymous letters, in which I've been called the vilest names imaginable. These letters, without a single exception, contained the foulest abuse that a degenerate mind could conceive."[17] Unlike the offensive mail, the newspaper article had an identifiable source with the ability to pay for its transgression.

To handle its defense, the paper's publishers hired the firm of Simpson & Cardozo.[18] The firm's practice usually consisted of contractual matters and commercial debt liquidation,[19] but it did have some experience with libel cases. In 1892, it had won a libel action against the *Brooklyn Daily Eagle* for insurance agent Richard D. Alliger after an erroneous report of his arrest for forgery.[20] In 1911, it had successfully defended the Commercial Advertiser Association against a suit brought by one Oscar B. Bergstrom after the association's paper reported his default on bail and subsequent incarceration in the Tombs prison. The Masterson suit was also not the first time that Cardozo had handled a case involving a public figure. In 1907, he successfully argued the appeal of Lee Shubert after the theater owner had lost a $25,000 verdict in a breach of contract case.[21] Cardozo then won a second trial, and prevailed again at the appellate level.[22] He also represented producer Florenz Ziegfeld in an unsuccessful action against an actress who had allegedly violated an injunction against appearing on stage except under Ziegfeld's management.[23]

In the *Masterson* case, Cardozo's defense strategy rested on the grounds that Ufer's statement was essentially accurate, that it was not meant to be taken seriously, and that it could not have caused Masterson's reputation any harm. In his answer, Cardozo stated: "[T]he plaintiff is and has been for a great many years well known throughout the United States as a promiscuous carrier and user of fire arms and as having shot a number of men, including Indians, some of whom died as a result of the said shooting, and that he did on divers occasions become involved in conflicts in which he shot, wounded and killed a number of men, including Indians, and that his reputation at the time of the publication was due to such alleged exploits."[24] He also maintained that Masterson was "for a great many years known as a sporting man"[25] and claimed that Ufer's remark was "composed and published as the remark of one sporting man concerning another sporting man, and [was understood] to be humorous and jocular."[26]

The trial began on Tuesday, May 20, 1913, in Trial Term, Part XI, of the New York County Supreme Court with Justice John Ford presiding. A former state senator, Ford had been elected a Supreme Court justice in 1906. Originally from Knowlesville, in upstate Orleans County, he was the son of Irish immigrants who won a scholarship to Cornell where he was captain of the football and crew teams. After graduating *magna cum laude* and Phi Beta Kappa in 1890, he began his legal career by working in a law office, and passed the bar in 1892.

Masterson's Testimony

The trial's star witness was, naturally, Bat Masterson. Described in a 1905 news article as "middle aged and middle sized,"[27] the graying 59-year-old man in the witness chair bore no resemblance to the popular image of a western hero or to the dapper figure portrayed by Gene Barry in the 1958–1961 *Bat Masterson* television program. His unremarkable appearance notwithstanding, the jurors listened closely as he testified under oath about his frontier adventures.[28] Justice Ford was also obviously quite interested, as he interrupted Masterson's testimony several times to ask for further details about his experiences.

When questioned by Benjamin Patterson, Masterson denied ever carrying a gun while employed by the *Morning Telegraph*, having been charged, indicted or convicted of any crime, shooting any Mexicans at all, having any personal encounter with an Indian, and shooting any drunken Indians or anyone else in the back.

In his cross-examination, Cardozo sought to establish that Masterson had indeed killed several men, including Indians. His initial question to Masterson was: "How many men have you shot and killed in your life?"[29] Masterson denied killing 28 men as repeatedly reported by the press. Instead, he ventured that the number was probably three, a soldier in Texas who had shot him first, a Texas cowboy in Dodge City who had just fatally wounded his brother, Sheriff Ed Masterson, and another Texan, a wanted murderer, in 1879. He added that he had also shot a man in Dodge City in 1881, but didn't know if he'd killed him or not. As for Indians, he professed not to know whether he'd ever shot any, noting that in battle "I certainly did try to shoot them. . . . It wasn't my fault that I didn't hit them. . . . I haven't any idea of and can't give you any notion as to whether any of them fell under my fire."[30]

Masterson also denied several widely circulated stories about his western career, including having been arrested in Dodge City and bringing armed men there to shoot inhabitants and intimidate residents. In response to Cardozo's question about altercations in Denver, he denied having a fistfight with Louis Spencer (a blackface comedian angered by Masterson's affair with his wife), or attacking fight promoter Reddy Gallagher with a gun. He did admit having a fistfight with rival boxing promoter Otto Floto, but denied striking him with a gun. He also confirmed that, while acting as a deputy sheriff, he had shot the gun from the hand of a policeman at a Denver polling place.

Cardozo then brought up an incident in 1902 when Masterson and several other westerners were arrested in Manhattan on suspicion of plotting to cheat a visiting Mormon elder, George A. Snow, in a rigged faro game.[31] These charges had been dropped almost immediately, but Masterson was fined $10 for carrying a pistol. Masterson insisted that he barely knew the others who had been arrested and that he had not been involved in any crooked scheme. He stressed that he was never "charged" with being involved in the crooked faro game, noting that "there was never any complaint filed against me."[32] He also asserted that although he was fined for carrying the pistol, he was not arrested for that offense, and had not been "convicted" of anything. He also denied involvement in a fistfight at the Waldorf-Astoria, but admitted a "little mix-up," with words exchanged, but no blows struck.[33]

Cardozo's questions next turned to the large number of articles about Masterson's career in the West. The witness denied knowledge of the specific content of such stories, saying, "There was so much of that stuff that I can't recall just what it was,"[34] and testified that he "was not at all interested in the accounts which the papers published."[35] Masterson indicated that he had never considered such stories as attacks on him, and that "[t]he mere fact that [he] was charged with killing a man standing by itself [he] never considered an attack upon

CONTINUED ON PAGE 14

CONTINUED FROM PAGE 12

[his] reputation."[36] He also stated, "[S]pace writers have to live, and if they could make a living off of me, well and good, let them go ahead."[37] Masterson differentiated the account in the *Globe* from other newspaper stories, characterizing it as "malicious," and later as "obviously malicious." Cardozo objected to both statements and successfully moved to have them stricken. Masterson stressed that what he most objected to was "the fact that [he] was charged with shooting drunken Indians and Mexicans in the back, when nothing of the kind ever happened,"[38] and that he resented the charge of shooting Indians "because [he] was charged with shooting drunken Indians in the back."[39]

On redirect examination by Patterson, Masterson described in detail various events he had testified about earlier, including his arrest in New York City, the three men he'd killed, and his participation at the Battle of Adobe Walls. As for the offending *Globe and Advertiser* article, he stated, "I have many friends among the public men of the United States. It would hurt my feelings to have them think I had shot drunken Mexicans and Indians in the back."[40] In his recross, Cardozo attempted to establish that at least some of the men killed by Masterson had been drunk. However, all the witness would admit to having said earlier was that the men who had shot his brother had been drinking, but were not drunk, and that the soldier who had shot him "probably had been drinking."[41] When asked about his prior use of the word "intoxicated," Masterson admitted that it was "his conclusion" that the men were intoxicated.

Other Witnesses

Masterson's two witnesses, *Morning Telegraph* publisher William E. Lewis and John Coulter, the paper's financial editor, did their best to bolster their colleague's case. When cross-examined by Cardozo, Lewis denied that Masterson was a habitual associate of gamblers or "sporting men." When asked by Cardozo about Masterson's purported 28 killings, Coulter testified that it was his understanding that Masterson was "compelled to kill people."[42] Asked if Masterson's reputation hadn't been built up by killing large numbers of persons, he denied it, stating, "I would say that his reputation was built up because he was a most efficient officer of the law."[43]

The witnesses called by the defendant must have done little to bolster Cardozo's case with the jury.

Leonard H. Edgren, the reporter who had researched the offending article, described Ufer as being very angry, contradicting Cardozo's assertion that the comment was merely jocular.

Nothing helpful came from the next defense witness, James E. MacBride, the article's author, who admitted under cross-examination that he had made no effort to verify Ufer's statement about Masterson.

Detective Patrick F. Gargan, the arresting officer in the rigged faro game incident, admitted that the complaining witness, George A. Snow, had never mentioned Masterson, and that Masterson had only been arrested because Gargan had seen him "do something." However, he wasn't particularly specific about just what it was that had been done, other than claiming that Masterson had been observed in the company of the alleged co-conspirators.

The defendant's final witness, Manhattan District Attorney (and future governor) Charles S. Whitman, was equally unhelpful, stating that Masterson's reputation for peace and order in New York was good and that he had never heard that his conduct in the West "was impelled by private motives or desire for revenge."[44]

Cardozo unsuccessfully moved for a directed verdict "upon the ground that it appears to be the uncontradicted evidence that the alleged libel has been justified; that this man had in fact killed a large number of persons, and that is all we charged him with doing."[45]

Trial Result

The trial resumed the next morning with the summations. In closing, Benjamin Patterson made a remark that became a major point in Cardozo's appeal, saying, "If your Honor please, there is one thing I overlooked. In 'The Winning of the West,' Colonel Roosevelt spoke in the highest terms of Mr. Masterson."[46] Cardozo immediately asked that the jury be instructed to disregard the remark. Justice Ford agreed, but when Cardozo then requested a mistrial, he was refused.

Ford's proposed charge to the jury said that the verdict must be for the plaintiff in the amount of six cents up to any reasonable sum. Cardozo responded with a lengthy series of requests for charges, including several that would have allowed the jury to find that the article had been accurate in whole or in part. Ford did make some minor modifications in his charge, but none that significantly benefited the defendant's case.

After deliberating, the jury brought in a verdict of $3,500 for the plaintiff, along with $129.25 in costs.[47] Cardozo, objecting to the size of the verdict, unsuccessfully moved that the verdict be set aside and that a new trial be granted.

The next day, a celebratory article by William E. Lewis appeared in the *Morning Telegraph*. It claimed that Masterson had been "vindicated," maintained that attorney Patterson had permitted "the other side utmost latitude in their efforts to defend and justify the publication," and praised Justice Ford for "impartially and ably conduct[ing] the trial."[48]

Benjamin Cardozo Cross-Examines Bat Masterson

Record at 22:

Q. Now, do you think of any other fights that you ever had?

A. Well, I am not thinking; I suppose you are doing all the thinking. I do not know of any other fights that I ever had; I have never had very many fights.

Q. You don't think you have been a fighting man at all?

A. No, indeed; I never had any one accuse me of it.

Q. How many fights have you had?

A. Well, I am 59 years old, and I have been – I can't tell you. I told you all about the serious troubles. The fist fights, if that is what you are referring to, I couldn't tell you anything about that.

Record at 23:

Q. Your counsel asked you whether you ever carried a pistol. When did you stop carrying a pistol?

A. When I ceased to be an officer. That has been a good many years ago. I was a United States officer here, and never carried any; and I haven't carried any in New York for the last ten years. The last time that I carried a pistol was, I think, probably in Denver when I was acting as Deputy Sheriff.

Q. Did you ever carry a pistol in the City of New York?

A. Yes, sir.

Q. Then it wasn't the last time that you carried a pistol when you were acting as Sheriff in Denver was it?

A. No. I had almost overlooked the New York incident.

Record at 24:

Q. You were arrested on the charge of being mixed up in a crooked faro game, weren't you?

A. Well, I never knew what I was arrested for; there was never any complaint against me.

Q. You mean to say that you didn't make any inquiry as to what the charge against you was?

A. No; I never learned. I attempted to. I heard what they said, and that is all I know about it.

Record at 26–27:

Q. You have, in your judgment, quite a reputation in this town, haven't you Mr. Masterson?

A. Well, I don't know what you mean by "reputation"; good or bad? What do you mean?

Q. Well, you are well known, – generally known, I mean?

A. Well, yes; yes, sir; I am very well known. I was well known when I came here. I don't think my reputation had been made by the affrays which I had been engaged in, in the West.

Record at 32:

Q. You have killed a great many men including your affrays in the Indian War, haven't you?

A. I think I have stated all here.

Q. Well, you are proud of those exploits in which you killed men aren't you?

A. Oh, I don't think about being proud of it. I do not feel that I ought to be ashamed about it; I feel perfectly justified. The mere fact that I was charged with killing a man standing by itself I have never considered an attack upon my reputation.

Appeal of the Verdict

Cardozo was hardly finished with the case, however. He filed an appeal with the Appellate Division, First Department a week later. In his brief, he reiterated his main themes at the trial, but also argued strenuously that Patterson's mention of Roosevelt's book required a reversal. Noting that the former president was not a witness and that the book was not in evidence, he characterized the attorney's remarks as "flagrantly improper,"[49] and argued, "It is idle to say that such misconduct is to be overlooked because the trial judge instructed the jury to disregard the remark."[50] Later, in his reply memorandum, Cardozo derided Patterson's claim that the remark was inadvertent, stating, "It was a deliberate attempt to gain an unrighteous advantage; and it should receive its fitting penalty."[51]

On the subject of the plaintiff's reputation, Cardozo presented an unflattering summary of Masterson's

career, which he characterized as "chequered."[52] Demonstrating the same facility with words he later exhibited in many of his judicial opinions, he remarked that during Masterson's career the "monotony of fist fights was varied by encounters with weapons."[53] With regard to Masterson's arrest in 1902, he wrote that when "the champion of the west came to the far east . . . [h]e had hardly set foot in this city before he was arrested on the charge of a disgraceful offense."[54] Cardozo also used Masterson's testimony about this arrest as an example of his alleged lack of candor on the witness stand.

Arguing without the benefit of* New York Times v. Sullivan, *both the facts and the law were against him.

Reviewing other aspects of the plaintiff's testimony, he asserted that Masterson's only real complaint was the charge that his victims were drunk, which "cut [the libel] down to a pretty fine point."[55] He concluded by stating that the plaintiff "complains, not because he has been defamed, but because he has not been sufficiently extolled."[56]

Cardozo also argued that, considering Masterson's reputation, the damages were excessive. Cardozo claimed that Masterson had gloried in the stories about him and "lived on notoriety,"[57] concluding that his "sudden sensitiveness ought not to be rewarded with a gift of $3,500 out of the defendant's treasury."[58]

The brief also defended the content of the article,[59] stressing that Masterson had indeed killed several men, and quoted John Coulter's statement that Masterson was spoken of "as an efficient killer."[60] It also noted Whitman's testimony that the number of Masterson's victims was reputed to be more than 28 men. Cardozo continued to insist that Ufer's remark was not to be taken seriously, but was merely "the rough, and rather rude, humor of sporting men and pugilists,"[61] adding that the idea that anyone would take them seriously ran "counter to common sense and experience"[62] and did not justify a $3,500 verdict.

The remainder of the brief dealt with Justice Ford's charge to the jury. It claimed that Ford had erred by charging that Masterson had been libeled as a matter of law and for refusing to allow the jury to consider whether the libel had been justified, either in whole or in part. He also objected to other aspects of the charge, including the failure to state that the article did not charge Masterson with cowardice and that there was no innuendo in the term "gunfighter."

The appeal was decided by a memorandum opinion issued on December 19, 1913, by the Appellate Division, First Department.[63] By a 3-2 vote, it reversed the trial court and awarded a new trial unless the plaintiff stipulated to a reduction of the verdict to $1,000. Voting to reverse were Presiding Justice George L. Ingraham, a veteran jurist who had been on the First Department bench since its establishment in 1896, Chester McLaughlin, who would later serve on the Court of Appeals with Cardozo from 1917–1926, and Francis M. Scott. For affirmance were Frank C. Laughlin and John Proctor Clarke, both appointees of Bat Masterson's friend, then-Governor Theodore Roosevelt.[64]

Although Laughlin and Clarke's dissent would have permitted an appeal to the Court of Appeals, at this point the case vanishes from the law reporters. There is also no mention of the appellate decision in either the *Morning Telegraph* or the *Globe and Commercial Advertiser*. Thus, it must be assumed the result was acceptable to both parties and that Masterson was paid his $1,000 in damages.

This was probably the best result that Cardozo could have hoped to achieve. Arguing without the benefit of *New York Times v. Sullivan*,[65] both the facts and the law were against him. Ufer's remarks taken as a whole were obviously false, and they were clearly motivated by his anger over the possibility that Masterson's charges about the Morris-Flynn fight would hurt box office receipts. In addition, Masterson was a popular figure whose claim to a good reputation had the endorsement of both former President Roosevelt and the Manhattan district attorney. Thus, Cardozo's best argument was his "common sense" claim that the passing remark of a man such as Ufer could have done no serious harm to Masterson's reputation, and that significant damages were unwarranted.

Even if the Court of Appeals had heard the *Masterson* case, Cardozo would no longer have been involved. Less than a month after the Appellate Division decision, he began his judicial career as one of Justice Ford's colleagues on the Supreme Court in the First Judicial District. Ford himself remained on the bench until his retirement in 1932. In the 1920s, he gained press attention as the founder of the Clean Books League, which sought to ban from the state such titles as D.H. Lawrence's *Women in Love*.[66] The *Globe and Commercial Advertiser* was absorbed by the *New York Sun* in 1923. The *Morning Telegraph* survived until 1972, when it was taken over by the *Racing Form*. As for Bat Masterson, he died at his sportswriter's desk in 1921, while working

on his column. He is buried in Woodlawn Cemetery in the Bronx.

---

1. 160 A.D. 890, 144 N.Y.S. 1129 (1st Dep't 1913).
2. There is also no mention of the case in Andrew L. Kaufman's *Cardozo* (1998), Richard A. Posner's *Cardozo: A Study in Reputation*, Richard Polenberg's *The World of Benjamin Cardozo*, or in any law review article. The trial is briefly discussed in the most comprehensive Masterson biography, but no mention is made of Cardozo. *See* Robert K. DeArment, Bat Masterson: The Man and the Legend 385 (1979).
3. The *Morning Telegraph* was a daily that featured several pages of standard news coverage, but the majority of each issue was given over to the coverage of sports and show business events and personalities.
4. *New Members of the Court of Appeals*, Bench & B., Feb. 1914, at 2.
5. Kaufman, *supra* note 2, at 112.
6. *Id*.
7. W.B. "Bat" Masterson, *Morris-Flynn Fight a Bunk Says Masterson*, Morning Tel. (N.Y.), Sept. 10, 1911, at 9.
8. W.B. "Bat" Masterson, *Governor Dix in Town; Will Look Over Boxing*, Morning Tel. (N.Y.), Sept. 12, 1911, at 7.
9. W.B. "Bat" Masterson, *Flynn-Morris Contest Still Being Exploited*, Morning Tel. (N.Y.), Sept. 14, 1911, at 6. When the fight was held, Flynn easily defeated the larger, slower Morris in a 10-round decision. *See Fireman Jim Flynn Whips Carl Morris; Oklahoma Giant and "White Hope" Shows No Class in Garden Fight*, N.Y. Times, Sept. 16, 1911, at 8.
10. Record at 93, *Masterson v. Commercial Advertiser Ass'n*, 160 A.D. 890, 144 N.Y.S. 1129 (1st Dep't 1913) (hereinafter "Record").
11. *Id.* at 6.
12. *See Too Much Blood*, Atchison Champion, Nov. 17, 1881, *reprinted in* DeArment, *supra* note 2, at 215.
13. *"Bat" Masterson – Here's How!*, Wash. Post, Feb. 8, 1905, at 6.
14. DeArment, *supra* note 2, at 216.
15. *Id.* at 180.
16. *Id*. at 244.
17. W.B. "Bat" Masterson, *Morris Surely Out of the Championship Race*, Morning Tel. (N.Y.), Sept. 17, 1911, at 4.
18. Cardozo's partner, Angel Simpson, retired during 1913 and the firm name then became Cardozo & Engelhard.
19. Kaufman, *supra* note 2, at 93.
20. *See Alliger v. Brooklyn Daily Eagle*, 6 N.Y.S. 110 (Sup. Ct. 1889), *aff'd*, 127 N.Y. 651 (1891).
21. *See Perley v. Shubert*, 121 A.D. 786, 106 N.Y.S. 593 (1st Dep't 1907), *aff'd sub nom. Hupfel v. Boston Ins. Co.*, 198 N.Y. 520 (1910).
22. *See Perley v. Shubert*, 199 N.Y. 544 (1910).
23. *See Ziegfeld v. Norworth*, 148 A.D. 185, 133 N.Y.S. 208 (1st Dep't), *appeal dismissed*, 202 N.Y. 580 (1911).
24. Answer to Am. Compl. at 9, *Masterson v. Commercial Advertiser Ass'n*, 160 A.D. 890, 144 N.Y.S. 1129 (1st Dep't 1913).
25. *Id*.
26. *Id*.
27. *"Bat" Masterson in Office*, Wash. Post, Mar. 28, 1905, at 1.
28. Before charging the jury, Justice Ford noted how intently they had followed the case. *See* Record at 77.
29. Record at 17.
30. *Id*. at 19.
31. Faro involves correctly guessing which of the next two drawn cards will be high or low. The game could be rigged by tampering with the box from which the cards were dealt.
32. Record at 24.
33. *Id*. at 26.
34. *Id*. at 28.
35. *Id*. at 30.
36. *Id*. at 32.
37. *Id*. at 49.
38. *Id*. at 33.
39. *Id*.
40. *Id*. at 44.
41. *Id*. at 45.
42. *Id*. at 74.
43. *Id*. at 76.
44. *Id*. at 69.
45. *Id.*
46. *Id* at 77. In the book, Roosevelt referred to Masterson as one of the men of "noble spirit" who "clean[ed] the West of its murderers, of its bandits, and of its criminals and making it the garden spot of America," *quoted in* William E. Lewis, *W.B. "Bat" Masterson Vindicated; the Globe Will Pay $3,500*, Morning Tel. (N.Y.), May 22, 1913, at 4.
47. Record at 12.
48. Lewis, *supra* note 46, at 4.
49. Appellant's Brief at 11, *Masterson v. Commercial Advertiser Ass'n*, 160 A.D. 890, 144 N.Y.S. 1129 (1st Dep't 1913) (hereinafter "Appellant's Brief").
50. *Id*. at 12.
51. Appellant's Mem. in Reply at 2, *Masterson*, 160 A.D. 890.
52. Appellant's Brief at 4.
53. *Id.* at 6.
54. *Id*. at 7.
55. *Id*. at 19.
56. *Id*. at 11.
57. *Id*. at 9.
58. *Id*. at 19.
59. *Id*. at 6.
60. *Id*. at 4.
61. *Id*. at 19.
62. *Id*.
63. *See Masterson v. Commercial Advertiser Ass'n*, 160 A.D. 890, 144 N.Y.S. 1129 (1st Dep't 1913).
64. Roosevelt had appointed Laughlin to the Appellate Division in 1901. That year, he had also chosen Clarke to fill the unexpired Supreme Court term of the late Justice H.R. Beekman.
65. 376 U.S. 254 (1964).
66. *See Justice Shocked by Book in Home; Ford Angered When He Learns Library Sent His Daughter "Women in Love,"* N.Y. Times, Feb. 11, 1923, at 18.

Appropriating Artists Face Uncertainty in Interplay Between First Sale and Fair Use Doctrines

BY JASON D. SANDERS

Matthew Barney's work *Cremaster 2: The Man In Black* incorporated an entire copy of *Billboard* magazine mounted on a nylon frame, opened up to a particular page showing an advertisement that included a photograph of Johnny Cash. On that page, Barney had made various graphite, petroleum jelly and beeswax alterations and additions. On May 3, 2003, the photographer of the underlying photograph filed a copyright infringement action in a San Francisco federal court seeking damages not only from Barney, but also from the auction house that was planning to auction the *Cremaster* work, Barney's gallery, and a magazine that ran an image of the *Cremaster* work.

The case was settled out of court, and thus a decision was never made, but the result highlights the legal uncertainty now faced by appropriating artists. A copyright holder has a right to make the first sale of a work or copies of a work, as well as the exclusive right to prepare any derivative works, which are defined as any "work based upon [the] preexisting work," including "any other form in which a work may be recast, transformed or adapted."[1] This right attaches the moment the work is put in any tangible form.

Once the first sale has been made of a copyrighted work or a copy of it, "the owner of a particular copy or phonorecord . . . or any person authorized by such owner . . . without the authority of the copyright owner, [has the right] to sell or otherwise dispose of the possession of that copy or phonorecord."[2] Essentially, this allows a purchaser of a copyrighted work, such as a book, to resell that object without threat of copyright infringement.

Under a separate doctrine, the public may also make "fair use" of the work, which allows the use of copyrighted material in a new work without the owner's consent in certain "fair" circumstances, such as criticism, comment and parody.

The interplay between these principles has never been clearly defined, and as appropriation art has become more prominent, so has the threat of lawsuits. Those who claim to follow in the footsteps of Andy Warhol or Marcel Duchamp may be choosing a dangerous path. For example, Warhol was threatened with a lawsuit by Patricia Caulfield over his use of a Caulfield photograph in making his *Flowers* paintings; Warhol settled.[3] Sherry Levine was also subjected to pressure over her use of Edward Weston photographs; she stopped using them.[4] Other artists such as Robert Rauschenberg and David Salle have similarly settled cases out of court when faced with copyright infringement actions.[5] As one prominent gallery owner commented, "If these copyright laws had been applied from 1905 to 1975, we would not have modern art as we know it."[6]

Appropriation Art

An artist's use of a tangible object, such as pages of a book or newspaper, a movie ticket, or a soda can is a staple of modernism and postmodernism. Picasso and Braque, who incorporated copies of newspaper clippings and other physical objects into collages, were among the first prominent artists to use these techniques in the early 20th century.

Sometimes appropriation is used simply for visual aesthetics, and other times for social or artistic commentary. For example, Kazimir Malevich's *Composition with Mona Lisa*, made in 1914, was a clear visual commentary

JASON D. SANDERS is an associate at the firm of Cowan, Liebowitz & Latman, P.C. in New York where he concentrates on intellectual property law matters. He is a member of the Intellectual Property Law Section of the New York State Bar Association. He previously practiced with the firm of Cleary, Gottlieb, Steen and Hamilton in New York. He graduated from Duke University and received his J.D. from the University of Michigan.

