NEW YORK STATE BAR ASSOCIATION

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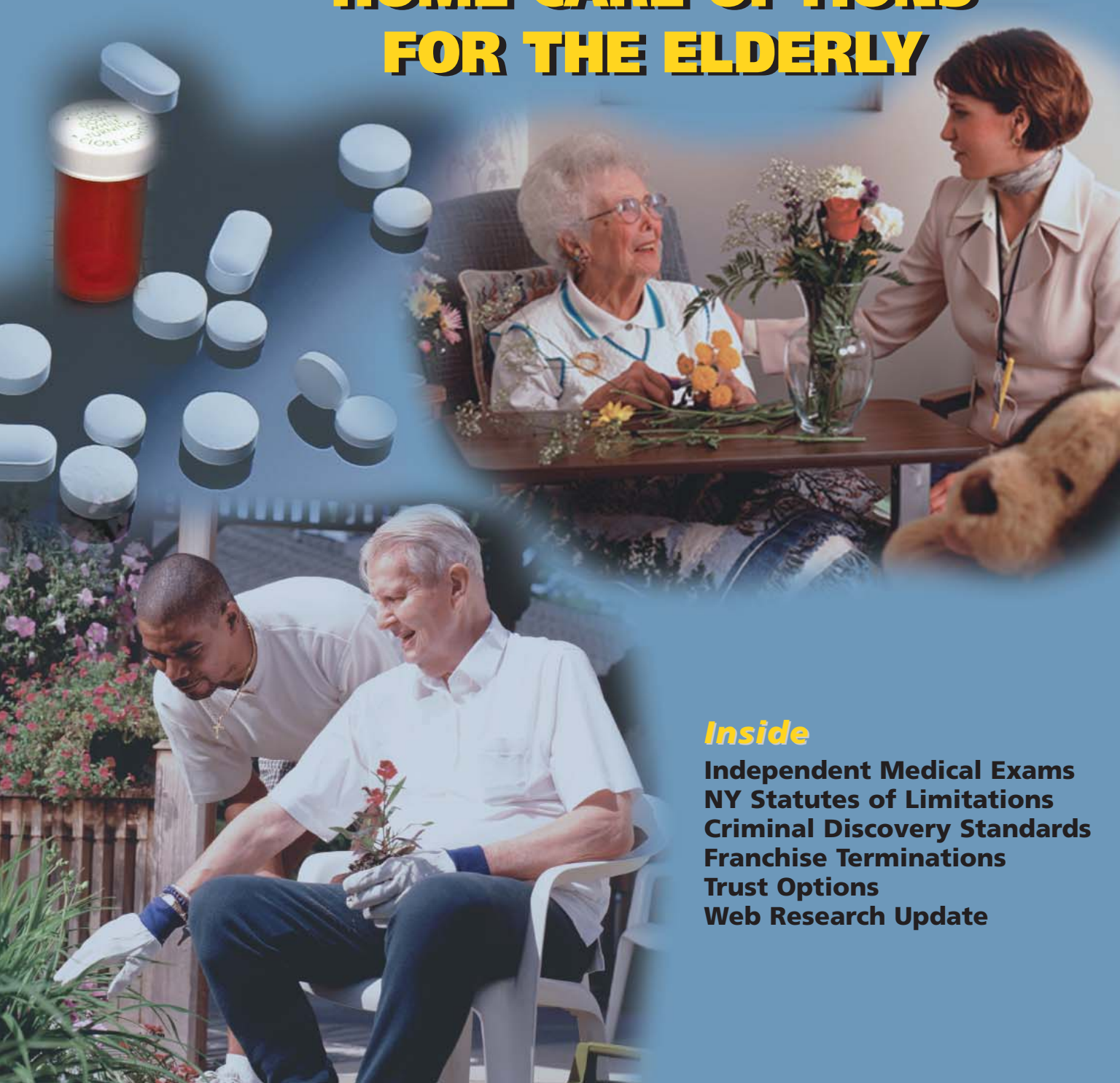
# Journal

## HOME CARE OPTIONS FOR THE ELDERLY



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## On The Cover

This month's cover illustration was prepared to accompany the article that begins on page 8 and describes the options available for the elderly and their families who hope to receive the health care they need while remaining at home.

*Cover Design by Lori Herzing.*



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# President's Message

LORRAINE POWER THARP

## Meetings Show Profession's Concerns

"[W]e do not take a trip. A trip takes us," John Steinbeck wrote as he prepared for his cross-country trip to meet the people and to hear the voices of America. He took this journey, described in his book *My Travels with Charley*,[1] 40 years ago to rediscover the country. "Otherwise," he said, "I could not tell the small diagnostic truths which are the foundations of the larger truth."

I recalled this advice and his excellent adventure as I crisscrossed the state, from Montauk to Elmira, from Mineola to Corning, and beyond, meeting with the members of the legal profession of New York in your local Bar meetings, at legal services offices, in the courts, at our Association's Section and Committee programs, and at the law schools. My travels have taken me out of state as well, and to marvelous Rome (not that we do not have a marvelous Rome in New York State, but the one I visited was the older one).

While Steinbeck packed a camper for a marathon journey accompanied by his poodle, Charley, my visits have been sprints throughout the year, returning home to the wagging tails of my own four-footed friends, Shannon and Sparky, who wondered where I had been and why they did not get to go. I agree with Steinbeck in the importance of leaving the labyrinth of high-speed highways and fast-paced lives to take time to stop, make personal visits and acquaintances, share thoughts, and break bread.[2] Like the author, in each meeting I may have arrived as a stranger, but did not leave as such. And I, too, returned renewed and enriched, gaining a deeper comprehension of the concerns, conditions and caring that define my colleagues in the profession. It was an opportunity to see a more complete picture – "the foundations of the larger truth." I have found these journeys to be of enormous value as we seek to have an impact on current issues and shape the future of the profession.

Writing at the height of the Cold War, Steinbeck discovered people willing to chat but reticent to show conviction, express an opinion or engage in a peppery argument on politics or other current events. A New England farmer chalked it up to the uncertain times as to what might happen – "What good's an opinion if you don't know? . . . We've got nothing to go on – got no way to think about things," he said. And a man from Minnesota opined that people were quick to blame problems on those removed from direct contact – those in Washington or Moscow, for example. A political reporter told him, "There used to be a thing or commodity we put great store by. It was called the People. Find out where the People have gone. . . . [T]hat's the commodity the Declaration was talking about, and Mr. Lincoln."

In my travels, I am pleased to report that despite today's complexities and concerns about the future of the practice of law, opinions flowed freely. There were discouragements expressed, but also an abundance of eagerness and energy to be a part of the solutions. The profession is alive and well. Let me share with you some virtual snapshots of my visits.

The legal services lawyers in rural Western New York, while tightening financial belts notch by notch as resources become increasingly elusive, demonstrated their long-term dedication and innovation to help the constantly growing numbers of people who come to their door. The depth and breadth of need and the tremendous sense of caring, expertise and commitment to the cause were equally evident in my meetings with the legal services lawyers on Long Island. A true measure of the incredible work being done by these legal services groups is the loyalty of the attorneys and staff whose longevity, under often less than ideal circumstances, is such a tribute.

In a Central New York Bar meeting, pride in the profession was in the air as ideas and initiatives were raised on ways to make the legal process more effective. But the frustration could be felt, too. It is difficult to remember, said one practitioner, that the individual attorney can and does make a difference and that someone other than the "stars" frequently quoted in the media can be heard – as this practitioner told me, "We cannot all be Johnnie Cochran."[3] Yet, as I talked with this attorney and others gathered that night I saw example after example of positive action – attorneys serving their community, attorneys identifying ways in which the laws could be improved, attorneys asking how they could

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help us make things happen. I was surrounded there by points of light generated by members of the Bench and Bar who touch lives for the better every day.

The Sections' continuing legal education programs were nothing short of extraordinary. What fun for me – a transactional attorney – to hear Dr. Michael Baden discuss scientific evidence in criminal investigations, to listen to one of our brilliant tax practitioners explain the nuances (who knew?) of outbound inversion transactions, to hear our former president, Henry Miller, so eloquently and passionately share his thoughts on closing arguments. And that is just to mention a few.

In Bar meetings north, south, east and west I was struck – but not surprised – by the extensive time devoted to sharing expertise in those wonderful CLE programs, in *pro bono* and other philanthropic service. Yet, there were common chords of concern – worry that rules and related procedures are growing to a point of being overwhelming as we try to pursue the day-to-day practice of law and service. It was akin to the frustrations expressed by physicians with respect to treating patients in today's health care structure.

My journeys also took me on campus. On Long Island, I spent an uplifting time with dedicated faculty members and students, including those pursuing law as a second career. Our far-ranging discussions included the shared efforts of the Bar and Academy in ensuring that the incoming generation of lawyers is prepared for the challenges and realities of a career in law, as well as fostering the profession's values, diversity and the opportunities to make a difference. These also were the subjects of dialogue over a dinner in December that I had with the deans of the New York State law schools.

Time and again, whether in urban, suburban or rural areas, talk turned to image and the view that the stereotyping and unfair portrayals of lawyers do have deleterious effects, causing us as individual members of the Bar to have to overcome that general negative impression upon a first meeting. At each venue, I vigorously agreed and described my State Bar initiatives to seize every opportunity to tell the story of the profession that is so familiar to us.

It is a story of how the justice system works and how judges and lawyers see that it does; how judges and lawyers work to make it better and to ensure that it is accessible every day, for everyone; and how judges and lawyers solve problems and make a difference in people's lives. I can attest from my visits with you, that these are not occasional occurrences, but the common bonds, spirit and sense of service that constitute "the larger truth" of the profession.

I look forward to talking with you as I continue my travels.

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1. The Viking Press (1962).
2. "When we get these thruways across the whole country, as we will and must, it will be possible to drive from New York to California without seeing a single thing."
3. Shortly after that visit, interestingly enough, I saw Johnnie Cochran in Buffalo, where he and I were on the same talk show. He complimented the State Bar on our Women in the Law Committee's Report on Gender Equity, which I had spoken about.

# Consumer Directed Assistance Program Offers Greater Autonomy To Recipients of Home Care

BY VALERIE J. BOGART

For elderly and disabled individuals who are nevertheless able to direct their own care or have someone who can assist them in providing that direction, the state's Consumer Directed Personal Assistance Program (CDPAP) provides an opportunity to obtain government financial assistance while maintaining a level of independence that is not possible when an agency takes the responsibility.

The home care services available from the New York Medicaid program range from skilled private duty nursing services[1] to personal care[2] or home health aide services[3] by paraprofessional aides, to a coordinated plan of combined services through the Long Term Home Health Care Program.[4] Although these services enable many to avoid placement in a nursing home, in most cases the client and family members have little control over choosing, training or supervising the aides who will assist them – they must accept virtually whomever a contracting home care vendor sends to their home. The CDPAP serves as an alternative, empowering disabled individuals of all ages by allowing them to select their own aides, who may then perform certain skilled tasks that would otherwise require a nurse.

In both CDPAP and the traditional home care programs, once someone has met the financial qualifications for the Medicaid program, the county agency that administers Medicaid assesses the potential client's needs and authorizes the number of hours of care for which Medicaid will pay the salary and benefits of an aide or private duty nurse.

The CDPAP program differs from the other home care programs in two key ways. First, in the traditional home care delivery system, a certified or licensed home care or nursing agency manages the delivery of home care – it hires, trains and schedules the aides. In CDPAP, the consumer or the person directing the individual's care performs these management functions directly – recruiting, hiring, training and scheduling the aide, whose salary is paid by Medicaid. The aides work as independent contractors rather than as employees of a home care vendor agency. A second unique feature of CDPAP allows aides to perform health care tasks that in the traditional system may be performed only by nurses (either registered nurses or licensed practical nurses) or by certified home health aides.

## Background of CDPAP

The consumer-directed movement was born in the late 1970s at the initiative of young people with disabilities who were strongly opposed to home care administrators, nurses and social workers having control of their lives in their homes. Some of these individuals had been institutionalized in facilities for many years before winning the right to live in the community. Although they needed extensive and often sophisticated types of care, such as management of ventilators or suctioning of tracheostomies, they understood their care needs well and wanted to hire and train aides of their choice, instead of having their care controlled by outside nursing agencies.

A core group of these self-directing, disabled people formed an organization called "Concepts of Independence" at a time when the New York City Human Resources Administration (HRA) was changing its service

**VALERIE J. BOGART** recently became senior attorney of the Evelyn Frank Legal Resources Program of Selfhelp Community Services, Inc. For the previous 11 years, she dealt with Medicaid and home care services as senior attorney at Legal Services for the Elderly in New York City. She serves on the Executive Committee of the Elder Law Section of the NYSBA as liaison to the legal services community. She lectures extensively on Medicaid and long-term care services, and has been recognized for her work by the Association of the Bar of the City of New York and the Samuel Sadin Law Institute of the Brookdale Center on Aging at Hunter College. A graduate of the University of Cincinnati, she received her J.D. from New York University School of Law.

delivery system to one based on contracts with non-profit vendor agencies.[5]

In late 1980, after a year of negotiations, Concepts of Independence, Inc. became the first CDPAP program in New York State when it won a contract with HRA to provide consumer-directed home care services for New York City residents who were self-directing and severely disabled. The agency, known as "CONCEPTS," acted as a fiscal conduit for Medicaid payments, and processed payroll and benefits for personal assistants. The consumers were responsible for recruiting, hiring, training and supervising their personal assistants. Initially, the HRA required CONCEPTS to enroll at least 100 consumers by the end of 1980 as a condition of continuation of the contract. By the end of 1980, more than 200 self-directing consumers had enrolled.

Over the next 10 years, CONCEPTS continued to grow in New York City, more than doubling the number of consumers enrolled. Meanwhile, the disability rights movement was advocating for expansion of CDPAP to other parts of the state. In 1991, the New York State Department of Social Services issued a Request for Proposals for what was then called "Patient-Managed Care" demonstration projects. The following year, demonstration projects were started in Utica and Syracuse.

In 1992, with strong advocacy by consumers, a new state law established a Patient-Managed Home Care demonstration program statewide.[6] In part, that law amended the Nurse Practice Act to allow aides hired through patient-managed care programs to stand in the same shoes as family or household members, friends, or domestic workers, who had long been permitted to perform skilled nursing tasks without being accused of practicing nursing without a license.[7] Because the 1992 program was not mandatory, however, the goal of expanding CDPAP throughout the state did not happen.

After more extensive lobbying by consumers, in 1995, the Consumer Directed Personal Assistance Program, with its name changed from "patient-managed care," was changed from a demonstration program to a statewide program.[8] All local districts were mandated to file an implementation plan with the State Department of Health by October 1, 1996, and the department would then provide all persons eligible for the CDPAP program an opportunity to enroll.[9]

Although the 1995 legislation required all counties statewide to create CDPAP programs, not all counties have done so even as of late 2002. More than 30 operating Consumer Directed Personal Assistance agencies cover about 48 of the 62 local districts in the state. New York City's CONCEPTS agency has expanded its consumer enrollment to 1,300 persons, and now serves six counties beyond New York City. In many counties, the local independent living center has won the contract to provide CDPAP services. A chart listing all CDPAP agencies in New York State, identifying the counties served and providing contact information, appears on page 14. Note that while CDPAP agencies may give information, the consumer does not apply for services with the agency directly; services must first be authorized by the local Medicaid agency.

Regulations have never been promulgated to implement the CDPAP authorizing statute. Between 1992 and 1995, the New York State Department of Social Services issued several Local Commissioner's Memoranda setting forth guidelines for districts developing CDPAP programs.[10] In spring 2002, the Department of Health informally circulated a draft of regulations to be proposed in the future for informal comment.[11]

## Who Is Eligible for CDPAP Services?

An "eligible individual" is defined as a person who:

> (a) is eligible for long term care and services provided by a certified home health agency,[12] long term home health care program[13] or AIDS home care program authorized pursuant to article thirty-six of the public health law,[14] or is eligible for personal care services[15] provided pursuant to this article;
>
> (b) is eligible for medical assistance;
>
> (c) has been determined by the social services district, pursuant to an assessment of the person's appropriateness for the program, conducted with an appropriate long term home health care program, a certified home health agency, or an AIDS home care program or pursuant to the personal care program, as being in need of home care services or private duty nursing[16] and is able and willing or has a legal guardian able and willing to make informed choices, or has designated a relative or other adult who is able and willing to assist in making informed choices, as to the type and quality of services, including but not limited to such services as nursing care, personal care, transportation and respite services; and
>
> (d) meets such other criteria, as may be established by the commissioner, which are necessary to effectively implement the objectives of this section.[17]

As shown by this definition, CDPAP enrollment is open to virtually all persons receiving any of the various Medicaid home care services. While the various types of home care services include a continuum of levels of care – from private duty nursing as the most skilled type of care to personal care provided by an unskilled para-professional – CDPAP eliminates the hierarchy of levels of care and any requirement that the aide be certified in any type of home care. A CDPAP aide is permitted to provide the care needed by persons eligible for all of these types of care, from skilled nursing to basic assistance with personal care needs. This change is made possible by the amendment of the Nurse Practice Act

## CDPAP Application Process

The steps required to apply for CDPAP services in New York City follow. The procedures vary in other areas of the state, but the pattern is similar.

**Where to Apply** In New York City, applications for CDPAP services are submitted to the Community Alternative Systems Agency (CASA), which maintains the neighborhood offices of the Home Care Services Program of the New York City Human Resources Administration. The CASA offices administer "personal care" also known as "home attendant" services. Even though CDPAP services are different from traditional personal care services and have some different eligibility criteria, they are authorized by the CASA offices. The CASA addresses and phone numbers are listed at <http://www.nyc.gov/html/hra/html/ serv_homecare.html>.

**Medicaid Application** In New York City, the CASA office can process both the Medicaid application (financial eligibility for Medicaid) and the home care application (functional eligibility for home care services). Thus while potential recipients of assistance must be financially eligible for Medicaid at the time they apply, it is not necessary to have a Medicaid card beforehand. If the client does not already have Medicaid, it will speed up the application process if a completed Medicaid application and documentation are sent to the CASA along with the home care application.

Home Care Application Each local Medicaid district has its own "physician's order" form on which the client's treating physician describes the client's functional and medical impairments and the need for home care services. Filing a completed physician's order is the first step in applying for personal care services.[1] In New York City, this form is called the "Medical Request for Home Care" or Form M11q, and is filed with the CASA. The Suffolk County form is at <http://www.co.suffolk.ny.us/Social%20Services/ma241-a.pdf>.

Because the same form is used for applications for both CDPAP and personal care services, the attorney should clarify in a cover letter and/or on top of page one of the M11q that the applicant wants CDPAP services, more commonly referred to as "CONCEPTS" in New York City. This is important in cases where the applicant may be ineligible for traditional personal care services because of skilled needs, but is eligible for CDPAP services. For guidance in completing the M11q, see "Q-Tips," published by the Center for Disability Advocacy Rights at <http://wnylc.net/web/news/XcNewsPlus.asp?cmd=view&articleid=1323>.

**Approval of Hours** After receiving the M11q, the CASA office conducts a series of assessments mandated by state regulation – one by a case manager, one by a nurse and, in some cases, one by a physician. The CASA then determines whether the applicant is eligible for personal care services and, if so, the number of hours per week. If insufficient hours are approved, a fair hearing may be requested. Accepting the hours offered to get services started does not bar the applicant from pursuing more hours at a hearing.

**CDPAP Enrollment** In New York City, it is only after the CASA authorizes a certain number of hours of services that the Home Care Services Program will determine whether an applicant may enroll in the CDPAP program. The client or the attorney handling the matter asks the CASA worker for a CONCEPTS application, on which the client, or the family member or other person who will direct care, answers questions explaining their plans to recruit, train, schedule and supervise aides in the CDPAP program. They must show the ability to assure aide coverage when the regular aide is on vacation or is sick. Denial of enrollment in CDPAP may be appealed at a fair hearing, but might be resolved informally.

**Actual Enrollment** Once CDPAP enrollment is approved, HRA notifies the CDPAP contractor CONCEPTS of the number of hours authorized. At that point the client's chosen aides may go to the CONCEPTS office at 120 Wall St. to process the paperwork necessary for payroll and benefits (including verifying citizenship or legal authorization to work in the United States). CONCEPTS phone: 212-293-9999.

1. 18 N.Y.C.R.R. § 505.14(b)(2)(i).

which allows CDPAP aides to perform tasks that must generally be performed only by licensed nurses.[18] As such, the CDPAP aides are viewed the same as a family member who, although not a nurse, might be trained at a hospital to administer injections or tube feeding for a loved one at home.

The elimination of levels of care in the CDPAP program has the effect of making home care accessible to persons who may otherwise be ineligible. For example, in the traditional personal care program, the client must be able to self-administer medications.[19] Although a personal care aide may assist the client with "self-adminis-

tration" by reminding the patient about the time, identifying the medication and reading the label for the client, bringing the medication and liquids to the patient, opening the container and positioning the patient for administration, the aide may not physically put the pill into the client's mouth, put eyedrops in the client's eyes or inject the insulin shot.[20] An application for regular personal care services would be denied if the client could not put a pill into her own mouth. The same client, however, would be eligible for CDPAP services provided that she, a guardian, family member or other adult is approved to manage the care.

To be eligible for CDPAP services, individuals in the various specified home care programs must be able and willing to direct and manage their care, or have a legal guardian, relative or other adult able and willing to direct their care. The statute defines this ability to direct as the ability to make "informed choices . . . as to the type and quality of services, including but not limited to such services as nursing care, personal care, transportation and respite services."[21] Beyond the ability to make choices, the consumer or his or her guardian or family member must demonstrate to the local Medicaid agency the ability to recruit, select, hire, train and manage the CDPAP aides. For example, the local Medicaid agency such as HRA asks applicants for CDPAP to state, in a questionnaire, how they will ensure continuity of care when the aide is sick, takes a vacation or is unexpectedly absent for any reason. In CDPAP, there is no vendor agency to call in such an emergency, and the consumer must make all such arrangements.

Persons who lack the cognitive ability to manage their own care may have a legal guardian, relative or other adult apply to direct their care.[22] This statutory language enables people who have dementia or other psychiatric or cognitive impairments to receive CDPAP services, managed by a family member or other adult. Services are also available to children with disabilities, whose parents or other caretakers are willing and able to assume responsibility to direct their care. When the statute was enacted in 1995, HRA initially did not comply with these provisions, and denied enrollment in CDPAP to persons who had Alzheimer's disease. Since a fair hearing decision was issued in 1997, reversing a denial of enrollment in one such case where a daughter applied to manage her mother's care,[23] enrollment has expanded to persons who have dementia or other mental impairments.

## Who Can Be Hired as an Aide?

One of the most desirable features of CDPAP is the right to recruit and hire aides of one's choice, rather than be assigned an aide selected by a home care agency. This feature is highly desirable for persons who have paid privately for home care and are now switching to the Medicaid home care program, but want to retain the same aides they hired privately.

In addition, people with special language or cultural needs may find aides who speak their language and are familiar with their cultural dietary preferences. Finally, consumers who have skilled needs and are training their aides to perform complex tasks such as the suctioning of tracheostomies or administration of ventilators want the right to select aides they determine are competent to perform these functions, and in whom they have personal confidence.

