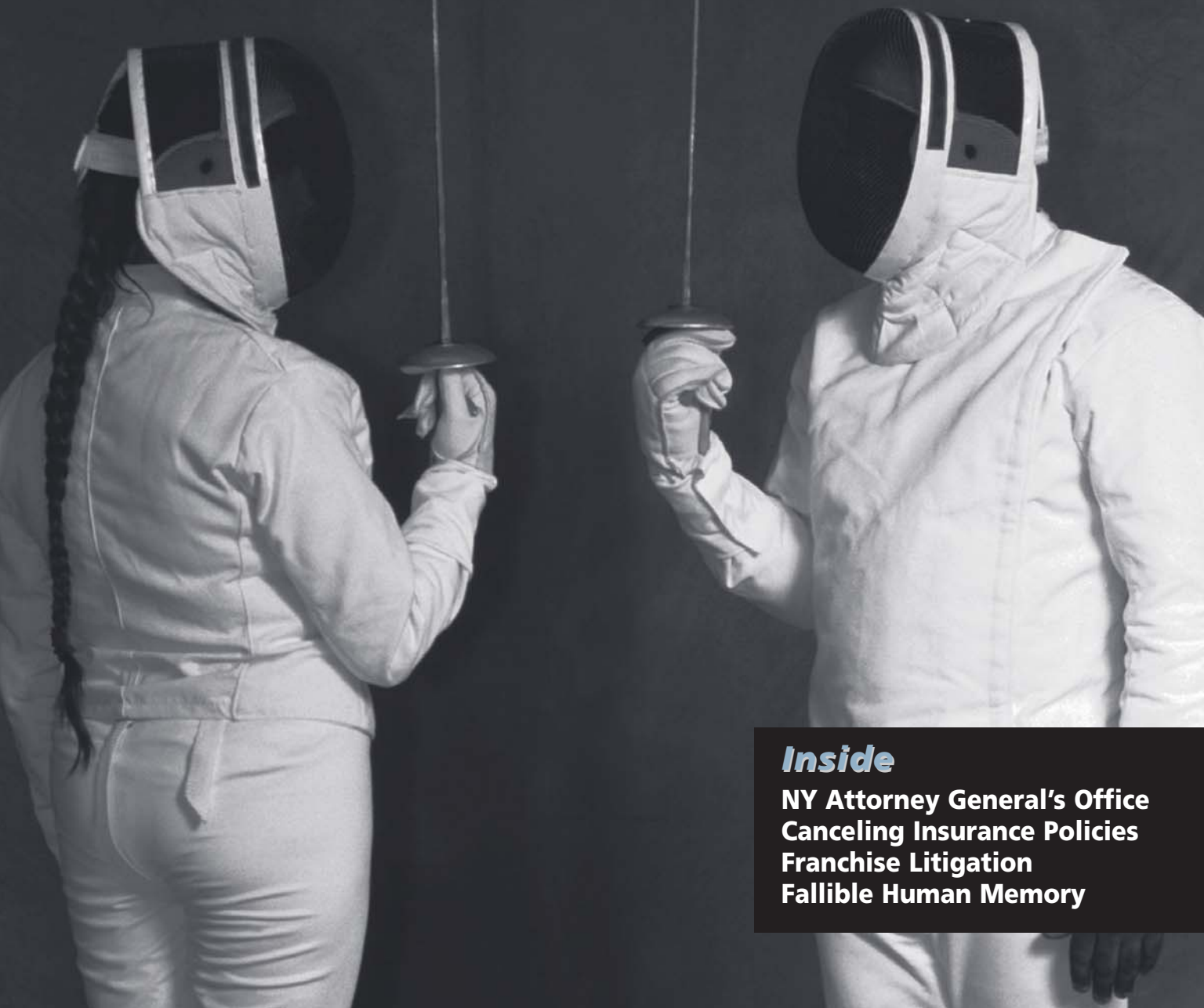
NEW YORK STATE BAR ASSOCIATION

JUNE 2004 | VOL. 76 | NO. 5

Journal

COMPLAINT AND RESPONSE: STRATEGY AND TACTICS



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May 2004

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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.
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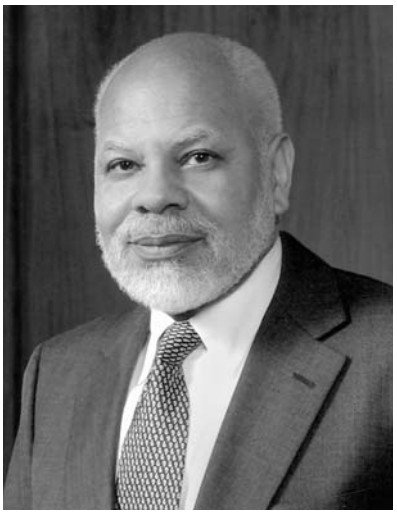
On The Cover

The fencers at the ready on the cover of this issue were chosen to symbolize the litigants' opening posture as they assess the stakes and square off to implement their chosen strategy and tactics.

Cover Design 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

Seizing and Making Opportunities

In our daily work and in our overarching mission for justice, our profession is often confronted with the challenge of seeking balance in competing forces. Each of us brings to this effort certain skills of advocacy, experience, innovative thinking and point of view. This energy, brought together through the Association, is our strength in making progress and in helping each other. Advancing this collective strength is what drew me to seek the leadership of the Association.

What better point to begin my inaugural message than to discuss these pushes and pulls on our journey for justice, how we can seize and make opportunity, and how you can and should be an active part of this action?

I view this page to be at least two, maybe three, kinds of "boards" – a sounding board to raise issues and possible approaches and seek your thoughts; a springboard inviting your ideas for initiatives and launching some new projects; and, perhaps, a bulletin board to keep you informed and to seek your help. Please tell me what you believe we should be addressing, how we're doing, what services would be helpful, and in what areas you would particularly like to be involved. Consider this an ongoing conversation and invitation.

Advocating for the rule of law, our members and the profession. So much of our efforts require a balance for the well-being of the profession – for example, balancing our professional and personal lives and balancing the responsibilities to our clients, our role as officers of the court and our efforts in service to society in general; and ensuring, as essential to public confidence, that the bench and bar are both accountable and independent.

As a profession, we also work to preserve sound precepts of law and practice, but also to advocate for constructive change in statutes, rules and procedures to better address today's complexities and to provide a viable means for resolution of the "simple" matter, as well as the complicated case. As the legal system grapples with increased case volume and demands, there must be a balance of efficiency with effectiveness of court and other procedures. In seeking to deal with these issues, the NYSBA is now measurably more visible and vocal in the legislative halls and in the media. We remain active in proposing and commenting on legislation, court rules and other provisions that affect our members and society as a whole. (We also have successfully litigated when necessary, most recently against the U.S. Federal Trade Commission.) What problems are you seeing? What changes in practice and procedure are needed? How can we do more to educate the public on the critical roles that members of the bench and bar play everyday?

Providing counsel. Too often, it seems, law is viewed by the general public as happening to people, rather than for people; too often, dealing with a legal issue is envisioned as becoming entangled in a convoluted, lengthy and painful process. Working to maintain and improve access to justice has long been and will continue to be a priority of the Association. I'm speaking of access in the broadest sense – including facilitating access to counsel and civil courts for low- and middle-income consumers and small businesses, increasing the public's knowledge of rights and responsibilities and where to turn when legal help is needed, and making the legal process less intimidating.

Many of us regularly schedule physicals for ourselves or prompt family members and friends to do so. We, similarly, need to encourage "legal check-ups" and increase awareness of our services in forestalling legal problems or resolving situations before they escalate. How can we overcome misperceptions and bring our services closer to the public? What can we do to publicize better our role as counselors? What we can do to help utilize unemployed and underemployed colleagues and foster opportunity for law offices to put their skills to use to serve underserved consumers?

Counseling ourselves. Perhaps by nature, training and certainly because of our sense of professional

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

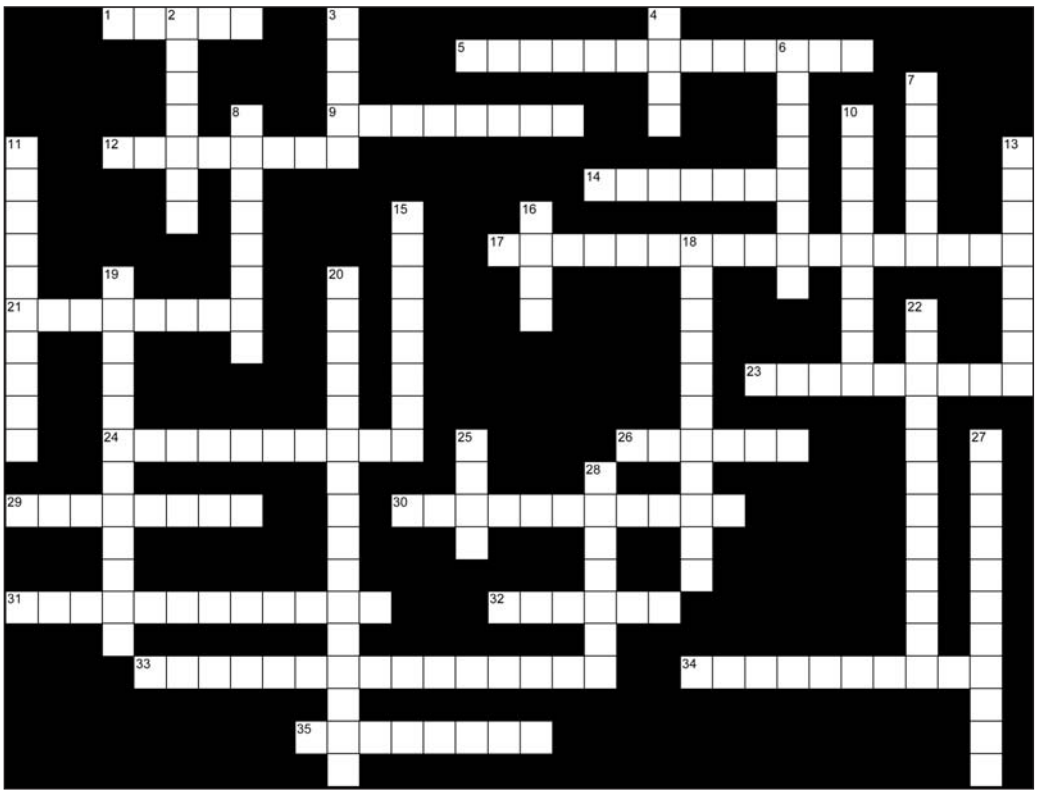
responsibility, members of our profession as a general practice put the well-being and interests of those we serve before our own and those of our loved ones, an undoubted source of conflict and stress for all of us. The ever-accelerating pace of society and demands on the profession likely will continue to escalate. Providing our members with resources, advice, a forum and other assistance to promote improved practice management techniques and a long-term healthy balance of personal and professional roles is an important function of the Association. This effort must focus not only on our individual actions, but also on our culture and expectations in our work. What additional steps should we take? Volunteer pro bono work and other community activities also enrich our lives and, even more so, those who benefit from our services. What more can we do as an association to foster opportunity and time for such involvement?

Promoting full opportunity to participate in the profession. We have taken a number of steps to ensure the opportunity for all our members to actively participate in the full range of activities of this association and to seek leadership positions. We continue to talk with colleagues and other bars to further this objective and to work on mutual concerns and opportunities. We also have under way a number of studies and projects to overcome obstacles to full participation in various work settings. There is more to do. I plan to pursue action on these studies and projects. As I have described, the strength of this Association is the shared knowledge, perspectives and energy of our members in confronting challenges. What is your experience? How can we further opportunity and diversity within our organization, in the workplace and bar generally?

Partnering with you. I look forward to continuing to meet as many of you as possible over my term and also hearing from as many of you as possible. My e-mail is one easy way – president@nysbar.com. Our communication and partnering are key to making progress.

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.)



Landlord vs. Tenants, by J. David Eldridge

Across

1 Extensive or unauthorized alterations by a tenant may constitute this

5 A covenant in a lease to recover _____ incurred in pursuing eviction proceedings is not against public policy

9 When the landlord does his own evicting

12 The tenant who materially annoys his neighbors is committing this

14 What the landlord must provide the cash-paying tenant of residential premises (RPL § 235-e)

17 Landlord's mechanism for recovering real property under Article 7 of the RPAPL

21 One settling on another's land without authority (RPAPL § 713)

23 The tenant's tenant

24 A provision in a lease allowing its transfer to another party

26 In response to a petition, the landlord may _____ orally or in writing (RPAPL § 743)

29 The vehicle for instituting eviction proceedings

30 What usually happens to the defaulting tenant's lease

31 What your tenancy automatically reverts to when the landlord lets you stay after the term of the lease expires

32 One legally possessing property rented or leased from its owner

33 Better not commingle this with your own funds

34 Grounds for eviction when the tenant doesn't pay (RPAPL § 711)

35 A tenant who doesn't leave "after the expiration of his term" is a _____ (RPAPL § 711)

Down

2 The one who actually removes people and property after successful eviction proceedings (RPAPL § 749)

3 An agreement creating a landlord-tenant relationship

4 What you pay in exchange for the right to possess another's real property

6 The owner's act of legally putting a tenant out of possession

7 Before bringing suit, don't forget to include the allegation that a _____ was made for the unpaid rent

8 The owner of an estate in land leased to another

10 *E.g.*, a reduction in rent where a portion of the premises has been damaged

11 What the landlord must deliver to the tenant in New York, absent a provision to the contrary (RPL § 233-a)

13 What is rendered at the end of a special proceeding determining the rights of the parties (RPAPL § 747)

15 Every petition to recover real property must state the landlord's _____ in the premises (RPAPL § 741)

16 In a summary proceeding in District Court, a tenant may demand a _____ trial upon answering (and payment of a set sum) (Uniform Dist. Ct. Act §§ 1303, 1305)

18 An injunction providing equitable relief from termination of a lease

19 Every tenancy includes an implied warranty of _____

20 A landlord cannot issue this paper commencing the action to recover real property (but his attorney can, under RPAPL § 731)

22 Under RPAPL § 755, eviction proceedings may be stayed where the landlord failed to make necessary repairs, resulting in a _____ eviction of the tenant

25 Most leases provide a defaulting tenant the opportunity to _____

27 Improper eviction of a complaining tenant who has not necessarily defaulted in his obligations

28 What the court issues after final judgment to remove a tenant (RPAPL § 749)

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Historical Perspective

Office of N.Y. Attorney General Sets Pace for Others Nationwide

By Philip Weinberg

Today's headlines portray state attorneys general leading the charge against securities, antitrust and environmental transgressors. A sampling of current news articles describes suits and investigations involving mutual funds accused of insider dealing, challenges to rules of the U.S. Environmental Protection Agency weakening Clean Air Act requirements, and a host of similar actions.[1] But it was not always thus.

Fifty years ago, state attorneys general represented their state government and its agencies in court, nearly always in defense of suits brought by others. When, infrequently, they commenced actions, it was almost invariably at the request of a governor or department head. Although some attorneys general had jurisdiction to prosecute crimes, in New York and many other states that power had lapsed, and local district attorneys exercised it.

The vast expansion of the role of attorneys general in protecting consumers, investors and the environment began in the late 1950s in New York. It soon encompassed other states, and today is a nationwide reality. This remarkable transformation originated with one attorney general, Louis J. Lefkowitz, who quickly proved the model for his successors in New York as well as his counterparts in other states. The story, largely untold, is an extraordinary one.

The Traditional Powers Of New York's Attorney General

In New York, as in all the 13 original colonies, the attorney general was appointed by the Crown. New York's first was Thomas Rudyard, named in 1684.[2] (Rudyard was deemed "not satisfactory" because he was "bred to a trade," not to "learning nor the law," and was soon replaced.)[3] The office, held by Aaron Burr among others after independence, became an elected one with the Constitution of 1847.[4] Like the governor, New York's attorney general served for a two-year term until the 1938 Constitution expanded both to the present four years.

The office stemmed from the King's Attorney, first appointed by the Crown in the 13th century.[5] John Herbert, named in 1461, was first to be called Attorney General, and the position became one filled by a member of the House of Commons with Sir Heneage Finch in 1670.[6] Today's British Attorney General has similarly evolved into not just the government's chief legal officer but a "guardian of the public interest."[7]

Although the British and the U.S. Attorney General have enormous authority to prosecute criminally, as do many state attorneys general, criminal jurisdiction in New York rapidly passed to an assistant attorney general in each judicial district. Despite their title, these officers were named not by the attorney general but by the state's Council of Appointment, and were not answerable to the attorney general.[8] After 1801, they adopted their modern title of district attorney, and eventually were elected to serve in each county.[9] The New York attorney general's original common-law power to prosecute crimes, upheld in 19th-century decisions, was firmly rejected by the courts in 1923.[10]

The Legislature did clothe the attorney general with jurisdiction to institute actions in the antitrust and securities fields. The Donnelly Act, enacted in 1899 and modeled on the Sherman Act, empowers the attorney general to sue to enjoin illegal acts and, following a 1933 amendment, to prosecute criminally.[11] But few reported cases before the 1960s involved actions brought by the state, and some of those few were suits against trade unions, dismissed pursuant to a provision exempting labor from the Act.[12]

The Martin Act, regulating securities, became law in 1921, antedating by more than a decade the federal

Philip Weinberg is a professor of law at St. John's University School of Law. He headed the Environmental Protection Bureau in the New York State Attorney General's Office, 1970–78. He is a graduate of the University of Pennsylvania and received his LL.B. from Columbia University School of Law.

He wishes to thank Sophie Lambrou (St. John's University School of Law 2004) for research in preparing this article.

Securities Acts of 1933 and 1934.[13] Enacted on the recommendation of a commission appointed by Governor Alfred E. Smith, the Martin Act authorized suits by the attorney general to enjoin fraudulent practices in the marketing of securities.[14] In 1955, at the suggestion of Attorney General (later United States Senator) Jacob K. Javits, a provision for criminal prosecution was added and the definition of fraud broadened.[15] Numerous reported decisions involve suits by the attorney general from the inception of the act.[16]

In addition, Executive Law § 63, enumerating the duties of the attorney general, has since 1956 empowered the office to bring suits to enjoin "repeated fraudulent or illegal acts . . . in the carrying on . . . of business" by partnerships and other unincorporated entities.[17] But the section appears to have been scarcely used in the year priors to the advent of Attorney General Lefkowitz.

By 1964, the National Association of Attorneys General was to note that New York was the most active state in the antitrust field.

The Lefkowitz Era

Louis Lefkowitz became attorney general in January 1957, named by the Legislature to succeed Attorney General Javits, who had been elected to the U.S. Senate. He was elected the following year and re-elected for five terms, retiring in 1979. His 22 years of service were and remain record-breaking for the office.

Born on New York's Lower East Side, and a graduate of Fordham Law School, Lefkowitz had been elected to the State Assembly for three terms as a Republican in a heavily Democratic lower-Manhattan district. His tenure as attorney general "remade a staid legal office whose main responsibility had been to defend the state in litigation."[18] In this alchemy he was ably assisted by his gifted first deputy, Samuel A. Hirshowitz, whom Lefkowitz aptly described as "a man who could see around corners." Together, they hired able deputies on their merit, gradually ending the office's traditional reliance on political appointment; notably, they were in the vanguard of appointing women to responsible and, indeed, leadership roles. The Albany office, second only to New York City's, was under Lefkowitz headed by Ruth Kessler Toch, and women also headed the Civil Rights Bureau and Election Frauds Bureau and handled first-magnitude litigation defending state agencies.

Louis Lefkowitz inherited an office hardly geared for affirmative litigation to protect the public interest. Although Attorney General Javits during his brief tenure from 1955 to the start of 1957 had added two weapons to the office's arsenal, expanding its securities law and consumer fraud powers,[19] these weapons remained largely sheathed. The 1956 Report of the Attorney General shows only one significant activity in enforcing the public interest: an anti-monopoly investigation into possible price-fixing of milk.[20]

The following year, things were different. In Attorney General Lefkowitz's first year of office, he established a Consumer Frauds and Protection Division and a Civil Rights Bureau.[21] At the recommendation of a New York State Bar Association special committee, and with the Attorney General's support, the Legislature amended the Donnelly Act to encompass monopolies in the "conduct of any business, trade or commerce or in the furnishing of any service in [the] state."[22] The previous statute was limited to manufacturing, transportation, marketing and sales. This led to a series of anti-monopoly investigations and suits, notably against the TelePrompTer Corporation and the promoters of the Floyd Patterson-Ingemar Johannson heavyweight championship fight, resulting in a consent judgment enjoining monopolistic acts involving arranging and broadcasting the event.[23]

By 1964, the National Association of Attorneys General was to note that New York was the most active state in the antitrust field.[24] That year the office obtained an injunction barring then-endemic price-fixing in the moving and storage industry.[25] In the next few years the Anti-Monopolies Bureau proceeded against price-fixing and restraint of trade in the plumbing business, by horse trainers at Aqueduct Race Track who were withholding horses from races, and by bulk milk carriers.[26] The last led to a challenge, ultimately unsuccessful, to the State Public Service Commission's approval of tariffs by the milk haulers' Tank Carriers Conference, which the Attorney General fought as anti-competitive.[27] The provision authorizing such agreements between carriers was repealed in 1983 as part of legislation described in the Governor's approval message as "stimulating competition."[28] In 1969, at the Attorney General's recommendation, the Legislature added a new provision to the Donnelly Act authorizing the office to sue on behalf of municipal governments and public authorities injured or threatened by antitrust violations.[29]

In the early 1970s the Anti-Monopolies Bureau focused on the automotive industry. It enjoined the major domestic auto manufacturers' joint practice of systematically denying the state and its municipalities the price discounts routinely offered fleet purchasers.[30] In addition, the office took part in the nationwide antitrust suit that sought damages from those manufac-

turers for their conspiracy to withhold pollution-control equipment, such as catalytic converters, from the market. The Justice Department obtained a consent decree enjoining that practice, but the states were later found to lack standing to recover damages on behalf of their citizens in federal court.[31]

The energy crisis ignited in the early 1970s by the raising of oil prices on the part of the OPEC nations spurred further antitrust actions in New York. Some of the major oil companies were charged with conspiring to withhold oil from the New York market through devices such as keeping tankers in holding patterns offshore.[32]

The newly formed Consumer Frauds and Protection unit, which soon became a separate bureau, obtained greater authority through a series of amendments, all part of the Attorney General's legislative program, strengthening Executive Law § 63. A 1958 amendment expanded the Attorney General's authority to seek injunctions against fraudulent business activity to persons doing business under their own name.[33] The earlier law applied only to partnerships and persons doing business under an assumed name. In the same year another amendment furnished the office with subpoena power in investigations under this provision.[34] The next year the statute was broadened to clarify that it applied to any business entity, including corporations.[35]

The newly created Civil Rights Bureau cut its teeth on actions against trade-union apprenticeship programs that excluded racial minorities, notably the plumbers' and sheet metal workers' unions.

A 1962 provision enabled the Attorney General to accept an assurance of discontinuance of unlawful acts, including payment of the costs of the investigation. Violation of an assurance was made *prima facie* proof of violation of the law involved.[36] In 1965 the statute's definition of fraud was broadened to encompass concealment as well as unconscionable contract provisions, a powerful weapon to protect consumers.[37] And a 1970 provision explicitly authorized the Attorney General to obtain restitution for aggrieved consumers.[38]

In 1975 an amendment broadened the "persistent fraud or illegality" requirement of the statute to require only "the continuance or carrying on of any fraudulent or illegal act or conduct."[39] Two years later the provision for restitution was strengthened to include damages.[40]

The legislative expansion of the Attorney General's jurisdiction dovetailed with a series of court successes in these years. The office enjoined, and won restitution for, hazardous conditions in rooming houses, false promises of employment to graduates of a paralegal school and billing hotel guests an automatic 2% surcharge for nonexistent "sundries."[41] Other actions enjoined advertising and sales of goods known to be unavailable, falsely asserting that goods were "reduced" or "on sale," and claiming to be able to obtain admission to medical and dental schools through influence peddling.[42] Another suit enjoined an advertising booklet publisher from pretending to be a state agency with authority to investigate potential advertisers, in order to threaten them with being officially deemed untrustworthy if they did not place ads.[43] In addition, the courts upheld the Attorney General's enforcement of a provision, part of the Attorney General's legislative program, requiring funeral homes to furnish itemized bills, to prevent belated add-on charges for services customers thought were included in the price.[44]

Not all these suits were successful. A major action against General Motors alleging fraudulent advertising, stemming from the practice of using engines produced by one division in cars bearing a more prestigious division's nameplate, foundered in the Court of Appeals on evidence that the practice was common to many manufacturing processes – as the Court found, "but a prototype of the assembly practices common generally to the automobile industry and to other American manufacturing industries."[45] But the office's consistently energetic and innovative enforcement in this area led the National Association of Attorneys General, in its 1971 Report on the Office of Attorney General, to note that "New York is recognized as a pioneer in the field of consumer protection activities. Attorney General Louis J. Lefkowitz initiated action against consumer frauds in 1957, utilizing existing statutes[.]"[46] Most states' attorneys general soon followed New York's lead and established consumer protection units of their own – 38 of the 50 by 1961.[47]

The newly created Civil Rights Bureau cut its teeth on actions against trade-union apprenticeship programs that excluded racial minorities, notably in the plumbers' and sheet metal workers' unions. Because these unions skirted the anti-discrimination laws through highly subjective "tests," the office drafted and obtained legislation mandating the use of objective criteria in apprenticeship testing.[48] To give an example of this device, an Attorney General's investigation showed that the steamfitters' union verbal test employed questions about art, music and geography, subjects not readily rel-

CONTINUED ON PAGE 14

CONTINUED FROM PAGE 12

evant to a steamfitter's responsibilities but effective, as graded, in barring minority applicants. An action against the union by the office led to an agreement to abandon the test.[49]

The sheet metal union's fierce resistance to ending its racial discrimination led to litigation that the union took to the U.S. Supreme Court, which ultimately upheld the lower federal courts' judgment requiring it to admit non-whites preferentially until it reached a 29% membership goal.[50] The suit was originally brought by the State Division of Human Rights, which had asked the Attorney General to investigate that union as early as 1961, in addition to the division's own ongoing investigation.[51]

These ventures into consumer, investor and environmental protection and civil rights soon became benchmarks for successive attorneys general, in New York and throughout the nation.