He wishes to thank Robert W. Clarida, a partner at Cowan Liebowitz & Latman and co-chair of the NYSBA Copyright Law Committee, for assistance in preparing this article.

on the appropriated work. At the center of Malevich's work was an image of the *Mona Lisa*, cut out from a newspaper, with a large red "X" across its center, expressing his repudiation of the classical realist painting style.[7] Other works, such as James Rosenquist's collages, may not be commenting on the incorporated image *per se*, but on what the image reflects about society, or simply the image's aesthetic value. Contemporary artists such as Tim Rollins, Nancy Chunn and Jason Rhoades continue the tradition of appropriation. These artists, at times, have all drawn or painted upon a background made up of pages from copyrighted texts, or otherwise incorporated copyrighted objects into their work.[8]

Sometimes appropriation is used simply for visual aesthetics, and other times for social or artistic commentary.

In determining potential liability for such artworks, a distinction must be drawn between "reproduction appropriation," in which an artist *reproduces* an image or aspect of a copyrighted work as part of a new work, and "consumption appropriation" in which an artist uses, and in doing so *consumes* the physical object, the original work itself, in the production of a new work.

Andy Warhol's *Flowers* would be considered a reproduction appropriation, because he reproduced the image of the flowers originally photographed by Patricia Caulfield.

Jason Rhoades' *PeaRoe Ramp* would be considered a consumption appropriation, because as part of the work he incorporated (and thereby consumed) the physical objects – Ivory Snow boxes (as well as, among other things, a 2003 XR50 Honda motorcycle).

Matthew Barney's work is an example of consumption appropriation, because it incorporates an entire copy of *Billboard* magazine. As a work of consumption appropriation, Barney's *Cremaster 2: The Man In Black* fell in the uncertain nexus of the competing copyright principles of transferability of tangible objects and protectability of the intellectual property embodied in those objects.

Albuquerque A.R.T. Decisions

The two cases with the most significant implications for liability in appropriation art arose in a situation far removed from the celebrity and creative process of Warhol or Jeff Koons. In the late 1980s and early 1990s a company called Albuquerque A.R.T. was sued for copyright infringement twice – once in California and once in Illinois – over its process of mounting lawfully purchased book pages, note cards and lithographs onto decorative ceramic tiles for resale.[9]

Both at the trial level and at the appellate level, A.R.T. lost in California and won in Illinois.[10] The two A.R.T. decisions conflict with each other, and the U.S. Supreme Court has not spoken directly on this issue. Thus, an artist's right to incorporate a physical copy of an existing work into a new creation is now narrower in California than in Illinois, and uncertain everywhere else. A recent Supreme Court decision, however, may signal the Court's willingness to engage the issue, and could potentially lead to greater creative freedoms for artists.

Ninth Circuit result: In *Mirage v. A.R.T.*, Albuquerque A.R.T. purchased a book of images by Patrick Nagel and, without permission from the copyright holders of the book or the original artwork, removed selected pages from the book, mounted them individually on ceramic tiles and sold the tiles. In 1986, A.R.T. was sued for copyright infringement by the copyright holder of the Nagel images. The Ninth Circuit Court of Appeals ultimately held that A.R.T. had indeed violated the underlying copyright by creating an unauthorized derivative work of the Nagel images.[11]

In applying the statute, the court focused on the phrase "any other form in which a work may be recast, transformed, or adapted" in the definition of a "derivative work."[12] The court held that this language only required that "the infringing work must incorporate a portion of the copyrighted work in *some form*."[13]

The court rejected A.R.T.'s defense that it was merely reselling an object it had lawfully purchased. It stated that the transfer of a copyrightable object does not grant the purchaser the right to create a derivative work of that object. With little analysis, the court determined that an owner's right to sell the work is secondary to the copyright holder's right to prohibit the making of derivative works. Indeed, this holding implies that a violation of copyright occurs as soon as any modifications are made – *whether or not there is even a resale of the modified object*. The implications of this are quite far-reaching. For example, this holding could be read to say that if notes are made in the margins of a book, they may constitute an infringement.

Seventh Circuit result: In 1994, Albuquerque A.R.T. was again sued over its process of purchasing images, mounting them onto ceramic tiles and reselling them. *Lee v. A.R.T.* was brought in the Northern District of

Illinois by Annie Lee, whose copyrighted note cards and small lithographs were purchased by A.R.T. and mounted on tiles. Both at the trial and at the appellate level, A.R.T. was held not to have violated the underlying copyrights.[14]

Judge Easterbrook, writing for the Seventh Circuit, initially noted that "one might suppose that this is an open and shut case under the doctrine of first sale."[15] The court reasoned that there was no economic rationale for allowing the copyright holder to preclude others from creating derivative works out of lawfully purchased copies, because the original artist captures the value of the work through the original sale.[16] The court, however, was certainly aware of the previous decision in California, and noted the tension between the doctrine of first sale and the copyright holder's exclusive right to prepare derivative works.[17] Chosing not to resolve that tension, the court instead examined the narrow question of whether A.R.T. had even created a "derivative" work.[18]

The court analogized A.R.T.'s process to the framing of an artwork, and stated that if "mounting works a 'transformation,' then changing a painting's frame or a photograph's mat equally produces a derivative work."[19] Further, the court stated that when the case was argued by the parties, the court had asked:

> [W]hat would happen if a purchaser jotted a note on one of the note cards, or used it as a coaster for a drink, or cut it in half, or if a collector applied his seal (as is common in Japan); [plaintiff's] counsel replied that such changes prepare derivative works, but that as a practical matter artists would not file suit.[20]

Finding this answer troubling at the least, the court stated, "A definition of derivative work that makes criminals out of art collectors and tourists is jarring despite [plaintiff's] gracious offer not to commence civil litigation."[21] The court stated that the A.R.T. work was "bonded to a slab of ceramic, but it was not changed in the process. It still depicts exactly what it depicted when it left Lee's studio."[22] Thus, the court held that by mounting the image on a tile, A.R.T. had not "recast, transformed or adapted" the original work and, therefore, no derivative work had been created; accordingly, there had been no copyright infringement.

The court's reasoning in finding no infringement was very narrow, based only on the proposition that mounting the images did not sufficiently transform the original to create a "derivative work." Thus, an artist who appropriates and consumes a copy of an existing copyrighted work, but also sufficiently alters the copy to create a new "transformed" artwork, will find no solace in this holding.

While, on its face, this holding strengthens the rights of those who lawfully acquire copies of copyrighted works, the problem is that it creates an almost perverse incentive. The more "creativity" that is added to an existing work in creating a new work, the more likely it is that the new work will be considered "derivative" of the original and, thus, more likely that liability will attach. Copyright law would thus inhibit free expression, rather than provide an incentive for it.

Artists' rights, generally known as rights of "attribution" and "integrity," fall under the rubric of the "moral rights" of an artist over his or her work.

"Moral Rights" And VARA

In the interim between the two A.R.T. decisions, Congress passed the Visual Artists Rights Act of 1990, known as "VARA," which provided specific protections for authors of "works of visual art."[23] The statute narrowly defines a protected "work of visual art" as a work that exists in a single copy or in a signed, numbered, limited edition of fewer than 200 copies.[24]

VARA gives artists the right to claim authorship in such works, to prevent the use of the artist's name in connection with works the artist did not create, and to prevent the intentional distortion, mutilation or modification of such an artist's work which would be prejudicial to the artist's honor or reputation.[25] These protections are afforded to the author of the work, regardless of whether the author still holds the copyright.[26] These artists' rights, generally known as rights of "attribution" and "integrity," fall under the rubric of the "moral rights" of an artist over his or her work. Such rights are prevalent in European systems, but until the enactment of VARA, were not explicitly protected under American law.[27]

VARA protects against a "modification" of a work only if (1) the work is a "work of visual art," as defined in the statute, and (2) the modification is "prejudicial" to the artist. If, however, the Ninth Circuit's interpretation of the derivative work protection is correct, when a work is "modified," a derivative work is created – giving rise to infringement liability under general copyright law. Thus, even if the requirements under VARA (that the work be of limited production and that the modification be prejudicial) are not met, general copyright protection would prevent the modification.

Because the Ninth Circuit's expansive interpretation of derivative work protection makes VARA's protections superfluous (and Congress did not likely intend to pass a meaningless statute), the continuing vitality of the Ninth Circuit's position is questionable.

Judge Easterbrook recognized in the Seventh Circuit's A.R.T. decision that, because the note cards at issue did not meet the definition of a "work of visual art," they would not be protected under VARA against the modification made by A.R.T.[28] The court cautioned that "[i]t would not be sound to use [the derivative works provision] to provide artists with exclusive rights deliberately omitted from the Visual Artists Rights Act."[29] Because, however, the holding of the decision was based on the finding that A.R.T. had not created a derivative work at all, the court's analysis of the VARA provisions was dictum.

U.S. Supreme Court in *Dastar*

The U.S. Supreme Court's decision last year in *Dastar* signals that the Supreme Court may be willing to engage this issue, and potentially to rein in the broad protections that ensnared A.R.T. in California.[30]

The case involved Dastar Corporation, which bought a copy of the television series *Crusade In Europe*, for which the copyright protection had expired. Dastar edited the series down to about half the length of the original, added a new opening sequence, credit sequence and closing, and new chapter titles. It called the series *World War II Campaigns In Europe*, created new packaging, and omitted any reference to the original *Crusade In Europe* series. Dastar then sold the revised version as its own product, without any reference to the original copyright owners (although the copyright had expired). Twentieth Century Fox, which had owned the copyright for the original series, brought an action against Dastar. Because copyright protection had lapsed, Fox claimed that Dastar had violated *trademark* law by misrepresenting the "origin of the goods" – namely, a misrepresentation of the creator or "author" of the series.

The Supreme Court ruled in favor of Dastar, noting that it was unwise to grant trademark protection in an area that is already covered by VARA. Recognizing that VARA is the legislation that specifically provides an author with "the right . . . to claim authorship of that work," the Court noted that the "express right of attribution is carefully limited and focused: It attaches only to specified 'work[s] of visual art,' is personal to the artist, and endures only for the 'life of the author.'"[31] The Court refused to issue a holding that "would render these limitations [of VARA] superfluous."[32]

The Supreme Court's reasoning in *Dastar* is in line with the discussion of VARA in the Seventh Circuit's *A.R.T.* decision. Analogous to the trademark protection

Preemption in New York Practice

Protecting an artist's moral rights in New York may have become harder due to a recent ruling in the Southern District of New York. In 1983, New York passed the Artists Authorship Rights Act, becoming the second state, after California, to pass a statute protecting the moral rights of artists. The Artists Authorship Rights Act (AARA), embodied in N.Y. Arts and Cultural Affairs Law § 14.03, protects against:

> [knowing] display in a place accessible to the public . . . a work of fine art or limited edition . . . or a reproduction thereof in an altered, defaced, mutilated or modified form if the work is displayed . . . as being the work of the artist, or under circumstances under which it would reasonably be regarded as being the work of the artist and damage to the artist's reputation is reasonably likely to result therefrom.

AARA protections overlap considerably with the protections afforded by the Visual Artists Rights Act (VARA), 17 U.S.C. § 106A, although there are some important distinctions. For example, VARA excludes from protection a work that is part of a building if the work cannot be removed without its "destruction, distortion or mutilation" and (1) the work was installed before the effective date of VARA or (2) the author and the building owner have specified in writing that installation of the work may subject it to destruction. There is no such exclusion in AARA.

In 2001, Forrest Meyers brought an action to enjoin the owners of the building at 559 Broadway from destroying one of his installations. The artwork, which had been installed before the passage of VARA, was composed of a series of aluminum bars bolted in the braces of the building. The work was part of a larger citywide project commissioned by City Walls, a predecessor to the Public Art Fund, an organization that continues to commission highly regarded artworks in public spaces throughout New York City. Likely concerned that his work might not be protected under VARA, Mr. Meyers brought an action under both VARA and AARA. In *Board of Managers of SOHO International Arts Condominium v. City of New York*,[1] the court dismissed Mr. Meyers' AARA claims, holding that AARA was preempted by VARA. In doing so, the court reasoned that "preemption occurs even when the state statute has a broader application."

1. 2003 U.S. Dist. Lexis 10221, No. 01 Civ. 1226 (DAB) (S.D.N.Y. June 17, 2003).

Partial Silence and a Transfer of Rights

Under New York law, it serves an artist to be specific if he or she wishes to retain certain, but not all, ownership rights in a work of art. One of the landmark rulings in that regard dates back to 1930, and concerns Hovsep Pushman and his painting *When Autumn is Here*. After completing the painting, Mr. Pushman turned it over to Grand Central Art Galleries to act as his agent for its sale. There was no discussion between Mr. Pushman and the gallery regarding reproduction rights. The painting was sold to the University of Illinois, which later sold the reproduction rights to the New York Graphic Society.

On learning that reproductions of his work were to be made, Pushman brought suit. The New York Court of Appeals rejected Pushman's contention that the sale of the physical work does not imply a transfer of the copyright. The Court held that though an artist's common law right to reproduce a work was separate and distinct from the ownership of the physical property, if an artist "wishes to retain or protect the reproduction right, [he or she] must make some reservation of that right when [he or she] sells the painting."[1] This seemingly harsh New York rule of total transfer was eventually abrogated by statute. N.Y. Arts and Cultural Affairs Law § 14.01 now provides that "the reproduction right" of a work of art is reserved unless it passes into the public domain by law or is otherwise "expressly transferred" in writing.

The underlying reasoning of *Pushman*, however, in many respects remains good law. In the recent dispute between Ronnie Greenfield (former member of "The Ronettes" and former wife of Phil Spector) and Philles Records over the right to license certain Ronettes recordings for use in connection with television and movies, the New York Court of Appeals relied on *Pushman* in interpreting the governing two-page contract. The Court reasoned that the otherwise broad contract's silence on the particular licensing issue was not an ambiguity and held in favor of Philles Records, stating that "the unconditional transfer of ownership rights to a work of art includes the right to use the work in any manner unless those rights are specifically limited by the terms of the contract."[2]

1. *Pushman v. New York Graphic Soc'y*, 287 N.Y. 302, 308 (1942).
2. *Greenfield v. Philles Records*, 98 N.Y.2d 562, 572, 750 N.Y.S.2d 565, 571 (2002).

sought by Fox, the Ninth Circuit's interpretation of general copyright protections renders VARA's more specifically delineated rights of attribution and integrity superfluous. Thus, if this issue is litigated again, the reasoning in *Dastar* may give the courts a clear basis for repudiating the Ninth Circuit's expansive approach.

An interesting test case may already be in the courts. A Utah-based video rental chain called Clean Flicks is in the business of offering for rent videos from which it has removed the "objectionable content" in the films, such as the nude scene in *Titanic*. In 2002, most likely fearing a suit from the members of the Directors Guild of America, Clean Flicks filed a preemptive action against several prominent directors seeking a declaration that its practices did not violate the rights of the directors.[33] The directors and several studios filed counterclaims alleging that Clean Flicks' practices violated the "false designation of origin" provisions of trademark law as well as copyright law. Because of the ruling in *Dastar*, there is a strong argument that the directors' false designation of origin claim is not tenable. If the court finds that to be the case, then will the court allow the action to go forward on copyright grounds? This action could be the test case of the Supreme Court's apparent inclination to scale back broad interpretations of generic intellectual property protections. Congress is apparently interested and not convinced that Clean Flicks or similar services will prevail under existing copyright and trademark laws. On June 16, 2004, a bill called the "Family Movie Act of 2004" was introduced in the House of Representatives. That bill would amend the Copyright Act and Lanham Act to specifically allow companies to continue to sell products that edit films for home viewing.[34] It seems that this battle will be fought in the legislature as well as in the courts.

Fair Use

One more significant defense was not discussed in *Lee*, *Mirage*, or *Dastar*. The Copyright Act carves out a specific area of "fair use" of copyrighted works, which it delineates as not an infringement of copyright. Of these "fair uses," one of the most commonly asserted is that of parody. Though not asserted in either *Lee* or *Mirage*, an artist who appropriates an existing work in order to parody or comment on that work may still be protected by the fair use doctrine. Several artists have tested these waters previously, with varying degrees of success.[35]

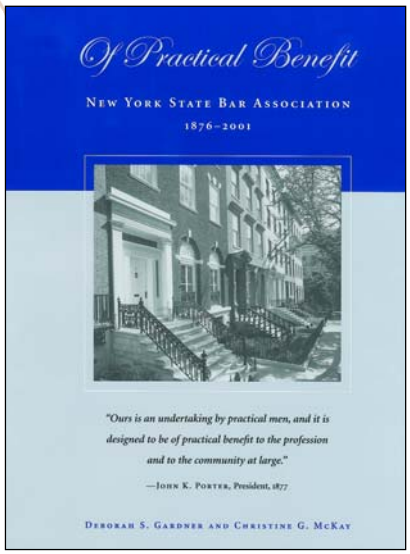
Generally, an artist who seeks to use the defense of parody will be much more likely to succeed if the work appropriated is both recognizable – or better yet, iconic – and is the subject of the parody. In a well-known example, a court found artist Jeff Koons liable for copy-

CONTINUED ON PAGE 24

Trials of the century.
Giants of the bench.

Of Practical Benefit

Conceived in the turmoil of the Boss Tweed investigations, it started with 91 attorneys meeting at "3 ½ o'clock." It wove its way through historic trials, momentous debates . . . and the specter of 9/11.



"It" is NYSBA—whose story is now captured in a vibrant read.

Of Practical Benefit recounts the rich history of the New York State Bar Association since its founding in 1876. The authors chronicle the great issues, the debates, trials and personalities, the evolution of the law and justice system—and NYSBA's impact on it all. This lavishly illustrated volume includes profiles of NYSBA's 23 Sections as well.

Commissioned for the Association's 125th anniversary, *Of Practical Benefit* is a must-read for all who want a deeper appreciation of the impact of the New York State Bar Association on the legal profession in New York State.

PN: annbk, 214 pp., $50.00

Order online at
www.nysba.org/NYSBAhistory
or call **800.582.2452**
Source Code: CL2198

NYSBA

CONTINUED FROM PAGE 22

right infringement for his work *String of Puppies* because, in large part, the copied work was obscure and the parody was of society, not of the work itself.[36] As the Supreme Court stated in *Campbell v. Acuff-Rose Music, Inc.*, "[p]arody's humor . . . necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin."[37]

Further, an appropriating artist who transforms the underlying work is also more likely to succeed on a fair use defense. On the other hand, the more of the work that is taken, and the less alteration that is done to that work, the greater the risk of a court finding a copyright violation.

Practical Concerns

Because liability may arise from the distribution of protected works as well as reproduction, potential defendants in an art-related lawsuit would include not only the appropriating artist, but also the gallery selling the work, or even the company publishing a catalog of the work. For those who are sued, or are fearful of being sued, to the extent that the action can be heard in the Seventh Circuit – or anywhere other than the Ninth Circuit – it would be helpful. The opposite advice applies to artists or copyright holders who believe that another artist has unlawfully appropriated their work.

Further, even assuming the court holds that an artist may appropriate an existing work if he or she "consumes" that work in the artist's own, this does not clear all hurdles. Even if the original of the work is protected, reproduction of that new artwork containing the appropriating copy would still pose serious concerns. The appropriating artist would only be able to *reproduce* the "new work" if a license had been obtained from the original artist for the underlying work, or in circumstances in which a fair use defense applied. For example, if the appropriating artist or a gallery wanted to advertise the new work for sale, a court might consider the advertisement a fair use on the ground that the reproduction in an advertisement is ancillary to the right to sell the new work.[38] If, however, the appropriating artist wished to reproduce the new work on a series of calendars, that would likely be found to be prohibited unless a license was obtained with respect to the appropriated work or unless a fair use defense, such as parody, applied.

Conclusion

Matthew Barney's technique of appropriating an existing text in the creation of the *Cremaster 2: The Man In Black* work is a well-established tool in contemporary art. Nonetheless, it falls in a very uncertain area of copyright law. Not only may artists, gallery owners, collectors and others who create or sell works of appropriation art face potential liability under current copyright decisions, because the law is so unsettled, it may be very difficult for even a well-informed individual to accurately gauge the potential liability.

Appropriation art has become far too common a practice to have its legality be unsettled. There is a need for courts to rectify the current uncertainty in copyright law and more clearly delineate the balance between copyright protection of existing works and an appropriating artist's ability to incorporate such works into a new work. As it stands, the broad reach of general copyright protections may indeed stifle the creativity that the Copyright Act was intended to promote. Until this issue is more clearly decided, artists, purchasers and sellers should be aware of the potential liability arising from such works.

---

1. 17 U.S.C. § 106.
2. 17 U.S.C. § 109(a).
3. *See* Note: *Beyond* Rogers v. Koons*: A Fair Use Standard for Appropriation*, 93 Colum. L. Rev. 1473 (1993). *See also infra,* notes 35 and 36 and accompanying text.
4. *Id.*
5. *Id.*
6. *See* William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 Geo. Mason L. Rev. 1, 17 (2000) (citing Geraldine Norman, *The Power of Borrowed Images*, Art & Antiques, Mar. 1996, at 125 (quoting art dealer Jeffrey Deitch)).
7. Several years later Marcel Duchamp marked up a similarly small-scale reproduction of the *Mona Lisa* by adding a mustache and goatee in his piece *L.H.O.O.Q.* (1919) which has itself become iconic.
8. Mr. Rollins works with Kids of Survival (K.O.S.) to create images laid upon the books/texts that embody motifs drawn from the text. In Tim Rollins' work, "[t]ypically, actual pages from literary classics are laid on canvas to form a ground and then over painted with imagery that embodies motifs from the text." Tim Rollins bibliography *available at* <http://www.ku.edu/~sma/online/rollins/rollinsinfo.html>. Nancy Chunn created a series of works entitled *Front Pages* which were 366 front pages of *The New York Times* from 1996 on which she made additions, comments, and eradications. *See* Press Release, Ronald Feldman Fine Arts Inc. (Dec. 22, 1996). Jason Rhoades creates sculptures that incorporate various objects, including objects containing copyrighted texts, such as a box of Ivory Snow soap. *See* Press Release, David Zwirner gallery (Sept. 1, 2003).
9. *See Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989); *Lee v. Deck the Walls, Inc.*, 925 F. Supp. 576 (N.D. Ill. 1996), *aff'd sub nom. Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997).
10. *See Mirage Editions*, 856 F.2d at 1344; *Lee*, 125 F.3d at 581–83.
11. *Mirage Editions*, 856 F.2d at 1344.
12. *Id.* at 1343.

13. *Id.* at 1343–44 (emphasis in original) (citations omitted).
14. *Lee*, 125 F.3d at 581–83.
15. *Id.* at 581.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 582.
20. *Id.*
21. *Id.*
22. *Id.*
23. Pub. L. No. 101-650; 17 U.S.C. § 106A.
24. 17 U.S.C. § 101 (defining the term "work of visual art").
25. 17 U.S.C. § 106A.
26. 17 U.S.C. § 106A(a) (the right belongs to "the author of a work of visual art").
27. *See Lee*, 125 F.3d at 582.
28. *Id.* at 583.
29. *Id.*
30. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).
31. *Id.* at 34.
32. *Id.* at 35.
33. Civil Action No. 02-M-1662 (MJW) (D. Colo. filed 2002).
34. The "Family Movie Act of 2004" would amend the Copyright Act and Trademark Act "[t]o provide that making limited portions of audio or video content of motion pictures imperceptible by or for the owner or other lawful possessor of an authorized copy of that motion picture for private home viewing, and the use of technology therefor, is not an infringement of copyright or of any right under the Trademark Act of 1946." H.R. 4586 108th Congr. (2004).
35. *See Campbell v. Acuff-Rose Music*, 510 U.S. 69 (1994) (parody defense successful); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (parody defense successful); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (parody defense fails).
36. *Rogers*, 960 F.2d 301.
37. 510 U.S. at 588.
38. In the context of a right of publicity claim, similar uses have been allowed. *See*, *e.g.*, *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 349–53 (S.D.N.Y. 2002) (advertising for non-infringing work did not incur liability due to its incidental nature to the exhibit itself).

Responses to Juvenile Crime Consider the Extent of Parents' Responsibility for Children's Acts

By Susan L. Pollet

You are a parent of a teenager. Your teenager assaults another child, or kills a teacher, or steals someone's property, or commits any manner of crime upon a third person. Maybe your child is a preteen or younger. To what extent should civil or criminal sanctions be imposed against you, the parent, for failing to supervise and/or control your child?

We all know parents whom everyone thinks to be competent as parents, and yet their children are "out of control." Conversely, we all know children who seem centered and stable, with parents and home lives that one would think would create "acting out children." When are the efforts of parents raising their children the best they can, not enough?

The observation has been made that, as a practical matter, "it is extremely difficult to draw a precise link between parenting and violent behavior by their children. Children are not widgets on an assembly line; we cannot attribute their defects to the manufacturing process of the parental factory."[1]

This article explores how the law has attempted to deal with parental responsibility, with an emphasis on the law in New York.