There are some limitations on who can be hired. First, the aide must either be a U.S. citizen or demonstrate authorization to work legally in the United States. Second, regulations prohibit certain family members from being hired as the aide. There is some conflict between federal and state regulations over which family members are barred. At a minimum, the aide may not be a family member who is "legally responsible" for the consumer.[24] This prohibition bars spouses from being paid for caring for one another, and bars parents from being paid to care for their minor-age children. State regulations promulgated prior to the 1997 federal regulations, however, are even more strict. They prohibit *any* member of the client's immediate family, defined as a spouse, parent, child, son-in-law or daughter-in-law, from being paid as the aide.[25]

The state regulation allows other relatives to become the aide if they do not reside in the client's home, or if

they must reside in the home only because of the high amount of care needed.[26] Thus, under federal regulations, but not state regulations, adult children of elderly consumers and parents of disabled *adult* children could become the paid CDPAP aide. The discrepancy in these regulations has not been litigated.

## How Does CDPAP Work?

Because most local Departments of Social Services (LDSS) do not comply with the requirement that they inform every Medicaid-eligible consumer receiving home care services about the availability of CDPAP, consumers and their advocates generally must learn independently about the program and then apply for services through the LDSS.

Although recipients have a right to enroll in CDPAP if eligible, it is important to remember that Medicaid home care services are subject to a prior authorization process. This means that eligibility for services and the number of hours of services to be provided each week must be approved by the LDSS. The CDPAP agency has no authority to increase hours of weekly care beyond what is approved by the LDSS.

New York counties differ on how they approve individuals for the CDPAP program, and how they determine the number of hours of care to authorize. In New York City, the HRA Home Care Services Program administers CDPAP for all consumers through its personal care (or "home attendant") program. For someone initially applying for services through HRA, and probably in other districts, it is important to note clearly on the application (the "Medical Request for Home Care" or Form M11q),[27] that the individual is applying for CDPAP (commonly known as "CONCEPTS" in New York City) services. This is especially important for those persons who may not otherwise qualify for personal care services because they cannot self-administer medication or because they have other skilled nursing needs.[28] Without this notation, the application might be rejected.

After the physician's order is submitted, the local district is required to conduct a series of assessments to evaluate the individual's eligibility for home care and the amount of hours to authorize. These include a nurse's assessment, a social assessment and, in some cases, a referral to the local medical director of the local district.[29]

Counties vary on how they conduct these assessments, both in their general home care and in their CDPAP programs. In some counties, the nurse's assessment is conducted by nurses who are employed by or are under contract with the LDSS; in others, the nurse is employed by or under contract with the CDPAP program or other home care vendor. The nurse's employment may influence his or her orientation and recommendation for services. After conducting all these assessments, the LDSS determines whether to approve services and, if so, the number of hours to authorize. Whether the applicant seeks CDPAP services or traditional home care services, that determination can be appealed through a fair hearing.

After an applicant who has requested CDPAP services has been approved for basic home care coverage, a separate determination must be made by the LDSS regarding the person's ability to assume responsibility for managing his or her own care, or the ability of a family member or other adult to do so. Local districts vary in the way they made this determination. In New York City, the consumers or those directing their care must complete a questionnaire explaining their ability to direct care, and an administrator in the HRA Home Care Services Program evaluates the responses to the questionnaire and approves or denies care. A denial of eligibility for CDPAP services is appealable in a fair hearing.

Once approved for CDPAP, the consumer is referred to the local CDPAP contractor agency. A list of these agencies is in the Appendix at the end of this article. The CDPAP contractors vary in the extent of guidance and supportive services they provide to consumers in helping them to recruit and train aides and manage their services. Some CDPAP agencies administer payroll and benefits directly; others contract with outside payroll agencies. The CDPAP agency generally requires the consumer and/or person directing care to sign a contract agreeing to perform various duties.[30] These include:

- Managing the services of the persons they employ – recruiting, hiring, training, scheduling, assigning tasks, firing.
- Processing and supervising required paperwork including time sheets, annual employee health assessments or medical examinations, and all required employment documents including but not limited to the W-4a and IT-2104 forms, employment/wage agreement, and enrollment eligibility verification (I-9).
- Scheduling and arranging for vacation and holiday coverage.
- Developing an emergency backup system in the event substitute employees are needed to replace permanent employees.
- Distributing paychecks to each worker under the consumer's employ.
- Informing the program of changes in their personal status that may include but are not limited to hospitalization, changes in phone number and/or address, etc.
- Informing the program of changes in the status of the persons they employ, including changes in schedules, numbers of tax exemptions and terminations.

• Scheduling visits with a registered nurse once every six months for the required nursing assessment.[31]

• Agreeing that the CDPAP agency is not liable for the fulfillment of the responsibilities agreed to be undertaken by the consumer.

In its contract with the consumer, the CDPAP program generally agrees to:

• Process the home care employee payroll.

• Monitor the completion of annual employee medical forms and all required medical documents.

• Act as the employer-of-record for insurance, unemployment and workers' compensation benefits.

• Coordinate annual leave, health insurance, unemployment and other benefits.

• Monitor the completion of the required nursing assessment forms and the consumer agreement outlining obligations and responsibilities.

• Maintain a personnel record for each CDPA including, at a minimum, copies of the enrollment forms, annual health assessments and the information needed for processing the payroll and administering benefits.

• Engage in ongoing monitoring of activities that include periodic contacts with the consumer, and reviews of the six-month nursing assessment.

• Provide appropriate notification pertaining to any intention to transfer or terminate the consumer from the program.

In the absence of state regulation, some of the local CDPAP providers and local districts have adopted policies and procedures that subvert some of the purposes of consumer-directed assistance. For example, the Columbia County CDPAP program had refused to approve aides selected by the parent directing care of their disabled child, on the ground that the aide had not provided three job references to the CDPAP program. In a fair hearing decision, the state held that once an individual was accepted into the CDPAP program, the CDPAP contractor could not impose restrictions on the consumer's selection of aides.[32]

In another case, a county had threatened to terminate CDPAP services because the consumers were receiving visiting nurse services through a certified home health agency (CHHA) in addition to the CDPAP services. The county was interpreting federal Medicaid regulations to prohibit the provision of CHHA nursing services concurrently with CDPAP aide services. The matter was resolved through negotiations among the State Department of Health, the local district and consumer advocates. It was clarified that although a consumer might train a CDPAP aide to perform certain skilled nursing tasks, the consumer might nevertheless have a need for a registered nurse or licensed practical nurse to perform other assessments or tasks, which might require more complex or sophisticated clinical expertise or judgment.

## Conclusion

The Consumer Directed Personal Assistance Program is one of the innovations that places New York State in the vanguard for providing consumer-oriented services that enable individuals with disabilities to live at home with independence and autonomy. Advocates for elderly or disabled clients should keep in mind CDPAP as an option for their clients, because it allows them more flexibility and access to vital home care services.

Advocates whose clients live in counties that have not complied with the statutory mandate to establish a CDPAP program are encouraged to join with their local independent living center and advocate with the state and local district to secure access to this vital program.

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1. N.Y. Social Services Law § 365-a(2)(a) (SSL).
2. SSL §§ 365-a(2)(e), 367-p, 365-f(2)(e); 18 N.Y.C.R.R. § 505.14.
3. SSL § 365-a(2)(d); 18 N.Y.C.R.R. § 505.23; 10 N.Y.C.R.R. § 763.5.
4. SSL §§ 366(6), 367-c; 18 N.Y.C.R.R. § 505.21.
5. *See* Web sites of Concepts of Independence, Inc. <http://www.CONCEPTScdpap.org> and the Consumer Directed Personal Assistance Association of New York State <http://www.cdpaanys.org>.

6. L. 1992 Ch. 795, eff. Dec. 1, 1992.
7. *Compare* N.Y. Education Law § 6908(1)(a)(iii) (enacted L. 1992 Ch. 795) (Educ. Law), *with* Educ. Law § 6908(1)(a)(i).
8. SSL §§ 365-f, 367-p(c) (L. 1995 Ch. 81).
9. *Id.*
10. New York State Dep't of Social Services, Local Commissioners' Memorandum No. 93 LCM-113, dated Sept. 1, 1993 reissued and updated as Number 94-LCM-3, dated January 12, 1994 regarding Patient-Managed Home Care 95 LCM 102.
11. Because they were not officially published in the State Register, no citation is available.
12. SSL § 365-a(2)(d); 18 N.Y.C.R.R. § 505.23; 10 N.Y.C.R.R. § 763.5.
13. SSL §§ 366(6), 367-c; 18 N.Y.C.R.R. § 505.21.
14. SSL § 367-e; 18 N.Y.C.R.R. § 505.21(a)(2).
15. SSL §§ 365-a(2), 367-p, 365-f(2)(e); 18 N.Y.C.R.R. § 505.14.
16. SSL § 365-a(2)(*l*).
17. SSL § 365-f(2)(d).
18. Educ. Law § 6908(1)(a)(i), (iii).
19. 18 N.Y.C.R.R. § 505.14(a)(6)(ii)(9).
20. *Id.*
21. SSL § 365-f(2)(c).
22. *Id.*
23. Fair Hearing No. 2553407R, dated January 28, 1997 (available in fair hearing bank at <wnylc.net>) New York Legal Assistance Group, representative.
24. 42 C.F.R. § 440.167 as amended 62 Fed. Reg. 47896 (Sept. 11, 1997, eff. Nov. 10, 1997).
25. 18 N.Y.C.R.R. § 505.14(h)(2).
26. *Id.*
27. The M11q is the form used by New York City HRA as the treating physician's order, which is the first of several assessments used to determine eligibility for home care and the amount of services authorized. 18 N.Y.C.R.R. § 505.14(b)(2)(i), (3)(i). Each county develops its own physician's order form.
28. *See supra* note 13 and accompanying text.
29. 18 N.Y.C.R.R. § 505.14(b)(2).
30. This list is based on information on the Web site of the Consumer Directed Personal Assistance Association of New York State *available at* <http://www.cdpaanys.org>.
31. 18 N.Y.C.R.R. § 505.14(b).
32. Fair Hearing No. 3027026J, dated October 25, 1999 (Columbia Co.) (appellant represented by Nina Keilin, Legal Services for the Elderly, New York City, and Simeon Goldman, Disability Advocates, Albany).

# Consumer Directed Personal Assistance

This chart showing member agencies of the Consumer Directed Personal Assistance Program is based on information from <www.cdpaanys.org> with some corrections and updates. Please note that county CDPAP contracts change frequently. Please verify with the agency listed and/or your local county Medicaid office to find out the CDPAP contractor for your county.

| Agency Name | County | Contact Information |
|---|---|---|
| Capital District Center for Independence<br>855 Central Avenue<br>Albany, NY 12206-1504 | Albany, Greene, Schenectady, Saratoga & Hamilton | (518) 459-6422 Fax: (518) 459-7847 |
| Horizons Allegany Co.<br>240 O'Connor Street<br>Wellsville, NY 14830 | Allegany | (716) 593-5700 Fax: (716) 593-4529 |
| Southern Tier Indep. Living Center<br>107 Chenango Street<br>Binghamton, NY 13901 | Broome, Tioga | (607) 724-2111 Fax: (607) 722-5646<br>CDPA@stic-cil.org |
| Seneca Cayuga ARC<br>27 William Street<br>Auburn, NY 13021 | Cayuga | (315) 255-2286 ext. 420<br>Fax: (315) 255-2328 |
| The Rehabilitation Center<br>17 N. Union Street<br>Olean, NY 14760 | Cattaraugus | (716) 375-4761 Fax: (716) 375-4869 |
| The Resource Center NYS ARC, Inc.<br>800 East 2nd Street<br>Jamestown, NY 14701 | Chautauqua | (716) 483-2344 Fax: (716) 284-0829 |

| | | |
|---|---|---|
| AIM<br>271 E. First Street<br>Corning, NY 14830 | Chemung, Steuben & Schuyler | (607) 962-8225 Fax: (607) 937-5125<br>Caim@stny.1run.com |
| The Center for the Disabled<br>PO Box 231<br>Stuvyesant Falls, NY 12174<br>also 314 S, Manning Boulevard<br>Albany NY 12208 | Columbia | (518) 828-2163 Fax: (518) 828-2163<br>pnolan@capital.net<br><br>(518) 233-1667 |
| Cortland County Community Action Program<br>32 Main Street<br>Cortland, NY l3045 | Cortland | (607) 753-6781 Fax: (607) 758-3620 |
| Eastern Orange County Center for Indep. Living, Inc.<br>5 Washington Terrace<br>Newburg, NY 12550 | Dutchess, Sullivan, Orange & Ulster | (914) 565-1162<br>dhovey@myindependentliving.org |
| Niagara Frontier Center for Independent Living<br>1522 Main Street<br>Niagara Falls, NY 14305-2522 | Erie, Niagara | (716) 284-2453 Fax: (716) 284-0829<br>kpautler@nfcil.org |
| PEOPLE, INC.<br>2128 Elmwood Avenue<br>Buffalo, NY 14207 | Erie | (716) 874-5600 Fax: (716) 874-0388 |
| UCP Assoc. of Fulton & Montgomery Counties, Inc.<br>PO Box 466<br>67 Division Street<br>Amsterdam, NY 12010 | Fulton, Montgomery & Hamilton | (518) 842-3511 Fax: (518) 843-6042 |
| Center for Disability Rights Monroe County Inc.<br>412 State Street<br>Rochester, NY 14613 | Monroe | (716) 546-7510 ext. 117<br>Fax: (716) 546-5643 |
| Long Island Center Indep. Living<br>3601 Hempstead Turnpike, Suite 312<br>Levittown, NY 11756 | Nassau | (516) 796-0144 Fax: (516) 796-0529<br>LICIL@aol.com |
| Niagara Frontier Center for Independent Living<br>1522 Main Street<br>Niagara Falls, NY 14305-2522 | Niagara, Erie | (716) 284-2453 Fax: (716) 284-0829<br>kpautler@nfcil.org |
| DALE Associates, Inc.<br>315 Bewley Bldg.<br>Lockport, NY 14095 | Niagara | (716) 433-4443 Fax: (716) 433-1212 |
| Resource Center for IL<br>401-409 Columbia Street<br>PO Box 210<br>Utica, NY 13503-0210 | Oneida, Madison, Delaware, Chenango, Lewis, Herkimer, Schoharie & Otsego | (315) 797-4642 Fax: (315) 797-4747 |
| Enable<br>1603 Court Street<br>Syracuse, NY 13208 | Onondaga | (315) 455-7591 Fax: (315) 454-6318<br>Sjohnston@enable1.org |

| | | |
|---|---|---|
| Ontario ARC<br>3891 County Road<br>Canadigua, NY 14424 | Ontario | (716) 394-7500 Fax: (716) 394-1987 |
| The Family Empower Council, Inc.<br>720 Rt. 17M<br>Middletown, NY 10940 | Orange, Sullivan | (845) 343-8100 Fax: (845) 343-9906 |
| Eastern Orange County Center for Indep. Living, Inc.<br>5 Washington Terrace<br>Newburg, NY 12550 | Orange, Dutchess, Sullivan & Ulster | (914) 565-1162<br>dhovey@myindependentliving.org |
| ARC Orleans County<br>122 Caroline Street<br>PO Box 439<br>Albion, NY 14411 | Orleans | (716) 589-6054 Fax: (716) 589-5669 |
| ARISE Child & Family Service<br>104 West Utica Street<br>Oswego, NY 13126 | Oswego | (315) 342-4088 Fax: (315) 342-4107<br>ARISEOSW@SCSinter.net |
| ILC of the Hudson Valley Troy Atrium<br>Broadway & 4th Street<br>Troy, NY 12180 | Rensselaer | (518) 274-0701 Fax: (518) 274-7944 |
| Rockland ILC<br>230 Main Street<br>Spring Valley, NY 10977 | Rockland | (845) 426-0707 Fax: (845) 426-0989 |
| UCPA North Country<br>4 Commerce Lane<br>Canton, NY 13617 | St. Lawrence, Franklin & Jefferson | (315) 379-9667 Fax: (315) 379-9388 |
| Medical Services Bureau Suffolk County DSS<br>Box 18100<br>Hauppauge, NY 11788 | Suffolk | (631) 854-9594 Fax (631) 854-9592 |
| Finger Lakes Indep. Center<br>609 W. Clinton Street<br>Ithaca, NY 14850 | Tompkins | (607) 272-2433 Fax: (607) 272-0902 |
| Competitive Edge<br>PO Box 443<br>Glens Falls, NY 12801 | Washington, Warren | (518) 792-7548 Fax: (518) 792-7796 |
| Westchester ILC<br>297 Knollwood Road<br>White Plains, NY 10607 | Westchester | (914) 682-3926 Fax: (914) 682-8518 |
| Westchester Disabled On the Move, Inc.<br>984 N. Broadway, Suite L-01<br>Yonkers, NY 10701 | Westchester, Putnam | (914) 968-4717 Fax: (914) 968-6137 |
| Concepts of Independence<br>120 Wall Street, Suite 1010<br>New York, NY 10005 | New York City (5 boroughs), Westchester, Nassau, Clinton, Albany, Saratoga & Schenectady | (212) 293-9999 Fax: (212) 293-3040<br>ConceptsCDPAP@aol.com<br>www.conceptsCDPAP.org |

# Careful Defense Groundwork On Independent Medical Exams Can Help Balance Trial Testimony

By Robert D. Lang

One of the advantages enjoyed by the plaintiff at the trial of a personal injury suit is the testimony of doctors. In addition to any other experts specifically retained for the case, some or all of the attending and treating physicians can be expected to testify for the plaintiff. These doctors will give their opinion based upon examinations of the plaintiff that occurred over the course of the months, if not years, that they treated the injured individual.

The number of separate instances in which these doctors examined the plaintiff can range from one to more than a dozen. Moreover, these doctors will be portrayed to the jury as "healers," whose involvement with the plaintiff only came about because they were trying to help the injured party, as contrasted with "hired guns" retained for the purpose of litigation (read: the defense medical experts).

To rebut the plaintiff's medical evidence, the defense will call a physician, retained solely because of the lawsuit, who usually will have examined the plaintiff only once and even then only under the restrictions of an independent medical examination (IME) allowed under CPLR 3121(a), usually with a representative of the plaintiff's counsel present. If the defense fails to call that doctor as a witness at trial, the plaintiff will generally receive a "missing witness" charge with an adverse inference drawn against the defendant.[1]

This process can result in an uneven playing field at trial. This article discusses several ways this inequality can be lessened from the defense standpoint so that medical opinion testimony can be more evenly presented to the jury.

## Defense Groundwork

The groundwork for a proper defense IME starts with the service of discovery requests for medical records regarding treatment for the plaintiff and a searching deposition of the plaintiff, as you will want your examining physician to have such records in hand at the time that the plaintiff is examined. In most instances, the IME will not be scheduled until after the plaintiff provides a bill of particulars and the deposition of the plaintiff is held. The EBT will not be conducted until after the preliminary conference order (the "PC Order").

The PC Order sets dates certain for both the plaintiff's deposition and the production of medical records and authorizations from the plaintiff. To ensure the receipt and submission of the plaintiff's medical records to the examining physician, so that the doctor has these records before the IME, care should be taken in the PC Order to provide for sufficient time after the deposition for the receipt of all such records. The plaintiff may seek to impose a relatively short period (perhaps 30 days) after the completion of the plaintiff's deposition for the scheduling of the IME; you should consider requesting at least 60 days after the completion of the deposition before the IME is held, if allowed by the judge assigned to the case. In addition, by linking the IME date to the completion of the plaintiff's EBT, if issues arise at the plaintiff's deposition so that you believe the deposition has not been fully concluded (*e.g.*, the plaintiff fails to provide all medical records and authorizations before the deposition or the need for additional authorizations and record production becomes apparent during the course of the plaintiff's deposition), you will have the relevant records in hand for your doctor at the time of the IME.

The reality of practice in New York State is that medical records are not always promptly provided to defense counsel even when a proper authorization is immediately sent to healthcare providers and advance payment is promptly made. Too often, diligent and re-

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peated follow-up (in the form of letters and telephone calls) to obtain records, x-ray films, MRIs and other diagnostic tests, is required. When the fault for the defense not having such records and film in hand is not that of the plaintiff, the scheduling of the IME may not be adjourned without the plaintiff's consent or a further court order. Therefore, you will want to maximize the amount of time between the conclusion of the plaintiff's deposition and the receipt of all authorizations before the IME is conducted.

### Conduct of Independent Medical Exams

In some instances, counsel for the plaintiff will ask that the IME be conducted at the offices of the plaintiff's counsel. You should not consent to such a requirement because it may limit the doctor in the type of tests to be conducted during the course of the IME. This is especially true if the doctor intends to take x-rays in connection with the physical examination, which is well within the scope of an IME.[2]

As noted, the IME is scheduled to take place a certain number of days after completion of the plaintiff's deposition. That due date will, of course, be immediately diaried by the defense attorney upon returning the office after preliminary conference. However, the deposition of the plaintiff, although court ordered, may be adjourned for any number of reasons, including the failure by the plaintiff to provide court-ordered authorizations on a timely basis so that those records are available for the examination of the plaintiff. If that occurs, the due date for the deposition will be automatically adjourned to take into account the new date for the plaintiff's EBT.

Take care to ensure that the new date for the IME is entered in the diary of the defense counsel and provided to the managing clerk of the firm; otherwise the plaintiff can claim that the defendant has waived the right to conduct the IME of the plaintiff, for failure to conduct that examination within the time prescribed by the PC Order. If you are unable to take the IME within the time period provided for in the PC Order and the plaintiff's counsel does not consent to an extension of time in which to do so, as a precaution to preclude any claim that the defense has waived the right to conduct the IME, an appropriate letter should be written to the plaintiff's counsel preserving the right to take the IME and stating why the IME has not yet been scheduled (*e.g.*, the deposition of the plaintiff has not been completed, additional medical authorizations remain outstanding from the plaintiff, the IME is to be conducted by a co-defendant, etc.).

In selecting the physician to conduct the examination, typically you will want to retain a doctor whose office is located in the county where the action is pending. The conventional wisdom is that jurors find it more reasonable and acceptable if the physician retained has an office in the county in which they themselves live, as opposed to hiring a doctor from another county. In addition, most plaintiffs' attorneys will not consent to having their client travel outside the county in which the trial is venued, to appear for an IME. Practically, it is easier (and less expensive) to retain a doctor from the county in which the action is venued when it comes time for the doctor to travel to and from the courthouse to testify. Although there may be instances where it is much preferable to hire a specific doctor whose office is outside the county of venue because of the doctor's specialty, all other things being equal, select a physician who has an office in the county where the action is brought.

***It may be critical to select a physician who not only has an impressive resume and writes a brilliant report but who also stands up well under searching cross-examination.***

The PC Order will also determine the type and number of doctors who will examine the plaintiff on behalf of the defendant. Some plaintiff's attorneys will argue that, if the PC Order does not call for independent medical examinations (plural), the defense is limited to just one examination (singular). Therefore, care should be taken in drafting or completing that portion of the PC Order that authorizes IMEs, if you intend to have more than one specialist examine the plaintiff.

In this regard, consider those doctors who have examined the plaintiff, based upon the medical records you may have in hand at the time of the preliminary conference. The bill of particulars, medical records and the reports provided by the plaintiff will usually indicate that the plaintiff has been examined by several different types of practitioners. This can provide the predicate for the defense to request the same type of specialists to examine the plaintiff for the defense. For example, if the plaintiff has been seen by a psychiatrist who has already rendered a report indicating cognitive loss, you will have a basis to include in the PC Order that the plaintiff be examined by a defense psychiatrist.

In other words, subject to the advice of your client or the claims examiner, you should generally consider at the outset requesting an IME by a corresponding specialist for the defense for each specialist who has ren-

dered a report for the plaintiff. At a minimum, you will want to keep your options open in the PC Order. It may be that you will ultimately decide that you do not need to have that each such specialist examine the plaintiff. However, if you fail to provide for the IMEs by such specialists in the PC Order but later wish you had, you may have an uphill battle if the terms and conditions of the PC Order provide for only one examination.