The Civil Rights Bureau also investigated and acted to halt gender discrimination at workplaces ranging from Time, Inc. to the Metropolitan Museum of Art, as well as New York Telephone and the Macmillan Publishing Company – some at the request of the Division of Human Rights, others as independent Attorney General cases in response to citizen complaints.[52] Time and the Metropolitan Museum agreed to cease gender discrimination as a result.[53] Another investigation into discrimination against women in extending credit by banks, credit card companies and other entities led to the enactment of a statute barring the practice.[54]

In other unprecedented sorties into new areas of law enforcement, the office obtained judgments appointing receivers to correct health-threatening conditions like lack of heat and hot water in tenements[55] and commenced the comprehensive regulation of theatrical financing, an area where some angels were fearing to tread.[56] This program resulted in passage of the Theatrical Syndication Financing Act, regulating the subject for the first time.[57] This statute empowers the Attorney General to investigate fraud and creative accounting of the sort spoofed in *The Producers*, and seek injunctions, appointment of receivers and criminal penalties.

These were but curtain-raisers, as it were, to a first-magnitude innovation, the adoption of a regulatory program for cooperatives and condominiums. Concerns voiced by investors and existing tenants led to regulations requiring disclosure and submission of each prospectus to the Attorney General's office, which in 1961 created a Real Estate Syndications Bureau for that purpose.[58] Three years later, as part of the Attorney General's program, the Legislature enacted the Real Estate Syndications Act, clothing the office with comprehensive regulatory jurisdiction.[59] Now known as the Condominium Act, this enactment regulates condos as securities under the Martin Act,[60] and requires public offerings to be approved by the Attorney General.

In 1970 Attorney General Lefkowitz created the Environmental Protection Bureau, designed to extend the Attorney General's historical authority to enjoin public nuisances to encompass actions to abate air and water pollution. Prior enforcement of the rudimentary statutes in this area had been performed at the request of the state's administrative agencies. The new unit, as in the antitrust, consumer protection and civil rights areas, was to proceed independently and affirmatively, and it soon began to do so. It brought actions against vacation home developers polluting lakes through defective septic systems,[61] the Port Authority's discharge of aircraft fuel into Jamaica Bay[62] and the City of Binghamton's deposit of oil-soaked waste in the Susquehanna River.[63] After successfully defending the state's endangered-species law from constitutional challenge,[64] the bureau investigated complaints and brought numerous suits to enforce that statute against importers and retailers, working in cooperation with the state's newly created Department of Environmental Conservation.[65]

The need to protect coastal wetlands from destruction soon became an environmental priority for the office. Wetlands are a crucial habitat for fish, shellfish, migratory birds and other wildlife, and are vital for storm and flood control. The Attorney General formed a Coastal Wetland Conservation Task Force and drafted what in 1973 became New York's Tidal Wetlands Act,[66] subjecting development in coastal wetlands to a permit program administered by the Department of Environmental Conservation. Injunction suits and criminal prosecutions for violations were brought by the office to enforce the Act, and its constitutionality was defended as against taking claims.[67] A related statute, part of the Attorney General's program, extended the Stream Protection Act, requiring a state permit to excavate or fill in navigable waters, to Long Island, from which it had (oddly) been historically excluded.[68]

The Environmental Protection Bureau also intervened in a major suit to prevent the dumping of dredge spoil into shell fishing grounds in Long Island Sound,[69]

sued the Federal Aviation Administration over its failure to adopt meaningful noise regulations,[70] and joined New York City as amicus in *Penn Central Transportation Co. v. New York City*,[71] where the U.S. Supreme Court upheld the city Landmarks Preservation Commission's rejection of an office tower atop Grand Central Terminal, rebuffing the owner's claim of an unconstitutional taking.

The enforcement of the Martin Act, a traditional endeavor of the Attorney General since its enactment in 1921,[72] also took on added impetus under Lefkowitz. A 1958 amendment, part of the Attorney General's legislative program, barred those with felony or securities law convictions from holding brokers' or dealers' licenses.[73] Two years later, the act was again strengthened to make a second violation a felony,[74] and to require investment advisors to submit their material to the office for approval.[75] A major investigation in 1971 led to a report, "The Auditors of Wall Street," highlighting gaps in the New York Stock Exchange's regulation of the industry – failures that recent events have dramatized.[76]

The Securities Bureau successfully enjoined corporate mergers designed to favor insiders and prosecuted a commodities option firm that violated the Martin Act.[77] It adopted regulations governing the conduct and qualifications of investment advisors.[78] Here, too, the office transcended the activities of previous attorneys general and acted in innovative ways to protect investors.

These ventures into consumer, investor and environmental protection and civil rights soon became benchmarks for successive attorneys general, in New York and throughout the nation. As noted earlier, New York's current Attorney General Eliot Spitzer has greatly expanded the scope of investigation and prosecution, notably in the securities and environmental protection arenas.[79] In other states, attorneys general have similarly moved far beyond their earlier limited roles – a particularly apt development at a time when federal enforcement of these laws has lacked sufficient resources. History should reflect how much this advance in using the full array of legislation, regulation and litigation on behalf of the public is due to the work commenced by New York's Attorney General Lefkowitz.

1. *See, e.g.*, Laura Johannes et al., *Fraud Charges Widen Scope of Scandal Facing Mutual Funds*, Wall St. J., Dec. 12, 2003, at C1; Katherine Q. Seelye & Jennifer B. Lee, *Court Blocks U.S. Effort to Relax Pollution Rule*, N.Y. Times, Dec. 25, 2003, at A1.
2. Karl T.W. Swanson, *The Background and Development of the Office of Attorney General in New York State* (unpublished thesis, Albany Law School Library, 1958), at 74.
3. State Attorneys General: Powers and Responsibilities 7 (Lynne M. Ross, ed., BNA 1990) (citing Hammond, *The Attorney General in the American Colonies* Anglo-American Legal History Series Vol. 1, No. 2, at 8 (1939)).
4. Swanson, *supra* note 2, at 134–35.
5. State Attorneys General: Powers and Responsibilities, *supra* note 3, at 4–5.
6. *Id.* at 5.
7. *Id.* at 30 (citing *Attorney Gen. ex rel. McWhirter v. Indep. Broad. Auth.*, 1 Q.B. 629 (Ch. App. 1973)).
8. Swanson, *supra* note 2, at 164.
9. *Id.*
10. *See People v. Miner*, 2 Lans. 396 (N.Y. App. Div. 1868); *People v. Tweed*, 13 Abb. Pr. (n.s.) 25 (1872) (upholding the prosecution of the notorious politico William Marcy Tweed). *But see Ward Baking Co. v. Western Union Tel. Co.*, 205 A.D. 723, 200 N.Y.S. 865 (3d Dep't 1923) (enjoining Western Union from furnishing evidence to the attorney general for a homicide investigation since the office lacked jurisdiction to prosecute).
11. N.Y. General Business Law §§ 340, 342, 347 (GBL). The Sherman Act is at 15 U.S.C. §§ 1, 2.
12. GBL § 340(4); *see People v. Gassman*, 182 Misc. 878, 45 N.Y.S.2d 709 (Gen. Sess., N.Y. Co. 1943), *aff'd*, 268 A.D. 377, 51 N.Y.S.2d 173 (1st Dep't 1944), *aff'd*, 295 N.Y. 254 (1945).
13. 15 U.S.C. §§ 77a–77aa.
14. GBL § 352; *see* Mihaly & Kaufman, McKinney's Practice Commentary, GBL art. 23-A, at 12–13 (1996).
15. GBL § 352-c; *see* Mihaly & Kaufman, McKinney's Practice Commentary, GBL art. 23-A, at 13–14 (1996) (section 352-c "afforded the Attorney General his most potent weapon in the field of securities regulation").
16. *See* McKinney's Practice Commentary, *supra* note 14, at 14–15.
17. N.Y. Executive Law § 63(12). Subdivision 12 was added by 1956 N.Y. Laws ch. 592. The statute was later amended

to extend the remedy to corporations. *See* 1959 N.Y. Laws ch. 242.

18. Obituary, Louis J. Lefkowitz, N.Y.L.J., June 24, 1996.
19. *See supra* notes 15, 17.
20. 1956 Ann. Report, N.Y. State Dept. of Law, at 19.
21. 1957 Ann. Report, at 4.
22. GBL § 340(1), *as amended by* 1957 N.Y. Laws ch. 893. *See* Governor's Memorandum, McKinney's Session Laws of New York, 1957, at 1881.
23. 1960 Ann. Report, at 84–85.
24. 1964 Ann. Report, at 2.
25. *State v. N.Y. Movers Tariff Bureau, Inc.* (Sup. Ct., N.Y. Co. 1964) (described in the 1964 Ann. Report, at 5).
26. 1968 Ann. Report, at 3–5; 1969 Ann. Report, at 2, 3.
27. *Attorney Gen. v. Lundy*, 59 Misc. 2d 436, 299 N.Y.S.2d 30 (Sup. Ct., Albany Co. 1969).
28. *See* 1983 N.Y. Laws ch. 635, § 5; Governor's Memorandum McKinney's Session Laws of New York, 1983, at 2789.
29. GBL § 342-b, *added by* 1969 N.Y. Laws ch. 635.
30. *See N.Y. v. Gen. Motors Corp.* (N.D. Ill. 1973) (described in 1974 Ann. Report, at 1).
31. *United States v. Auto. Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969); *see In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122 (9th Cir. 1973).
32. Edward Cowan, *U.S. Energy Chief Focuses on Crime*, N.Y. Times, Apr. 7, 1975, at 49.
33. 1958 N.Y. Laws ch. 84.
34. 1958 N.Y. Laws ch. 175; *see* 1962 N.Y. Laws ch. 310, § 130 (reflecting adoption of CPLR).
35. 1959 N.Y. Laws ch. 242.
36. 1962 N.Y. Laws ch. 743.
37. 1965 N.Y. Laws ch. 666. This was done to harmonize the statute with Uniform Commercial Code § 2-302. *See* Memorandum of Attorney General, McKinney's Session Laws of New York, 1965, at 2078.
38. 1970 N.Y. Laws ch. 44.
39. 1975 N.Y. Laws ch. 115.
40. 1977 N.Y. Laws ch. 539.
41. *Application of People by Lefkowitz*, 24 Misc. 2d 83, 202 N.Y.S.2d 352 (Sup. Ct., N.Y. Co. 1960); *State by Lefkowitz v. Person*, 75 Misc. 2d 252, 347 N.Y.S.2d 391 (Sup. Ct., N.Y. Co. 1973); *State by Lefkowitz v. Hotel Waldorf-Astoria Corp.*, 67 Misc. 2d 90, 323 N.Y.S.2d 917 (Sup. Ct., N.Y. Co. 1971).
42. *State by Lefkowitz v. Bevis Indus., Inc.*, 63 Misc. 2d 1088, 314 N.Y.S.2d 60 (Sup. Ct., N.Y. Co. 1970); *State v. Remedial Educ. Inc.*, 70 Misc. 2d 1068, 335 N.Y.S.2d 353 (Sup. Ct., N.Y. Co. 1972).
43. *State by Lefkowitz v. Slowek*, 79 Misc. 2d 1098, 362 N.Y.S.2d 110 (Sup. Ct., Albany Co. 1974).
44. *State v. J.S. Garlick Parkside Mem'l Chapels, Inc.*, 30 A.D.2d 143, 290 N.Y.S.2d 829 (1st Dep't), *aff'd*, 23 N.Y.2d 754, 296 N.Y.S.2d 952 (1968) (involving N.Y. Public Health Law § 3440-a, an Attorney General's program bill). *See* McKinney's Session Laws of New York, 1964, at 1868.
45. *State v. Gen. Motors Corp.*, 48 N.Y.2d 836, 838, 424 N.Y.S.2d 345 (1979).
46. Report on the Office of Attorney General, National Association of Attorneys General, Committee on the Office of Attorney General, at 396 (Feb. 1971).
47. 1961 Ann. Report, at 7.
48. N.Y. Labor Law § 815, *added by* 1964 N.Y. Laws ch. 948.
49. 1971 Ann. Report, at 17–18.
50. *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986).
51. *Id.* at 427; *see* 1961 Ann. Report, at 25–26. The U.S. Equal Employment Opportunity Commission later commenced a separate suit, which resulted in the judgment being upheld by the Supreme Court.
52. 1970 Ann. Report, at 24; 1971 Ann. Report, at 18; 1972 Ann. Report, at 21; 1974 Ann. Report, at 25.
53. 1971 Ann. Report, at 18; 1972 Ann. Report, at 21.
54. Exec. Law § 296-a, *added by* 1974 N.Y. Laws ch. 173.
55. 1960 Ann. Report, at 19.
56. 1963 Ann. Report, at 21; 1964 Ann. Report, at 18.
57. N.Y. Arts & Cultural Affairs Law art. 23, *added by* 1964 N.Y. Laws ch. 728 (originally GBL art. 26-A). This led to restitution in some major ventures. *See* 1977 Ann. Report, at 26.
58. 1961 Ann. Report, at 16.
59. N.Y. Real Property Law art. 9-B, *added by* 1964 N.Y. Laws ch. 82.
60. GBL art. 23-A.
61. *State v. Ole Olsen, Ltd.*, 35 N.Y.2d 979, 365 N.Y.S.2d 528 (1975).
62. *People v. Port of N.Y. Auth.*, 64 Misc. 2d 563, 315 N.Y.S.2d 9 (Sup. Ct., N.Y. Co. 1970).
63. 1972 Ann. Report at 51.
64. *A.E. Nettleton Co. v. Diamond*, 27 N.Y.2d 182, 315 N.Y.S.2d 625 (1970), *appeal dismissed sub nom. Reptile Prods. Ass'n v. Diamond*, 401 U.S. 969 (1971).
65. 1971 Ann. Report, at 37–38; *People by Lefkowitz v. Corum Watch Co.*, 39 A.D.2d 513, 330 N.Y.S.2d 186 (1st Dep't 1972).
66. N.Y. Environmental Conservation Law art. 25, *added by* 1973 N.Y. Laws ch. 790 (ECL).
67. *See Kessler v. Sherman*, 51 A.D.2d 52, 378 N.Y.S.2d 573 (2d Dep't 1975), *aff'd*, 41 N.Y.2d 851, 393 N.Y.S.2d 703 (1977) (criminal prosecution); *Marine Equities Corp. v. Biggane*, 49 A.D.2d 907, 373 N.Y.S.2d 622 (2d Dep't 1975) (taking claim rebuffed).
68. ECL § 15-0505, *as amended by* 1975 N.Y. Laws ch. 349, § 1.
69. *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1975).
70. 1976 Ann. Report, at 51.
71. 438 U.S. 104 (1978).
72. *See supra* notes 13–16 and accompanying text.
73. GBL § 353(2), *added by* 1958 N.Y. Laws ch. 750, § 3.
74. GBL § 359-g, *as amended by* 1960 N.Y. Laws ch. 972.
75. GBL § 352-b, *as amended by* 1960 N.Y. Laws ch. 961.
76. 1971 Ann. Report, at 13.
77. 1975 Ann. Report, at 19; 1976 Ann. Report, at 22.
78. 1977 Ann. Report at 24; *See* N.Y. Comp. Code R. & Regs. tit. 13, pt. 11.
79. *See* note 1 and accompanying text.

Banking Law Sets Strict Procedures For Canceling Insurance Policies Paid Through Finance Companies

BY MITCHELL S. LUSTIG

One of the more arduous and frustrating tasks faced by the insurance practitioner involves the cancellation of an automobile insurance policy when the coverage is terminated by a premium finance company rather than an insurance company. The procedures can seem arcane to the uninitiated.

The key to handling these cases both for attorneys who represent the insured and those who act for the insurer is to understand the nature of the premium finance transaction and the procedures required for a successful cancellation. The cancellation of a policy by a premium finance company is governed by Banking Law § 576, not Vehicle & Traffic Law § 313, which applies when an insurance company cancels a policy. Consequently, the procedures for canceling an automobile policy are very different under the two laws.

Banking Law § 576(1)(a) through (g) establishes detailed procedures that a premium finance company must follow scrupulously if it wishes to cancel a policy for nonpayment of the finance agreement. Each procedural hurdle must be painstakingly satisfied.[1] Any deviation from the statutory requirements, no matter how slight, renders the cancellation void and coverage would remain in effect under the policy.[2]

Premium Finance Transactions

Due to the high cost of automobile insurance in New York, many insureds choose to finance their automobile policies through a premium finance company. Under the typical arrangement, the insured pays the finance company a small down payment and the finance company advances the full premium to the insurance company. The insured then sends the premium finance company monthly installment payments that include both principal and interest.

To protect the finance company if the insured fails to make the monthly installment payments, the finance agreement normally contains a power of attorney clause in which the insured gives the finance company permission to cancel the policy on behalf of the insured if there is a default in payment of the monthly installments. A typical power of attorney clause provides as follows: "If I [insured] fail to pay the required premium, then I give you [finance company], permission to cancel the insurance policy for which you have paid the premium on my behalf."

Banking Law § 576 allows a premium finance company to cancel a financed policy "only if the right is contained in the finance agreement,"[3] and only if it first demonstrates that it possesses a valid power of attorney giving it the right to request cancellation on behalf of the insured. Accordingly, to defend the cancellation, the finance company must be able to produce a signed copy of a finance agreement with the power of attorney clause.

When the policy is cancelled, the insurance company returns the unearned premium directly to the finance company. The finance company will first retain the returned premium to satisfy any outstanding indebtedness that the insured owes it under the terms of the finance agreement. Only after the finance company has been made whole will the finance company return any portion of the returned premium to the insured.

As is often the case in any debtor-creditor relationship, it is common for the insured to default under the terms of the finance agreement. When this occurs, the finance company exercises the power of attorney and attempts to cancel the policy.

Two-Step Process for Cancellation

Assuming the existence of a valid power of attorney, cancellation is a two-step process. Banking Law § 576(1)(a) requires that the premium finance company first send

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the insured a Notice of Intent to Cancel. This document advises the insured that a payment is past due under the loan agreement.

The Notice of Intent to Cancel must give the insured at least 10 days to cure the default. The Banking Law further provides that if the Notice of Intent to Cancel is sent by mail, an additional three days must be added to the 10-day period. Because virtually all Notices of Intent to Cancel are sent by mail, the statute gives the insured 13 days to cure the default

The 13-day period to cure the default must be 13 *full* days, with each day consisting of 24 hours. In *Nationwide Mutual Insurance Co. v. Bates*,[4] the court held that a Notice of Intent to Cancel that only gave the insured 12 days and one minute to cure the default was invalid. A copy of the Notice of Intent to Cancel must also be mailed by the finance company to the insured's agent or broker.

If the 13-day period expires and the insured has not cured the default, Banking Law § 576(1)(d) provides that the finance company may "in the name of the insured, cancel such insurance contract by mailing to the insurer a notice of cancellation stating when thereafter the policy shall be cancelled, and the insurance contract shall be cancelled as if such notice of cancellation had been submitted by the insured himself." A copy of the notice of cancellation must also be mailed to the insured.

Significantly, Banking Law § 576 does not contain any grace period between the last day to cure the default under the Notice of Intent to Cancel and the date of cancellation. The only requirement in the statute is that the cancellation be effective sometime "thereafter." In *Ward v. Gresham*,[5] the New York Court of Appeals upheld the validity of a cancellation that was to take effect as early as the next day.

Banking Law § 576(1)(c) provides that both the Notice of Intent to Cancel and the Notice of Cancellation must contain in 12-point type: (1) a statement that proof of financial security is required to be maintained continuously throughout the registration period and (2) a regulatory notice prescribed by the Commissioner of Motor Vehicles indicating the punitive effects of failure to maintain continuous proof of financial security and the actions that may be taken by the insured to avoid such effects. If either the statement or regulatory notice is missing from the Notice of Intent to Cancel and/or the Notice of Cancellation or they are not in 12-point type, the cancellation is invalid.

Banking Law § 576(1)(b) states that service of the Notice of Intent to Cancel and the Notice of Cancellation "by mail shall be effective provided that the notices are mailed to the insured's last known address as shown on the records of the premium finance agency."

Notably, the statute does not contain a requirement for a "Certificate of Mailing" as provided for in Vehicle & Traffic Law § 313. The failure of the Banking Law to adopt a uniform mailing standard such as a Certificate of Mailing has created a great deal of uncertainty because not all finance companies employ the same mailing procedures.

In the absence of a requirement for a Certificate of Mailing, courts reviewing finance company cancellations have typically adopted the common law test for mailing, which requires proof of an office practice and procedure followed in the regular course of business, which shows that the notices have been duly addressed and mailed.[6] Some courts, however, have applied the common law test so rigidly that it vitiates any cancellation where the finance company failed to produce the mail-room employee who physically placed the required notices in the envelopes and brought them to the post office.[7]

Such a stringent application of the common law rule has presented most finance companies with an almost impossible standard if the mail-room employee who performed the actual mailing is no longer employed by the finance company.

When a cancellation is challenged, the finance company can demonstrate compliance with the mailing requirements of the statute by producing separate mailing logs for both the Notice of Intent to Cancel and Notice of Cancellation, listing the names and addresses of insureds to whom notices were sent on a designated date, which should be posted on the top of the mailing logs. In addition, the mailing logs should be accompanied by an affidavit or testimony from an officer or supervisor at the finance company with knowledge of the mailing procedures, stating that the notices were mailed in the regular and ordinary course of business. In the absence of a requirement in the statute that the finance company obtain a Certificate of Mailing, it is not mandatory that the mailing logs be stamped by the post office.

Assigned Risk Policies

One question that continues to baffle both the bench and bar is whether a premium finance company that cancels an automobile policy issued under the New York Assigned Risk Plan (the "Plan") must include in the Notice of Cancellation the language required by Section 19 of the Plan: "As your policy was obtained through the New York Assigned Risk Plan, you are advised that you have the right of review (of the cancellation) by a committee of the Plan."

There is no doubt that if an insurer requests a cancellation of an Assigned Risk Policy, the right-of-review language set forth above must be included in the text of

the Notice of Cancellation.[8] The question of whether a premium finance company must also include such language in its Notice of Cancellation has engendered conflicting judicial decisions that have been occasioned, in part, by the drafting language of the Plan itself.

In *Roth v. Aetna Life & Casualty Insurance Co.*,[9] the Second Department held that a Notice of Cancellation issued by a premium finance company that failed to include the right-of-review language articulated in Section 19 of the Plan was deficient. One year later, however, the Fourth Department, in *Aetna Casualty & Surety Co. v. Preisigke*,[10] rejected the reasoning of *Roth* that held it was not necessary for a finance company to include such language in the Notice of Cancellation. Relying on the 1983 decision of the New York Court of Appeals in *Ward*, the Fourth Department stated that insurance carriers and premium finance companies should be treated differently and noted that the rules of the Plan are only applicable when an insurer initiates the cancellation.

Under the common law, actual receipt of the cancellation notice by the insurer was required to cancel a policy of insurance.

Apparently as a result of the conflicting decisions of the Second and Fourth Departments, the Plan, in April of 1988, amended Section 18.1 of the Plan rules, adding a new paragraph 3. It provides:

> Cancellation by a premium finance company acting pursuant to a power of attorney granted by the insured is deemed to be a cancellation at the request of the insured. An insured has no right of review of such cancellation action by the Governing Committee of the Plan.

In adopting this amendment, the Plan made it clear that the insured had no right of review by the Governing Committee of the Plan of a finance company cancellation. The Plan was explicitly recognizing that a premium finance cancellation should be treated as if the insured initiated the cancellation. Because there is no right of review by the Plan when the insured requests cancellation, there is likewise no right of review when the finance company cancels pursuant to a power of attorney.

In October 1992, Section 18 was amended again. The amendment, contained in a new Section 18.5, provides:

> Cancellation of a policy under a Premium Finance Agreement shall be on a pro-rata basis subject to a minimum earned premium on the policy of ten percent or $60.00, whichever is greater. An insured has no right of review of such action by the Governing Committee of the Plan.

On its face, the 1992 amendment does not expressly state, as its predecessor did, that there is no right of review of the "cancellation action," but more vaguely states that an insured has no right of review of "such action," which in context appears to apply only to the *pro rata* return of premium. In *Preferred Mutual Insurance Co. v. Rollo*,[11] a judge in the Supreme Court of Westchester County, feeling constrained by the holding of the Second Department in *Roth*, construed the amendment to mean that the insured has no right of review of the calculation of the earned premium. The decision noted, however, that the parties had not submitted any information with respect to the 1992 amendment to the Plan, despite being offered the opportunity to do so by the court.

In *Liberty Mutual Insurance Co. v. Duerr*,[12] decided six years later, the Supreme Court of Nassau County declined to follow *Rollo* and held that a Notice of Cancellation issued by a premium finance company did not have to advise the insured of the right of review. Relying upon the invitation left open by the court in *Rollo*, counsel for the proposed additional respondent, New York Central Mutual Fire Insurance Company, provided the court in *Duerr* with documentation from the Plan administrators, discussing the purpose of the 1992 amendment to the Plan.

