NEW YORK STATE BAR ASSOCIATION

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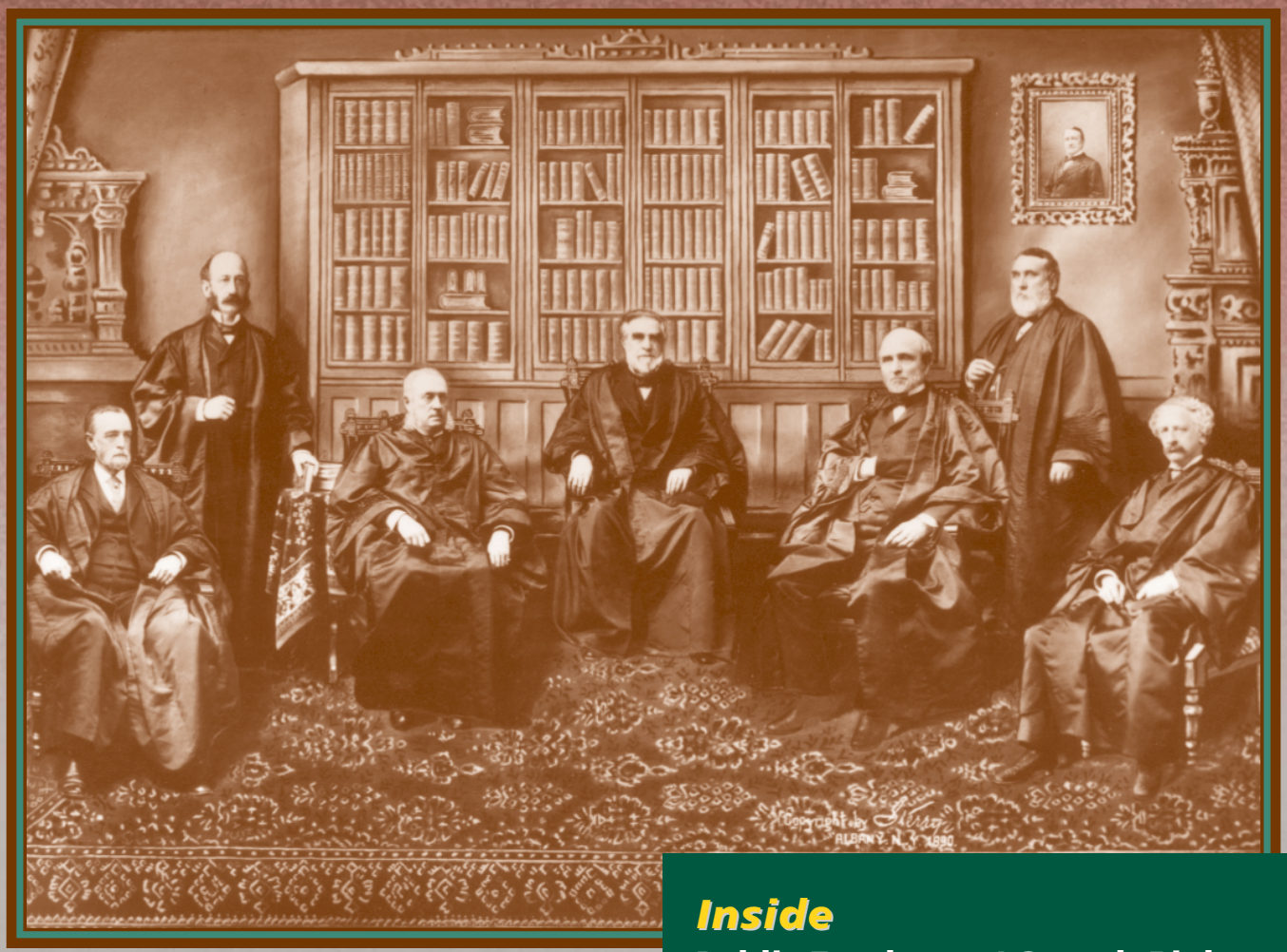
Journal

FORMING A HISTORY SOCIETY FOR THE NEW YORK COURTS



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Special Pull-out Section:
Annual Report to the Membership

This year's Report focuses on the tragedy of September 11, 2001, and its aftermath, and is dedicated to those who gave so much in aiding victims, families and colleagues.

ON THE COVER

This month's cover shows the members of the Court of Appeals in 1890. From left: Francis M. Finch of Ithaca, John Clinton Gray of New York City, Charles Andrews of Syracuse, Chief Judge William C. Ruger of Syracuse, Robert Earl of Herkimer, Denis O'Brien of Watertown, and Rufus W. Peckham Jr. of Albany.

Cover Design by Lori Herzing.

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President's Message

Lorraine Power Tharp

Assistance of Counsel

" . . . and to have the assistance of counsel for his defense."[1]

The voices became more emotional and sentences went unfinished as the television talk show panelists jostled to make their points. The topic of the July 29 program was "Troubles Criminal Defense Attorneys Face." At the core of the questions was that perpetual source of public angst: How can you represent him/her? "This attorney defended Samantha's alleged killer last year—got him off the hook, no prison time. And now John Pozza faces death threats, personal doubts, questions from the public, and from our panel," program host Larry King commented, referring to the acquittal in a previous trial in a molestation case.

Attorney Pozza explained that his role was not fact-finding, but rather, providing the best defense possible for every client. He spoke of his extensive inner thoughts as he realized that the accused in the death of the 5-year-old is his former client and of his efforts to separate personal and professional feelings. The panelists wrestled with applying constitutional rights and lawyers' professional responsibilities to the case at hand.

The debate and questions raised by the participants and callers emphasized the need for the Association to do more to educate the public and speak out in the media on behalf of the profession. The discussion in this program and in the many others confirmed that the priority that we have given to communications is indeed well placed.

Attorney Pozza, of course, is not alone in being asked how he can provide criminal defense, how he can represent those charged with acts that send a chill upon telling, what his obligations are as an attorney, what an acquittal means, how he separates the professional from the personal, how he deals with the fear that a guilty person will go free, and why he does what he does. As raised in the program described, the fear extends to the prosecutor, concerned about conviction of someone who is innocent. Responding to these questions and reviewing the principles and values of our constitutional and judicial system must make clear that these issues weigh heavily on members of the bar. It must also make clear that the defense of the accused by the effective assistance of counsel is at the heart of our system and our freedoms. We need only look at this issue's insert, the "Report to the Membership," to relive the horror of September 11 and to remind ourselves of the precious and fragile nature of those freedoms, as well as the vital roles of the legal profession.

My studies of this subject took me to the diary of another criminal defense attorney, who related his considerations and experiences in representing soldiers on trial for the killing of five civilians—a case marked by public outcry and substantial press coverage. The defense counsel wrote that he devoted himself "to endless labor and anxiety, if not infamy and death, and that for nothing, except what indeed was and ought to be all in all, a sense of duty." The representation, he said, was "one of the best pieces of service I ever rendered my country." In discussing his defense of the British soldiers in the 1770 Boston Massacre, John Adams stressed the importance of a fair trial—a cause he saw as vital to the country and its justice system. Following an argument of self-defense, the soldiers were acquitted, excepting two who were punished by thumb branding. Adams saw the verdict as proper, but advised that it did not mean that the incident should not be termed a massacre and it should not be construed as an endorsement of the British government's actions and its maintenance of standing armies that led up to the situation. He came in for heavy criticism for taking on the case.

The defense of Timothy McVeigh in the Oklahoma federal building bombing was another case in which the issues of defense and fair trial were on trial in the public arena. An article in the *New York Times* reported, "some legal scholars and practitioners say the case is likely to underscore how the American legal system, for all its flaws, can provide a fair trial to the most reviled suspects in high-profile cases." One lesson on the role of counsel was provided in the comments of one of McVeigh's attorneys: "'The reason I accepted the appointment in the first place is that I've never seen anyone who needed a lawyer more than that boy did.'"[2]

The answers to the "how can you defend" probing require an explanation of the adversary system devel-

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oped in the Sixth Amendment's right to assistance of counsel in criminal matters and the Fourteenth Amendment's due process and equal protection provisions, coupled with the obligations set forth in the Code of Professional Responsibility. Referring to Adams and the long line of successors at the bar who courageously upheld the principles and values of the justice system, the Ethical Considerations of our Code of Professional Responsibility state:

> History is replete with instances of distinguished sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of personal feelings, a lawyer should not decline representation because a client or cause is unpopular or community reaction is adverse. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.[3]

A related EC, however, advises that "a lawyer should decline employment if the intensity of personal feelings, as distinguished from a community attitude, may impair effective representation of a prospective client."[4]

Building on these points, the essential role of criminal defense counsel is succinctly described in the American Bar Association's Standards for Criminal Justice, as a basic duty "to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." And the standards advise that the "[d]efense counsel is the professional representative of the accused, not the accused's alter ego."[5]

These are lessons not quickly imparted or grasped. While the Constitution is at least part of school curriculum, professional responsibility provisions seldom go beyond study within the profession. Professor Barbara Allen Babcock of Stanford Law School finds that the "how can you defend" query in fact contains four questions, each emphasizing a different word in the sentence. Citing the value in continuing the effort of explanation, she notes that in the hundreds of times she responds to this question, the inquirer has never really been satisfied and nor has she.[6] It is for us to heighten awareness and educate at every opportunity.

I have become "tuned in" to the numerous legal issues brought up in the talk show circuit, as well as in the daily press and broadcast news updates. The good news is that general interest in the law seems to be at an all-time high. I have no doubt that this will continue, with issues of corporate fraud and enemy combatants and detainees at the forefront. The challenge is to make headway in a sea of misunderstanding, mistrust and strong emotions. Progress can be made, but it will take consistent, concerted advocacy as an organization and as individuals. In addition to our institutional outreach, we will work to aid you in seizing opportunities to speak out in your community. Communication is a major topic for our upcoming Executive Committee strategic planning retreat, and I will have much to report to you on those proceedings and on the action plans that result.

In looking at this issue, I must confess to a certain background. The daughter of a district attorney and the spouse of an assistant district attorney, I often heard that prosecutors were on "the side of the angels." Whether they are or not, let us help to educate one another and the public that, by ensuring the accused effective assistance of counsel, the defense attorney is not made out to be the devil.

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1. U.S. Const. amend. VI.
2. Peter Applebome, *The Pariah as Client: Bombing Case Rekindles Debate for Lawyers*, N.Y. Times, Apr. 28, 1995, at A28.
3. The Lawyer's Code of Professional Responsibility EC 2-27 ("Code").
4. Code, EC 2-30.
5. ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-1.2(b), (e).
6. Barbara Allen Babcock, *Defending the Guilty*, 32 Clev. St. L. Rev. 175, 177 (1983).

Preserving a Heritage

Historical Society Will Collect Records of New York's Courts

BY HOWARD F. ANGIONE

Spurred by a concern that irreplaceable records of the courts in New York are being lost, a group of prominent judges and attorneys have formed the Historical Society of the Courts of the State of New York.

The group, patterned after a similar society that has existed for many years to preserve the history of the U.S. Supreme Court, has received a charter from the New York State Board of Regents. It plans to locate the materials it is collecting at the Pace University School of Law in White Plains.

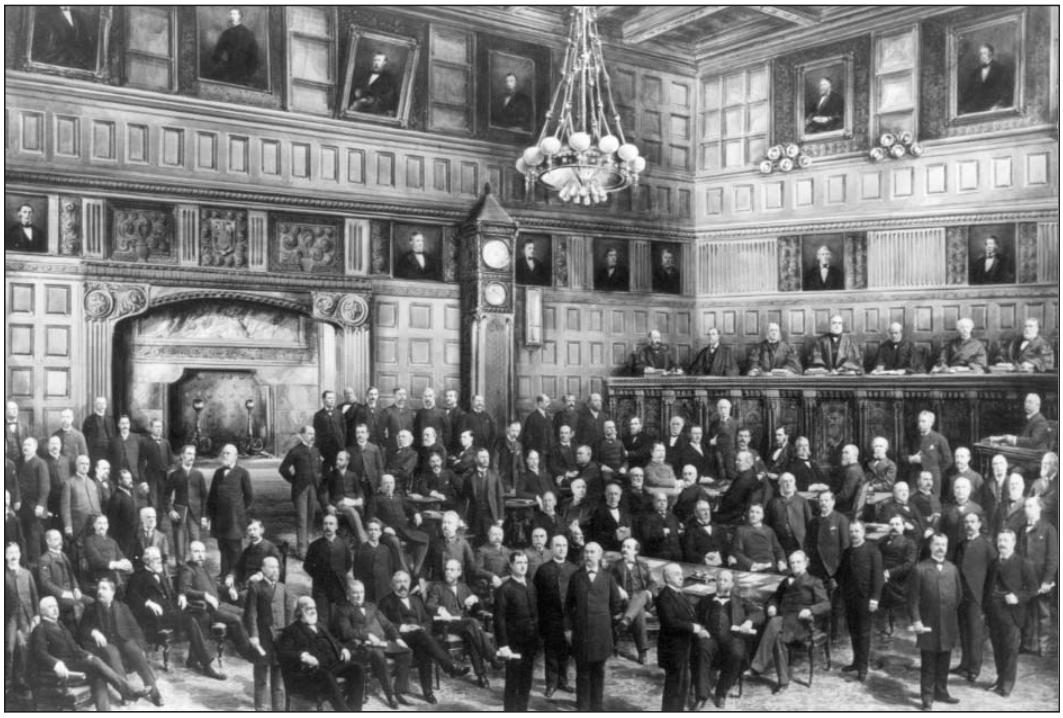
The officers are Albert M. Rosenblatt of the Court of Appeals, president; Richard J. Bartlett, the attorney who headed the commission that established a new penal law for the state in 1967, vice president; E. Frances Murray, the librarian at the Court of Appeals in Albany, secretary; and Stephen P. Younger of Patterson, Belknap, Webb & Tyler LLP in New York, treasurer.