When the plaintiff alleges in the bill of particulars that he or she is unable to return to work or can only work in a reduced capacity as a result of the alleged loss, the examination of the plaintiff by a vocational rehabilitation expert may be in order. The Court of Appeals ruled in *Kavanagh v. Ogden Allied Maintenance Corp.*,[3] that a vocational rehabilitation examination may be conducted in addition to, and not in lieu of, a medical IME and the right to conduct that examination should also be included within the PC Order – especially where the plaintiff has designated a non-physician vocational rehabilitation expert. In those instances, the defense can request that the plaintiff be compelled to submit to a physical examination by a defense vocational rehabilitation specialist.[4]

## Selecting a Physician

Special care should be taken when selecting the specific physician or physicians to conduct the IMEs. Although many defense firms use companies that employ groups of potential experts for defense firms, you should not entirely delegate to those companies the function of selecting the specific physician. It is the responsibility of the attorney responsible for the case to review carefully the curriculum vitae of the proposed expert, the specific area of expertise of the doctor, and consult with other defense attorneys regarding their prior experience with the physician. Some doctors may prepare excellent reports but may not be as proficient when testifying.

If you anticipate that the case will go to verdict, it may be critical to select a physician who not only has an impressive resume and writes a brilliant report but who also stands up well under searching cross-examination and makes a good impression before jurors. In addition, if based upon your due diligence, you learn that a particular physician is less than willing to spend the time to be prepared for testimony at trial, you may be well advised to look elsewhere and hire another doctor for the IME.

After you pick a physician to conduct the IME, you should send the doctor copies of the summons and complaint; the bills of particulars and any supplemental or amended bills of particulars; medical records received through discovery (both those produced directed by the plaintiff's counsel and those obtained through authorization); and diagnostic films and tests. It is not the obligation of the plaintiff or plaintiff's counsel to bring medical records to the examining physician; that is the responsibility of the defense.

To avoid questions at trial about the specific records a doctor actually reviewed, your letter to the physician should identify the records in sufficient detail so that later, at the time of trial, you will know at a glance which records the doctor received. In addition, you may consider making a duplicate set of the records sent to the doctor, then keep them in a separate folder or file so marked.

## The Deposition and Follow-up

Ordinarily, the IME will be conducted after the deposition. If the plaintiff required a translator for the deposition, you should consider hiring a translator for the IME. A failure to have a translator for the IME can prove to be a stumbling block later if a plaintiff who required a translator at his or her deposition, does not have one available at the IME. Among other problems, it may suggest that the medical history taken by the doctor at the IME is incomplete and that the doctor may not have fully understood the plaintiff's responses. Care should be taken so that any language difficulty does not interfere with the doctor's ability to converse fully with the plaintiff, properly test the plaintiff's medical condition and understand the plaintiff's verbal responses.

Although plaintiff's counsel or a paralegal from plaintiff's counsel's office may be present at the IME, he or she may not interfere with a proper examination of plaintiff.[5] If you learn that plaintiff's counsel or a representative from that office improperly interfered with the doctor's examination (*e.g.*, by refusing to answer questions regarding the plaintiff's medical history or refusing to allow non-invasive and painless tests to be conducted), you should call the doctor and find out the details and the extent to which the examination was thwarted. Where the doctor advises of a refusal/failure by the plaintiff or counsel, you should then consider making a motion to compel the plaintiff to submit to a second IME, with the cost of the doctor assessed as a result of the aborted or incomplete first IME. Because defense counsel is typically not present at IMEs, an affidavit from the doctor may be included in support of the motion to compel a second IME.

Your review of the doctor's report following the IME may point to additional information or materials that your doctor did not have at the time of the examination. For example, the report may indicate that the doctor did not review certain MRI films referred to in the medical records or did not review hospital records that were noted in the examination but were not included in the materials sent to the examining physician. In these in-

stances, you should promptly furnish to the doctor the records and films (if you have them) or take steps to immediately obtain the materials so that the doctor may issue an addendum reflecting careful review of all the relevant medical materials. Your failure to provide these records to the doctor may allow the plaintiff's counsel to cross-examine the doctor on his or her "inability/refusal" to review all the relevant medical records regarding the extent and permanency of any injuries suffered by plaintiff, yet still state an opinion in the report.

In some instances, the examining physician will recommend that certain further or additional tests be conducted. For example, an orthopedist may recommend that a radiologist examine film or that other specific medical experts review certain aspects of the plaintiff's complaints. These requests are red flags; they should receive your immediate attention and be promptly acted upon so that if additional experts should be hired and/or further tests conducted, this is done before, and not after, the case is certified for trial and placed on the trial calendar.

***There is much that a pro-active defense attorney can do to minimize the advantages enjoyed by the plaintiffs regarding medical examination of plaintiffs.***

## Additional Items for Review

To avoid a potential motion to preclude the IME report, defense counsel should make certain that the IME report and the curriculum vitae of the examining physician are provided to plaintiff's counsel within the time prescribed by the PC Order. As with the scheduling of the IME, if the IME report is not ready to be sent to plaintiff's counsel by the due date under the PC Order (for any number of reasons), the defense attorney should either obtain an extension of time or make a record by writing to opposing counsel and stating that the report will be produced shortly (and thereafter make good that representation).

Between the time of the IME and the time of the trial, additional medical records and reports may be received for a variety of reasons (*e.g.*, because plaintiff is continuing to undergo medical treatment, because compliance with authorizations can be slow, because additional authorizations are requested and obtained from plaintiff's counsel and thereafter processed, etc.). These additional medical records and film should be sent to the examining physician for review so that the doctor will have the opportunity to incorporate them in giving his or her opinion. This will also head off plaintiff's counsel stating during cross-examination that the "good doctor" failed to review important evidence.

Nothing in the CPLR limits the number of IMEs permitted in a personal injury action. Where a serious permanent injury is alleged, and a substantial change of circumstances has occurred since the first IME (*e.g.*, re-hospitalization of the plaintiff or significant surgery), a further IME of the plaintiff is within the discretion of the trial court.[6]

For example, in *Rouen v. Chrysler Credit Corp.*,[7] the plaintiff alleged numerous neurological and psychological injuries as a result of a head-on collision. The defendant's IME was conducted by a psychologist who concluded that the final status of plaintiff's cognitive functioning should be reserved for at least another year because further improvement "is ordinarily expected to occur during this period." The defendant did not request a neurological examination of the plaintiff.

After the note of issue was filed and shortly before the pre-trial conference, the defendant requested a further psychological examination, as well as a separate neurological examination. Although it granted the further psychological examination, the trial court denied the request for a neurological examination. On appeal, the First Department held that the defendant was entitled to have the plaintiff examined by a medical doctor, as well as a psychologist, notwithstanding that a neuropsychological examination includes areas in which the disciplines of psychology and neurology overlap.

When the plaintiff serves a supplemental bill of particulars following the IME alleging new claims for disabilities, in addition to having to write to have a further deposition of the plaintiff, the defendant may also request a further IME of the plaintiff.[8]

Likewise, if a plaintiff seeks leave to amend the bill of particulars alleging a psychological or psychiatric component of damages, the defendant may be granted leave to conduct a psychological or psychiatric examination of the plaintiff as a condition of that motion.[9]

Where you represent a third-party defendant who has not been brought into the action until after the IME is conducted, you can join with the defendant in relying on the IME previously conducted. However, you also have the right to have the plaintiff examined by a physician of your choice.[10] Often, counsel for a third-party defendant and the defendant may work together in having a specialist examine the plaintiff on behalf of the third-party defendant, thereby broadening the scope of the IMEs.

When the plaintiff refuses to appear for the IME, a motion to preclude the plaintiff from offering evidence of the injuries or a motion to strike the complaint can be brought. Typically, the courts will be reluctant to grant such relief and may make any order of dismissal conditional upon plaintiff receiving "one last chance" to comply with the order directing an IME.[11]

In sum, there is much that a pro-active defense attorney can do to minimize the advantages enjoyed by the plaintiffs regarding medical examinations of plaintiffs. Diligence and creativity by the defense can prove to be especially effective in this area of practice.

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1. *Brueckner v. Simpson*, 206 A.D.2d 448, 614 N.Y.S.2d 553 (2d Dept 1994).
2. *Healy v. Deepdale General Hosp.*, 145 A.D.2d 413, 535 N.Y.S.2d 404 (2d Dep't 1988).
3. 92 N.Y.2d 952, 683 N.Y.S.2d 156 (1998).
4. *Bradley v. Fisher Assocs.*, 251 A.D.2d 440, 674 N.Y.S.2d 405 (2d Dep't 1998).
5. *Allen v. State*, 228 A.D.2d 1001, 644 N.Y.S.2d 843 (3d Dep't 1996).
6. *Buerger v. County of Erie*, 101 A.D.2d 1025, 476 N.Y.S.2d 699 (4th Dep't 1984).
7. 145 A.D.2d 381, 535 N.Y.S.2d 724 (1st Dep't 1988).
8. *Fleming v. Chris Craft Indus., Inc.*, 97 A.D.2d 730, 469 N.Y.S.2d 3 (1st Dep't 1983).
9. *Cassavecca v. Airport Transp. Servs., Inc.*, 110 A.D.2d 804, 488 N.Y.S.2d 227 (2d Dep't 1985).
10. *Fleming v. Chris Craft Indus., Inc.*, 97 A.D.2d 730, 469 N.Y.S.2d 3 (1st Dep't 1983).
11. *Smith by Smith v. Parkchester Apts. Co.*, 256 A.D.2d 58, 680 N.Y.S.2d 541 (1st Dep't 1998).

# New York's Statutes of Limitations Affect Counterclaim Strategies And Potential for Recoupment

By James A. Beha II

When the business litigator is consulted about a commercial or securities case newly brought against a client by another business entity, the tactical questions initially considered invariably include: are there grounds for a motion to dismiss, and what aspects of the soured relationship between these two businesses will support a counterclaim?

Very often your client is aggrieved, feeling more sinned against than sinful, and is ready to expound upon a list of wrongs, some of which could, with your skillful assistance, be framed as counterclaims in the initial answer. Nonetheless, the common tactical decision is to pursue a motion to dismiss and defer answering. What if there is a concern that the applicable statute of limitations will run before the answer asserting the counterclaim will be served? A confident answer will require careful evaluation of the claim and of the law of the jurisdiction whose limitations rules will apply.

The limitations "clock" for any counterclaim based on New York law is deemed frozen when the complaint is filed (CPLR 203(d)), but under prevailing case law this relief is said to be available only for matters pleaded in the "original" answer. The rules in other jurisdictions vary, and depending on conflicts of law principles, those rules rather than CPLR 203(d) may apply in a case litigated in New York.[1] Whatever the potential saving provision, these rules only save *pleaded* claims; succeeding on a motion to dismiss when no answer has been served forgoes salvation and does not extend the limitations period for purposes of a subsequent action on the claim.

Even if the limitations period has run before the commencement of the case, in most jurisdictions if the claim arose from the transaction or occurrence on which the complaint is based, the barred counterclaim may be asserted for "recoupment" purposes, *i.e.*, in reduction of the plaintiff's damages.[2]

Defendant's counsel can be navigating in uncertain waters here, but conditions really get choppy when a possible counterclaim is uncovered later in the proceedings. Some recent cases send inconsistent signals on whether the claim is sunk if the statute has run by then. Sometimes facts supporting a particular pre-existing counterclaim only become apparent during discovery of the adversary, in review of the client's own document production, or when someone else at the client is interviewed (as to this, especially when the potential claim relates to a different transaction), upon substitution of counsel, or otherwise long after the initial answer was filed.

In such circumstances counsel must, of course, deal with the general standards for the grant of leave to amend.[3] But that is only one step. How, if at all, will application of the "relation back" rules of CPLR 203(f) or Fed. R. Civ. P. 15(c) interplay with those claim-saving provisions of CPLR 203(d) that would have been available for the original answer? And what if the limitations period ran before the initial pleading was filed so that only recoupment can be sought – is "relation back" still a problem? Courts wrestling with these questions have reached differing conclusions.

## CPLR 203(d)

In New York, discussion starts at the bedrock of a statute, CPLR 203(d):

> (d) Defense or counterclaim. A defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the

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Sara Attas and Keri Kilcommons, associates in the office, assisted with the research for this article.

extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.

Two immediate observations about this provision are in order. First, the limitations "freezing" mechanism at the filing of the complaint is available for *any* counterclaim, regardless of whether it is related to the matters alleged in the complaint (some other jurisdictions are not as broad-minded). Second, this provision refers to "a pleading containing it" without differentiating the character of the pleading. Nonetheless, as discussed below, it is now established in New York that the timeliness of an affirmative counterclaim in an *amended* answer is to be assessed under CPLR 203(f) and its "relation back" test in the first instance. Some cases have extended this rule to mean that unless a counterclaim is pleaded in the "original" answer it cannot have the benefit of CPLR 203(d) at all.[4] As long as the counterclaim is contained in the "original" answer, however, it does not matter how much time has passed since the filing of the complaint. Thus, in a case that was stayed for some six years after the complaint was filed, a state law counterclaim in the answer served after the case was returned to the active docket was deemed timely by operation of CPLR 203(d).[5]

***As long as the counterclaim is contained in the "original" answer, it does not matter how much time has passed since the filing of the complaint.***

Section 203(d) does not "toll" the limitations period for counterclaims in the strict sense, but only freezes it for purposes of what might be contained in the answer. However, in New York practice there is a closely related "tolling" provision under CPLR 203(e): if an action wherein a "defense or counterclaim" has been pleaded in an answer is later terminated by a party's death or is dismissed, the entire period between commencement and termination is not counted in assessing the timeliness of subsequent assertion of the claim, whether in a direct action thereon or as a defense or counterclaim "in another action brought by the plaintiff or his successor in interest."[6] Other jurisdictions differ on whether (or to what extent) such a "toll" is available. In all events, the claim must have been *pleaded* in the prior case for any tolling under these New York provisions to have effect.

## Recoupment

Under common law, when a defendant's plea of a claim based on a matter arising out of the transaction sued upon is proposed to be used only to defeat the plaintiff's damage claim (*i.e.*, in reduction of the net damages to be awarded to the plaintiff), the plea generally is allowed notwithstanding expiration of the statute of limitations.[7] The latter part of CPLR 203(d) is generally characterized as codifying this common law doctrine of "recoupment," with its common law limitations.[8]

CPLR 203(d) makes recoupment available where the claim arises from the "same transactions, occurrences, or series of transactions or occurrences" as a claim in the complaint. In the recoupment context, many courts have approached the "transaction or occurrence" test with tunnel vision.[9] Cases have held that if a plaintiff's claims relate to performance of a contract, counterclaims arising out of the negotiation of the agreement are not revived for recoupment purposes.[10] A recent New Jersey case held that a claim for defamation based on the plaintiff's statements about the events at issue in the complaint "does not arise from the same transaction" for purposes of recoupment.[11]

In other jurisdictions, recoupment is generally available based on common law, but some states have statutory provisions, including some that are broader than those in New York. New Mexico, for example, apparently does not provide for "tolling" as to affirmation counterclaims. However, its statutes permit both recoupment *and* offset (*i.e.*, using an unrelated claim to reduce a plaintiff's judgment) so long as the counterclaim was not barred at the time the plaintiff's cause of action arose.[12]

## Federal Rules

Limitations on federal claims may be found in the particular statute or borrowed by courts from related federal statutes or even borrowed from analogous state statutes where no federal statute appears to apply. Because periods of limitations and tolling provisions are substantive provisions under *Erie*,[13] the approach to limitations in federal court depends on the claim and the context.

The first step is an easy one: for a state law claim, the federal court is to apply the state's limitation rules, including those in regard to "tolling,"[14] and CPLR 203(d) is routinely applied in federal court in this context.[15] The second step is tricky: where the limitations period for a federal claim has been set by adopting an analogous state limitations period, the federal court must use the same state's tolling rules unless these are deemed inconsistent with the statutory purpose.[16]

Finally, many federal claims are governed by a federal limitations period, either expressly or by borrowing from a federal statute.[17] Relatively few decisions have considered how such limitations should be applied to a counterclaim. Most courts agree with the Wright & Miller treatise that, in the absence of any express provision in the limitations statute itself (and there being no equivalent to CPLR 203(d) in the Federal Rules), a *compulsory* counterclaim of this character will be given the benefit of measuring limitations as of the date the complaint was filed, but a *permissive* counterclaim will not.[18]

Both antitrust and RICO counterclaims have been saved by this policy in reported cases in other jurisdictions.[19] Nonetheless, in a 1998 Southern District case, Judge Ward applied CPLR 203(d) to save various state law counterclaims, but he held that on Clayton Act and RICO counterclaims under federal law "the statute of limitations continues to run until the counterclaims are filed," unless recoupment is applicable.[20] Judge Ward's opinion did not discuss the federal policy described in Wright & Miller, and it appears from the record that this line of cases was not briefed.[21] Nonetheless, the same result might have followed upon consideration of this rule, because the proposed federal counterclaims could be viewed as permissive rather than compulsory.[22]

The federal policy on counterclaims was recited by Judge Scheindlin in another 1998 Southern District case, but the court then noted that the counterclaims in question were based on state law, and accordingly CPLR 203(d) was to be applied.[23]

Wright & Miller use the phrase "tolls or suspends" with respect to running of the statute for compulsory federal counterclaims, but it is unlikely that this "toll" operates outside the context of the immediate case. *Employers Insurance of Wassau v. United States*[24] points out that the issue is generally moot: if the federal claim later asserted in a separate action was a compulsory counterclaim that should have been pleaded in the earlier action but was not, that in itself is likely to preclude subsequent litigation.[25] In one odd case, however, a defendant that had asserted a counterclaim did not seek to preserve the action for purposes of the counterclaim when its motion to dismiss the complaint succeeded. The defendant took the dismissal and then later sought to assert the claim in a new action.[26] The court concluded that in the new action relation back was unavailable as a tolling mechanism and that the counterclaim was time-barred.[27] This result suggests that "tolls or suspends" means less than one might expect, and the federal result is therefore to be contrasted to CPLR 203(e).

## Amended Answers and CPLR 203(d)

What happens when a defendant becomes aware of, or otherwise decides to plead, a counterclaim after the original answer has been served? Last year, Justice Kehoe of the Fourth Department argued vigorously that CPLR 203(d) should save the counterclaim so long as the general standards for amendment (CPLR 3025(b)) were satisfied.[28] But that argument was made in dissent, with the majority holding that claims in an amended answer are subject to the relation-back test in CPLR 203(f).[29]

New York courts have concluded that applying CPLR 203(d) directly to a late-asserted counterclaim would conflict with CPLR 203(f)'s policy of saving a late-asserted claim for limitations purposes only where it "relates back" to an earlier, timely pleading, a condition that requires sufficient notice in the prior pleading of the potential for the claim. New York courts have also consistently held that a proposed counterclaim cannot relate back to an original answer containing only general denials.[30] This has led some courts to say, and at least one court to hold, that CPLR 203(d) is available *only* for the "original" answer.

In a September 2002 case, Justice Kornreich extended this holding to a claim for recoupment, holding that where the "original answer did not mention it (*e.g.*, where the original answer consisted merely of general denials)," an amended answer could not assert recoupment.[31] In two related recent cases,[32] Judge Scheindlin discussed CPLR 203(d) at some length and went even further in restricting its availability. She read New York law as holding that CPLR 203(d) applies only to an "original answer" and cannot be available for a recoupment counterclaim asserted in an amended answer. Judge Scheindlin expressly stated that relation back to the original answer would not help the defendant because the claims were "time-barred when it served its original answer,"[33] thereby declining to link relation back with CPLR 203(d).

The analysis in the context of recoupment is perhaps more complex than either opinion reveals: a counterclaim for affirmative recovery requires relation back to link it to a point where it was timely, but a recoupment claim by definition is already untimely when the complaint was filed. Thus, whether CPLR 203(f) applies to relate the recoupment claim back to the earlier answer cannot effect a cure of the limitations problem to which CPLR 203(f) is directed. Assuming the timing of the amendment is acceptable under CPLR 3025, the argument can be made that the second sentence of CPLR 203(d) should save a late-proposed untimely counterclaim as a "defense" for recoupment purposes. Several years ago, Judge Lowe of the Southern District concluded precisely that, holding that CPLR 203(d) did permit assertion of recoupment in an amended answer, and rejecting an argument that any "relation back" analysis was necessary.[34] Her view was that "no statute of limi-

tations question exists" if the counterclaim meets the criteria for a recoupment claim.[35] In this context, a 1998 First Department case, *Enrico & Sons Contracting, Inc. v. Bridgemarket Assocs.*, is instructive. A contractor sued for payment, and the court allowed the defendant to amend its answer to plead a recoupment claim "relating as it does to plaintiff's performance under the very same contract pursuant to which plaintiff would recover," applying CPLR 203(d) without any discussion of requiring relation back under CPLR 203(f).[36]

The New York cases discussed above present at least two further questions: first, if "general denials" do not support relation back, what more is necessary? Second, if a proposed counterclaim can relate back to the "original" answer, does it *then* get the additional benefit of CPLR 203(d)?

In terms of the first question, New York courts insist upon some affirmative pleading language that makes statements about the relevant transaction or occurrence and thereby gives effective notice in the answer of the potential for a claim. It might be argued that if the counterclaim concerns the very same transaction on which the complaint is based, then even denials could give such "notice" as to a counterclaim based on that transaction.[37] *Shays* appear to have been such a case, because one might well argue that a general denial of liability for legal fees implicitly warns of a malpractice claim. Nonetheless, the defendant's general denials failed the "notice" test. The message in New York is that, for relation back to work, the original answer must go beyond denials to "call the plaintiff's conduct into question."[38]

***New York courts insist upon some affirmative pleading language that makes statements about the relevant transaction or occurrence and thereby gives effective notice in the answer of the potential for a claim.***

Anything that does go beyond the vague, blanket "general denial" might be enough, so long as the plaintiff's own conduct in the transaction has been questioned.[39] As McLaughlin suggests, an affirmative defense (pleading comparative fault, for example, or perhaps "unclean hands," provocation, or the like) could suffice.[40] In *Ace Hoeffner Contracting Co., Inc. v. P.J. Panzaka, Inc.*,[41] for example, a "conclusory" reference in an affirmative defense (there are no specifics in the opinion) was held sufficient to support relation back for a counterclaim.

The federal courts seem to have been more liberal than New York courts in deeming a counterclaim to relate back to the original answer where the counterclaim concerns the same transaction pleaded in the complaint (and therefore has been addressed by denials in the answer).[42] For example, in *Beck v. The CIT Group*,[43] a guarantor sued a lender alleging that the lender's improper auctioning off of the principal obligor's collateral resulted in the wrongful loss of the guarantor's cash collateral. Several years after filing an answer denying liability, the lender sought to add a counterclaim for the balance of the debt, based on the guaranty. After considering the other Rule 13(f) factors, Judge Cedarbaum found that amendment would not be futile because the claim related back to the original answer for limitations purposes, since the answer "pleaded" the same transaction.[44]

It may be that part of the difference between the New York and federal results on relation back, despite the near-identity of the stated legal standard, is best explained by differences in pleading practice. In state practice, and especially in state practice of some years ago, the "general denial" was often quite literally that – a summary blanket denial without more, not even a few sentences offering a competing version of the event or agreement in question, let alone any assertion of even rote affirmative defenses. Federal practice was (and still is) perhaps more likely to produce answers to complaints that discuss the transaction in some regard and thereby arguably give "notice" that the defendant may have its own complaints about the dispute plaintiff has brought to court.