The documentation revealed that the sole purpose of the 1992 amendment was to bring the Plan in compliance with a 1991 amendment to Banking Law § 576(1)(f), which requires that the return premium of a policy financed by a premium finance company be calculated on a *pro rata* basis in lieu of short rate and was not intended to alter the effect of the 1988 amendment, which rejected administrative review of premium finance cancellations. As Referee Michael Trainor noted in an unpublished decision:

> These [Plan] documents show that the 1992 amendment to the rules was prompted by an amendment to the Banking Law requiring pro rata premium refunds to insured persons upon termination of an insurance policy financed by a premium finance agency. Nothing in the correspondence indicates an intent to change the plan's policy denying administrative review of premium finance company cancellations.

Referee Trainor's decision, which stands as the most recent analysis of the Plan's internal documents, appears to provide the best available pronouncement on the subject. The implication is that there is no right of review by the Governing Committee of the Plan of a premium finance cancellation and a Notice of Cancellation issued by the finance company does not have to include such language.

The Notice of Cancellation

To complete the cancellation process, Banking Law § 576(1)(g) requires the insurer to file the cancellation with the Commissioner of Motor Vehicles no later than 30 days following the effective date of cancellation. This 30-day requirement is strictly construed.[13] Although the same 30-day period is statutorily prescribed under Vehicle & Traffic Law § 313 when a policy is cancelled by an insurance company, a cancellation under § 313 will be sustained even if the filing is made after 30 days, so long as the cancellation is filed prior to the date of the accident.[14]

Not so with a cancellation by a premium finance company under Banking Law § 576. Because that section prescribes detailed procedures that must be scrupulously followed, a timely filing goes to the "essence of proper cancellation and in the absence of such timely filing there can be no cancellation."[15] A late filing under the Banking Law cannot be cured by filing prior to the accident.[16] The only remedy is for the finance company to start the cancellation process again.

Effective Date of Cancellation

Assuming that the premium finance company complies with the strict statutory requirements of Banking Law § 576, what is the effective date of the cancellation? Is it the date specified in the Notice of Cancellation issued by the finance company or the date that the notice is received by the insurer? The answer can have a significant impact on cases where a loss occurs in the period between the cancellation date specified in the Notice of Cancellation and the date of its receipt (often a few days later) by the insurer.

Under the common law, actual receipt of the cancellation notice by the insurer was required to cancel a policy of insurance.[17] Does Banking Law § 576 supersede the common law rule? In other words, when a policy is cancelled by a premium finance company, is the policy cancelled on the date specified in the Notice of Cancellation issued by the finance company or the date the notice is received by the insurer?

In *Crump v. Unigard Insurance Co.*,[18] the Court of Appeals stated that Banking Law § 576 did not abrogate the common law rule requiring actual receipt by the insurance company and held that a cancellation initiated by a premium finance company was not effective until the insurer received the Notice of Cancellation. Therefore, a loss that occurs in the gap between the date of cancellation specified in the Notice of Cancellation issued by the finance company and its actual receipt by the insurer would be covered under the policy.

Conclusion

In light of the demanding requirements of Banking Law § 576, many attempted cancellations fail to pass muster and are invalidated by the courts. The insurer, however, has little recourse against the finance company, even if the defect in the cancellation was due to the obvious error of the finance company.

In *Home Mutual Insurance Co. v. Broadway Bank & Trust Co.*,[19] the Court of Appeals held that the finance company cannot be held liable to the insurer for monies paid by the insurer in settlement of a claim arising out of a defective cancellation. If the finance company improperly cancels, the insurer is entitled only to recover from the finance company the amount of the return premium that the insurer initially returned to the finance company premised upon the fact that the cancellation was valid.

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1. *Anzalone v. State Farm Mut. Ins. Co.*, 92 A.D.2d 238, 459 N.Y.S.2d 850 (2d Dep't 1983); *Nationwide Mut. Ins. Co. v. Bates*, 179 Misc. 2d 231, 683 N.Y.S.2d 739 (Sup. Ct., Nassau Co. 1998).
2. *Sea Ins. Co. v. Kopsky*, 137 A.D.2d 804, 525 N.Y.S.2d 266 (2d Dep't 1988).
3. *Anzalone*, 92 A.D.2d at 239.
4. 179 Misc. 2d 231.
5. 59 N.Y.2d 878, 465 N.Y.S.2d 931 (1983).
6. *Anzalone*, 92 A.D.2d at 240.
7. *See L.Z.R. Raphaely Galleries, Inc. v. Lumbermens Mut. Cas. Co.*, 191 A.D.2d 680, 595 N.Y.S.2d 802 (2d Dep't 1993); *Lumbermens Mut. Cas. Co. v. Collins*, 135 A.D.2d 373, 521 N.Y.S.2d 432 (1st Dep't 1987); *Felican v. State Farm Mut. Ins. Co.*, 113 Misc. 2d 825, 449 N.Y.S.2d 887 (Sup. Ct., Queens Co. 1982).
8. *Daniel v. Rivera*, 93 A.D.2d 877, 461 N.Y.S.2d 425 (2d Dep't), *aff'd*, 60 N.Y.2d 662, 468 N.Y.S.2d 104 (1983).
9. 128 A.D.2d 514, 512 N.Y.S.2d 447 (2d Dep't 1987).
10. 139 A.D.2d 900, 527 N.Y.S.2d 895 (4th Dep't 1988).
11. 172 Misc. 2d 631, 658 N.Y.S.2d 937 (Sup. Ct., Westchester Co. 1997).
12. Index No. 633/98 (Sup. Ct., Nassau Co.).
13. *See Ottey v. Motor Vehicle Accident Indemnification Corp.*, 71 Misc. 2d 164, 335 N.Y.S.2d 755 (Sup. Ct., N.Y. Co. 1970), *aff'd*, 39 A.D.2d 874, 334 N.Y.S.2d 593 (1st Dep't 1972); *see Orisini v. Nationwide Mut. Ins. Co.*, 35 A.D.2d 238, 315 N.Y.S.2d 390 (3d Dep't 1970).
14. *Allcity Ins. Co. v. Rodriguez*, 212 A.D.2d 405, 622 N.Y.S.2d 43 (1st Dep't 1995).
15. *Theodore v. Hartford Accident & Indem. Co.*, 60 Misc. 2d 991, 993–94, 304 N.Y.S.2d 688 (Sup. Ct., Albany Co. 1969).
16. *Ottey*, 71 Misc. 2d 164.
17. *Russ Togs, Inc. v. Fidelity-Phenix Ins. Co.*, 36 A.D.2d 706, 319 N.Y.S.2d 1 (1st Dep't 1971), *aff'd*, 32 N.Y.2d 628, 342 N.Y.S.2d 658 (1973).
18. 100 N.Y.2d 12, 760 N.Y.S.2d 71 (2003).
19. 53 N.Y.2d 568, 444 N.Y.S.2d 436 (1981).

Can a Choice of Forum Clause Force a Franchisee to Litigate In the Franchisor's Home State?

By Mitchell J. Kassoff

A franchisee who has a grievance against his franchisor is not likely to want to pursue litigation in a distant forum, and thus may turn to a state court in his home state. The franchisor typically removes the case to federal court,[1] and then, invoking the forum selection clause in the typical franchise agreement, seeks to transfer the case to the federal court in the franchisor's home state.

Although it is well settled that parties to a contract may voluntarily agree to a choice of forum in the event they engage in litigation, when the parties are from different states the question becomes whether the forum selection clause was voluntarily negotiated.

In franchise disputes, typically involving a franchisee from one state and a franchisor from another, the key issue becomes whether the forum selection clause can be enforced. The franchisee may also raise other issues in an attempt to defeat a transfer motion. This article assesses the issues and arguments that the franchisee may raise to defeat a motion to transfer the case to federal court in the franchisor's home state.

Franchise Agreement Terms

Before a franchisor grants a franchise, the franchisee is required to execute a franchise agreement provided by the franchisor. The agreement is usually presented on a take-it-or-leave-it basis and is not subject to negotiation. When litigation ensues, the franchisee is thus likely to allege that the forum selection clause was, effectively, an improper contract of adhesion.

The argument for that position typically cites the franchisor's superior financial resources and superior bargaining ability. This franchisee's affidavit is not likely to be disputed by the franchisor, opening the way for the franchisee to argue that the adhesive nature of the document provides a foundation for invalidating the franchisor's attempt to enforce the forum selection clause.

McNally Wellman Co. v. New York State Electric & Gas Corp.[2] holds that the court must first inquire "into any inequities of bargaining power when the parties drafted the contract, a factor NYSEG cannot argue existed here. Further, an assessment of unconscionability 'generally requires a showing that the contract was both procedurally and substantively unconscionable when made – *i.e.*, some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'"[3]

The franchisee may claim that, in addition to the breach of the franchise agreement, the franchisee has other causes of action such as fraud, lost opportunities and violation of the antitrust laws. Even if the court were to decide that the forum selection clause should be enforced, the franchisee's typical argument contends, the issue would be moot because these causes of action that go beyond breach of a franchise agreement are not subject to the selection clause. This reasoning then supports an argument that the case should continue in the franchisee's home state because these other counts of the complaint are inextricably woven with the allegation that the franchisor has committed a breach of contract.

In *Jones v. GNC Franchising, Inc.*,[4] the U.S. Court of Appeals held that a franchisor's forum selection clause was not enforceable. The relative financial burdens of litigating and the location of relevant witnesses favored California, where the franchisee was located. This would be the same in a situation in which the only con-

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nection between the franchisor's home state and the lawsuit is the location of the franchisor.

Weight to Franchisee's Choice

In *Goff v. AAMCO Automatic Transmissions, Inc.*,[5] a U.S. District Court, quoting the Comment to the Proposed Official Draft of the Restatement Second, Conflict of Laws, stated that:

> "A choice of law provision, like other contractual provisions, will not be given effect if the consent of one of the parties to its inclusion in the contract was secured by misrepresentation, duress, undue influence, or mistake. A factor which the forum may consider is whether the choice of law provision is contained in an 'adhesion' contract, namely one that is drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms."

The pleadings of the complaint and the affidavits of the franchisee need to show this to be the situation in the franchisee's case. At the very least, the franchisee's strategy would be to argue that litigation must continue in the chosen venue to allow the franchisee to prove these allegations.

In *Choice Hotels International, Inc. v. Madison Three, Inc.*,[6] a U.S. District Court denied the motion for a transfer of venue to a federal court in another state. The court held:

> To a large extent, then, there has been no substantial showing by [franchisors] that a transfer under the circumstances of this case would do anything other than shift the greater burden and inconvenience of trial from [franchisors] to [franchisee], which is not a proper purpose of a transfer of venue. I note that a [franchisee's] choice of forum is entitled to a degree of deference, although "the weight given to this factor should be commensurate with the degree it impacts the policy behind section 1404(a), that is to make trial 'easy, expeditious and inexpensive.'"

In *Quality Inns International, Inc. v. Patel*,[7] a U.S. District Court held:

> The motion to transfer imposes upon the moving party the burden of establishing that the case should be transferred and it is important that the franchisee's choice of forum be accorded grave weight. The court must assess three factors in determining whether the motion to transfer will be granted; (1) the convenience of the parties; (2) the convenience of witnesses; and (3) the interest of justice.
>
> * * *
>
> Put simply, "[W]here a transfer would merely shift the inconvenience from one party to the other or where after balancing all the factors, the equities lean but slightly in favor of the movant, the franchisee's choice of forum should not be disturbed."

Thus, when the parties, activities and witnesses can be shown to be concentrated in the franchisee's state, the franchisee is then in a position to argue that the current court is the proper forum.

In *Call Carl, Inc. v. BP Oil Corp.*,[8] a U.S. District Court held:

> Therefore, even if a corporation is not found or doing business in a jurisdiction, it is subject to venue in an antitrust suit if it is transacting business there.
>
> This provision has received considerable attention in the courts, which have generally construed it as providing [franchisee] with a wide choice of forum, regardless of harm to the [franchisor] corporations sued under the Act. The leading case on the section 12 venue provisions, *United States v. Scophony Corp.*, 333 U.S. 795, 92 L. Ed. 1091, 68 S. Ct. 855 (1948), characterizes judicial construction of the Act as follows: "[The Supreme Court in *Eastman*] relieved persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due."

Franchisor's Action

The franchisee also needs to argue that the falsity of the information in the franchisor's Uniform Franchise Offering Circular (UFOC) and the franchisor's knowledge thereof are issues to be addressed during discovery. When a major part of the franchisee's case is based on fraudulent conduct, the argument becomes that the case is not subject to a forum selection clause for two reasons: acceptance of the clause was the result of the very fraud at issue, and the franchisor perpetrated the fraud in the franchisee's state *prior* to the existence of the contract. When this argument can be made convincingly, the franchisee is then well positioned to insist that a transfer of the case to a federal court in another state is appropriate.

The court also needs to be informed that the case involves the sale of a franchise by a franchisor. The Federal Trade Commission rule on franchising[9] ("FTC Rule"), states that:

> In connection with the advertising, offering, licensing, contracting, sale, or other promotion in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any franchise, or any relationship which is represented either orally or in writing to be a franchise, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for any franchisor or franchise broker:
>
> * * *
>
> (b) To make any oral, written, or visual representation to a prospective franchisee which states a specific level of potential sales, income, gross or net profit for that

> prospective franchisee, or which states other facts which suggest such a specific level, unless:
>
> (1) At the time such representation is made, such representation is relevant to the geographic market in which the franchise is to be located;
>
> (2) At the time such representation is made, a reasonable basis exists for such representation and the franchisor has in its possession material which constitutes a reasonable basis for such representation, and such material is made available to any prospective franchisee and to the Commission or its staff upon reasonable demand.

Therefore, the franchisee's argument becomes that the franchisor must show that it complied with the requirements of the FTC Rule. This is an issue that requires discovery and that is not subject to the terms of the franchise agreement.

The franchisor's response may be that there is no private cause of action pursuant to the FTC Rule, which is quite correct. The franchisee needs to be able to respond that this allegation is not being made so that the franchisee can sue for the violation of the FTC Rule. The reason that the franchisee is providing this information to the court is to show that by failing to follow the requirements of the FTC Rule, the franchisor committed fraud in providing the information in the UFOC, which does not allow the franchisor the use of the forum selection clause.

The argument becomes that . . . the franchisor perpetrated the fraud in the franchisee's state prior to the existence of the contract.

The franchisee must argue further that if the franchisor makes the claim that the statement or omission must have been misleading at the time it was made, then the franchisor's motion must be denied because discovery is required to determine whether the statement was false when it was made.

Antitrust Issues

The franchisee may also try to argue that the terms of the franchise agreement violate state and federal antitrust laws. The franchisee's position is likely to cite the importance of the antitrust laws and remind the court that the U.S. Supreme Court, in *United States v. Topco Associates, Inc.*,[10] stated:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete – to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

The franchisee's position becomes that the market and products are clear and unambiguous – the market is simply the franchisee's territory and the products and services are those the franchisor provides. Based on the holdings in the cases cited, the franchisee can then take the position that he must have his day in court to prove the charges in the complaint. The franchisee also argues that the litigation must continue in this court so that discovery can commence in order for more specific information to be obtained.

The franchisee's complaint also needs to deal with monetary damages resulting from the franchisor's violation of the antitrust laws. The argument becomes that the franchisor's statements in response to these allegations raise questions of fact to be resolved at trial.

Private antitrust actions, such as this, are the only means by which injured individuals or businesses can recover their damages under the antitrust laws. For this reason, the U.S. Supreme Court and Congress have long recognized the importance of such actions.[11]

In regard to the pleading of an antitrust claim, as held in *Nagler v. Admiral Corp.*,[12] an antitrust complaint need not spell out detailed facts, and need only satisfy the liberal notice pleading requirements of Federal Rule of Civil Procedure 8(a).[13] The courts have gone so far as to say that an antitrust complaint need only furnish "the slightest clue as to what conduct by the [franchisors] is claimed to constitute 'an illegal contract combination and conspiracy,'"[14] and have taken the position that dismissal of an antitrust claim is appropriate only if it is "wholly frivolous."[15]

In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*,[16] the U.S. Supreme Court held that:

> The trial court dismissed its suit not because Walker failed to allege the relevant market, the dominance of the patented device therein, and the injurious consequences to Walker of the patent's enforcement, but rather on the ground that the United States alone may "annul or set aside" a patent for fraud in procurement. The trial court has not analyzed any economic data. Indeed, no such proof has yet been offered because of the disposition below. In view of these considerations, as well as the novelty of the claim asserted and the paucity of guidelines available in the decided cases, this deficiency cannot be deemed crucial. Fairness requires that on remand Walker have the opportunity to make its [Sherman Act] § 2 claims more specific, to prove the alleged fraud, and to establish the necessary elements of the asserted § 2 violation.

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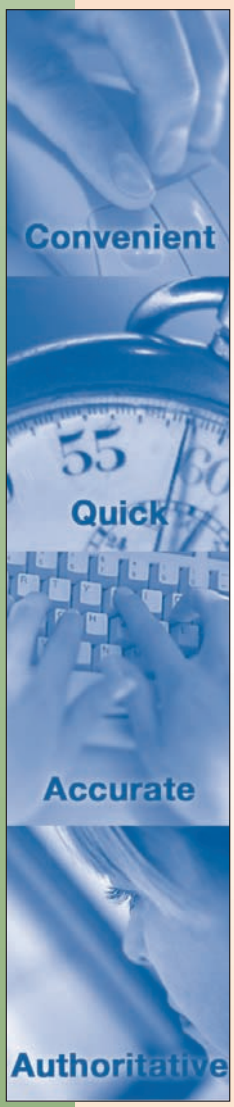

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Thus, the franchisee can be in a position to argue that these antitrust violations must be tried in this court at this time.

Conclusion

The franchisee in a suit against a franchisor is likely to argue that even if the court were to accept the franchisor's argument that an alleged breach of contract should be subject to the choice of forum provision in a contract, the forum selection provision should not apply to the other counts in the complaint. In the interests of judicial economy, therefore, the matter is then portrayed as one that should proceed in one forum, the franchisee's home state. The franchisee is further likely to argue that the franchisor's motion to dismiss or stay the franchisee's lawsuit should be denied so that discovery can proceed and allow the parties to obtain information uniquely available in the franchisee's home state.

The final result regarding any dispute on the venue of the litigation is likely to be quite fact specific.

1. 28 U.S.C. §§ 1441, 1446.
2. 63 F.3d 1188, 1198 (2d Cir. 1995).
3. *Id.* at 1198 (citation omitted) (quoting *Gillman v. Chase Manhattan*, 73 N.Y.2d 1, 537 N.Y.S.2d 787 (1988); *see Am. Dredging Co. v. Plaza Petroleum*, 799 F. Supp. 1335, 1339 (E.D.N.Y. 1992), *vacated in part*, 845 F. Supp. 91 (E.D.N.Y. 1993).
4. 211 F.3d 495 (9th Cir. 2000).
5. 313 F. Supp. 667, 670 (D. Md. 1970).
6. 23 F. Supp. 2d 617, 622 (D. Md. 1998) (citations omitted) (quoting *Laughlin v. Edwards Bus. Machs.*, 155 F.R.D. 543, 545 (W.D. Va. 1994).
7. 1988 U.S. Dist. LEXIS 14342, *2, *4 ((D. Md. Dec. 8, 1988) (citations omitted) (quoting *Derry Fin. N.V. v. Christiana Cos., Inc.*, 555 F. Supp. 1043, 1046 (D. Del. 1983).
8. 391 F. Supp. 367, 370–71 (D. Md. 1975) (citations omitted), *aff'd in part, rev'd in part on other grounds*, 554 F.2d 623 (4th Cir. 1977).
9. 16 C.F.R. § 436.1.
10. 405 U.S. 596, 610 (1972) (citations omitted).
11. *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968); *Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968); *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 131 (1969); *Minnesota Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont, Inc.*, 845 F.2d 404, 411 (2d Cir. 1988), *aff'd*, 492 U.S. 257 (1989); *Monarch Life Ins. Co. v. Loval Protective Life Ins. Co.*, 326 F.2d 841, 845 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964).
12. 248 F.2d 319 (2d Cir. 1957).
13. *Accord Barr v. Dramatists Guild, Inc.*, 573 F. Supp. 555, 559 (S.D.N.Y. 1983) ("[a] franchisee is not required to provide detailed allegations"); *Broadcast Music, Inc. v. Hearst/ABC Viacom Entm't Servs. Inc.*, 746 F. Supp. 320, 326 (S.D.N.Y. 1990) ("[a]ntitrust allegations, however, are governed by the 'short and plain statement' requirement of Rule 8(a)"); *Newburger, Loeb & Co. v. Gross*, 365 F. Supp. 1364, 1367–68 (S.D.N.Y. 1973) ("skeletal" allegations survive a motion to dismiss).
14. *Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 299 (2d Cir. 1965).
15. *Radovich v. NFL*, 352 U.S. 445, 453 (1957); *see United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954); *Three Crown Ltd. P'ship v. Caxton Corp.*, 817 F. Supp 1033, 1047 (S.D.N.Y. 1993).
16. 382 U.S. 172, 178 (1965).

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Advanced Litigation Techniques

Conventional Wisdoms or Mistakes: The Complaint and the Response

This is another in a planned series of articles devoted to litigation techniques. An article in the January issue explored how to create a team-like effort with the client, together with an overview of strategy, tactics, risk assessment and innovation, and dealings with adversaries.

This article looks at how to formulate and implement strategy and tactics, beginning with planning and commencing the suit. It assumes that the facts are understood, the key documents have been gathered, the essential research is complete, and a "reality check" has been done on both the merits of the case and the client's reliability and veracity.

BY SANFORD F. YOUNG

Significant and deliberate strategy decisions must be made for beginning an action or responding to the complaint, as well as initiating discovery. These decisions and their implementation will have a pervasive effect on all subsequent proceedings and the eventual outcome of the contest.

Initial Strategy

Sue first, ask questions later.

Upon being retained to litigate a dispute, the initial question is what is the first step: send a demand letter, explore alternative dispute resolution or commence suit?

Other than small nuisance cases and minor personal injury claims, pre-suit demands are not likely to be worthwhile. They serve only to postpone the inevitable. In the past, a lawyer's letter may have been an effective strategy to gain a party's attention and give the opponent an impetus to settle without the need for litigation. Today, however, most individuals, and almost every business, have been conditioned to the point that lawyers and litigation are accepted as a necessary evil. Hence, in most cases you can assume that by the time you are retained, your client is ready and anxious to throw down the gauntlet and serve papers.

Nevertheless, there may be specific circumstances in which a pre-suit demand is desirable. Such a situation may be the rare case where the parties are susceptible to the rational influence of new faces – the attorneys – to bring them to the bargaining table. Obviously, the most rational reason is that settlement avoids substantial cost and eliminates risk. Other reasons may be to clarify or solidify the parties' positions or where a pre-suit demand is required by contract or statute.[1] A pre-suit letter is also a way of testing, to a small degree, your client's willingness to engage his or her adversary – especially when there is some continuing relationship with or dependency on the adverse party, such as an employer, partner, supplier, customer, trade organization, government agency, relative or friend.

Alternative dispute resolution (ADR) may also be considered, whether in the form of non-binding mediation or binding arbitration. ADRs are typically used when required by agreement, which is often the case in certain industries, or if required by the court, as may be true in some federal courts.[2] Otherwise, the parties will have to give their consent, which is difficult to obtain once the parties are feuding. When using a commercially available mediation or arbitration service – "rent-a-judge" – the cost can be substantial with hourly rates

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commensurate with that of other highly experienced attorneys.

In the case of binding arbitration, there are many considerations that can be looked upon as both pros and cons. First, most arbitrations are final and non-reviewable, subjecting the parties – much to the delight of the winner and chagrin of the loser – to a binding and final decision without any right of meaningful review.[3] Second, discovery is usually very limited. Third, arbitrations are rarely, if ever, resolved by pre-hearing dispositive motions (*e.g.*, dismissal or summary judgment). Fourth, rules of evidence are generally only loosely applied, with hearsay statements (including affidavits) and documents usually freely admitted. Fifth, the conventional wisdom is that ADRs are more likely to result in compromise awards than court actions. Sixth, while ADR proceedings are expected to be rapid and efficient, they too can get bogged down and take longer than expected.

The best complaint and the most successful suits are those that are simple and well focused.

On balance, other than specific areas of law where arbitration has become the norm (such as labor, stock brokerage and various contractual, construction and insurance matters), most attorneys are more comfortable with and prefer litigating cases in conventional courts, where the rules of evidence and case precedents are more predictable and strictly applied, and juries and appeals are available.[4]

Most lawyers find that commencing suit is the most committal act of litigation. Once filed, the lawyer is legally obligated to the case and client, unless relieved by the client and/or court.[5] For that reason alone, your retainer should be sufficient to carry you a substantial way into the case. Commencing suit is also the act that best secures your statutory lien.[6]

Whom to Sue and Where

Keep it simple.

Many attorneys have a tendency toward overly complicating the case. Those tendencies include naming too many parties and drafting long and verbose complaints as if they were trying to prove their case and convince the defendants of the error of their ways in one fell swoop. These are poor strategies that you will pay for many times over. The best complaint and the most successful suits are those that are simple and well focused.