Members of the board of trustees include Chief Judge Judith S. Kaye of the Court of Appeals, who traces the impetus for the project to the 1997 commemoration of the 150th anniversary of the Court of Appeals "when we were shocked to realize how little of the history of the state's courts was being preserved and that opportunities to preserve personal recollections and memories were being lost every day."

Attorneys and judges from throughout the state are being invited to participate in the activities of the society. A program/membership committee is headed by Henry M. Greenberg of Couch White, LLP in Albany and Steven C. Krane of Proskauer Rose LLP in New York City, immediate past president of the New York State Bar Association.

A Web site describing the society's activities and acquisitions is being prepared and is expected to be available this fall, at www.courts.state.ny.us/history.

Recalling the efforts to commemorate the Court of Appeals' anniversary, Judge Kaye said, "We realized, for example, that we had portraits for only six of the eight judges of the original Court of Appeals. Fortunately Judge Rosenblatt was able to find a picture of Charles H. Ruggles and we found a distant nephew of Charles Gray who provided his portrait." The com-



In this photograph, members of the Court of Appeals in 1890–1892 are shown on the bench at the far right. In attendance at a ceremonial gathering were New York attorneys and dignitaries.

memorative project led eventually to the publication of a book, *There Shall Be a Court of Appeals*, a title taken from the language in Article VI, § 2 of the New York State Constitution in 1846.

The historical society is taking on a broader mandate to collect and preserve records of all courts throughout the state, providing background and the human stories that go beyond officially reported court decisions.

"We struggled mightily to put together our own history at the Court of Appeals," Judge Kaye said. "It made us realize that a concerted effort would be necessary to organize and record the history of the state's courts. To perpetuate our justice system, we need to know and understand its roots. We want to provide a resource where everyone—attorneys, historians, students, and the public—can explore how our court system has evolved."

Concluding her thoughts on a lighter note, Judge Kaye added, "And besides, it's fun!"

Judge Rosenblatt said he hopes the project will help to show future generations what life and law were like up through the dawning of this new millennium. "We should not disappoint them," he said. "Perhaps if we help them understand us and our forebears, they can improve on what we all have done. We want to save what is about to be lost, assemble what we have, and make a tableau for the future."

He noted that, as a starting point, the society is fortunate to have access to some "great riches," including a minute book for the New York State Supreme Court that survives in a library in Flushing and contains material dating back to the establishment of that court in 1691. Other items available include intact blueprints of New York City Hall, which was completed in 1703 and served as the site of the Peter Zenger trial, and a roll of New York lawyers that bears the signature of Alexander Hamilton. And then there are "the riches we have yet to discover—the documents and relics that will turn up once we cast the net."

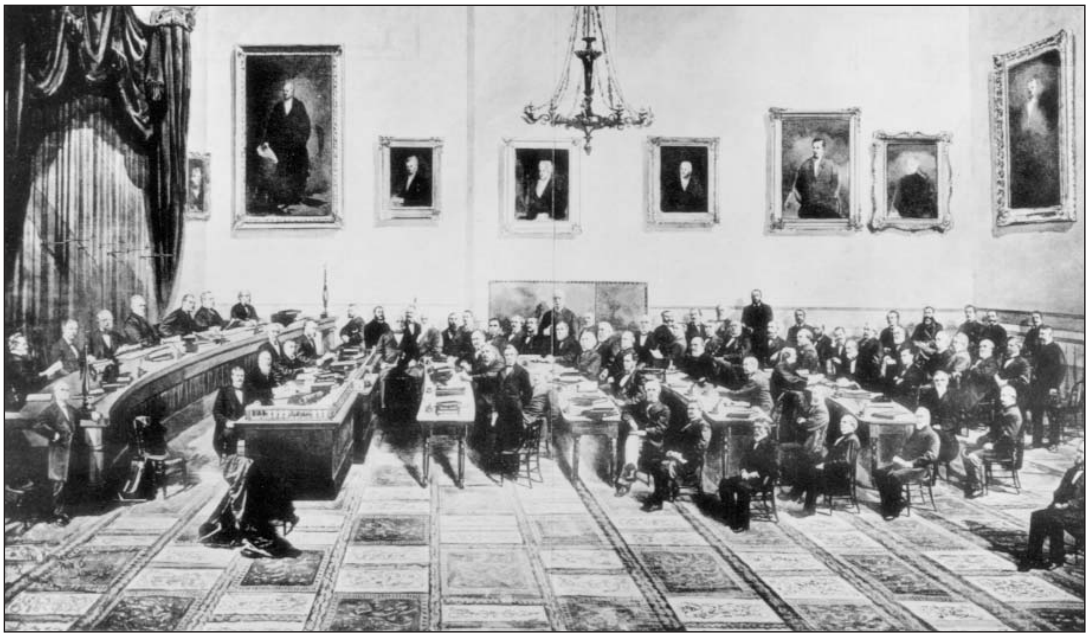
Turning philosophical, Judge Rosenblatt reflected that computers and cameras now make it possible to record historical events, but they have "very little imagination and no soul. In this respect, humans have it all over their computers and cameras, but human beings have a serious shortcoming: when the heart stops beating, the mind's memory bank is lost forever. Herodotus, Thucydides, Plutarch, Josephus, The Venerable Bede and James Boswell each had his own extraordinary talent and a capacity for detail and perspective. But there is one thing they have in common—an achievement so extraordinary that we are forever in their debt: they wrote things down."

Trustees of the society, in addition to the officers and Judge Kaye, are Barbara A. Brinkley, Stuart M. Cohen, Norman Goodman, John D. Gordan III, Henry M. Greenberg, Andrew L. Kaufman, Steven C. Krane, Jonathan Lippman, E. Leo Milonas, M. Catherine Richardson, Leon Silverman, Christine W. Ward and William M. Wiecek.

Shown below are samples of some of the photographs being assembled by the society.

Anyone interested in participating in the society's activities will find an application for membership on the Web site. Questions may also be directed to Joann Dean at Pace University School of Law, (914) 682-3222.

Howard F. Angione is the editor of the *Journal.*



This 1878 photograph depicts members of the bar in the first courtroom used by the Court of Appeals. Shown at the tables are five former judges of the Court of Appeals, numerous current and former judges of the Supreme Court, and prominent lawyers from throughout the state.

An Advocate's Perspective

Mediation in Commercial Cases Can Be Very Effective for Clients

BY JAMES A. BEHA II

In business disputes, mediation is too often merely the interruption of ill-tempered litigation for an equally litigious negotiation. Simply put: that's just not good lawyering! Participating in a mediation can turn out to be very effective for your business client, and perhaps even supply information you will find useful if the litigation continues.[1]

To turn the experience to advantage, however, counsel and client need to perceive how different the mediation forum is from a trial setting, and counsel needs to consider how best to employ, and restrain, advocacy skills in this framework.[2]

Mediation falls within the burgeoning sphere of "ADR" (Alternate Dispute Resolution), but it differs from the multitude of variations on the arbitration theme in the very key respect that the mediator, although often regarded by the clients as having an independent, judge-like role, in fact has no authority to impose an outcome on the participants.[3]

Mediation is often defined as a "voluntary" process, but in practice participation is often mandated by the court—or is so heartily encouraged that it cannot be evaded. A number of courts, including the Commercial Division of the Supreme Court in New York City, now mandate the parties' good faith participation in a mediation program early in the life of a lawsuit.[4] While the court administrators are proud of the track records of these programs, in some jurisdictions court-sponsored mediation programs are themselves giving rise to debates—and some litigation.[5]

If the parties are ready for mediation of their own accord, they can now turn to a wide variety of dispute resolution services. Parties may also consult organizations such as the Institute for Dispute Resolution of the Center for Public Resources, which does not supervise proceedings but does offer lists of well-respected lawyers, jurists and businessmen prepared to serve as mediators.

Timing and Format

A concern with many court-mandated mediation programs is that mediation may be required at a juncture when the case is not yet ripe for it—for example, when some key factual or legal issue must yet be resolved. However, uncertainty often is a *good* circumstance for mediation, because a wide range of outcomes remains possible.[6]

Even if the case is not "ready" to settle, counsel should be very much aware that an unsuccessful early mediation may nonetheless both provide useful insights about the opposing party's view of the merits and the evidence and leave clients with "something to chew on" that may lead to resuming discussions later. So even if the timing seems wrong, counsel and client should consider investing serious effort in a mandated mediation, to see what they can learn in the process and to lay the groundwork for future negotiation, possibly even for resumption of the mediation down the road.

Although there are many variations, mediations typically move along a well-formatted, five-step path, with clients present throughout:

- *Introductory Session*—Some kind of joint session where rules and procedures are explained, the mediator gives the parties some sense of the mediator's particular approach and style, and a schedule is set for submitting materials to the mediator.
- *Presentations*—Some kind of joint session where each side makes a presentation, most often with the opposing party present.
- *Caucus*—A series of separate meetings between the mediator and each side, commonly referred to as a "caucus." Initial meetings explore positions; later meetings communicate the opposing party's reactions and responses (and usually some comment thereon by the mediator) and pose follow-up questions.

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• *Working Sessions*—Periodic joint sessions to build relationships, often including a joint session of clients with the mediator, without counsel present (some counsel will refuse to agree to this procedure, but many mediators press hard for it).

• *Concluding or Bridge Session*—A concluding session to identify areas of agreement, point to areas for further communication, commit parties to a process of future discussion, and perhaps schedule future sessions.

A mediation differs in many important ways from a "settlement conference." There is far more communication with the client; the mediator does not have power over the future of the case; the mediator will evidence sympathy with your client's position rather than hammer at weaknesses; and most mediators will be reluctant to offer opinions on the law.

As an advocate for the client, counsel should think carefully about how mediators function and assess a particular mediator in those terms.

One of the best aspects of privately arranged mediation is that the parties can come to define with the neutral what they want from the process, and when. In one recent collection of five interconnected cases, my client participated in six different mediations, of varying scope. One was in the Southern District's court-mandated program, one was informally court-mandated, and the others were initiated by the parties.

Each mediation had a different format: Some maximized direct communications between client representatives, but several never connected the clients directly at all. Some began with fairly elaborate presentations by counsel for each side with clients present, but one used briefing memoranda intended for the mediator only and not exchanged with the other side. One mediation put heavy emphasis on decision-tree analysis as a tool for pushing the parties to reach a shared specification of the issues in the case and to debate probability ratings, while another mediation avoided issues analysis altogether and focused solely on communicating offers and responses between separate caucuses. Finally, while some mediations proceeded through several straight days of "all hands" meetings, another met for one or two days a month over the course of almost a year, sometimes on the telephone and sometimes face-to-face, sometimes with both sides and other times with only one.

Mediators—Styles

Quite a few retired judges and a number of practicing lawyers are making the conduct of mediations the primary focus of their practice.[7] Counsel cannot assume, however, that because someone is a respected judge, lawyer, or businessperson he or she necessarily will be an effective mediator. Although some mediation skills come naturally, others require good training—especially for lawyers, for whom patience and keeping one's views to oneself are seldom primary character traits. Good judges, and particularly those known as "settlement judges," may also lack the style or skills for a process that is fundamentally coaxing, not coercive.

Some persons put in the role of mediator have little training in the methods for achieving agreement in a noncoercive setting, but more and more frequently mediators have been through an extensive program that has provided training in framing questions, refining discussions, displaying empathy, avoiding premature evaluations, and so forth. Such mediators likely also have received some training in mediation ethics, and may be part of an organization that has a code of ethics. In other cases, the ADR program itself may have its own standards of conduct—as is the case for the programs administered in New York Supreme Court, where the mediators are trained volunteers generally drawn from the practicing litigation bar.

As an advocate for the client, counsel should think carefully about how mediators function and assess a particular mediator in those terms, to see how counsel can best work toward a successful result for the client.[8] To get that result, counsel should be attuned to how mediators are typically trained to think of their role, particularly as that role breaks into four distinct segments:

• *Negotiation*—To manage discussions, including reasoned argument, and to serve as a port through which communications about settlement are passed.

• *Facilitation*—To help parties (a) to define the subject of the mediation in terms of their underlying interests, (b) to recognize the legitimacy of issues or concerns raised by the adversary, and (c) to develop and choose a responsive solution.