## Linking CPLR 203(d) and (f)

If a defendant clears the hurdle of "relation back" to the original answer, will the proposed counterclaim get the added benefit of CPLR 203(d)? The answer in *Mopex* was "no"; the wording of *Shays* certainly implies that the answer could be "yes." There appear to be no New York State cases that have actually decided the precise question, and neither McLaughlin nor the general treatises have focused on this point. Some federal judges have grappled with the link between relation back and CPLR 203(d), but with inconsistent results.

In terms of recoupment, although Judge Scheindlin turned thumbs down in *Mopex*, when Judge Patterson considered a case where the new counterclaim for recoupment did not "allege any new facts . . . but rather present[ed] a new state law theory regarding the same transaction," he agreed that CPLR 203(f) should be applied, but then considered CPLR 203(d) and (f) as inter-

active and cumulative, and allowed the recoupment counterclaim to be added.[45] (Again, however, where only recoupment is sought, it might be more logical to conclude, as Judge Lowe did, that CPLR 203(f) should be beside the point, and that when even the general standards for amendment are met, CPLR 203(d) recoupment should be allowed because limitations are not an issue for recoupment purposes.)

So what about affirmative counterclaims, which must satisfy limitations and which, in New York practice, need not be related to the transactions pleaded in the complaint?

First of all, it is clear that claims arising after the complaint was filed – a subsequent libel or contract breach, for example – continue to be governed by their own statutes of limitations; saving provisions such as those in CPLR 203(d) apply only to pre-existing claims.[46]

The only additional analysis appears to be one predating by decades all the cases discussed above: Judge McMahon's 1976 decision in *Diematic Manufacturing Corp. v. Packaging Industries*.[47] Judge McMahon read the two provisions together and concluded that a proposed counterclaim "would relate back to the date the complaint in this action was filed . . . so long as Diematic was apprised of the transaction by Packaging's answer."[48] After more than a quarter century, *Diematic* still appears to be the only case applying these two sections of CPLR 203 together to an affirmative counterclaim proposed for an amended answer.

## Conclusion – Practice Points

Before moving to dismiss (or even while a motion to dismiss is pending), breathe deeply and consider whether serving an answer may preserve a valuable counterclaim that might be lost to limitations if the case were dismissed. When initially answering, at the very least do not rest on a general denial, but (assuming there is a good faith basis, of course) put the plaintiff's conduct at issue. Better still, investigate and plead all counterclaims (including possible time-barred grounds for recoupment) at the outset, lest you have to navigate the cases discussed in this article.

Where another jurisdiction's limitation periods apply, look for that state's tolling and pleading rules – they often differ from what New York practitioners assume from experience. And remember in local practice that there likely is no "tolling" at all under these rules for either (1) a counterclaim arising after the complaint was filed or (2) a permissive counterclaim with a federal statute of limitations.

In sum, be careful out there!

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1. In New Jersey, for example, one court "adopted the view that when plaintiffs file suit, they are on notice of possible counterclaims," so that limitations will not bar a counterclaim (in that instance, a counterclaim based on the same transaction). However, New Jersey's Supreme Court vacated that decision on related procedural grounds (holding that the action was complete and closed before defendant sought to amend his answer to assert the counterclaim, which would have "related back" to an affirmative defense on the initial answer). The Court expressly declined to "rule on whether defendant's counterclaim whether considered germane or new, pressed after the statute of limitations expired but while plaintiff's claim was still 'alive' could be saved." *Molnar v. Hedden*, 138 N.J. 96, 649 A.2d 71 (1994). As discussed below, federal courts will look to the relevant jurisdictions for state law claims and federal claims with limitations periods "borrowed" from analogous state statutes, but for claims with federal statutes of limitations it appears that at most such "freezing" relief is available only for a counterclaim that is compulsory – the statute continues to run on permissive federal law counterclaims until those are actually asserted in a pleading.
2. CPLR 203(d).
3. *See* CPLR 3025(b); Fed. R. Civ. P. 13(f), 15(a).
4. *See, e.g.*, 75A N.Y. Jur. 2d, Limitations and Laches § 312 (2000), and discussion below.
5. *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 2000 U.S. Dist. LEXIS 17748 (S.D.N.Y. Sept. 20, 2000) (applying CPLR 203(d)).
6. See CPLR 205(b), which allows reassertion of a defense or counterclaim if plaintiff brings a new action. The importance of CPLR 203(e) is that it supports both defensive use and the later prosecution of the claim by the former defendant.
7. *See*, *e.g.*, *Stone v. White*, 301 U.S. 532 (1937). Federal courts apply state common law on recoupment and also allow the assertion of a stale federal law counterclaim for purposes of recoupment if based on the same transaction or occurrence. C. Wright & A. Miller, Federal Practice and Procedure – Civil, § 1419 at 153–54 (2002); 3-13 Moore Federal Practice – Civil § 1393 (2002). The limitation to the same transaction or occurrence distinguishes recoupment from claims for offsets, which may be based on unrelated transactions and remain subject to limitations. *See*, *e.g.*, *Nester v. O'Donnell*, 301 N.J. Super. 198, 207–08, 693 A.2d 1214, 1219 (App. Div. 1997).
8. However, McLaughlin notes that prior New York common law did not permit a tort claim to be interposed as a recoupment to a contract claim, a "conceptualism" eliminated by the statute. 7B McKinney's Consol. Laws of New York, Practice Commentary CPLR 203, C203:9 (the Commentary to CPLR 203 is hereafter cited as "McLaughlin, Commentary").
9. *See Bernstein v. Spatola*, 122 A.D.2d 97, 101, 504 N.Y.S.2d 686 (2d Dep't 1986) (stating in dicta that in an action for royalties under a contract, a counterclaim for rescission and restitution of funds paid were not the same transaction for purposes of CPLR 203(d) [then (c)]). *And see Berger v. City of N. Miami*, 820 F. Supp. 989 (D. Va. 1993) (state law contract claims did not arise from same transaction as suit for CERCLA clean-up expenses at hazardous waste site).
10. *Levy v. Kendricks*, 170 A.D.2d 387, 388, 566 N.Y.S.2d 604 (1991). *But see X.L.O. Concrete Corp. v. Rivergate Corp.*, 190 A.D.2d 113, 117, 597 N.Y.S.2d 302 (1st Dep't 1993), *aff'd*, 83 N.Y.2d 513 (1994) (counterclaims based on negotia-

tions leading up to execution of contract did arise from same transactions as complaint, for recoupment purposes).

11. *Ho v. Rubin*, 333 N.J. Super. 599, 756 A.2d 643 (1999).
12. *See Hartford v. Gibbons & Reed, Co.*, 617 F.2d 567, 570–71 (10th Cir. 1980) (applying New Mexico statute).
13. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).
14. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) (state limitations periods apply in diversity cases); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (state "tolling" rules apply in diversity cases); *Diffley v. Allied-Signal, Inc.*, 921 F.2d 421, 423 (2d Cir. 1990).
15. *See, e.g.*, *Meridian Int'l Bank Ltd. v. Republic of Liberia*, 23 F. Supp. 2d 439, 448 (S.D.N.Y. 1998) (applying CPLR 203(d) to state law counterclaims); *Hartford Accident & Indem. Co. v. Pro-Football, Inc.*, 127 F.3d 1111, 1118 (D.C. Cir. 1997) (applying District of Columbia tolling rules); *Azada v. Carson*, 252 F. Supp. 988, 989 (D. Haw. 1966) (recognizing that local law on tolling would apply). *But see Andre v. Schenectady County*, 1997 U.S. Dist. LEXIS 3564 at *506 (N.D.N.Y. Mar. 13, 1997) (McAvoy, J.) (applying federal rule discussed below (not CPLR 203(d)) to counterclaim of assault) and discussion in notes 16 and 18 below.
16. *Bd. of Regents of the Univ. of the State of N.Y. v. Tomanio*, 446 U.S. 478, 486 (1980) (Section 1983 action borrows state law of limitations governing an "analogous" cause of action, and "tolling" must be governed by state, not federal, law unless inconsistent with the federal policy underlying the cause of action). *But see Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380, 387–88 (4th Cir. 2000) (IDEA action borrows state limitations; nonetheless "federal rule" (*see* note 18) applied to salvage IDEA counterclaim – but court notes result under state rule would be the same).
17. *See*, *e.g.*, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) (borrowing 1933 Securities Act limitations period and limitations period elsewhere in 1934 Exchange Act for "implied" actions based on 1934 Exchange Act § 10b actions, overruling cases borrowing state statutes, and holding equitable tolling did not apply because the one year-three year structure of these provisions was inconsistent with allowing tolling). In *Public Loan Co., Inc. v. Hyde*, 47 N.Y.2d 182, 417 N.Y.S.2d 238 (1979), the Court of Appeals applied CPLR 203(d) to save a Truth in Lending counterclaim governed by a federal limitations statute. In *Beneficial Fin. Co. v. Swaggerty*, 86 N.J. 602, 432 A.2d 512 (1981), the New Jersey Supreme Court cited *Public Loan* and other cases applying state statutes to TILA counterclaims and concluded that these were wrongly decided because "the surrounding constellation of federal common law" had to be applied along with the federal limitations period (citing Oregon and Pennsylvania cases in agreement). 86 N.J. at 607–08, 432 A.2d at 515.
18. 6 C. Wright & A. Miller § 1419, *supra* note 7. *See Burlington Indus., Inc. v. Milliken & Co.*, 690 F.2d 380, 389 (4th Cir. 1982) (institution of plaintiffs' suit tolls or suspends limitations period for compulsory antitrust counterclaim); *Kirkpatrick*, 216 F.3d at 387; *Canned Foods, Inc. v. United States*, 140 F. Supp. 771, 772 (Ct. Cl. 1956) (applying rule after discussing split in early cases); *UST Capital Corp. v. Charter Nat'l Life Ins. Co.*, 684 F. Supp 757, 759 (D. Mass. 1986) (applying rule to salvage RICO counterclaim); *see also Aramony v. United Way of Am.*, 1998 U.S. Dist. LEXIS 5885 (S.D.N.Y. Apr. 27, 1998) (Scheindlin, J.) (noting federal rule but applying CPLR 203(d) to permissive state law counterclaim). *But see Meridian Int'l Bank*, 23 F. Supp. 2d at 453–54 (discussed in text). But see also Moore's Federal Practice § 13.93 (2002), stating that even compulsory counterclaims are subject to limitations when asserted affirmatively rather than for recoupment. The discussion in this treatise is confused, however, and two cases cited for this proposition do not discuss federal claims, but rather apply state law in circumstances where counterclaim was time-barred *before* complaint was filed. Similarly, *Smith-Johnson Steamship Corp. v. United States*, 231 F. Supp. 184, 186 (D. Del. 1964), is sometimes cited for the proposition that in federal court "affirmative counterclaims may not be instituted after the applicable statute of limitations has expired." However, in making that statement the Court was applying Delaware law. I have also found that some decisions making broad statements about limitations and counterclaims similar to that found in Moore's actually address claims as to which limitations had expired *before* the complaint was filed. Such cases are really about whether a claim is "independent" or so connected to the complaint that it can be "revived" for recoupment purposes. *See*, *e.g.*, *Basham v. Finance Am. Corp.*, 583 F.2d 918, 927–28 (7th Cir. 1978).
19. *See Burlington Indus.*, 690 F.2d 380 (antitrust) and *UST Capital Corp.*, 684 F. Supp 757 (RICO), *supra*, note 18.
20. *Meridian Int'l Bank*, 23 F. Supp. 2d at 453–54. Recall that any New York State counterclaims get the benefit of CPLR 302(d), so a permissive *state* counterclaim would be saved by the *state* rule, while a permissive claim subject to federal limitations would not be saved by the narrower federal rule.
21. From the record it appears that defendant argued that CPLR 203(d) applied to *all* claims without presenting a separate rationale for the federal counterclaim and that in response plaintiffs quoted language from some of the cases dealing with federal cross-claims. Cases do hold that federal cross-claims do not get the benefit of any suspension of limitations. *See*, *e.g.*, *U.S. of Bros. Builders Supply Co. v. Old World Artisans*, 702 F. Supp. 1561, 1569 (N.D. Ga. 1988). As a consequence, the "federal rule" discussed in note 18 above was not brought to the Court's attention.
22. Judge Ward's statement that "recoupment is not what is being sought" implies that these counterclaims were not, in his view, based on the same "transaction." *Meridian Int'l Bank*, 23 F. Supp. 2d at 453.
23. *See Aramony v. United Way of Am.*, 1998 U.S. Dist. LEXIS 5885 (S.D.N.Y. Apr. 27, 1998) (Scheindlin, J.). The only other case within the Second Circuit to mention the federal policy appears to be *Andre v. Schenectady County*, 1997 U.S. Dist. LEXIS 3564 at *506 (N.D.N.Y. Mar. 13, 1997) (McAvoy, J.), which states the policy but applies it to a proposed state law counterclaim. In the author's view the proper tack would have been the application of CPLR 203(d), which might have yielded the same result (see discussion at text accompanying note 28 and thereafter about CPLR 203(d) and amended answers).
24. 764 F.2d 1572 (Fed. Cir. 1985).
25. *Id*. at 1576.
26. *Chamberlain Mfg. Corp. v. Maremont Corp.*, 1991 U.S. Dist. LEXIS 17512 (N.D. Ill. 1991).
27. *Id*. at *4.
28. *Joseph Barsuk Inc. v. Niagara Mohawk Power Corp. (Appeal No. 2)*, 281 A.D.2d 876, 877, 722 N.Y.S.2d 456 (4th Dep't 2001).

29. *Joseph Barsuk, Inc. v. Niagara Mohawk Power Corp. (Appeal No. 1)*, 281 A.D.2d 875, 722 N.Y.S.2d 192 (4th Dep't), *leave dismissed*, 97 N.Y. 2d 638 (2001).

30. The most prominent additional state case to this effect is *Coleman, Grasso & Zasada Appraisals Inc. v. Coleman*, 246 A.D.2d 893, 667 N.Y.S.2d 828 (3d Dep't), *leave dismissed*, 91 N.Y.2d 1002 (1998). See also the *Mopex* cases, *infra*, note 32. All of the state cases discussed deal with amendments under CPLR 3025(b). I have not located a case addressing an amendment of right under CPLR 3025(a) and deciding whether CPLR 203(d) is directly applicable or still must be mediated by CPLR 203(f).

31. *Shays, Kemper v. Nachman*, N.Y.L.J., Sept. 20, 2002, p. 18 col. 3 (Sup. Ct., N.Y. Co.). Justice Kornreich did, however, allow defendant to assert his malpractice claim as an affirmative defense, so that "in the context of those defenses, the adequacy of plaintiff's representation may be explored." This result takes us back to CPLR 203(d)'s reference to "defenses or counterclaims." If a defense is not subject to limitations in the first place, why this careful and repeated phrasing?

32. *American Stock Exchange, LLC v. Mopex, Inc.*, 2002 U.S. Dist. LEXIS 10533 (S.D.N.Y. June 12, 2002) and *Mopex, Inc., v. American Stock Exchange, LLC*, 2002 U.S. Dist. LEXIS 3532 (S.D.N.Y. Mar. 5, 2002).

33. Judge Scheindlin appears not to have agreed that, if relation back were achieved, CPLR 203(d) should *then* take over, as Judge Patterson had held in a recoupment case a few years earlier (*infra*, note 45).

34. *Burgee v. Patrick*, 1996 WL 227819 *7 n.6 (S.D.N.Y. May 3, 1996). Weinstein-Korn-Miller New York Civil Practice § 203.30a (2002) raises the question of whether a recoupment claim should be allowed under CPLR 203(d) without requiring relation back, but does not take a position.



35. *Burgee*, 1996 WL 227819 at *6.

36. 252 A.D.2d 429, 430, 675 N.Y.S.2d 351 (1st Dep't 1998).

37. That was the view taken in the New Jersey case cited in note 1.

38. *New York Tel. Co. v. County Asphalt, Inc.* 86 Misc. 2d 958, 959–60, 382 N.Y.S.2d 211 (Sup. Ct., Ulster Co. 1976) (general denial did not call plaintiff's conduct into question and hence did not give notice of potential claim even though it arose from some transactions addressed by denial); *Hager v. Hager*, 177 A.D.2d 401, 576 N.Y.S.2d 246 (1st Dep't 1991). *See* Weinstein-Korn-Miller § 203.30a nn. 236, 240–41, *supra* note 34 (collecting cases where notice in original answer was or was not sufficient to support adding later counterclaim).

39. Something more would of course be necessary to give notice of an unrelated, permissive counterclaim. In *Darby & Darby, P.C. v. VSI Int'l, Inc.*, 268 A.D.2d 270, 273, 701 N.Y.S.2d 50 (1st Dep't 2000), for example, the First Department held that a counterclaim for malpractice in an earlier, separate engagement concerned a different "retainer" than that "alleged in defendants' original answer" wherein defendant had already counterclaimed for malpractice in a *later* representation for which the law firm had sued for fees.

40. McLaughlin, Commentary C203:11.

41. 76 Misc. 2d 864, 865, 351 N.Y.S.2d 813, 815 (Dist. Ct., Suffolk Co., 1973) (*cited in* Carmody-Wait 2d New York Practice § 13:401).

42. Although Fed. R. Civ. P. 13(f), the rule expressly dealing with amendments to add a previously omitted counterclaim, does not contain "relation back" provisions, the prevailing view is that the savings provision of Rule 15(c) is available for a counterclaim. *See, e.g., Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank*, 744 F.2d 237, 242–43 (2d Cir. 1984). *See also* 3-13 Moore § 13.93, *supra* note 7. *But see Stoner v. Terranella*, 372 F.2d 89, 91 (6th Cir. 1967) (Rules 13(f) and 15(c) mutually exclusive and relation back not available for Rule 13(f) amendments).

43. 1998 U.S. Dist. LEXIS 14947 (S.D.N.Y., Sept. 24, 1998).

44. *Id.* at *3. *Cf. Milam v. Massey-Ferguson, Inc.*, 580 F. Supp. 879, 880–81 (S.D. Miss. 1984) (in suit for breach of warranty arising from sale of collateral, amendment to answer to add claim for deficiency on sale allowed as relating back to initial answer, applying Rule 15(c)). *See also Diematic Mfg. Corp. v. Packaging Indus.*, 412 F. Supp. 1367, 1373 (S.D.N.Y. 1976) (alternate analysis under federal rules).

45. *Geller Media Mgmt., Inc. v. Chenault*, 1997 WL 362446 *2 (S.D.N.Y. July 1, 1997). In an earlier case, *Manhattan Life Ins. Co. v. A.J. Stratton Syndicate*, 132 F.R.D. 139, 141 n.3 (S.D.N.Y. 1990), Judge Patterson appears to have assumed recoupment would be available for a counterclaim in an amended answer, but denied amendment on other grounds.

46. McLaughlin, Commentary C203:9.

47. 412 F. Supp. 1367 (note that Judge McMahon was considering an earlier CPLR 203 in which these provisions were CPLR 203(c) and (e) respectively).

48. *Id.* at 1373–74. Uncertain whether federal or state rules would apply, Judge McMahon alternatively applied both CPLR 203(f) and Fed. R. Civ. P. 15(c) in conjunction with CPLR 203(d), reaching the same result on both routes.

# Recent Second Circuit Cases Reinforce Criminal Discovery Standards Set by Supreme Court

BY THOMAS F. LIOTTI

The last time the U.S. Supreme Court spoke on the issue of discovery in criminal cases was in *Kyles v. Whitley*,[1] a 1995 decision that requires prosecutors to act with due diligence to turn over all *Brady*[2] material. More recently, in a series of decisions based on the high court's findings, the Second Circuit has underscored a vigorous interest in discovery issues and a willingness to reverse convictions based upon discovery abuses.

In *Kyles*, the Court held that it was immaterial whether discovery was under the control of the prosecutors. What is controlling is whether prosecutors can, by exercising due diligence, obtain the exculpatory evidence, thereby mandating its turnover to the defense. Many prosecutors have tended to disregard the holding in *Kyles*.

But the times are likely to change if the full impact of recent Second Circuit decisions is taken into account. In *United States v. John Gil*,[3] the Second Circuit reversed the conviction of a heating and air-conditioning contractor who allegedly committed mail fraud by over-billing the Off Track Betting Corporation (OTB). The defendant made numerous demands for discovery, continually invoking *Kyles v. Whitley*, as the burden of the prosecution. Two days before the start of trial, the prosecutor turned over 3,000 pages of so-called "3500 material."[4] None of the information was highlighted as *Brady* or *Kyles* material. A memo, amidst the voluminous 3500 material from an OTB employee, showed that the manner in which the defendant billed had been approved by the OTB. Therefore, an entrapment by estoppel defense that had lacked documentary support was now more viable. The Second Circuit castigated prosecutors in the Eastern District of New York for not making this memo available sooner and for not disclosing it pursuant to the numerous discovery demands that had been made. The memo was not found by the defense until five months after trial.

The trial court judge, when confronted by a post-trial motion to set aside the jury's verdict, determined that the memo was not material. The Second Circuit disagreed and the case was remanded for a new trial.[5] The defendant was able to retain, as his appellate counsel, Herald Price Fahringer, one of the country's leading appellate advocates.[6]

To establish a *Brady* violation, the Circuit has reasoned that "evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[7]

In a now impressive array of cases in the *Brady* progeny, the Second Circuit has upheld the defense's right to exculpatory evidence. In *Leka v. Portuondo*,[8] the court reversed a murder conviction, holding that: (1) favorable eyewitness testimony by a police officer was withheld from the defense; (2) delayed disclosure to the defense of key witnesses, identified nine days before opening arguments and 23 days before the defense began its case, constituted "suppression" of evidence by the government pursuant to *Brady*; and (3) eyewitness testimony of an off-duty police officer was material for *Brady* purposes. The court cited its earlier holding in *United States v. Payne*,[9] which states:

> Under *Brady* and its progeny, the government has an affirmative duty to disclose favorable evidence known to it, even if no specific disclosure request is made by the defense. The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation. Where the government's suppression of evidence amounts to a denial of due process, the prosecutor's good faith or lack of bad faith is irrelevant.

In one opinion, the Second Circuit backtracked from the duty that it has imposed elsewhere on the prosecu-

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tion to disclose in a timely manner. In *United States v. Coppa*,[10] the court allowed for an interlocutory petition for mandamus to overturn the trial court's determination that the government has a constitutional duty to disclose *Brady* and *Giglio*[11] material immediately upon request from the defense.[12]

The Second Circuit sharpened its pen in *Gil*[13] by holding that disclosure of *Brady* material one to two days before trial was not sufficient time for adequate preparation by trial counsel. But, how much time is enough? The trial court judge in *Coppa* tried to allow for ample trial preparation time with the use of *Brady* material that is disclosed early. It would seem that if the trial court in *Coppa* had not predicated its ruling of immediate disclosure as a constitutional requirement, but simply issued a scheduling order, the Circuit would have upheld the ruling as being within the judge's sound discretion.

***The Second Circuit sharpened its pen in* Gil *by holding that disclosure of* Brady *material one to two days before trial was not sufficient time for adequate preparation by trial counsel.***

The Second Circuit, by Judges Oakes, Jacobs and Calabresi, determined in *Gil* that prosecutors had "suppressed" *Brady* material and that the defendant suffered prejudice as a result. This article examines the import of *Gil* with particular reference to what sanctions are imposed and should be imposed against prosecutors who fail to disclose *Brady* and *Kyles* material.