Often, the initial impulse is to sue as many parties as can be named – *sue the world*! It is thought that the more parties you sue, the more likely someone will settle and the more parties among whom liability can be spread when judgment day comes. Except in a small number of situations, however, this is a poor strategy. By suing more than one or two parties, you exponentially increase the complexity, cost and length of the case. From a plaintiff's point of view, numerous defendants means fighting numerous attorneys, impossible scheduling delays and, often, getting caught in the delay caused by their cross fires. On the other hand, from the defendant's standpoint, it is a field day to gang up on the plaintiff and prolong the case.

Of course, there are critical exceptions where multiple defendants may be necessary or desirable – notwithstanding the increased cost and delay. An example may be where the ultimately liable party may not be known, such as in a product liability, medical malpractice, construction or other complex tort cases where multiple actors were involved in the events leading up to the injury. Similarly, apportionment rules may necessitate suing all potentially liable parties so as to avoid the risk and legal malpractice of liability being assessed against the "empty chair."[7] There may, however, be strategic reasons for not suing critical actors. Those situations often arise in the case where you are suing negligent parties whom you are trying to hold liable for the acts of an intentional tortfeasor (such as the one who committed an assault) who is judgment proof and has little or no insurance.[8] In those cases, even though the risk of apportionment is great, the presence of the intentional tortfeasor in court may exacerbate that problem. In any event, you should be sure that the client is informed of and agrees to the decision to omit critical defendants.

Suing multiple defendants in tort cases also creates a problem if you want to settle with, or otherwise need to discontinue against, less than all parties. The General Obligations Law will automatically release the remaining parties of the proportionate share of liability of the released party, even if their settlement payment was minimal.[9]

Some attorneys also name witnesses as defendants for the singular purpose of obtaining discovery against them. This tends to be a more common practice in certain types of cases such as medical malpractice. Aside from the impropriety of this strategy, there are pros and cons. On the one hand, it is true that it is generally easier to obtain discovery from a party than from a disinterested and unmotivated non-party witness against whom sanctions for non-production are limited to the drastic remedy of contempt.[10] On the other hand, aside from the risk of sanctions for bringing a frivolous suit by naming them as a party, you will encounter the resistance of their defending counsel, who may impose road-

blocks and delays, such as making motions to dismiss and insisting on priority of discovery.[11]

Some attorneys overrate the use of class actions and seize upon the first opportunity to bring one. However, the use of a class action must be well thought out, because it is a species unto itself. While class actions are obviously suited to cases where there is a great number of plaintiffs, for whom bringing separate actions would not be feasible or possible, there are costs and concerns that come with the field. First, you need to prove the standards for bringing the class, including your own standing and ability to represent the class.[12] In that regard, other class action attorneys may join in the fray with their own representative class plaintiffs and thus battle you for control and the lion's share of the fee. Second, you will need to move the court to certify the class within the early time limits required by the rules[13] – which application will often result in a cross-motion to dismiss before you have had meaningful discovery. Third, while the prosecuting attorney may believe that the class action could result in a substantial fee, it will be subject to judicial scrutiny, and the court will likely base the fee on factors such as time spent, rather than the formulaic percentages typically used in traditional named-plaintiff actions.[14] Fourth, from the point of view of individual claimants who have a substantial loss – such as in mass or toxic tort cases – becoming part of a class may diminish the claimants' ability to settle their individual claims, which will become lost in a sea of claims where the value of each class-member's claim is diluted and prolonged. Hence, if you are able to sign up significantly injured plaintiffs, bringing suit as named plaintiffs – whether individually, one large action, or joined or consolidated actions – may be the better way to go.

If you are able to sign up significantly injured plaintiffs, bringing suit as named plaintiffs – whether individually, one large action, or joined or consolidated actions – may be the better way to go.

The choice of court and venue is another area where simplicity and common sense should guide. Those considerations obviously include convenience (yours and the clients'), the known characteristics and biases of the local jury pool, and the length of the waiting time to get to trial. Other considerations include the accessibility of non-party witnesses, the quality of the local bench and how well connected or regarded you and your likely adversaries are in that venue. In cases where there may be significant legal issues or verdicts, you should also consider which venues and appellate courts are most likely to rule in your favor, especially where there are critical conflicting precedents, new law to be made or potentially large jury awards to be reviewed.

In diversity cases, some attorneys jump at the opportunity to sue in the federal courts. This may be a poor strategy, however. Practitioners not accustomed to litigating in federal court may be surprised to find themselves in a court that is more suited and favorable to non-diversity cases, such as those involving federal questions, and that may well be less patient with run-of-the-mill cases, extended discovery[15] and lack of adherence to the federal court's rigid requirements for discovery, scheduling, briefing and pretrial motions.[16] The risks of sanctions are also greater,[17] especially if you are making "novel" arguments; that may inhibit how aggressive you would otherwise be. The limited availability of appellate review – *i.e.,* that appeals are generally only allowed from final orders and judgments[18] – may also leave the parties with little recourse when faced with unfavorable District Court judges and ruling. And, when an appeal is allowed, the practitioner will be surprised by the stringent appellate rules and short deadlines, as well as the continuing threat of sanctions.[19]

Drafting the Complaint

Less is more.

Having decided whom to sue and where, you are now down to the business of drafting the complaint. Here, you should be clear on your objective and prioritizing your goals.

First, the main goal is to state a legally cognizable claim. Second, to state the claim in a way that would either minimize inviting a motion to dismiss or, more specifically, avoid dismissal. Third, to increase the chances of gaining admissions, without giving too many. Fourth, to clearly outline the various theories of the case as a template for future strategy. Fifth, to avoid inviting excessive requests for disclosure. There may also be a goal of convincing the adversary of the merits and resolve of your case, but that goal is not generally achieved by any one single part of the litigation. It is achieved by the entire strategy and implementation: winning at trial or by dispositive motion. It is that well-focused resolve that will enhance the chances of settlement.

As for the first priority, we all know that modern jurisdictions, such as the federal courts, ostensibly require only notice pleadings[20] with only a bare-bones statement of the case. Nevertheless, various types of

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Discovery in Federal Court Is Closely Supervised

As discussed in the main article, the CPLR provides for a myriad of discovery devices in state court, with few limits on their use and combination. The U.S. District Courts and local district court rules, on the other hand, severely limit discovery, unless otherwise directed by the court.

Except in certain prescribed categories of cases (*e.g.*, for administrative review, habeas corpus, etc. [Fed. R. Civ. P. 26(a)(1)(E), 26(d)]), the Federal Rules of Civil Procedure prohibit the parties from seeking any discovery prior to the parties conferring, developing and submitting a proposed discovery plan to the court in advance of a scheduling conference [Fed. R. Civ. P. 16, 26(d), (f)].

Once discovery begins, the rules restrict the use of the various discovery devices. For example, no more than a total of 10 depositions are allowed by each side [Fed. R. Civ. P. 30(a)(2)(A)] and each deposition is limited to one day of seven hours [Fed. R. Civ. P. 30(d)(2)]. Interrogatories are limited to 25 questions, including sub-parts [Fed. R. Civ. P. 33(a)]. Southern District Rule 33.3 further limits the scope of interrogatories to identifying witnesses, documents, insurance, physical evidence and damage computations. Western District Rule 34 also limits the number of document requests to 25 items.

The rules provide that certain discovery must automatically be provided "without awaiting a discovery request" – *i.e.*, the identity of individuals with knowledge, copies of relevant documents, computation of damages and insurance coverage [Fed. R. Civ. P. 26(a)(1)], which are to be given within 14 days after the Rule 26(f) conference. There are no rules of priority [Fed. R. Civ. P. 26(d)]. Southern District/Eastern District Rule 26.2 and Western District Rule 26(f) provide special rules for assertions of privilege, and Southern District/Eastern District Rule 26.3 and Western District Rule 26(e) provide uniform definitions for certain words, such as "document" and "identify."

The one area where the Federal Rules are more liberal than the state rules is expert discovery. While CPLR 3101(d)(1) provides for limited disclosure of the identity, opinion, basis and qualifications, the Federal Rules require production of the expert's report setting forth "a complete statement of all opinions . . . and the basis and reasons therefor." The expert's qualifications must include a list of all publications going back ten years, the compensation being paid and a list of all cases where the expert testified at trial or deposition going back four years [Fed. R. Civ. P. 26(a)(2)(B)]. Unlike state court, the Federal Rules also provide that a party may depose his adversary's expert [Fed. R. Civ. P. 26(b)(4)(A)] provided that – unless "manifest injustice" will result – the deposing party pay the expert's reasonable fee for his time [Fed. R. Civ. P. 26(b)(4)(C)].

Of course, the Federal Rules provide for court supervision and that the court may otherwise limit discovery based upon factors such as whether it is cumulative or duplicative, burden, need, amount in controversy and party resources [Fed. R. Civ. P. 26(b)(2)]. The various rules cited above also allow for broadening discovery for cause. The parties may also alter the procedures by stipulation, so long as extensions regarding interrogatories, documents and admissions do not interfere with the discovery cut-off date [Fed. R. Civ. P. 29].

Parties and their attorneys are subject to various sanctions and are subject to paying for expenses for abuses [Fed. R. Civ. P. 26(g)(3), 30(d)(3), 37].

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cases have minimal requirements, such as the need to state fraud claims with particularity,[21] and the mandated compliance standards for medical malpractice cases.[22]

For cases that are beyond the garden variety claims of personal injury or simple breach of contract, you should be concerned about the potential for a motion to dismiss. Here, the quality and style of the pleading is critical in both reducing the invitation to the defendant to move and, should the motion be made, enhancing your ability to successfully defend against a dismissal motion. Obviously, that begins with researching and applying current law and requirements before you draft the complaint, knowing all available causes of action and then being sure to allege all necessary elements of each cause of action claimed.[23]

A well-drafted complaint should be easily understood and organized in some logical fashion, which is most often in rough chronological order of how events unfolded. The complaint should not be rambling or verbose; lengthy and prolix complaints are likely to invite motions. Organizing the complaint often includes dividing it into various subheadings, such as for listing jurisdictional allegations, identifying the parties, alleging the facts applicable to all causes of action and then stating each individual cause of action (*i.e.*, legal theory). Each cause of action can also be labeled with the theory (*e.g.*, Breach of Contract, Fraud, etc.) being

invoked and, if numerous parties are named, labeled with the identification of the parties against whom it is being asserted.

In very complex cases, an introductory paragraph can be used. In framing each numbered paragraph, aim for single-sentence paragraphs, and ideally, reasonably short sentences.[24] Second-level lettered sub-paragraphs (*e.g.*, a, b, c, etc.) can be used to describe elements of a complaint or to describe the essential factual elements of the respective causes of action, such as a claim for fraud.[25] First-level numbered paragraphs, however, are preferable to assure getting specific responses in the answer.

Keep in mind how the complaint will be read by your adversary, who will be looking to move to dismiss; how it will be perceived by a court considering such a motion; and how you will use the complaint to your advantage to defend against the motion. In other words, think of what you will want the complaint to contain, if and when the motion is made, rather than wait for the motion and hope for the best, or need to struggle for leave to amend and replead.

Be clear on what relief is requested for each cause of action, and keep monetary claims separate from equitable. For the latter, be sure to include required allegations, such as when there is "no legal remedy" or "irreparable harm." The complaint can allege inconsistent claims,[26] but try to do it in a way so that your client – who is likely unfamiliar with the fine legal nuances – cannot be harshly cross-examined when the time comes.

Although it is difficult to obtain substantial admissions, an effort to try to pin down the defendant is worthwhile. That is done by alleging each fact in short, concise, separately numbered paragraphs. As you draft the allegations, strive to make it difficult for the defendant and the defendant's counsel to avoid giving admissions. Avoiding an admission is easy when lengthy paragraphs contain numerous factual and legal allegations, any one of which may arguably be deniable. Also, the use of verified pleadings – unique to New York State – may be marginally useful.[27]

Keep in mind the scope and number of discovery requests that the complaint may elicit from the defendant, whether by way of document requests, interrogatories and to a lesser extent, depositions. The longer the complaint and the greater the number of facts alleged, the greater the discovery you will be asked to give.

Documents can be annexed to the complaint,[28] but this approach should only be used sparingly and deliberately. If documents are annexed, it may make it easier for the defendant to move to dismiss, because there is something concrete to attack.[29] Nevertheless, there may be tactical reasons to annex and refer to critical documents, such as the contract or vital predicate notices or orders, or to obtain specific admissions, such as to authenticity.

Court rules usually give the right to amend once without leave of court, but that right ends soon after all responsive pleadings are completed.[30] Thereafter, leave of court is required. Leave is typically said to be freely given when there is merit and minimal prejudice,[31] but it is not wise to start the action with a plan to amend later. That is a risky strategy, except in special situations, such as where you need to commence suit hastily to make the statute of limitations. Try to make the initial pleading as complete and strong as possible, so that the case does not depend on an amendment.

Although the CPLR provides for other means to commence suit, such as a "motion for summary judgment *in lieu* of complaint" to recover "upon an instrument for the payment of money only or upon any judgment,"[32] a normal plenary action is generally preferable. Motion procedure is cumbersome – you need to prepare a formal motion (with notices, affidavits and exhibits, as well as a summons) and pick a return date based upon your guess of how long it will take to make service. Second, motions provide the defendant with additional procedural defenses that slow down the process, rather than speed it up. Last but not least, if the defendant defaults, as many often do in cases brought on instruments (*e.g.*, notes) and judgments, obtaining a default judgment will be complicated and delayed by the possible need for a court order deciding the motion, when under a normal plenary action, it could simply be entered by the clerk.[33]

Responding to the Complaint

To answer or move, that is the question.

Have you ever noticed that in a significant number of complex or large lawsuits, the first response by the defendants is to move to dismiss, rather than answer? While there are many reasons that militate in favor of moving to dismiss, there are only a few against it.

The reasons for moving to dismiss are: (1) it is the first of several possible *bites of the apple* to dismiss the case;[34] (2) until you answer, the plaintiff cannot cross-move for dispositive relief;[35] (3) the motion is a good opportunity to test the legal sufficiency and validity of some or all claims; (4) even if the motion doesn't eliminate the entire case, it may eliminate some causes of action, as well as possible remedies; (5) eventually, and the sooner the better, you should research and analyze the plaintiff's theories, and the motion puts that expense to practical use; (6) it postpones discovery and gives you more time to develop your case; and (7) it creates an opportunity to approach settlement at a point in which you create uncertainty for and shift the burden of work to the plaintiff.

The main disadvantages of moving to dismiss are: (1) it is expensive; but part of that expense would be inevitable as the research and analysis must be done; (2) it can result in an adverse decision that becomes *the*

law of the case and may lock your party into an unfavorable legal position (which may not have happened if you had waited for discovery); and (3) the denial of the motion may fortify the plaintiff's expectation of success down the road, and thus entrench its future settlement posture.

One of the most underutilized procedural tools is the motion to dismiss based upon documentary evidence.[36] Thus, while we may traditionally understand that motions to dismiss are based solely upon the allegations within the four corners of the complaint, it is possible to go beyond. Examples of documentary evidence typically used are documents that are the subject of and contemporaneous with the events that are the subject of the complaint – *e.g.*, contracts, leases, notes, mortgages, deeds, insurance policies and the like.[37]

The idea is to learn whatever you can about the adversary and all the transactions, then pin the other side down on details so it has no wiggle room.

Other possible grounds to move for dismissal include failure to state a cause of action, lack of jurisdiction, running of the statute of limitations, etc. You should also be sure to meet other stringent time requirements, when applicable, such as for removing cases to the federal courts[38] or contesting improper venue.[39]

Answering the complaint is one of those laborious tasks that just have to be done. It is also a task that, when done correctly, requires detailed information from the client. Make the answers as precise as possible. If necessary, qualify the denial with more specific statements.

Whether moving or answering, it is critical to follow the rules closely so that various defenses are preserved. The rules provide a non-exclusive list of "affirmative defenses"[40] as well as other grounds for dismissal,[41] which must be asserted either by motion or answer.[42] Many attorneys automatically allege a laundry list of affirmative defenses, whether applicable or not, in their answers.[43] Special rules apply to *in personam* defenses, which must be asserted in the first response to the complaint – whether via motion or answer, or else waived.[44] If lack of proper service is asserted in the answer, a motion to dismiss on those grounds must be made within 60 days.[45]

Unlike federal practice, the CPLR does not have a compulsory/permissive counterclaim rule.[46] Thus, in state court, strategic decisions must be made about whether to assert related counterclaims or cross-claims. In either forum, such decisions must be made with regard to whether to assert unrelated claims, or leave that to a separate suit. Decisions also need to be made about joining – impleading – parties.

Discovery

Take control.

At the earliest opportunity, whether you are the plaintiff or defendant, stake your claim to discovery by serving your demands and notices. If you are the defendant in state court, you have the automatic right to preserve your priority of depositions and interrogatories by serving your notices with the answer.[47] Priority can be pivotal, because it gives you a leg up on learning the adversary's case, places the greater burden on the adverse party, who must now respond, and gives you greater control over the proceedings that follow. At times, however, there can be advantages in allowing adversaries to take the first depositions, particularly if their questioning is likely to provide insights into the facts and theories of their case.

There are various discovery devices available,[48] most of which are not substitutes for, but rather complementary to, each other. When used in concert and in proper order, they allow for the best opportunity to gain the most complete discovery, and to get it in an organized order and fashion. Those devices include:

- discovery and inspection of documents,
- interrogatories or demand for a bill of particulars,
- discovery and inspection of things and places,
- depositions (of parties and non-parties),
- notices to admit,
- expert information,
- accident reports,
- insurance information,
- photographs, video and audio recordings,
- physical and mental examinations,
- names and addresses.

Initial discovery demands should almost always consist of a demand for documents, questions in the form of interrogatories or a demand for a bill of particulars and notices to take depositions. In organizing the order of discovery, every effort should be made to complete the documentary production and responses to interrogatories (or bills of particulars) before depositions are taken. Other discovery may follow.

Bills of particulars are unique to New York practice.[49] While there may be some technical advantages to using a bill – which I have yet to figure out – there are significant disadvantages. Demands for particulars are limited to merely seeking amplification of affirmative allegations of the pleadings; they cannot be used for obtaining evidentiary information and material.[50] By contrast,

interrogatories, which must be sworn to by the party,[51] are not limited and can cover any material relevant to the case.[52] The CPLR requires that you make a choice between demanding a bill or using interrogatories.[53] Given the choice, opt for interrogatories. In personal injury cases, the CPLR *suggests* the use of a demand for a bill of particulars, because it provides that interrogatories and a deposition may not be sought from the same party.[54] The CPLR also prescribes the questions that may be asked in a demand for a bill in personal injury cases.[55]

Drafting a well-crafted set of interrogatories and demand for documents is a time-consuming and exacting process, which requires a high degree of organization and intuition. The project is a top-down process whereby your questions and requests cover a range of subjects, each going from the general to the specific. General items are those that ask about all communications between the parties or that relate to the dispute; all agreements between the parties or that relate to the dispute, and so forth. Specific questions are those that cover the facts and documents specifically related to the allegations of the complaint or answer, as well as what are specifically known to, or by intuition or logic likely to, exist.

The idea is to learn whatever you can about the adversary and all the transactions, then pin the other side down on details so it has no wiggle room. If you are successful, your demands will create a great deal of discomfort for an adversary who may be more used to being – or who desires to be – evasive. Be aware, however, that your questions and demands can be thrown back at you. Therefore, your demands and eventual responses should be consistent with what you expect from your adversary. In other words, do not ask anything that you are unwilling to answer yourself. Also, be prepared when the time comes to compel further answers and/or defend against a motion for a protective order by being able to justify the relevance and burden for each question and demand you make.

Asking the right questions is only half the battle. The other half is maintaining the stamina and determination to compel complete responses. Make a careful review of the adverse party's initial responses, including its objections. In almost every complex case, there will be objections that need to be challenged, and the initial production and answers will not be complete, perhaps to the point of being evasive. Soon after receiving the response, draft a detailed letter outlining the deficiencies in the response and, if possible, tie it in to the timetable for your own responses (*e.g.*, condition your response, if you have priority, on the adversary's). Be prepared to follow up with further "deficiency letters" as well as to move to compel. Note that your extrajudicial efforts to seek compliance will be part of your record for the motion, as well as a possible condition to seeking court intervention.[56]

When documents are produced, request copies. Other than exceptional situations (such as where there is a truckload of non-relevant documents), it is usually economical and feasible to request copies rather than merely inspect documents at your adversary's office. Reserve the right, where appropriate, to inspect originals if there are special issues, such as to the authenticity or the order and organization of the original documents.

If you have not already began the process of organizing your own client's documents, begin doing so for your and your adversary's documents. That means several phases: The first step is a preliminary review of what was produced to get a good feel for what there is, as well as for what may be missing. Do not, however, pull any documents without maintaining a complete and intact set of each side's production (*i.e.*, maintain a "shadow set"). From that, flag the relevant documents, which can be copied as needed. Second, pick the most relevant or critical documents for which copies should be made so that they can be organized into a "trial book" that will include all parties' key documents, pleadings, substantive discovery answers and other critical material for use at trial, as well as at depositions. The trial book (to be discussed in the next article of this series) will become the "bible" of the case, because it will be the starting point for preparing for depositions, potential motions for summary judgment and trial. The third step involves a comprehensive review of the documents. How and when this step is taken (which can be part of the second phase), depends on many practical factors, including the complexity and size of the case, volume and type of documents, available personnel and budget, and most important, your own style of reviewing and digesting information.

Some lawyers rely on paralegals or associates to do the comprehensive review. Others prefer to do it primarily by themselves. Engaging the client's assistance is also a good idea. In large cases, it may be necessary or desirable to have the documents digested and indexed, which may include use of specialized software and, in major cases, digital imaging and cataloguing. However it is done, you will need to select and organize documents to assure easy retrieval. There are several organizational goals: (1) organize by subject matter; (2) organize by witness for the purposes of preparing for each witness's depositions, as well as preparing your own clients; (3) prepare for the eventual selection of documents to be used at trial; and (4) prepare for the ability to conduct future reviews as issues arise or become clarified.

How to best organize documents is an intuitive and learned process, based on your understanding of the

case, an overview of the documents, an intuitive feel of what and how the documentation fits into the underlying transaction and dispute, and your experience of how you best work with documents. While your first organization may not be perfect or final, the objective is to begin a process that will be able to keep up with the case as it progresses, and then grow as more documents and facts are added. Avoid a process that would require scuttling the first organization and starting all over. But, if that is to happen, do it early while the documents are still manageable and you are not in panic mode on the eve of trial.

Summary

Significant and deliberate strategy decisions must be made for commencing the action or responding to the complaint, as well as initiating discovery. These decisions and their implementation will have a pervasive effect on all subsequent proceedings and the eventual outcome of the contest.

A future article will explore, in greater detail, tactics for discovery, when and how to move for summary judgment, and how to prepare for trial.