• *Evaluation*—To consider presentations, to ask questions and help the parties to understand the strengths and weaknesses of their own case (and their adversary's case) and to consider the likely outcomes of continued litigation.

• *Transformation*—To foster a redefinition of the parties' dispute and of their relationship, by recognizing each party's interests, values and opportunities in a way which empowers the parties to find a solution. (Many,

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many commercial cases involve business relationships and issues that are not simply about specific dollar recoveries.)

ADR and mediation are becoming their own specialty fields, and, as they do, newly coined experts begin to announce what "is" or "is not" truly mediation. Some argue, for example, that if the neutral comes to take a substantially evaluative role in assessing the merits of a party's positions, whether communicated to the party only or also to its adversary, this should not be considered "mediation."[9]

Advocate your client's positions, but convince the neutral that you and your client are committed to reasoned dialogue.

Evaluation *is* problematic at times, especially when one party is not well-represented and the client comes to look to the mediator as an advisor. Evaluation can also be problematic if it comes forcefully too early in the process, giving the impression that neutrality has been lost and that the mediator has "taken sides." In other circumstances, however, clients may want a respected third party to point out the strengths and weaknesses of the case as advocated by their counsel—and as presented by adversary counsel. In all events, at the outset the parties and the mediator should openly discuss the extent to which evaluative feedback will be part of the particular mediation.

With this in mind, what behaviors by the mediator should counsel anticipate in the course of the mediation sessions? First and foremost, a skilled mediator's behavior will demonstrate a commitment to a *process* in which time, patience, empathy, and communication move parties to *want* to *succeed* by finding a resolution. It will also emphasize reaching out to the clients as the decision-makers in resolving the dispute. Whether the mediator reaches *through* counsel, or *around* counsel, will depend on how each advocate has filled his or her role. More specifically, counsel should expect the process to move through the following phases, considering carefully for each phase how counsel can best communicate the client's position, build a negotiating base and move the process toward a result satisfactory to the client:

• *Trust*—The mediator will seek to develop a relationship of trust with each side and to facilitate fruitful communication.

• *Venting*—The mediator will allow client anger and animosity to be vented in private caucuses and then try to move each party to a dispassionate definition of its own interests, to recognition of the interests of other parties and to specification of potentially acceptable resolutions without "win" or "lose" labels.

• *Advocacy, Then Movement Beyond*—The mediator will allow advocacy to be expressed, particularly in the initial stages, but then will push beyond it, reaching out to the clients to focus them on their underlying interests, not just their legal positions.

• *Zones of Agreement*—Once past these relationship-building stages, the mediator will explore what parties are prepared to reveal about their "bottom lines" and see whether there is a prospect of a "zone of agreement."

• *Other Currency*—The mediator will thoroughly explore the relationship of the parties to see if there are avenues for mutual gain or points that can be fruitfully traded because they are differentially valued.

• *Costs of Proceeding*—The mediator will focus the parties on the likely alternatives to reaching a negotiated agreement at this time.[10]

• *Building a Bridge*—The mediator will eventually bring the clients into some sort of direct, bridge-building contact, unless there is an overwhelming reason to avoid this. The mediator's goal is to develop a relationship between the adversary clients of mutual respect and a cooperative, problem-solving attitude that will continue after the immediate sessions.

• *Commit to Process and Use Momentum*—Because experienced mediators have a strong commitment to the process, the mediator will try hard to commit the parties to continued movement toward resolution by demonstrating the mediator's own commitment through patience, perseverance and empathy, hoping that the process will itself create momentum, especially for clients who spend their business lives trying to "get to deal" (as distinguished from litigators who focus on points of dispute). The mediator wants the parties to perceive that reaching a resolution is their personal success.

• *Channels Open*—If agreement is not reached, the mediator will seek to frame a mechanism for future communication between the clients and perhaps for resumption of mediation at a more opportune time.

Comments

Every practicing litigator has an internalized model for how negotiations should proceed, drawn from past experience and perhaps from the numerous self-help books on negotiation.[11] That mental framework must be consciously restructured to take account both of the mediator's control over this particular process and the complications (and benefits) of negotiating in a mediated framework. With that in mind, I have some practical advice to share with counsel preparing for mediation, which I have collected as a dozen points:

• Carefully consider the impression you are trying to make on the other side, both counsel and client. How do you want to be perceived today, and in the future stages of litigation? How do you plan to convey that image?

• Consider the relationship your team wants to build with the mediator—what is he or she looking for during the process from you as counsel and from your client? Advocate your client's positions, but convince the neutral that you and your client are committed to reasoned dialogue. Convince the neutral that what you say about the facts, the law and your client's interests can all be relied upon. How do you build your credibility? Can you build enough of a relationship to enlist the neutral at some crucial stage? If your group has several lawyers or several clients, discuss the role each will play and how the different roles may help in working with the mediator.

• Be realistic about the prospects for agreement at this time. How will your assessment of settlement prospects affect the kinds of processes you are willing to engage in now? Why *has* the other side agreed to voluntary mediation at this juncture? Why did *your* client? Are there perhaps discrete disputes or aspects of the parties' continuing relationship where agreement can be reached—perhaps even implemented—at this juncture?

• Decision trees can be very useful in identifying key issues and unreasonable assumptions, but be wary and make sure you have played with the model thoroughly in advance.[12] Watch out for "out-liers" and the impact of even small probabilities. Does a 1% chance of a $100 million verdict really create $1 million of settlement value? Or is a 1% chance the same as "no chance" in the real world—it just isn't going to happen. How do you express that to the mediator?

• Whether settlement prospects are high or remote, also think about the process as discovery: what can you learn about personalities, people, or positions? At this stage, what cards are you willing to show?

• Spend considerable time preparing your client representative. Cover what you will say in the presentation, what to expect from the adversary, and your evaluation of the positions likely to be taken publicly by each side. Evaluate the case with the client and discuss negotiating positions and variations. Because the neutral will want to communicate directly with your client and will try to get the client to speak for himself or herself, even if you are present, make sure the client is prepared for that, as well as for potential meetings with the neutral and the adversary client without counsel present.

• Think carefully about litigation costs. Your client likely will want estimates—explain them carefully, because they may come back to haunt you. The mediator likely will ask you about costs to trial, to try to pull those dollars into the settlement mix. What do you say to the mediator? What about your adversary's costs?

How do you best argue against putting litigation costs into the settlement "pot"?

• Unless this is strictly a one-time, money-only dispute, explore all non-monetary issues in the case with your client in advance, and thoroughly investigate other possible relationships between the clients. The neutral will want to know if there are other business routes to resolution, trading points that mean more or less to each side. If this is a possibility in a major matter, very seriously consider bringing a seasoned corporate negotiator into your advising group.

• Don't let your client get too much adrenaline from *your* advocacy; if the case goes to trial, you will not be the judge. If your own client is "oversold" on the case (or too emotionally involved), consider whether there is some way to work with the mediator to bring better perspective without compromising your own relationship with the client or your commitment as an advocate.

• Even litigators can adopt a cooperative stance—sometimes we even mean it! Throughout the mediation, consciously decide whether the circumstances warrant a combative, truculent, or cooperative stance. Be prepared to shift your tone in recognition of the behavior of the adversary and the view of the mediator, always with the intent to keep the process moving toward your client's goals.

• At some point you may be ready to walk out—but take a deep breath: will more patience help? Will sticking with the process a little longer really hurt? On this or any other point, can you impress the mediator with your frustration (or with your firmness of purpose) by playing out a dialogue within your own group for the mediator's benefit? If you stay, or if you move on a point, emphasize that you are doing it because of your commitment to the *process* and because of your appreciation of the mediator's efforts and patient commitment.

• On the other hand, be wary of momentum. Will the desire to "make a deal" build to the point where your client will regret the deal it accepts? Invested time should be a reason to continue the process, but not a reason to accept a result. This *is* voluntary!

Finally, thank the mediator—no matter what you think. Good manners aside, that last step should reflect your consciousness throughout the process that settlement discussions, and mediations, likely will recommence at a later time if no resolution is reached at this time. Take your positions today with an eye to that future, and deal with the mediator on the assumption that the lawyers—or the clients—may decide to pull him or her back into the settlement process down the road.

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1. The arguments for participating in mediation are reviewed in J.A. La Manna, *Mediation Can Help Parties Reach Faster, Less Costly Results in Civil Litigation*, N.Y. St. B.J. (May 2001). Ms. La Manna particularly stresses the value of the process in giving a client a "day in court" to be heard by an independent party and the role of the mediator in helping clients see the strengths and weaknesses of their case. Some practitioners, however, believe that "evaluative" feedback must be given sparingly, if at all, because of the potential for the client to find the mediator unsympathetic or perceive the mediator as biased. *See infra* text accompanying note 8.

2. Mediation is increasingly common in employment disputes and matrimonial cases (where it is mandatory in New York). The writer's personal experience with mediation has been in commercial cases and this article is written for the commercial practitioner, although most of its observations could apply in other contexts.

3. A thorough review of ADR programs can be found in the Report of the Committee on Alternate Dispute Resolution of the New York State Bar Association, *Report on the Current Status and Future Direction of ADR in New York* (February 1999), *available at* http://www.nysba.org.

4. The New York court-sponsored ADR programs of various forms can be found through the state system's Web site, *at* http://www.courts.state.ny.us/adr. A fairly current summary of New York ADR programs was provided by Stephen Younger in *New York Moving Forward to Put ADR into the Mainstream*, N.Y.L.J., May 30, 2000, p. 9.

5. *See* J.J. Alfini & C.G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 Ark. L. Rev. 171 (2001). *See also* W.C. Smith, *Much Ado About ADR*, 86 A.B.A. J. 62 (2000); M. Wise, *Alternate Dispute Resolution Symposium: Current Public Law and Policy Issues in ADR*, 22 Hamline J. Pub. L & Pol'y 383 (2001).

6. For some very practical advice on the timing of a mediation, see J. Krivis, *From Conflict to Resolution*, 17 G.P. Solo 28 (ABA: Oct./Nov. 2000).

7. For a vivid recounting of the full-time mediator's practice, see von Kahn, *A Week in the Life of a Mediator*, Legal Times, Apr. 11, 2002.

8. There is by now a well-developed theoretical literature on the conduct of mediation. For just two examples, see L.L. Ruskin, *Understanding Mediator Orientations, Strategies and Techniques: A Guide for the Perplexed*, 1 Harv. Neg. L. Rev. 7 (1996); K.K. Kovach & L.P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 Harv. Neg. L. Rev. 71 (1998).

9. One proponent of mediation refers to mediation as "an oasis away from the traditional litigation process to which they [the clients] must return if the mediation session fails," underscoring the recognition that a return to litigation involves not only concrete financial costs and business inconvenience but also the client's loss of control in shaping the resolution of a dispute, a control that mediation returns to the clients for so long as they collaborate within the "oasis." J.H. Paulk, *Why Mediation Works*, 36 Tulsa L.J. 861 (2001).

10. This is one of the points emphasized in Kovach & Love, *supra* note 8.

11. Mediators, in turn, have often been trained about what to expect from counsel who have studied books like the seminal Roger Fisher et al., Getting to Yes (2d ed. 1991).

12. *See* D.P. Hoffer, *Decision Analysis as a Mediator's Tool*, 1 Harv. Neg. L. Rev. 113 (1996).

Parties Who Do Not Receive Mail May Have Difficulty Obtaining A Hearing on Service Issues

BY PAUL GOLDEN

The phrase "the check's in the mail" is used sarcastically, principally because so many people lie about it. Is there anyone who hasn't, at one time or another, told a "little white lie" about when mail was sent, or when it was received? For the most part, these misstatements are not terribly important. However, when the mailing of time-sensitive documents is at issue, one such lie could improperly affect the outcome of an entire case.

For example, a party may claim that he served a conditional order of dismissal on his adversary by mail; such an order can result in the loss of the whole case if that adversary fails to respond by the established deadline. If the purported sender submits an affidavit of service, and the alleged recipient claims he did not respond because he did not receive the mailing, there are three possibilities: (1) the alleged mailer lied, (2) the post office did not properly deliver it, or (3) the alleged recipient lied.

New York courts generally presume—without conducting a hearing—that the purported sender has sworn to the truth. The alleged addressee therefore cannot cross-examine the alleged server. If the latter loses this right to "the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure,"[1] he cannot extract from the alleged server qualifying circumstances concerning the service, or other facts which may diminish the alleged server's trustworthiness. This article examines the problem, and provides some guidance on how an attorney can obtain a hearing to dispute an affidavit of mailing, even in the face of the general rule against it.