## Applicable Standards

In *Gil*, the Circuit referred to its earlier decision in *Leka v. Portuondo*:[14]

> When such a disclosure is first made on the eve of trial, or when trial is under way, the opportunity to use it may be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing. And the defense may be unable to assimilate the information into its case.[15]

The exculpatory memo in *Gil* became known as the "Bradford Memo," named after a deceased employee of OTB. In reversing Mr. Gil's conviction on all counts and remanding for a new trial, the court held:

> Although the Bradford memo was produced before trial, the defense was not in a position to read it, identify its usefulness, and use it. It was among five reams of paper labeled "3500 material," delivered sometime on the Friday before Monday trial, at a time presumably when a conscientious defense lawyer would be preoccupied working on an opening statement and witness cross-examination, and all else.
>
> Moreover, disclosure on the eve of trial "may be insufficient unless it is fuller and more thorough than may have been required if the disclosure had been made at an earlier stage." The two-page memo was not easily identifiable as a document of significance, located as it was among reams of documents, and indexed as Dorfman 3500 material on page twelve of the exhibit list. Although the government discounts the significance of the memo, and reasonable minds can differ about that (the district judge, for one), the government runs a certain risk when it turns over so late documents sought by the defense for so long.
>
> The prosecution contended on appeal that it received the Bradford memo from OTB "only days before" the government produced it to the defense. But in a Rule 28J letter submitted to this Court approximately three weeks after oral argument, the government concedes that an OTB investigator saw the Bradford memo at some point during the grand jury investigation of Gil. The government is reasonably expected to have possession of evidence in the hands of investigators, who are part of the "prosecution team." The government thus constructively possessed the Bradford memo long before it was turned over to the defense.
>
> The government has not otherwise undertaken to justify its failure to find and timely deliver the Bradford memo, and there is no obvious explanation for this failure in light of the defendant's numerous requests for such documents.[16]

The opinion in *Kyles* was delivered by Justice Souter in which Justices Stevens, O'Connor, Ginsberg and Breyer joined. Justice Stevens filed a concurring opinion in which Justices Ginsburg and Breyer joined. Justice Scalia filed a dissenting opinion, in which the Chief Justice and Justices Kennedy and Thomas joined. Kyles was convicted by a Louisiana jury of first degree murder and sentenced to death. After the affirmance of his conviction on direct appeal, it was revealed that the prosecutor had withheld evidence favorable to the defendant. The evidence withheld included eyewitness statements taken by the police; statements from an informant, never called to testify; and, a computer printout of license numbers of cars parked at the crime scene on the night of the murder, which did not list the number of Kyles' car. In reversing Kyles' conviction, the Court reviewed its earlier decision in *United States v. Bagley*[17] and determined that some aspects of materiality for *Brady* purposes bore emphasis.

Under *Bagley*, favorable evidence is material, and constitutional error results when it is suppressed by the government and there is a "reasonable probability" that, had the evidence been disclosed to the defense, the re-

sult would have been different. The trial court must then make a determination as to the skill and ability of trial counsel. If trial counsel is an effective advocate, then *Brady* material in his or her hands will be a lethal weapon. If defense counsel is ineffective, the Supreme Court suggests that the *Brady* evidence becomes less material because a bad lawyer may not use it properly. This analogue supplants another injustice on the Sixth Amendment violation already apparent when a lawyer demonstrates ineptitude. No court should be permitted to deny a *Brady* violation by stating that it would not matter, because the defense lawyer was ineffective. The *Bagley* Court stated as much.

## The Test of Materiality

Under *Bagley* and *Kyles*, the test of materiality is "reasonable probability" that the result would be different, not proof by a preponderance of the evidence that this is the case. In *Kyles*, the Court noted that if *Brady* material would enable the defense to attack the "thoroughness or even the good faith of the investigation," then the violation becomes far more pertinent. In *Gil*, the defendant had an entrapment by estoppel defense that would have been helped by the *Brady* material. Although the court in *Gil* did not pass upon the admissibility of that evidence, it concluded, *ipso facto*, that it was material and there was a "reasonable probability" that it would have affected the outcome.

*Kyles* expanded the *stare decisis* of *United States v. Agurs*,[18] where the Court determined that "a defendant's failure to request favorable evidence did not leave the government free of all obligation."[19] While the Court noted that the constitutional requirements were less onerous than those of the ABA Standards for Criminal Justice (citing § 3-3.11(a) (3d ed. 1993)) and the ABA Model Rule of Professional Conduct (citing § 3.8(d) (1984)), it did impose a substantial responsibility on prosecutors: "This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[20]

The prosecutors in *Kyles* and *Gil* and all other pertinent cases on this subject were not referred for disciplinary sanctions. Indeed, the Jencks Act[21] itself limits the remedy for failure to disclose to striking the testimony and if the interests of justice require it, declaring a mistrial.[22] But, the Jencks Act does not include the remedy of a dismissal of the charges as well as monetary and disciplinary sanctions against the prosecution.

Courts have been reluctant to impose sanctions against prosecutors aside from striking testimony or declaring a mistrial and have held that the rigors of *Brady*, *Kyles* and *Gil* do not apply in the absence of bad faith or a motive to suppress on the part of the government, and that the prejudice is not curable at trial.[23]

A few courts have considered sanctions, such as contempt, fines, penalties and the like, but not imposed them.[24] Meanwhile, judges do impose Rule 11 and other sanctions upon defense lawyers.

If meaningful discovery is to be provided, then in this author's opinion there must be serious consequences for prosecutors who do not heed the warning shots of *Brady*, *Kyles* and *Gil*, *et al.*

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1. 514 U.S. 419 (1995).
2. 373 U.S. 83 (1963).
3. 297 F.3d 93 (2d Cir. 2002).
4. 18 U.S.C. § 3500.
5. Unfortunately, by the time of the reversal the defendant had already served more than six months of a three-year sentence; had expended considerable sums for legal fees; had forfeited a luxury yacht to the U.S. government; and, had been debarred from doing business with municipalities, including the City of New York. These were a few of the consequences of non-disclosure that prosecutors failed to recognize. He had made an application for bail pending appeal, which was denied.
6. Mr. Fahringer was gracious enough to place this author's name on the brief as lead counsel. I take little credit for this result except to help to preserve the issue at the trial court level. The accolades go to Mr. Gil for uncovering the document after trial, Mr. Fahringer for writing and arguing brilliantly and the Second Circuit in following *Kyles v. Whitley*, 514 U.S. 419 (1995).
7. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999); *Leka v. Portuondo*, 257 F.3d 89, 98 (2d Cir. 2001); *In re United States (Coppa)*, 267 F.3d 132, 139 (2d Cir. 2001).
8. 257 F.3d at 101.
9. 63 F.3d 1200 (2d Cir. 1995) (citations omitted).
10. 267 F.3d 132 (2d Cir. 2001).
11. *Giglio v. U.S.*, 405 U.S. 150 (1972).
12. *See U.S. v. Shvarts*, 90 F. Supp. 2d 219 (E.D.N.Y. 2000).
13. *U.S. v. John Gil*, 297 F.3d 93 (2d Cir. 2002).
14. 257 F.3d 89, 101 (2d Cir. 2001).
15. *Gil*, 297 F.3d at 106.
16. *Id.* at 106–07 (citations omitted).
17. 473 U.S. 667 (1985).
18. 427 U.S. 97 (1976).
19. *Kyles v. Whitley*, 514 US 419, 433 (1995).
20. *Id.* at 437.
21. 18 U.S.C. § 3500(d).
22. *U.S. v. DeFranco*, 30 F.3d 664 (6th Cir. 1994).
23. *U.S. v. Angelini*, 607 F.2d 1305 (9th Cir. 1979); *U.S. v. Simtob*, 901 F.2d 799 (9th Cir. 1990); *U.S. v. Taylor*, 13 F.3d 986 (6th Cir. 1994).
24. *U.S. v. DeLeon*, 498 F.2d 1327 (7th Cir. 1974); *U.S. v. Harrison*, 524 F.2d 421 (D.C. Cir. 1975); *Montgomery v. U.S.*, 384 A.2d 655 (1978).

# Should a Franchise Holder Be Allowed to Continue Operating While a Termination Suit Is Pending?

By Mitchell J. Kassoff

Should a court issue an injunction ordering a franchisor to allow a franchisee to continue to operate his franchise pending conclusion of trial on charges that a franchise was improperly terminated? The position taken here is that in many cases such relief should be granted.

The primary argument of the franchisee will be that an injunction is necessary to prevent irreparable harm if the injunction is not granted. A secondary argument is that during this process a franchisor will earn money from the franchise fees paid by a franchisee, thereby benefiting from this relationship.

The facts in such cases are usually quite simple. A franchisor will have terminated a franchise due to an alleged breach of the franchise agreement. The franchisee will argue that either (a) the breach of the franchise agreement did not exist or (b) it was *de minimis* and not worthy of the drastic step of terminating a franchise. In some cases, a franchisee will allege that it has been discriminated against.

The franchisee will state that its request is simply that the court order a franchisor to maintain the *status quo ante* while this matter is litigated. The franchisee will continue in that if the injunctions are not granted, monetary damages will not suffice and it will be impossible to put a franchisee back in its former position because it will be impossible to know how much a franchisee would have made or would have sold at their franchises.

The U.S. Supreme Court held that a court must weigh "the relative harms to the parties" when deciding if an injunction should be issued.[1]

In a case in the Eastern District of New York,[2] the plaintiff dealer filed a motion for a preliminary injunction enjoining the defendant distributor from terminating its dealership until the dealer's suit against the distributor was concluded. The court concluded that the dealer made a sufficient showing of irreparable harm if his business were closed.

In a case in the Southern District of New York,[3] plaintiffs brought an order to show cause why the defendant should not be preliminarily enjoined from terminating their carrier agreements and from committing other acts of harassment. The court held:

> If the defendant does in fact terminate the plaintiffs, the plaintiffs will be irreparably harmed. They will have lost their business and their customers and should they eventually succeed on the merits of this case, it may be impossible to reestablish the businesses as going concerns. Such a victory would, indeed, be pyrrhic.

That the court has the power to issue an injunction when the likelihood that the franchise will be terminated is quite clear. "Many courts have held that defendants who are or may be guilty of anticompetitive practices should not be permitted to terminate franchises, leases or sales contracts when such terminations would effectuate those practices." This is true even though "the plaintiff had violated the terms of the franchise or sales agreement and had given [the] defendant a contractual basis for termination."[4]

In a case in the Eastern District of New York,[5] a franchisee violated its franchise agreement on several occasions. Finally, the franchisor threatened to terminate the franchise agreement. The franchisee filed a complaint in state court seeking a temporary restraining order prohibiting the franchisor from removing the franchisee from the franchisor's reservation system. The temporary restraining order was granted and the defendant

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removed the case to the Eastern District, where the court held:

> The franchise relationship is the lifeline of the franchisee's business; the franchisee's investment of capital, time, and effort in promoting the franchisor's goods or services – to the general exclusion of competing goods and services – would be irreparably lost upon termination. Money damages cannot make the franchisee in such situations whole. *See Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124, 125–26 (2d Cir. 1984) (per curiam) ("The loss of Roso-Lino's distributorship, an ongoing business representing many years of effort and the livelihood of its husband and wife owners, constitutes irreparable harm. What plaintiff stands to lose cannot be fully compensated by subsequent money damages.").[6]

**The harm that the plaintiff will suffer if the injunction is not granted must be analyzed together with the balancing of equities between the parties.**

In a Northern District of New York case,[7] the plaintiffs sought a temporary restraining order (TRO) against a franchisor. The plaintiffs alleged various causes of action including violations of the New York Franchise Sales Act, fraudulent inducement to enter into certain asset purchase contracts and franchise agreements, fraud, breach of the implied covenant of good faith and fair dealing, conspiracy, and detrimental reliance. The court granted the plaintiffs' motion for a TRO, holding that such an order could be granted where the party could establish irreparable harm and that if the restraining order was not granted, there was the likelihood of the franchisee being forced into bankruptcy and suffering irreparable harm, thereby rendering a final judgment useless. The court found that the balance of equities weighed in favor of the plaintiffs and granted the TRO for 10 days or until a hearing and determination of the plaintiffs' application for a preliminary injunction.

The Southern District of New York[8] has held that the court

> must balance the equities to determine if "the harm which [it] would suffer from the denial of [its] motion is 'decidedly' greater than the harm [Cherokee] would suffer if the motion is granted." *Buffalo Forge Co. v. AMPCO-Pittsburgh Corp.*, 638 F.2d 568, 569 (2d Cir. 1981); *see also Roland Machinery Co. v. Dresser Industries Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) (balance the potential harm to the plaintiff if the injunction is erroneously denied against the potential harm to the defendant if it is erroneously granted).[9]

The harm that the plaintiff will suffer if the injunction is not granted must be analyzed together with the balancing of the equities between the parties. If the court grants the requested relief, the franchisee will argue, it will cost the defendant virtually nothing to comply; indeed, the defendant will make additional money. Therefore, the harm that will be caused if the relief is not granted is greatly magnified when it is compared with the zero cost to the defendant.

It should also be noted that all factors are not weighted equally. The Fourth Circuit[10] stated:

> These factors are not, however, all weighted equally. The "balance of hardships" reached by comparing the relevant harms to the plaintiff and defendant is the most important determination, dictating, for example, how strong a likelihood of success showing the plaintiff must make. *See Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991).[11]

The Court of Appeals went on to state:

> Even if a loss can be compensated by money damages at judgment, however, extraordinary circumstances may give rise to the irreparable harm required for a preliminary injunction. For example, the Seventh Circuit has noted that *even where a harm could be remedied by money damages at judgment, irreparable harm may still exist where the moving party's business cannot survive absent a preliminary injunction.*[12]

The U.S. District Court in Kansas[13] held:

> Plaintiff claims it will be irreparably harmed in several ways if defendant is allowed to discontinue its monthly supply of PVC compound. First, plaintiff claims that because the Shintech supply contract provides only half of its PVC compound requirements it will not be able to meet customer demands, which are presently very high. Consequently, plaintiff will lose goodwill and will eventually lose its customers to other PVC pipe manufacturers able to meet customer demands. Second, the reduction of compound supply will necessitate plaintiff's laying off 10–12 employees and curtailing operations from seven days per week to five days per week on April 1, 1988. Third, plaintiff will not be able to operate profitably at less than full capacity, and thus will eventually be forced to cease its manufacturing operations altogether. Numerous cases support the conclusion that loss of customers, loss of goodwill, and threats to a business' viability can constitute irreparable harm. *See Tri-State Generation*, 805 F.2d 351, 356 (10th Cir. 1986); *Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124, 125–26 (2d Cir. 1984); *Otero Savings & Loan Ass'n v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981); *Federal Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981); *Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980); *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.*, 588 F.2d

> 24, 28–29 (2d Cir. 1978), *cert. denied*, 440 U.S. 960, 99 S. Ct. 1502, 59 L. Ed. 2d 773 (1979); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970); *Associated Producers Co. v. City of Independence*, 648 F. Supp. 1255, 1258 (W.D. Mo. 1986); *Stanley-Fizer Associates, Inc. v. Sport-Billy Productions Rolf Deyhle*, 608 F. Supp. 1033, 1035 (S.D.N.Y. 1985); *Great Salt Lake Minerals & Chemicals Corp. v. Marsh*, 596 F. Supp. 548, 557 (D. Utah 1984).[14]

Strong notice should be taken of the last line of the quote, to wit: "Numerous cases support the conclusion that loss of customers, loss of goodwill, and threats to a business' viability can constitute irreparable harm."

The Eighth Circuit Court of Appeals held that "where the status quo is a condition not of rest, but of action, and the condition of rest (in this case the refusal to deliver the seed corn) will cause irreparable harm, a mandatory preliminary injunction is proper."[15]

The Southern District of New York[16] described the necessary elements for an injunction as follows:

> To prevail on its claim for a preliminary injunction, [the moving party] must demonstrate a threat of irreparable injury and either (1) a probability of success on the merits, or (2) sufficiently serious questions going to the merits of the claims to make them a fair ground for litigation, and a balance of hardships tipping decidedly in its favor. *See, e.g., Brenntag Int'l Chems. Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999). Although the monetary injury claimed here usually does not constitute irreparable harm because such injury can be estimated and compensated, irreparable harm may exist where "*but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied.*" *Id.* (internal cite omitted); *S.E.C. v. Princeton Econ. Int'l, Ltd.*, 73 F. Supp. 2d 420, 425 (S.D.N.Y. 1999) (same).[17]

The Second Circuit[18] held:

> Unlike a party seeking specific performance, a party that requests a preliminary injunction *must* discuss the merits of the dispute underlying the injunction motion. The requirements for a preliminary injunction are well settled: a party seeking relief must show (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor. *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam).
>
> The test for specific performance is more flexible. It initially requires proof that (1) a valid contract exists between the parties, (2) the plaintiff has substantially performed its part of the contract, and (3) plaintiff and defendant are each able to continue performing their parts of the agreement. *See Travellers Int'l AG v. Trans World Airlines, Inc.*, 722 F. Supp. 1087, 1104 (S.D.N.Y. 1989). A party seeking relief must show equitable factors in its favor, for example, the lack of an adequate remedy at law, and must also demonstrate that its risk of injury, *if* the injunction is denied, is one that after balancing the equities entitles it to relief. *Id.* One of the factors balanced is irreparable harm, a common element under both tests. *See Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468, 472 (2d Cir. 1980); *see also Payroll Express Corp. v. Aetna Casualty and Sur. Co.*, 659 F.2d 285, 292 (2d Cir. 1981) (specific performance injunction granted where money damages speculative and court found absence of "offsetting equities militating against a grant of equitable relief"); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972) (specific performance injunction upheld based on contract language and showing of irreparable damage).[19]

The franchisee will state that the relief requested is in reality seeking specific performance of the contract between the parties, namely the continuation of the contractual relationship among the parties.

There are two tests to determine if a court should grant the injunctive relief requested by a franchisee. They are (a) irreparable injury to the moving party and (b) probable success on the merits of the case *or* "*sufficiently serious questions going to the merits as to make them a fair ground for litigation.*" To succeed, the plaintiff "need only make a showing that the probability of . . . prevailing is better than fifty percent."[20]

Some courts add an additional two tests (c) a balancing of the equities between the parties and (d) the public good. As shown below, not only are these tests easily passed by the plaintiff, but the balancing of the equities of the parties is clearly in favor of granting the relief because the harm to the plaintiff is potentially very significant while the harm to the defendant is likely to be minimal.

In terms of the public good, the franchisee will argue that society as a whole will be helped because it is in the public interest not to allow a franchisor to have a franchisee work more than six years to build up a business and then take it from him. If a large franchisor is permitted to succeed, it will be encouraged to repeat this behavior in countless other cases.

As Judge Friendly once remarked, "the opportunity for doing equity is considerably better than it will be later on."[21] In addition to federal law, the law of New York State also supports the franchisee's position.

The Second Department[22] has held that:

> The defendants are clearly attempting to terminate the plaintiffs' exclusive licensing agreement and, absent a preliminary injunction, there is no assurance that the plaintiffs will be able to stay in business pending trial. Such interference with an ongoing business, particularly one involving a unique product and an exclusive licensing and distribution arrangement, risks irreparable injury and is enjoinable (*see, e.g., Chrysler Realty Corp. v. Urban Investing Corp.*, 100 A.D.2d 921; *Roso-Lino*

> *Beverage Distribs. v. Coca Cola Bottling Co.*, 749 F.2d 124). In the absence of any proof that Carvel will be harmed by the granting of injunctive relief in order to maintain the status quo, the existence of disputed factual issues should not preclude the remedy (*see*, *Burmax Co. v. B & S Indus.*, 135 A.D.2d 599; *City Store Gates Mfg. Corp. v. United Steel Prods.*, 79 A.D.2d 671; *see also*, CPLR 6301; *Blake v. Biscardi*, 52 A.D.2d 834; *Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 70 A.D.2d 1021).[23]

In the Third Department,[24] a corporation entered into a written contract to provide radiology services to a hospital. The contract provided that either party could terminate the agreement as long as the action taken was not arbitrary or capricious in nature. The hospital terminated the agreement in order to reduce the operating expenses of the radiology department, which had operated at a loss. The corporation sought a preliminary injunction requiring the hospital to reinstate the corporation pending the trial of the underlying breach of contract action. The trial court denied preliminary injunctive relief, but the court reversed. The court held that the moving party had to demonstrate the likelihood of ultimate success on the merits; irreparable injury absent granting of the preliminary injunction; and a balancing of equities. The corporation made a *prima facie* showing that the hospital's action could have been seen as arbitrary or capricious, and disruption of the corporation's practice would have resulted in the loss of good will and patient referrals, which was impossible to ascertain.[25]

**The Eighth Circuit has held that "where the status quo is a condition not of rest, but of action, and the condition of rest will cause irreparable harm, a mandatory preliminary injunction is proper."**

The Appellate Division reversed the order of the trial court that denied the corporation's motion for preliminary injunctive relief. The court granted a preliminary injunction directing the hospital to reinstate the corporation pending the underlying action.

Therefore, both the Second and Third Departments have stated that the injunctive relief in a situation similar to that of plaintiffs should be granted.

The Supreme Court, New York County,[26] held:

> The claim of irreparable injury is met with a glib response that money damages would make petitioner whole if the License Agreement has been wrongfully terminated. *This ignores the real threat that termination poses to the continued existence of Innomed* whose only asset is the valuable sublicense. Furthermore, Innomed has a valuable marketing agreement with Pfizer, Inc., that would be defeated. This agreement generates substantial revenues from which royalties on the plastic comb are supposed to be paid to Comb Associates. *Besides, the calculation of petitioner's damages if the license passes to another is an exercise in speculation.* It is true that part of these damages will be measured by the actual sales of the new licensee. But, if those sales could be greater had the license not been terminated, petitioner would be entitled to a higher sum incapable of measurement. *In any event, the possibility that money damages may be adequate does not prevent injunctive relief.*[27]

As a fallback position, a franchisor will attempt to have a bond imposed upon the franchisee. This can be quite devastating to the franchisee if it cannot afford the bond fee. The franchisee will submit that the court should grant the franchisee's request for injunctive relief without requiring the franchisee to post a bond.[28]

In relevant part, the rule states that

> [n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.[29]

The franchisee will state that the franchisor has only benefited financially from the plaintiffs' operations of their franchises. In addition, the clear trend is that since the plaintiffs' sales have been increasing, the benefit to the defendant shall only increase.

The language of Rule 65(c) has been held to give the court "[w]ide discretion to set the amount of a bond, and even to dispense with the bond requirement 'where there has been no proof of likelihood of harm.'"[30]

The franchisee's final argument will be that the franchisor will continue to profit from the franchisee's efforts. The franchisee will emphasize that the posting of a bond will be a significant financial hardship for the franchisee, which it should not be required to endure.

In conclusion, the franchisee will state that based upon the irreparable harm that the franchisee will have and the lack of harm the franchisor will have if the court grants the requested injunctive relief, the injunctive relief requested by the franchisee should be granted. In addition, the franchisee will state that the requested injunctive relief must be granted to preserve the *status quo ante*. Finally, the franchisee will state that should the injunctive relief not be granted, it will be impossible to properly compensate plaintiffs at the successful conclusion of the trial.

For the reasons described here, in many cases the injunctive relief requested by the franchisee should be granted.