Juvenile crime is a topic of ever-increasing concern:

> Generally, criminology theories and empirical studies indicate that families, economic status, academic achievement, peer groups, community attachment, and susceptibility to the media affect whether a child becomes delinquent.[2]

Alternatives for reducing juvenile crime that have focused on the parents have included laws on child abuse and neglect, statutes on contributing to the delinquency of a minor, and standards that hold parents civilly and criminally liable for their children's criminal acts.[3] Efforts to "address the root causes of juvenile crime before the crime is committed" have included teaching morals in early childhood, providing character education in the schools, establishing intensive day care and family services for those below the poverty line, and having cities enforce juvenile curfews "to compensate for parents' lack of supervision."[4] Some states (including New York), in seeking to address the causes of juvenile crime, have used prevention programs, including "family training, mentoring, conflict resolution classes, criminal law instruction, community safe sanctuaries, and public service announcements."[5]

Parental Responsibility Laws

States and municipalities have enacted parental responsibility laws "that are noteworthy for their increased emphasis on holding parents guilty for the wrongdoing of their children. These laws evolved from 'endangering the welfare' statutes."[6]

> This new penology is defined by several trends, including a greater emphasis on managing crime than on eliminating it, a greater focus on dangerous populations than on culpable individuals, a normalization of crime and anti-crime measures, and the use of lawmaking as a symbolic activity.[7]

Commentators have reported that 43 jurisdictions have enacted parental responsibility laws, the first of which was passed in Colorado in 1903.[8] Parental liability statutes hold parents liable, either criminally or civilly, for failing to control their child's delinquent behavior.[9] A "notorious" parental liability statute enacted in St. Clair Shores, Mich., for example, "based its liability on a theory of negligence, and it stated 'it is the continuous

Susan L. Pollet, now the executive director of the Pace University Women's Justice Center, was until recently a senior court attorney in the Westchester County Family Court. A past president of the Westchester Women's Bar Association and a past vice president of the Women's Bar Association of the State of New York, she has published more than 20 articles regarding family law and related topics. She is a graduate of Cornell University and received her J.D. from Emory University School of Law.

duty of the parent of any minor to exercise reasonable control to prevent the minor from committing any delinquent act.'"[10] Some commentators argue that the negligence standard is the most effective one for a parental liability statute.[11] Other scholars have advocated a "hybrid-type model" of parental liability laws, which includes possible monetary fines, criminal penalties and other court-ordered remedies.[12]

The critics of parental liability laws have argued, from a policy standpoint, that these laws create a greater division in family relationships, which could result in parental abuse of the child or increased violence between the parents,[13] and that "laws and judicial action alone will never make all parents pay proper attention to their children."[14] Critics maintain that these laws are ineffective and underused.[15] From a legal standpoint, critics argue that parental liability laws present issues of "vagueness, overbreadth, and imputing liability without fault."[16] The argument is made that parents have "a constitutionally protected interest in raising [their] children, an interest with which the State cannot lightly interfere. *E.g. Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)."[17]

From a policy standpoint, commentators note that parental responsibility laws "are supported by the assumption that there is an incontrovertible nexus between 'bad' children and 'bad' parents."[18] This assumption is belied by the fact that as children develop, parental influence increasingly competes with other types of influence such as from peers, the community and popular culture, and, therefore, this approach is too simplistic.[19] The argument is made that, because many theories on the causes of juvenile delinquency exist, and the impact of parental influence continues to be debated in the literature, there should be debate as well on legislative reasoning relying primarily on this "parental influence" theory to support creating parental responsibility laws.[20] Policy advocates state that a broader approach would work better because parental responsibility laws address only the family, and focus primarily on sanctioning parents as a means of reducing crime. Professionals from other disciplines could work together with legal professionals (*e.g.*, prosecutors).[21]

Advocates of parental liability laws argue that "increased civil and criminal liability for parents may be the quickest, most cost-effective way of getting parents to better monitor their children."[22] Commentators suggest that there should be a "coherent public policy response," enforced by tort law, to "encourage parents to control and monitor their children using the threat of pecuniary damages."[23] The position is also taken that "victims of juvenile delinquency, vandalism, and other acts of violence or malicious mischief by minors must be granted relief and allowed to look to the parents for redress under circumstances reasonably indicating neglectful or irresponsible parenting."[24] An argument raised is that parental liability should be expanded as a means of "promoting corrective justice" in circumstances where children harm others, but also to "underscore the shared nature of the responsibility for the children's wrongs."[25]

The three major legal theories that advocate imposing civil parental liability are liability without fault, liability based on misaction, and liability based on inaction.

With respect to parental civil liability, there have been three major stages in the development of this jurisprudence in the United States. The first is the traditional common-law view that, except in rare instances, parents are not civilly liable for the acts of their minor children. The second stage is an exception to the common-law rule, carved out in the Restatement (Second) of Torts, section 316, which holds parents liable, in certain circumstances, for the torts of their minor children. The third stage is the creation of state statutes that hold parents liable for "the willful, malicious, or intentional conduct of their minor children."[26]

In the legal arena, the three major legal theories that advocate imposing civil parental liability are liability without fault, liability based on misaction, and liability based on inaction.[27] Although many states in the United States have, in the last few years, passed new laws or strengthened old ones to hold parents accountable for their children's acts, in fact, few cases actually "make it to the courtroom."[28]

New York's Position

What is the New York response to parental liability? With respect to criminal liability, the New York Penal Law contains a section regarding "endangering the welfare of a child," a class A misdemeanor.[29] With respect to civil liability, parents of a child more than 10 and less than 18 years can be held civilly liable, pursuant to N.Y. General Obligations Law § 3-112, for damages caused by such child, where the child has "willfully, maliciously, or unlawfully damaged, defaced or destroyed . . . public or private property" or where such child has "knowingly entered or remained in a building and has wrongfully taken, obtained or withheld such public or private personal property from such building" or where

such child "has falsely reported an incident or placed a false bomb."[30]

With respect to New York case law, the longstanding approach has been that a "parent is not liable, merely by reason of his or her relationship, for the torts of the child,"[31] unless the parent is "guilty of some further act or omission that, in conjunction with the relationship's duties and obligations, caused the damages."[32] The Appellate Division, Second Department, in a leading case from 1937, which is recognized for illustrating the common-law rule, set forth certain situations when the parent may be held liable:

> Where the relationship of master and servant exists and the child is acting within the scope of his authority accorded by the parent; (2) where a parent is negligent in intrusting to the child an instrument which, because of its nature, use and purpose, is so dangerous as to constitute, in the hands of the child, an unreasonable risk to others; (3) where a parent is negligent in intrusting to the child an instrumentality which, though not necessarily a dangerous thing of itself, is likely to be put to a dangerous use because of the known propensities of the child; (4) where the parent's negligence consists entirely of his failure reasonably to restrain the child from vicious conduct imperilling others, when the parent has knowledge of the child's propensity toward such conduct, and (5) where the parent participates in the child's tortious act by consenting to it or by ratifying it later and accepting the fruits.[33]

Under common law, a parent is not liable for failure to supervise a child.[34] In the seminal case of *Holodook v. Spencer*, the New York Court of Appeals held that a parent's negligent failure to supervise his or her child is not recognized as a tort, actionable by a child.[35] Thus, the general rule in New York is "that there is no parental liability for the torts of minors."[36] The New York Court of Appeals has stated that "parents are in the best position to determine how much supervision is right for their children."[37] Case law has subsequently limited and distinguished *Holodook*.[38] In *Nolechek v. Gesuale*, the New York Court of Appeals held that "an alleged tort-feasor . . . may seek indemnity or contribution from the injured child's parent when the child's injury, and the tort-feasor's consequent tort liability, resulted from the parent's negligent entrusting of a dangerous instrument to the child."[39] (The dangerous instrument was a motorcycle in that case.) Commentators have noted that:

> The New York courts are reluctant to intrude upon parents' rights to bring up their children as they see fit. At some point, though, the parents must be accountable for the actions of their children, especially if they are particularly aware of dangerous conduct.[40]

The New York Court of Appeals has stated that "it is well-established law that a parent owes a duty to third parties to shield them from an infant child's improvident use of a dangerous instrument, at least, if not especially, when the parent is aware of and capable of controlling its use."[41] The Court of Appeals explained the rule further in *La Torre v. Genesee Management*, holding that a mother could not be held liable for leaving her developmentally disabled child unsupervised at a shopping mall, even though the mother knew of the child's propensity for violent outbursts.[42] The Court stated that it is "unreasonable to burden parents and guardians . . . by exposing them to rebound liability, flowing from a child's or adult's natural deficits or personal qualities" based merely on "general allegations."[43] The Court of Appeals established the rule that "parental liability for negligent entrustment is limited to circumstances where a parent's conduct creates a particularized danger to third persons that is plainly foreseeable."[44]

Conclusion

New York has not enacted parental responsibility legislation that is as broad as the provisions enacted by some other states. Critics of such legislation would argue against having New York expand liability for parents of children who commit crimes. Preventing juvenile crime is a goal all would agree upon, and yet, the means of achieving that goal has varied by state. An interdisciplinary approach is essential with such complicated issues when crafting legislation nationwide in both the criminal and civil arenas.

---

1. Andrew Schepard, *Parental Responsibility: The Columbine Aftermath*, N.Y.L.J., July 8, 1999, p. 3.
2. Tami Scarola, Note, *Creating Problems Rather Than Solving Them: Why Criminal Parental Responsibility Laws Do Not Fit Within Our Understanding of Justice*, 66 Fordham L. Rev. 1029, 1073–74 (Dec. 1997).
3. *Id*. at 1040.
4. *Id*. at 1040–41.
5. *Id*. at 1074.
6. Paul W. Schmidt, Note, *Dangerous Children and the Regulated Family: The Shifting Focus of Parental Responsibility Laws*, 73 N.Y.U. L. Rev. 667, 677 (May 1998).
7. *Id*. at 668.
8. Eric Paul Ebenstein, Note, *Criminal and Civil Parental Liability Statutes: Would They Have Saved the 15 Who Died at Columbine*, 7 Cardozo Women's L.J. 1, 15 (2000).
9. Tammy Thurman, *Parental Responsibility Laws/Are They the Answer to Juvenile Delinquency?* 5 J. L. Fam. Stud. 99 (2003).
10. Ebenstein, *supra* note 8, at 16 (citing St. Clair Shores, Mich., Code 20.563(a) (1994)).
11. *Id*. at 17.
12. *Id*. at 20.
13. *Id*. at 20–21 (citing Christine T. Greenwood, *Holding Parents Criminally Responsible for the Delinquent Acts of Their Children: Reasoned Response or 'Knee-Jerk Reaction'?* 23 J. Contemp. L. 401, 427 (1997).
14. *Id*. at 21.

15. Scarola, *supra* note 2, at 1046.
16. Ebenstein, *supra* note 8, at 21–22.
17. Schepard, *supra* note 1.
18. Thurman, *supra* note 9, at 101.
19. *Id.* at 102.
20. *Id.*
21. *Id.* at 107.
22. Ebenstein, *supra* note 8, at 28.
23. Valerie D. Barton, Comment, *Reconciling the Burden: Parental Liability for the Tortious Acts of Minors*, 51 Emory L. J. 877, 880 (Spring 2002).
24. *Id.* This commentator suggests several different legislative solutions, including allowing a rebuttable presumption of parental negligence for tortious actions by children under the age of seven, or statutes permitting the assertion of the doctrine of res ipsa loquitur, or strict liability.
25. Rhonda V. Magee Andrews, *The Justice of Parental Accountability: Hypothetical Disinterested Citizens and Real Victims Voices in the Debate Over Expanded Parental Liability*, 75 Temple L. Rev. 375, 442 (Fall 2002).
26. Andrew C. Gratz, Comment, *Increasing the Price of Parenthood: When Should Parents be Held Civilly Liable for the Torts of Their Children?*, 39 Hous. L. Rev. 169, 172–73 (2002).
27. Thurman, *supra* note 9, at 103.
28. *Id.*
29. N.Y. Penal Law § 260.10.
30. For a good discussion of this statute, and the case law interpreting it, see Joseph Mack, Comment, *Street Fights, Air Rifles, Shotguns, Minors & Their Parents. A New York Perspective on Parental Liability for the Torts of their Minors*, 21 Pace L. Rev. 441, 463–64 (Spring 2001).
31. *Steinberg v. Cauchois*, 249 A.D. 518, 519, 293 N.Y.S. 147 (1937) (citations omitted).
32. *Id.*
33. *Id.* (citation omitted).
34. Schepard, *supra* note 1.
35. 36 N.Y.2d 35, 45, 364 N.Y.S.2d 859 (1974).
36. Mack, *supra* note 30, at 468.
37. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 338, 413 N.Y.S.2d 340 (1978) (citing *Holodook*, 36 N.Y.2d at 49–51).
38. Mack, *supra* note 30, at 450–63.
39. *Nolechek*, 46 N.Y.2d at 336; *see* Mack, *supra* note 30, at 457.
40. Mack, *supra* note 30, at 468.
41. *Nolechek*, 46 N.Y.2d at 338–39 (citations omitted).
42. 90 N.Y.2d 576, 665 N.Y.S.2d 1 (1997).
43. *Id.* at 582.
44. *Rios v. Smith*, 95 N.Y.2d 647, 652, 722 N.Y.S.2d 220 (2001). *See Linder v. Bidner*, 50 Misc. 2d 320, 270 N.Y.S.2d 427 (1966), in which the Supreme Court, Queens County, applying section 316 of the Restatement (Second) of Torts, held that in order for parental liability to arise, it must be demonstrated that the parents knew of the dangerous propensities of the child, and then neglected to use reasonable care to control the child so as to prevent the indulgence in those propensities. The court noted that there is no liability on the part of the parents for the general incorrigibility of the child.

Court-Appointed Law Guardians Face Issues Involving Liability, Conflicts and Disqualification

By Gary Muldoon

Being a law guardian – an attorney appointed to represent a minor – poses issues that differ from those that face counsel who represent other litigants. Some of these issues focus on ethical matters, including compensation, legal liability (malpractice), and disqualification.

A law guardian is appointed by a judge to provide representation in Family Court or state Supreme Court. The case may involve custody, adoption, juvenile delinquency, abuse or neglect, divorce, or post-divorce issues. The law guardian may be a private attorney or an employee of a legal aid society.

Liability and Immunity

In a family law proceeding – often focusing on the issue of custody[1] – the child is represented by a law guardian, while each parent has separate counsel. Decisions addressing whether a parent may sue a law guardian for negligence or legal malpractice hold that quasi-judicial immunity applies.[2] These cases are consistent with decisions in other contexts that quasi-judicial immunity extends to appointees of a judge.[3] The threat of civil liability of a law guardian would inhibit necessary investigation and advocacy for children in furtherance of their best interests.[4]

One lower court decision notes, however, that a law guardian does not possess quasi-judicial immunity for intentional torts against a party.[5]

While a malpractice suit may be barred, there is no reimbursement for the law guardian for defending the action.[6]

Conflicts of Interest

One difficulty with a parent or other party suing a law guardian is the ongoing nature of a family law case. If a client sues his or her own attorney, at that point an obvious conflict arises. Where another party sues an opposing attorney, no conflict then occurs – the other party and attorney had antagonistic positions from the outset. But where the law guardian is sued by a parent – who may be a party to a pending family law case – the law guardian, while not representing that parent, might eventually advocate that the child be placed with, or visit with, that parent or the other parent, or another party. Filing suit against the law guardian could itself create a conflict of interest.

Should a law guardian, upon being sued, move to withdraw?[7] Should the judge who has appointed the law guardian, grant the withdrawal motion? If so, does this create a situation where a disgruntled parent can use the simple expedient of bringing a collateral lawsuit to remove a law guardian for one possibly more favorably disposed to the parent's wishes? Using an even easier route of filing an ethics complaint with the grievance or disciplinary committee, does this compel the law guardian to withdraw?

A parent is usually a poor candidate to raise issues of conflict of interest and improper representation of the child, yet the minor is legally unable to raise these issues, and may also be unable to articulate his or her concerns, or even realize that a problem exists with representation.[8]

Normally, one party may not disqualify the attorney of another party – the other party has the right to counsel of his or her choice.[9] In custody cases, each parent almost inevitably has a significantly different perception of the law guardian. Based on that perception, one parent may seek to disqualify the law guardian.[10] Such a motion will usually fail.[11]

In one case where a parent sought to disqualify the law guardian, the basis for the application was the

Gary Muldoon is a partner in Muldoon & Getz in Rochester (muldg@aol.com), with an emphasis on litigation and appeals. He teaches a course at Monroe Community College on family law and is coauthor of three books on law, including *Handling a Criminal Case in New York* (Thomson West). He is a graduate of Skidmore College and received his J.D. from State University of New York at Buffalo School of Law.

"advocate-witness" rule.[12] The court denied disqualification of the law guardian, finding there was no showing that the attorney would be called as a witness.[13]

Where there are several children in a family, one law guardian is often appointed to represent all. When a conflict of interest arises among the children, however, new counsel for the children may be required.[14] A law guardian's judgment regarding the best interests of the child may lead to properly advocating a position that is contrary to the child's expressed wishes.[15]

Disqualification Granted

Where the mother's attorney was president of the legal aid society that employed the law guardian, the law guardian's judgment could reasonably be affected, and the children could not consent to representation after full disclosure of the conflict.[16]

In another case, however, where two separate divisions of a legal aid society represented the mother on a criminal case as well as the child in a termination of parental rights case, disqualification was not ordered. No information had been disclosed from one division to the other. In addition, the mother had delayed significantly in moving for disqualification and further delay would have imposed a significant burden on the child.[17]

It is important that the law guardian's judgment be independent of both parents and other litigants. In Supreme Court, a judge can order the parties to pay the law guardian's fees. The law guardian, however, should obtain court approval beforehand for such compensation. Where compensation occurred outside of what the court ordered, the law guardian was removed.[18]

A parent may properly refer children to an attorney, who then may represent them. In a custody or neglect case, however, the appearance or possibility of a conflict of interest[19] precludes allowing the parent to retain counsel for the children or become so involved in the representation. In other cases where the interests of the parent and child do not conflict, such as juvenile delinquency, it may be appropriate for parents to retain counsel for the minor.

The "no-contact" rule applies to a child represented by a law guardian: another attorney may not communicate directly with the child.[20] In one case where the father's attorney had a psychiatrist examine the child without the law guardian's knowledge and consent, the father's attorney was disqualified and use of the psychiatric examination was barred.[21]

Like other attorneys in a lawsuit, a law guardian should not have *ex parte* contact with the judge.[22] Providing a law guardian's report to the judge, which commonly occurred in some courts in the past, is improper: not only is it *ex parte*, it also may place the law guardian in the role of an unsworn witness.[23] The law guardian may properly advocate the client's position in the presence of other counsel.[24]

Sample Letter to Parents

The following is a sample of an introductory letter that a law guardian might send to the parents of the affected children in a case involving custody.

Dear (Parent 1 and Parent 2):

I am writing to you about the custody proceeding that is going on. The judge has appointed me to act as a "law guardian." I will be the legal representative of your child(ren), _____.

As you know, the next court appearance is _____, 20__, at _____ m. It will be necessary for me to meet with the child(ren) before that, and perhaps more than once. Please understand that anything that I discuss with the children remains private, just as your conversations with your attorney remain private. Also, during the course of my involvement, it may be necessary for me to make recommendations to the court. These will be based on my contact with the child(ren), contacts with others, and my own evaluation. The recommendation will be mine, rather than the child(ren)'s.

Enclosed is a copy of the court order assigning me. As it notes, as a law guardian, it may be necessary to contact others, such as child care, schools, agencies and doctors as part of my representation.

I would also appreciate the opportunity to speak with each of you regarding your own concerns. If your attorney wishes to be present during such a meeting, by this letter I am requesting him/her to notify me. Because I am a law guardian, representing the child(ren), be advised that information you provide to me is not covered by the attorney-client privilege, and I may disclose it.

Please contact my office so that we may arrange a time to meet.

The order provides that both parents are responsible to pay the fees for representing your child(ren). If you have any questions on this, please discuss it with your attorney.

Very truly yours,
Law Guardian

Enc.
c: (Attorney - Parent 1)
(Attorney - Parent 2)

Compensation

In Family Court cases, the law guardian is usually paid by New York State, although a Family Court judge may require payment by the parties.[25] (The Fourth

Department does not permit law guardians in Family Court to be paid by the parties.[26]) A private attorney who acts as law guardian may be paid by New York State at the rate fixed by statute, now $75 per hour.[27] A private law guardian is subject to Part 36 of the Rules of Court.[28]

The trial judge may require the parents to pay the law guardian at the prevailing rate for attorneys in private practice, rather than the assigned counsel rate.[29] A parent required to pay the law guardian's fee may, at the end of the case, seek a hearing on the appropriate amount of the fee, but not at the time an interim award is made.[30]

Where the law guardian is not paid by New York State, but instead by a private source (usually the parents), interim payments of law guardian fees may be appropriate.[31]

A law guardian should timely apply for compensation, but he or she does not forfeit the right to be paid by not complying with a court's informal request for submitting the voucher, so long as the application is made within the statute of limitations.[32]

Conclusion

The role of the law guardian is changing, taking on a more important function in custody cases as well as in other family law litigation. Higher standards are expected of lawyers who represent children.[33]

---

1. In some types of cases, appointment of a law guardian is mandatory. In others, *e.g.*, custody, the appointing of a law guardian is discretionary. Merril Sobie, New York Family Court Practice § 14.2 (1996); *see Wilson v. Bennett*, 282 A.D.2d 933, 724 N.Y.S.2d 520 (3d Dep't 2001).
2. *Drummond v. Drummond*, 291 A.D.2d 368, 737 N.Y.S.2d 628 (2d Dep't 2002); *Bluntt v. O'Connor*, 291 A.D.2d 106, 737 N.Y.S.2d 471 (4th Dep't 2002).
3. *See Mosher-Simons v. County of Allegany (In re Estate of Eck)*, 288 A.D.2d 823, 732 N.Y.S.2d 771 (4th Dep't 2001) (county that performed home study at court's direction had immunity), *aff'd*, 99 N.Y.2d 214, 753 N.Y.S.2d 444 (2002); *Pertilla v. Genetic Design*, 166 Misc. 2d 843, 634 N.Y.S.2d 1006 (Sup. Ct., Chenango Co. 1995) (laboratory appointed by court).
4. *Bradt v. White*, 190 Misc. 2d 526, 740 N.Y.S.2d 777 (Sup. Ct., Greene Co. 2002); *see* Susan L. Thomas, Annotation, *Liability of Guardian ad litem for Infant Party for Negligence in Connection with Suit*, 14 A.L.R. 5th 929 (1993).
5. *See Bradt*, 190 Misc. 2d 526 (dictum).
6. *See Stein v. Murphy*, 82 A.D.2d 794, 439 N.Y.S.2d 221 (2d Dep't 1981) (assigned counsel defending malpractice suit). *But see United States v. Barner*, 285 F. Supp. 2d 568 (M.D. Pa. 2003) (attorney who represented defendant in federal court under Criminal Justice Act awarded fees under 18 U.S.C. § 3006A(d)(1) as compensation for the "opportunity costs" lost in appearing at 17 days of hearings to defend himself against allegations of ineffective assistance of counsel).
7. A law guardian should be permitted to withdraw where it is clear that the law guardian and minor are not communicating. *In re Elianne M.*, 196 A.D.2d 439, 601 N.Y.S.2d 481 (1st Dep't 1993).
8. One commentator has stated:

   > A law guardian has a special obligation when representing the very young child. An infant or toddler obviously cannot formulate or articulate a specific legal position, and children of elementary school age may not be fully capable of guiding a law guardian. In these situations it may be preferable for the court to appoint a law guardian *ad litem* in addition to the law guardian, but Family Courts rarely do so.

   Sobie, *supra* note 1, § 14.3. *Cf. Fargnoli v. Faber*, 105 A.D.2d 523, 524, 481 N.Y.S.2d 784 (3d Dep't 1984) ("It is evident that guardians ad litem should not normally be appointed when minors are the subject of proceedings in Family Court, but that Law Guardians or counsel of their own choice should represent the minors.").
9. *See S & S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp.*, 69 N.Y.2d 437, 443, 515 N.Y.S.2d 735 (1987).
10. A motion to disqualify the law guardian must be made in order to preserve the issue for appeal. *In re "Nicole VV,"* 296 A.D.2d 608, 746 N.Y.S.2d 53 (3d Dep't 2002).
11. *See Petkovsek v. Snyder*, 251 A.D.2d 1087, 674 N.Y.S.2d 211 (4th Dep't 1998); *King v. King*, 266 A.D.2d 546, 698 N.Y.S.2d 906 (2d Dep't 1999); *Maurer v. Maurer*, 243 A.D.2d 989, 663 N.Y.S.2d 421 (3d Dep't 1997); *Stien v. Stien*, 130 Misc. 2d 609, 496 N.Y.S.2d 902 (Fam. Ct., Westchester Co. 1985); *see also Smith v. Smith*, 241 A.D.2d 980, 667 N.Y.S.2d 141 (4th Dep't 1997); *Zirkind v. Zirkind*, 218 A.D.2d 745, 630 N.Y.S.2d 570 (2d Dep't 1995).
12. The Lawyer's Code of Professional Responsibility, DR 5-102 (hereinafter "Code").
13. *Herald v. Herald*, 305 A.D.2d 1080, 759 N.Y.S.2d 275 (4th Dep't 2003).
14. *In re H. Children*, 160 Misc. 2d 298, 608 N.Y.S.2d 784 (Fam. Ct., Kings Co. 1994).
15. *Carballeira v. Shumway*, 273 A.D.2d 753, 710 N.Y.S.2d 149 (3d Dep't 2000); *see James MM. v. June OO.*, 294 A.D.2d 630, 740 N.Y.S.2d 730 (3d Dep't 2002).
16. *B.A. v. L.A.*, 196 Misc. 2d 86, 761 N.Y.S.2d 805 (Fam. Ct., Rockland Co. 2003).
17. *In re Commitment of T'Challa D.*, 196 Misc. 2d 636, 766 N.Y.S.2d 500 (Fam. Ct., Kings Co. 2003), *aff'd*, 3 A.D.3d 569, 770 N.Y.S.2d 649 (2d Dep't 2004).
18. *Davis v. Davis*, 269 A.D.2d 82, 711 N.Y.S.2d 663 (4th Dep't 2000); *see Fargnoli v. Faber*, 105 A.D.2d 523, 481 N.Y.S.2d 784 (3d Dep't 1984).
19. *See Campolongo v. Campolongo*, 2 A.D.3d 476, 768 N.Y.S.2d 498 (2d Dep't 2003) (disqualification of parent's attorney).
20. Code, DR 7-104; NYSBA Committee on Professional Ethics, Op. 656 (1993).
21. *Campolongo*, 2 A.D.3d 476.
22. *In re Connor*, N.Y.S. Commission on Judicial Conduct (Sept. 22, 2003), *available at* <http://www.scjc.state.ny.us/Determinations/C/connor.htm>. *See Weiglhofer v. Weiglhofer*, 1 A.D.3d 786, n.1, 766 N.Y.S.2d 727 (3d Dep't 2003); *Cobb v. Cobb*, 4 A.D.3d 747, 771 N.Y.S.2d 476 (4th Dep't 2004); *see also Flynn-Federico v. Federico*, __ A.D.3d __, 777 N.Y.S.2d 649 (1st Dep't 2004) (improper for judge to initiate *ex parte* contact with forensic neutral).

23. "In some cases, a law guardian has been requested by the Court to submit a separate pre-trial report and recommendations, or the attorney has elected to submit such a report. Frequently, the report includes hearsay statements, summaries of out of court interviews, impressions, or factual conclusions. The preparation and submission of such a report is inconsistent with the purpose and role of an attorney. The law guardian is not a social worker or a probation investigator. . . . Further, a law guardian who submits a report and recommendation opens the possibility that he will or should be called as a witness." NYSBA Committee on Children and the Law, Guide to Representing Children, Law Guardian Representation Standards, Commentary to Standard B-7 (Nov. 1999), *available at* <http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/NYSBA Reports/Guide_to_Representing_Children/Guide_to Representing_Children.htm>.