Law on Mailing Presumption Inconsistent

One of the underpinnings of the judicial system is that a fact-finder generally cannot determine which of two parties is telling the truth unless both parties testify in open court, where each can cross-examine the other. In the case of personal service, some courts have thus directed traverse hearings based on no more than what is essentially a bald denial by the person allegedly served. In such cases the affidavit of service loses its presumption of validity, and the plaintiff then must prove, by a preponderance of the evidence, that he obtained jurisdiction over the defendant.[2] This inclination to order a hearing exists because, as the Court of Appeals has held in other circumstances (citing Dean Wigmore's treatise on evidence), "no statement unless by special exception should be used as testimony until it has been probed and submitted to the test of cross-examination, the greatest legal engine ever invented for the discovery of truth."[3]

Where mail service is involved, however, the reverse seems to be true. If the defendant submits only a sworn denial that he received process allegedly sent by mail, courts will not grant the defendant a hearing to prove lack of service.[4] In cases that do not involve service of a summons, the same rule applies: generally speaking, a party cannot rely on a mere denial that he did not receive a certain mailing in order to obtain the crucial factual hearing.

A history of the case law on this issue does not reveal why courts have distinguished between a denial of mail service and the denial of personal service. In fact, over time, the courts have wavered significantly on the issue of what a party must allege to defeat the presumption that a sworn affidavit of service by mail is accurate. For example, in 1924 Judge Cardozo, speaking for the Court of Appeals, wrote *dicta* indicating that a denial of receipt alone might be sufficient: "The evidence of mailing [an affidavit of service by mail] does no more than create a presumption that the letter reached its destination.

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Against it, we have the defendant's denial in his answer that the statement was received."[5]

However, in 1936, the Court of Appeals issued a decision in *Trusts & Guarantee Co. v. Barnhardt* concerning receipt of a notice of dishonor and protest of a promissory note.[6] The relevant statute provided that an affidavit of service constituted *prima facie* evidence of mailing, and that where the notice is mailed, the sender was deemed to have given notice of dishonor regardless of any mis-delivery by the post office. Thus, when the alleged recipient denied receipt, the Court held that this alone did not raise a question of fact to be sent to the jury.

Over time, the courts have wavered significantly on the issue of what a party must allege to defeat the presumption that a sworn affidavit of service by mail is accurate.

In 1978 the Second Department stated in *Empire National Bank v. Judal Construction of New York, Inc.*, "The affidavit of service, asserting mailing [of a summons and complaint], is not conclusive once there has been a sworn denial of receipt." It then held that the purported mailer "must be made available for cross-examination."[7] This would have resolved the issue if it had remained the law, but the cases have not been consistent. For example, in 1983, in *Engel v. Lichterman*, the same court more thoroughly analyzed the issue and came to the opposite conclusion, although it did not explicitly overturn *Empire*.[8] In *Engel*, the Second Department granted summary judgment to a defendant, and in doing so ruled that the plaintiffs' attorney's mere denial of receipt of a conditional order, standing alone, did not raise an issue of fact sufficient to require a hearing.

However, Justice Gibbons wrote a well-thought-out dissent in *Engel*, arguably the most thorough and insightful study of this issue by any appellate judge in this state. He noted that the majority's conclusion seemed to be based on law from *Barnhardt*, and he then cited Dean Wigmore's criticism of the *Barnhardt* decision. Wigmore had stated that in *Barnhardt*, the subject statute presumed receipt only if the notice had actually been mailed. However, because mailing had been disputed, the statute did not apply, and thus Wigmore indicates that the reason given for the *Barnhardt* decision was "inadequate." Justice Gibbons also noted that the *Barnhardt* rule "runs counter to the rule followed in most of the jurisdictions in this country."[9] Moreover, as courts use the evidentiary rule that letters properly mailed are presumed to have been received, the dissent argued, "As a logical matter the obverse of this presumption is equally valid: if a letter were not received, then it should be presumed not to have been properly mailed."[10] Thus, Justice Gibbons asserted, the alleged recipient should have had the opportunity to cross-examine the purported sender, or else he would have no method of obtaining further evidence of non-mailing.

Engel v. Lichterman was reviewed by the Court of Appeals, but it did not specifically rule on Justice Gibbons's logic. Rather, it simply indicated that because the plaintiffs' attorney had admitted that it "appear[ed]" that the order was mailed and because the attorney "surmise[d] that this document was lost in the mail, since it was never delivered to our offices," the plaintiffs had not actually raised a question of fact as to whether proper service was made.[11] Thus, the Court of Appeals did not clearly resolve whether an addressee who expressly denies receiving service by mail is entitled to cross-examine the purported sender. As a result, some courts issued opinions in the 1980s and 1990s that still indicated that when a party denied receipt of papers allegedly sent by mail, those alleged recipients were entitled to a hearing on the issue.[12] However, other courts rendered decisions that held the reverse, ruling that a mere denial of receipt does not rebut the inference of mailing which arises from an affidavit of service.[13]

Kihl v. Pfeffer Favors Mailing Party

In 1999, the Court of Appeals decided *Kihl v. Pfeffer*, which makes it even more difficult to prove that a party did not send legal papers by mail.[14] In that case, the defendant allegedly mailed the plaintiff a conditional order dismissing the complaint unless the plaintiff served certain responses to discovery requests. The plaintiff did not respond, and the court dismissed the complaint.

The plaintiff's counsel then submitted two affidavits: one from a partner in the firm who reviewed the mail, and one from the attorney's secretary who opened the mail, both asserting that they did not receive the order. Moreover, the plaintiff even described a fact that might have led a court to question the veracity of the purported server: the conditional order was dated in June, but the affidavit of service of mailing indicated that the server had made her sworn statement of service in April. (In response, the server did not allege that she had traveled in time, but claimed this was a typographical error.) Despite all of this detail in the addressee's affidavits, the Court of Appeals affirmed the decision which held that this did not overcome the presumption of delivery and did not trigger the need for a hearing.

As the cases discussed above indicate, there seems to be little logic underlying decisions denying hearings.

Perhaps courts simply are weary of listening to parties raise technical objections concerning improper service, and feel that such arguments constitute an abuse of the system. As Heywood Broun said, "A technical objection is the first refuge of a scoundrel." Courts know that one of the simplest excuses for not responding to mail is to claim that it never was received, and may not want to spend their time making determinations on this issue. Thus, they have created blanket rules to avoid conducting fact-finding hearings on the subject.

The presumption of proper mailing and receipt can be dangerous and unjust. It amounts to an open invitation to unethical people to prepare false affidavits of service.

Perhaps when the issue is again presented to the Court of Appeals, there will be a party who will successfully convince the Court to overturn *Kihl*, or at least limit its effects. After all, one of the most respected sources on the law of evidence, Wigmore, disapproves of the New York approach on this subject.[15] Wigmore stresses that if an addressee denies receipt, and the court believes this denial, this is some evidence that there was no mailing. "Add to this, that the testimony to mailing comes usually from the mouth of persons who are vitally self-interested in proving the fact of mailing." Thus, the "correct view, accepted by many courts" is that a case may go to the jury on the issue of which testimony is accurate: the purported sender or the alleged addressee.

The presumption of proper mailing and receipt can be dangerous and unjust. It amounts to an open invitation to unethical people to prepare false affidavits of service. When a court renders a decision that bars a hearing, it forecloses the possibility of countering statements that a document was mailed. As indicated above, when a party denies he or she was personally served, the usual result is a court-ordered hearing on the issue; but when a party merely denies that he received service by mail, the court will not make such an order. Interestingly, the distinction between the two sometimes can be blurred. Courts have ruled that even in cases involving allegations of personal service, "conclusory denials of service" may be insufficient to raise an issue of fact.[16]

Overcoming the Presumption

As Justice Gibbons wrote in the *Engel* case,

> The majority maintains that a "mere" denial of receipt is inadequate to raise a question of fact as to mailing. In the first instance, what else may a person who never received a paper, purportedly mailed, say but, "I never received it.". . . Where, without a hearing, can the addressee get any further competent evidence to establish that there was not, in fact proper mailing?[17]

This is the conundrum that many litigators periodically face. Yet, despite the seemingly impenetrable rule against challenging the *bona fides* of a mailing, there are in fact a number of methods to obtaining a hearing on the issue. If a court is presented with the right kind of detail, it should permit a party to cross-examine the alleged server in a hearing, with the ultimate relief that the court may decide that service was incomplete.

First, however, one must be absolute in asserting that the alleged mailer did not send the document by mail. In the *Engel* case, the party claiming that the mail was not received was a little too polite and admitted that it "appears" that his adversary had sent the mailing. He could only "surmise that this document was lost in the mail."[18] There is no room for such niceties in a war. An attorney has to allege clearly that the adversary failed to send the document. In short, if you waffle and acknowledge the possibility that it *may* have been sent by mail, you likely will lose. Service by mail is complete regardless of delivery if the party complies with all mailing requisites.[19] The addressee also cannot hope to help himself by drafting an oblique phrase such as that he did not receive "sufficient written notice."[20]

Next, the attorney challenging the service must examine the entire context of receipt, such as the size and mail-handling routine of the addressee's office. In one case, the attorney explained that he ran a small office, and that he saw all the incoming mail. He then informed the court that he had demanded a complaint on behalf of his client, but had never received it, nor any communication requesting an answer. This was ruled as sufficient detail to warrant a hearing.[21]

On the other hand, if the alleged recipient has a large office, with a more sophisticated method of handling incoming mail, the alleged recipient should stress those factors; a denial based on procedures that would have accounted for the mail, had it come into the office, will carry more weight. In that regard, strong proof that a mailing was not received may be found in a diary. A diary of incoming mail, if it contains no entry of receipt of the crucial correspondence, is sufficient to rebut the presumption of a proper mailing.[22] In one case, an attorney's secretary submitted an affidavit in which she alleged that she had a practice of making notes when certain legal papers in files were received, and that she noted in a diary the corresponding response dates.

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Thus, she claimed that her lack of entries regarding the papers implied a lack of receipt. The court determined that the alleged addressee had rebutted the presumption of mailing.[23]

Aside from the addressee's own evidence, the attorney attempting to overcome the presumption can also try to find deficiencies on the alleged server's proof. He or she should study the affidavit of service for any possible errors, oddities, or inconsistencies. For example, service of process on a natural person is governed by CPLR 308, and if the affidavit does not demonstrate "strict compliance" with the statutory mailing requirements, there is no presumption of proper service.[24] In one case, the court noted that the affidavit did not indicate whether the mail was sent by first-class mail. If it had not, it would be a fatal defect. Thus, the court ruled that it would hold a hearing to determine credibility and whether or not proper service was made.[25]

Further, if the party is served with process by a method other than by in-hand personal delivery, triggering the requirement of a follow-up mailing, the envelope must bear the legend "personal and confidential," and be free of any exterior reference to an attorney or the lawsuit.[26] Thus, if the affidavit does not indicate these details, it may provide another basis for claiming improper service. The passage of too much time between the mailing and the execution of the affidavit may also prove useful to the objector; one court held that when the affidavit of service was not executed until six months after the alleged mailing, it would not be presumed accurate.[27] On the other hand, an improperly executed affidavit of service is frequently disregarded as a mere irregularity.[28]

Along the same lines, a careful check of the address that the server claimed he used on the envelope is in order. Is there any potential argument that the server mailed the document to an incorrect address? If so, one can successfully rebut the presumption of proper mailing.[29] If the post office box is missing or is inaccurate, a court should rule that there is no presumption of proper service.[30] Even if the address is not misprinted, but the defendant makes the claim that it was not his actual place of business, the presumption of proper service of process by mail can be overcome.[31] A missing or erroneous ZIP code also can be evidence of improper service.[32] (Of course, there are times where a more fruitful argument might be directed to some other aspect of service. The plaintiff may have served a person of suitable age and discretion at the defendant's home or business; in such a case, one is much more likely to obtain a hearing by disputing service on that person, rather than by disputing the mailing.[33])

In addition to the receiving attorney's normal office procedures and defects apparent in the affidavit, a good-faith effort to locate the errant mail may be persuasive. The attorney can assert that upon discovery of the alleged mailing a diligent search for the alleged incoming mail was made, and yielded nothing. One court held that affidavits and deposition testimony describing the extensive search for a certain mailing, as well as a description of procedures it followed for mail received and improperly delivered, rebutted the presumption of mailing.[34]

A legal argument might also be made that, despite the recent *Kihl v. Pfeffer* case, a simple denial of service by mail is in fact sufficient to obtain a hearing. As indicated above, there are several cases that had indicated that this is the law. Although they predated *Kihl*, it is still possible to argue that if the Court of Appeals had intended to overturn these previous cases, it would have done so explicitly, and the attorney can then distinguish those cases from the later Court of Appeals decision. In any event, one can always attempt to distinguish the attorney's own case from *Kihl* on its facts. Indeed, based on the history of this issue in New York, it seems unlikely that *Kihl* will be the last word on the subject.

Avoiding Sanctions Even When Mailing Was Proper

Even if the court decides that the mail was properly sent, another avenue may be open. There is authority for the proposition that even if the document was in fact mailed, the addressee may be excused for failing to respond if it was not received.[35] The prejudice to the intended receiving party should be stressed if the lack of response would cause the court to strike one's pleadings. For example, in one case the court held that even if the plaintiffs had mailed a conditional order, and the defendants received it but did not respond due to law office failure, the plaintiffs would not be entitled to summary judgment in their favor.[36] This was because the plaintiffs had not established that they suffered any prejudice, and the defendants had established a meritorious defense and had engaged in certain pretrial activities.