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1. *Honig v. Doe*, 484 U.S. 305, 328 (1988).
2. *Two Wheel Corp. v. American Honda Corp.*, 506 F. Supp. 806 (E.D.N.Y.), *aff'd*, 633 F.2d 206 (2d Cir. 1980).
3. *Lepore v. New York News, Inc.*, 365 F. Supp. 1387 (S.D.N.Y. 1973).
4. *Milsen Co. v. Southland Co.*, 454 F.2d 363, 366 (7th Cir. 1971). *See Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970); *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y.), *aff'd*, 417 F.2d 621 (2d Cir. 1969) (emphasis added); *see also Lepore*, 365 F. Supp. at 1389.
5. *Laguardia Assocs. v. Holiday Hospitality Franchising, Inc.*, 92 F. Supp. 2d 119 (E.D.N.Y. 2000).
6. *Id.* at 131.
7. *Progressive Restaurant Sys., Inc. v. Wendy's Int'l, Inc.*, 1990 U.S. Dist. LEXIS 9289, 17 Fed. R. Serv. 3d (Callaghan) 786 (N.D.N.Y. 1990).
8. *Holford USA v. Cherokee, Inc.*, 864 F. Supp. 364, 374 (S.D.N.Y. 1994).
9. *Id.* at 374.
10. *Hughes Network Sys. v. Interdigital Communications Corp.*, 17 F.3d 691 (4th Cir. 1994).
11. *Id.* at 691.
12. *Id.* at 699 (emphasis added).
13. *Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 685 F. Supp. 1172 (D. Kan. 1988).
14. *Id.* at 1181.
15. *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984).
16. *Quantum Corporate Funding, Ltd. v. Assist You Home Health Care Servs. of Va., L.L.C.*, 144 F. Supp. 2d 241 (S.D.N.Y. 2001).
17. *Id.* at 248 (emphasis added).
18. *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430 (2d Cir. 1993).
19. *Id.* at 433.
20. *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985) (emphasis added).
21. *Electronic Specialty Co. v. Int'l Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969).
22. *U.S. Ice Cream Corp. v. Carvel Corp.*, 136 A.D.2d 626, 523 N.Y.S.2d 869 (2d Dep't 1988).
23. *Id.* at 628.
24. *Wasilkowski, v. Amsterdam Mem'l Hosp.*, 92 A.D.2d 1016, 461 N.Y.S.2d 451 (3d Dep't 1983).
25. *Id.* at 1016.
26. *Saferstein v. Wendy*, 137 Misc. 2d 1032, 523 N.Y.S.2d 725 (Sup. Ct., N.Y. Co. 1987).
27. *Id.* at 1035–36 (emphasis added).
28. Federal Rules of Civil Procedure 65(c).
29. *Id.*
30. *Doctor's Assocs. v. Distajo*, 107 F.3d 126, 136 (2d Cir. 1997) (quoting *Doctor's Assocs. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996)); *see Clarkson Co. v. Shaheen*, 544 F.2d 624, 632 (2d Cir. 1976).

***Trust Glossary***

# Trusts Provide Variety of Options To Manage and Preserve Assets

BY MICHAEL M. MARIANI

Trusts provide numerous benefits as a way for individuals to provide for management of their assets during their lifetimes and after death, but the frequent use of acronyms to identify different types of trusts causes confusion that discourages many clients from exploring appropriate options.

The glossary that follows identifies the most common types of trusts and their key features.

All share the common bond that a trust, in its most basic sense, is an arrangement where an individual (the "grantor") transfers assets to a newly created legal entity that is managed by a "trustee," which can be a bank, a trust company, a trusted friend or family member, or even the grantor in some circumstances.

This arrangement is governed by a document (a "trust agreement") created by the grantor during lifetime. Depending on the nature, purpose and duration of this arrangement, the trust may be revocable (changeable) or irrevocable (not changeable). A trust can also be created under an individual's will (testamentary trust) to take effect after that individual's death.

**Credit Shelter Trust** – Also known as a "bypass trust" or a "unified credit trust," this trust is typically created under a will or revocable trust agreement and is funded after death with an amount equal to a testator's or grantor's unused "applicable exclusion amount," the maximum amount insulated from federal estate taxes at an individual's death. Due to the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001, the applicable exclusion amount rose from $675,000 in 2001 to $1,000,000 in 2002 and 2003, and is gradually increased to $3,500,000 in 2009.

A credit shelter trust generally reduces, and may even eliminate, the federal estate taxes ultimately due on the estate of a married couple. Although the terms of this trust can vary, most credit shelter trusts benefit a surviving spouse for life; other individuals, such as the children, may also benefit. At the surviving spouse's later death, the trust's assets can pass outright or in trust to the children or other designated individuals free of federal estate taxes.

***Crummey*[1] Trust** – An irrevocable trust established for the benefit of one or more individuals, it is typically created to act as a vehicle to receive and retain annual tax-free gifts in trust. Normally, a gift in trust is not a gift of a present interest and does not qualify for the annual $11,000 gift tax exclusion because the beneficiary does not have the immediate use of the property. To avoid this restriction, a *Crummey* trust gives the beneficiary a current right to withdraw the money contributed to the trust, not to exceed $11,000, called a "*Crummey* withdrawal power," during a limited period of time (typically 30 or 60 days). If, after receiving formal notice, the beneficiary fails to withdraw the property during the specified period (and a withdrawal usually does not occur), the gifted property becomes part of the trust assets and is administered with the other property in accordance with the provisions of the trust agreement.

Most irrevocable life insurance trusts are *Crummey* trusts. This planning technique is also an alternative to a 2503(c) minor's trust when making gifts to minors.

**Dynasty Trust** – Also known as a "perpetual trust," this irrevocable trust is typically created by a grantor during lifetime for the benefit of the grantor's children, grandchildren and more remote descendants. This trust is generally funded with an amount up to the grantor's maximum available generation-skipping transfer (GST) tax exemption ($1,100,000 for 2002 and $1,120,000 for 2003). A dynasty trust is normally created to last for a term that will not violate a particular state's "rule against perpetuities" (the maximum trust term permitted under state law), which is equivalent to a period of

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21 years beyond the lives of designated individuals living at the time the trust is created.

A number of states, including Alaska, Delaware, Illinois, New Jersey and South Dakota, have abolished laws relating to the rule against perpetuities, making it attractive to establish a dynasty trust in those jurisdictions. If properly drafted and properly administered, a dynasty trust can last hundreds of years, providing a vehicle to pass assets from one generation to the next, free of estate tax, gift tax and GST tax.

***A trust, in its most basic sense, is an arrangement where an individual (the "grantor") transfers assets to a newly created legal entity that is managed by a "trustee."***

**Generation-skipping Transfer Tax Exempt Trust (GST Exempt Trust)** – An irrevocable trust, such as a dynasty trust, to which all or a portion of a grantor's unused generation-skipping transfer tax (GST tax) exemption has been allocated. The exemption represents the amount of assets a grantor can insulate from GST tax. Subject to several exceptions, the GST tax is imposed whenever there is a transfer to a "skip" person – an individual who is two or more generations below the grantor, such as a grandchild or great-grandchild. A skip person can also be a non-family member, if that individual is more than 372 years younger than the grantor.

The GST tax is in addition to any estate or gift tax owed on a transfer. In 2003, each individual is allowed a lifetime GST tax exemption of $1,120,000, rising from $1,100,000 in 2002. In 2004, the lifetime GST tax exemption increases to $1,500,000 and gradually increases to $3,500,000 in 2009. A GST exempt trust is generally created to use an individual's GST tax exemption, thereby insulating those trust assets from GST taxes and allowing them to pass to future generations, free of any GST tax. Generation skipping transfers that exceed an individual's GST tax exemption are taxed at the highest federal estate and gift tax rates, which are currently 49% and gradually decrease to 45% in 2007.

**Generation-skipping Transfer Tax Non-exempt Trust (GST Non-exempt Trust)** – An irrevocable trust as to which no portion of a grantor's unused generation skipping transfer tax exemption has been allocated.

**Grantor Retained Annuity Trust (GRAT)** – An irrevocable trust into which the grantor transfers assets and retains the right to receive, at least annually, payment of a fixed dollar amount (the annuity) for a specified term of years (GRAT term). At the end of the GRAT term, the trust's remaining assets (including appreciation thereon) pass to designated beneficiaries, generally members of the grantor's family (remainderpersons).

A transfer to a GRAT constitutes a taxable gift if the value of the grantor's retained right to receive the annuity is less than the value of the transferred property. If the grantor dies during the GRAT term, some part or all of the remaining trust assets will be includable in the grantor's estate for estate tax purposes. However, if the grantor survives the GRAT term, the assets remaining at the end of the GRAT term pass to the remainderpersons free of any further gift tax.

***Inter Vivos* Trust** – A trust created during a grantor's lifetime. Depending upon the grantor's wishes, this trust can be revocable or irrevocable. It is to be distinguished from a testamentary trust, which is created under a will and becomes effective and irrevocable after an individual's death.

**Irrevocable Trust** – A trust that cannot be revoked or amended by a grantor during lifetime or at death. It is distinguished from a revocable trust, which can be revoked or changed during the grantor's lifetime.

**Irrevocable Life Insurance Trust (ILIT)** – An irrevocable trust created by an individual (grantor-insured) to remove life insurance proceeds from the grantor-insured's estate for estate tax purposes. This technique uses the trust as the owner and beneficiary of the life insurance policies. This trust can be funded either by transferring an existing policy to the trust or by having the trust purchase a new policy on the grantor-insured's life. If existing insurance is transferred to the trust, the grantor must live for three years for the proceeds to be removed from the estate for estate tax purposes.

**Qualified Domestic Trust (QDOT)** – A trust created for the benefit of a surviving spouse who is not a U.S. citizen, which can qualify for the federal estate tax marital deduction. In general, property passing from a decedent to a surviving spouse who is not a citizen of the United States does not qualify for the marital deduction unless the property is distributed to a QDOT. Similar to a QTIP trust (see below), the QDOT must provide that the surviving spouse is entitled to receive all income from the trust, payable at least annually. However, the QDOT is subject to a number of stringent requirements. For example, the trust must have at least one U.S. trustee who is a U.S. citizen or domestic corporation. Similarly, if trust principal is distributed to the non-citizen spouse, the U.S. trustee is required to withhold funds equal to an estate tax attributable to the principal distributed.

Although exceptions are made for principal distributions due to hardship, the estate tax is determined at the highest rate applicable to the deceased spouse's estate.

**Qualified Personal Residence Trust (QPRT)** – An irrevocable trust into which a grantor transfers a personal residence and reserves the right to occupy the residence, without payment of rent, for a specified term of years (QPRT term). When the QPRT term ends, the residence passes to designated beneficiaries, usually the grantor's children or other family members, either outright or in further trust. The grantor may continue to reside in the residence when the QPRT term ends but the grantor must pay fair market value rent to avoid the inclusion of the residence in his or her estate for estate tax purposes.

The major advantage of this technique, if the grantor survives the QPRT term, is the grantor's ability to transfer a personal residence to family members at the future date (when the QPRT term ends) using the present value of the residence for gift tax purposes reduced by the actuarial value of the grantor's retained right to occupy the residence during the QPRT term. If the residence appreciates in value during the QPRT term, that appreciation will pass to the family members free of estate and gift tax. If the grantor dies during the QPRT term, the entire value of the residence will be includable in the grantor's estate for estate tax purposes.

If specific statutory requirements are met, a vacation home can also qualify for this planning technique.

**Qualified Terminable Interest Property Trust (QTIP Trust)** – A trust created for the benefit of a surviving spouse that qualifies for the federal estate tax marital deduction so that no estate tax is payable on the assets passing to that trust. A QTIP trust must pay the surviving spouse all income from the assets at least annually, and no other person can have a present interest in the assets during the surviving spouse's lifetime. In addition, to the extent that the trust's assets qualify for the marital deduction, those assets are includable in the surviving spouse's estate for federal estate tax purposes at the spouse's later death.

**Revocable Trust** – Also known as a "living trust," this is a trust created by a grantor to manage his or her assets during lifetime. The grantor retains the right to change or alter the terms of the trust, including the right to completely revoke the trust. The trust becomes irrevocable and unamendable at the grantor's death. One of the often-cited benefits of a fully funded revocable trust is the avoidance of probate and its attendant delay in the management of estate assets. However, the primary benefit is that the trust provides a pre-arranged mechanism to assure the continued management and preservation of assets if an individual becomes disabled, and its provisions then simplify asset management at death. The trust can also set forth all of the dispositive provisions of the grantor's estate plan.

Generally speaking, a revocable trust does not save the grantor income taxes during lifetime; nor will it save estate taxes at the grantor's death.

**Supplemental Needs Trust (SNT)** – Also known as a "special needs trust," this trust is created for the benefit of a disabled person to supplement but not supplant or diminish governmental benefits such as Supplemental Security Income (SSI) or Medicaid, to which the disabled person may be entitled. A SNT is typically created by a parent or grandparent for the benefit of a disabled child or grandchild to provide additional funds for the disabled individual in areas not covered by governmental benefits, without jeopardizing or reducing those benefits. A SNT may also consist of proceeds of a personal injury award.

**Testamentary Trust** – A trust created under a will. It becomes effective and irrevocable after an individual dies and his or her will is admitted to probate.

**2503(c) Minor's Trust** – An irrevocable trust established for the benefit of a minor to receive and retain annual tax-free gifts in trust until the child reaches age 21. Normally, a gift in trust is not a gift of a present interest and does not qualify for the annual $11,000 gift tax exclusion because the beneficiary does not have the immediate use of the assets. However, Internal Revenue Code § 2503(c) creates an exception to this rule and specifically authorizes gifts in trust for a minor child's benefit that will qualify for the annual gift tax exclusion, if three conditions are met. The trust instrument must provide that (1) the principal and income from the trust may be expended for the child's benefit at all times; (2) all undistributed principal and income must be distributed to the child when the child reaches age 21; and (3) if the child dies before reaching age 21, the principal and income will be included in the child's estate.

If properly structured, the trust can continue for the child's benefit after he or she reaches age 21, if the child does not withdraw the property from the trust at that time.

## CHARITABLE TRUSTS

**Charitable Lead Annuity Trust (CLAT)** – A trust that is required to distribute a specific dollar amount to a qualified charity. The annuity amount must be paid out periodically, at least annually, for a specified number of years or for the life or lives of individuals. At the end of the trust's term, the remainder interest must be distributed to one or more non-charitable beneficiaries. A CLAT can be created during a donor's lifetime or at death.

**Charitable Lead Unitrust (CLUT)** – A trust that is required to distribute a sum equal to a fixed percent of the

net fair market value of the trust's assets as valued annually to a qualified charity. The unitrust amount must be paid out periodically, at least annually, for a specified number of years or for the life or lives of individuals; at the end of the trust's term, the remainder interest must be distributed to one or more non-charitable beneficiaries. A CLUT can be created during a donor's lifetime or at death.

**Charitable Remainder Annuity Trust (CRAT)** – A trust that is required to distribute a fixed sum of at least 5% of the initial value of the trust's assets to a non-charitable beneficiary. The annuity amount must be paid out periodically, at least annually, for a specified number of years or for the life or lives of individuals; at the end of the trust's term, the remainder interest must be distributed to a qualified charity. No additions to the trust's principal may be made after the trust is established. A CRAT can be created during a donor's lifetime or at death.

**Charitable Remainder Unitrust (CRUT)** – A trust that is required to distribute a fixed sum of at least 5% of the net fair market value of the trust's assets as valued annually to a non-charitable beneficiary. The unitrust amount must be paid out periodically, at least annually; at the end of the trust's term, the remainder interest must be distributed to a qualified charity. Additions to the trust's principal may be made after the trust is established. A CRUT can be created during a donor's lifetime or at death.

1. Named after *Crummey v. Comm'r*, 397 F.2d 82 (9th Cir. 1968), in which the provisions of such a trust survived a court challenge.

***Web Research Update***

# New Web Sites Add to Research Resources Available Online

BY WILLIAM H. MANZ

Constant change is a given in the area of Internet legal research. Much of this involves changes in Web addresses, producing annoyance and frustration, when attempted visits to Web sites result in encounters with dead links. Even when Web addresses have not been changed, sites may be redesigned, sometimes making what was easily accessible, difficult to locate, or worse, causing useful content to suddenly vanish.

Conversely, new developments can involve useful enhancements to existing sites or, even better, the addition of new potentially useful Web sites. Four such sites relating to New York Internet-based research appeared during 2002. They include those posted by the Historical Society for the Courts of the State of New York,[1] the Law Revision Commission, the New York State Bar Association, and the Center for New York City Law.

The Historical Society for the Courts of the State of New York site, which appeared online in September 2002, has a wide variety of content. Of particular interest to the legal researcher are 55 Court of Appeals cases taken from "150 Years of Leading Decisions" by Stewart Sterk,[2] providing for the first time free online access to the full text of such notable Cardozo classics as *MacPherson v. Buick Motor Co.*,[3] *Palsgraf v. Long Island Railroad Co.*,[4] and *Wood v. Lucy, Lady Duff-Gordon*,[5] as well as later well-known decisions including *Babcock v. Jackson*,[6] *People v. Goetz*,[7] and *O'Brien v. O'Brien*.[8] Also included are the early New York State constitutions, as reprinted in Charles Z. Lincoln's *The Constitutional History of New York from the Beginning of the Colonial Period to 1905*.[9]

Other content on the society's site includes the complete text of the book *There Shall Be a Court of Appeals*,[10] individual histories of each of the four Appellate Divisions, and *Duely & Constantly Kept: A History of the New York Supreme Court, 1691–1847*. An entire Web page is dedicated to Benjamin Cardozo, together with color portraits and biographical sketches of leading members of the New York Bar. There are also color photos, illustrations, and brief histories of New York courthouses built from the 19th century to the 1990s. Further expansion of the site's contents is being planned.

The second new addition is the Web site of the revived New York State Law Revision Commission,[11] which was posted in early 2002. The commission, which was established in 1934, had lacked a staff between 1995 and 1999 due to budgetary considerations, but it resumed its functions in 2000. Its reports from both 2000 and 2001 are posted at the site, along with the text of commission-sponsored bills. New reports will be added as they are published, but no retrospective expansion is planned. For older commission reports, researchers will still have to rely on the traditional print sources, including the old legislative document series and the reprints in *McKinney's Session Laws*.

The New York State Bar Association launched its new Web site in May 2002. Available through the site are valuable information and links for members and nonmembers alike, although the bulk of the site is reserved for members only.

Finally, there is the Web site of The Center for New York City Law at New York Law School, which came online in August 2002. It provides a searchable database of more than 5,000 New York City administrative cases, including decisions from the Conflict of Interest Board, Loft Board, Office of Administrative Trials and Hearings (OATH), and the Office of Collective Bargaining. This represents a considerable improvement, because the full texts of these decisions were not previously available at the individual agency Web sites, and the Conflict of Interest Board decisions were available only on LEXIS and Westlaw.[12] Further expansion of the site's database is planned, beginning with the decisions of the New York

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City Tax Tribunal. Also available is the table of contents of the latest issue of the center's bi-monthly newsletter, *City Law*, and the full text of recent issues of its bi-weekly publication, *City Regs*, which contains summaries of "every current proposed or adopted New York City rule and regulation."

*Addresses of Internet Sites*

Materials noted in this article, and those mentioned in "Changes Expand and Contract Research Options in New York," published in the February 2002 issue of the *Journal*, may currently be found at the following Internet addresses.

## New York State Courts

### Opinions

**Cornell Legal Info. Inst. (LII)** http://www.law.cornell.edu/ny/ctap (Ct. App. since 1990).

**Ct. of Appeals** http://www.courts.state.ny.us/ctapps/decision.htm (Ct. App. since July 2000).

**Ct. of Claims** http://www.nyscourtofclaims.state.ny.us/decision.htm (since Mar. 2000).

**Findlaw.com** http://www.findlaw.com (Ct. App. since 1992).

**Historical Society of the Courts of the State of New York** http://www.courts.state.ny.us/history/Cases.htm (55 leading Ct. App. cases).

**Law Reporting Bureau/West Group Slip Opinion Service** http://www.courts.state.ny.us/reporter/Decisions.htm
http://nyslip.westgroup.com (recent decisions only, except those never published, which remain permanently).

**LexisOne** http://www.lexisone.com (last five years) (requires registration).

**N.Y. St. Bar Ass'n** http://www.nysba.org (last three years, available to NYSBA members only; more available for members through link to Loislaw.com).

**Unified Ct. Sys.** http://www.courts.state.ny.us/decisiontc.htm (has many links to lower court sites).

### Court Rules and Forms

**Unified Ct. Sys.** http://www.courts.state.ny.us/ucsrules.html (full rules for N.Y. State courts. Local rules may be available at individual court sites available through links to individual court sites. *See* list of links at http://www.courts.state.ny.us/ctpages.html. Forms at http://www.courts.state.ny.us/forms3.html. Forms may also be found at individual court Web sites.

**Unified Ct. Sys. Library and Info. Network (LION)** http://207.29.128.12/ipac-i/ipac (online catalog of App. Div. records and briefs on microfiche. Record information only. No full text).

## New York Federal Courts

**Second Circuit** http://csmail.law.pace.edu/lawlib/legal/us-legal/judiciary/second-circuit.html
http:// www.nysba.org (for members, through Attorney Resources and legal research links).
http://www.tourolaw.edu/2ndcircuit
(both since Sept. 1995)
http://www.ca2.uscourts.gov (since 2001).

**E.D.N.Y.** http://www.nyed.uscourts.gov/doi/doi.html ("decisions of interest" since 1999; local rules).

**N.D.N.Y.** http://www.nynd.uscourts.gov/CourtWeb.htm (recent decisions of participating judges; local rules).

**S.D.N.Y.** http://www.nysd.uscourts.gov/rulings.htm (recent decisions of participating judges; local rules).

**W.D.N.Y.** http://www.nywd.uscourts.gov/decision/decision.php (decisions since 2000; local rules).

**E.D.N.Y. Bankr.** http://www.nyeb.uscourts.gov/rules.htm (local rules).

**S.D.N.Y. Bankr.** http://www.nysb.uscourts.gov/local_rules_html/index.html.

**N.D.N.Y. Bankr.** http://www.nynb.uscourts.gov/usbc/albdec/albdecmenu.html (Albany decisions since 2002); http://www.nynb.uscourts.gov/usbc/utidec/utimenu.html (Utica decisions since Oct. 2000; local rules).

**W.D.N.Y. Bankr.** http://www.nywb.uscourts.gov/ (recent decisions; local rules).

## Legislative Materials

**Legislative Bill Drafting Comm'n** http://public.leginfo.state.ny.us/menuf.cgi (bills/bill status, laws, sponsors' memoranda, veto and approval messages for current Legislature).

**N.Y. St. Assembly** http://assembly.state.ny.us (bills/bill status, laws, and sponsors' memoranda (current Legislature; reports since 1998).

**N.Y. St. Bar Ass'n** http://www.nysba.org (Use "Attorney Resources" and "Legislation" links) (Association's legislative reports/proposals).

**N.Y. St. Law Revision Comm'n** http://www.lawrevision.state.ny.us (reports/Commission bills since 2001).

**N.Y. St. Library** http://www.nysl.nysed.gov/edocs/education/chcktext.htm (Assembly journals (1994-1998, governors' memoranda, and selected reports and hearings since the late 1990s). (Accessed through "Checklist of Official Publications" page).

**N.Y. St. Senate** http://www.senate.state.ny.us (bills/bill status, laws for current Legislature through link to Legislative Bill Drafting Commission site; reports since 2000).