24. *See Rueckert v. Reilly*, 282 A.D.2d 608, 723 N.Y.S.2d 232 (2d Dep't 2001).

25. *See Campo v. Campo*, 3 A.D.3d 565, 772 N.Y.S.2d 68 (2d Dep't 2004).

26. *Lynda A.H. v. Diane T.O.*, 243 A.D.2d 24, 673 N.Y.S.2d 989 (4th Dep't 1998).

27. N.Y. Judiciary Law § 35(3). N.Y. Comp. Codes R. & Regs. tit. 22, §§ 679.14 (Second Department); 835.5 (Third Department); 1032.6 (Fourth Department). By statute, the maximum amount of compensation is $4,400, although that may be exceeded where extraordinary circumstances exist. Also in extraordinary circumstances, a court may award in excess of the statutory hourly rate. *Krista M. v. Gregory D.*, 194 Misc. 2d 526, 753 N.Y.S.2d 712 (Fam. Ct., Madison Co. 2003).

28. 22 N.Y.C.R.R. § 36.1(a)(3).

29. G. Van Ingen, Annotation, *Allowance of Fees for Guardian ad litem Appointed for Infant Defendant, As Costs*, 30 A.L.R.2d 1148 (1953).

30. *C.E. v. P.E.*, 177 Misc. 2d 272, 676 N.Y.S.2d 403 (Sup. Ct., Bronx Co. 1998). *See Campo v. Campo*, 3 A.D.3d 565, 772 N.Y.S.2d 68 (2d Dep't 2004) (Family Court award of $250 per hour to law guardian, $50 more than had even been requested, reduced on appeal).

31. *C.E.*, 177 Misc. 2d 272.

32. *Benatovich v. Koessler*, 231 A.D.2d 880, 647 N.Y.S.2d 880 (4th Dep't 1996).

33. *See* Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 Fam. L.Q. 105 (2003).

Judges' Clerks Play Varied Roles In the Opinion Drafting Process

By Gerald Lebovits

In 1875, Massachusetts Chief Justice Horace Gray hired a law-school graduate to be his secretary. The Chief Justice paid the young man — whom he called a puisne[1] judge — from his own pocket. A few years after the Chief Justice was elevated to the Supreme Court, the United States government decided to pay for a clerk for each Justice.[2] Most Justices hired stenographers, but Justice Gray continued to hire young law graduates.

In 1919, after the government decided to pay for typists and a clerk, the other Justices began to hire recent law graduates. Thus began in federal court the institution of law clerks,[3] which became common in federal court in 1936, when district judges were allowed to use law clerks, and widespread since 1959, when certifications of need for district judges were no longer required.[4]

What Law Clerks Do

Law clerks, the generic title used in this article, are integral to the decision-making process, both federally and in every state court of record. They "are not merely the judge's errand runners. They are the sounding boards for tentative opinions."[5] Law clerks do "time-consuming and essential tasks: checking the record, checking citations, performing legal research, and writing first drafts . . . . Law clerks are indispensable to the judges, enabling them to focus on the decision itself and the refinement of the decision in writing."[6] Dan White, the satirist, explains the law clerk's role this way: "All judicial clerks do the same thing, namely, whatever their judges tell them to do."[7]

Law clerks are extensions of their judges. Whatever they do reflects on their judges. Good law clerks will excel at research, writing, administering the docket, and conferencing cases if in a trial part. Good law clerks maintain all personal and judicial confidences, play devil's advocate with and be confidants to the judge, leave the decision making to the judge, save the judge from committing errors, and commit few of their own. A poor law clerk "dislikes library work, or . . . is unhappy unless agitating for a cause, or . . . is addicted to the telephone or cannot stand solitude."[8]

Law Clerk Confidentiality

A maxim for law clerks is that what happens in chambers stays in chambers. Rarely while they work for judges have law clerks been known to share secrets. History records only one notorious example.[9] In 1919, Justice Joseph McKenna's law clerk was accused of leaking word of the decision in *United States v. Southern Pacific Co.*[10] The clerk's alleged co-conspirators profited from insider trading. When the plot was uncovered, the clerk resigned and was indicted for "conspiracy to defraud the Government of its right of secrecy concerning the opinions." The clerk argued that no law forbade his supposed conduct, but his motion to dismiss was denied, as was his appeal to the D.C. Circuit and his petition for certiorari to the Court of his former employ.[11] The prosecution, however, eventually moved to dismiss the charges. Everything else about this affair is shrouded in mystery, except this: When the clerk, later a successful Washington baker, died at 83, he was cremated, and his ashes were "strewn on court property . . . . under the cover of darkness."[12]

Current law clerks may not reveal current confidences, but may they discuss their duties after they retire? The conventional wisdom is that law clerks must take confidences to the grave.[13] But dozens of the nation's most eminent attorneys and judges have written in surprising detail about their judges and the role they and their judges played in cases of national consequence.[14] Law-clerk disclosure has turned into a "long-

Gerald Lebovits was the court attorney to Justice Edward J. McLaughlin in Supreme Court, Criminal Term, New York County, before becoming a judge of the New York City Civil Court, Housing Part, New York County. He is also an adjunct professor and Moot Court faculty advisor at New York Law School. He received a bachelor's degree from Carleton University and law degrees from Ottawa, Tulane and New York University law schools.

standing historical tradition that has developed over the past sixty years."[15]

A law clerk to Justice Robert Jackson was once accused of betraying confidences about other law clerks.[16] In an article that created a firestorm of protest and support, then-Mr. William Rehnquist wrote that "a majority of the clerks I knew [showed] extreme solicitude for the claims of communists and other criminal defendants."[17] Apparently recovered from that controversy, then-Justice Rehnquist later wrote a beautiful portrayal of his judge in an article that disclosed no confidences.[18] One can write about experiences as a law clerk and divulge nothing secret. For a piece of this kind from a two-year New York Court of Appeals clerk, see an article by Mario M. Cuomo.[19]

"All judicial clerks do the same thing, namely, whatever their judges tell them to do." — Dan White

Law-Clerk Writing

According to a federal judge who knows, "most judicial opinions are written by the judges' law clerks rather than by the judges themselves."[20] Law clerks often write first drafts: "It is an ill-kept secret that law clerks often do early drafts of opinions for their judges." Law-clerk opinion writing comes as no surprise to those who work in the courts: "It is widely recognized . . . that law clerks now draft many of the decisions that emanate from . . . chambers."[21] By their writing, law clerks play a role in decision making: "[M]any judges, if not most, require their law clerks to draft opinions for motions before the judges even skim the briefs. . . . [M]any motions present a close call. The person who gets to take the first crack at it (*i.e.*, the law clerk) may influence the outcome."[22] The outcome is influenced because "[h]e who wields the pen on the first draft . . . controls the last draft."[23]

Law clerks, especially at the appellate level, also write bench memorandums.[24] The bench memorandum, or report, may include the following: A concise statement of the facts, with a verification of the litigants' statements of fact by reference to the record; a statement of the issues in contention; the litigants' arguments on the issues, verifying the authorities; an analysis of the issues and the law; a list of questions that inquiry at oral argument might resolve; a recommendation on whether the court should decide the matter with a full, per curiam, or memorandum opinion; and a draft per curiam or memorandum opinion if the law clerk recommends either following a screening process.

The precise format of the bench memorandum depends on the court's tradition, but the memorandum should emphasize the relevant issues and be impartial, critical, and thorough — but not so thorough that the judges might as well have read the briefs and the record before oral argument. The law clerk's goal is to familiarize the court with the case before oral argument and to focus a judge who wishes to do further research. It is appropriate for neutral, objective clerks to state their views pre-argument. The court may, and often does, disagree with the clerks' views after oral argument and additional study. Moreover, "the only mission of a [memorandum] opinion is to inform the parties why the court is deciding as it is and to assure them that the court considered and understood the case. . . . Staff in these cases can relieve the judges of the initial drafting job, simple though it may be, thereby freeing judge time for the other demands of the court's business."[25]

Is law-clerk writing good or bad for the administration of justice? According to D.C. Circuit Judge Patricia M. Wald, "judges who write every word of their own opinions (except for a few certifiable geniuses) do not produce works of markedly greater clarity, cogency, or semantic skill. The opposite is more likely true. . . . I for one would not return to the days when law clerks sharpened pencils and checked citations; the present system for deciding cases could not sustain that development."[26]

Some believe that a rule should be enacted to make it unethical for law clerks to write judicial opinions.[27] Most believe, however, that law-clerk writing is good for the courts.[28]

The Interplay Between Law Clerk And Judge in Opinion Writing

Much law clerk-judge writing is collaborative.[29] But whether the law clerk prepares the initial drafts or the final edits, the entire adjudicative function and decision-making process must remain exclusively with the judge. The litigants' rights and public confidence in the judiciary demand no less. Even if the law clerk writes every word of a particular opinion, the judge must agree with and understand every one of those words as if the judge alone wrote each word. Every word and citation must be the authentic expression of the judge's thoughts, views, and findings. This requirement forces judges to review, with an eye toward editing, every opinion but the most routine, mundane, and brief draft.

In the end, "no matter how capable the clerk, the opinion must always be the judge's work."[30] That is because "[w]e lose the judge's processed involvement when technically proficient law clerks write the opin-

Law Clerks in New York

The position of law clerk in New York has been authorized for some judges since 1909.[1] New York clerks are appointed differently from federal law clerks and play somewhat different, larger roles.

Like federal clerks, New York clerks should be selected with care. The judge-clerk relationship is "the most intense and mutually dependent one . . . outside marriage, parenthood, or a love affair."[2] But unlike federal judges, who typically appoint recent law-school graduates and mostly ask them to serve one- or two-year terms, New York judges tend to appoint experienced attorneys and retain them for lengthy durations as career court employees. New York practitioners and judges alike appreciate the maturity and wisdom that an experienced law clerk brings to a busy state court.

A federal clerkship has more status than a New York clerkship, but New York clerks are paid far better and in the main enjoy decidedly greater responsibilities, especially in the trial courts. Federal clerks can earn top salaries when they leave their judges, but New York clerks often secure job opportunities for which their federal counterparts must wait years: The New York judiciary is filled with law clerks who went directly from their clerkships to the bench, either by appointment or election.

In New York, court attorneys are called law clerks when they work for a Court of Claims judge or are the personal appointment of an elected Supreme Court justice. Otherwise, they are court attorneys — from the court attorneys in the New York City Civil Court's Housing Part, to the pool attorneys in Supreme Court, to the court attorneys to the Chief Judge of the State of New York. Law clerks and court attorneys used to be called, respectively, law secretaries and law assistants.

Central staff court attorneys of the Court of Appeals answer to the Chief Judge and the court rather than to any particular Associate Judge. Court attorneys in the Appellate Division and the Appellate Term answer to the Presiding Justice of the Department or Term. Court attorneys assigned to a trial-term judge answer first to their judge, then to their supervising and administrative judges, and ultimately to the person who appoints them: the Deputy Chief Administrative Judge for New York City Courts or the Deputy Chief Administrative Judge for Courts Outside New York City. Law clerks are hired and fired by their justices alone.[3] Trial Term court attorneys not assigned to a judge answer to their chief court attorney, then to their administrative judge, and ultimately to their respective Deputy Chief Administrative Judge.

The distinction between personally appointed law clerks and court-appointed court attorneys affects law clerks' and court attorneys' ethical obligations in terms of political activity,[4] a fact of life in New York because many judges are elected from law-clerk ranks.

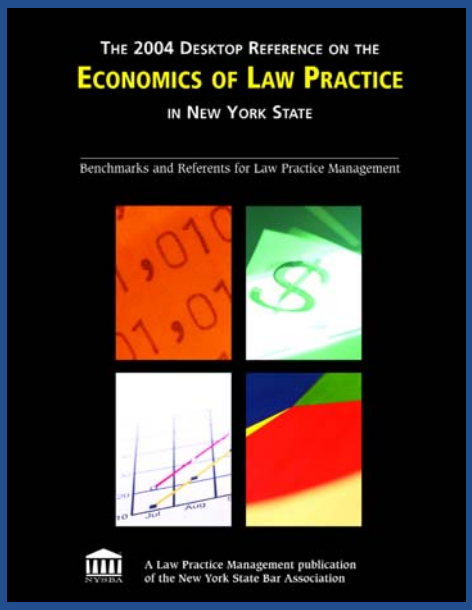
1. See N.Y. Judiciary Law §§ 166, 173 (Laws of 1909, Ch. 35), which gave Supreme Court justices the power to appoint confidential attendants and confidential law assistants.
2. Patricia M. Wald, *Selecting Law Clerks*, 89 Mich. L. Rev. 152, 153 (1990).
3. *In re Blyn v. Bartlett*, 39 N.Y.2d 349, 359–60, 348 N.E.2d 555, 560–61, 384 N.Y.S.2d 99, 104–105 (1976) (per curiam). A personally appointed clerk to an elected Supreme Court justice need not even be a lawyer. *In re Gilligan v. Procaccino*, 27 N.Y.2d 162, 166–68, 263 N.E.2d 385, 385–87, 314 N.Y.S.2d 985, 987–88 (1970).
4. *See* Gerald Lebovits, *Judicial Ethics, Law Clerks and Politics*, N.Y.L.J., Oct. 21, 1996, at 1, col. 1 (examining New York's Rules of the Chief Judge (governing nonjudicial-employee conduct) and the Rules of the Chief Administrator of the Courts (governing judicial conduct) as they apply to law clerks and court attorneys).

ions and the judge understands his role more as a decision maker and editor, if that, than as a writer."[31] Although judges delegate "the task of stating the reasons for the decision, not the authority to decide . . . , the justice must make the final version his own opinion, because he is responsible for what it says."[32] Thus, "the strongest control over staff personnel in their dealings with the judges is an ordinary sense of personal relationships. The judge is the boss. What he says and does are the final mandates on an issue . . . ."[33] Third Circuit Senior Judge Aldisert gives this advice to his clerks: "You were not selected by me to be a 'yes man.' . . . . [Yet] when the decision is in, that is it."[34]

Crediting Law Clerks and Law Students

Federal case law, including Supreme Court case law, is filled with textually relevant judicial acknowledgments that law clerks performed legal research.[35] But a

CONTINUED ON PAGE 38



How Do the BEST Law Practices Practice?

(IT'S ALL IN HERE.)

All the things you could do with hard data on law firm practice: Improve profitability. Make better financial decisions. Become more competitive.

Not only best practices, but best practices *in your region.*

Finally, that data is here — all in one resource.

The *2004 Desktop Reference on the Economics of Law Practice in New York State* provides an independently researched, 360° view of the way firms manage their practices — with statistical break-outs **by firm size and region of New York State.** Inside you'll find benchmarks and referents on:

- Billing, collection and payment practices
- Law office economic management practices
- Salaries and compensation
- Popular marketing practices
- Office space per attorney
- And much more

This 290-page desk reference includes more than 340 charts and tables, detailed analyses, and aggregate information for New York State and various subcategories. **Information simply unavailable anywhere else.**

And at $95 for NYSBA members, $295 for non-members, plus tax, this **steep member discount may pay for NYSBA membership all by itself.**

Make the most of your practice. Order the *2004 Desktop Reference on the Economics of Law Practice in New York State* today.

To Order:

Call toll free 800-582-2452, go online to www.nysba.org/econsurvey or fax us at 518-487-5618.

Source Code: LPM1002 Product #LPMBK

NYSBA

CONTINUED FROM PAGE 36

judge should never acknowledge that a law clerk or judicial intern (often called "extern") wrote the opinion. Doing so makes it appear that someone other than the judge decided the case. Reversal and remand to a different judge might be warranted if a judge credits a law clerk's "preparation of this opinion."[36] If a federal judge thanks an intern for assisting in writing an opinion, the West Group will print that appreciation.[37] So will the *New York Law Journal* if a New York State judge does so. A Westlaw check disclosed a surprising 146 published opinions (82 in the First Department, 64 in the Second Department) from 1990 to March 2004, in which the *Law Journal* printed acknowledgments to student interns from New York State judges.

Judicial interns, especially those who receive law-school academic credit for their work, are now accepted features in the courthouse.[38] Judges who thank their interns do so out of kindness to students who, mostly without pay, make a significant contribution. What is kind to the interns, however, is unkind to the litigants and the public. This is not to suggest that judges not use interns to help with opinions. To the contrary, judges and their law clerks improve legal education and sometimes their opinions when they assign research, writing, and editing tasks to interns, so long as the judge and the law clerk monitor all student work closely. But crediting the intern makes it appear that the court delegated its decision-making obligations to an unaccountable law student.

A higher authority forbids what the *New York Law Journal* and the West Group permit. For the past decade, the New York State Law Reporting Bureau has put into effect a Court of Appeals policy in which the State Reporter will not print judicial acknowledgments to law clerks or interns. This policy suggests that judges who want to thank their clerks and interns reconsider their impulse, however well meaning. Before the Court announced that policy, the New York State Official Reports occasionally printed irrelevant acknowledgments that law students provided "research assistance" "in the preparation of this opinion."[39]

Law-Clerk Cheating

Heaven forbid, a law clerk must never slip language or references past a judge. That happened in *United States v. Abner*,[40] which contains multiple allusions to the songs and albums of the Talking Heads rock band. The law clerk included these references to get free Talking Heads concert tickets. To no one's dismay, law clerks have been fired for including non-judge-approved writing in judicial opinions. Judge Jerry Buchmeyer[41] tells the story of the soon-to-be-dismissed law clerk in *State v. Lewis*.[42] Without consulting a judge, the clerk added a lawyer's lament, written as a fictional "reporter," to the Kansas official reports:

> Statement of Case, by Reporter
> This defendant, while at large,
> Was arrested on a charge
> Of burglarious intent,
> And direct to jail he went.
> But he somehow felt misused,
> And through prison walls he oozed,
> And in some unheard-of shape
> He effected his escape.
>
> * * *
>
> LEWIS, tried for this last act,
> makes a special plea of fact:
> "Wrongly did they me arrest,
> As my trial did attest,
> And while rightfully at large,
> Taken on a wrongful charge.
> I took back from them what they
> From me wrongly took away."
>
> * * *
>
> Opinion of the Court. PER CURIAM:
> We — don't — make — law. We are bound
> To interpret it as found.
> The defendant broke away;
> When arrested, he should stay.
> This appeal can't be maintained,
> For the record does not show
> Error in the court below,
> And we nothing can infer.
> Let the judgment be sustained —
> All the justices concur.

Nor may a judge use an outside expert — as opposed to an intern, law clerk, special master, or referee — to assist in opinion writing.[43] As the New York Court of Appeals wrote in *In re Fuchsberg*, "law clerks often contribute substantially to the preparation of opinions. [But] [w]e cannot accept respondent's explanation that he looked upon the law professors he consulted as 'ad hoc' law clerks."[44]

First Amendment Rights

May a law clerk refuse to draft an opinion? In *Sheppard v. Beerman*, a law clerk to a Supreme Court, Queens County, justice declined to draft an opinion that, the clerk claimed, would result in "railroading" a defendant. The justice fired the clerk in December 1990 after the clerk called him a "son of a bitch" and "corrupt." The clerk sued the justice under 42 U.S.C. § 1983. District Judge I. Leo Glasser of the Eastern District of New York twice granted the justice's motions to dismiss the complaint. Citing the law clerk's free-speech rights, however, the Court of Appeals for the Second Circuit

reversed — twice.[45] From a unanimous *Sheppard II*: "[T]he relationship between a judge and clerk is one based upon trust and faith. . . . But the First Amendment protects the eloquent and insolent alike."[46]

In early 2002, Judge Glasser granted the now-retired justice's summary-judgment motion, which the justice filed after he and others, including his two children, were subjected to 31 depositions.[47] In early 2003, in *Sheppard III*, the Second Circuit affirmed, "[g]iven the explosive exchange between Beerman and Sheppard and Sheppard's inability to produce any evidence supporting his claim of improper motive,"[48] and the Supreme Court denied certiorari in late 2003.[49] The 13-year saga thus ended on a First Amendment analysis, but not on whether a law clerk may refuse to write an opinion.

Advice to Law Clerks and Practitioners

Law clerks have neither the judge's commission nor the judge's experience. Some clerks tend to overwrite; they include the irrelevant because they are unsure about what is important and because they might not have been at oral argument.

Practitioners can overcome a possible obstacle by making it easy for clerks to read and understand their papers — thus making it easy for the court to rule for them. Getting to the point quickly, applying law to fact succinctly, attaching photocopies of key precedents and statutes (for trial judges), making clear what relief is requested, and countering the other side's points in writing as opposed to leaving them for oral argument are among the good habits practitioners should consider, not only for judges but especially for their clerks.

For judges and their clerks, communication is one answer to assuring quick and accurate decision making and opinion writing. Here is another for clerks. Law clerks, who come and go, must learn a valuable talent: how to emulate their judge's writing style. Writing is connected to personality. Personality is reflected in the tone of the writing. Personality traits and writing styles do not change easily or overnight. Judges have preferences. Law clerks should learn them. Learning them maintains consistency, lets the judge adjudicate rather than edit for style, and, no small benefit, improves the law clerk's writing. The best ways to learn the judge's writing style is to study the judge's opinions and to profit in future cases from the judge's edits to current drafts.

Law clerks do not only write, whether opinions or jury charges. They also work with the public, whether it is scheduling cases or settling them. Law clerks are their judges' alter egos. Clerks are imbued with the sense that they are more than their judges' lawyers. As the Fifth Circuit put it, "Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be."[50] Clerks expect litigants and lawyers to deal with them as if they are dealing with the judge. Practitioners should realize that treating a member of the court family disrespectfully will not advance their cause. And clerks, who are subject to many of the same ethical rules as judges,[51] must treat litigants and lawyers with the respect, competence, and intelligence with which the judge with the mandate must treat all.

---

1. Pronounced "puny."
2. *See* 24 Stat. 254 (1886).
3. To study the history and current role of law clerks in America, see Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 Vand. L. Rev. 1125 (1973); George D. Braden, *The Value of Law Clerks*, 24 Miss. L.J. 295 (1953); Heather Bupp-Habuda, *Law Clerk's Ethical Boundaries*, 38 Fed. B. News & J. 213 (1991); Norman Dorsen, *Law Clerks in Appellate Courts in the United States*, 26 Modern L. Rev. 265 (1963); John G. Kester, *The Law Clerk Explosion*, 9 Litig. 20 (1983); Cornelius J. Moynihan, Jr., *Ghostwriters in the Courts*, 17 Litig. 37 (1991); John B. Oakley & Robert S. Thompson, Law Clerks and the Judicial Process: Perceptions of the Qualities and Functions of Law Clerks in American Courts (1980); Richard A. Posner, The Federal Courts: Crisis and Reform 102–119 (1985); Nadine J. Wichern, Comment, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DePaul L. Rev. 621 (1999); Eugene A. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 Vand. L. Rev. 1179 (1973). A book-length volume about law clerks by 15 prominent judges, academics, politicians, and journalists is found in *Law Clerks: The Transformation of the Judiciary*, 3 Long Term View: A Journal of Informed Opinion (1995).
4. J. Daniel Mahoney, *Law Clerks: For Better or Worse*, 54 Brooklyn L. Rev. 321, 325–26 (1988).
5. *Hall v. Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983) (Rubin, J.).
6. Jefferson Lankford, *Judicial Law Clerks: The Appellate Judge's "Write" Hand*, Arizona Att'y 19, 21 (July 1995).
7. D. Robert White, The Official Lawyer's Handbook 71 (1983).
8. Robert Braucher, *Choosing Law Clerks in Massachusetts*, 26 Vand. L. Rev. 1197, 1199 (1973).
9. This story is told best in Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 Or. L. Rev. 299, 310 (1961), and John B. Owens, *The Clerk, The Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal of 1919*, 95 Nw. U. L. Rev. 271 (2000).
10. 251 U.S. 1 (1919).
11. *See Embry v. United States*, 257 U.S. 655 (1921).
12. David J. Garrow, *"The Lowest Form of Animal Life"? Supreme Court Clerks and Supreme Court History*, 84 Cornell L. Rev. 855, 849 n.27 (1999) (book review).
13. *See* Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. Pa. L. Rev. 1230 (1981).
14. For an illuminating look at the extent to which former Supreme Court law clerks have disclosed confidences, see Garrow, *supra* note 12 (reviewing Edward Lazarus, Closed Chambers: The First Eyewitness Account of the

Epic Struggles Inside the Supreme Court (1998), and Dennis J. Hutchinson, The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White (1998) (footnotes in title omitted)).