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1. Of course, it is imperative that you abide by the statute of limitations, as well as any applicable notice of claim periods.
2. The federal courts have various mediation and/or arbitration programs, some of which are mandatory: *See, e.g.*, 28 U.S.C §§ 651 *et seq*.; Local Rules of the U.S. District Courts of N.Y. for the Southern and Eastern Districts §§ 83.10–83.12; Local Rules for the Northern District §§ 83.2, 83.7, 83.11; Local Rules for the Western District § 16.2. However, unlike typical binding arbitration rules, the federal rules all provide the right to a trial *de novo*. 28 U.S.C § 657(c); S.D./E.D. Rule 83.10(h); N.D. Rule 83.7-7; W.D. Rule 16.2(I). *Cf.* 22 N.Y.C.R.R. §§ 28.1 *et seq*.
3. CPLR 7511(b) provides narrow grounds for vacating an arbitration award, such as based on corruption, fraud, partiality, etc.; *cf.* 9 U.S.C. § 10(a) *and particularly* subsection 3 (includes refusing to hear pertinent and material evidence, etc.).
4. Most attorneys, while familiar with the rules of court, are unfamiliar with the rules and nuances of the various arbitral forums, as well as various lesser known laws that govern certain arbitrations. *See, e.g.*, the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*
5. CPLR 321(b). Unlike New York practice which allows a substitution by agreement of the client, the various local federal rules require a court order. S.D./E.D. Rule 1.4 (must show "satisfactory reasons" and "posture of the case"); N.D. Rule 83.2(b) (must show "good cause" and substitution "shall not result in the extension of any deadlines . . ."); W.D. Rule 83.2(c) (for "good cause shown"). *See, e.g.*, *Connors v. Tradition North Am., Inc.*, 2001 WL 267076 (S.D.N.Y.).
6. Judiciary Law § 475 creates an automatic lien on any recovery once an action is commenced (or counterclaim asserted). Prior to commencement of an action, however, a notice of lien is required. Jud. Law § 475-a.
7. Article 16 of the CPLR departs from the common law rule that held each tortfeasor jointly and severally liable for the entire loss. Generally, CPLR 1601 provides that for non-economic loss (*e.g.*, pain and suffering), where there are two or more tortfeasors, any defendant found to be 50% or less responsible for the injury is liable only for his or her proportionate share of culpability. The rule has a myriad number of exceptions, most notably motor vehicle accidents, for which the common law rule still applies. CPLR 1602(6).
8. Article 16 of the CPLR can have harsh results where the main tortfeasor is judgment proof but held to be the most culpable, thus absolving deep-pocket defendants of joint and several liability.
9. General Obligations Law § 15-108. It should be noted that the GOL does not have the exceptions or 50% threshold found in Article 16 of the CPLR. Hence, suing and then releasing someone can create more problems than had you not sued and released them in the first place.
10. *Compare* CPLR 2308(b) *with* CPLR 3126.
11. *See* CPLR 3106(a).
12. CPLR 901 *et seq*.; Fed. R. Civ. P. 23. *See Meachum v. Outdoor World Corp.*, 171 Misc. 2d 354, 654 N.Y.S.2d 240 (Sup. Ct., Queens Co. 1996).
13. CPLR 902 requires that the class certification rule be made within 60 days after the answer is due. *Cf.* Fed. R. Civ. P. 23(c)(1) ("As soon as practicable . . .").
14. CPLR 909 *et seq*.; Fed. R. Civ. P. 23(h). *See, e.g.*, *Becker v. Empire of Am. Fed. Savings Bank*, 177 A.D.2d 958, 577 N.Y.S.2d 1001, 1002 (4th Dep't 1991) ("Initially, the court must determine the number of hours reasonably expended from contemporaneous time sheets").
15. *See, e.g.*, Fed. R. Civ. P. 26(b)(2), (d), (f), 30(a)(2), (d)(2), 33(a). *See also* S.D. Rule 33.3; W.D. Rule 34.
16. *See, e.g.*, Fed. R. Civ. P. 16, 26(b)(2), (d), (f). *See also* N.D. Rule 10.1, 16.1, 16.2; W.D. Rule 16.1. *Cf.* 22 N.Y.C.R.R. §§ 202.19, 202.26.
17. *Compare* Fed. R. Civ. P. 11 *with* 22 N.Y.C.R.R. § 37.1.
18. 28 U.S.C. § 1291.
19. *See, e.g.*, F.R.A.P. 38 and Local Rule 38.
20. CPLR 3013 requires pleadings to be "sufficiently particular to give the court and parties notice of the transactions, occurrences . . . and the material elements of each cause of action." Fed. R. Civ. P. 8(a)(2) requires "a short and plain statement of the claim," in addition to the grounds for the court's jurisdiction (subsection 1). *See, e.g.*, *Millis v. State of N.Y.*, 2001 WL 856465 (Ct. Cl.).
21. *See* CPLR 3015–3016; Fed. R. Civ. P. 9. *See, e.g.*, *Hartford Cas. Ins. Co. v. Vengroff Williams & Assocs., Inc.*, 306 A.D.2d 435, 761 N.Y.S.2d 308 (3d Dep't 2003).
22. *See, e.g.*, CPLR 1603 (inapplicability of apportionment rules), 3012-a (certificates of merit in medical malpractice cases), 3016 *and particularly* subsection g (threshold injury).
23. Federal complaints must also allege the basis for jurisdiction. Fed. R. Civ. P. 8(a)(1).
24. CPLR 3014; Fed. R. Civ. P. 10(b).
25. Fraud, being one of the legal claims that must be stated with particularity, is ripe pickings for motions to dismiss. CPLR 3016(b); Fed. R. Civ. P. 9(b).
26. CPLR 3002, 3014; Fed. R. Civ. P. 8(e)(2).
27. One of the main purposes for verifying the complaint is to compel the defendant to verify his answer. The utility

of the verification is substantially lost, however, where the attorney is able to sign it *in lieu* of the client, due to one of the many exceptions listed under CPLR 3020 *and particularly* subsection d.

28. CPLR 3014; Fed. R. Civ. P. 10(c).
29. Below, we will discuss how defendants can move to dismiss using documentary evidence under CPLR 3211(a)(1). *But see* Fed. R. Civ. P. 12(b), (c).
30. CPLR 3025 and Fed. R. Civ. P. 15(a) generally allow one amendment as of right up to 20 days after the last responsive pleading is served.
31. *Cf. Oil Heat Inst. of L.I. Ins. Trust v. RMTS Assocs., LLC*, 2004 WL 351880 (1st Dep't); *Miller v. Goord*, 1 A.D.3d 647, 766 N.Y.S.2d 466 (3d Dep't 2003).
32. CPLR 3213.
33. *See* CPLR 3215(a). Also pay particular attention to subsection g(3) for the additional notice required in contract cases.
34. Other bites of the apple can come from motions for summary judgment and the trial, as well as any potential appeals. However, the motion to dismiss is a bite available only to the defendant.
35. *Cf.* CPLR 3212(a); Fed. R. Civ. P. 12(c), 56(a).
36. CPLR 3211(a)(1). *But see* CPLR 3211(c); Fed. R. Civ. P. 12(b) (motions going beyond the complaint may be treated as one for summary judgment). *Cf. Shannon v. U.S. Parole Comm.*, 1998 WL 557584 (S.D.N.Y.) (on motion to dismiss for lack of jurisdiction "the Court may rely on evidence outside the pleadings, such as affidavits and documentary evidence").
37. *See, e.g., N.Y. Community Bank v. Snug Harbor Square Venture*, 299 A.D.2d 329, 749 N.Y.S.2d 170 (3d Dep't 2002) (lease; the documentary evidence "must resolve all factual issues as a matter of law, and conclusively dispose of the plaintiff's claim . . ." [citations omitted]); *Igarashi v. Higashi*, 289 A.D.2d 128, 735 N.Y.S.2d 33 (1st Dep't 2001) (deeds); *Ozdemir v. Caithness Corp.*, 285 A.D.2d 961, 728 N.Y.S.2d 824 (3d Dep't), *aff'd*, 97 N.Y.2d 605, 737 N.Y.S.2d 52 (2001) (contract).
38. 28 U.S.C. § 1446(b) requires that notice to remove must be filed within 30 days of service of the state summons and complaint. Do note, however, my discussion above as to whether it truly makes sense to opt for federal court.
39. CPLR 511(b) requires that a demand to change venue based upon improper venue be served by the time the answer is served and that a motion be made within 15 days, unless the plaintiff consents.
40. CPLR 3018(b); Fed. R. Civ. P. 8(c).
41. CPLR 3211(a); Fed. R. Civ. P. 11(b).
42. If a motion is made, CPLR 3211(e) requires that certain enumerated defenses be included in the motion, or otherwise they are waived.
43. By alleging a host of superfluous defenses, the defendant burdens the plaintiff, improperly, with the task of ferreting out those that apply to the case.
44. CPLR 3211(e); Fed. R. Civ. P. 12(h)(1) (federal rule also includes venue).
45. CPLR 3211(e).
46. *Compare* CPLR 3019 *with* Fed. R. Civ. P. 13.
47. CPLR 3106, 3132.
48. *See* CPLR 3101 *et seq. and particularly* subsection a; Fed. R. Civ. P. 26–37.
49. CPLR 3041–3044.
50. *See Northway Eng'g, Inc. v. Felix Indus., Inc.*, 77 N.Y.2d 332, 567 N.Y.S.2d 634 (1991); *Graves v. County of Albany*, 278 A.D.2d 578, 717 N.Y.S.2d 420 (3d Dep't 2000).
51. CPLR 3133(b). By contrast, not all bills of particulars have to be verified, and when they are, they are subject to the same exceptions that may allow the attorney to sign the verification. CPLR 3044; *see* CPLR 3020(b), (d).
52. CPLR 3131; *see* CPLR 3101.
53. CPLR 3130(1).
54. *Id.*
55. CPLR 3043.
56. 22 N.Y.C.R.R. § 202.7(a); Fed. R. Civ. P. 37(a)(2)(A).

Human Memory Is Far More Fallible And Malleable Than Most Recognize

An article in the March/April issue reviewed the cognitive functions of perception and attention, noting how unconscious distortion or error may arise. This article addresses the next step in this mental sequence, the memory function, and surveys some of the potential errors at this stage of cognition.

BY JUSTIN S. TEFF

The "memory stage" describes the time period beginning the instant that information is initially encoded in the brain through and including any moment it is retrieved into working memory and perhaps related; it thus includes, conceptually, both the retention and retrieval stages.[1]

The underlying premise of much psychological research in this area is that while certain tendencies of memory may be matters of ordinary sensibility, human memory is far more fallible, and indeed malleable, than most recognize.[2] William James notes generally that "we paint the remote past, as it were, upon a canvas in our memory, and yet often imagine that we have direct vision of its depths."[3] Although variations in individual intellect affect the accuracy of recollection, this discussion focuses on what is common among most individuals.

Theorists have described the memory system in terms of various parts and procedures. Incoming stimulation is believed to initially enter a sensory buffer zone, where it is perceived and interpreted, and if heeded sufficiently, transferred to short-term or working memory. Information in working memory will quickly fade if not repeated or rehearsed, and any such activity increases the probability of these informational records being transferred to and retained in long-term permanent memory. These stored records may be drawn back into working memory or conscious recollection by certain cues, or associated information prompting retrieval of the particular memory.

The most prevalent neurological theory of learning is called long-term potentiation, describing a process whereby new experiences cause neuronal connective patterns to form and fire. Repeating that input causes the connections to strengthen and become permanent.

Research has shown consistently that general decline in encoding and retrieval functions surfaces as people age. Although the underlying reasons are not well understood, there is agreement that problems should seldom percolate before individuals reach their 60s or 70s. Numerous observations have also shown that the memories of children are especially fallible and more subject to suggestion and alteration than those of adults.[4]

Memory Decay

Memory decay is the natural propensity of recorded knowledge or information to dissipate as time passes.[5] Hermann E. Ebbinhaus's famous curve of forgetting posits that most information is lost in the early period after it is learned, and the rate of decay declines as time passes, with eventual loss of up to three-fourths of initial input.[6] In a later study, however, Guy Whipple observed, "Lengthening of the time-interval between experience and report exerts, as one might expect, a generally unfavorable influence, but there is nothing like the loss in efficiency shown in curves of memory for nonsense syllables, as in the familiar Ebbinhaus test: indeed, for some reporters the report seems to be somewhat improved after several days have elapsed."[7] Ebbinhaus's experiments involved nonsense syllables with no personal meaning or significance, one hallmark of a firmly entrenched recollection.

Repetition, rehearsal or practice may counteract the decay effect. This notion is consistent with the theory of long-term potentiation; with sufficient rehearsal, the learning is said to become hard-wired. Thus, forgetting becomes less likely when a subject meditates upon a particular piece of information. A phone number that

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This article is a further exploration of concepts he examined in "How to Spot a Lie: Checking Substance and Source," which appeared in the July/August 2003 issue of the *Journal*, and "Distinguishing Intended Deception From Unconscious Inaccuracy," which appeared in the March/April 2004 issue.

someone is straining to remember will quickly disappear if not repeated at least long enough to dial; even so, only protracted repetition or elaborate association will permit permanent storage of the number.

The decay effect is also correlated to the significance or salience of the original perception or sense impression. More important events, versus nonsense or meaningless symbols or images, will be recalled more readily, perhaps because such complex memories contain more scattered elements that may be accessed to recreate the initial image. It also goes without saying, however, that important events are likely to be ruminated upon more often than meaningless observations. Thus, it is not clear whether the initial event is actually burned deeper into the psyche, or whether the subsequent process of rumination acts as an internal rehearsal device.

We often notice ourselves recalling a particular scene, wishing we had spoken or acted differently, and replaying the event in our minds with our chosen fantasy ideas.

Yet even when a complex event is deeply engraved, people still tend to recall only the most significant structural themes and elements, whereas the particular inconsequential details lapse, perhaps later to be replaced by imagination and generalization. Although the decay process may not itself distort a stored memory, it opens the way for gaps or faded memories. These rifts are also where later influences are most likely to trespass.

Internal Factors

Internal sources of erroneous recollection involve spontaneous psychic phenomena with the potential to distort memory regardless of whether the subject is ever exposed to external post-event information. Some of these include: (a) a natural cognitive mix-up called misattribution; (b) the incidence of desire or fantasy-thinking; (c) the effects of post-event experiences, particularly those effecting changes in personal beliefs, biases or constructs; and (d) a subject's mood and mindset at the moment of retrieval and relation. The importance of cognitive affect, or mood and mindset, has been noted in connection with perception and will not here be restated.

Daniel Schacter defines a misattribution as a common memory mistake, the origin of which is an erroneous association, or a miscombination, of pieces of unrelated reminiscences when gathering the parts of a desired memory during the retrieval process.[8] The misattribution may involve the importation of a foreign element into an otherwise accurate memory or entire experiences someone has never had but has imagined and thus integrated into the memory of reality. The usual source is related knowledge or information in the psyche. Schacter details illustrative situations in which a person might recall an occurrence correctly, but attribute it to an incorrect time or place; recall an event but transport into the memory a face seen in an unrelated capacity; or remember accurately what was said or done during an event but attribute it to the wrong participant. When identification of faces is involved, the phenomenon is termed "unconscious transference," and it has been recognized as a major source of faulty eyewitness identifications.[9]

Another internal phenomenon with the potential to wreak havoc among stored memories is the influence of desire, imagination or fantasy-thinking. When actual images have faded, they are particularly susceptible to being altered by such mental activity. In conjunction with the concept of directed thinking, or thinking in words, Jung describes the cognitive counterpart of this kind of thinking, namely fantasy-thinking:[10]

> What happens when we do not think directly? Well, our thinking then lacks all leading ideas and the sense of direction emanating from them. We no longer compel our thoughts along a definite track, but let them float, sink or rise according to their specific gravity. . . . At this point thinking in verbal form ceases, image piles on image, feeling on feeling, and there is an ever-increasing tendency to shuffle things about and arrange them not as they are in reality but as one would like them to be. Naturally enough, the stuff of this thinking which shies away from reality can only be the past with its thousand-and-one memory images. Common speech calls this kind of thinking "dreaming."

To be sure, we often notice ourselves recalling a particular scene, wishing we had spoken or acted differently, and replaying the event in our minds with our chosen fantasy ideas. People even play out in their minds scenes or events which have never transpired, but which are pure products of desire and imagination. If such thinking is abundant, there is an acknowledged tendency for fantasy notions to become integrated into actual recollections until there is no apparent differentiation between real and fantasy elements. As Hugo Munsterberg notes, "There are not a few who finally believe their hunting stories after they have told them repeatedly."[11]

Elizabeth Loftus provides a forensic illustration by describing a hypothetical situation, based upon actual litigation, in which a woman witnesses her daughter being struck by a car. Immediately after the incident, the traumatized mother concedes, "there was nothing he

[the driver] could do," and soon after describes the car's speed as "a mite fast." At a later deposition, however, the mother indicates the "car was coming like a bat out of hell." To explain for this drastic alteration, Loftus proposes:

> [L]et us first set aside the possibility that the witness is deliberately lying on one of these two occasions. Next, we might ask whether the witness was exposed to any postevent information during the interval between her two recollections. If no evidence for this sort of influence can be found, a reasonable alternative is that the witness's own internal thoughts, wishes, and desires intruded during the interval. The witness's thoughts bend in a direction that would be advantageous to her purposes. The strong influences that one's wishes and desires have can be quite unconscious.[12]

Finally, not only is perception influenced by past experience, our memories are similarly affected by experiences that occur after an event, particularly those effecting a serious change in belief or attitude. Schacter explains, for instance, "consistency and change biases show how our theories about ourselves can lead us to reconstruct the past as overly similar to, or different from, the present."[13] These biases may occur with respect to any stored information, such as feelings about politics, government and current events; thoughts about our relationships and ourselves; notions regarding the world in general.

People will shape existing memories, and even invent new recollections, to conform to the erroneous suggested, but now integrated, information.

External Factors

The most prominent external influence on recollection is the power of suggestion and other outside information to infiltrate a subject's memory images during retention and retrieval.[14] Indeed, any experience, information or input encountered after a particular perception is encoded has the potential to distort existing memories of the original event stimulus. In a passive sense, post-event information may simply be incorporated into existing memories in a form of cognitive misattribution, and in a more active sense, actual suggestion can implant information and influence subsequent trains of thought and association. Loftus has demonstrated that external post-event information may not only alter existing memories but may even implant completely new and false recollections.

Active suggestion may affect memory images by prompting certain cognitive associations and facilitating misattribution. Anyone doubting the apparent influence of suggestion need only acknowledge the astronomical sums spent on advertising, the sole purpose of which is to suggest or implant particular ideas and even desires by manipulating a subject's train of thought or associations. Suggestion is often overt, involving use of language and verbal prompting, but it may also be quite subtle, consisting of only body language and associated cues. The suggestion has been made that even an officer's most subtle reactions to a particular identification may pose a subconscious influence on the witness's cognitive train. The issue is of particular concern when it relates to the questioning of child victims or witnesses, who can be particularly susceptible to suggested ideas.

External influence may come from myriad sources, and memory may fall victim at any one of several moments – the point of initial encoding, such as when witnesses discuss among themselves what they have seen; any time in the ensuing period when there is contact with outside information, such as when a witness encounters a news report, participates in a police line-up or other identification procedure, or discusses the matter with police or counsel; or the very moment of retrieval, such as when the wording of a question influences the information retrieved. Fortunately, Loftus describes an experiment by Dritsas and Hamilton, which demonstrated that details central to an event are more difficult to alter with post-event information than are peripheral or inconsequential attributes.[15]

As disquieting as the basic tendency for external information to supplant recollections, is the curious phenomenon that people will shape existing memories, and even invent new recollections, to conform to the erroneous suggested, but now integrated, information. Munsterberg rightly observes that a person is often helpless against "the involuntary elaboration of a suggestion" that has been put into the mind.[16] He describes an experiment in which a picture of a room is shown to adult subjects who are later asked about their recollections. Although there was no stove in the picture, numerous subjects recalled one following a suggestive question such as, "Did you see the stove in the room?" Munsterberg further reports, "As soon as the subject has answered that there is a stove in the room, he is at once ready to reply by a positive statement to the further question, where is the stove standing? The one says on the left, the other on the right; one in the corner, and one against the middle of the wall, each simply following the path of least resistance in his own imagination."[17] This tendency to weave imaginary tapestries has particular significance, because the process often operates in conjunction with the previous information gaps,

whether arising from lapses in perception, attention or memory.

Munsterberg also notes that certain people are naturally more suggestible, or susceptible to external influence, than others: "[The] degree of suggestibility changes from man to man and changes in every individual from mood to mood, from hour to hour."[18] He observes, "Emotion certainly increases suggestibility with everybody; so does fatigue and nervous exhaustion." Being a member of a particular group can also give rise to such problems, because group psychology and attendant pressures so often play a defining role in shaping individual cognition.

Although ordinary rehearsal can help to create a solid and accurate recollection, the notion of freezing is worth mention.[19] This term describes the process whereby the retelling of a story tends to solidify in the mind the precise details from that relation, as opposed to the correct details of the initial perception. Thus, if a subject repeats a story with errors, he or she is likely to recall the story with those errors integrated.

Whipple describes the process in these terms:

> When a given reporter is called upon to make his report several times, the effect of this repetition is complex, for (1) it tends in part to establish in mind the items reported, whether they be true or false, and (2) it tends also to induce some departure in the later reports, because these are based more upon the memory of the verbal statements of the earlier report than upon the original experience itself, *i.e.*, the later reports undergo distortion on account of the flexibility of verbal expression.[20]

Such a process is also said to increase confidence in the false recollection.

Practical Implications

Forensic psychological research holds some important practical implications for the examiner. First, as an analytical tool, it not only provides a framework for analysis, but a default reference in situations involving seemingly honest but mistaken witnesses. Second, the examiner should be aware that specific research involving the form and content of questions has demonstrated that these factors also affect accuracy of recollection.

Analytical Framework Although many of the psychic phenomenal particulars responsible for unconscious inaccuracy remain largely imperceptible to the examiner absent some protracted psychoanalytic effort, a thorough investigation of the factors affecting the various cognitive stages may nevertheless afford the examiner a basis for an informed and educated estimation regarding the etiology of such unconscious error.

If after scrutiny a witness appears by all reckoning to be honest and forthright, yet the subject's assertions simply cannot be reconciled, the examiner should look to the various forms of unconscious inaccuracy as a default reference. Although the precise moment of inception may be elusive, by investigating each stage of cognition in sequence the examiner may at the very least ascertain whether the relevant conditions at each juncture would make the possibility of unconscious error more or less likely.[21] The examiner should explore conditions relevant to perception, memory, and retrieval,[22] and be receptive to possible error cues.[23]

As important, the assessment of whether misinformation is deliberate or unconscious will dictate how the examiner handles the witness, and the tenor and tone of examination. Most advocates can readily attest to the alienating effect on the fact finder of mistreating a seemingly honest and credible witness. As well, if the truest inner motivations for a person's perceptions and recollections are unknown even to that person, he or she can hardly be deemed deceitful for failure to disclose.

Form and Content of Questions The form of question used to conduct an interview has been shown to affect accuracy of recollection. Whipple speaks of the advantages and disadvantages of using a "narrative" versus an "interrogatory" form of inquiry.[24] The general agreement is that allowing a witness to complete an uninterrupted free narrative account of a memory will increase the accuracy of recall but will diminish thoroughness; whereas, interview by interrogatory will decrease the accuracy but increase the thoroughness and coverage of reporting.[25] As such, the most desirable interview will begin with asking the witness to relate an uninterrupted free narrative, followed by more direct and specific forms of questions, while minimizing any possibility of suggestive influence from the examiner.

Ronald Fisher focuses on interviewing techniques[26] and suggests several points: (a) interrupting a witness's free narrative has deleterious effects on accuracy and should be avoided, because the interruption may inappropriately direct the subject's otherwise free associations; (b) accuracy may be increased somewhat by specifically directing a subject not to guess, to separate what was actually perceived from what may have been personally integrated, and to avoid editing out pieces of information for any personal reason (more is better); and (c) "memory probes are most effective when they recreate the context of the original event, as in returning to the scene of the crime . . . before answering any material questions about the crime, witnesses should be instructed to mentally recreate the environmental, cognitive, physiological, and affective states that existed at the time of the original event."[27]

The content or wording of a question can influence the accuracy of recall.[28] This is often observed in connection with the study of cognitive suggestibility. Loftus has demonstrated that after viewing a film of a multiple

car accident, subjects are more likely to report seeing something that was not actually in the film when asked, for instance, whether they saw "the" broken headlight, as opposed to whether they saw "a" broken headlight.[29] In another such study, subjects estimated a much higher rate of speed when asked, "About how fast were the cars going when they smashed into each other?" than when asked, "About how fast were the cars going when they hit each other?"[30] Loftus further reports:[31]

> One week later the subjects returned and, without viewing the film again, they answered a series of questions about the accident. The critical question was, "Did you see any broken glass?" There was no broken glass in the accident, but because broken glass usually results from accidents occurring at high speed, it seemed likely that the subjects who had been asked the question with the word "smashed" might more often say yes to this critical question. And that is what we found:

"Smashed"	"Hit"
16 yes	7 yes
34 no	43 no

Thus, the examiner must be cognizant that even the slightest variation, in form or content, in the question posed to a witness can have an appreciable effect on the accuracy of the recollection by the witness.

Conclusion

Professor Munsterberg's book was extremely critical of the legal profession for what he deemed ignorance of the psychological sciences. In 1909, Professor John H. Wigmore, demonstrating a profound familiarity and comprehension of the then available psychological material, staged a literary trial of Munsterberg and found him guilty of libel against the legal profession.[32] Professor Wigmore explained that concepts involving the fallibility of human perception and memory were not by any means novel; that the American system of jurisprudence had never ignored such ideas, and instead significantly valued and respected the works of modern psychologists;[33] and that many of these psychological concepts had long been entwined in our traditional and trusted methods of cross-examination and judicial decision making,[34] yet the adversarial system of jurisprudence relied primarily upon individual counsel to make such notions known to the court in the form of evidence in any individual case. Wigmore also noted that experimental psychology was certainly not so precise in its methods or findings as to substantially overcome the present practices of the legal profession, and even the psychologist would concede that individual human nature and experience cannot be reduced to mathematical calculation.[35]

Regardless of one's views on this issue, a thorough knowledge of these concepts can certainly bring no harm to the examiner. As well, put to good use, the concepts can add to the examiner's repertoire a broad spectrum of analytical techniques that will augment examinations skills and allow the examiner to begin to discern instances of intentional deception from those of pure unconscious error.

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1. Many analyses separate the memory storage stage and the stage involving the moment of retrieval and relation. Because there is yet no mechanism for directly monitoring the unconscious psyche, and because neurologists proffer that a memory as such actually consists of various pieces of information stored in different parts of the brain, which are recollected when called upon, it is reasonable to theorize that a memory is the functional equivalent of the act of retrieval.

   It might also be conceived that pure storage in memory is really only the factor of delay, sometimes called the retention interval, between the event and the recall; any influencing factor will take place or have its distorting effect at the moment of recall, or the moment the memory is drawn from permanent memory into working memory for present use, whether this transfer is for internal rumination or for external relation. Prior to this, it might be argued that the "memory" is simply bits of energy and networks of neurons lying semi-dormant in scattered areas of the brain. William James observes, "Retention means *liability* to recall, and it means nothing more than such liability. The only proof of there being retention is that recall actually takes place. The retention of an experience is, in short, but another name for the *possibility* of thinking it again, or the *tendency* to think it again, with its past surroundings." William James, The Principles of Psychology I 654 (1950).