## Constitution, Codes, and Regulations

**Governor's Off. of Regulatory Reform** http://www.gorr.state.ny.us (links to agency sites posting selected regs.).

**Hist. Soc'y of the Cts. of the St. of N.Y.** http://www.courts.state.ny.us/history (historical constitutions only).

**Legislative Bill Drafting Comm'n** http://public.leginfo.state.ny.us/menuf.cgi (Const., Consol. Laws, and Unconsol. Laws).

**N.Y. St. Assembly** http://assembly.state.ny.us

**Yale Univ. Avalon Project** http://www.yale.edu/lawweb/avalon/states/ny01.htm (1777 Const.).

## Administrative Rulings, Decisions, Orders, Etc.

**Adirondack Park Agency** http://www.dec.state.ny.us/website/ohms/decis/indexapa.htm (decisions since mid-1992).

**Attorney Gen.** http://www.oag.state.ny.us (opinions since 1995).

**Comptroller** http://www.osc.state.ny.us/legal (opinions since 1988).

**Dept. of Banking** http://www.banking.state.ny.us/lo.htm (opinon letters since Oct. 1998).

**Bd. of Elections** http://www.elections.state.ny.us/law/law.htm (formal and advisory opinions).

**Comm. on Open Gov.** http://www.dos.state.ny.us/coog/oindex.html (Open Meetings Law opinions since 1998); http://www.dos.state.ny.us/coog/findex.html (FOIA opinions since 1993).

**Dept. of Educ.** http://www.counsel.nysed.gov/Decisions/home.html (Commissioner of Educ. decisions since July 1991).

**Dept. of Env't Cons.** http://www.dec.state.ny.us/website/ohms/decis/index.htm (decisions & orders since mid-1992).

**Dept. of Health** http://www.health.state.ny.us/nysdoh/opmc/monthly.htm (monthly Prof. Med. Conduct Decs. and Orders since 1992) (use "Physician Search" button).

**Dept. of State** http://www.dos.state.ny.us/cnsl/counsel.html (memos on cemetery regulation, corporations, local government, licensing services, rule making, and subdivided lands).

**Dept. of Tax and Fin.** http://www.tax.state.ny.us/pubs_and_bulls/Advisory_Opinions/AO_tax_types.htm (advisory opinions since 1993).

**Freshwater Wetlands App. Bd.** http://www.dec.state.ny.us/website/ohms/decis/indexfwb.htm (decisions and orders since mid-1992).

**Ins. Dept.** http://www.ins.state.ny.us (Inf. Ops. since 2000; privacy ops. since 2000; privacy circular letters since 2001; index of circular letters since 1924).

**Off. of St. Rev.** http://web1.nysed.gov/sro/dec.htm (St. Educ. Dept. Rev. Officer's decisions since 1990).

**PERB** http://www.perb.state.ny.us/Dec.asp (summaries of recent decisions only).

**Pub. Serv. Comm'n** http://www.dps.state.ny.us/doc_search_form.html (orders and opinions since Mar. 1995) (use "Orders and Opinions" link on pull-down menu).

**Temp. St. Comm'n on Lobbying** http://www.nylobby.state.ny.us/opino/adviopin.html (advisory opinions since 1978).

## Ethics/Professional Responsibility Opinions

**Ass'n of the Bar of the City of N.Y.** http://www.abcny.org (since 1986) (includes an opinion index) (use "Lawyer Services" link to reach "Ethics Opinions" listing).

**Ethics Comm'n** http://www.dos.state.ny.us/ethc/ao.html (since 1988).

**Nassau County Bar Ass'n** http://www.nassaubar.org/ethic_opinions_archive.cfm (begins with Op. 93-3, but comprehensive coverage starts with Op. 96-1).

**N.Y. County Lawyers Ass'n** http://www.nycla.org/main.htm (summaries since Oct. 1970, full text since July 1996).

**N.Y. St. Bar Ass'n** http://www.nysba.org (since Sept. 1991) (use "Attorney Resources" and "Ethics Opinions" links).

**Suffolk County Bar Ass'n** http://www.scba.org (use "Ethics Opinions" link).

## Municipal Materials

**City of Yonkers** http://www.cityofyonkers.com (Charter, Code, and Zoning Ordinance).

**General Code Publishers** http://www.generalcode.com/webcode2.html (very large number of village, town, county, and city codes).

**Legislative Bill Drafting Comm'n** http://public.leginfo.state.ny.us/menuf.cgi (NYC Charter and Admin. Code available as part of "Laws of New York" database).

**Municipal Code Publishers** http://www.municode.com (Codes of Tonawanda and Rome).

**NYC Bd. of Standards and App.** http://www.citylaw.org/decisions/index.phtml# (decisions since 1989).

**NYC Charter Revision Comm'n** http://www.nyc.gov/html/charter/home.html (docs. from 2001-2002).

**NYC Council** http://www.council.nyc.ny.us (intros/local laws since 1990; resolutions for 2002; selected reports since 1990).

**NYC Conflict of Interest Bd.** http://www.citylaw.org/decisions/index.phtml# (decisions since 1968).

**NYC Dept. of Bldgs.** http://www.nyc.gov/html/dob/html/ppn.html (policy and procedure notices since 1987). Building Code at http://www.nyc.gov/html/dob/html/code.html.

**NYC Dept. of City Planning** http://www.ci.nyc.ny.us/html/dcp/html/zone/zonetext.html (Zoning Resolution).

**NYC Dept. of Fin.** http://www.nyc.gov/html/dof/html/redacted.html (redacted letter rulings since 1999).

**NYC Div. of Tax App.** http://www.nyc.gov/html/dof/html/tribunal.html (decisions since 1998).

**NYC Housing Ct.** http://www.tenant.net (decision summaries since 1996).

**NYC Loft Bd.** http://www.citylaw.org/decisions/index.phtml# (decisions since 1996).

**NYC Off. of Admin. Trials and Hearings (OATH)** http://www.citylaw.org/decisions/index.phtml# (decisions since 1990).

**NYC Off. of Collective Bargaining** http://www.citylaw.org/decisions/index.phtml# (decisions since 1968).

**Cornell Univ. Sch. of Industrial and Labor Relations** http://www.ilr.cornell.edu/library/e_archive/default.html?page'home (decisions since 1969).

**NYC Rent Guidelines Bd.** http://www.housingnyc.com (apartment orders since 1969; hotel orders since 1971).

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1. For a discussion of the society, see Howard F. Angione, *Preserving a Heritage – Historical Society Will Collect Records of New York's Courts*, 74 N.Y. St. B.J. 8 (Sept. 2002).
2. These appeared in *There Shall Be a Court of Appeals* (1997).
3. 217 N.Y. 382, 111 N.E. 1050 (1916).
4. 248 N.Y. 339, 162 N.E. 99 (1928).
5. 222 N.Y. 88, 118 N.E. 214 (1917).
6. 12 N.Y.2d 473, 191 N.E.2d 279 (1963).
7. 68 N.Y.2d 96, 240 N.Y.S.2d 743 (1986).
8. 66 N.Y.2d 576, 498 N.Y.S.2d 743 (1985).
9. These include the constitutions of 1777, 1801, and 1846, as well as major amendments added in 1801 and 1846–1894.
10. Published in honor of the Court's 150th anniversary.
11. For a discussion of the past financial problems of the commission, see Gary Spencer, *Future of Law Revision Panel Still in Doubt: $90,000 Appropriation Will Pay 1 Lawyer, Rent*, N.Y.L.J., Aug. 7, 1995, at 1.
12. *See* William H. Manz, *Changes Expand and Contract Research Options in New York*, 74 N.Y. St. B.J. 40 (Feb. 2002).

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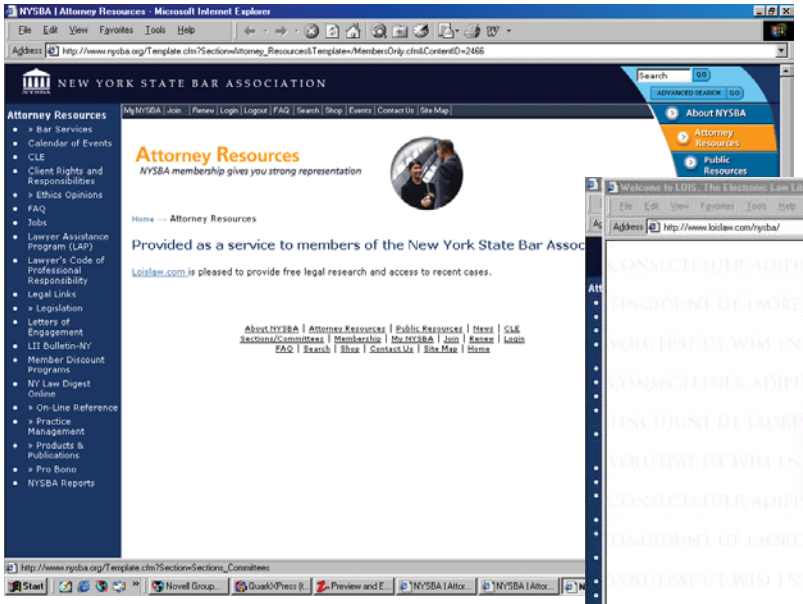


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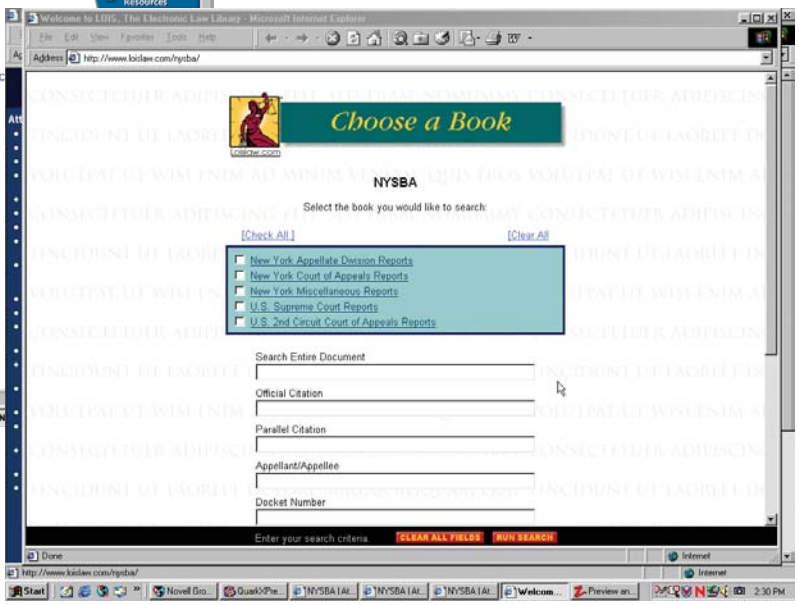


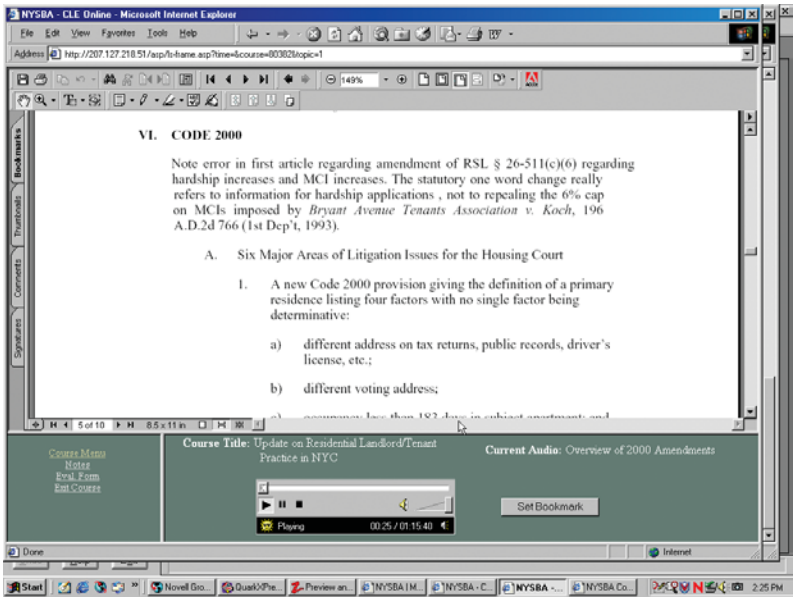


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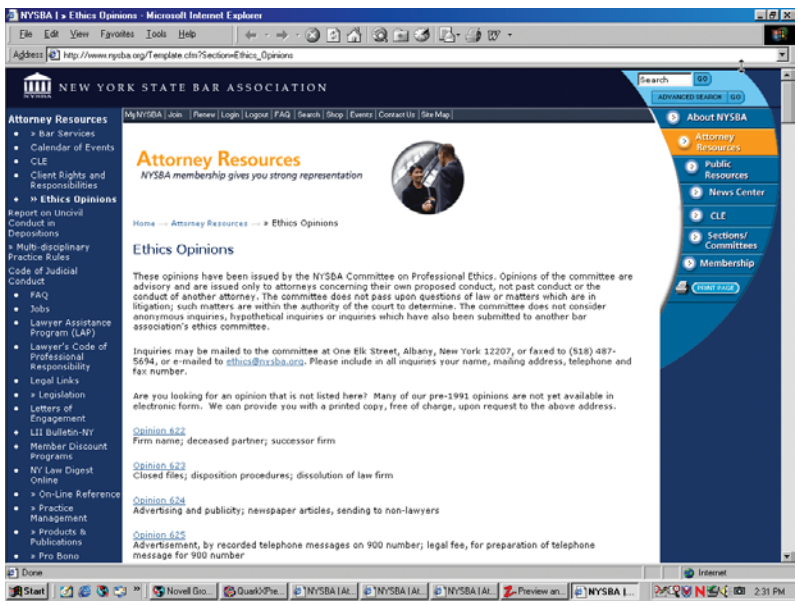


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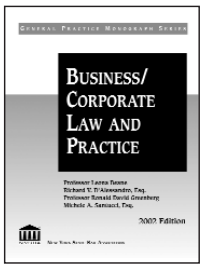


This monograph, organized into three parts, includes coverage of corporate and partnership law, buying and selling a small business and the tax implications of forming a corporation.

*2002 • PN: 40512*
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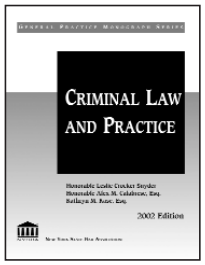
## Criminal Law and Practice




*Criminal Law and Practice* is a practical guide for attorneys representing clients charged with violations, misdemeanors or felonies. This monograph focuses on the types of offenses and crimes that the general practitioner is most likely to encounter.

*2002 • PN: 40642*
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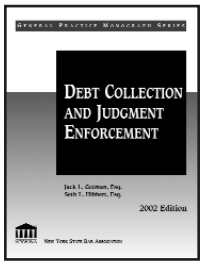
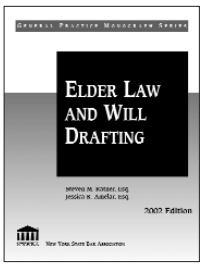
## Debt Collection and Judgment Enforcement




This latest edition offers guidance on the basics of debt collection from evaluating the claim and debtor, to demand upon the debtor and payment agreements, to alternatives to litigation.

*2002 • PN: 42382*
List Price: $50
**Mmbr. Price: $38**

## Elder Law and Will Drafting




The first part of *Elder Law and Will Drafting* provides an introduction to the scope and practice of elder law in New York state. This edition also includes a step-by-step overview of the drafting of a simple will—from the initial client interview to the will execution.

*2002 • PN: 40822*
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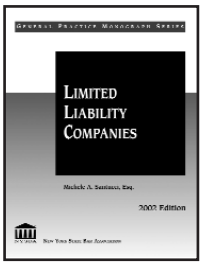
## Limited Liability Companies




This practical guide, written by Michele A. Santucci, enables the practitioner to navigate the Limited Liability Company Law with ease and confidence. Benefit from numerous forms, practice tips and appendixes.

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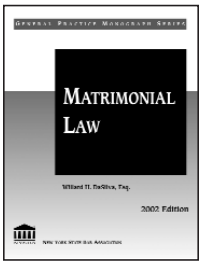
## Matrimonial Law




Written by Willard DaSilva, a leading matrimonial law practitioner, *Matrimonial Law* provides a step-by-step overview for the practitioner handling a basic matrimonial case. While the substantive law governing matrimonial actions is well covered, the emphasis is on the frequently encountered aspects of representing clients.

*2002 • PN: 41212*
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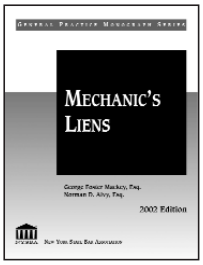
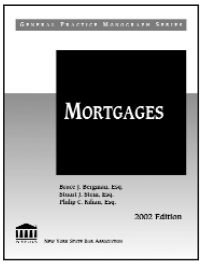
## Mechanic's Liens




*Mechanic's Liens*, written by George Foster Mackey and Norman Alvy, is an invaluable guide to what can be a volatile area of practice. The methods of preparing, filing and enforcing mechanic's liens on both private and public works construction are covered.

*2002 • PN: 40312*
List Price: $55
**Mmbr. Price: $45**

## Mortgages



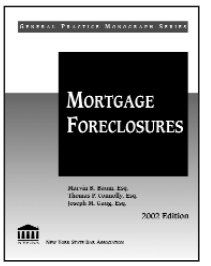

The authors of *Mortgages* provide a clause-by-clause analysis of the standard mortgage, introduce the recommended additional clauses most worthy of inclusion in a mortgage rider and provide a review of basic mortgage terms.

*2002 • PN: 41382*
List Price: $60
**Mmbr. Price: $50**

The titles included in the GENERAL PRACTICE MONOGRAPH SERIES are compiled from the most frequently consulted chapters in the *New York Lawyer's Deskbook* and the *New York Lawyer's Formbook*, a five-volume set that covers 25 areas of practice. The list price for all five volumes of the *Deskbook* and *Formbook* is $440.

# The Updated 2002 Editions

## Mortgage Foreclosures




This monograph guides the practitioner through the basics of a mortgage foreclosure proceeding. With its helpful practice guides and many useful forms, this is an invaluable resource.

*2002 • PN: 41412*
List Price: $50
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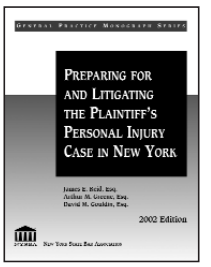
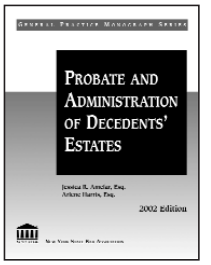
## Preparing for and Litigating the Plaintiff's Personal Injury Case in New York




This useful publication is a quick reference guide to areas likely to be encountered in the preparation and trial of a civil case in New York state. The book discusses preliminary considerations and also covers substantive law, liens, insurance law, pleadings, discovery and trial techniques.

*2002 • PN: 41912*
List Price: $65
**Mmbr. Price: $50**

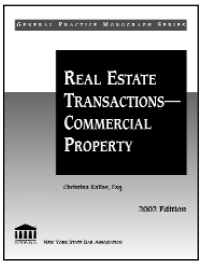
## Probate and Administration of Decedents' Estates




The authors, experienced trusts and estates practitioners, provide a step-by-step guide for handling a basic probate proceeding and for completing the appropriate tax-related forms.

*2002 • PN: 41962*
List Price: $60
**Mmbr. Price: $45**

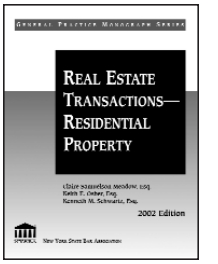
## Real Estate Transactions—Commercial Property




This latest edition provides an overview of the major issues an attorney needs to address in representing a commercial real estate client and suggests some practical approaches to solving problems that may arise in the context of commercial real estate transactions.

*2002 • PN: 40372*
List Price: $70
**Mmbr. Price: $55**

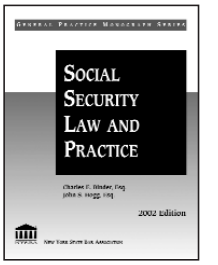
## Real Estate Transactions—Residential Property




This reference is a practical guide for attorneys representing residential purchasers or sellers. This invaluable monograph covers sales of resale homes, newly constructed homes, condominium units and cooperative apartments.

*2002 • PN: 42142*
List Price: $75
**Mmbr. Price: $62**

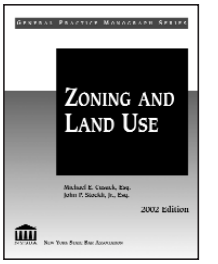
## Social Security Law and Practice




The Social Security Act is "among the most intricate ever drafted by Congress." This monograph offers valuable, practical advice on how to muddle through the enormous bureaucracy. With analysis of the statutes and regulations, the authors guide you through the various aspects of practice and procedure.

*2002 • PN: 42292*
List Price: $60
**Mmbr. Price: $45**

## Zoning and Land Use




This publication is devoted to practitioners who need to understand the general goals, framework and statutes relevant to zoning and land use law in New York State. It provides a broad discussion of zoning and land use in New York.

*2002 • PN: 42392*
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**POINT OF VIEW**

# Re-thinking Retirement

BY WHITNEY NORTH SEYMOUR JR.

*Life is short. It is up to you to make it sweet.*

Sadie Delaney at age 102

A few months ago, my wife and I went to a dinner party in honor of a friend's 70th birthday. Seated at our table was a college classmate I had not seen for many years. He used to head the litigation department at a major New York City law firm. Under the firm's partnership agreement, he had been forced to retire at 65, and he and his wife had moved to the Florida Keys, where he goes swimming every day. Both he and I are now in our late 70s. At 10 p.m. my wife reminded me that it was time to go home. "You've got to go to the office in the morning," she said. My classmate looked up in surprise. As we shook hands, he asked me if I still worked as a lawyer.

When I said "Yes," his response was pained: "How I envy you."

I have visited Florida on occasional trips over the years. I have seen the many manicured condominium communities behind chain-link fences with uniformed security guards, some of them with swimming pools and golf courses. The sight always gives me a chill. A self-imposed prison sentence.

At the 50th reunion of my law school class in 2000, I listened with sadness as talented lawyers – once so full of promise – talked about going shopping at the supermarket every day or so, and taking alumni group tours to St. Petersburg or the Greek islands. All I could think of was the colossal waste of years of experience and expensive education that could have been put to use to help real people with real problems, whom our system of justice has failed.

I "retired" 19 years ago from the Wall Street firm where I had worked for 30 years. Since then, I have spent full-time working every day in my own two-partner law office, representing real people; rarely charging a fee; and having the most exciting and enjoyable professional experience of my life.

Along the way, I learned by trial and error how to overcome the economic obstacles that make law so costly that ordinary people simply cannot afford to hire legal counsel. Our law firm often does not make money – neither do golfers – but the excitement, variety and challenge of this form of "retirement" beats any easy life in a retirement community where one can only look forward to boring oneself to death.

We are located in low-rent space in the old fur district of Manhattan, just south of Penn Station. The area is not elegant, but it is colorful. Our clients know right away that ours is not a "boutique" law practice, but a shirt-sleeves operation. However, we almost always have fresh flowers in a vase near the entrance, and we take time out for tea every day. There also are lots of interesting paintings and objects to look at around the office – including our library, which is made up mostly of history books, very few legal treatises.

Our part-time legal secretaries are the best in the business – fast, smart, and experienced. They turn out beautiful pleadings and briefs – which sometimes may be thinner on the law, but are stronger on the facts and always look like a million dollars. Our papers get out right on schedule – we never ask for adjournments, even when that means working nights and weekends to get things done.