Assuming the court believes that a mailing occurred which required a response, there are also statutes that can provide a party with relief if a deadline has been missed. CPLR 317 provides that if the defaulting party did not personally receive the summons and has a meritorious defense, the court may allow that party to defend the action even after judgment has been entered against him; the fact that the summons was properly mailed would therefore not be fatal. CPLR 5015 allows a court to relieve a party from an order made on default, if such party can demonstrate a reasonable excuse for

the failure to respond, and merit to his claim or defense. Lack of receipt of a mailing might provide the excuse. CPLR 2004 similarly allows a court to give a party an extension of time the court deems just, if that party shows good cause, regardless of whether the time period had already expired. Finally, CPLR 2005 allows a court to excuse delay or default in certain cases even if it resulted from law office failure (such as the failure to respond to a mailing).

Conclusion

It seems that the courts have made a decision not to grant hearings on disputed mailings, an issue that they apparently believe is not worth the expenditure of judicial resources. Even though this general rule favors senders over recipients, the latter still have some options—even if those options may have been limited by the Court of Appeals in *Kihl.* If and when our courts or the legislature take note that a purported sender is no more likely to have produced a truthful affidavit than the alleged addressee, there may be a change in the law, which would arm more parties with the right to cross-examine the sender. With such a threat looming, there would be additional pressure on servers to actually serve what they claim to serve—resulting in fewer disputes and, ironically, a reduced need for hearings.

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1. 5 Wigmore, Evidence § 1367 (Chadbourn rev. 1974).
2. *Dime Sav. Bank v. Steinman*, 206 A.D.2d 404, 613 N.Y.S.2d 945 (2d Dep't 1994).
3. *In re Hyde's Estate,* 218 N.Y. 55, 58, 112 N.E. 581 (1916) (internal quotation marks omitted). The Court quoted a portion of Wigmore's treatise, which is now located within 5 Wigmore, Evidence § 1367 (Chadbourn rev. 1974).
4. *European Am. Bank v. Abramoff*, 201 A.D.2d 611, 608 N.Y.S.2d 233 (2d Dep't 1994).
5. *Curry v. Mackenzie*, 239 N.Y. 267, 272, 146 N.E. 375 (1925).
6. 270 N.Y. 350, 1 N.E.2d 459 (1936).
7. 61 A.D.2d 789, 789–90, 401 N.Y.S.2d 852 (2d Dep't 1978).
8. 95 A.D.2d 536, 467 N.Y.S.2d 642 (2d Dep't 1983), *aff'd*, 62 N.Y.2d 943, 479 N.Y.S.2d 188 (1984).
9. *Id*. at 547.
10. *Id*. at 551.
11. 62 N.Y.2d 943, 479 N.Y.S.2d 188 (1984).
12. *Poet v. Kolenda*, 142 A.D.2d 633, 530 N.Y.S.2d 589 (2d Dep't 1988); *Adames v. N.Y. City Transit Auth.*, 126 A.D.2d 462, 510 N.Y.S.2d 610 (1st Dep't 1987); *Rochdale Vill. v. Harris*, 172 Misc. 2d 758, 659 N.Y.S.2d 416 (Civ. Ct., Queens Co. 1997).
13. *E. River Sav. Bank v. Curtis*, 229 A.D.2d 999, 645 N.Y.S.2d 199 (4th Dep't 1996); *European Am. Bank v. Abramoff*, 201 A.D.2d 611, 608 N.Y.S.2d 233 (2d Dep't 1994); *Dean v. Sarner*, 201 A.D.2d 770, 607 N.Y.S.2d 485 (3d Dep't 1994); *Colucci v. Zeolla*, 138 A.D.2d 286, 526 N.Y.S.2d 3 (1st Dep't 1988).
14. 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999).
15. 9 Wigmore, Evidence § 2519 (Chadbourn rev. 1981).
16. *Simmons First Nat'l Bank v. Mandracchia*, 248 A.D.2d 375, 669 N.Y.S.2d 646 (2d Dep't 1998); *Remington Invest. v. Seiden*, 240 A.D.2d 647, 658 N.Y.S.2d 696 (2d Dep't 1997).
17. 95 A.D.2d 536, 551–52, 467 N.Y.S.2d 642 (2d Dep't 1983), *aff'd*, 62 N.Y.2d 943, 479 N.Y.S.2d 188 (1984).
18. *Id.* at 538.
19. *De Forte v. Doctors Hosp. of Staten Island*, 66 A.D.2d 792, 410 N.Y.S.2d 903 (2d Dep't 1978); *14 Second Ave. Realty Corp. v. Szalay*, 16 A.D.2d 919, 229 N.Y.S.2d 722 (1st Dep't 1962). *See* CPLR 2103(b)(2).
20. *St. Clare's Hosp. v. Allcity Ins. Co.*, 201 A.D.2d 718, 608 N.Y.S.2d 325 (2d Dep't 1994).
21. *Sport-O-Rama Health & Fitness Ctr., Inc. v. Centennial Leasing Corp.*, 100 A.D.2d 584, 473 N.Y.S.2d 525 (2d Dep't 1984).
22. *De Leonardis v. Gaston Paving Co.*, 271 A.D.2d 839, 706 N.Y.S.2d 254 (3d Dep't 2000).
23. *Vita v. Heller*, 97 A.D.2d 464, 467 N.Y.S.2d 652 (2d Dep't 1983). Justice Gibbons drafted a concurrence which indicated a different view of the case: the alleged addressee admitted that the server had properly mailed the papers, and thus there was no need for a hearing on service. However, he ruled that the secretary's affidavit indicated that the papers may have been mishandled in transit, which would excuse the lack of response.
24. *Kanner v. Gerber*, 197 A.D.2d 673, 602 N.Y.S.2d 874 (2d Dep't 1993). *See Avakian v. De Los Santos*, 183 A.D.2d 687, 583 N.Y.S.2d 275 (2d Dep't 1992) (citing *Macchia v. Russo*, 67 N.Y.2d 592, 505 N.Y.S.2d 591 (1986)).
25. *Slutzky v. Aron Estates Corp.*, 157 Misc. 2d 749, 597 N.Y.S.2d 997 (Sup. Ct., Rockland Co. 1993).
26. CPLR 308(2), (4).
27. *Glen Travel Plaza, Inc. v. H.G. Anderson Equip. Corp.*, 122 A.D.2d 327, 504 N.Y.S.2d 298 (3d Dep't 1986).
28. *Mrwik v. Mrwik*, 49 A.D.2d 750, 372 N.Y.S.2d 693 (2d Dep't 1975).
29. *Holland v. N.Y.C.*, 271 A.D.2d 609, 706 N.Y.S.2d 161 (2d Dep't 2000).
30. *Connolly v. Allstate Ins. Co.*, 213 A.D.2d 787, 623 N.Y.S.2d 373 (3d Dep't 1995); *Hesselbarth v. Paredes*, 110 A.D.2d 818, 488 N.Y.S.2d 238 (2d Dep't 1985).
31. *Continental Hosts, Ltd. v. Levine*, 170 A.D.2d 430, 565 N.Y.S.2d 222 (2d Dep't 1991).
32. *Avakian v. De Los Santos*, 183 A.D.2d 687, 583 N.Y.S.2d 275 (2d Dep't 1992); *N.Y.C. Hous. Auth. v. Fountain*, 172 Misc. 2d 784, 660 N.Y.S.2d 247 (Civ. Ct., Bronx Co. 1997). *But see Karlsson & Ng v. Cirincione*, 186 Misc. 2d 359, 718 N.Y.S.2d 783 (Civ. Ct., N.Y. Co. 2000).
33. *See Frankel v. Schilling*, 149 A.D.2d 657, 540 N.Y.S.2d 469 (2d Dep't 1989).
34. *State v. Int'l Fid. Ins. Co.*, 272 A.D.2d 726, 708 N.Y.S.2d 504 (3d Dep't 2000).
35. *Vita v. Heller*, 97 A.D.2d 464, 467 N.Y.S.2d 652 (2d Dep't 1983) (Gibbons J., concurring).
36. *Glen Travel Plaza, Inc. v. H.G. Anderson Equip. Corp.*, 122 A.D.2d 327, 504 N.Y.S.2d 298 (3d Dep't 1986).

Balancing Test and Other Factors Assess Ability of Public Employees To Exercise Free Speech Rights

By William A. Herbert

Since the late 1960s, it has been settled law that a state or local government cannot condition public employment on a basis that infringes upon a public employee's constitutionally protected interest in freedom of expression,[1] but the way that federal and state courts have applied the legal standards in these cases has made it very difficult to predict the outcome in many free speech cases.

Inherent in the tests used to balance the interests involved is the reality that free speech protections for public employees are not absolute. Moreover, the background and composition of a particular circuit or appellate panel may affect the way the balancing test is applied. One circuit's application of the balancing test may have little or no persuasive value in another circuit considering a case with similar facts.

In determining whether a public employer's adverse action against a public employee for engaging in speech violates the First Amendment, the standard balancing test, first enunciated in *Pickering v. Board of Education*,[2] seeks to balance the interests of the employee, as a citizen, to comment on matters of public concern, against the interests of the public employer in promoting the efficient performance of public services.

However, in *New York State Correctional Officers and Police Benevolent Ass'n, Inc. v. State*,[3] the New York Court of Appeals refused to apply the *Pickering* test in assessing whether to vacate an arbitration award that reinstated a correction officer who had been disciplined for off-duty racist symbolic speech. The Court reasoned that applying the test to determine whether to vacate an arbitration award on public policy grounds would invade the province of the arbitrator and be inconsistent with the parties' choice of forum.

In *Waters v. Churchill*,[4] the plurality decision by the U.S. Supreme Court determined that, in applying the *Pickering* balancing test, the courts should consider what the employer reasonably believed the employee's statements or conduct to be in forming the basis for its adverse personnel action. Under *Waters*, discipline can be imposed against a public employee for speech activity, "only if the facts of the case, as reasonably known to the employer, indicate that the employer's interest in promoting efficiency of public services outweighs the employee's interest in free speech."[5]

The Second Circuit has emphasized that before the *Pickering* balancing test can be applied, the public employee has the burden of demonstrating by a preponderance of the evidence that (1) the speech touched upon a matter of public concern, (2) the employee suffered an adverse employment decision, and (3) a causal connection exists between the protected speech and the adverse employment determination, so that it can be said that the speech was a motivating factor in the determination.[6]

Was the Speech a Matter of Public Concern?

To determine the degree of protection provided by the First Amendment, the threshold consideration is whether the speech at issue addresses a matter of public concern.[7] Speech addresses a matter of public concern when it can be fairly considered as relating to any matter of political, social or other concern to the commu-

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nity.[8] The manner, time and place of the expression are relevant as well as the context in which it is made.[9] The speech will be analyzed objectively and based on the entire record.[10] The employee's motivation and the choice of forum also are factors that will be considered in assessing whether a statement is one of public concern.[11]

In *Bartnicki v. Vopper*,[12] the U.S. Supreme Court determined that the content of an unlawfully recorded cellular telephone conversation between a public sector union president and the union negotiator touched upon a matter of public concern. During the conversation, the union representatives discussed the timing of a proposed strike, the difficulties created by public comments about the negotiations and the need for the union to respond more forcefully to the employer's position during the negotiations. The majority of the Court concluded that the months of negotiations regarding the compensation for unit members were unquestionably a matter of public concern.

In *Lewis v. Cowen*,[13] the Second Circuit held that the refusal by a policy maker to follow an order to serve as head of a governmental unit and to present changes in a governmental program "in a positive manner" to a governmental body touched upon a matter of public concern. The court stated that in determining whether speech touches upon a matter of public concern, a court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose.

The Second Circuit has also ruled that a report dealing with the proper administration of state facilities for the incarceration of juveniles touched upon an issue of public concern. In *Hale v. Mann*,[14] the court reversed the grant of summary judgment, concluding that a reasonable jury could conclude that the forwarding of a critical report regarding the administration of the facility, written by another, to superiors could be construed as protected speech under the First Amendment.