15. Garrow, *supra* note 12, at 893.
16. *See* William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. News & World Rep., Dec. 13, 1957, at 74.
17. *Id.*
18. *See* William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-Five Years Later*, 44 Albany L. Rev. 533 (1980).
19. *The New York Court of Appeals: A Practical Perspective*, 34 St. John's L. Rev. 197 (1980).
20. Richard A. Posner, Cardozo: A Study in Reputation 148 (1990).
21. Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 Brooklyn L. Rev. 685, 697 (2001).
22. Abby F. Rudzin & Lisa Greenfield, *Ten Brief-Writing Don'ts — The Judicial Clerk's Perspective*, 85 Ill. B.J. 285, 285 (1997).
23. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1384 (1995).
24. For advice on writing a bench memorandum, see Alvin B. Rubin & Laura B. Bartell, Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges 143–44 (Fed. Jud. Ctr. rev. ed. 1989); Richard B. Klein, *Opinion Writing Assistance Involving Law Clerks: What I Tell Them*, 34 Judges' J. 33 (1995).
25. Daniel J. Meador, Appellate Courts: Staff and Process in the Crisis of Volume 49 (1974).
26. Wald, *supra* note 23, at 1384.
27. *See* David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 Geo J. Legal Eth. 509, 555 (2001) ("Judges should write their own published opinions. They should not have law clerks or anyone else do the writing for them.").
28. *See, e.g.*, Alex Kozinski, *Making the Case for Law Clerks*, 3 The Long Term View: A Journal of Informed Opinion 55 (1995).
29. Douglas K. Norman, *Legal Staff and the Dynamics of Appellate Decision Making*, 84 Judicature 175, 175 (2001). To avoid the dangers of allowing pool, or central staff, attorneys to produce "no judge" opinions, see an article by (later recalled) California Chief Justice Rose E. Bird, *The Hidden Judiciary*, 17 Judges' J. 4 (1978). To make effective use of law clerks in opinion writing while preventing bureaucratic, or committee, writing, see a piece by Second Circuit Judge J. Daniel Mahoney, *supra* note 4, and another by an Arkansas Supreme Court justice, George Rose Smith, *A Primer of Opinion Writing for Law Clerks*, 26 Vand. L. Rev. 1203 (1973).
30. Federal Judicial Center, Judicial Writing Manual 11 (1991).
31. William Domnarski, In the Opinion of the Court x (1996).
32. Bernard E. Witkin, Manual on Appellate Court Opinions § 10, at 16 (1977).
33. Jack Leavitt, *The Yearly Two Foot Shelf: Suggestions for Changing Our Reviewing Court Procedures*, 4 Pacific L.J. 1, 17 (1973).
34. Ruggero J. Aldisert, *Duties of Law Clerks*, 26 Vand. L. Rev. 1251, 1256–57 (1973).
35. *See Conroy v. Aniskoff*, 507 U.S. 511, 527–28 (1993) (Scalia, J., concurring) (noting that legislative history "examined and quoted" was "unearthed by a hapless law clerk to whom I assigned the task"); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 318 n.5 (1977) (Stevens, J., dissenting) (noting his law clerk's statistical analysis); *Noto v. United States*, 76 S. Ct. 255, 258 n.4 (1955) (Harlan, J.) (noting that data came from the record "or from the research of my Law Clerk").
36. *See, e.g.*, *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988) (Gibson, J.) (mandating recusal of federal district judge who credited his law clerk in a footnote), *cert. denied*, 490 U.S. 1066 (1989).
37. *See, e.g.*, *Veras v. Strack*, 58 F. Supp. 2d 201, 201 n.1 (1999) (Baer, J.) (acknowledging student intern); *Masayesva for & o/b/o Hopi Indian Tribe v. Zah*, 816 F. Supp. 1387, 1393 n.* (D. Ariz. 1992) (Carroll, J.) (acknowledging law clerk).
38. *See generally* Gerald J. Clark, *Supervising Judicial Interns: A Primer*, 36 Suffolk U. L. Rev. 681 (2003); Rebecca A. Cochran, Judicial Externships: The Clinic Inside the Courthouse (2d ed. 1999).
39. *See In re Application of the Dist. Att'y of Queens County*, 132 Misc. 2d 506, 512 n.5, 505 N.Y.S.2d 293, 297 n.5 (Sup. Ct. Queens County 1986) (Rotker, J.); *People v. Sadacca*, 128 Misc. 2d 494, 501 n.3, 489 N.Y.S.2d 824, 830 n.3 (Sup. Ct. N.Y. County 1985) (Rothwax, J.). One reported opinion went even further: "The hard work, thorough research and scholarship of Edward Larsen, New York Law School Intern participating in the Richmond County Bar Association Summer Intern Program, is gratefully acknowledged and in large measure credited in the formation of this opinion. Mr. Larsen has the sincere thanks of this Court." *Wolkoff v. Church of St. Rita*, 132 Misc. 2d 464, 473, 505 N.Y.S.2d 327, 334 (Sup. Ct. Richmond County 1986) (Kuffner, J.).
40. 825 F.2d 835 (5th Cir. 1987) (Garza, J.).
41. *Criminal Law: The Escape*, 45 Tex. B.J. 541, 542 (Apr. 1982).
42. 19 Kan. 260 (1878).
43. *See, e.g.*, *In re Judicial Disciplinary Proceedings Against Tesmer*, 219 Wis. 2d 708, 580 N.W.2d 307 (1998) (per curiam) (reprimanding judge for having law professor write 32 opinions).
44. 43 N.Y.2d (J), (Y), 426 N.Y.S.2d 639, 648–49 (per curiam) (Opn. of Censure — Ct. on Jud. 1978).
45. *See Sheppard v. Beerman*, 822 F. Supp. 931 (E.D.N.Y. 1993), *aff'd in part & vacated in part by* 18 F.3d 147 (2d Cir.) (Altimari, J.) (*Sheppard I*), *cert. denied*, 513 U.S. 816 (1994), *on remand to & dismissed by* 911 F. Supp. 606 (E.D.N.Y. 1995), *vacated & remanded*, 94 F.3d 823 (2d Cir. 1996) (McLaughlin, J.) (*Sheppard II*).
46. 94 F.3d at 829.
47. *See Sheppard v. Beerman*, 190 F. Supp. 2d 361, 362 (E.D.N.Y. 2002), *aff'd*, 317 F.3d 351 (2d Cir. 2003).
48. *Sheppard v. Beerman*, 317 F.3d 351, 357 (2d Cir. 2003).
49. *Sheppard v. Beerman*, 124 S. Ct. 135 (2003).
50. *Hall*, 695 F.2d at 179.
51. *See generally* John Paul Jones, *Some Ethical Considerations for Judicial Clerks*, 4 Geo. J. Legal Ethics 771 (1991).

You're a New York State Bar Association member.

You recognize the relevance of NYSBA membership.

For that we say, *thank you.*

The NYSBA leadership and staff extend thanks to our more than 72,000 members — attorneys, judges and law students alike — for their membership support in 2004.

Your commitment as members has made NYSBA the largest voluntary state bar association in the country. You keep us vibrant and help make us a strong, effective voice for the profession.

Kenneth G. Standard
President

NYSBA

Patricia K. Bucklin
Executive Director

Early Review by Medical Experts Offers Opportunity to Develop Theory of the Case More Efficiently

By Steven Wilkins

Additional requirements and distinctions set medical malpractice suits apart from other personal injury claims,[1] but one similarity between med-mal cases and other tort actions is frequently overlooked: a good case is built on early and thorough investigative efforts to discern the departures from accepted conduct.

Too often, general practitioners who also do medical malpractice cases postpone investigating the exact details of the medically negligent act until the pretrial period, when a testifying expert signs on.

A medical malpractice case typically begins when a potential client contacts an attorney and relates an experience with a medical caregiver[2] or hospital that turned out poorly. Although there is a natural tendency to evaluate the potential of the case by focusing on the amount of damages, this is a classic example of backwards thinking.

The decision to proceed with litigation is more efficiently made when it is based on facts in the medical record that can unequivocally substantiate the existence of negligent conduct. An experienced malpractice attorney will always put the chart first.

Classically, in order to comply with CPLR 3012(a),[3] a licensed caregiver should review the facts of the case and agree that there is a reasonable basis to commence an action, even before a complaint is filed. In practice, however, many firms rely at this point on an informal expert review. Typically, an office staff person or a paralegal prepares a summary of events, which is then transmitted or conveyed to the reviewer without a copy of the primary records. With this approach, the initial reviewer's opinion is unfortunately and clearly based only upon hearsay.

Importance of the Initial Review

A professional who is knowledgeable in the relevant field, and not a nurse or paralegal, should perform the initial review. Cases proceed more smoothly when the initial review is thorough, compelling and performed by such a caregiver. Ideally, the reviewer will have wide experience and no allegiances. Money spent on this kind of a thorough expert review at the outset of a case avoids the embarrassment and anxiety of finding out too late that the theory of the case is suspect or that the case is not as strong as was originally thought. The non-professional reviewer may not see the full scope of the issues to be considered.

Why not use the eventual testifying expert to do the review? Being able to identify what kind of expert will eventually be needed is unrealistic. Testifying often requires specialists whose rates for such an initial review are prohibitive, even in this high-stakes game. It is difficult to assess availability of the testifying expert when the time from initial review until trial can be years. What's more, many specialist reviewers focus only on their own backyard. Hiring a cardiologist to review a case might lead to disregarding the potentially negligent actions of the gastroenterologist involved. Other specialist reviewers may tend to justify the actions of their specialty group peers and place the blame on other specialists in other fields. Only later, when experts in these other fields are hired to review, at an additional expense, is misdirection suspected.

If the eventual testifying expert is ill-equipped to do the initial valuation of a chart and identify the best theory, who should be used for this initial review? Ideally,

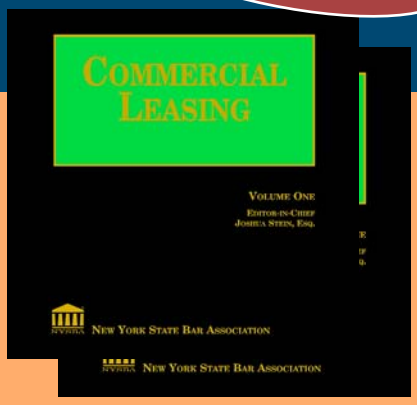
Continued on page 44

Steven Wilkins (medmalattorneyservice@nysbar.com) is a physician and lawyer who has been reviewing medical records for several attorney groups in the Greater New York area for the last eight years. He was a general and critical care surgeon for 10 years before graduating from Hofstra University School of Law. He graduated from Massachusetts Institute of Technology and received his medical degree from State University of New York at Downstate Medical College, where he was president of his class.

THE NEW YORK STATE BAR ASSOCIATION ANNOUNCES A MAJOR NEW PUBLICATION

Commercial Leasing

New Release



Your clients' existing lease will expire soon, or they're opening a new location or consolidating some functions. What if the construction goes over budget or takes too long? What if your clients can't move out before their old lease expires? Would your clients prefer flexibility or certainty in their lease?

The owner of a building faces an entirely different set of questions: How to get the right kinds of tenants into the building? How to assure that tenants pay the highest possible rent? Would the owner trade some rent revenue for greater tenant stability?

Commercial Leasing discusses all of these issues. This two-volume, 1,344-page reference is written and edited by leading experts in the field. It examines in detail the issues that arise in lease negotiations.

Commercial Leasing features numerous forms and exhibits, including model leases, making this an especially valuable reference.

- **Editor-in-Chief, Joshua Stein, Esq.**
- **Written from both landlord's and tenant's perspective**
- **Numerous checklists, model leases, forms, and contracts**
- **Covers everything from the basics to the "hidden" issues that can arise**

Product Info and Prices

Book Price*
2004 • 1,344 pp., loose-leaf, 2 volumes • PN: 4041

NYSBA Members	$130
Non-Members	$165

*Price includes shipping and handling

Expand your professional knowledge

NEW YORK STATE BAR ASSOCIATION
1.800.582.2452 www.nysba.org/pubs
Mention Code: CL2203

NYSBA

Checklist for Early Involvement By an Evaluating Physician

1. Can the patient intake be performed by a physician affiliated with your office?
2. Is the expert competent in the field of medicine to be reviewed?
3. Has a complete set of the medical records been acquired?
4. Once the records are obtained in the office, do not prepare any documents to assist the expert in determining the chronology of events. These documents could alter the theory of the case identified by the expert and might not be accurate. Instead, just send copies of the records for evaluation.
5. Make sure any additional records identified as necessary by the expert are procured.
6. Will the expert produce a written report for your use?
7. Will the expert sit down with you in the office and assure that you understand the relevant medicine as well as the departures from the standard of care?
8. Can you postpone the bill of particulars until after the expert review is available? If not, are any modifications necessary?
9. Has the reviewer identified texts or pertinent journal articles that can be used to help refresh the eventual testifying expert on the pertinent standards of care?
10. Will the expert assist you in identifying and procuring experts willing to testify?

CONTINUED FROM PAGE 42

the best reviewers have wide clinical experience in a general field, like internal medicine, general surgery, or critical care. The ability to scrutinize a medical chart for potential errors is a talent borne of wide experience, and is typically contrary to the mindset of practicing specialist physicians. Further, the ability to identify the legal theory most likely to persuade a jury is the real Holy Grail, and specialist physicians do not typically involve themselves in this type of a search.

Although any intelligent, objective specialist expert can scrutinize a record to corroborate or dismiss a theory already proposed, actively searching for a potential mistake is often viewed by these medical experts as a defiance of their medical fraternity, and is therefore somehow distasteful. As a result, their searching is not performed as objectively.

Many firms use nurses to perform their initial reviews. This is an inefficient means of identifying every strong case. Nurses can competently decipher handwriting and find data sheets in the record confirming actions that were taken, but they do not always understand the underlying thought processes of the treating physician. Nuances, couched by the writer in phrases such as "pain out of proportion to the findings," may fail to alert a nurse to the significance of the fact that the writer has an underlying belief that bowel ischemia is present. The nurse reviewer may fail to understand these phrases, but even if understood, may fail to recognize their significance in the malpractice action. In the case alluded to, the only evidence that a gastroenterologist had implored a surgeon to wrongfully explore the abdomen, when an endoscopy should have first been performed, was the quoted material above. The importance of the phrase had been missed and the gastroenterologist almost escaped liability. Too often, reports by nurse reviewers are peppered with parentheses, their contents beseeching the attorney to "find out from an expert what this means."

If the attorney has access to a physician, podiatrist, or dentist willing to help injured, neglected patients and ignore the jeers of his or her peers, then the initial assessment acts as a template for the rest of the case. With the help of these enlightened medical caregivers, discovery is no longer a random search for implicating records. It becomes a focused search for the medical office records of important ancillary providers who can corroborate the proposed theory. Depositions are no longer a blind search for random contrary or conflicting statements, instead they become an opportunity to lock a defending caregiver into an explanation before he or she has had the opportunity to develop an alternate theory justifying the actions taken. The objective should be to find an enlightened physician who recognizes that helping a plaintiff's attorney is akin to helping a patient. To palliate the effects of iatrogenic injuries, fighting disease sometimes means fighting physicians. Only physicians willing to buck the establishment are inclined to take this step.

Assessing the Case

Provided you are fortunate enough to find such an ideal case reviewer, what are the steps you should expect the reviewer to take in helping an attorney assess the case? If possible, the reviewer should be involved even as early as the initial patient intake. This helps show the potential client that the attorney is serious about reviewing the events leading to the injury, and helps dispel a plaintiff's notion that a bad result neces-

sarily equates with malpractice. As a show of power, it also contributes to a client's respect for the firm handling the case. An attorney who introduces the reviewing doctor to the potential client gains immediate credibility.

Once the initial meeting of the attorney, client and medical reviewer takes place, a decision to obtain the records follows whenever a potentially negligent action is suspected. When a potential client's story fails to pass the initial evaluation of either the attorney or reviewer, it is unlikely that a case exists. Bad and frivolous cases are nipped in the bud at minimal expense.

When a course of conduct is puzzling, a professional reviewer may approach experts in the field or research the relevant issue in the medical library of a nearby university or hospital.

Careful evaluation of medical records by a professional reviewer requires ignoring any chronologies prepared by office staff. Sometimes, innocuous entries in the record may provide the most compelling cases. In one recent example, a woman suffered a complication of her pelvic surgery. Although the complication (ARDS) was a known risk and could not have been predicted while she was in the intensive care unit, seven days after hospital admission an alcohol level was ordered after a phone call by a physician. The suspicious circumstances surrounding this order led to the theory that a hospital cover-up of an inadvertent administration of intravenous alcohol had occurred. There was no way the patient could have drunk alcohol while on a ventilator, paralyzed in the ICU. The effects of any alcohol that could have been swallowed before hospital admission were long gone, especially because the patient had been sober for four years. Predictably, the ordering of the alcohol level was never mentioned in the initial paralegal's review. The alleged injury of postoperative cognitive dysfunction could just as easily have been attributed to the alcohol as to the ARDS.[4]

After preparing a chronology, each action of every potential defendant must be analyzed. When a course of conduct is puzzling, a professional reviewer may approach experts in the field or research the relevant issue in the medical library of a nearby university or hospital. These resources are not as readily available to those outside the medical field. This research effort also allows the reviewer to develop relationships with experts who later may become testifying experts on the case.

When the assessment is completed, a written analysis should be prepared. Although many firms prefer to tape record the expert's findings and avoid writing anything on grounds that it is open to discovery by the defendants, any material so prepared is probably protected by the attorney privilege.[5] The report should specifically explain the negligent action and the causative link to the various injuries suffered. After the attorney has had an opportunity to read the report, the reviewer should present it in person, providing the opportunity for the attorney and any associates to fully understand what happened medically and to ask questions. This meeting of the minds assures that pleadings are then artfully drawn. It also makes it more likely that the explanations given by the medical caregiver will be easily understood by laypersons. Complicated medicine makes for difficult jury cases.

In sum, by involving a professional reviewer in the early decision making, by using a reviewer with a wide experience in the pertinent field (but not one whose experience is only in that field), and by planning out the exact details of the negligent behavior to be charged, a plaintiff's medical malpractice attorney maximizes the chance of victory and avoids the anxiety-provoking last-minute change in strategy.

---

1. Some of these distinctions include a different statute of limitations, as codified in CPLR 214(a), tactical decisions regarding the composition of the bill of particulars, expert disclosure rules, codified in CPLR 3101(d), and statutory limits on contingency fees. In fact, the index to the CPLR has five columns of distinctions under the heading, "Medical and Dental Malpractice."
2. For purposes of readability, "caregiver" or "reviewer" is used throughout this article to identify doctors, dentists and podiatrists.
3. CPLR 3012(a)(1) states that a certificate accompanying the complaint must be executed by the attorney for the plaintiff and must state that at least one medical caregiver in the respective field of medicine, dentistry, or podiatrics has been consulted, is reasonably knowledgeable regarding the relevant issues and that, based on that review, the attorney believes the commencement of the action is reasonable.
4. This case has not yet settled and is still being litigated at the time of publication.
5. Because initial reviewers are not testifying experts, their reports are not governed by CPLR 3101(d). CPLR 3101(a) is inapplicable because there is a limitation on the broad discovery presumption in cases where the material is attorney work product. *Hoenig v. Westphal*, 52 N.Y.2d 605, 439 N.Y.S.2d 831 (1981). CPLR 3121 allows independent medical examination material to be shared, but as long as the report is based on the chart and not on a medical examination of the patient, this section is inapplicable.

NYSBACLE

Partial Fall 2004 Seminar Schedule

(Subject to Change)

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

PROGRAM	DATE	LOCATION
Henry Miller — The Trial	September 10 October 29 November 5	New York City Uniondale, LI Westchester
Bridging-the-Gap: Intellectual Property	September 21 September 28 October 19 October 26 October 27 November 3	Uniondale, LI Rochester New York City Buffalo Albany Syracuse
† Ninth Annual NYS and City Tax Institute	September 22–23	New York City
Basic Surrogate's Court Practice	September 24	New York City
† Hot Topics in Real Property Law and Practice (video replay)	September 29	Jamestown
Hot Topics in Landlord/Tenant Practice	October 1	New York City
Suing and Defending Municipalities	October 1 October 28 November 3 November 10 November 19 December 3	Rochester New York City Albany Buffalo Westchester Uniondale, LI
† Ethics and Professionalism (video replay)	October 1	Canton
Practical Skills: Basic Matrimonial Practice	October 5	Albany, Buffalo, Melville, LI, New York City, Rochester, Syracuse, Westchester
Gathering and Presenting Evidence in the 21st Century	October 6 October 29 November 3	Uniondale, LI New York City Rochester
Residential Mortgages	October 7 October 12 October 20 October 29 November 4	Albany New York City Uniondale, LI Buffalo Westchester
Microsoft Word for the Law Office with Leigh Webber	October 14 October 15 October 28 October 29	New York City Westchester Buffalo Syracuse
Health Care Provider Transactions: Practical Issues and Skills	October 15 October 28 November 5	New York City Albany Rochester
Article 9 of the UCC	October 20	New York City
Advice From More Experts: More Successful Strategies for Winning Commercial Cases in Federal Courts	October 22	New York City
Products Liability: Great Cases Revisited	October 22 November 5	Albany, Uniondale, LI Buffalo, New York City
Update 2004 (live sessions)	October 22 November 5	Syracuse New York City

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

To register

or for more information call toll free **1-800-582-2452**

In Albany and surrounding areas dial (518) 463-3724 • Or fax your request to (518) 487-5618

http://www.nysba.org/CLE/fall2004/

(Note: As a NYSBA member, you'll receive a substantial discount)

† Update 2004 (video replays)	November 4	Albany
	November 10	Plattsburgh, Saratoga, Utica
	November 18	Ithaca
	November 19	Buffalo, Jamestown, Watertown
	November 29	Westchester
	November 30	Binghamton, Uniondale, LI
	December 1	Poughkeepsie
	December 3	Canton, Loch Sheldrake
	December 7	Rochester
	December 9	Suffern
Securities Arbitration: A Primer for the Practitioner	October 26	New York City
Practical Skills: Probate and the Administration of Estates	October 27	Buffalo, Melville, LI, New York City, Rochester, Syracuse
	October 29	Albany, Westchester
Matrimonial Update 2004	October 29	Syracuse
	November 5	Buffalo
	November 19	Melville, LI
	December 3	Albany
	December 10	New York City
Successful Strategies in Automobile Litigation	October 29	Rochester, Westchester
	November 5	Albany, Melville, LI
	November 19	New York City
† Second Annual Sophisticated Trusts & Estates Law Institute	November 4–5	New York City
Local Criminal Court Practice	November 4	Uniondale, LI
	November 5	New York City
	December 2	Buffalo
	December 7	Albany
Practical Skills: Forming and Advising Businesses	November 15	Albany, Buffalo, Melville, LI, New York City, Rochester, Syracuse, Westchester
Modern Discovery	November 17	Melville, LI
	November 19	Albany, Rochester
	December 3	New York City
† Advanced Elder Law	November 18	New York City, Syracuse, Uniondale, LI
	December 2	Albany
	December 3	Westchester
Ethics and Professionalism	November 4	Buffalo
	November 18	Rochester
	November 23	Westchester
	November 29	Albany, New York City
	December 2	Uniondale, LI
	December 8	Syracuse
The Sixth Annual Institute on Public Utility Law	November 19	Albany
The Heart of the Case with James McElhaney	December 1	Rochester
	December 2	New York City
Fundamentals of Banking Law	December 1	New York City
Practical Skills: Basic Workers' Compensation Law Practice	December 1	Buffalo, New York City, Syracuse, Westchester
	December 2	Albany
† Advanced Real Estate Practice	December 3	New York City

Attorney Professionalism Forum

To the Forum:

I recently had an unsettling experience in a litigated matter, in which I felt that my client was interfering with the exercise of my professional judgment.

I represent a corporate client in a highly technical and specialized area of the law. We were served with a discovery request that called for the production of numerous confidential documents. Procedural principles unique to this practice area require the court to conduct a tedious, lengthy *in camera* inspection of each individual document prior to its production. Technically, such a hearing is scheduled upon a motion to compel discovery or on a motion for a protective order. As a practical matter, however, there is no legal or factual basis for opposing the former or making the latter, because no relief will be granted to either side without the hearing. In fact, research and experience has taught me that such hearings are invariably ordered in every case, and that no judge has ever failed to do so.

Reaching the conclusion that a hearing to review the confidential documents was inevitable, I consented to one without a motion being made, and because I viewed such motion practice as a mere technical formality I did not consult my client in advance. To be clear, I did not stipulate to the production or admissibility of any documents at the hearing, nor did I waive any applicable privilege. However, my client vociferously objected, and threatened to take its future business elsewhere.

While I aspire to high standards of professionalism, including the waiver of mere formalities (see EC 7-38), I am concerned that my client is trying to pull the steering wheel out of my hands. Further, I am concerned that my relationship with this client may have been irreparably damaged. Was I right in waiving unnecessary motion practice?

Sincerely,

Baffled

Dear Baffled:

You are both right and wrong.

At first blush, your unilateral decision to waive a procedural formality without consulting your client probably did not affect the merits of the case, nor did it substantively prejudice your client's rights within the meaning of the Code of Professional Responsibility. To that extent, you did nothing wrong. However, there is more to the issue than that. Indeed, your question highlights the tension between the client's right to make substantive decisions, and the exercise of a lawyer's professional judgment regarding strategy and procedure.

Under the Code of Professional Responsibility, a lawyer is obligated "to seek the lawful objectives of the client through reasonably available means permitted by law and the disciplinary rules . . ." DR 7-101(A)(1). The duty of zealous advocacy has been called "the fundamental principle of the law of lawyering."[1] Moreover, the Ethical Considerations provide that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer" (EC 7-7).

On the other hand, as pointed out by Professor Roy Simon of Hofstra University School of Law, the Code permits a lawyer "to do six unzealous things" without violating the duty of zealous representation.[2] For example, a lawyer is permitted to "exercise professional judgment to waive or fail to assert a right or position of the client," may refuse to participate in conduct the lawyer views as illegal, and may accede to reasonable requests by opposing counsel that would not prejudice the rights of the client (*see* DR 7-101(B)). The Ethical Considerations urge a lawyer to waive "procedural formalities, and similar matters which do not prejudice the rights of the client" (EC 7-38). Moreover, the Code encourages lawyers to "follow local customs of courtesy or practice," and to be courteous and respectful to adversaries and others (*see* EC 7-36, 7-37, 7-38).

In short, a lawyer is entitled to make procedural decisions "not affecting the merits of the cause or substantially prejudicing the rights of a client" (EC 7-7), but the client is entitled to make substantive decisions – preferably, with the benefit of the lawyer's advice, experience and counsel.

Your question suggests that you did not consent to the production of confi-

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.

dential documents. Rather, you did no more than to waive the formality of a pointless motion, which you had no legitimate ground to oppose (*see* DR 7-102(A)(1) [frivolous or dilatory actions taken merely to harass or injure another proscribed]), in favor of a hearing at which you presumably would vigorously advocate your client's interests. Thus, at least within the letter of the foregoing sections of the Code, you were right.

However, in the broader realm of attorney professionalism, which incorporates not only competence, good judgment and integrity, but also dedicated service to clients, you get a somewhat lower grade. The fact that you may have been within the strictures of the Code in waiving a procedural formality seems to have been of little comfort to the client, who disagreed with you about whether to waive the procedural formality of a hearing. Because the client insisted on the motion practice, and in so doing was advancing an objective that was neither illegal nor prohibited by principles of substantive law, you probably should have discussed the issue with the client before making the decision.

The Code's Ethical Considerations urge a lawyer to "exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations" (EC 7-8), and also provide that a lawyer "may urge any permissible construction of the law favorable to the client, without regard to the lawyer's professional opinion as to the likelihood that the construction will ultimately prevail" (EC 7-4). In view of these concepts, it is preferable to communicate with the client about procedural matters, even concerning decisions that appear to fall within the lawyer's professional judgment.