It is amazing how much you can help people simply by writing a letter on a law firm letterhead. Our very first fee was two bottles of Irish whiskey from a local grocer after we helped him collect an overdue account from the estate of a deceased customer, just by writing a letter to the executor demanding an accounting.

My partner has found time to serve a two-year term as President of the New York County Lawyers' Association and to teach a course at New York Law School. I spend a lot of my time on non-profit activities, helping start-up groups get things accomplished, and providing them with free legal services.

We practice law on "first principles" – to borrow the phrase of the late U.S. Supreme Court Justice Robert H. Jackson, who practiced for many years as a small-town lawyer in Jamestown, N.Y. When we get into a new matter, we interview the client thoroughly until we know all the facts. Next, we go to the bar association library, spend several hours browsing through treatises until we find the legal theory that fits. Then we go to work drafting a complaint. If we are off-base, our adversary educates us soon enough with a motion to dismiss. We then make the necessary corrections in our legal theory and go for broke. While our first-impression legal theories may be shaky, we are always solid on our facts.

We never flinch from tough cases – indeed the tougher, the more enjoyable the challenge. Of course, we lose many of them. But the client knows we did our best, and they have had their day in court. We do not get fees in these cases, but we do get hand-written thank you letters.

We are generalists. We have learned that you do not need to specialize. Some of the legal fields which we have litigated include: civil rights law, class actions, consumer fraud, copyright infringement, derivative shareholders' suits, domestic relations law, ERISA law, FCC regulations, general business law, landlord-tenant, Lanham Act, Medicare regulations, SSI law, software piracy, and trust accountings.

In their book, *Having Our Say*, the two elderly Delaney sisters said that when they were children they learned from their minister father a family motto, which they had always followed: "Your job is to help somebody." Lawyers who apply that same precept to a small, low-overhead law practice, instead of playing golf every day, can find true happiness in their "retirement" years.

Here are the practical operating principles we have learned through our own hands-on experience at Landy & Seymour:

***Prerequisite*** You must have sufficient retirement income and/or savings to cover:

1. Family living expenses and taxes.

2. Office overhead and staff salaries (for a year or even two, if necessary).

## Operating Principles

1. Represent only individuals you like and respect. Limit commercial corporations.

2. Satisfy yourself that your client is in the right. You should believe strongly in the justness of his or her cause.

3. Never charge a fee for the initial interview with a prospective client; that will only screen out the most deserving cases that really need your help.

4. Prepare a retainer letter agreement immediately after your initial conference with the client, clearly spelling out fee arrangements. Have the client sign duplicate originals, one for you and one for the client.

5. Do not expect to charge fees directly to the client. This will give you an immense tactical advantage against "scorched earth" adversaries who think they can stop you in your tracks by increasing your client's legal costs.

6. If possible, plan litigation so you will be eligible for court-awarded fees (class action, EAJA, civil rights, qui tam, etc.) or so you can share in any recovery on a contingent-fee basis. You will need occasional infusions of cash flow to cover support staff salaries, disbursements and office expenses.

## Peter Zenger's Lawyer

In 1735, when journalist John Peter Zenger was prosecuted in the Colony of New York for libeling the Royal Governor, local counsel were disbarred for challenging the court's jurisdiction. Andrew Hamilton, Esq., was imported from Philadelphia to replace them. Hamilton successfully tried the case and won his client's acquittal from the trial jury, establishing the principle that truth is a complete defense to a charge of libel – a major landmark in the history of Freedom of the Press.

Hamilton was 80 years old at the time. He represented Zenger without fee. The author of the accompanying article urges modern-day lawyers to follow Hamilton's example.

7. Form a two-member partnership or make some other arrangements with another lawyer you respect so you will always have a colleague available to brainstorm and discuss legal and tactical questions.

8. Do not be afraid to base your legal theory on "first principles" of justice and fair play. Your adversary will educate you on adverse case precedents soon enough and you can amend accordingly. Do your legal research at bar association libraries; do not invest heavily in law books; use LOIS, not Westlaw.

9. In most cases you will be representing plaintiffs, and you should therefore adopt a plaintiff's mentality – *always* meet court deadlines; *never* request adjournments. Move your cases along as quickly as possible (this will still take forever!).

## Administrative Matters

1. Rent or borrow office space outside of your home, with minimum overhead, using phone answering system, fax and e-mail technologies. Keep costs down.

2. Arrange access to top-flight typists for pleadings, motions and briefs – or type them yourself.

3. Enlist your secretary, spouse or a family member to serve as office administrator and keep you current with payment of monthly bills for rent, telephones, FedEx, messengers, etc.

4. Keep complete daily time charges and records of disbursements, using one of the available computer software programs like *Time Slips* so you can prepare fee applications on short notice that are 100% accurate and self-explanatory. Record hourly charges at current market rates for lawyers in big firms with your level of experience.

5. If and when (if ever) you receive a substantial fee award from the court or in a settlement, reward yourself and your family with a vacation trip or a new car.

6. Share any good fortune with your staff by paying generous bonuses.

## Professional Pleasures

1. Contribute time and effort to your favorite bar association.

2. Find CLE teaching opportunities to interact with younger lawyers.

3. Make it a habit to work nights and weekends whenever necessary to keep on top of complex cases.

4. Take time for at least one real vacation each year.

5. Contribute work and ideas to non-profit and community organizations that can benefit from your efforts, especially those involving history and education-related programs.

6. Read history books and biographies to broaden your perspective, enrich your supply of anecdotes, and keep your mind alert.

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WHITNEY NORTH SEYMOUR JR. graduated from Yale Law School in 1950 and went to Simpson Thacher & Bartlett in New York City, from which he retired in 1983. He has also served as U.S. attorney for the Southern District of New York and in other public offices, and as president of the New York State Bar Association.

# Language Tips

By Gertrude Block

**Question:** If you haven't yet done so, perhaps you might be interested in discussing the contradictory meanings of the word *sanction*, both the verb and the noun. Consider this in the context of the current international situation: "While the United Nations has never *sanctioned* Iraq's build-up of weapons of mass destruction, it has imposed *sanctions* upon Iraq for that nation's refusal to allow weapons-inspectors."

**Answer:** New York City attorney Francis J. Serbaroli, who sent this comment, added, "Since I personally don't sanction confusion in the use of legal terms, perhaps you can advise your readers as to how to avoid confusion (and possible sanctions) in using these terms."

Mr. Serbaroli has done that job for me. As he noted, *sanction* (both the verb and the noun) have two contradictory – and equally correct – meanings. The noun, for example, can mean either "approval" or "penalty," as in:

• The sanction of violence should never be government policy. (*i.e.*, "approval")

• Official sanctions are being considered against Iraq. ( *i.e.*, "penalties")

The verb can mean "to authorize" or "to prohibit," although it is more often used to mean the former:

• The United States has never sanctioned the violation of civil rights. ("approved")

• Sanctioning nations for non-compliance with international law is common. ("penalizing")

Lawyers should be alert for words that have more than one meaning. And there are a number of such words in English. For example, *oversight* can mean "unintentional error" or "intentional watchful supervision." You may have failed to do something through oversight; or governmental agencies may lack proper oversight. Same word, opposite meanings.

The adverb *effectively* can mean either "in effect" or "efficiently," as in:

• The supervisor was effectively fired when his responsibilities were removed. ("in effect")

• The employee was rewarded because he had effectively completed the job. ("efficiently")

The adverb *ultimately* can mean either "at the end" or "at the start ":

• The runner ultimately arrived at her goal. ("at the end")

• The two words are ultimately cognates. ("at the start")

And the word *cite* can mean "commend," "point out," or "summon before a law court":

• The corporal was cited for his courage under fire. ("commended")

• He was cited as being a typical jurist. ("pointed out")

• The driver was cited for a traffic violation. ("summoned before a law court")

Finally, (although this list is by no means complete) the adjective *moot* can refer to a controversy that no longer exists because the issues have been settled, or to a question that is debatable because the issues have not been settled:

• The plaintiff having settled out of court, the question is moot. (having been decided)

• Whether the United Nations is effective is a moot question. (not having been decided)

The next question deals with another word that has two possible meanings.

**Question:** Attorney Kathryn McCary of Scotia wrote that her local newspaper, reporting on the use of sedative gas by Russia in the theater hostage siege, quoted U.S. Ambassador Alexander Vershbow as saying, "It's clear that perhaps with a little more information, at least a few more of the hostages may have survived"; but Ms. McCary added that the word *may* is ambiguous in this context. She wrote that although Ambassador Vershbow intended to say that had more information been available, more hostages might have survived, he could have meant that more hostages had survived than we actually knew about.

**Answer:** As Ms. McCary noted, many people use "may" to mean "might," sometimes causing ambiguity. The modal *may* can indicate either permission or possibility. In the statement "Students may adhere to the dress code," does *may* mean that students are permitted to do so or that it is possible they will? That question about the intended meaning of *may* has caused numerous law suits. See *Words and Phrases* for the list. In addition to the ambiguity of *may* discussed here, judges have had to decide whether *may* means *shall*. But that's a subject for another column.

**From the Mailbag**

In the September *Language Tips* I discussed the current tendency of Americans to omit prepositions that are grammatically required. Several readers sent e-mails with additional prepositions that have been dropped. From Valley Stream, Attorney Seymour S. Lesser "updated" my comment about *mailman*, which once was two words ("mail man"), then was hyphenated ("mail-man"), and is now one word. Mr. Slesser pointed out that the word *mailman* has been replaced by *mail carrier*, because "the word 'man' is *verboten*."

Another reader wrote that the preposition *from* is now often dropped from the statement, "I graduated college." He's right; although that usage is still non-standard. Seventy-seven percent of the *American Heritage Dictionary* (2000 edition) Usage Panel label it unacceptable. Some may recall a time when even "I graduated from college" was considered incorrect. Teachers pointed out that *you* didn't graduate; the *college* graduated *you*, and thus insisted upon, "I was graduated from college." Eighty-nine percent of the Usage Panel said they would now accept "I graduated from college." The reader added: "To the horror of my ears, my students often say, 'I was discriminated,'" omitting the grammatically necessary preposition *against*.

As always, I appreciate all the feedback my readers provide. As someone has said, the worst blow to the ego is when even your mistakes go unnoticed!

---

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).

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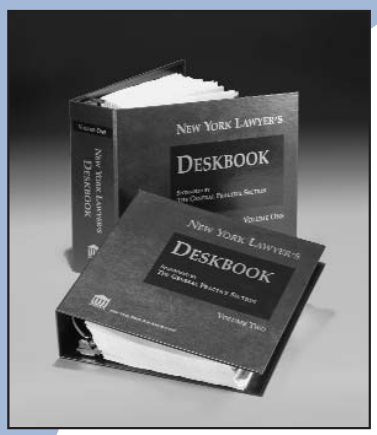


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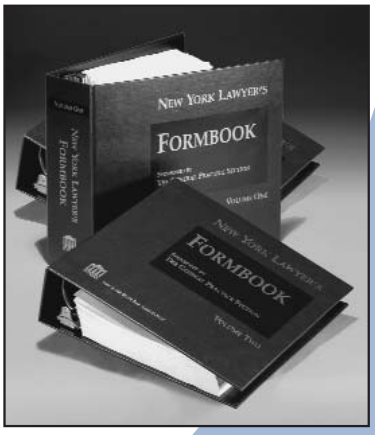


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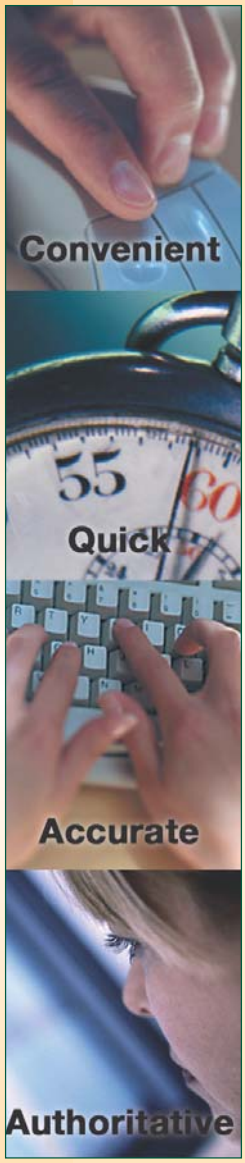


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13. Bryan A. Garner, *Clearing the Cobwebs from Judicial Opinions*, 38 Ct. Rev. 4, 4, 6, 7, 8, 10, 12 (2001); *accord* Bryan A. Garner, *The Citational Footnote*, 7 Scribes J. Legal Writing 97 (1998–2000).
14. *See, e.g.*, Richard A. Posner, *Against Footnotes*, 38 Ct. Rev. 24 (2001); Helen A. Anderson, *Are Citations on the Way Down? The Case Against Footnotes* <www.wsba.org/barnews/2001/12/anderson.htm> (Dec. 2001) (visited Nov. 7, 2002), *reprinted in* 20 The Catchline (Ass'n of Reporters of Judicial Decisions) 8 (Feb. 2002).
15. *Melancon v. Walt Disney Prods.*, 127 Cal. App. 2d 213, 214 n.*, 273 P.2d 560, 561 n.* (2d Dist. 1954) (McComb, J.).
16. *See generally* Arthur J. Goldberg, *The Rise and Fall (We Hope) of Footnotes*, 69 A.B.A. J. 255 (Mar. 1983).
17. 492 U.S. 229, 237–38 (1989) (noting years of controversy sparked by one footnote in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985)).
18. Chicago Manual of Style § 15.8, at p. 494 (14th ed. 1993).
19. Got that?
20. *See Lewis v. City of New Orleans*, 415 U.S. 130, 137 (1974) (Blackmun, J., dissenting) ("[I]t is no happenstance that in each case the facts are relegated to footnote status, conveniently distant and in a less disturbing focus.").
21. John E. Simonett, *The Footnote as Excursion and Diversion*, 55 A.B.A. J. 1141, 1142 (Dec. 1969).
22. 44 U. Miami L. Rev. 1009 (1990) (footnotes in title omitted).
23. 90 Cal. App. 3d 505, 514 n.2, 153 Cal. Rptr. 624, 628 n.2 (2d Dist. 1979) (Thompson, J.).

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ally relevant discussion in footnotes or endnotes or make footnotes or endnotes too lengthy. Information in footnotes and endnotes might go unread. That would be unfortunate for attorneys because the decision maker might miss an argument. It would also be unfortunate for judges because "[a] footnote is as important a part of an opinion as the matter contained in the body of the opinion and has like binding force and effect."[15]

• Too few footnotes or endnotes draw special attention and elevate their importance in a way the author might not intend. Too many footnotes or endnotes lessen the value of all the footnotes or endnotes.[16]

• Footnotes or endnotes should not be written merely to show that you are scholarly. When an appellate court does that, years of litigation can ensue, as the Supreme Court acknowledged in *H.J., Inc. v. Northwestern Bell Tel. Co.*[17]

• Write footnotes and endnotes in the same point size and font as those in the text. Single space footnotes and endnotes even when the text is double spaced. These rules may be different for published materials, depending on the publisher.

• Double space between footnotes and endnotes. Here, too, this rule may be different for published materials, depending on the publisher.

• If you justify the text, justify the footnotes and endnotes as well. Note, however, that most readers prefer nonjustified (ragged-right) margins for typed (unpublished) materials.

• Footnote and endnote numbers appear in the text as superscripts (raised above text in smaller type). Writers may use more than one footnote or endnote number in a sentence. Footnote and endnote numbers immediately follow, without a space, the word, phrase, clause, or quotation to which they refer. Persuasive legal writers should be careful, however, not to overload readers with too many footnotes in a sentence. Law reviews might get away with that. But a persuasive brief is not a law-review article.

• When footnote and endnote numbers follow punctuation, place them immediately (no space) after quotation marks, periods, commas, question marks, exclamation points, colons, semicolons, and parentheses – but before dashes.[18]

• In formal legal writing, all sentences, including those in footnotes and endnotes, should be complete. No sentence fragments.[19]

• The first time you cite in a footnote or an endnote, give a full citation, even if you already gave a full citation in your text.

• *Bluebook* format: When pinpoint-citing to footnotes or endnotes, use an ampersand ("&") when the reference is found at the page and in the footnote: *A v. B*, 91 A.D.3d 19, 19 & n.9 (5th Dep't 2012) (mem.) If the reference is in the footnote or endnote alone, cite the page and footnote or endnote directly: *X v. Y*, 16 N.Y.4th 61, 62 n.3 (2012). Cite multiple footnotes thus: *X v. Y*, 16 F.5th 62 nn.3–4 (15th Cir. 2012).

• Because footnotes and endnotes might go unread, legal writers sometimes sneak important information into them to hide content or to treat it disdainfully. Justice Blackmun once commented on that technique, of which, he argued, the Supreme Court majority was guilty.[20] Footnotes and endnotes can hide useless, irrelevant information born of "exhaustive research [that] would be a shame to discard."[21] For ways in which legal writers engage in footnote skullduggery and other bad habits, see Arthur D. Austin, *Footnote Skullduggery and Other Bad Habits*.[22]

One bad habit is to use single-spaced footnotes in briefs to cheat on page limits. Another is to sneak in a barb. A footnote of that kind comes from *People v. Arno*, in which the majority of the California Court of Appeal, in seven consecutively numbered sentences, told a dissenter that he is a "S-C-H-M-U-C-K."[23]

And there you have it: footnoting for lawyers whose eyes are set vertically rather than on an inefficient horizontal plane.

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1. Esoterica, from Judge Learned Foot: The first Supreme Court opinion to use footnotes was *Viterbo v. Friedlander*, 120 U.S. 707, 714 (1887) (Gray, J.). The case that set the record for the most footnotes – 1,715 – is *United States v. E.I. Du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953) (Leahy, Ch. J.), *aff'd*, 351 U.S. 377 (1956). The most footnotes in a law-review article – 4,824 – is in Arnold S. Jacobs, *An Analysis of Section 16 of the Securities Exchange Act of 1934*, 32 N.Y. L. Sch. L. Rev. 209 (1987). The footnote widely acknowledged as the nation's most important comes from *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), in which Justice Stone, in three paragraphs, set out the three levels of constitutional scrutiny: rational-basis scrutiny, intermediate scrutiny, and strict scrutiny.
2. Endnotes appear at the end of the document. Footnotes appear at the bottom of the page.
3. Ruggero J. Aldisert, Opinion Writing 177 (1990) (quoting Burton S. Laub).
4. Myron L. Gordon, *A Note on Footnotes*, 60 A.B.A. J. 952, 952 (Aug. 1974).
5. Abner J. Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647, 648 (1985).
6. 77 Cal. App. 3d 322, 324 n.1, 142 Cal. Rptr. 545, 546 n.1 (4th Dist. 1978) (Gardner, P.J.).
7. *Id.*
8. 791 F.2d 1191, 1199 n.7 (5th Cir. 1986) (Goldberg, J.).
9. Not that I recommend sidelights in judicial opinions: "The best opinion disdains high-falutin' language, skips esoteric asides, avoids analytical meandering, discards marginally helpful research products and side themes, and hopes only to be understood." Richard B. Cappalli, Viewpoint, *Improving Appellate Opinions*, 83 Judicature 286, 321 (2000).
10. *See* William Glaberson, *Legal Citations on Trial in Innovation v. Tradition*, N.Y. Times, July 8, 2001, at 1, col. 1 (footnote in title omitted).
11. *Id.*
12. *Id.*

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O'Mara, Timothy M.
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Bartlett, Mayo G.
Fedorchak, James M.
Geoghegan, John A.
Goldenberg, Ira S.
Herold, Hon. J. Radley
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Manley, Mary Ellen
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Nashak, George J., Jr.
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Peskoe, Michael P.
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# THE LEGAL WRITER

# The Bottom Line On Footnotes[1] and Endnotes[2]

BY GERALD LEBOVITS

Footnotes and endnotes have been the subject of mirth. Pennsylvania Judge (and later Dickinson Law School Dean) Laub once said, "Anyone who reads a footnote in a judicial opinion would answer a knock at his hotel door on his wedding night."[3] U.S. District Court Judge Gordon of Wisconsin once remarked, "If judicial opinions had Blue Cross, they could go to the hospital and have their footnotes removed."[4] And D.C. Circuit Chief Judge (and later Presidential Counsel) Mikva once wrote, "If footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes being set vertically rather than on an inefficient horizontal plane . . . ."[5]

All believe that footnotes or endnotes are acceptable for excerpts of testimony and to quote contractual, statutory, and constitutional provisions. Good legal writing gets to the point without the distractions often found in footnotes and endnotes. If something is important enough to include, it's important enough to feature in the text. But footnotes and endnotes may also contain collateral thoughts and special effects too interruptive for the text.

One special effect for a footnote or endnote is a sidelight. For a classic sidelight, read *People v. Benton*,[6] in which the court used a footnote to lament that the defendant, a gun-point robber, told his victims "don't say a mother-f—-ing word." The *Benton* court yearned for the good old days, when English highwaymen used richer criminal argot, such as "Stand and deliver."[7] Another sidelight appeared in *Golden Panagia S.S., Inc. v. Panama Canal Comm'n*:[8] "Counsel for Golden Panagia informed this court at oral argument that Newell is now, in any event, dead. A Higher Court thus has jurisdiction over Henry Newell, and we are confident that any sins he may have committed will be dealt with appropriately there. *See Matthew* 25:41–46 (explaining Final Judgment procedures)."[9]

Some believe that citations should appear in footnotes, although most attorneys and judges put citations in their text. Citations in text are called "sentence citations." A movement led by legal-writing maven Bryan A. Garner is afoot to use citational footnotes, or sentence citations in footnotes.[10] Anti-traditionalists who favor moving sentence citations into footnotes argue that sentence citations are "aggravating," a "nuisance."[11] They also contend that citational footnotes force opinion writers to assure that what remains in the text does not look like "legal code."[12] And that, they urge, makes legal writing accessible and democratic. Garner argues that volume and page numbers should be put into footnotes to make sentences shorter; paragraphs forceful and coherent; ideas, not numbers, controlling; poor writing laid bare; case law better discussed; and string citations less bothersome.[13] Opponents of citational footnotes argue, however, that looking up and down at the footnotes is itself distracting.[14]

Whatever approach you favor – sentence citations or citational footnotes – conforms with approved usage. You can even compromise by putting case names in running text and citations in footnotes or endnotes. But I offer three cautions if you use citational footnotes or endnotes.

First, use footnotes or endnotes only for citational letters and figures. Do not develop legal authority in footnotes or endnotes or use them for any other purpose. In short, do not let an opportunity to use footnotes or endnotes for citations lead you to put into your footnotes or endnotes what should properly appear in your text.

Second, for judges, if your opinion goes online, readers will have a difficult time hyperlinking to your footnoted citations. They will be forced to move their cursors up and down repeatedly.

Third, attorneys and judges should add relevant information to their running text to explain the citation's weight of authority – such as the name of the court and the year of the opinion – even if that information will also be in the citation. Do not force readers to read footnotes or endnotes to get necessary information.

***Footnoting is for lawyers whose eyes are set vertically rather than horizontally.***

For those who footnote or endnote items other than citations, here are some rules to make legal writing go above and beyond the bottom line:

- Attorneys in their papers and judges in their opinions should use footnotes, if at all, and not endnotes. Readers need to find citations quickly. They get frustrated when they are forced to flip to the end of the document to get them. On the other hand, editors and publishers of legal newspapers, newsletters, and magazines, which often jump pages to generate interest and maximize space, find endnotes helpful, whereas law journals and law reviews, which do not jump pages, prefer footnotes.
- If you use footnotes or endnotes, do not include deep analysis or textu-

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