The fact that a statement may relate to a working condition does not render it unprotected *per se*.[15] Therefore, "a statement concerning racial discrimination on the part of a public agency is a matter of public concern because it involves information that enables the members of society to make informed decisions about the operation of their government."[16] An internal protest to an employer's personnel actions can touch upon a matter of public concern.[17] A public employee's internal complaint for being denied a promotion can constitute speech that touches upon an issue of public concern.[18] Accusations of corruption made by a law clerk directly to a judge in chambers can constitute speech concerning a matter of public concern.[19] However, a letter to a radio station that was signed "Overheated Worker" and sought to correct an earlier news story about the lack of air conditioning in a county building did not touch upon a matter of public concern.[20]

The Second Circuit affirmed the dismissal of amended complaints by public employees alleging that they were adversely treated because they had complained about their job duties and promotion status and had commenced a Fair Labor Standards Act lawsuit regarding their salaries. The court determined that the employees' speech was not, for First Amendment purposes, a matter of public concern.[21]

Matters and speech regarding public safety are considered "quintessential matters of 'public concern.'"[22] *Myers v. Hasara*[23] concluded that a health inspector's comments to a mall manager regarding an open-air produce market allegedly violating city and state law, touched upon a matter of public concern. In reaching its holding, the Seventh Circuit noted, "It is important to good government that public employees be free to expose misdeeds and illegality in their departments. Protecting such employees from unhappy government officials lies at the heart of the *Pickering* cases, and at the core of the First Amendment."[24]

Statements made concerning a public employer's failure to comply with an affirmative action policy touch upon a matter of public concern.[25] However, the filing of an EEOC charge and a title VII lawsuit that seeks damages for personal harm only, may not be viewed by the courts as touching upon an issue of public concern.[26]

However, the 11th Circuit has held that a police officer's speculative comment that the police chief might have stolen money from the evidence room touched upon a matter of public concern.[27] Similarly, a principal's letter criticizing the failure to renew her contract by the board of trustees as well as its failure to defend her against allegations of misuse of public funds did not touch upon a matter of public concern.[28] One factor the Fifth Circuit used in reaching this legal conclusion was the principal's use of official stationery in writing to the board of trustees.

A professor's advocacy in the faculty senate regarding a no-confidence vote and criticism by the professor of a university regent, the university president and a proposed reorganization plan did not touch upon issues of public concern.[29]

Decisions by a prison hearing officer may constitute communicative acts that touch upon a matter of public concern.[30] Similarly, a letter sent by a state tax attorney to the governor alleging that the state tax department was granting illegal tax abatements and that political influence was negatively impacting the agency was found to touch upon an issue of public concern.[31]

An allegation to an investigatory agency regarding alleged theft of money by a police chief touched upon an issue of public concern.[32] Testimony given by an employee during a non-public hearing regarding disciplinary charges against her former supervisor was found to not touch upon a matter of public concern.[33] In *Maggio v. Sipple*, the 11th Circuit focused on the fact that the purpose of the testimony was to support a grievance regarding alleged misconduct by the supervisor.[34] Nevertheless, detrimental testimony during a trial in a lawsuit between a former co-worker and a state agency touched upon an issue of public concern.[35]

Speaking on a topic that may be of public importance does not guarantee that the employee's speech addresses a matter of public concern.[36] In *Kokkinis v. Ivkovich*, the Seventh Circuit ruled that a police officer's comments during a television interview regarding another officer's sex discrimination lawsuit did not touch upon a matter of public concern. In *Gonzalez v. City of Chicago*,[37] the same circuit concluded that statements regarding police corruption in reports prepared by a police investigator did not touch upon issues of public concern because "[t]hey are reports on his investigations as required by his employer." Similarly, the Seventh Circuit, in *Kuchenreuther v. City of Milwaukee*,[38] held that a note placed by a police union's shop steward on the union's bulletin board, stating her opinion regarding the police chief's request that police officers donate money to an arts fund, did not touch upon on an issue of public concern. In reaching its holding, the Seventh Circuit relied upon the shop steward's articulated motive of "voicing my opinion." The Seventh Circuit also held that the shop steward's questioning of a policy requiring police to carry only one set of handcuffs was a mere complaint "about a change in equipment allocation."

Finally, in *Snider v. Belvidere Township*,[39] the Seventh Circuit concluded that a female employee's complaint regarding her disparity in salary with other employees based on tenure did not touch upon a matter of public concern. In reaching this holding, the court distinguished between an employee who makes a complaint about a sex-based disparity in wages.[40] In *Padilla v. South Harrison R-II School District*,[41] the Eighth Circuit held that a schoolteacher's testimony, during cross-examination in a criminal trial, about his opinion regarding the appropriateness of a teacher having a sexual relationship with a non-student minor, did not touch upon a matter of public concern.

Speaking on a topic that may be of public importance does not guarantee that the employee's speech addresses a matter of public concern.

Application of the *Pickering* Test

Once it is determined that the speech touched upon an issue of public concern, courts will balance the interests of the employee as a citizen to comment on matters of public concern with the public employer's responsibility to provide efficient public services. The employer must establish either that the employee's conduct interfered with the effective and efficient fulfillment of the employer's responsibilities to the public, or the employer reasonably believed that the speech would interfere with governmental operations.[42] When the speech substantially involves matters of public concern, it is entitled to significant weight under the balancing test.[43]

In *McEvoy v. Spencer*,[44] the Second Circuit reiterated that the nature of the job held by the public employee can play a significant role in the application of the *Pickering* test.[45] The policy-making status of an employee is significant in the *Pickering* test but not conclusive.

Municipal regulations requiring employees to obtain permission before speaking with the media were struck down by the Second Circuit because they constituted unlawful prior restraint and violated the employees' First Amendment rights.[46] Two executive orders were issued governing contacts between employees of the city's social services agencies and the media; the regulations were premised on the legal mandates protecting the confidentiality of the agencies' clients. A city employee was disciplined for being interviewed while off-duty by the media regarding a high-profile case, without obtaining permission. The employee was quoted as stating that "'the workers who are considered the best workers are the ones who seem to be able to move cases out quickly' and 'there are lots of fatalities the press doesn't know anything about.'"[47]

In *MacFarlane v. Village of Scotia*,[48] the Third Department applied the *Pickering* test in an Article 78 proceeding that challenged the imposition of discipline against a police union official for the content of a letter he sent to four members of the village board. The letter criticized the position taken by the chief of police in a published letter to the editor regarding a well-publicized dispute over the 911 emergency call system. In his letter to the village trustees, the police union official stated, *inter alia*, "'I was very surprised (as were many people I talked to) that the Chief of Police would jump into this political pot to publicly shaft his men and the P.B.A. and suck up to the Mayor in the same article.'"[49]

Although the court found that the letter addressed a matter of public concern, it held that the communication was not protected by the First Amendment because the village's interests in having an efficient and effective police force outweighed the employee's interest in commenting on the issue of public concern.[50] The court explained:

> In balancing the competing interest, the overarching factor forming our determination is that a police force is a quasi-military organization demanding strict discipline. The proof shows that respondent's police force is a small one which mandates a close working relationship between its Chief of Police and officers if it is to operate efficiently and effectively. It is self-evident that this relationship was imperiled by the dissemination of petitioner's letter to the Board.[51]

The First Department rejected a constitutional challenge to the termination of a New York City police officer for posing nude for a magazine in which she "used her position, uniform and police equipment, without authorization, for her personal commercial benefit, and actively promoted the commercial product, in a manner that was likely to hold the department up to public ridicule."[52]

In *Dangler v. New York City Off Track Betting Corp.*,[53] the Second Circuit reiterated that in applying the *Pickering* test, allegations of an employer's unlawful conduct will be given greater weight than other forms of employee speech:

> Thus, although the public employer normally "need show only a '*likely* interference' with its operations, and 'not an *actual* disruption,'" *Lewis v. Cowen*, 165 F.3d at 163 (quoting *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir.), *cert. denied*, 516 U.S. 862 (1995) (emphases in *Jeffries*)), a public employer cannot, with impunity, fire an employee who "blew the whistle" on other employees' violations of law on the ground that those disclosures impaired office morale.

In *McCullough v. Wyandanch Union Free School District*,[54] the Second Circuit reaffirmed that high-level employees are entitled to limited First Amendment protections and are unlikely to prevail under the *Pickering* test when they have engaged in speech that is critical of their employer.

Similarly in *Lewis v. Cowen*,[55] the Second Circuit emphasized that a public employer's interests in running an effective and efficient office will be given the utmost weight where a high-level employee vocally and publicly criticizes the employer. In *Lewis*, the court held that the termination of a policy maker for his refusal to obey an order to present to an administrative board "in a positive manner" a change in public policy he privately opposed did not violate the First Amendment because of the employer's reasonable belief that the refusal "might impair" governmental operations. In reaching its holding, the court distinguished its prior holding in *Piesco v. City of New York*,[56] where the termination of a policy maker for testifying truthfully before a legislative committee was found to violate the First Amendment.

In *Prager v. LaFaver*,[57] the 10th Circuit, affirming the denial of a motion to dismiss, determined that "office tensions" resulting from a state tax attorney disclosing to the governor the illegality of a tax abatement did not outweigh the substantial weight to be given to the attorney's disclosure of governmental corruption.

In *Johnson v. University of Cincinnati*,[58] the Sixth Circuit reversed the granting of summary judgment, which was based on the conclusion that a university's interest in hiring prospective employees outweighed a vice president's right to speak out regarding the university's failure to follow its affirmative action program. The court concluded that there were contested issues of material fact on the impact of the vice president's speech, warranting a trial.

In *Kokkinis v. Ivkovich*,[59] the Seventh Circuit stated, "Deference to the employer's judgment regarding the disruptive nature of an employee's speech is especially important in the context of law enforcement."

In *Worrell v. Henry*,[60] the 10th Circuit held that a prosecutor's office did not violate the First Amendment when it rescinded an offer to hire an individual to be a drug task force coordinator because he had testified as an expert defense witness in a murder trial. In applying the balancing test, the court found that the prosecutor's interest in maintaining an efficient drug task force outweighed the individual's right to testify as an expert witness.

In *Anderson v. Burke County, Ga.*,[61] the 11th Circuit reached very similar legal conclusions, based on the application of the *Pickering* balancing test as applied to a police department.

Similarly, in *Edwards v. City of Goldsboro*,[62] the Fourth Circuit held that a police officer set forth a cause of action under the First Amendment by alleging that his municipal employer had disciplined him and prohibited him from engaging in the private, off-duty employment of teaching concealed handgun safety.

In *Geer v. Amersqua*,[63] the Seventh Circuit ruled that, in applying the *Pickering* test, the manner and means of an employee's speech are key considerations in balancing the respective interests of the employer and employee. The court found that because a firefighter used a news release rather than internal procedures to complain about perceived favoritism toward gays and women, the employer's interest in disciplining the employee and maintaining order was quite substantial.[64]

Prior Restraint of Employee Speech

In *United States v. National Treasury Employees Union*,[65] the Supreme Court held that the *Pickering* test needed to

be modified when applied to situations involving cases of prior restraint. In striking down a federal law prohibiting federal employees from receiving honoraria for off-duty speeches and articles, the Supreme Court noted that *Pickering* and its progeny involved "*post hoc* analysis of one employee's speech and its impact on that employee's public responsibilities."[66]

The decision recognized that, with a prior restraint, the impact is more widespread than any single supervisory decision, and it found that a prior restraint chills potential speech rather than punishes actual speech. Therefore, it ruled that a public employer in a prior restraint case must demonstrate that "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."[67]

Although qualified immunity may shield individual defendants from a claim for monetary damages, it does not bar actions for declaratory or injunctive relief.

In *Metropolitan Opera Ass'n, Inc. v. Local 100, HERE*,[68] the Second Circuit vacated a preliminary injunction against a private sector union that had engaged in a series of protests against the Metropolitan Opera in New York City, seeking to persuade it and its patrons to compel its food service provider to cease resisting union representation. In vacating the injunction, the court found that the terms of the injunction constituted a broad prior restraint on speech that was unconstitutionally vague.[69]

The Second Circuit has ruled that work rules prohibiting uniform employees from wearing buttons, badges or other insignia on their uniform violated the First Amendment rights of the employees.[70] In affirming the lower court's issuance of an injunction against the rule, the Second Circuit noted that the broad rule prohibited the wearing of buttons at all times "regardless whether the employee's job ever places the employee in contact with the public and regardless whether the employee is in contact with the public while wearing the button."[71]

In *Latino Officers Ass'n v. Safir*,[72] the Second Circuit affirmed the denial of a preliminary injunction sought by a group of Hispanic police officers seeking to challenge certain notice and reporting procedures with respect to police officers making public statements regarding police department matters. Under police regulations that applied at the time of the appeal, police officers were required to notify their department of their intent to speak and provide a summary of their comments after the fact. In denying the preliminary injunction, the Second Circuit acknowledged that the regulations had the potential to chill speech. Nevertheless, the court concluded that the potential chill was conjectural and insufficient to establish real and imminent irreparable harm. In addition, the court found that, in applying the *Pickering* test, the challenged regulations struck a reasonable balance between the interest of the officers speaking out on issues of public concern and the city's strong interest in staying informed about police officers' statements regarding the sensitive nature of police work.

However, in *Latino Officers Ass'n v. City of New York*,[73] the court affirmed the granting of a preliminary injunction against a police department policy prohibiting members of a Latino police organization from marching in uniform behind their organizational banner in various parades, including the Puerto Rican Day Parade and the Dominican Day Parade. In its decision, the Second Circuit found that the District Court had correctly applied the holding in *United States v. National Treasury Employees Union*[74] by placing a higher burden on the defendant to justify its parade policy because it constituted a prior restraint.

As discussed earlier, in *Harman v. City of New York*,[75] the Second Circuit struck down municipal regulations requiring employees to obtain permission prior to speaking with the media, finding that the regulations constituted unlawful prior restraint and violated the employees' First Amendment rights.