Once your client is convinced that he or she has been included in discussions of even procedural questions, that client may ultimately decide that your judgment can be trusted and that regular contact on such subjects is no longer necessary. That would leave the steering wheel in your hands when procedural issues arise, which is where you clearly want it to be.

The Forum, by
Barry R. Temkin
Fiedelman Garfinkel & Lesman
New York, NY

---

1. Monroe Freedman, *The Errant Fax*, Legal Times 26 (Jan. 23, 1995) (quoting Geoffrey C. Hazard, The Law of Lawyering).
2. Roy Simon, Simon's New York Code of Professional Responsibility Anno. (2003) at 700.

LETTERS TO THE FORUM:

We received the following reader response to the June question and answer, "Wondering About a Wise Guy":

To the Forum:

I read with interest the letter printed in the June 2004 *Journal* concerning the *Sopranos* episode wherein a matrimonial attorney told Carmella Soprano that he could not represent her because he had previously met with Tony about a possible divorce.

Let's go one step further. Let's assume that Tony "poisoned" a number of specialists in the field and Carmella was therefore deprived of her choice of competent counsel, and let's further assume that one or more of the "poisoned" counsel were not part of a scheme or plot with Tony. How can they free themselves from the constraints of disqualification and offer counsel to those seeking legal services within EC 2-1, 2-26, 2-31 and 2-33?

I can think of (1) seek an opinion from the appropriate Bar Association Committee, (2) a Court order or (3) apply an equitable remedy – *i.e.*, "take a chance" and let the opponent move to disqualify.

Any guidance you can offer will be helpful to those in this situation.

Very truly yours,
Gerald Goldstein
Davidoff Malito & Hutcher LLP
New York, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am General Counsel to a major University. A former graduate student (I shall call her Ms. Fortune), who was academically dismissed from the science program in which she was enrolled, has initiated a *pro se* lawsuit. In a rambling and verbose complaint, she claims a breach of contract, along with a number of other convoluted and inartfully stated causes of action. For example, Ms. Fortune claims bad academic advising, unfair grading, prejudices of various sorts, an incompetent science department generally and an unwillingness to make accommodation for a reading disability. In addition to naming the University as a defendant, she has named 14 faculty members and two administrators as individual defendants, citing various wrongs they allegedly committed against her during her academic career.

Needless to say, these persons are extremely upset at being targeted in the action, and several have demanded that the University allow them to hire private attorneys, whose fees are to be paid by the University. Not only might this result in an enormous expense for the University, but I personally would have to deal with up to 16 separate attorneys, as well as the *pro se* plaintiff herself.

We (that is, the relevant officers of the University and I) believe the complaint to be unfounded. In simple terms, Ms. Fortune did not fulfill graduate requirements and her time for doing so expired. Further, the faculty involved believed that she would not be successful, even if her time to complete the program had been extended. In short, it appears that the University has a strong defense to this suit. That, however, does not solve my immediate problem about the requests for outside counsel.

I have asked the individual defendants to postpone any decision about

CONTINUED ON PAGE 52

TAX TECHNIQUES

Specialty Retirement Plans

BY GEORGE KOZOL

Owners of family businesses and self-employed professionals can benefit greatly from specialty retirement plans. The term "specialty retirement plan" encompasses fully insured pension plans, age-weighted profit-sharing plans with contributions based on employee class, and 401(k) plans with profit-sharing features.

These plan designs, which became possible with the passage of federal tax legislation in 1996[1] and 1997,[2] are beginning to take hold in the financial services community. As accountants, tax attorneys and other financial advisors were coming to understand the retirement plan design potential offered by the '96 and '97 tax legislation, the federal government presented us with the Economic Growth and Tax Relief Reconciliation Act of 2001[3] (the "2001 Tax Act"). Many provisions of the 2001 Tax Act, which by and large first took effect in 2002, have a salutatory impact on specialty retirement plan designs.

Chart A depicts the greater tax savings and benefit levels that the 2001 Tax Act has given to fully insured plans, also known as 412(i) plans.

Chart B depicts the enhancements that the 2001 Tax Act has brought to safe harbor 401(k) plans with age-weighted profit-sharing features.

The 2001 Tax Act brought still another specialty retirement plan option – a 401(k) plan with profit-sharing features. This post-2001 Tax Act retirement plan design means that a self-employed individual or owner of a family business with modest payroll can now afford to offer a 401(k) plan rather than a SIMPLE IRA[4] or SEP[5] plan.

Chart C compares a post-2001 Tax Act 401(k) plan with a SIMPLE IRA and SEP. Clearly, an individual who would like to achieve a higher level of retirement savings over what is possible with a SIMPLE IRA or SEP can do so with a modern 401(k) plan.

The charts suggest that specialty retirement plans will soon supplant conventional IRAs, SIMPLE IRAs, SEPs and salary deferral 401(k) plans as the most effective retirement programs for many business owners and self-employed individuals.

The first two reasons are intuitive: specialty plans provide greater tax-deductible contributions for the owner or self employed, which leads to greater post-retirement income potential. The third reason for the increased popularity of specialty retirement plans is that they allow the business owner and self-employed individual to lessen the opportunity costs[6] associated with sponsoring and contributing to a retirement plan. The reduced opportunity cost potential relates to the fact that federal pension law permits the purchase of life insurance on plan participants using retirement plan funds.[7] In doing so, the business owner can use the funds that would have otherwise been devoted to insurance for myriad other business needs. A lawyer might invest in his caseload inventory. A manufacturing company could upgrade its equipment. A retail establishment might take on addition product lines, and so forth.

Life insurance is not, however, permitted in conventional IRAs, SIMPLE IRAs or SEPS.[8] Moreover, as a practical matter, life insurance is not generally offered in deferral only or deferral with employer match 401(k) plans, because the contribution levels year to year are not predictable and the amounts involved could generally not achieve a meaningful pre-retirement survivor benefit for most participants. Thus, the business owner or self-employed professional who opts for one of these plans would have to arrange for his or her life insurance using funds that could have been used for other business purposes.

The renaissance of the defined benefit plan and the emergence of age-weighted class segmented profit-sharing plans have required advisors to become reacquainted with life insurance rules pertaining to qualified plans.[9] The regulations provide that a pension plan exists primarily to provide retirement benefits but it "may also provide for the payment of incidental death benefits through insurance or otherwise."[10] The regulatory language regarding the incidental benefit rule in the context of a profit-sharing plan is more expansive. Specifically, the regulations provide that a profit-sharing plan is "primarily a plan of deferred compensation, but the amounts allocated on the account of the participant may be used to provide for him or his family incidental life or accident or health insurance."[11] The Internal Revenue Service has interpreted this language as allowing a profit-sharing plan participant to acquire second-to-die coverage on the participant and his or her spouse.[12] Thus, profit-sharing plan participants are permitted to use their profit-sharing plan funds to achieve significant estate liquidity without making current gifts.

Over the years, the Internal Revenue Service has provided objective guidance on the meaning of the word "incidental" in this context. In the case of a defined-benefit pension plan, life insurance benefits will be considered incidental if the death benefit provided does not exceed the

amount of the death benefit that would be paid if all benefits under the plan were funded by retirement income – endowment policies that have a death benefit of $1,000 for each $10 per month of life annuity promised under the plan at retirement age.[13] This test has come to be referred to as the "100 to 1 test." In the case of a profit-sharing plan, the IRS has ruled that incidental death benefit limitation allows the plan to provide whatever life insurance benefit can be achieved using less than one half the amount allocated annually to the participant's account.[14]

The nature of a profit-sharing plan is such that a much greater insurance benefit can be achieved for the owner of a closely held business or a self-employed professional by relying on the "aged money" provisions of the federal tax and labor law. These rules, which are independent of the incidental benefit rule, permit the use of profit-sharing funds to acquire unlimited amounts of insurance on the life of the participant, or for that matter on the lives of anyone in whom the participant has an insurable interest, using employer contributions that have been in the plan for at least two years.[15] In short, the business owner or self-employed professional is able to achieve all of his or her estate liquidity via a profit-sharing plan or 401(k) plan with custom profit-sharing feature.

Although the '96 and '97 tax legislation made it possible for small business owners and self-employed professionals to add insurance benefits to their retirement plans, some accountants and attorneys were reticent about the idea. The advisors were troubled that life insurance benefits provided under a retirement plan are included in the estate of the insured participant for estate tax purposes. The estate tax relief[16] provided by the 2001 Tax Act has blunted this criticism.

The increasing credit shelter amount, along with the putative perception that the 2009 credit shelter amount of $3.5 million will be extended to future years or that the federal estate tax may be repealed, promises to increase the popularity of retirement plan designs with insured pre-retirement survivor benefits. Moreover, the fact that life insurance within a qualified plan is included in the estate of a participant for tax purposes is probably of no moment for many business owners. In this regard, the business owner whose children are active in the business would do well to leave the business to the children and provide for his or her surviving spouse using

CHART A

	Pre 2001 Tax Act		Post 2001 Tax Act	
	W2 Wage	412(i)	W2 Wage	412(i)
Doctor (Age 55)	$170,000.00	173,324	$205,000.00	204,265
Nurse (Age 35)	$40,000.00	11,947	$40,000.00	11,948
Total		185,271		216,213
% to Doctor		94		95

CHART B

Pre 2001 Tax Act

	W2 Wage	Employer Contribution	Elective Deferral	Safe Harbor	Catch-Up Deferral	Total
Owner (Age 55)	$170,000.00	13,125	10,500	5,100	-	**28,725**
Employer (Age 35)	$40,000.00	-	-	1,200	-	**1,200**
% to Owner						96

Post 2001 Tax Act

	W2 Wage	Employer Contribution	Elective Deferral	Safe Harbor	Catch-Up Deferral	Total
Owner (Age 55)	$205,000.00	21,850	13000	6,150	3,000	**44,000**
Employer (Age 35)	$40,000.00	800	-	1,200	-	**2,000**
% to Owner						95.7

CHART C

(W2 wage of $100,000)

	Pre-2001 Tax Act			Post 2001 Tax Act		
	SEP	SIMPLE	Micro(k)	SEP	SIMPLE	Micro(k)
Salary Deferral	-	6,000	10,500	-	9,000	13,000
Catch-Up Deferral	-	-	-	-	1,500	3,000
Max. Employer Contr.	15,000	3,000	2,925	25,000	3,000	25,000
Total Contribution	15,000	9,000	13,425	25,000	13,500	41,000

CHART D

Estate Tax Relief

Year	Credit Shelter Amount
2000-2001	675,000
2002-2003	$1,000,000
2004-2005	$1,500,000
2006-2008	$2,000,000
2009	$3,500,000
2010	NA
2011	$1,000,000

the life insurance held in the qualified plan. The unlimited marital deduction would insulate the insurance proceeds from estate tax.

GEORGE KOZOL, a lawyer in Binghamton, N.Y., is a senior vice-president for Security Mutual Life Insurance Company of New York and a member of the Board of Directors of Security Administrators, Inc. He received his J.D. from Syracuse University and an LL.M from the University of Florida.

1. Small Business Job Protection Act of 1996, P.L. 104-188, 110 stat. 1755.
2. Taxpayer Relief Act of 1997, P.L. 105-34, 111 stat. 788.
3. P.L. 107-16, 115 stat. 38.
4. SIMPLE is the acronym for Simplified Tax Favored Retirement Plan for Small Employers, a retirement plan type authorized by Section 1421 of the Small Business Job Protection Act of 1996.
5. SEP is the acronym for Simplified Employee Pension, a retirement plan type authorized by Section 152(b), Revenue Act of 1978, P.L. 95-600, 92 stat. 2797.
6. Opportunity costs represent the benefits that a decision maker forgoes when he or she takes an action that forecloses alternative actions. In the business world the notion of opportunity costs allows the business owner to evaluate the cost and benefit of competing proposals.
7. Treas. Reg. § 1.401-1(b)(1)(i).
8. I.R.C. § 408(a)(3); Treas. Reg. § 1.408-2(b)(3).
9. *See* Finston & Gilles, 351 3rd TM Plan Qualification Pension and Profit Sharing Plans, A-9 and 10; *see also* Stephen J. Krass, The Pension Answer Book (2002 ed., Panel Publishers, N.Y.).
10. Treas. Reg. § 1.401-1(b)(1)(i).
11. Treas. Reg. § 1.401-1(b)(1)(ii).
12. Rev. Rul. 61-164, 1961-2 CB 99.
13. Rev. Rul. 61-121, 1961-2 CB 65; Rev. Rul. 68-453, 1968-2 CB 163; Rev. Rul. 74-307, 1974-2 CB 126.
14. Rev. Rul. 57-213, 1957-1 CB 157; Rev. Rul. 60-84, 1960-1 CB 159.
15. Rev. Rul. 71-295, 1971-2 CB 184.
16. I.R.C. § 2010(c), as amended by P.L. 107-16, 115 stat. 71.

ATTORNEY PROFESSIONALISM FORUM
CONTINUED FROM PAGE 49

hiring their own attorneys, to let me respond to the complaint for everyone, and to conduct the litigation alone, at least for the present. I have explained that should it appear, at any time, that the interests of an individual defendant (or defendants) are different from those of the University, I would so advise that person or persons, who would then be free to hire individual counsel. I also told them that whether the University would cover the cost of outside counsel would be determined on the facts as they emerged during the litigation.

My question: Is this a fair, logical, fiscally responsible and ethical way to handle the requests for individual representation?

Thanking you in advance for your reply, I remain,

Fiscally and Ethically Concerned

Questions, comments, alternate views? Contact us at journal@nysba.org.

Language Tips

By Gertrude Block

Question: I need some help with my "assist" and some assist with my "help." My colleagues and I differ somewhat on how to write the sentences in the following paragraphs and I am unclear how much the correct answer is driven by idiomatic usage as opposed to formal rules of grammar.

Answer: Attorney Jeremy A.K. Zeliger, of Cohoes, N.Y., provided two illustrations of his question. The first was the sentence, "Mediators help parties (communicate/to communicate) more effectively." His question, should the word *to* be deleted? The answer is yes. The word *to*, although not ungrammatical, is unnecessary and redundant.

That part of his question was easy. The next was not so easy: Are the verbs *help* and *assist* interchangeable? The illustrative sentence he submitted was, "The goal of the program is to assist employees to resolve conflicts at the earliest stage." He added that he thought *help* would be better in this sentence than *assist*, though he didn't know why. And does one assist another *with* or *to* something?

Both the questioner and I prefer *help* in that sentence, perhaps because using a one-syllable verb instead of a two-syllable verb and avoiding the word *to* ("To help employees resolve conflicts") makes the construction briefer and more direct.

The next question was: When we use *assist* do we *assist with* or *assist to*? Dictionaries were of little help with the answer. The *American Heritage Dictionary of the English Language (Fourth Edition, 2000)* defines *assist* as "to give help or support to, especially as a subordinate or supplement." That definition indicates a slight distinction in the meaning of the two verbs. The preposition *with* seems to connote help that does not result in finality. "My father assisted me with my homework." His assistance did not finish the job. But the preposition *in* does seem to indicate a conclusion to the action: "He assisted me in getting into my car."

Question: Where do I put the question mark in the following sentence, "Will you be attending the Retreat; let me know so I can arrange to meet with you." The person who sent the question added, "Yes, I know. I could make two sentences or re-organize the ideas, but let's not fight the hypo."

Answer: I'd like to oblige, but English sentence structure forbids. You can't insert a question mark anywhere in the quoted sentence, so you have to make two sentences out of the one you submitted. "Will you be attending the Retreat? Let me know so I can arrange to meet with you."

The same reader had a question about the punctuation of possessive nouns, as in the following sentence: "It is in the U.S.'s interest" or "It is in the U.S.' interest."

The way you pronounce the word determines the answer. If you pronounce the *-'s* when you say the word, add *-'s* when you write the word. Some examples are, "The witness's testimony," "Congress's actions, "my boss's approval."

If you don't pronounce the *-s*, don't add it when you write the word. Some examples are, "Moses' commandments," "Socrates' death," "My thesis' conclusion."

If any of these constructions seem awkward, switch to the periphrastic possessive. For example, instead of "My thesis' conclusion," say, "The conclusion of my thesis." If you are a native speaker, your ear will guide your punctuation. Your ear will also act as a guide in the punctuation of plural nouns ending in *-s*: "The Joneses' family reunion"; "the four agencies' agreements."

As for singular compound nouns, add the *-'s* to the last noun: "my mother-in-law's sister"; "the secretary-treasurer's minutes." When the compound is plural, add the -'s after forming the plural: "my brothers-in-law's requests"; "the attorneys general's convention." If the resulting construction sounds awkward, use the periphrastic possessive: "the requests of my brothers-in-law"; "the convention of the attorneys general."

For abbreviations, add *-'s* to the singular form: "PBS's documentary"; "P.J.'s opinion"; but to plural abbreviations add just the apostrophe: "The M.D.s' study"; "the J.D.s' meeting."

The possessive forms of the personal pronouns and of the relative pronoun *who* are easy to remember. They need no punctuation: "*his, hers, its, ours, yours, theirs;* and *whose.* But indefinite pronouns: *somebody's, anybody's, everybody's, someone's, anyone's,* and *no one's* do require apostrophes, as shown.

After this long discussion, you may agree with Oliver Goldsmith, who wrote, in *She Stoops to Conquer*:

> Let schoolmasters puzzle their brain,
>
> With grammar, and nonsense, and learning;
>
> Good liquor, I stoutly maintain,
>
> Gives genius a better discerning.

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).

Membership Totals

New Regular Members
1/1/04 - 7/2/04 _____4,828

New Law Student Members
1/1/04 - 7/2/04 _____677

Total Regular Members as of
7/2/04 _____61,942

Total Law Student Members as of 7/2/04_____3,338

Total Membership as of
7/2/04 _____65,280

New Members Welcomed

FIRST DISTRICT

Amy Elizabeth Abbazia
Candice Leigh Ackermann
Kwadwo Addo-Prempeh
Robert Brandon Aebersold
Alexis Agathocleous
Brian Mawuli Agboh
Melissa Alegre
Anselmo A. Alegria
John Edward Alessi
Eric Fletcher Allendorf
David B. Anziska
Melissa Tamiko Aoyagi
Scott T. Arakawa
Alyssa Leigh Arnold
Lynette Dawn Ashby
Eric Scott Askanase
Mischa Auerbach-Ziogas
David Christopher Austin
Nebiat Zemicael Baarez
Daniel Oren Backer
Eunhae Bae
Joseph Barbella
Jenna Barrows
Emilie Maude Baser
Gustavo Bastidas
John Alexander Bates
Jorge Batlle
John U. Bauco
Jessie F. Beeber
Frederique Beky
Alissa Jennifer Belkin
Erica Beth Bellarosa
Alexander David Benjamin
John Jacques Benson
Peter D. Bernstein
Albert Berry
Jennifer Lynn Bianrosa
Amy L. Blackman
Christopher Adam Blackman
Sean Gregory Blackman
Brian Patrick Blake
Vivian Michelle Blanco
Jason G. Blechman
Joshua Demetrius Bloodworth
Jill Heather Blumberg
Vamsikrishna Bonthala
Ryan Whitcomb Borho
Melisa R. Boross
Michael Scott Bosworth
Michael A. Bottar
Jana Lee Bozelko
Rachel Lomax Braunstein
Felix Bronstein
Terryl L. Brown Clemons
Christopher M. Bruckmann
Nicholas Albert Brunero
Richard Matthew Budd
James Andrew Bulger
Jennifer Helen Burdman
Michael Harlan Burger
Adam Daniel Burk
Michael S. Burling
Jennifer L. Burns
Tamara S. Burtman
Manny Joseph Caixeiro
Dennise A. Calderon-Barrera
Christine Lopez Calip
Gordon Nyman Cameron
Klaus Werner Cannive
Jeremy Brad Cantor
Cira Veronica Caroscio
Matthew Stephen Carrico
Anthony J. Casey
Carlotta Cassidy-Young
Thomas Nicholas Cassino
Gregory Patrick Cavanagh
Chelsea Helene Chaffee
Amoy W. Chambers
Rebecca Grace Chang
Regina Chang
Oliver Gottfried Chase
Lilach Chemtob
Caroline K. Cheng
Howard Cheng
Jill Deena Chesler
Grace Yi-tyng Chiang
Govind Mayilvahanan Chirayilparambu
Jonathan Andrew Choa
Mira Suh-hee Choi
Stuart B. Cholewa
Carter Kam Fong Chow
Glynna K. Christian
David L. Chu
Alice Ming Chung
Sang Hee Chung
Paul Andrew Clewell
Lisa Marjorie Coar
Amanda Leigh Cohen
Craig M. Cohen
Heather Michelle Cohen
Jenny Faye Cohen
Matthew Byron Colangelo
Simone R. Coley
Carolyn Lesley Conner
Clinton Lee Conner
Tiffany Britton Constantin
Christopher Gillen Conway
Peggy Anne Cooke
Felise Galit Cooper
Kevin Robert Corbett
Joseph Nicholas Cordaro
Jessica Cordova
Bryan David Corlett
Edward John Costello
Therese Craparo
Marie Angela Cressy
Dominick Ronald Cromartie
David P. Crowley
Jessie Ann Crowley
Alan S. Dale
Samer Hanna Danfoura
Michael Anh Dang
Joseph F. Daniels
Margaret Eliza Daum
Priti K. Dave
Qubilah Attallah Davis
Andrea De Pieri
Ryan Kirk Deford
Paul John Degaetano
Amanda Doreen Dekki
Bindi R. Dharia
Matthew Lawrence Di Risio
Paul Diamond
John Mark Dibari
Steven Sheppard Dicesare
Sherry Jessica Didia
Gina Marie Digaudio
Anthony Disalvo
Jeffrey Lee Dodes
Jennifer Lynne Dohan
Edgar Chan Domingo
Dee Ann Dorsey
Marina Drapey
Eliezer Drew
Denis Patrick Duffey
Paul Christopher Dunn
Seth Andrew Dymond
Gail Miriam Eckstein
Michael Andrew Elliott
James Edward Elworth
Diana M. Eng
Michael Oren Epstein
Arturo Rodrigo Estrella
Robert Anthony Evans
Susan Moulton Evans
John Lequeux Ewald
Leah R. Fang
Stacey Faraci
Rebecca Farand Bonventre
Jeffrey Robert Farmer
Summer Farris
Jeffrey James Federman
Alan Richard Feigenbaum
Michael L. Feinberg
Yisacher Feldberg
Eric D. Feldman
Katie Irene Feldman
Heather Donovan Fennell
Joshua Paul Fershee
Kendra Jean Huard Fershee
Kristin Dana Fisher
John P. Flanagan
Matthew Kenneth Fleming
Ann Marie Folan
Alyssa Ann Forslund
Jeffrey A. Fox
George A. Freitag
Eduard Fridman
Sidney Friedman
Natasha Iris Friedrichs
Desiree Lovell Fusco
Timothy Gerard Gallagher
Reena Ganju
Seth Rich Gassman
Myriam Gauthier
Ashley Brooke Geller
Jaime Lynn Genua
Janine Dorothy Geraigery
Elisa Gerontianos
Evandro Cristiano Gigante
Timothy Kelso Gilman
Emma Gilmore
Joseb Sun Gim
John Amory Glaccum
Marina Alexandra Gliklad
Brian D. Glueckstein
Christina Cindy Gmiterek
Gil Golan
Stephanie Lee Gold
Dawn Leslie Goldberg
Emily Goldberg
Eric Adam Goldberg
Scott Goldman
Elena Stacy Goldstein
Jason M. Gonder
Dawei Gongsun
Randi Leigh Goring
Jordan Behling Grant
Rachel Ann Grant
Anthoula Grech
Alycia Sara Green
Edward Ralph Green
Michelle Greenberg
Evan S. Greene
Israel M. Greisman
Leah Jane Griggs-Pauly
Yesenia Gutierrez
Holly L. Haas
Kristen Marie Hackford
Jennifer Renee Haddad
Matthew Han
Vano I. Haroutunian
Melissa Sharisse Harrison
Sabrina Yasmin Hassan
Annette Haugland
LeRoy T. Haynes
Shira D. Hecht
Adam Z. Heilman
Matthew G. Heinz
Abigail Sarah Hendel
Christopher C. Henry
Caroline Rose Hepner
Jenna Kay Herman
Gabriel Herrmann
Kristofer William Hess
Lura Ann Hess
John P. Hewson
Tanya Denise Hicks
Elizabeth Maria Hijar
Alexandra C. Hindes
Takuo Hirose
Mark Gerard Holden
Robert S. Holmes
Katherine F. Hooker
Tamar Hostovsky-Brandes
Jennifer Ann Hoult
Keri Lynn Howe
Colin Switz Hsu
Harry Lane Hutchinson
Jason Augustine Hwang
Nobuyoshi Inujima
Hironori Ishizaka
Anna R. Isman
Nicole Hunt Jackson
Andrew Seth Jacobs
Marissa Ann Jacobs
Nancy Lynne Jacobson
Tobias B. Jacoby
Barbara Jakubowicz
Zoe Eva Jasper
Laura M. Jastrem
Tiloma S. Jayasinghe
Deerrun Bright Jea
Annie Hyun Jeong
Nina Lynn Jezic
Andreana Galatea Joannidis
Kristin Nicole Johnson
Bayne Castle Johnston
Michael A. Jonas
Amy B. Jones