   The examiner, however, must be cognizant of the fact that a memory does not need to be related externally in order to be drawn from permanent into working memory, manipulated by the process of non-directed fantasy-thinking, and restored to long-term memory. Indeed, this process may occur countless times before a recollection is ever related to another person. Any of the distorting factors here detailed may operate whether the memory is recalled for verbalization or mere contemplation. Such internal mental activity has no less the potential to distort memory information, as different cognitive associations may occur each time a memory is recalled.
2. The present discussion excludes various forms of memory loss or distortion due to physical injury or damage to part of the brain and other actual psychopathology such as various forms of amnesia, traumatic dissociation or repression, Alzheimer's disease, or confabulation (a tendency to manufacture false memories due to some measure of actual brain damage).
3. James, *supra* note 1 at 643.
4. *See* Guy M. Whipple, *The Observer as Reporter: A Survey of the "Psychology of Testimony,"* 6 Psychol. Bull. 153, 163 (1909); *see also* Guy M. Whipple, *Psychology of Testimony and Report*, 9 Psychol. Bull. 266 (1912) (noting, "The inadequacy of the child's report is due not so much to poor memory as to the fact that he fails to perceive many features in the original experience, that he fails to put into words even what he does perceive, and especially to the fact that he is absurdly uncritical (his assurance, indeed, commonly reaches 100 per cent)"). Whipple notes, however, that this view is not shared by all of his contempo-

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raries: "Gross, however, stakes his thirty years of experience in the court against the views of these physicians. He declares that a healthy half-grown boy is the best possible witness for simple events." Guy M. Whipple, *The Psychology of Testimony*, 8 Psychol. Bull. 308 (1911)).

5. Interestingly, Carl Jung describes the unconscious to include, in addition to Freudian concepts of repressed material, and his own notions of the archetypes,

> everything of which I know but of which I am not at the moment thinking; everything of which I was once conscious but have now forgotten; everything perceived by my senses, but not noted in my conscious mind; everything which, involuntarily and without paying attention to it, I feel, think, remember, want, and do; all the future things that are taking shape in me and will sometime come to consciousness: all this is the content of the unconscious.

See Carl G. Jung, On the Nature of the Psyche (1947) (originally, Der Geist der Psychologie, Eranos-Jahrbuch (1946).

6. *See* Hermann E. Ebbinhaus, Memory: A Contribution to Experimental Psychology (1885 & 1964).
7. *See* Guy M. Whipple, *The Observer as Reporter: A Survey of the "Psychology of Testimony,"* 6 Psychol. Bull. 153, 163 (1909).
8. *See* Daniel L. Schacter, The Seven Sins of Memory: How the Mind Forgets and Remembers 88–111 (Houghton Mifflin 2001).
9. *See* Elizabeth F. Loftus, Eyewitness Testimony 142–44 (Harvard 1979 & 1996).
10. Carl G. Jung, Symbols of Transformation (1956) (originally, Transformations and Symbols of the Libido (1912)). Jung also notes:

> Anyone who observes himself attentively will find that the idioms of common speech are very much to the point, for almost every day we can see ourselves, when falling asleep, how our fantasies get woven into our dreams, so that between daydreaming and night-dreaming there is not much difference. We have, therefore, two kinds of thinking: directed thinking, and dreaming or fantasy-thinking.

11. *See* Hugo Munsterberg, On the Witness Stand: Essays on Psychology and Crime 198 (Doubleday 1913).
12. Loftus, *supra* note 9, at 80.
13. Schacter, *supra* note 8, at 139.
14. It has also been demonstrated that accuracy can be affected, although to a lesser extent, by the status of the examiner and the environment at the moment of retrieval. For instance, it has been stated that a subject will tend to have a better recollection of an event in the actual surroundings and environment in which it took place, as opposed to an alien environment with strange or foreign elements.
15. Loftus, *supra* note 9, at 63 (citing W.J. Dritsas & V.L. Hamilton, *Evidence About Evidence: Effects of Presumptions, Item Salience, Stress, and Perceiver Set on Accident Recall* (unpublished, University of Michigan, 1977)).
16. Munsterberg, *supra* note 11, at 165.
17. *Id.* at 182.
18. *Id.* at 190.
19. *See* Loftus, *supra* note 9, at 84–86.
20. Whipple, *supra* note 7, at 167.
21. Francis Wellman explains:

> It is obviously the province of the cross-examiner to detect the nature of any foreign element which may have been imported into a witness's memory of an event or transaction to which he testifies, and if possible to discover the source of the error; whether the memory has been warped by desire or imagination, or whether the error was one of original perception, and if so, whence it arose, whether from lack of attention or from wrong association of previous personal experience.

See Francis L. Wellman, The Art of Cross-Examination 157 (Touchstone 1997). Wellman devotes an entire chapter to what he calls "the fallacies of testimony," the natural cognitive tendencies toward error herein discussed.

22. An examiner will want information regarding every contact, discussion, reading or other possible influencing factor a witness has encountered after the fact, insofar as rules of privilege permit. As well, documents and sometimes tangible evidence reviewed by a witness in preparation for testimony are typically discoverable. An examiner should pay close attention to the types and forms of questions employed in each contact or interview.
23. For instance, Loftus notes, "[A] fact that is reported sometime after a critical incident along with the remark 'I knew it all the time, but I just forgot to mention it' should be treated with some caution." *See* Loftus, *supra* note 9, at 104.
24. *See* Whipple, *supra* note 7, at 157, 164; *see also* Loftus, *supra* note 9, at 90–92 (noting, "The legal system has recognized this in part and as a result has developed the concept of a leading question and has formulated rules indicating when leading questions are allowed (*Federal Rules of Evidence* 1975)").
25. *See* Whipple, *supra* note 7, at 157, 164; Loftus, *supra* note 9, at 90–92. It is worth mentioning, however, a study conducted by James Marshall, Kent H. Marquis and Stuart Oskamp (1971), in which the experimenters found that the "trade-off between accuracy and coverage was much less" than many previous researchers has posited. *See* James Marshall et al., *Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony*, 84 Harv. L. Rev. 1620 (1971) (noting that "the very act of interrogation and the type of questions asked had, as we had expected, a marked positive effect on completeness although, contrary to our initial hypotheses, very little effect on accuracy").
26. *See* Ronald P. Fisher, *Interviewing Victims and Witnesses of Crime*, 1 Psychol. Pub. Pol'y & L. 732 (Dec. 1995).
27. *See id.* In Michael Owen Miller, *Working with Memory*, Litig., Vol. 19, No. 4, at 10 (Summer 1993), the author notes:

> Research on witnesses who have been exposed to misleading facts after the event suggests that original perceptions can be recovered by a thorough review of the situation in which the original perception occurred. . . . First, go with the witness to the scene of the event, if possible. In any event, concentrate on contextual factors – time, place, emotion, relationship to others. Have the witness describe, or agree with your description of, the setting that led to his observation of the event. By forcing the witness to srecall the preliminary or initial details, you encourage recollection of the original perception – vaulting backward over the information later supplied.

28. Most advocates can attest that even an improper objection which contains particular language, a so-called speaking objection, can easily implant into a witness's psyche suggested, desired or even misleading information.
29. Elizabeth F. Loftus & G. Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 Bull. Psychonomic Soc'y 86–88 (1975).
30. *See* Loftus, *supra* note 9, at 77, 96.
31. *Id.* at 77–78.
32. *See* John H. Wigmore, *Professor Munsterberg and the Psychology of Testimony*, 3 Ill. L. Rev. 399 (1909) (Wigmore was then Professor of the Law of Evidence at Northwestern University). Of note, the cross-examination performed by Prof. Wigmore ("Mr. Tyro," counsel for plaintiffs in the trial) is exceptional and rivals that of Socrates of Meletus in *Trial and Death of Socrates*.
33. *See id.* at 432. In his closing argument, Wigmore (Mr. Tyro) "urged earnestly, as the lawyers in Europe were urging, friendly and energetic alliance of psychology and law, in the noble cause of justice. That cause already needed the union of all good and efficient forces."
34. *See id.* As an illustration, Wigmore (Mr. Tyro) puts to Munsterberg (p. 419):

    Q. Just one more example of this sort:

    "The effort of the memory often supplies circumstances harmonious with the general impression of a fact or event, but which are supplied only by the imagination and the association of ideas."

    "It is a very common thing for an honest person to confuse his recollection of what he actually observed, with what he has persuaded himself to have happened, from impressions and conclusions not drawn from his own actual knowledge."

    "In all cases in which one frequently thinks over his experiences he is very apt to * * forget that he has only imagined a thing of which his memory was not certain, and then remember that he has imagined as though it were a real memory of an actual fact."

    Now of these three extracts two were written by judges a generation ago, and one is fresh from the pen of a psychologist; but would you be willing to stake a considerable sum of money whether that one is the first [*Bark Adolph*, 4 Fed. Rep. 730, 741 (1880)], the second [*In re Wool*, 36 Mich. 299, 302 (1877)], or the third [Kuhlmann, American Journal of Psychology, 1905, p. 396]?

    A. No, I think not.
35. *See id*. at 421, 423, noting:

    Q. Or suppose that two honest witnesses were to testify, of a man found dead on Thursday morning, that they being together had seen him alive, but one placed it on Wednesday and the other on Tuesday; do you say that this "experimental psychology" which in your words, "can furnish amply everything which the court demands," can tell the court which witness is correct in his memory?

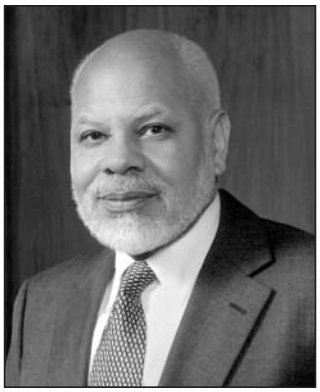
    A: No.

    Q: But you admit that the physician's chemical science, which you say psychology equals in exactness, might by examining the deceased's stomach on Thursday, tell the court whether the man had been alive as late as Wednesday?

    A: Yes, it might.

Meet Your New Officers

President



Kenneth G. Standard, special counsel in the labor and employment law practice group at the Manhattan office of the international law firm of Morgan, Lewis & Bockius, took office on June 1 as president of the 72,000-member New York State Bar Association. The House of Delegates, the Association's decision- and policy-making body, elected the Chappaqua resident at the organization's 127th annual meeting this past January in Manhattan.

Standard received his undergraduate degree from Harvard College and earned his law degree from Harvard Law School. He holds an LL.M. degree from New York University School of Law.

Prior to joining Morgan Lewis, Standard served as Assistant General Counsel for Labor Relations, Environmental and Benefit Plans at Consolidated Edison Company (ConEd) of New York City. In addition, he is the former director of the Office of Legal Services of the New York City school system and was earlier Vice-President and senior Counsel of the Products Division of the Bristol-Myers Company.

A former member-at-large of the State Bar's Executive Committee, Standard was vice-president representing the First Judicial District and Association treasurer. He has served on numerous NYSBA committees including: Judicial Selection, Law Governing Firm Structure and Operation (MDP), Association Governance, and Executive Director Search.

A sustaining member of the NYSBA, Standard is a Fellow of both the New York State and American Bar Foundations; he is a member of the Association of the Bar of the City of New York, the American Bar Association and the National Bar Association.

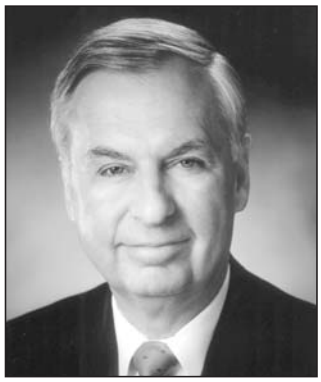
Active in community affairs, Standard served three years as vice president, followed by three years as president, of the 12,000-member Harvard Club of New York City. He has held numerous other offices at the organization, including secretary of the Admissions Committee, chair of the Athletics and Human Resources committees, trustee of the employees' pension fund and benefit plans, and chair of the Special Committee on Eligibility and served on the Nominating and Schools committees.

Standard serves as a director of the Visiting Nurse Service of New York City and a member of its Board's Finance and Audit, Development, and Governance committees. The Visiting Nurse Service of New York is the largest not-for-profit home health care provider in the nation, with approximately 10,000 employees. Standard also has served as a director of the United Seamen's Service and is a former vice-chairman of the Board of the Aspirin Foundation of America. He is a former director of the Harvard Club of New York City Foundation.

In 2003, *Crain's New York Business* named him as one of "100 Most Powerful Minority Business Leaders in New York."

Along with his duties as chair of the House of Delegates, during his year as president-elect, Standard co-chaired the President's Committee on Access to Justice (formed to help improve access to the courts for all members of our society).

President-Elect



A. Vincent Buzard, a partner in the Rochester offices of Harris Beach LLP, is the new president-elect of the 72,000-member New York State Bar Association. He was elected at the Association's 127th annual meeting in Manhattan by the House of Delegates, the organization's decision- and policy-making body. As president-elect Buzard will chair the House of Delegates and co-chair the President's Committee on Access to Justice. He received his undergraduate degree from Wabash College and earned his law degree from the University of Michigan Law School.

Buzard has held various leadership positions in the Association during the past 20 years, including member-at-large of the Executive Committee, vice president representing the Seventh Judicial District and, most recently, Association secretary. Buzard has served on the House of Delegates, chaired the New York State Conference of Bar Leaders, and co-chaired both the Lawyers in the Community and Medical Malpractice committees. Currently, he co-chairs the Special Committee to Review Attorney Fee Regulation.

As chair of the Special Committee on Cameras in the Courtroom, Buzard led a comprehensive study, which included interviewing scores of New York judges and attorneys who had participated in televised trials during the more than 10-year cameras in court "experiment." The committee determined that "there is no pattern of specific harm in specific cases and no substantial evidence that cameras adversely affect the outcome of trials." As the result of his passionate advocacy, the House of Delegates reversed its long-standing position that cameras could only be allowed in New York courtrooms with the consent of both parties, voting to recommend returning cameras without the consent provision but with appropriate safeguards.

Buzard also chaired the Special Committee on Legislative Advocacy and presented its report to the House of Delegates. That report was adopted and is being implemented.

He is a past president of the Monroe County Bar Association where, among his many accomplishments, he conducted a People's Law School, published an "Ask a Lawyer" column in the local newspaper, created a Tools for School project to distribute backpacks and school supplies to underprivileged students, and founded the student mentoring program at School 29. Active in the community, Buzard serves on the City of Rochester Cultural Center Commission,

Monroe County Sports Development Authority, and has served on the Rochester Board of Ethics. Presently, he is a member of the Governor's Fourth Department Judicial Screening Committee to review candidates for judicial appointment by the governor, and a referee for the New York State Judicial Conduct Commission. Buzard also served on Chief Judge Judith S. Kaye's Special Committee on the Establishment of Commercial Courts in the State of New York. A trial lawyer for more than 30 years, Buzard focuses on complex civil litigation including commercial and municipal matters and chairs his firm's Appellate Practice Group. He also represents people who are seriously injured, with a particular emphasis on those who have suffered brain injuries. A past president and former member of the board of directors of the New York State Head Injury Association, Buzard has lectured extensively on trial practice and representation of people with head injuries.

Buzard has worked in various roles in both radio and television, including: host of public affairs programs and "Advocates" on WXXI-TV, weekly commentator on WHAM-Radio and WOKR-TV, and commentator on WROC-TV and WXXI-Radio.

Treasurer

James B. Ayers, a partner in the Albany law firm of Whiteman Osterman & Hanna, LLP, was re-elected treasurer of the 72,000-member New York State Bar Association.

Ayers received his undergraduate degree from Colgate University (1964) and his law degree from Columbia Law School (1967). He has practiced in New York State since 1967 and is also admitted before various federal courts.

Ayers served in the public sector as: confidential law assistant to the state Supreme Court, Appellate Division (1967–1968); assistant counsel to Gov. Nelson A. Rockefeller (1971–1973); counsel, Temporary State Commission on Constitutional Tax Limitations (1974–1975); and special counsel to the Deputy Majority Leader, New York State Senate (1975). Prior to joining Whiteman, Osterman & Hanna, he was a partner in the Albany law firm of DeGraff, Foy, Holt-Harris, Kunz & Devine.

An active NYSBA member, Ayers has served as vice-president of the Third Judicial District since 1999. In addition, Ayers chaired the Trusts and Estates Law Section and has been a member of its Executive Committee since 1984. He is also a member of the Albany County and American Bar associations and a Fellow of the American College of Trust and Estate Counsel.

In addition to his professional affiliations, the Guilderland resident has been active in various civic groups, including serving on the board of directors of the American Red Cross, Salvation Army, Historic Albany Foundation, Kattskill Bay Association, and the board of trustees of the Westminster Presbyterian Church.

Secretary

Kathryn Grant Madigan, a partner in the Binghamton law firm of Levene, Gouldin & Thompson is secretary of the 72,000-member New York State Bar Association. She took office as secretary on June 1 of this year.

Madigan received her undergraduate degree from the University of Colorado at Boulder, where she was elected to Phi Beta Kappa. She earned her law degree from Albany Law School of Union University.

The Binghamton resident has held a number of leadership positions within the Association, most recently as vice president for the Sixth Judicial District. She served 10 years on the Executive Committee and 17 years on the House of Delegates.

A long-time mentor for the Young Lawyers Section, Madigan chairs the Special Committee on Association Publications and is the former chair of the Elder Law Section. She chaired the Section's Litigation Task Force, which recommended the historic *NYSBA v. Reno* lawsuit. A member of the Committee on Bylaws, Committee on Diversity and Leadership Development, Committee on Membership, and the Special Committee on Fiduciary Appointments, she also chaired the Association's Membership Committee, served as founding chair of the Committee on Attorneys in Public Service, and served on the Executive Council of the Conference of Bar Leaders, the Task Force on Solo and Small Firm Practitioners, the Special Committee on the Future of the Profession, the Nominating Committee, and the Executive Committee of the Trusts and Estates Law Section. She is a Fellow of The New York Bar Foundation and Chair of the Sixth District Fellows.

The youngest and first woman president of the Broome County Bar Association, during her tenure that association twice received NYSBA's Award of Merit. She was honored with the Stanley B. Reiter Award for Extraordinary Service to the Bar Association, in 1997. A noted lecturer in the field of estate planning and elder law, Madigan is a Fellow of the American College of Trust and Estate Counsel and a member of the National Academy of Elder Law Attorneys. She received the Kate Stoneman Award from Albany Law School, the 1987 NYSBA Outstanding Young Lawyer Award and the Phoenix Award from Citizen Action of New York.

Active in many community and civic organizations, Madigan is Trustee of the Binghamton University Foundation and United Health Services Foundation, where she chairs its Nominating and Personnel Committees. She supervises the production of "Ask the Attorney," a program airing weekly on WBNG-TV, a CBS affiliate.

Madigan performs at the annual Broome County Chamber of Commerce Dinner as a Live Wire Player, and is president of the chamber's Live Wire Club.

Attorney Professionalism Forum

To the Forum:

I just graduated from law school and plan to take the bar exam in July, after which I will start a job as an associate in a firm that specializes in family and matrimonial law.

On a recent study break I tuned in to an episode of "The Sopranos," which raised the type of ethical issue that one doesn't ordinarily see on a television program known primarily for mob hits, cement overshoes and exotic dancers.

Tony Soprano and his long-suffering wife, Carmella, have separated. Carmella approached a number of attorneys to represent her in seeking a divorce, but was turned down by one after another. It seems that Tony had preemptively consulted with several of the more prominent matrimonial lawyers in town, and these attorneys refused to represent her – presumably because Tony had, in the process, disclosed to them confidential information about himself. I had the impression that Tony's purpose in consulting with these high-priced attorneys was to disqualify them from representing his wife in their upcoming divorce.

While it was not clear whether this idea was Tony's or his lawyer's, it made me wonder about this strategy in the "real world." If a person is advised by counsel to preemptively "poison" other matrimonial attorneys so that they could not represent that person's spouse, would this violate any ethical principle? My instincts tell me that the answer is "yes."

Please advise.

Sincerely,

Wondering About a Wise Guy

Dear Wondering:

Your instincts are good. Any matrimonial lawyer who gives such advice would be stretching the principle of zealous representation within the bounds of the law, as stated in Canon 7 of the Lawyer's Code of Professional Responsibility ("Code"), to the point of distortion.

Lawyers are custodians of our adversary system of justice. They have a professional obligation to preserve the virtues of that system and, if possible, to improve it. The system aspires to achieve impartial justice through fair procedures. Even though this cannot always be achieved, it ill behooves a lawyer to help a client manipulate that system to achieve a result through an unfair process.

Cynical manipulation of the type you describe jeopardizes justice not only in the particular case – here, possibly causing a mismatch between counsel – but also besmirches the reputation of lawyers generally. Those whose perceptions would be adversely affected would include the opposing spouse, the disqualified lawyers, knowledgeable observers and even the "successful" client who knows that, with the help of a scheming lawyer, he or she has achieved the desired result unfairly. This undermines the very system of justice attorneys are supposed to protect. For that reason, it is unprofessional and contrary to the best traditions of the law for an attorney to counsel a client to engage in this tactic.

If you are asking whether such conduct violates a particular provision of the Code the answer is less clear, but ultimately must be in the affirmative as well.

Tactical disqualification is nothing new. Courts adjudicating disqualification motions acknowledge it regularly. In the 1970s, it was well known that some corporations placed high-profile securities lawyers on retainer primarily to prevent corporate opponents from hiring one of these attorneys to take action against them. A corporation's payment of an annual retainer to a lawyer or law firm to prevent their working for the enemy does not, *ipso facto*, violate the Code. In any event, in a large metropolitan area, it is hard to imagine such tactics resulting in the disqualification of all highly qualified lawyers.

In certain circumstances, however, tactical disqualification may threaten to take all of the very best lawyers out of circulation. For example, in a small town upstate, or even in New York City in a very esoteric area of the law, the number of qualified lawyers may be limited, and the use of such tactics may disqualify all the top-tier lawyers in the area. In that context, the use of such tactical disqualification would run afoul of a lawyer's duty to assist in

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.

making qualified lawyers fully available to those seeking legal services (Ethical Considerations 2-1, 2-26, 2-31, 2-33).

In addition, and of more serious import, the lawyer who counsels a client to disguise tactical disqualification as a bona fide preliminary consultation is, in effect, counseling a fraud. In that case, the suggested preliminary consultations are simply a charade. The client is being advised to deceive the other matrimonial lawyers into thinking that they are being considered for hire when, in fact, the client has already hired someone else, and is being counseled by that attorney to impart confidences and secrets for the sole purpose of ensuring another attorney's disqualification.

The lawyer who counsels a client to engage in such deceit will thereby be violating DR 7-102(A)(7), which provides that in representing a client a lawyer shall not "counsel or assist the client in conduct that the lawyer knows to be . . . fraudulent." In response to those who would question whether this type of client conduct rises to the level of fraud, DR 1-102(A)(4) provides more generally that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." That the lawyer personally has avoided making any deceitful comments or misrepresentations to the other lawyers consulted is no defense. DR 1-102(A)(2) provides that a lawyer shall not "circumvent a Disciplinary Rule through the actions of another." Therefore, a lawyer who counsels a client to engage in deceitful conduct intended to result in a tactical disqualification cannot avoid the thrust of DR 1-102(A)(4) by contending that the client was the perpetrator of the fraud.

In short, counseling such tactical disqualification is not only unprofessional; it also violates the Code.

The Forum, by
James M. Altman
Bryan Cave LLP
New York City

QUESTION FOR THE NEXT 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

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS
1/1/04 - 5/14/04 _____3,464

NEW LAW STUDENT MEMBERS
1/1/04 - 5/14/04 _____617

TOTAL REGULAR MEMBERS AS OF
5/14/04 _____59,549

TOTAL LAW STUDENT MEMBERS AS OF 5/14/04_____3,316

TOTAL MEMBERSHIP AS OF
5/14/04 _____62,865

Language Tips

By Gertrude Block

Question: Please settle an argument between my partner and me. She says that the following sentence is correct. I say it's not, but I can't explain why. Here's the sentence:

• The defendant's words were at a loss to express his meaning.

Answer: You are right. The sentence is incorrect because the words "at a loss" require that the subject be a human noun. Words cannot be "at a loss," only people can. So the sentence needs re-stating: "The defendant was at a loss to express his meaning." Dictionary definitions often lack this explanation, although the better dictionaries do include contexts that indicate how the words are used.

Most people think of the need for "agreement" only in terms of number, for example, the grammatical requirement to use a plural verb with a plural subject. But agreement extends beyond number. A recent news item breached the rule of agreement when it stated, "The judge rebuked the language of the defense attorney," because the verb rebuke cannot take a non-sentient object. You can rebuke other persons, and perhaps even household pets, but you cannot rebuke language.

This sentence, from a law student's thesis is another example:

• Statute section 460 states that deadly weapons obtained during the commission of a crime constitute burglary.

But weapons, however deadly, cannot constitute burglary. So the sentence needs re-drafting to indicate that the possession of a weapon during the crime is what constitutes burglary.

What I call "impossible comparisons" result from the breach of agreement. The following two statements illustrate this problem:

• Like the deadly weapon in *Bass*, the defendant in *Rogan* used his boot to assault the victim.

• Like New York law, Connecticut provides for restitution as an alternative to prison for first offenders.

A defendant cannot be compared to a deadly weapon, nor can the state of Connecticut be compared to a New York law. So these statements should be re-cast to create a true comparison:

• Like the *Bass* defendant, the defendant in *Rogan* used his boot to assault the victim.

• Like New York, Connecticut provides for restitution as an alternative to prison for first offenders.

Another rule for agreement requires that modifiers be near the words they modify. Failure to observe this rule sometimes causes confusion or amusement instead of enlightenment. Here are two sentences that illustrate the problem:

• In *Barton*, plaintiff was a passenger on a carrier raped by the chauffeur.

• Tutor needed by law student proficient in verbal skills.

Placement of the modifier may change the meaning of your sentence. Compare

• This material is clearly not obscene.

• This material is not clearly obscene.

The word only is not to be carelessly tossed into a sentence. Its placement is sometimes crucial. See how it affects the meaning of the following statements:

• Only after checking oncoming traffic, motorists can turn right on red.

• After checking only oncoming traffic, motorists can turn right on red.