Freedom of Association

The First Amendment right of freedom of association can be a basis for challenging the termination of an employee for participating in organizational activities including union activity.[76] In *Boddie*, the court held that the "public concern" standard did not apply to a firefighter's free association claim based on union activity. However, other courts have applied the "public concern" standard to free association claims.[77]

Nevertheless, the 10th Circuit affirmed the dismissal of a First Amendment complaint for failure to state a cause of action alleging that a plaintiff engaged in union activity and because of that activity was subjected to retaliation.[78]

In *Kuchenreuther v. City of Milwaukee*,[79] the Seventh Circuit found that the removal of postings from a negotiated union bulletin board at the workplace did not violate the First Amendment. The court reasoned that the postings did not comply with a police procedure requiring prior approval for all postings, even if such procedure was inconsistent with the terms of the collective bargaining agreement.

The 11th Circuit granted qualified immunity to individual county defendants who demoted a public sector union activist based on the content of a questionnaire sent to candidates for public office.[80]

In *Stagman v. Ryan*,[81] the Seventh Circuit affirmed the granting of summary judgment dismissing a First Amendment claim by a non-attorney working for the Illinois attorney general's office alleging that he was retaliated against for various union activities. In its decision, the court assumed that the speech was protected, but reaffirmed that not all union activities are protected by the First Amendment.[82] In affirming the granting of summary judgment, the court found that the employee failed to demonstrate that the supervisory employees, who made the decision to terminate, were aware of his union activities or that the decision was responsive to those activities.

In *Adler v. Pataki*,[83] the Second Circuit held that the First Amendment provided public employees with a right to maintain an intimate marital relationship free from undue public employer interference. There, a former deputy counsel for a state agency asserted that he had been terminated in retaliation for a well-publicized pending lawsuit by his wife who had been terminated from her position as an assistant attorney general. In addition, Adler alleged originally that he had been terminated for another reason: political patronage. However, in his appeal, Adler abandoned his political patronage claim, conceding that his position was a policy-making position. In reversing a grant of summary judgment against Adler, the court held that the activity of Adler's wife in challenging her termination based on alleged employment discrimination could not reasonably be found to have justified the discharge of Adler from his state position. In holding that the First Amendment does protect a public employee's right to maintain a marital relationship, the court noted that:

> We need not decide in this case whether in some circumstances the conduct, or even the identity, of a wife might raise such serious concerns about her husband's suitability for public employment as to justify the husband's discharge (or the discharge of an employee wife because of the identity or conduct of her husband).[84]

Similarly, in *Kipps v. Caillier*,[85] the Fifth Circuit, *en banc*, held that a former assistant football coach had a clearly established constitutionally protected right to familial association with his son. In addition, it found that his complaint alleging that he was terminated because his son chose to play football at another university stated a cause of action. Nevertheless, the court found that the defendants were entitled to qualified immunity because, under the unique facts of the case, defendants' actions were objectively reasonable.

The Defense of Qualified Immunity

The defense of qualified immunity shields individual defendants from claims of monetary damages if it is objectively reasonable for the individual defendants to believe that their retaliatory conduct did not violate the employee's First Amendment rights.[86]

In *Johnson v. Jones*,[87] the U.S. Supreme Court held that where the only issue on appeal is a question of "evidence sufficiency" as to the constitutional right, the denial of qualified immunity is not immediately appealable.[88]

In *McCullough v. Wyandanch Union Free School District*,[89] the Second Circuit reiterated that:

> A government agent enjoys qualified immunity when he or she performs discretionary functions if either (1) the conduct did not violate clearly established rights of which a reasonable person would have known, or (2) it was objectively reasonable to believe that the conduct did not violate clearly established rights. A right is clearly established if the contours of the right are sufficiently clear that a reasonable official would understand that what he or she is doing violates that right. The question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the defendant's position should know about the constitutionality of the conduct. The unlawfulness must be apparent.[90]

A police chief was granted qualified immunity for firing a police officer who had voiced speculation that the police chief had stolen money from the evidence room because the officer's "theory" was based mainly on the mere fact that the chief had been a manager over the evidence room.[91]

Although qualified immunity may shield individual defendants from a claim for monetary damages, it does not bar actions for declaratory or injunctive relief such as reinstatement.[92]

Like other aspects of First Amendment jurisprudence regarding the free speech rights of public employees, it is difficult to predict when qualified immunity will be granted in a particular case. For example in *Piesco v. City of New York*,[93] the Second Circuit rejected the qualified immunity defense, holding that the constitutional right of a public employee to testify truthfully before a legislative body was sufficiently clear that a reasonable municipal officer would understand that to retaliate against an employee for such testimony would violate the First Amendment. Nevertheless, eight years later, qualified immunity was granted to state officials involving a similar dispute regarding the content of an employee's testimony before a state board.[94]

Conclusion

As James Madison noted in *The Federalist Papers No. 51*, "if men were angels, no government would be nec-

essary. If angels were to govern men, neither external nor internal controls on government would be necessary."

Despite our society's dedication to the principles of freedom of speech and freedom of association, contained in the United States and New York State Constitutions, there remains an ever-present temptation, by some executing governmental authority, to retaliate against men and women who speak or act in opposition to governmental policy. Such retaliation can be in the form of unlawful prohibitions against speech and conduct or through disciplinary action and denial of terms and conditions of employment.

The primary and necessary external check to such governmental retaliation rests with an independent judiciary which, along with labor arbitrators, can provide public employees with an opportunity to challenge such unlawful government action.

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1. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Waters v. Churchill*, 511 U.S. 661 (1994); *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995); *Zaretsky v. New York City Health & Hosps. Corp.*, 84 N.Y.2d 140, 615 N.Y.S.2d 341 (1994).
2. *Pickering*, 391 U.S. 563.
3. 94 N.Y.2d 321, 329, 704 N.Y.S.2d 910 (1999).
4. 511 U.S. 661 (1994).
5. *Myers v. Hasara*, 226 F.3d 821, 826 (7th Cir. 2000).
6. *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999).
7. *See Pickering*, 391 U.S. 563; *see also Sheppard v. Beerman*, 18 F.3d 147, 151 (2d Cir. 1994); *Bieluch v. Sullivan*, 999 F.2d 666, 670 (2d Cir. 1993); *Piesco v. City of New York, Dep't of Personnel*, 933 F.2d 1149, 1155 (2d Cir. 1991).
8. *Connick*, 461 U.S. at 146.
9. *Piesco*, 933 F.2d at 1156.
10. *Tao v. Freeh*, 27 F.3d 635 (D.C. Cir. 1994); *Ezekwo v. New York City Health & Hosp. Corp.*, 940 F.2d 775, 781 (2d Cir. 1991).
11. *Id.*; *Barkoo v. Melby*, 901 F.2d 613, 618 (7th Cir. 1990).
12. 532 U.S. 514 (2001).
13. 165 F.3d 154, 164 (2d Cir. 1999).
14. 219 F.3d 61 (2d Cir. 2000).
15. *Holder v. Allentown*, 987 F.2d 188 (3d Cir. 1993).
16. *Tao v. Freeh*, 27 F.3d 635, 640 (D.C. Cir. 1994) (citing *McKinley v. Eloy*, 705 F.2d 1110 (9th Cir. 1983)).
17. *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979).
18. *Tao*, 27 F.3d at 640.
19. *Sheppard v. Beerman*, 18 F.3d 147, 149 (2d Cir. 1994).
20. *Luck v. Mazzone*, 52 F.3d 475 (2d Cir. 1995).
21. *Tiltti v. Weise*, 155 F.3d 596 (2d Cir. 1998).
22. *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 353 (4th Cir. 2000). *See Lee v. Nicholl*, 197 F.3d 1291, 1295 (10th Cir. 1999) (memoranda regarding traffic safety at a particular intersection); *Edwards v. City of Goldsboro*, 178 F.3d 231, 247 (4th Cir. 1999) (speech regarding proper handling of firearms affected public safety); *Kincade v. City of Blue Springs*, 64 F.3d 389, 396 (8th Cir. 1995) (expressing concerns about potential danger to community's citizens).
23. 226 F.3d 821 (7th Cir. 2000).
24. *Id.* at 826.
25. *Johnson v. University of Cincinnati*, 215 F.3d 561, 584 (6th Cir. 2000).
26. *See Padia v. City of Miami*, 133 F.3d 1443 (11th Cir. 1998); *Yatvin v. Madison Metropolitan Sch. Dist.*, 840 F.2d 412 (7th Cir. 1988); *Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985).
27. *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1288 (11th Cir. 2000).
28. *Bradshaw v. Pittsburg Indep. Sch. Dist.*, 207 F.3d 814 (5th Cir. 2000).
29. *Clinger v. New Mexico Highlands Univ., Bd. of Regents*, 215 F.3d 1162, 1166–67 (10th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).
30. *Perry v. McGinnis*, 209 F.3d 597 (6th Cir. 2000).
31. *Prager v. LaFaver*, 180 F.3d 1185 (10th Cir.), *cert. denied*, 528 U.S. 967 (1999).
32. *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1288 (11th Cir. 2000).
33. *Maggio v. Sipple*, 211 F.3d 1346 (11th Cir. 2000).
34. *Id.* at 1353.
35. *Hudson v. Norris*, 227 F.3d 1047 (8th Cir. 2000).
36. *Kokkinis v. Ivkovich*, 185 F.3d 840, 844 (7th Cir. 1999).
37. 239 F.3d 939, 941 (7th Cir. 2001).
38. 221 F.3d 967, 974 (7th Cir. 2000).
39. 216 F.3d 616 (7th Cir. 2000).
40. *Id*. at 620.
41. 181 F.3d 992, 997 (8th Cir. 1999).
42. *Waters v. Churchill*, 509 U.S. 903 (1993); *Frank v. Relin*, 1 F.3d 1317, 1329 (2d Cir. 1993).
43. *Piesco v. City of New York, Dep't of Personnel*, 933 F.2d 1149, 1157 (2d Cir. 1991).
44. 124 F.3d 92 (2d Cir. 1997).
45. *See id*. at 102.
46. *See Harman v. City of New York*, 140 F.3d 111 (2d Cir. 1998).
47. *Id*. at 118.
48. 241 A.D.2d 574, 659 N.Y.S.2d 351 (3d Dep't 1997).
49. *Id*. at 574.
50. *See id*. at 575; *see also Village of Scotia*, 29 PERB ¶ 3071 (1996), *aff'd sub nom. Village of Scotia v. New York State PERB*, 241 A.D.2d 29, 670 N.Y.S.2d 602 (3d Dep't 1998) (affirming a PERB finding that the same letter constituted protected activity under the Taylor Law).
51. *MacFarlane*, 241 A.D.2d at 575 (citations omitted).
52. *Shaya-Castro v. New York City Police Dep't*, 233 A.D.2d 233, 233, 649 N.Y.S.2d 711 (1st Dep't 1996).
53. 193 F.3d 130, 140 (2d Cir. 1999).
54. 187 F.3d 272 (2d Cir. 1999).
55. 165 F.3d 154 (2d Cir.), *cert. denied*, 528 U.S. 823 (1999).
56. 933 F.2d 1149 (2d Cir.), *cert. denied*, 502 U.S. 921 (1991).
57. 180 F.3d 1185, 1190–91 (10th Cir.), *cert. denied*, 528 U.S. 967 (1999).
58. 215 F.3d 561, 585 (6th Cir.), *cert. denied*, 531 U.S. 1052 (2000).

59. 185 F.3d 840, 845 (7th Cir. 1999).
60. 219 F.3d 1197 (10th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001).
61. 239 F.3d 1216 (11th Cir. 2001).
62. 178 F.3d 231 (4th Cir. 1999).
63. 212 F.3d 358, 371 (7th Cir. 2000), *cert. denied*, 531 U.S. 1012 (2001).
64. *Id.* at 373.
65. 513 U.S. 454 (1995).
66. *Id.* at 466–67.
67. *Id.* at 468 (citing *Pickering*, 391 U.S. 563, 571).
68. 239 F.3d 172 (2d Cir. 2001).
69. *Id.* at 176–78.
70. *Scott v. Meyers*, 191 F.3d 82 (2d Cir. 1999).
71. *Id.* at 88.
72. 170 F.3d 167 (2d Cir. 1999).
73. 196 F.3d 458 (2d Cir. 1999).
74. 513 U.S. 454 (1995).
75. 140 F.3d 111 (2d Cir. 1998).
76. *Boddie v. City of Columbus*, 989 F.2d 745 (5th Cir. 1993).
77. *See Anderson v. Pasadena Indep. Sch. Dist.*, 184 F.3d 439 (5th Cir. 1999); *Griffin v. Thomas*, 929 F.2d 1210 (7th Cir. 1991); *Gros v. Port Washington Police Dist.*, 932 F. Supp. 63 (E.D.N.Y. 1996); *Petrozza v. Village of Freeport*, 602 F. Supp. 137 (E.D.N.Y. 1984).
78. *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1199–1200 (10th Cir. 2000).
79. 221 F.3d 967, 975 (7th Cir. 2000).
80. *Anderson v. Burke County, Ga.*, 239 F.3d 1216 (11th Cir. 2001).
81. 176 F.3d 986 (7th Cir.), *cert. denied*, 528 U.S. 986 (1999).
82. *Id.* at 999 n.4.
83. 185 F.3d 35 (2d Cir. 1999).
84. *Id.* at 44.
85. 205 F.3d 203 (5th Cir.), *cert. denied*, 531 U.S. 816 (2000).
86. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Smith v. Garretto*, 147 F.3d 91 (2d Cir. 1998); *Adler v. Pataki*, 185 F.3d 35 (2d Cir. 1999); *Frank v. Relin*, 1 F.3d 1317, 1328 (2d Cir. 1993); *Bieluch v. Sullivan*, 999 F.2d 666, 669 (2d Cir. 1993); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1064 (2d Cir. 1993).
87. 515 U.S. 304 (1995).
88. *Id.* at 313.
89. 187 F.3d 272 (2d Cir. 1999).
90. *Id.* at 278 (citations omitted).
91. *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280 (11th Cir. 2000).
92. *Adler v. Pataki*, 185 F.3d 35 (2d Cir. 1999).
93. 933 F.2d 1149 (2d Cir.), *cert. denied*, 502 U.S. 921 (1991).
94. *Lewis v. Cowen*, 165 F.3d 154, 166 (2d Cir.), *cert. denied*, 528 U.S. 823 (1999).