Veronica Joyce
Vera Kagan
Eliza Allan Kaiser
Naoko Kamimura
Todd D. Kaminsky
Alison R. Kane
Erin Heather Kanterman
Eric T. Kaplan
Mariya Kaplan
Mauricio Pablo Kasianko
Elana Katcher
Sandhya Elizabeth Kattakuzhy
Moira Anne Katz
Sandhya Pratap Kawatra
Jonathan Evan Kellner
Michael James Kelly
Brianna Cathleen Kenny
Anke Nicoline Kernkamp
David Ian Keusch
Jennifer Lynn Kevelson
Sinan Khatib
Brian Kenneth Kidd
Jonathan Michael Kiesel
Annie Kim
Esther Kim
Jae Young Kim
Miree Kim
Anthony David King
Jason Francis King
David S. Kivisaari
Debbie Klein
Justin Evan Klein
Sarah Klosek
Megan Kendall Knott
Thomas Joseph Koffer
Dina Kolker
Shefali Mahendra Kothari
Michael Krasnovsky
Dawn Johanna Miriam Krigstin
Chris D. Krimitsos
Jihay Kwack
Ageliki Venetsanos Kyriakopoulos
Robert Alvin Ladislaw
Robert Mitchell Lafferty
Bernice Lynn Lake
Corinne Nicole Lalli
Michele Christine Lamberti
Lindsay Jean Lamprecht
Tao Lan
Jacqueline Nanci Land
Erik Jason Langner
Dessa Lansen
Elizabeth Mary Lasorte
Marie Lattanzio
Caroline H. Lee
David D. Lee
Denise Ping Lee
Edward Hale Lee
Eugene Lee
Kyung Hei Lee
Kyung Moon Lee
Peter Lee
Colleen Jeanne Lefferts
Jonathan Frank Lehmann
Barry Ryan Lenson
Eric Scott Lent
John Albert Lepore
Magnolia D. Levy
Jenny-Rebecca Lewis
Margaret Katri Lewis
Audra Michelle Lewton
Jie Li
Honghan Lin
Wilda Lin
Wendi Beth Litt
Chau-yi Christine Liu
Jeffrey E. Livingston
Deirdre Mei-won Lok
Anna Lokshina
Elizabeth Anne Longacre
John Philip Longobardo
Joseph Lopiccolo
Karine Louis
Brian Andrew Low
Jessica Dawn Lubarsky
Lance Luckow
Nicole Ludwig
Arthur Luk
Kurt Konrad Lunkenheimer
Renate Jean Lunn
William Brady Mack
Alastair John MacKinnon Findeis
Jane Macrae
Ari Royce Magedoff
George Peter Magiros
Haydn Andrew Main
Michael Zorn-atlee Maizner
Natasha Zaleema Majid
Clara Wai Yin Mak
Natalie Chana Maksin
Eric Sean Malinowski
Amy Kitinusa Maliza
Yelena Maltser
Sara Linda Manaugh
Marc Owen Mandel
Gregory Adam Manter
Arthur J. Margulies
Andrew Paul Marks
Lauren Anne Marks
Stephen Brandt Marseille
Roberto Cesar Martens
Jonathan David Martin
Gregory James Mason
Miguel Kaluag Mathay
Andrew Bruce Matheson
James D. Mathews
Jeffrey A. Mathews
Bethany Faith Mattone
Sonja Celeste Mayers
Zachary William Mazin
John J. McCarthy
Robert G. McCarthy
Scott Michael McClelland
Erica Lynn McCormick
Amy Ruth McCoy
Michael Kelly McDonnell
Valerie Breda McElligott
Terence Hayden McGuire
Ann Porter McLean
Jay John McMahon
Haley Anne Meade
Kyle Matthew Medley
Carolyn Elizabeth Meers
Sarah Fern Meil
Eric Mendelsohn
Jenny Elizabeth Menscher
Kristina Marie Mentone
Anna Meresidis
John David Merimee
Judith Carol Messier
Jason Metula
Mark G. Metz
Bryan M. Mignone
Svetlana Milina
Daniel Carl Miller
John Gillespie Miller
Theodore Benjamin Miller
Sami Asad Mir
Jeffrey Allen Misher
Guy Hamilton Mitchell
James John Miuccio
Martin Molina
Ann M. Monaghan
Nicole S. Monson
Steven Richard Montgomery
Megan Patricia Moore
Renika Cheraun Moore
Michael Morano
Ryan Mitchell Morettini
Gerard C. Morici
Garrett Barak Moritz
Jeffrey Mark Movit
Jamie Mowder
Cheryl Sharon Mpande
Sudip Neil Mukherjee
Kristen Mary Mulhern
Michael Mcgee Munoz
Carolina Musalem
Minor Myers
Mona Vivian Najib
Jaimee Lynn Nardiello
Damian Matthew Narvaez
Evdoxia Nastou
Aviam Eric Navo
Rachel M. Nelsen
Leigh Michele Nemetz
Michelle Nerozzi
Milam Foster Newby
Angelina Nguyen
Ashley Elizabeth Normand
Daniel Jonathan O'Neill
Marko Divac Oberg
Araba Ames Ocran
Atsushi Oishi
Alexandra Oprescu
Victoria Lindsey Oswald
Jason Donald Padgett
Carmen I. Pagan-Ortiz
Marissa Alexis Pagnani
Jennifer Palm
Ronald Palmese
Chintan Vijay Panchal
Daniel Guy Pancotti
Aeri Pang
Eunice Eunyoung Park
Hyun Sun Park
Marian Suhkyung Park
Mathew D. Parke
Rebecca Eden Parra
Nilima Viju Patel
Tarun R. Patel
Darcy August Paul
Helder Pedroso Pereira
Douglas Jon Perlson
Justin Brent Perri
Blake Matthew Perry
Lisa Anne Pessah
Daniel Evan Philips
Lynnise Elizabeth Phillips
Ryan Michael Philp
Luis Alfredo Pinilla Plazas
Ekaterina Yurievna Pischalnikova
Jennifer Chloris Plotkin
Genevieve Ann Pope
Elena Popovic
Rafaelina R. Portu
Beth F. Potashnick
Joshua Harris Povill
Hilary Lovett Preston
Elizabeth Ann Previte
Kevin Jerome Prey
Amsler Priddy
Anthony Raccuglia
Ellen Joy Radice
Amanda Michelle Raines
Saira Sameera Rao
Babak Ali Rastgoufard
Daniel Richard Read
Robert F. Redpath
Amanda Wilson Reed
Carter Reich
Emily Sarah Richman
Joseph A. Risico
Jason Charles Rose
Naama Rosen
Jacqeline M. Rosenblum
Edward H. Rosenthal
Uzi Rosha
Pauline L. Ross
Samara Joy Rothchild
Alex Rafael Rovira
Gregory Samuel Rowland
Marc A. Rozic
Benjamin C. Rubinstein
Melvin Thomas Sabour
Steffen Dominik Sachse
Stacey Clare Sager
Kristen Marie Santillo
Eran A. Sarig
Allison Lauren Satin
Joshua David Saviano
Leila Sayar
Sarah Henriette Emilie Schaeffer-Roth
Daniel J. Schiffer
Frank William Schimel
Andrew Keith Schinder
Ivan Schinderman
Lars Frederik Schmidt
Derek Marsh Schoenmann
Eric Edward Schroeder
Todd Adam Schulman
Daniel Scott Schuman
Lea K. Schwartz
Douglas T. Schwarz
Katherine M. Scovin
Amanda Claire Scuder
Marisa Anne Sechrest
Anne Melissa Seelig
Paul Lawrence Seeman
Rebecca Elizabeth Segrest
Robert Jaan Sein
Amy Mills Sethi
Lea Zita Sevcik
Nubiaa Kianga Shabaka
Shefali A. Shah
Linda Sharaby
Neena Ganguli Shenai
Olga Sher
Geoffrey Adam Sherman
Galen Leigh Sherwin
Mark D. Shifton
Adam T. Shore
Jeremy Adam Shure
Imtiaz A. Siddiqui
Jeffrey Scott Siegel
Richard Irving Siegmeister
Gary Phillip Silber
Jonathan Adam Silver
Meredith Bogash Silver
Caryn Joy Silverman
Stacey B. Simcox
Stephen Scott Simnowitz
Alfredo Simon
April B. Simon
Sonya Bikram Singh
Priyamvada Sinha
Aviv Siso
Catherine Skokowski

Debra Carolyn Sloane
Shelton S. Smallwood
Erica Lynn Smith
Kelvina Monique Smith
Zachary H. Smith
Robert David Lee Snodgrass
Sumiko Soekawa
Avani Mehta Sood
Effimia Soter
Lorne Amir Sperling
Julia Claire Spivack
Leo Spooner
Robert Andrew Sporn
Pierce Paschal Stacey
Stuart Z. Stahl
Nicole A. Stallworth
Jason R. Stanevich
Iwona Anna Stasiewicz
Maya Steinitz
Richard Abraham Stieglitz
Andrew D. Stillufsen
Greg H. Stoller
Jesse Strauss
Jeffrey Wayne Stupak
Michael John Sullivan
Hope Ann Sweeney
Natalia Elizabeth Szip
Wendy K. Szymanski
Devin Lloyd Talbott
Nicole Annine Talma
David W. Tang
Eda Tanker
Wade Taylor
Zachary Stewart Taylor
Julie Anne Tenney
Virginika Foster Tent
Vanessa Marie-carmelle Thomas
Frank Delano Thompson
Latisha Vernon Thompson
Micheal Steven Thorne
Justin Scott Tichauer
Melissa S. Tidwell
Melissa Wei Lynn Toh
Jeffrey Daniel Torkin
Amit Kumar Trehan
Rebecca J. Trent
Jeanette Trudell
Peter Nicholas Tsapatsaris
Amelia Kristin Tuminaro
Julie Ann Turner
Victoria Jo Vanasco
Joseph Christopher Ventura
Vilda Iris Vera
Dmitri Valentinovich Verenyov
Robert G. Vidoni
Margaret Asayo Vining
Joshua Elliot Vitow
Assunta Vivolo
Lisa Michelle Walker
Charles Robert Walsh
Elizabeth Anne Walsh
Heather Marie Ward
Hannah Ellen Weiss
Edward Troy Werner
Daniel J. Werther
Christine Marie Whitledge
Esther Widowski
Nadia Ruth Wilkinson
James Soemijantoro Wilson
Maura Eileen Wilson
Ewa M. Wolaniuk
Christopher Hung Nie Woo
Jordan Bryan Woods
Jeffrey Daniel Wust
Akihiko Yamada
Stella Natsue Yamada
Lauren Sung-jin Yang
Jessica Ichu Yeh
Grace Yin Yeung
Daniel Yunger
Jeffrey David Zack
Yoel A. Zagelbaum
Gwen J. Zeisler
Douglas Dongming Zhang
Dana Catherine Ziker
Jared Zola

SECOND DISTRICT
Pamela K. Allred
Poonam Barua
Pearl Sarah Basch
Kristen N. Belolan
Viktoria A. Beress
Jaclyn Gail Braunstein
Blueth Bianca Bromfield
Gregory Calliste
Alicia Elizabeth Camron
Anne Florence Catapano
Stacy-Ann Nicola Christian
Anta Cisse
Anita S. Cohen
Emily Barrett Costello
Eleni Larcombe Day
Joseph John De Vesta
Rosario Devito
Raffaele A. DiMaggio
Michael Joseph Ferrara
Erin Marie Ferrone
Donnahue G. George
Sebastian Y. Gheith
Jeanine Marie Girgenti
David Grandwetter
Kevin R. Greco
Adam Preston Greenstein
Laura Celeste Grimaldi
Monique Nicole Harris
Jennifer Robyn Held
Bnayahu Hovav
Dmitry Georgievich Ivanov
Seymour Jaffe
Meredith J. Jensen
Jacqueline A. Jones
Judith Agatha Joseph
Heather Newell Justice
Susan Michelle Kalnitzky
John Chul-joon Kim
Steve Daewon Kim
Michael Krigsfeld
Steven T. Krolak
Mark David Lanpher
Craig Stuart Lanza
Sandra R. Lorman
Evan Morgen Mandel
Christopher Marlborough
Tracy Anne McDonagh
Lee Noel Mermelstein
Hope Janice Mitchell
Kathryn Grace Moore
David Luis Moreno
Tara Katryn Morley
Deon Isola Morris-Belo
Jennifer L. Murray
Nicola Rosemarie Murray
Karina E. Murski
Hinh Nguyen
Christina Nikoloudakis
Suzanne M. O'Malley
Nirav Bipin Patel
Thomas Anthony Pepe
Christopher Daniel Pinnisi
Andrew John Potak
Andrew William Prior
Paul J. Proulx
Therese Reyes
Simon B. Sanchez
Chanani Yosef Sandler
Jennifer Kate Santilli
Allegra Santomauro
Elisabeth Genevieve Sawyer
Lacey Alexandra Schwartz
Michael Shender
Felix Shipkevich
Tanika-imani Smith
Mariusz Sniarowski
Clea Moore Stanton
Joseph Paul Stoduto
Patricia Ann Sullivan
Irene Tenedios
Rebecca Marie Velez
Maureen F. Wagner
John Whitlow
Jared Philip Yaffee
Eileen Joyce H. Yap

THIRD DISTRICT
Christina A. Buoniconto
Richard Fishbein
Jeremiah M. Flaherty
Matthew F. Guilbault
John P. Hicks
Steve Krantz
Andrew Maulbetsch
Alfred A. O'Connor
Susan Corbett Zeronda

FOURTH DISTRICT
Peter M. Damin
Yvonne Michelle Ward

FIFTH DISTRICT
Anthony J. Brindisi
Ralph G. DeMasi
Gustave J. DeTraglia
Joseph Robert Harris Doyle
Joseph Michael Hobaica
Anthony J. Monaco

SIXTH DISTRICT
Alexander Leon Stabinski
Shawn Michael Tourville

SEVENTH DISTRICT
Katherine E. Gavett
Garfield Grimmett
Robert Nelson Tucker

EIGHTH DISTRICT
Robert David Barone
Jonathan Gerald Gorman
Anita L. Howard
Michael Robert Madia
Erika M. Marabella
Danielle Marie Mayer
Domenic J. Migliaccio
Deborah B. O'Shea
James E. Privitera
Amy E. Przewzny
Samuel P. Puleo
Peter C. Wiltse

NINTH DISTRICT
Hamra Ahmad
Michelle Almeida
Michele Bayer
Mark William Blanchard
Cynthia L. Boland
Megan Rose Brillault
Kieran Thomas Byrne
Tracy Anne Cass
Senajda Celaj
Matthew John Costa
Judith M. Crelin-Mayle
Alexandra Derian
Charles F. Devlin
Angelo Trent Distefano
James Anthony Duckham
Samuel Scott Fagin
Eric Gary Fendt
Robert Joseph Fluskey
John Louis Galgano
Philip Gambino
Richard I. Golio
Adam Marlowe Goold
Jamie Greenwald
Luke Patton Hilpert
Kelly A. Kamen
Joshua Seth Katzman
Amanda Rose Kronin
Pat Longobucco
Maryanne McGovern
James G. Mermigis
Robin Arlene Meyer
Adeel Mirza
Michael Andrew O'Reilly
Eileen M. O'Rourke
Charles A. Peddy
Savina Patricia Playter
Alexander M. Razi
Daniel M. Richmond
Kerry Marie Roche
Deborah A. Rogozinski
Robyn Alexandra Scopteuolo
Frank Paul Sedlarcik
Andrew Downing Showers
Andrew Anthony Smith
Anne Marie Smith
Matthew Phillip Solomon
Peter Dexter St. Phillip
Jonathan Howard Stelzner
David S. Sultan
Eric Michael Tepper
Jane Scott Thies
B. Faye Thorpe
Talitha Thurau
Emily Anne Tran
Kerrie Nicole Roxroy Williams
Jesse Holihan Young

TENTH DISTRICT
Joseph A. Adams
Luma Alchalabi
Michael John Ammerman
Ory Apelboim
John William Baker
Opal Ann-Marie Barrett
Nicole Layne Benjamin
Karen Antoinette Bent
Andrea B. Berkowitz
Rashmi C. Bhatnagar
Jason Craig Blond
Panagiotis Dimitrios Boboris
Ian B. Bogaty
James J. Bracken
Marta Brodsky
Neil Brown
Peter Andrew Brown
Bryan L. Browns
John Calimano

Cecilia Tikura Capers
John J. Caravella
Manu Chadda
Amy Lynn Chaitoff
Melissa Anne Cicalo
Michael Ciraolo
Carlo Colagiacomo
Christopher Keith Collota
Matthew James Corker
Meghan Cuomo
Philip L. Curcio
Joseph Anthony D'agostino
Augustino Dominick Dalonzo
Tara Kristen Demaio
Cyril M. Derzie
Patricia Mary Dooley
Guillermo Duque
Jason Adam Dworkin
Eric Brenner Eubanks
Lilia Factor
Christina E. Farrell
Edward Anderson Fenn
Patrick Brian Fife
Darin Finkelstein
Barrie Lynn Friedman
Michelle Ann Fumai
Scott J. Gilmore
Walter William Gouldsbury
William Eric Grigo
Daniel J. Gulizio
Sara Z. Heszkel
Daniel E. Hirschel
David Evan Horn
Glenn Jawitz
John Joseph Julius Ferro
Kathleen Kane
Adam Jordan Kass
Ryan Patrick Kelly
Joshua Adam Kittenplan
Joanne Klass-Drew
Brandi Pamela Klineberg
Jason Peter Klopfer
Robin Freier Kressel
Natalie Lamarque
Colleen E. Lehmann
Christopher LoPalo
Judy Elizabeth Lukose
Rachel Christine Maio
Frank Michael Marcigliano
Nicole Ursula Marmanillo
Kathleen Ann Marshall
Maureen L. McLoughlin
Neil Miller
Leigh Alden Minsky
Maureen Claire Murphy
Kelli Monique Muse
Anthony Armando Nozzolillo
Lisa S. O'Connor
Lee Joseph Odierno
Jack Palmeri
Anthony Michael Pettolina
Kiyam Jamal Poulson
Margaret B. Rahner
Stephen John Romano
John Patrick Rowland
Alexander Rudis
William Anthony Schafer
Edward Robert Schmitt
Roy Silverberg
Zoltan A. Simon
Justin Peter Skaferowsky
Cory Erin Skolnick
Mark E. Spund
Michael Stam
Peter Dennis Strouzas
Pavithra Candida Suresh
Sabrina Elena Taub
Yasha Tehrani
Kevin George Thurman
Erez I. Tucner
Justin Varughese
Nicole Marie Walsh
Phillip Leigh Wartell
John E. Wehrum
Karen M. Wilutis
Allison Marie Worthington
Kan Yang
Traceyrose Zappola

ELEVENTH DISTRICT

Melissa Grace Andrieux
Rodney Harendra Atreopersaud
Steven Nicholas Balahtsis
Michael M. Baruch
Erika A. Blecker
Danielle Marie Boccio
Nina Sumbatova Bompart
Tara Lee Breen
Rong Chen
James Chung
Carolyn Salian Clyne
Edward Michael Conlon
Christine Michelle Corbett
Leo Cuomo
Adrienne Joy Forspan Winokur
Susan D. Fort
James J. Franzetti
Jonathan S. Goldberg
Maureen Hoey
Christina Lee Hoggan
Dan C. Hulea
Yasmeen Ilana Hussaini
Hardeep Kaur Josan
Trevor Navindra Karran
Sendi Katalinic
Tara Alyse Kelly
Hyun-jung Anna Kim
Judy Kim
Katherine Ann Kokkosis
Michelle Ann Labayen
Adam Lindenbaum
Matthew W. Mamak
Bianca S. Mileck
Claudine Liz Moore
Ali Reza Nassiripour
Eleanor F. Oppenheimer
Abraham Park
Mary Ellen Pelzer-Cabrera
Sophia Maria Piliouras
Lisa C. Pollack
Jennifer Eve Price
David I. Reischer
Roberto J. Ristorucci
Jared Ryan Rosenblatt
Venecia Maria Segura
Celesta Elizabeth Sligar
Yasmin Soto
Steven J. Stonitsch
Soma Sultana Syed
Floretta L. Vigil
Spiredoula Viglis
Christos Vorillas
Tara Maria Vrettos
Michael J. Watling
Caroline Ann Whalen
Keela K. White
John L. Wolthoff
Marsha M. Wright
Yungsang Yu
Jeffrey Zawadzki
Jianbo Kwong Zhao

TWELFTH DISTRICT

Cassandra Genevieve Aquart
Marc Anthony Brown
Joan Barbara Carroll
Cheryl C. Joseph
Andrew V. Lofredo
Vanessa Marie Losicco
Ingrid E. MacDonald
Sebastian Maguire
Antoinette Ann Marie Osbourne
Damien Jason Rodriguez
Carly Stapleton
Jill Eden Strauzer
Milda S. Taveras
Erica Susan Weissberg

OUT OF STATE

Benil Abraham
Philip Samuel Adelman
Olufolake Ayodeji Adeyemi
Saba Ahmad
Nicole Elizabeth Allen
Tiffany Rae Almy
Vincent Anthony Amatrudo
Ikenna Amechi
Yvonne Michele Anderson
Suzanne Arady
Katherine Lee Aschenbrenner
Neil Pravin Ashar
Sarwat Ashraf
Marine Assadollahi
Elizabeth Jeker Averill
Florence Bal
Fawn Daveen Balliro
Matthew Vincent Barter
Matthew Harris Bateman
Virginia Ann Bergonzoni
Kuljeet Kaur Matharu Bhachu
Gregory A. Bibler
Jean Blackerby
Juan Carlos Blanco
Kenneth Antoine Bouillion
Kelly R. Bowers
Martin E. Bozmarov
Graziano Brogi
Kevin Paul Broughel
Catriona Elizabeth Alison Brown
Elayne Carol Bryn
Nicolas Busquet
Jian Cao
David S. Caplan
Aliette Marine Carre
Eduardo M. Carreras
Stefanie Anne Cartwright
Gabrielle Hannah Casini
Ted Peter Castell
Jonathan M. Cerrito
Manas Laxmi Chandrashekar
Wayne Chang
Judith L. Chase
Andrew C. Chien
Chiyoung Cho
John Cigavic
John E. Clough
Ilona Cohen
Simon Alistair Cooper
Renee Courtney C. Cote
Mary F. Courtney
David Michael Creed
Eduardo Luis Crosa
Edward Patrick D'Alessio
Sophia Louise Degenhardt
Melissa Amelia Dell'Orto
Yevheniy Deyneko
Paul Dibranco
Benjamin Salvatore Dimarco
Elizabeth Marie Dimare
Timothy Charles Doherty
Rachel Usher Doobrajh
Alison Marie Doran
Laura Anne Drossman
Mark E. Duckstein
Angela B. Dudley
Jennifer Jon Dugan
Wendy Ellen Duvall
Eric Thomas Eberwine
Gregory Alan Fairbanks
Gary Layne Fales
David O. Farrell
Michael Christopher Fasano
Angel Ya-chi Feng
Gerard Filitti
Maia Simone Fisher
Donald Michael Fishman
Jonathan Scott Fitzgerald
Nicole Florentino
Patricia Mary Fluery
Anita Marie Forbes
John J. Frank
Michael A. Frankel
Laura J. Freedman
Keri Losen Fuller
Mirella Bethlynne Gadd
Tina Louise Garmon
Seth Michael Garrod
Paulina Anna Gasinska
Scott Reed Gengras
Laura Marie Ginkel
Andrew Jules Goncharoff
Brian Gorman
Amy Lynne Gottlieb
Viviana Lopez Green
Stephanie Townes Greene
Andrea Leigh Hamilton
Adam Shane Handler
Danielle C. Harris-Baker
Stacie Rachel Hartman
Christopher Blake Harwood
Deborah M. Heindl
Hector Oscar Hernandez-Lopez
Andrew McIntyre Hetherington
Andrew Paul Heyman
Benjamin Higham
Brian Phillip Hill
Maki Setogawa Hirashima
Fumiharu Hiromoto
Reut Hirschhorn
Amy Eleanora Mei Yuk Ho
Heath William Hoglund
Eric S. Hong
Yukiko Horiguchi
Christian Horn
Grace Ying Hui Huang