• After checking oncoming traffic, only motorists can turn right on red.

• After checking oncoming traffic, motorists can only turn right on red.

• After checking oncoming traffic, motorists can turn only right on red.

• After checking oncoming traffic, motorists can turn right only on red.

Short words like clearly and only are far more important to meaning than they seem. Consider the word over. Its placement in the following sentences determines their meaning:

• I looked over the table.

• I looked the table over.

• I overlooked the table.

Finally, the placement of the small word good indicates which person in the contract did well:

• He got a good price for it.

• He got it for a good price.

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).

Foundation Memorials

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

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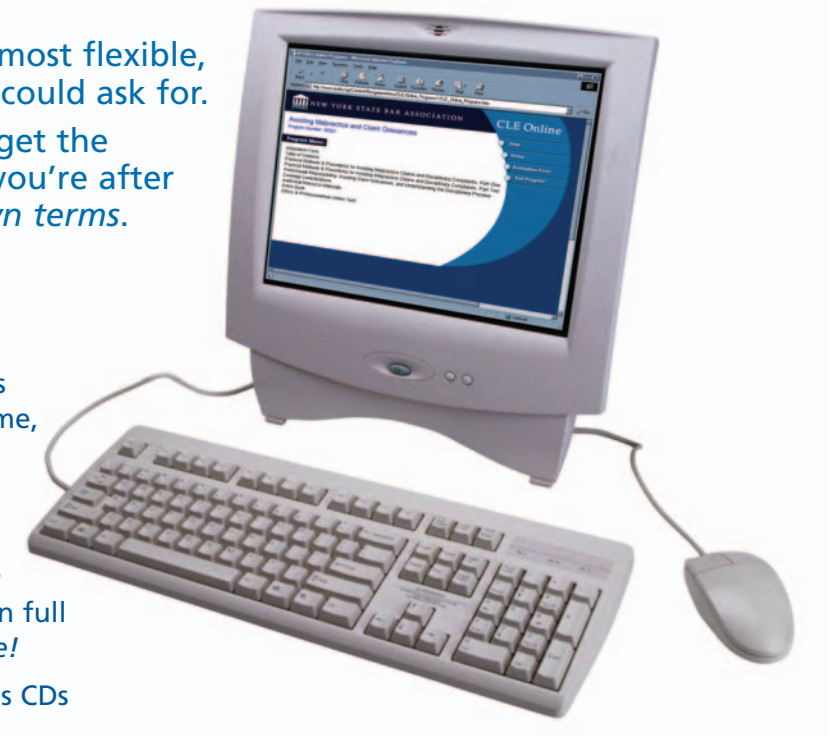

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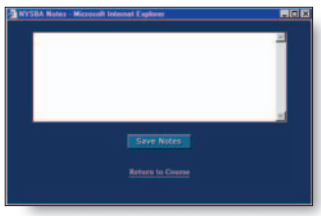

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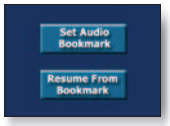
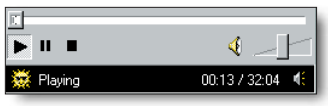
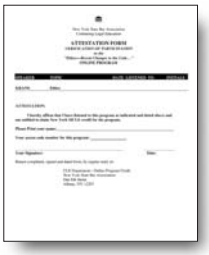


Bookmarking lets you stop your course at any point, then pick up right where you left off – days, even weeks later – from anywhere.



Audio Seminars complement the onscreen course texts. You control the pace, and you can "bookmark" at any point.



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Neal Stefan Cohen
Sara A. Cohen
Joseph R. Coleman
Nora Coleman
Jean Marie Del Colliano
Sasha Crosland Conroy
David Jacob Cooper
Paige E. Cooperman
Germaine Alexander Corprew
Jeffrey Coviello
Erin Cowan
Stefano Crosio
Kelly Blythe D'auria
Asa Robison Danes
Jonathan Michael De Santis
Christina Jacqueline De Vries
Hadi Nicholas Deeb
Gerard M. Deenihan
Tiana A. Demas
Marvina Dejean Denny
Anna Domenica Di Gabriele
Lori Irene Diamond
Happy Melissa DiCenso
Daniel P. Dietrich
Paul Stuart Dion
Eden Danielle Doniger
Richard Wadsten Donner
John Kelly Donohue
Nancy Lynn Donovan
Ellen Maureen Dowling
Seth David Ducharme
John Cochrane Duncanson
Jacqueline Richelle Dungee
Matthew D. Dunn
Tracey Anne Dunn
Marc Laurence Edelman
Joshua Alan Ehrenfeld
Dahlia Eissa
Daniel Joseph Ellowitch
Burcu Umut Ergun
Cherylyn Antoinett Esoy
Alicia Beth Fagen
Amy Elizabeth Fallon
Nicole Marie Fantigrossi
Tara Lisa Fasano
Benjamin Mann Faulkner
Meyer Haim Fedida
Elizabeth Eldridge Feeney
Alyssa Feinsmith
Jennifer L. Femminella
Christopher Richard Fenton
Davina Janette Figeroux
Joanne Filiberti
Margaret C. Finster
Peter James Flanigan
Jennifer Robin Fleischer
Karen Kay Fleshman
Kerry Ellen Flynn
Ferran Foix
James Ernest Franklin
Eva Frecker
Kimberly L. Frederick
Jessica Lauren Friedman
Jared R. Friedmann
Michael B. Frisch
Nadine Y. From
Arshiya M. Fyazi
Aayesha Gaisi
Joseph John Galvano
Nicole Suzanne Garbarino
Corie Rochelle Garbati
Kristelia Ann Garcia
Erin Lynn Gardiner
Melinda Jean Garvey
Seth Allen Gastwirth
Keith Steven Geffen
Tyler Emil Gellasch
Brian Jeffrey Gershengorn
Rebecca Nellie Gingold
Deborah Julie Ginsberg
Ramona Rachael Gittens
Jeremy Seth Gladstone
Rachel Shayne Gold
Keren E. Goldenberg
Jill M. Goldman
Orit Goldring
Anna Alexandra Goldstein
Stuart W. Goldstein
Debra J. Gordon
Jeremiah Tristan Gordon
Mary Abigail Gorman
Theo E.M. Gould
Hallie Beth Grainer
Daniel Colin Green
Wendy M. Greenberg
Joseph Benjamin Greene
Joseph Barry Gross
Kristen Laura Gudewicz
Matthew J. Guercio
Chetan Gulati
Ling Guo
Inna Gutman
Heather J. Haase
David Cobert Haber
Katherine Leigh Hamm
Kristina Younghee Han
Gregory Neil Harris
Mher Hartoonian
Matthew Hamilton Hawes
Rebecca Ann Hazard
Huairong Ruth He
Li He
Michael S. Helfer
Jeff Henle
Adam Jason Henslovitz
Beth Lisa Herbstman
Timothy Hia
Daniel Mark Hibshoosh
Neal Leigh Higgins
Eric Hochstadt
Carlie Hoffman
Hirokazu Honda
Geri Beth Horenstein
Daniel Ira Horowitz
Jacqueline Nicole Howell
Lisa Howley
Sarah Chih-jen Hsia
Jennifer Huang
Diana Rachel Hyman
Dolores M. Iannarone
Sadie Zea Ishee
Haneefah Aesha Jackson
John David Jackson
Grace S. Jean
Taleah Esperanza Jennings
Sarah S. Johnson
Gregory James Johnston
Bhavana Joneja
Shaunna Dionne Jones
Jaekyun Jung
Aaron Robert Jeremiah Kaalberg
Jordan Michael Kam
Nicole J. Kaplan
David Spencer Karp
Albert Howard Kass
Kenneth Joel Katz
Alexandra Anna Kau
Stacy Mara Kelner
Evan Bradley Kelson
Elizabeth Catherine Kennedy
Amelia Jane Keuning
Samuel Alfred Khalil
Paul Tae Kim
Sharon S. Kim
Soo Jin Kim
Eileen Sharon King
Brian Kinney
Galen Douglas Kirkland
Carrie L. Kissick
Curtis Kloepfer
Rajpreet Kaur Kochhar
Jenning Kohlberger
Richard Kohlberger
Daniel S. Kokhba
Jordan Knight Kolar
Robert Y. Konig
Joshua Robert Kopelowitz
Robert Adam Koslow
Debra Kramer
Steve V. Krishtul
John Michael Krug
Leigh Anne Kuiken
Mark S. Kundla
Jorge Carlos Kuri
Edgar Damian Kwee
Eleanor M. Lackman
Margaret M. Laffler
Gian-Carlo Laguzza
Suling Lam
Jordana Eden Ayelet Lambert
Banjamin Otto Lang
Oren Dov Langer
Benjamin Langille
Steven Antonio Lastres
Sharon Sue Laveson
Jennifer Dawson Lawrence
Elina Lecour
Kevin John Lehpamer
Seth Michael Leifer
Marie E. Lemmo
Brian Sinclair Lennon
Jacqueline Michele Lesser
Sara Rebecca Lesser
Shira Pamela Levine
Alison Beth Levy
Brian J. Levy
Robert Patrick Levy
Edgar John Lewandowski
Sarah E. Lieber
Linda S. Lin
Melissa Alison Linde
Christopher Hubbard Lindstrom
Douglas E. Lippin
Trish Lisa
John Michael Littzi
Philippa S.M. Loengard
Michael J. Lonergan
Kevin Longo
Frank Knight Lord
Ingrid Whipple Loreen
Catherine Anne Loughlin
Lev Mark Loukhton
Jessica Lyn Lund
Elliot H. Lutzker
Shona Lashea Mack-Pollock
Stephanie Jean Mah
Richard Alan Maletsky
Peter Malloy

Philip M. Manela
Venu M. Manne
Mark Ashton Marino
Danielle Marks
Andrea Danielle Martin
Michael Louis Masterson
Kiera Ann Kociban Mathey
Juno A.H. Mayer
Douglas Robert Mc Land
Meredith Anne McGrady
Meghan Elizabeth McHale
Brendan Scott McParland
Jonathan Desow Melber
Richard Andrew Meloff
Caroline Memnon
Brenna Hope Mendelsohn
Christian Pedro Mendoza
Grace Meng
Hind Merabet
Hindy Merabet
Shannon Michaels
Timothy Mark Michaels
Robert C. Micheletto
Chaim Yaakov Miller
Matthew Minerva
Carrie Lynn Mitnick
Scott David Mitnick
Samuel Insoo Mok
Steven Francis Molo
Gerard Andrew Monusky
Catherine Ruth Moore
George R. Morris
Michael Evan Morrison
Lauren Anne Mowery
Peter R. Moyers
Frank Ikonero Mugabi
Ilir Mujalovic
Ellen Marie Murphy
Monique Mutharika
Madeleine Andrea Narvilas
David Alan Nasar
Leora Nathan
Kan M. Nawaday
Diana Joyce Nehro
Christopher Fleming Nelson
Cyrus Mousavi Nezhad
Kenneth Ng
Lan Xuan Nguyen
Linh Caroline Nguyen
Charles Ross Nightingale
Ivana A. Nizich
Debra May Nodiff
Kelly E. Norton
David Edward Novick
Sean Matthew Novick
Altagracia M. Nunez
Licha Malome Nyiendo
Niall Diarmuid O'Murchadha
Edwin C. Opoku
Jessica L. Orlando
Yoko Oshima
Andrew Edward Owens
Courtney Erin Ozer
Natalie C. Pagano
Christine S. Paine
Diane M. Paolicelli
Soyeon Park
Steven Zev Parnass
Natasha May Parrett
Carlie E. Parsoff
Matthew Parsons
Kendell Derek Pease
Jeanette Perez
Simone Mello Perez
Carlos C. Perez-Hall
Brett Shawn Phillips
Michelle Lauren Picheny
Nathalie Therese Pierre-Louis
Rebecca Tova Pilch
April Natarsha Plana
Ellen Polissky
Kenneth Allen Polite
Richard B. Polner
Melissa Pressley
Jennifer Ann Pusey
Hilary Ann Puskar
Cynthia Pyun
Anita Ditya Raman
Raha Ramezani
Joel D. Ramsey
Gerard Stephen Rath
Christopher William Rawsthorne
Charles Edward Reese
Teresa Young Reeves
Colette Anne Reiner
Jeremy Lawrence Reiss
Kevin James Renna
Denis Michael Reo
Brian Matthew Resnick
Maria Lucia Ricci
Matthew Francis Rice
Asha Kamaria Richards
Pamela S. Richardson
M. Asher F. Richelli
Christopher Michael Rickey
Keri Elizabeth Riemer
Jecarl Bruce Riggins
Erin D. Roach
Meredith Blake Robbins
Graham Arthur Robinson
Kevin William Robinson
Albino Michael Rocchi
Aaron J. Rokosz
Yasmin Roman
Elena Vladimirovna Romanova
Jessica Anne Rose
Kurt Frederick Rosell
David Paul Rosen
Jennifer Lee Rosen
Amy Lauren Rosenberg
Nicola Rosenstock
Oren Rosenthal
Douglas Robert Rosenzweig
Steven Rosenzweig
Elizabeth M. Rotenberg-Schwartz
Natalie Susan Rothman
Melissa-Jean Rotini
Irena Royzman
Jennifer Lindsay Rubin
James Rupley
Carole Jennifer Sabbah
Lewis Michael Saideman
Gregory Timothy Santos
Jaime Jane Santos
George Neil Sapio
Stacey Ann Sarver
Zoe Colinda Baer Scharff
Yolanda Ann Schillinger
Dominick L. Schirripa
Andrew M. Schmertz
Cliff S. Schneider
Heather Adler Schoen
Bonnie Joy Schreiber
Ludger Schult
Robert Schwartz
Sandy T. Schwartz
Suzanne Melissa Scott
Scott M. Shapiro
Yuval Sheer Sheer
Michael David Sherman
Jungyon Shin
Sue Shin
Robert Craig Shmalo
Michael Brian Shortnacy
Stephanie D. Shuler
Jill Blau Siegelbaum
Lydia Sigelakis
Wendy Lynn Silver
Jose Salomon Singer-Freeman
Brendan Charles Skelly
Maura Una Slack
Kasandra Lydia Slangan
Kevin Patrick Smith
Ellen Marie Snare
Edward Hau-wah So
Michael E. Sofia
Pamela Franklin Sohn
Mark B. Solomon
Heather Renee Solow
Alexis Soterakis
Laurie K. Spinella
Bryan Seth Spiro
Stacy Caryn Spodick
Peter R. Stambleck
Natalie Stamler
Natalie D. Stanford
Elliot Howard Steelman
Marc Howard Stein
Shanee Stein
Nathan Steinberg
Thomas Allen Stenger
Joseph V. Stephen
Hilary Suzanne Steuer
Melissa Lea Stewart
Craig David Story
Joseph Anthony Strazzeri
Andrew L. Strom
Rachel Joan Strum
Eva Elana Subotnik
Akiko Sueoka
Gary B. Suffir
Alissa Fialla Sugerman
Natalie Corinne Suhl
Angie M. Sullivan
Nicole Summer
Joshua Alexander Sussberg
Yuko Suzuki
Vincent Tadarello
Tamar Sima Tal
Mohamed Na-il Tamimi
Jennifer Tan
Kenichi Tanizaki
Anthony James Taylor
John Reid Taylor
Norberto Terrazas
Rozanna Tesler
Ann Thomas
Kathleen M. Thompson
Christopher Robert Thomson
Julia Louise Tomassetti
Michelle Sharee Toy
Jeffrey S. Trey
David Treyster
Amanda Gabrielle Trivax
Marisa Lauren Tuch
Susan Beth Tuchman
Christine Leigh Turner
Jessica Lorena Uguccioni
Elaine Rapp Unkeless
Hiroyuki Usuda
Adam Matthew Vaccaro
Megan Elizabeth Vallerie
Peter Warren Van Gelderen
Rena Mariam Varghese
Vera Varshavsky
Olivia A. Vasilescu
John Daniel Vavas
Helen Vaysman
Victor John Vecchiariello
Darin K. Vest
Patricia Emma Villar
Stephen Brian Vogel
Ryan J. Walsh
Shawei Tsuei-wei Wang
Jaclyn Blake Ward
Rivka Weill
David Marcus Weinberger
Sandra Lea Weinglass
Andrew H. Weisberg
Allison Jill Weisman
John W. Weiss
Marcus Lee Weiss
Sara A. Welch
Glen Karl Westerback
Sandra Whang
Michael Kaniela Wheeler
Kenya S. White
Monyca White
Adam Henry Wierzbowski
Paul Michael William
Davida Atara Williams
Dawanna LeJeune Williams
Holly Rachel Winefsky
Myron Winiarsky
Alice Eleanor Winkler
Desiree A. Wise
Stewart Adam Wolf
Stephanie R. Wolfe
Aaron Todd Wolfson
Patricia Ann Wonder
Heather Diane Wurman
Kazuhiro Yanagida
Beesian Yap
Shavit Yarden
Marsha Wellknown Yee
Elaine Yerkhova
Linda Ja Yi
James S. Yu
Wai-yin Alice Yu
James Mario Zaleta
Sarah Tribit Zampino
Sloan J. Zarkin
Erin Pamela Zavalkoff
Kimberly Helene Zelnick
Zhanna Alexandrovna Zenina
Lina E. Ziurys
Elias M. Zuckerman

SECOND DISTRICT

Judith C. Aarons
Dimple Abichandani
Lisa L. Adcock
Sarena Cheryl Adest
Rita M. Antonacci
Daniel Joseph Bellizio
Andrew David Bizer
Yasmin Adelle Blackburn
Margaret Burow
Stephen Serge Burzio
Albert A. Calise
Melissa Lynn Carvajal
Nancy Michelle Christensen
Kerri Ann Clark
Marco R. Difava
Roseann Scotto Dirinaldi
Jessica Ann Faige
Neil Jon Firetog
Richard Frohlich
Ronald Jay Goldstein
Mindy L. Gress
Junhua Gu
Edward R. Hall
Davida Patricia Holmes
Tamika Hurdle
Peter Maximilian Jaensch
Sandy K. Jensen
Bernadette Dino Jentsch
Marcia Lakish Johnson
Alison Ruth Kirshner
Natalie Kossov
Alla Kostinsky
Callie Marie Kramer
Yosef E. Kraus
Jessica Marie Latour
Paula Lopez
Jason M. Lynch
Douglas Whiting Mace
Denise Marangos
Daniel Cooper Moore
Joshua Arditi Naftalis
Hyder Abbas Naqvi
Margaret M Orange
Jaime M. Pasqua

Barbara Levi Quint
Katherine Anne Rabb
Jason Harris Rosenblum
Tonia Sayour
Simcha D. Schonfeld
Esther Schwartz
Esther Elizabeth Schwartz
Salvatore J. Sciangula
Retu Rani Singla
David M. Tull
David Mark Turoff
Yuriy Yegorovich Shirokikh Ukraine
Iris M. Valentin
Jimmy F. Wagner
Tyson Harold Weaver
Ronald G. White

THIRD DISTRICT
Samara Dawn Anderson
Michele M. Bateman
William F. Berglund
Daniel Frederick Billard
James Michael Henday
Joshua David Jacobson
Carolyn Betz Kerr
Samantha June Lindsay-Gaddy
Jennifer J. Monthie
Kathleen Marie O'Brien-Nejame
Scott W. Owens
Kiley D. Scott
Lauren Eileen Swan
Jeffrey L. Zimring

FOURTH DISTRICT
Amy V. Casiuk
Mark Vincent Cowen
Nicole Lyn Fish
Tammy D. Gifford
Nicole Marie Helmer
Judy Lee McGowan
Brad D. Nephew
Dara Janine Older
Richard Henry Plumadore
Michael M. Stone
William Earl Strickland
Daniel B. Wade
Jennifer Clare Zegarelli

FIFTH DISTRICT
Ryan L. Abel
Audra Albright
Frederick J. Arcuri
Kari E. Arnold
Jeremy Leon Barlow
Spencer R. Bell
Craig S. Better
Tyler Gary Brass
Daniel R. Brice
Christi Lynn Caratozzolo
Jason L. Cassidy
Kenna Marie Clarke
James Ryan Daley
Nathaniel P. Getman
Brent J. Horton
Addie Ann Elizabeth Jenne
David B. Jones
Kristine Ann Kipers
Kara A. LaSorsa
Susan Lesmerises-Degraff
Jeffrey Douglas Lowe
Donald Forbes Manley
John Rossman Palmer
John Anthony Reading
Jeffrey Paul Reisner
Jennifer M. Reschke
Eric R. Schwerzmann
Paul T. Sharlow
Jarrod W. Smith
Nathan Elliott Vander Wal
Theologos A. Voudouris
Misty Marie Watson
Zea M. Wright

SIXTH DISTRICT
Stephanie L. Devaney
Jessica Marie Drake
Howard Henry Engelskirchen
Leslie Beth Friedman
Stephen John Mescall
Leslie E. Phelps
Holly M. Zurenda

SEVENTH DISTRICT
Francis M. Ciardi
Dennis Brian Danella
Stephen A. Davoli
Daniel Patrick Debolt
Jeffrey Michael Dooley
Meagan K. Dorritie
Tonia Marie Ettinger
Michael Fallone
Elena Anastasia Gekas
Heidi G. Goebel
Justin M. Hill
Sarah A. Janas
Mikal J. Krueger
Sean David Lair
Gavin M. Lankford
Jason Allen Macbride
Martin Patrick McCarthy
Margaret Baldwin McMullen
John I. Menard
Gregory R. Nearpass
Michael Paul Petro
Kelley Provo
Jennifer Lynn Renn
Bryan David Richmond
Peter A. Rolph
Rachel I. Rosen
Paul Andrew Sanders
Colin M. Smith
Matthew Edward Thomas
Sarah Lynn Wannop
Seth A. Weinstein
Christopher Thomas Wilcox
Roberta G. Williams

EIGHTH DISTRICT
David Michael Abbatory
Cheryl A. Aloi
Jonathan Lucas Altman
Emily Lynn Anderson
Jessica L. Anderson
Christen D. Archer
Fawn Amber Arnold
Ronald Joseph Battaglia
Michael Vincent Booth
Howard Dunning Cadmus
Frank C. Callocchia
Angela R. Carlson
Alison Cleary
Patrick M. Corbett
John Michael Coyle
Esther Fay Dittler
Steven Richard Dolson
Mariely Lindsay Downey
Patrick B. Farrell
Yousra Yousuf Fazili
Jessica E. Fried
Bradley R. Girdler
Christopher Stephen Glascott
Burton Greenspon
Thomas Joseph Grillo, Jr.
Stephanie Lynne Guerriero
John J. Hannibal
Brian Robert Hogan
Susan M. Howard
Douglas Anthony Janese
Deborah Kim Jessey
Peter T. Juliano
Gretchen Marie Kaplan
Ronald J. Kilburn
Jung-dong Kim
Robert Knaier
Thomas Martin Krol
Jane Ellen Kwiatkowski
Mara Caerleon Leighbody
James Michael Lennon
Joseph Alexander Leta
Anne Letizia Magats
Athena McCrory
Andrew Michael McElwee
Margaret A. Murphy
Carly Marie Nasca
Maura Kathleen O'Donnell
April J. Orlowski
Scott Richard Orndoff
Amol Kumar Pachnanda
Carrie P. Parks
David George Peltan
Jill Marie Plavetzki
Martin Alex Polowy
John Francis Quinn
Alison Hall Richard
Andrea Rigdon
Alan James Roscetti
Joseph E. Schneider
Susan M. Schwing
Lori Marie Shawver
Michelle Corinne Smeadala
Jamie M. Smith
Christina Sorrento
Kristin Anne St. Mary
Edward W. Stano
Shuping Wang
Steven W. Wells
Eileen M. Wheeler
Scott Joseph Whitbeck
Keri Deshane White
Brian Richard Wutz
Brian Daniel Zuccaro

NINTH DISTRICT
Susanne Aberbach-Marolda
Nancy Avery
Michele Lyn Babcock
Aaron Baily
Nancy Ilana Becker
Ann Sterling Beddingfield
Taylor Y. Berlow
Minni Bhatia
Evan Solomon Blumberg
Tracy Cass
Thomas M. Citron
Jennifer Beth Corcoran
John J. Corgan
Jean Amelia Dipaolo
Jeremy Mathew Eichel
John Louis Fendt
Mark Alan Froehlich
Maritza Fugaro
David Lee Gove
Nadine A. Graham
James Robert Hannon
Paule Apter Harris
Melece Hernandez
Yosef Eliyahu Horowitz
Patty Hurtado
Peter L. Jameson
Edwin Lewis Jefferies
Kristen A. Kelley
Brian Theodore Kohn
Damian Joseph Laviano
Adam Charles Lease
Cheryl Jean Lee
Harris J. Maslansky
Sinead M. McLoughlin
Silvia Maria Metrena
Katherine Ann Moloney
Nicholas J. Oliva
Kathryn Plunkett
Sheldon M. Riner
Alexandra Schatoff
Nancy R. Schembri
Iris Noam Schwartz
Margaret Regan Smith
Arabella Wattles Teal
Jordan Thompson
Michelle Lynn Tierney
Zoltan Vaizer
Vinai C. Vinlander
Diane P. Whitfield
Lisa Anne Pepe Whittaker

TENTH DISTRICT
Isa A. Abdur-rahman
Anna Acquafredda
Anthony Ametrano
Samantha J. Arluck
Claudia Avin
Elizabeth L. Baldwin
Marleen Maritza Bello
Karen Ann Bily
Andrea G. Block
Teresa Campano
Alan D. Canarick
Eva Marie Cappuccio
Sean T. Carew
Valerie M Cartright
Adam Robert Cohen
Mona R. Conway
Kerryann Marie Cook
Philip L. Curcio
Farahnaz Damaghi
Gina T. Danetti
Peter M. DeCurtis
Audra Anne Divone
Matthew Evans Douthat
Mary Geraldine Duffy-Tierney
Harrison Joseph Edwards
Vidal Erbesh
Shiry Gaash
Greg Garber
Karen R. Garber
Ayisha Gelin
Robert Holden Giannelli
Michelle Blaire Glatt
Marnie April Goldgrub
Davin Goldman
Danielle A. Gordon
Seth Howard Greenberg
Brett M. Grossman
Antonia Leah Hamblin
Rose Marie Hardina
Donna Marie Haugen
Matthew William Hawkins
Sarah B. Hay
Jordan S. Hiller
Vanessa Helen Hlinka
Jonathan Deda Ivezaj
Jennifer J. Kim
Matt Brian Klein
Sandra Jean Kosman
Tara M. La Morte
Sol Lefkowitz
Adam Michael Levy
Eric Matthew Linder
John D. Logigian
Shauna Leigh Lonigro
Leslie Lopez
Martin Lorenzotti
Fred Lutzen
Kyle T. Lynch
Daniel G. Lyons
Donald Browning Macdougall
David Makhani
Antonio Geraldo Marano
Rachel Rivka Marks
Brian Christopher McCarthy
Bari Meyerson
Jennifer Elizabeth Miller
Michael E. Mirabella
Maryann Santina Mirabelli
Edward J. Mitchell
Allison Muscara
Ryan Charles Napoli
Agnes Beata Neldner-Ratuszny

Laura P. Newcombe
Dennis P. O'Brien
Sophia Ohanessian
Patrick Frank Palladino
Anthony J. Palumbo
Michelle Ann Pitman
Avroham Popack
John M. Porchia
Linda A. Prizer
Anthony Proscia
Michael D. Raniere
William J. Raniolo
Scott Robert Reel
Vincent Renda
Rebecca Lisa Reyhani
Neil Kip Reynolds
Angelo Francesco Rizzo
Lindsey McCabe-Neigler Rohan
Gayle Rebecca Rosenblum
Todd Reuben Samelman
David Brandon Satisky
Michael A. Schoenberg
Gregory Scolieri
David Gary Seman
Biagio Sguera
Sapna K. Shah
Munisha R. Shandal
Joshua Aaron Shapiro
Melissa Beth Silberman
Ryan Matthew Silverman
Joseph Simantov
David G. Smitham
Daniel M. Solinsky
Diane Somberg
Matthew Benjamin Stein
Annette Marie Totten
Catania Trigo
Sofia S. Tsytsarev
Robert Vadnais
Andreas Vasilatos
Michael Sean Weiner
Lisa Marie Williams

ELEVENTH DISTRICT
Martin Afshari-Mehr
Christine Anne Battaglia
Durga Prasad Bhurtel
Lawrence Jay Brenner
Edward L. Campanelli
Christina Lori Caturano
Aryeh L. Ciment
Tristn Dacunha
Shannon Falcone
Ilona Finkelshteyn
Sheila Francis
Jean Robert Gabeau
Roger Philip Giardino
Caryn E. Goldstein
Casey Scott Grannis
Jason Michael Hadley
Hanna Hall
Junping Han
Amber Erin Heller
Amy Huiya Hsu
Yan Huang
Kate Huntington
Valerie Joe
Daniel D. Kim
Rong Tao Kohtz
Demetrios H Koniarelis
Chih-Sheng Lin
Adam Jason Lindenbaum
Richard Bacani Lovina
Nicole Maglio
Eric William Mausolf
Robert A. Moran
Hadaryah Tebach Morgan
Artemis Gricelda Moutsatsao
Claire Denise Nilson
Edwin I. Novillo
Mark Thomas O'Rourke
Murray H. Ocko
Amanda Elizabeth Perez
Anthony Pirraglia
Edward S. Shim
Jessica E. Silver
Pantelis Skulikidis
Keith Tagliavia
Evangelina Triliouris
Oren Varnai
Basilios Vassos
Ann Wang
Chaiyot Wattanachaiyot
Joseph N. Weinstein
Ting Zhao

TWELFTH DISTRICT
Neriza Ally
Zina Avrutova
Robert Baker
Christina Marie Brescia
Marisa Milliken Capra
Christopher Ryan Clarke
Jennifer Estrella Cruz
Veronique Angelica Ferguson
Ita Rachel Flug
Brian Gibbons
Shibu J. Jacob
Amanda Greer Katz
Amy J. Litwin
Yvette Lopez
Ambre Nerinck-Seltzer
Katrina L. Nusum
Na Na Park
Chevor Omar Pompey
Jennifer Beth Reich
Marla Dawn Richman
Jason Andrew Rifkin
Samantha Lisa Riley
Adrienne Scholz
Carrie Beth Seiden
Richard E. St. Paul
Eric Peter Sugar
Tammy Maria Vadasz
Leana Vertucci
Jillian E. Wieder

OUT OF STATE
Bryant Kenneth Aaron
Olanrewaju A. Abiola
Edward Scottie Abrams
Armando Javier Acosta
Francisco Acuna Mendez
Sae Ahn
Kazumi Aizawa
Roxana Aleali
Jeffrey Scott Alexander
Albertus Magnus Alfridijanta
Carm Regan Almonor
Kevin Robert Amer
Adefolake Oyewande Amona
Pamela Maureen Anah
James B. Anderson
Kelso Lorne St. Jacques Anderson
Reyn Christine Anderson
Nina Elisabet Andersson
Desislava Kostadinova Angelkova
Dewan Sharmin Arefin
Sonia Cristina Arias
Eleonore Asfour
Alan Steven Ashkinaze
Mark David Augustine
Steven Frank Daniel Bainbridge
David Andrew Balaban
Silva Barbanti
Courtney Alexis Barg
Thoreau Adrian Bartmann
Gerald Baty
Andrew Jared Belofsky
Charles James Benjamin
Keith Ian Bernstein
Laurie Jamile Beyranevand
Desiree Vasantha Biehn
Brian Biggie
Andrea Bisconti
Joadyann Kimberley Blagrove
Anthony Bodensztein
Tina Marie Boudreaux
Christopher Eugene Brence
Carolyn Ann Brenner
Terrence Scott Brody
Timothy Matthew Brody
Stephen Henry Broer
Daniel Matthew Bronski
Andrew Reese Bronsnick
Thomas Wates Brown
Aaron-Andrew Paul Bruhl
Maximilian Walter Buecklers
Basim Nasreen Bulos
Christopher Matthew Bunge
Timothy Ryan Burch
Antony Stephen Burt
Sachiko Bussey
Thomas John Butler
Maria Anne Cahill
Matthew Aaron Calarco
Katrina Krawec Camera
Robert Drew Caridad
Michael Roger Carper
Syreeta Lamay Carrington
Keisha N. Carter
David Anthony Casserly
Elisa Castellon
Todd Bitner Castleton
Dennis Wai Yip Chan
Faisal Iqbal Chaudhry
Jennifer Hueiling Chen
Sindy Szu-yin Chen
Byung Hwan Choi
Tju Liang Chua
Dennis Gene Clark
Ariele Lee Cohen
Erica H. Cohen
Hagay Cohen
Sophie C. Coignat
Avril Tundete Cole
Claire Elise Coleman
Abigail Audrey Conlon
Jonathan David Cooper
Aimee Leigh Creed
George William Crimmins
Mariana M Cunha
Terence John Dahl
Paul Gedeon Daigle
Amanda Duncan Darwin
Lien M. De Kimpe
Craig Nathan Dee
Gerard Desmond Dempsey
Marc Aldo Denegri
Xan Kaitlin Desch
Jamie Lynn Desciak
Meena Dev-Sidhu
Laura Isabel Devine
Melissa Anne Didato
Bryan Russell Diederich
Ethan Mark Dietrich
Wade Travis Doerr
Alex Jeffrey Dolhancyk
Michael Donald Dolphin
Jonathan Domante
Nicole Marie Donzello
Matthew Kenneth Doonan
Tim W. Dornis
Conor Anthony Doyle
Kevin John Doyle
Afi Drake
Kevin O'Donoghue Driscoll
Donna Drumm
Tao Du
Min Duan
Kimberlee M Dunlop
Paul Edwin Dwyer
Paul Daniel Eaton
Rebecca Allyse Edelman
Kimberly Lynne Edwards
Daniel Kenneth Eidle
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end with a period. Thus, never begin a blocked quotation without an introduction from the line preceding the quotation. The introduction may be a colon, a comma, or no punctuation at all.

If you omit one or more paragraphs in a blocked quotation, go to the next line, indent, insert four ellipses (". . . .") preceded by a quotation mark, and resume the quotation on the next line, skipping a space.

Under the *Tanbook*, if your blocked quotation has more than one paragraph, begin each paragraph with quotation marks but place the closing quotation mark only at the end of the final paragraph, not after each paragraph.

Cousins of the blocked quotation are run-on and snippet quotations. Never use them. Run-on quotations are quotations that follow one another. They'll burn your reader's brain cells. Snippet quotations are strings of snippetizing, or too many short quotations in a row. These "snippet quotations"[7] will "give the reader"[8] the sensation "of sliding"[9] along "the surface of"[10] complicated "issues."[11]

Alterations & Omissions

Alter, add to, or delete from your quotation to assure a grammatical fit in your sentence. But paraphrase instead of overly altering your quotation. If you alter your quotation too much, you'll invite suspicion that you're fudging its meaning.

Use brackets "[]" (not parentheses) to show alterations or additions to a letter or letters in a word: Alteration: "Clearly" becomes "Clear[]." (Note the empty bracket.) "Proof" becomes "Pro[ve]." "Clearly" becomes "[c]learly." "Clerly" becomes "Cle[a]rly." Addition: "The judge did [not] like to arrive latte [sic] to court." Note: When quoted material contains a spelling, usage, or factual error, use "[sic]" (or "[*sic*]" in *Tanbook* usage), meaning "thus," after the error. Using "sic" tells your readers that the original quotation is ill.

If the context makes it clear that the mistake was in the original, don't add "[sic]." And don't overuse the "[sic]" device. The reader will wonder why the author quoted material only to point out an error. Did the author mean to embarrass? Altering the quotation is often the answer: "The judge did [not] like to arrive lat[]e to court." Other times paraphrasing is better: "The judge liked to come to court on time." A third option is "to find another quot[ation] that fits the situation without needing . . . extensive surgery."[12]

An update to the 2002* Tanbook *effective June 2004 eliminates asterisks "*\"***

Use ellipses to show omission. Use three-dot ellipses (". . ."), all separated by spaces, to show omissions of punctuation or a word or more in the middle of your sentence. Use four-dot ellipses (". . . ."), all separated by spaces, to show omissions at the end of a sentence if (1) the end of the quotation is omitted; (2) the part omitted is not a citation or a footnote; and (3) the remaining portion is an independent clause. Unless all three criteria are satisfied, use a period, not an ellipse. Note that an update to the 2002 *Tanbook* effective June 2004 eliminates asterisks "* * * *". From June forward, all New York legal writers should use ellipses.

When using ellipses to quote from only the relevant portion of something, don't write: "The statute provides, in relevant part, ..." Your ellipses already show that you quoted the relevant portion only. The phrase "in relevant part" is always unnecessary. Quote only the relevant part.

Don't use ellipses before the portion you quote. You're already telling the reader whether you're omitting something by how you introduce your quotation: *Incorrect*: The Third Department found that the action ". . . should not have been dismissed." *Monfort v. Larson*, 257 A.D.2d 261, 265 (3d Dep't 1999). *Correct*: The Third Department found that the action "should not have been dismissed." *Monfort v. Larson*, 257 A.D.2d 261, 265 (3d Dep't 1999). Incorrect: The Third Department found the ". . . fourth cause of action" valid in *Monfort v. Larson*, 257 A.D.2d 261, 265 (3d Dep't 1999). *Correct*: The Third Department found the "fourth cause of action" valid in *Monfort v. Larson*, 257 A.D.2d 261, 265 (3d Dep't 1999). Moreover, don't use ellipses after the portion you quote if you add material after your quotation. Incorrect: The Third Department found the "fourth cause of action . . ." valid in *Monfort v. Larson*, 257 A.D.2d 261, 265 (3d Dep't 1999). And don't use quotation marks until you start to quote. *Incorrect*: "[The litigants] sought to dissolve their marriage." *O'Shea v. O'Shea*, 93 N.Y.2d 187, 189 (1999). *Correct*: The litigants "sought to dissolve their marriage." *O'Shea v. O'Shea*, 93 N.Y.2d 187, 189 (1999).

Don't use ellipses to show the omission of a footnote or a citation before the end of the portion you're quoting. Instead, follow the citation with a notation that something is omitted, added, or deleted. Thus, write and cite: "As explained elsewhere, '[w]hen sanitation workers — New York's *Strongest* — are assigned to courthouses, they follow the "litter of the law."'" *A v. B*, 101 Misc. 2d 101, 103 (Sup. Ct., Bronx County 1996) (quoting *B v. A*, 99 Misc. 2d 99, 100–01 (County Ct., Rockland County 1999) (footnotes & citations in *A v. B* omitted) (emphasis in *B v. A* deleted) (emphasis in *A v. B* added). Note: The *Tanbook* provides that italics in published opinions, if supplied in the Official Reports, should be noted in a parenthetical or a bracket: "(italics supplied)."

Add "footnote added" in a parenthetical (bracket inside a parenthetical in *Tanbook* usage) after your citation if you add to your quotation a footnote not in the original quotation. According to the *Bluebook*, don't use

CONTINUED ON PAGE 58

CONTINUED FROM PAGE 57

"footnote omitted" or "citation omitted" if the citation or footnote you're omitting is at the end of the portion you're quoting. That comes up often under the *Tanbook*, too, which allows writers (1) to end a sentence with a period and then begin the citation after a parenthetical or (2) to end a sentence without a period and then begin the citation with a parenthetical. (In the first option, the period is placed outside the parenthetical. In the second option, the period is placed inside the parenthetical.)

Q & A of Quoting

Use quotation marks when quoting the words of others. The difference between scholarship and plagiarism is a quotation mark and a citation. Also, use quotation marks for specific phrases and direct speech. Quotation marks further indicate that the word refers to the word itself rather than the word's meaning. (Hint: could the words "word," "phrase," or "term" precede the definition?) *Correct*: "Anyone who uses 'mens rea' instead of 'guilty intent' should have a guilty conscience." Quotation marks additionally surround the words "endorsed," "entitled," or "signed" (the contract was signed "Jane Roe").

Don't insert quotation marks inside a parenthetical to surround proper nouns not turned into acronyms. *Correct*: Lesbian and Gay Law Association of Greater New York ("LeGaL") or, without the quotation marks, (LeGaL). *Incorrect*: John Jones ("Jones"). Also, don't use quotation marks when paraphrasing; around the words "yes" or "no" (*incorrect*: He said "yes."); around terms of art (*incorrect*: The People proved that defendant had a "guilty mind."); or to indicate sarcasm or irony, unless you want to be labeled "egotistical." Thus, don't use "scare" quotation marks. *Bad form*: My adversary filed a "brief" filled with "facts." Slang and nonstandard usage, too, must go without quotation marks: "If you feel uncomfortable using a word because it is informal or ambiguous, change the word rather than put[] it in quotation marks."[13] Avoid quoting the facts of a case you're citing. Quote only the case's law unless you've got a special reason to quote facts. And never quote from, or cite to, a headnote or the syllabus of a case.

Finally, always be certain to open and close your quotation marks. It's a sign of sloppiness for lawyers "to open but not close quotations, or verse visa.[14]

Quote, unquote: All lawyers who write should quote — not too much, not too little, always accurately, always with complete citation references, and always in context and syntactically. You can quote me on that.

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.

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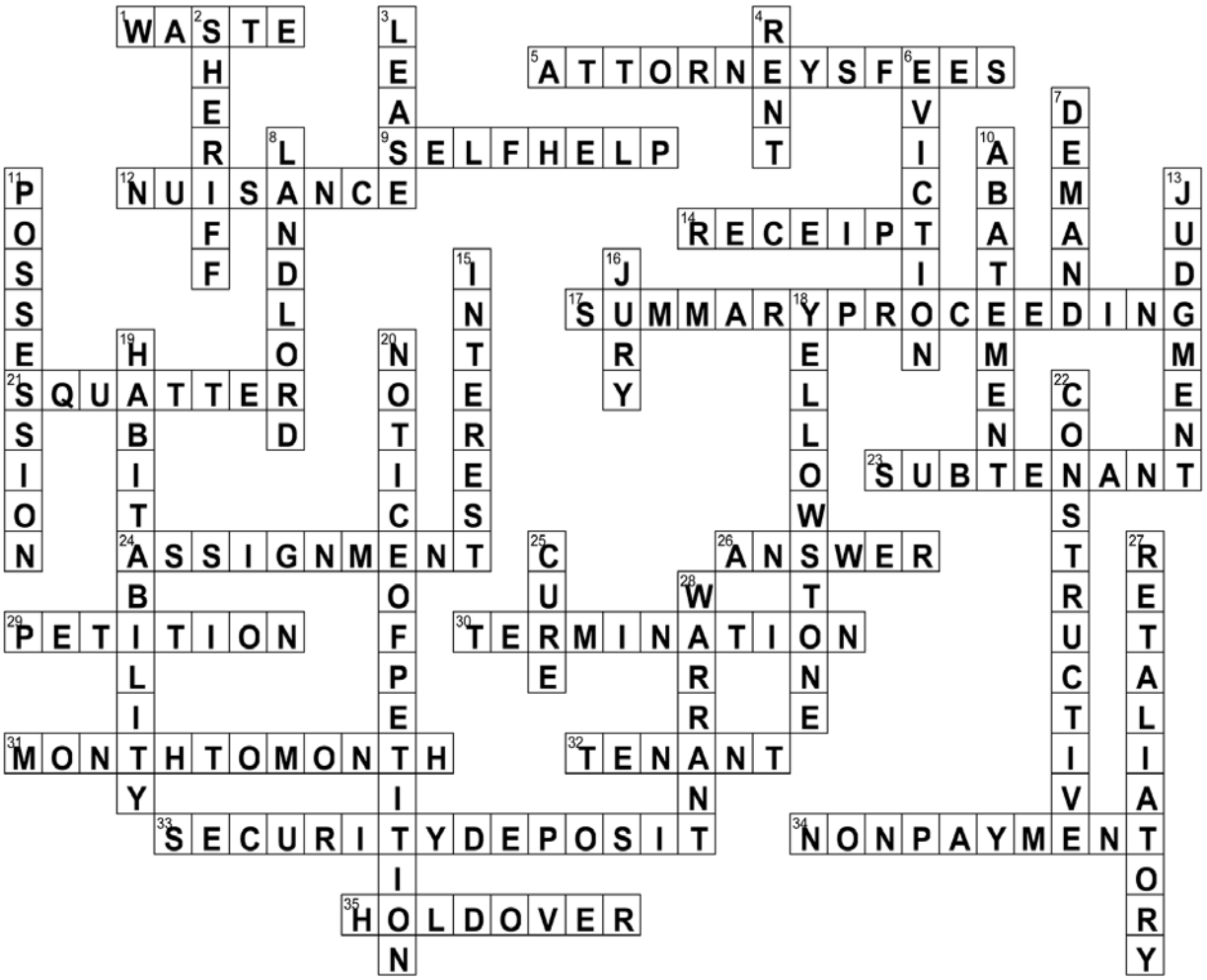
1. *See Official Edition New York Law Reports Style Manual* (2002 ed.). Some *Tanbook* rules will change effective June 2004. To download the *Tanbook*, go to www.courts.state.ny.us/reporter/Styman_Menu.htm. For a review of the 2002 *Tanbook*, see Gerald Lebovits, *New Edition of State's "Tanbook" Implements Extensive Revisions in Quest for Greater Clarity*, 74 N.Y. St. B.J. 8 (Mar./Apr. 2002).
2. N.Y. Post, Feb. 16, 1990, at AI (quoting Marla Maples referencing Donald Trump), cited in Jerry Nachman, N.Y. Post editor, *Annual Judicial Conference of the Second Circuit*, 141 F.R.D 573, 637 (1992). The *Post's* most famous headline is from April 15, 1983: "Headless Body in Topless Bar."
3. Charles R. Calleros, *Legal Method and Legal Writing* 313 (4th ed. 2002).
4. Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* § 17.6, at 249 (4th ed. 2001).
5. Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* § 9.5.1.b, at 241 (2001).
6. Terri LeClercq, *Expert Legal Writing* 161 (1995).
7. Neumann, *supra* note 4, § 17.6, at 250.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Mary Barnard Ray & Jill J. Ramsfield, *Legal Writing: Getting it Written and Getting it Right* 291 (3d ed. 2000).
13. *Id*. at 296.
14. Doesn't the missing closing quotation mark irritate you?

Answers to Crossword Puzzle on page 8.



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Hanna, John, Jr.
Higgins, Patrick J.
Kelly, Matthew J.
Kinum, John B.
Kretser, Rachel
LaFave, Cynthia S.
Lynch, Margaret Comard
Lytle, James W.
Maier, Christopher
Miranda, David P.
Perino, Juanita R. Cintron
† * 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
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Buzard, A. Vincent
Doyle, Hon. John D.
Frazee, Hon. Evelyn
Harren, Michael T.
Grossman, James S.
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
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
Hans, Stephen D.
James, Seymour W., Jr.
Lee, Chanwoo
Nashak, George J.
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.
Schwartz, Roy J.
Summer, Robert S.
Weinberger, Richard

Out-of-State
* Fales, Haliburton, 2d
Peskoe, Michael P.
* Walsh, Lawrence E.

THE LEGAL WRITER

You Can Quote Me: Quoting in Legal Writing — Part II

BY GERALD LEBOVITS

Last month the *Legal Writer* offered some "suggestions" on how to quote. We continue.

Punctuation

There's no question about this. Period! It's not logic. It's not what looks better. It's modern American usage. To ascertain what's now the standard format, Doubting Thomases should skim current New York State Court of Appeals and federal opinions; every large American newspaper, magazine, and popular book; and the 2002 *Tanbook*, New York's official citation guide.[1]

Here are the rules: Place periods and commas inside the quotation mark. Place colons and semicolons outside the quotation mark. Place em dashes, question marks, and exclamation points inside or outside quotation marks depending on whether dashes, marks, or points are part of the original.

Correct: Did Judge Jones sentence defendant to "100 years in jail"? (Question mark not part of original.) Correct double quotation: "Did Judge Jones sentence defendant to '100 years in jail'?"

Correct: Judge Jones asked the Parole Board, "Will defendant really serve 100 years in jail?" (Question mark part of original.) Correct double quotation: "Judge Jones asked the Parole Board, 'Will defendant really serve 100 years in jail?'"

Correct: Judge Jones sentenced defendant to "100 years in jail"! (Exclamation point not part of the original.) Correct double quotation: "Judge Jones sentenced defendant to '100 years in jail'!"

Correct: Judge Jones told defendant, "You will serve 100 years in jail!" (Exclamation point part of the original.) Correct double quotation: "Judge Jones told the defendant, 'You will serve 100 years in jail!'"

Quotations within quotations: "X was a 'good sport,'" said Y. (Note that British usage and American newspaper headlines begin and end quotations with a single quotation mark: *New York Post* front-page headline of February 16, 1990: 'Best Sex I Ever Had!'[2])

Some folks put a comma before every quotation. Doing so is wrong. Put a comma before a quotation only (1) when the quotation is an independent clause and (2) when what precedes the quotation is inapposite to the quotation or to replace a "that" or a "whether" before the quotation.

Blocked Quotations

Avoid blocked (single-spaced, double indented) quotations (also known as "block quotations") unless you're quoting important provisions of a statute or a contract or a critical test from a case. Even then, it's best to divide your quotation into several parts and to integrate your quotation into your text — or at least to pare down your quotation to its basics. For busy practitioners, "simply attach photocopies of the authority as an appendix to your document."[3] That's because, writes Hofstra University Professor Richard Neumann, blocked quotations are bad:

> Readers feel that block quotations are obstacles that have to be climbed over. The more you use them, the more quickly a reader will refuse to read any of them. And judges and supervising attorneys view large quotations as evidence of a legal writer's laziness. They think that your job is to find the essential words, isolate them, and concisely paraphrase the rest.[4]

If you must use lengthy quotations, follow these conventions: Block all quotations of 50 words or four lines of text or more, although "some writers use [blocked] quotations for persuasive reasons even when the quotation is fairly short."[5] Under the *Tanbook*, New York State's official citation manual, put the citation at the end of the blocked quotation, after the closing quotation marks. Under the *Bluebook*, put the citation on the next line. Under both the *Tanbook* and the *Bluebook*, single space blocked quotations, but double space between blocked paragraphs.

Don't "snippetize." "Snippet quotations" will "give the reader" the sensation "of sliding" along "the surface of" complicated "issues."

Under the *Tanbook*, put double quotation marks around the entire blocked quotation, and put single quotation marks around a quotation within a quotation. The *Tanbook's* justification for putting quotation marks around the entire blocked quotation is that online services don't preserve the indentations around the blocked quotation. Under the *Bluebook*, however, never surround the quotation with quotation marks, but put double quotation marks around a quotation within a quotation. The *Bluebook's* justification for not putting quotation marks around the entire blocked quotation is that "[t]he double signal is a crutch . . . ."[6]

Never, under the *Tanbook* and the *Bluebook*, end a paragraph with a blocked quotation. The line that precedes the blocked quotation may not

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