Martin Stephen Hupka
Celine Chien-ling Hwang
Kumi Tiara Ikeda
William Matthew Iler
Renee Regina Jamal
Celia Johnson
Jennifer Anne Johnson
Jenny D. Johnson
Andreas Christian Joklik
Nadine Jones-frances
Tejas S. Kapadia
Peter A. Kast
Amanda Katherine Kay
Timothy Peter Kelly
Regina Kent
Aaron Seth Kesselheim
Candice Yukyung Kim
Inhyock Kim
Sohyun Kim
Justin B. Kleinman
Michelle Chi-hsun Ko
Ichiro Kobayashi
Shelly Kohli
David Sean Koller
Christopher K. Koutsouris
Sandra Lisa Kozlowski
Monica Danielle Kraft
Jennie Boehm Krasner
Ojoon Kwon
Livia Langton
Leslie Lansman
Lina Laraki
Aleicia Nicole Latimer
Dianne E. Laurenzo
Rosalind Lazar
Yuval Lazi
Chae Jin Lee
Chamho Lee
Donna A.M. Lee
Kyounga Lee
Aaron J. Lefkowitz
Amy Esther Lefkowitz
Belinda Leung
Andrew James Levay
Jeffery M. Leving
Lisa Margaret Ligas
Justin Mark Lilien
Paula Cristina Lisso
Jeffrey L. Love
Phuc Hong Lu
Justin Adriaan Francis Lucas
Juan Lueiro
George A. Lyden
Daniel Christopher Lynch
Jessica Ann Lyons
Amy Susan Macisaac
Karyllan Dogson Mack
Lauren Marie Macksoud
Jweied Maha
Mark E. Manigan
Goud Pradyumna Maragani
Ashley Beck Mason
Rani Newman Mathura
Danny T. Matrafajlo
Joann Mazur
Ron Tavares McCormick
Joanne McKenna
David John McLean
Pedro Alberto Medrano
Sapna Anil Mehta
Maria Rocio Mendoza
Yael Mesika
Stacey Linn Middleton
William Mc Caulley Mihalke
Hisayuki Miyashita
Yutaka Miyoshi
Merete Lundbye Moller
Alcira Moncada
David James Moore
Maygen Elena Moore
Michael James Terence Morris
Galit Moskowitz
Rachel Anna Mulligan
Lloyd H. Munjack
Mari Nakajima
Amir M. Nassihi
Ferris Karim Nesheiwat
Thomas M. Newman
Kazumi Nishikawa
Rhoda Kisembo Nkojo
Kevin Robert Noble
Yoshikazu Noma
Adav Noti
Anthony John Novella
Keith Peter O'Grady
Lorraine Ann O'Hehir
Kyle A. Odin
Min Young Ohm
Jason Stephen Oliver
Eliya E. Oria
Andrea Denise Orr
Ramon Nolasco Osborne
Edward Kofi Osei
Petr Panek
Gregory Evan Parets
Jong-Won Park
Margaret Grace Parker-yavuz
Mukti Naresh Patel
Tanuja Patel
Anna Frances Patras
Dweynie Esther Paul
Tamara Anthea Paul
Susan Paulson
Aysecan Akarli Peking
Beverly J. Pellegrini
Peter Michael Perkowski
Matthew Ian Peters
Vishal Sanmukh Petigara
Barbara Pierre-Louis
Renee J. Pinto
Jonathan Edward Poe
Eric Michael Pollanen
John J. Porta
Stacey Kathryn Porter
Jason L. Portnoy
William Angulo Preston
Nicole Rachelle Rabner
Anthony Michael Rainone
Scott Michael Rankin
Supriya Rao
Pejman Razavilar
David Victor Reingewirtz
Ronald Salvatore Ribaudo
Robert Allen Rivers
Kristin Keely Roberts
Elizabeth Michelle Rogers
Saskia Dagmar Rohm
Sylvia J. Rolinski
Philippe H. Rommel
Ian Rockwell Rooney
Tamar Rebecca Rosenberg
Jeffrey Thomas Rowes
Marisol Rubecindo
Michael Sean Ruff
Daniel Louis Russell
Robert Eric Sacks
Jodie Lyne Salzano
Inbal Sansani
Christen Denise Santiago
Steven Everett Savage
Gabrielle Rae Schaich
Bruce Robert Schlanger
Heather Marie Schmidt
Linda Susan Schmidt
Melissa Schmucker
Sven Henrik Schneider
Sara S. Schramm
Michelle Denise Schwartz
Liana Yvonne Sebastian
Raj Sehgal
Alexander V. Semernine
Tara Ann Senior
Corey Michael Shapiro
Megan P. Shearer
Kazuhisa Shibayama
Ryan Jiun-Huei Shih
Oded Shomroni
Ronnie Shore
Margarita Shulman
Nicole Yanika Silver
Karl Judah Silverberg
Shimona Pratap Singh
John Adam Skaggs
Jana A. Slavina
Michael James Slocum
Elizabeth A. Smith
James Allan Smith
Tara Simone Smith
Robert Scott Snellings
Joseph Michael Solimene
Don R. Sommerfeldt
Sang Woo Song
Johannes Spreckelmeyer
Sam Stanton
Erica Beth Stein
Nathan Jordan Stein
Odeh L. Stevens
Jane Kathryn Stoever
Dawn M. Sullivan
Hsin Sun
Kevin Matthew Sutehall
Taeko Suzuki
Patricia Anne Swicicki
Fernando Szterling
Alan Michael Taboada
Arthur Gee-yeh Tan
Karen Teck-ping Tan
Cedric Teissier
Hsiao-huey Teo
John Edward Thompson
Junichi Tobimatsu
Sheila Jean Tobin
Matthew Alvin Tolman
Kiriaki Tourikis
Peter Hoanghanh Truong
Samantha Marie Tuttle
Ron Isaac Tzadik
Tony Kiyung Uhm
Timothy John Valdez
Diana Mineva Valkova
Jon D. Van Gorp
Myles Patrick Varley
Natasha Varyani
Alexander Villamar
Eric Solomon Volkman
Teruko Wada
Yariv Waks
Maxine Georgia Walker
Ayanna Cori Walters
Vanessa Michelle Walts
Amity I. Wang
Honghong Wang
Tianpeng Wang
Tin-an Andy Wang
Sean Jason Ward
Yoshihisa Watanabe
Caroline Watson
Laura Mae Weinrib
Aaron Stenzler Weiss
Elliot Julius Wiesner
Bettina Dorothea Wildemann
Jamie Leigh Wilensky
Allison Claudine Williams
Daniel John Williams
Simone Petrice Wilson
Htaik Htaik Win
G. Micah Wissinger
Xuqiong Wu
Jian Xie
Hiroya Yamazaki
Carine Mou Si Yan
Jian Yang
Cherry Tran Yao
Hong-Keun Yoo
Terufumi Yorita
Justin Randolph Young
William David Young
Garland Ka-lun Yu
Ying Yu
Farage Yusupov
Sven Paul Zabka
Ken M. Zeidner
Jieying Zhang
Andrew Todd Zidel

In Memoriam

Thomas M. Barnell
Pulaski, NY

Erwin L. Corwin
New York, NY

Leonard H. Feder
Ardsley, NY

Robert A. Ferro
Whitestone, NY

Alexander T. Galloway
New York, NY

Richard L. Goldman
White Plains, NY

Robert A. Kanziger
Miami, FL

Anthony B. Kuklin
New York, NY

Edgar C. Leonhardt
Fultonville, NY

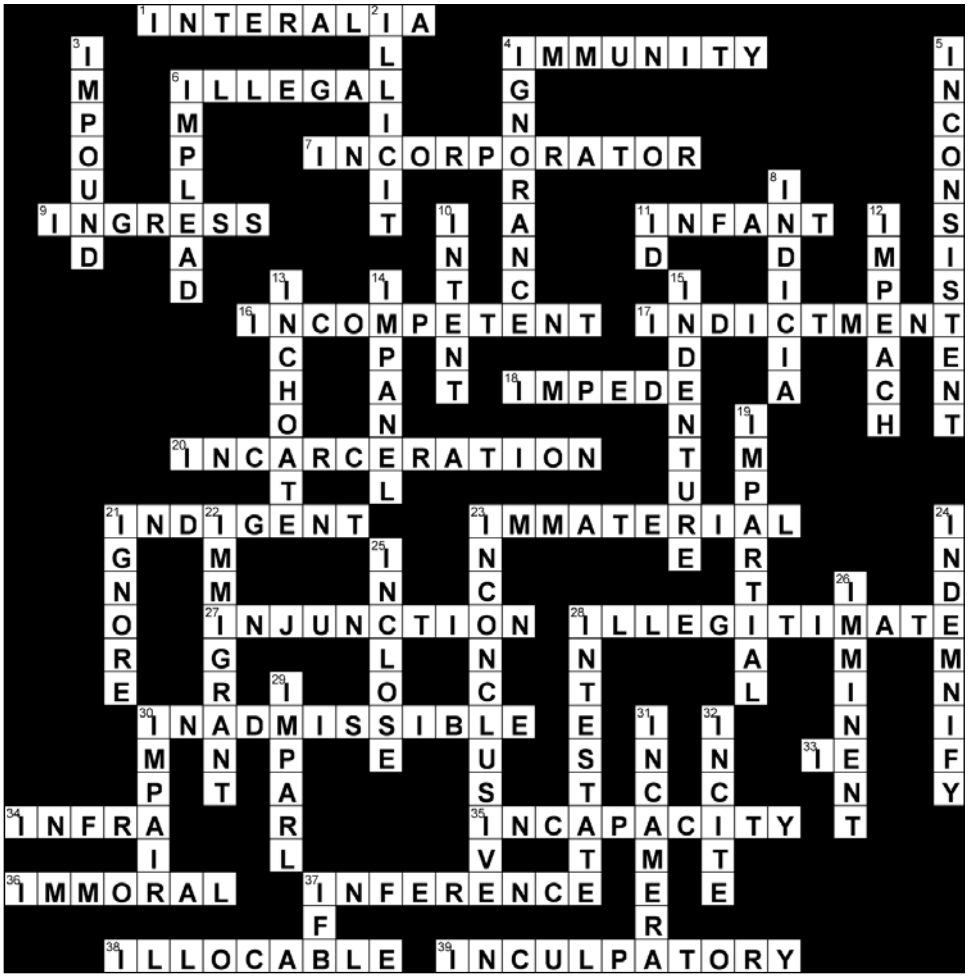
Terrance W. Schwab
New York, NY

Richard C. Thompson
White Plains, NY

Alan R. Wentzel
New York, NY

Samuel Winner
Clearwater, FL

Answers to Crossword Puzzle on page 8.



Most often, art forms result in banalities, like the federal opinion that irrelevantly, even flippantly, used lines from the *Saturday Night Live* "Wayne's World" skits and the 1992 hit movie, *Wayne's World*: "In short, Prime Time's most bogus attempt at removal is 'not worthy' and the Defendants must 'party on' in state court."[14] Or the Ninth Circuit's Vanna White opinion, which wished they could all be California girls: "[A]n attractive appearance, a graceful pose, blond hair, an evening gown, and jewelry are attributes shared by many women, especially in Southern California."[15] Or the New Jersey Supreme Court's Bruce Springsteen "Born to Run" opinion: "Fleming claims that despite the difficulty of working in a prison, she remained the kind of person who '[a]t the end of every hard earned day . . . [found] some reason to believe.'"[16]

Springsteen isn't the only musician lionized in the judicial reports. In *United States v. Youts*,[17] the Tenth Circuit used four footnotes to venerate John Denver and the Grateful Dead in a criminal prosecution for train wrecking.

Judges should know something about the classics, not merely about popular culture. Here's why, from Learned Hand: "[A] judge [must] have a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant . . . . [E]verything turns upon the spirit in which he approaches the questions before him."[18]

Mores and culture affect decision making. Judge Hand was right: The more learned the judge, the better the opinion. But judges should be wary of airing their erudition. Knowing about pop culture or the classics is different from including them in a judicial opinion.

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. Ruggero J. Aldisert, Opinion Writing 196 (1990).
2. *In re Carlos P.*, 78 Misc. 2d 851, 358 N.Y.S.2d 608 (Fam. Ct., Kings County 1974) (Gartenstein, J.).
3. *Mileski v. Locker*, 14 Misc. 2d 252, 257, 178 N.Y.S.2d 911, 917 (Sup. Ct., Queens County 1958) (Pette, J.).
4. 407 U.S. 258 (1972) (Blackmun, J.).
5. *United States v. Dumont*, 936 F.2d 292, 294 (7th Cir.) (Easterbrook, J.), *cert. denied*, 502 U.S. 950 (1991).
6. *City of New York v. United States Dep't of Com.*, 739 F. Supp. 761, 762 (E.D.N.Y. 1990) (McLaughlin, J.).
7. *Reuther v. Southern Cross Club, Inc.*, 785 F. Supp. 1339, 1340 (S.D. Ind. 1992) (Barker, J.).
8. *Carter v. Ingalls*, 576 F. Supp. 834, 835 (S.D. Ga. 1983) (Bowen, J.).
9. *O'Shea v. City of San Francisco*, 966 F.2d 503, 504 (9th Cir. 1992) (Beezer, J.) (footnote omitted).
10. *People v. Craig*, 151 Misc. 2d 442, 445, 581 N.Y.S.2d 987, 989 (Sup. Ct., Bronx County 1992) (Eggert, J.).
11. *Brush v. Office of Personnel Mgmt.*, 982 F.2d 1554, 1559 (F. Cir. 1992) (Smith, J.).
12. *Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 890–91 (1st Cir. 1988) (Selya, J.).
13. *United States v. Harrington*, 947 F.2d 956, 964 (D.C. Cir. 1991) (Edwards, J., dissenting) (telling the story from Hans Christian Andersen, *The Emperor's New Clothes* (Pictureback ed., Random House 1978)).
14. *Noble v. Bradford Marine*, 789 F. Supp. 395, 397 (S.D. Fla. 1992) (Paine, J.).
15. *White v. Samsung Elect. Am., Inc.*, 971 F.2d 1395, 1405 (9th Cir. 1992) (Alarcon, J., concurring & dissenting).
16. *Fleming v. Correctional Healthcare Solutions, Inc.*, 164 N.J. 90, 99–100, 756 A.2d 1035, 1040 (2000) (per curiam) (alteration in original) (quoting Bruce Springsteen, "Reason to Believe," *on Nebraska* (Sony/Columbia 1982)).
17. 229 F.3d 1312 (10th Cir. 2000) (Seymour, C.J.).
18. Learned Hand, quoted in N.Y. Times, Nov. 18, 1954, Mag. at 14 (*reprinted in* Henry J. Abraham, The Judicial Process 61 (7th ed. 1998)).

HEADQUARTERS STAFF E-MAIL ADDRESSES

Executive
Patricia K. Bucklin, *Executive Director*, pbucklin@nysba.org
John A. Williamson, Jr., *Associate Executive Director*, jwilliamson@nysba.org
L. Beth Krueger, *Assistant Executive Director*, bkrueger@nysba.org

Administrative Services, Meetings and Media Relations
L. Beth Krueger, *Assistant Executive Director*
Administrative Services
The New York Bar Foundation
Rosanne M. Van Heertum, *Director of Development,* rvanh@nysba.org
Law, Youth and Citizenship Program
Deborah S. Shayo, *Director*, dshayo@nysba.org
Charles F. Heritage, *Program Manager*, cheritage@nysba.org
Media Services and Public Affairs
Bradley G. Carr, *Director*, bcarr@nysba.org
Frank J. Ciervo, *Associate Director*, fciervo@nysba.org
Amy Travison Jasiewicz, *Editor, State Bar News*, ajasiewicz@nysba.org
Meetings
Kathleen M. Heider, *Director*, kheider@nysba.org

Continuing Legal Education
Terry J. Brooks, *Senior Director*, tbrooks@nysba.org
CLE Programs
Jean E. Nelson II, *Associate Director*, jnelson@nysba.org
Jean Marie Grout, *Staff Attorney*, jgrout@nysba.org
Leslie A. Fattorusso, *Staff Attorney*, lfattorusso@nysba.org
Cheryl L. Wallingford, *Program Manager*, cwallingford@nysba.org
CLE Publications
Daniel J. McMahon, *Director*, dmcmahon@nysba.org
Patricia B. Stockli, *Research Attorney*, pstockli@nysba.org

Finance and Human Resources
Paula Doyle, *Senior Director*, pdoyle@nysba.org
Finance
Kristin M. O'Brien, *Director*, kobrien@nysba.org

Legal and Governmental Affairs
Kathleen R. Mulligan-Baxter, *Senior Director*, kbaxter@nysba.org
Counsel's Office
Governmental Relations
Ronald F. Kennedy, *Associate Director*, rkennedy@nysba.org
Lawyer Assistance Program
Ray M. Lopez, *Director*, lopez@nysba.org
Lawyer Referral and Information Service
Pro Bono Affairs
Cynthia Feathers, *Director*, cfeathers@nysba.org

Marketing and Information Services
Richard J. Martin, *Senior Director*, rmartin@nysba.org
Desktop Publishing
Marketing
MIS
John M. Nicoletta, *Director*, jnicoletta@nysba.org
Paul Wos, *Data Systems and Telecommunications Manager*, pwos@nysba.org
Web Site
Barbara Beauchamp, *Editor*, bbeauchamp@nysba.org

Membership Services
Patricia K. Wood, *Senior Director*, pwood@nysba.org
Chief Section Liaison
Lisa J. Bataille, lbataille@nysba.org
Law Practice Management
Cynthia Cornaire, *Director,* ccornaire@nysba.org
Membership

Print and Facilities Operations
Roger E. Buchanan, *Senior Director*, rbuchanan@nysba.org
Building Maintenance
Graphics
Print Shop
Matthew Burkhard, *Production Manager*, mburkhard@nysba.org

THE NEW YORK BAR FOUNDATION

2004-2005 OFFICERS

Robert L. Haig
President
101 Park Avenue
New York, NY 10178-0001

John R. Horan
Vice President
825 Third Avenue
New York, NY 10022

Patricia K. Bucklin
Secretary
One Elk Street
Albany, NY 12207

Hon. Randolph F. Treece
Treasurer
445 Broadway
Albany, NY 12207

DIRECTORS

James B. Ayers, *Albany*
Hon. Richard J. Bartlett, *Glens Falls*
Jonathan G. Blattmachr, *New York City*
Cristine Cioffi, *Niskayuna*
Charles E. Dorkey, III, *New York City*
Emily F. Franchina, *Garden City*
Maryann Saccomando Freedman, *Buffalo*
John H. Gross, *Northport*
Paul Michael Hassett, *Buffalo*
Frank M. Headley, Jr., *Scarsdale*
John J. Kenney, *New York City*
Steven C. Krane, *New York Citys*
Glenn Lau-Kee, *White Plains*
Bernice K. Leber, *New York City*
Susan B. Lindenauer, *New York City*
Kay Crawford Murray, *New York City*
Carla M. Palumbo, *Rochester*
Richard Raysman, *New York City*
Thomas O. Rice, *Garden City*
Sanford J. Schlesinger, *New York City*
Lorraine Power Tharp, *Albany*
Lucia B. Whisenand, *Syracuse*

JOURNAL BOARD MEMBERS EMERITI

As a tribute to their outstanding service to our *Journal*, we list here the names of each living editor emeritus of our *Journal*'s Board.

Richard J. Bartlett
Coleman Burke
John C. Clark, III
Angelo T. Cometa
Roger C. Cramton
Maryann Saccomando Freedman
Emlyn I. Griffith
H. Glen Hall
Paul S. Hoffman
Charles F. Krause
Philip H. Magner, Jr.
Wallace J. McDonald
J. Edward Meyer, III
Kenneth P. Nolan
Albert M. Rosenblatt
Robert J. Smith
Lawrence E. Walsh

2004-2005 Officers

Kenneth G. Standard, President
New York
A. Vincent Buzard, President-Elect
Rochester
James B. Ayers, Treasurer
Albany
Kathryn Grant Madigan, Secretary
Binghamton

Vice-Presidents

First District
Mark H. Alcott, New York
Stephen D. Hoffman, New York
Second District
Barry M. Kamins, Brooklyn
Third District
Rachel Kretser, Albany
Fourth District
Cristine Cioffi, Niskayuna
Fifth District
Michael E. Getnick, Utica
Sixth District
James C. Gacioch, Binghamton
Seventh District
C. Bruce Lawrence, Rochester
Eighth District
Sharon Stern Gerstman, Buffalo
Ninth District
Henry S. Berman, White Plains
Tenth District
Hon. Joel K. Asarch, Hempstead
Eleventh District
Seymour W. James, Jr., Queens
Twelfth District
Lawrence R. Bailey, Jr., New York

Members-at-Large of the Executive Committee

Donald C. Doerr
John H. Gross
Claire P. Gutekunst
David R. Pfalzgraf
Jay G. Safer
David M. Schraver

† *Delegate to American Bar Association House of Delegates*
* *Past President*

Members of the House of Delegates

First District
Alcott, Mark H.
Bienstock, Peter
Boyers, Hon. Seymour
Brett, Barry J.
† Campos-Galvan, Manuel
Chambers, Hon. Cheryl E.
Cheng, Pui Chi
* Cometa, Angelo T.
Dominguez, Ivan J.
Ferrara, Lucas A.
Fink, Rosalind S.
Finkelstein, Robert
Flood, Marilyn J.
* Forger, Alexander D.
* Gillespie, S. Hazard
Grays, Taa R.
Green, Prof. Bruce A.
Gregory, John D.
Gross, Marjorie E.
Gutekunst, Claire P.
† Haig, Robert L.
Harris, Arlene
Harris, John B.
Hendricks, Susan L.
Hoffman, Stephen D.
Hollyer, A. Rene
Horan, John R.
Jacobs, Robert A.
Jacobs, Sue C.
Kiernan, Peter J.
* King, Henry L.
†* Krane, Steven C.
Kuntz, William F., II
Lau-Kee, Glenn
Lee, Charlotte C.
Lesk, Ann B.
Levy, M. Barry
Lieberman, Ellen
Lieberstein, Marc Ari
Lindenauer, Susan B.
* MacCrate, Robert
McShea, Sarah Diane
Milito, Christopher Scott
Miller, Michael
Minkowitz, Martin
Mitzner, Melvyn
Moreland, Thomas H.
Nathanson, Eugene
Nathanson, Malvina
* Patterson, Hon. Robert P., Jr.
Paul, Gerald G.
Plevan, Bettina B.
Ramos, Hon. Charles E.
Reimer, Norman L.
Reitzfeld, Alan D.
Richman, Steven H.
Rifkin, Richard
Rosner, Seth
Rothstein, Alan
Safer, Jay G.
* Seymour, Whitney North, Jr.
Sherman, Carol R.
Sherwin, Peter J.W.
Sherwood, O. Peter
Silkenat, James R.
Smith, Prof. Beverly McQueary
Smoley, Lewis M.
Sonberg, Hon. Michael R.
Stenson, Lisa M.
Torrent, Damaris E.
Wales, H. Elliot
Walsh, Susan J.
Warner, Rita Wasserstein

Second District
Cerchione, Gregory T.
Connors, John P., Jr.
Cyrulnik, Hon. Miriam
Digiovanna, Lawrence F.
Golinski, Paul A.
Hall, Thomas J.
Kamins, Barry
Longo, Mark A.
Romero, Manuel A.
Slavin, Barton L.
Sunshine, Hon. Jeffrey S.

Third District
Ayers, James B.
Bauman, Harold J.
† Butler, Tyrone T.
Cloonan, William N.
Copps, Anne Reynolds
DeFio, Elena M.R.
Engel, Hon. Franklyn J.
Freeman, Paul M.
Greenberg, Henry M.
Hanna, John, Jr.
Higgins, Patrick J.
Kelly, Matthew J.
Kinum, John B.
Kretser, Rachel
Lynch, Margaret Comard
Lytle, James W.
Maier, Christopher
Miranda, David P.
Perino, Justina R. Cintron
Privitera, John J.
†* Tharp, Lorraine Power
Thornton, Timothy B.
Treece, Hon. Randolph F.
* Yanas, John J.

Fourth District
Bartlett, Hon. Richard J.
Cantwell, Lori A.
Cioffi, Cristine
Clements, Thomas G.
Coffey, Peter V.
Dorsey, Matthew J.
King, Barbara J.
Pelagalli, Paul
Tishler, Nicholas E.

Fifth District
Alessio, George Paul
Benedict, Timothy A.
Doerr, Donald C.
Dunckel, Earl B.
Garramone, Hon. Anthony J.
Getnick, Michael E.
Hayes, David M.
Myers, Thomas E.
Norfleet, Doren P.
Peterson, Margaret Murphy
Plumley, Judy L.
Priore, Nicholas S.
* Richardson, M. Catherine
Weinstein, Ellen Stempler

Sixth District
Beehm, Angelina Cutrona
Denton, Christopher
Gacioch, James C.
Kachadourian, Mark
Lee, Carolyn S.
Lewis, Richard C.
Madigan, Kathryn Grant
Smyk, Stephen D.
Tyler, David A.
Wayland-Smith, Tina

Seventh District
Ashcraft, Sara Stout
Barney, Brian J.
† Buzard, A. Vincent
Doyle, Hon. John D.
Frazee, Hon. Evelyn
Grossman, James S.
Harren, Michael T.
Lawrence, C. Bruce
†* Moore, James C.
* Palermo, Anthony R.
Reynolds, J. Thomas
Schraver, David M.
Tyo, John E.
* Van Graafeiland, Hon. Ellsworth
* Vigdor, Justin L.
* Witmer, G. Robert, Jr.
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, 2d
Peskoe, Michael P.
* Walsh, Lawrence E.

The Legal Writer

A Pox on Vox Pop

By Gerald Lebovits

Should judges veto vox populi in opinion writing?

According to one master opinion writer, "Literature, poetry, popular culture and other art forms can be worked effectively into opinion writing."[1] One example of blending literature with opinion writing comes from the New York Family Court, which relied on *Invisible Man*, Ralph Ellison's novel about racism in America, to issue an order the court itself said it had no jurisdiction to issue.[2] Another is from the New York Supreme Court, which drew from Shakespeare's *King Lear* to condemn two children who cheated their mother: "How sharper than a serpent's tooth it is to have a thankless child."[3]

Many U.S. Supreme Court opinions contain art forms. Often the art overtakes the opinion, as in *Flood v. Kuhn*,[4] which lists 88 baseball greats and footnotes two baseball verses in exempting baseball from antitrust laws.

This is from one judge of the law-and-economics school: "The Grateful Dead play rock music. . . . Wherever the Dead appear, there is a demand for LSD in the audience. Demand induces supply. Vendors follow the band around the country; law enforcement officials follow the vendors."[5] Another federal judge, from Brooklyn, opened with a Bible lesson:

> Census-taking has never been easy, and has rarely received favorable press. King David learned this the hard way. In First Samuel, the King directed his Census Bureau, one Joab, to "go through all the tribes of Israel From Dan to Bersabee, and number ye the people that I may know the number of them." When Joab had reluctantly counted as far as 800,000, David realized that, in some eyes, his task might be regarded as hubris on the scale of the Tower of Babel. He repented, lamenting: "I have sinned very much in what I have done; But I pray thee O Lord, to take away the iniquity of thy servant because I have done exceedingly foolishly." The Lord turned a deaf ear for he sent David a pestilence and 70,000 died.[6]

One federal judge quoted the entire theme song of the 1960s TV show *Gilligan's Island* in footnote one, and began as follows: "'Just sit right back and you'll hear a tale' of what happened when David Reuther, while vacationing in the Cayman Islands at the Pirates Point Resort hotel, decided to go SCUBA diving — 'a fateful trip that started from this tropic port, aboard this tiny ship.'"[7]

Movies, too, attract opinion writers. One court far, far away from New York, joined the dark side by dwelling on *Star Wars*:

> The study of prisons and the *pro se* litigants who inhabit them is like the study of astronomy or even science fiction. The explorer of the world of prisons and *pro se* plaintiffs embarks upon a fantastic voyage into another world, even another galaxy, far, far away. Prisoners protect themselves with the laser-light power of their constitutional rights. Prison officials shield themselves with administrative autonomy. Both sides have power, but both must exercise restraint, lest they give in to the dark side of the force.[8]

This federal opinion opened with a history lesson:

> Plutarch, the great biographer, recounts the battle between the foot soldiers of Pyrrhus, king of Epirus, and the Romans at Asculum in 280 B.C. Six thousand Romans were felled that day. Pyrrhus lost three thousand of his own troops. According to Plutarch, when advised that he had won the battle, Pyrrhus reportedly replied in so many words: "Another such victory and I am undone." In this case, history will recount that, like Pyrrhus, plaintiffs won a battle, but lost the war.[9]

Cinderella is popular with opinion writers who enjoy using literary references for metaphoric comparison. This, from New York, is elegant: "A Judge of this State who crosses a State line instantly undergoes a transformation as dramatic as Cinderella's midnight metamorphosis."[10] But this, from the Federal Circuit, is forced: "The language of this statute is as clear as a glass slipper, there is no shoehorn in the legislative history, and the government, just as surely as Cinderella's step-mother, cannot make the fit."[11]

Mores and culture affect decision making. But judges should be wary of airing their erudition.

Other opinions incorporate fairy tales. From the First Circuit: "In the end, Aoude huffs and puffs, but he fails to blow down the edifice which the district court competently constructed from the facts of record and the applicable law. *Cf. The Three Little Pigs* 16–18 (E. Blegvad ed. 1980) (house three)."[12] From the D.C. Circuit: "Like the Emperor's new clothes, the Sentencing Guidelines are a bit of a farce."[13]

Continued on page 61