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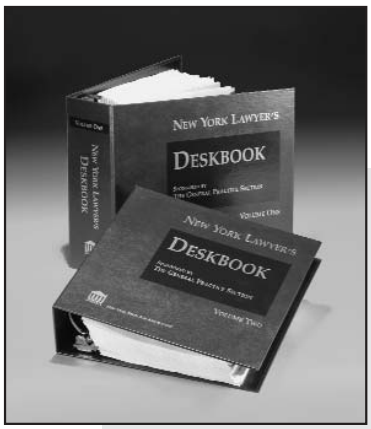

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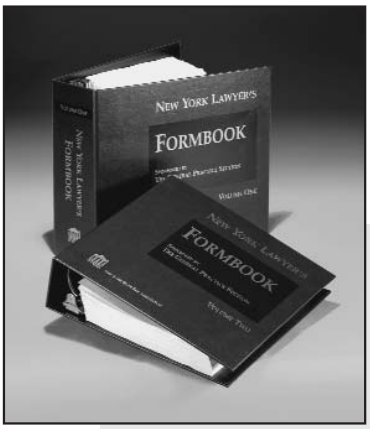

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Point of View

A Suggestion for Individuals and Businesses With Charitable Inclinations

By Peter Siviglia

Affirmative action? For me, one word defines affirmative action: "Education."

Apart from altruistic considerations, assisting students to obtain the best possible education is an investment in our future—indeed, in the future of civilization.

This essay suggests a type of academic scholarship program that I hope to establish one day. It also contains an example of that program.

I had originally thought that to be entitled to an academic scholarship, the student should maintain a minimum grade average. However, my wife, who teaches English and creative writing at a private school in New York, suggested that scholarship students also maintain a minimum "effort grade" in their courses. In fact, the school where she teaches has, in addition to academic grades, a system of effort grades. After considering my wife's suggestion, I decided to eliminate the academic grade entirely: The only standard for the scholarship is effort—that is, a grade to measure the effort a student makes to do the best work that the student can in a course.

People who work hard to do the best possible job they can—apart from deserving respect and assistance—will probably be successful. Those people will not only benefit themselves and their families, but they will also benefit any enterprise for which they work. Those persons are also likely to be socially responsible individuals and models for others. I know my father and mother were for me.

High school students would be the recipients of the scholarships under the sample program that follows. Of course, each person will have his or her own preferences regarding those students who should benefit from the program.

The sample also treats most, if not all, of the important considerations in a program of this kind. It grants a great deal of discretion to the administration and the teachers. Again, while different people will have different ideas on how to treat these considerations, I believe the sample provides a useful, adaptable model for this type of scholarship.

Further, given the litigious nature of our society, the sample contains provisions to protect the program and the school, including a form of agreement that parents of scholarship students must sign. I realize that the indemnity provisions in this agreement are of limited value because, by definition, the parents are of limited means, as they require financial aid for their child. All in all though, the agreement should have a prophylactic effect.

Needless to say, effort grades depend to a great extent on perception. In this respect they are more subjective than academic grades. Yet teachers—especially experienced teachers—know the efforts their students make, and I trust that those in the academic community possess the integrity to assess those efforts conscientiously and fairly. The goal: fostering, encouraging and underwriting industrious effort to do well, warrants scholarships based on this principle.

I hope that readers and their clients inclined to charitable work will seriously consider this suggestion.

The _____ Scholarship Fund for Students attending

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2. Intention; Effective Time
3. The Fund
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8. Amendments
9. Section Headings

[State here dedication and any appropriate remarks]

* * *

This document establishes, all on the terms hereinafter set forth, The _____ Scholarship Fund (the "Fund") for Students attending _____ _____, located in _____ ("School," which term includes any "Successor" as defined in Section 7 below).

1. Definitions

The word "Student" means either (i) a student attending the School, or (ii) a student admitted to the School though not yet attending it.

The word "Parent" means a mother or a father or a legal guardian of a Student or any other person *in loco parentis* with respect to a Student. The word "Parents" will include reference to both the plural and singular.

The word "Headmaster" means the headmaster of the School or other person occupying the position of a headmaster or principal of the School.

The word "scholarship" means a scholarship awarded under this document.

The word "Code" means the Internal Revenue Code (IRC) of 1986, as amended and as the same may from time to time be amended.

The term "Qualified Educational Institution" means an entity organized or created for educational purposes that qualifies under the Code as an entity to which contributions are deductible for federal income, estate and gift tax purposes. During

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Peter Siviglia is the author of *Commercial Agreements: A Lawyer's Guide to Drafting and Negotiating* (rev. ed., 1997) (Supp. 1998); *Exercises in Commercial Transactions* (1995), a textbook for law schools; and *Writing Contracts: A Distinct Discipline* (Carolina Academic Press 1996) (2nd Printing, 2001). A graduate of Williams College, he received an M.A. from Brown University in 1962, and a J.D. from Harvard University in 1965. He practices law and writes in Tarrytown, N.Y.

any period when there are no federal income, estate and gift taxes, or when contributions to entities organized or created for educational purposes are not deductible for federal income, estate and gift tax purposes, the term "Qualified Educational Institution" means any entity that would qualify as a successor to this document and to the Fund under Section 7 (Succession) below without regard to the first sentence of this paragraph.

2. Intention; Effective Time

(a) This document and the Fund (described below) are intended to be a charitable entity within the meaning of IRC § 501(c)(3).

(b) This document and the Fund will become effective upon the issuance of a ruling by the Internal Revenue Service that contributions to the Fund under this document will be deductible for federal income tax purposes *provided* that when that ruling is issued _____ is a Qualified Educational Institution.

(c) This document and contributions to the Fund will be irrevocable *except* that if this document does not become effective on or before _____, 2____, any contributions to and income earned by the Fund will be returned to [FOUNDER] and this document will be null and void.

3. The Fund

(a) The Fund is established by an initial contribution of _____ dollars ($_____.00). Additional contributions may be made to the Fund.

(b) The Fund will be invested in U.S. dollar debt obligations issued or guaranteed by the United States or by any agency of the United States or by any other obligor in the United States with a credit rating of at least double A by both Moody's and Standard & Poor's. If the School determines that investments of the kind described in the foregoing sentence are not readily available or not readily marketable, then the School may, to the extent it determines, invest the Fund in other high-grade securities.

(c) The income of the Fund will be used to provide scholarships for Students in accordance with this document; but if the income of the Fund exceeds the minimum amount required by law to be used for those scholarships in order to maintain the tax exempt status of the Fund and the School, then fifty percent (50%) of that excess will be added to the principal of the Fund and the balance of that excess will, in such portions as the School determines, (i) be used to provide scholarships for Students in accordance with this document or (ii) be added to the principal of the Fund or (iii) be used to do both.

(d) Except to the extent required by law in order to maintain the tax-exempt status of the Fund and the School, the principal of the Fund will not be used to provide scholarships.

4. Administration of the Fund

(a) The School will administer the Fund without charge.

(b) Whenever this document requires the School (as opposed to the Headmaster) to do anything, that function will be performed by the Headmaster and/or by any one or more of the employees, trustees or directors of the School as the Headmaster selects; but the School may, at the expense of the Fund (unless the School elects to pay the expense), engage the services of a professional investment advisor to invest the Fund in accordance with the requirements of this document.

Notwithstanding the foregoing, as long as [FOUNDER] is alive and competent and willing to do so, the School will not engage the services of a professional investment advisor but instead will invest the Fund in consultation with [FOUNDER]; but the decision of the School as to the investments will be final, binding and conclusive without regard to any opinion or recommendation of [FOUNDER].

(c) If any situation arises that is not determined by any provision of this document, or if any provision of this document requires interpretation, the Headmaster will decide how to deal with the situation or make the interpretation, as the case may be.

(d) Any decision, determination or other action under this document by the School or by the Headmaster and/or by any one or more of the employees, trustees or directors of the School selected by the Headmaster (i) will be made or taken in the sole and absolute discretion of the person or persons making the decision or determination or taking the other action, (ii) will be final, binding and conclusive on all parties concerned, (iii) will not be subject to challenge, and (iv) will not give rise to or be grounds for any claim.

(e) Notwithstanding any other provision of this document: (i) this document and the Fund will at all times be administered in a manner that this document and the Fund will at all times be a Qualified Educational Institution, and (ii) no action under this document will be taken that would constitute a prohibited transaction under the Code.

5. Scholarships

(a) Students entering the ninth, tenth, eleventh or twelfth grades who require financial aid to attend the School will be eligible for scholarships; but a Student admitted to the School for entry into the eleventh or twelfth grade will not be eligible for a scholarship. The School will determine the Students who will receive scholarships.

Scholarships will be awarded without regard to race or creed.

A Student may receive a scholarship only if the Parents of that Student sign an agreement in the form of EXHIBIT A hereto with such modifications as the School and, while he is alive and competent, [FOUNDER], shall approve. The agreement in the form of EXHIBIT A hereto will be modified appropriately if the Student has only one Parent.

(b) The scholarships, including renewals as provided in this document, will be for the entire School year and will pay for all or part of the cost of tuition, books and other materials for academic courses (see Section 6 below), and meals at the School. The School will decide the amount of each scholarship based on the School's determination of the financial aid needed by the Student to attend the School. The amount of the scholarship of any Student may vary from year to year depending on the School's determination of the amount of financial aid that Student needs. In addition, even if a Student is entitled to a renewal of his or her scholarship, the School may withdraw the scholarship if it determines that the Student is no longer in need of financial aid.

(c) A scholarship Student will be entitled to renewal of his or her scholarship for the next School year if, for the School year preceding the renewal year, that Student has (i) an Average Effort Grade (as determined under Section 6 below) of not more than 1.5, and (ii) no Effort Grade (as determined under Section 6 below) of more than 2.

A non-scholarship Student attending the School in the ninth, tenth or eleventh grade may be awarded a scholarship for the following School year only if that Student for the year prior to the award of the scholarship has (i) an Average Effort Grade (as determined under Section 6 below) of not more than 1.5, and (ii) no Effort Grade (as determined under Section 6 below) of more than 2.

A fraction in excess of 1.5 will be deemed more than 1.5, and a fraction in excess of 2 will be deemed more than 2.

(d) If a scholarship Student is suspended or expelled, or if a scholarship Student otherwise ceases to attend the School or takes a leave of absence for any reason other than illness or injury, that Student's scholarship will terminate. The School will use any unused portion of that scholarship (i) to supplement scholarships in the year of termination for scholarship students

that the School determines are in need of additional financial aid, or (ii) for scholarships in the next School year, or (iii) for both purposes.

(e) If a scholarship Student takes a leave of absence on account of illness or injury, that Student will be entitled to a renewal of the scholarship upon his or her return to the School, regardless of the Student's Effort Grades for the School Year in which the leave of absence occurs. The School will use any unused portion of that Student's scholarship (i) to supplement scholarships in the year of termination for scholarship students that the School determines are in need of additional financial aid, or (ii) for scholarships in the next School year, or (iii) for both purposes.

(f) If the scholarship of a scholarship Student terminates, that person will not be eligible again for a scholarship under this document.

6. Effort Grades

(a) An Effort Grade is a measure of the effort a Student makes to do the best work that Student can in a course.

(b) Teachers will assign Effort Grades in all academic courses for scholarship Students and for Students in the ninth, tenth or eleventh grade who wish to be considered for scholarships in the following School year. Effort Grades will be assigned according to the following standards:

1 - excellent
2 - good
3 - satisfactory
4 - unsatisfactory

A teacher may assign an Effort Grade between any of the two whole numbers listed above, but an Effort Grade lower than 1 may not be assigned.

One Effort Grade will be assigned for each course at the end of that course, but if a course overlaps more than one School year, then Effort Grades for that course will be given (i) at the end of the School year after which that course will continue, and (ii) at the end of the course.

Academic courses include, without limitation, courses in music, the arts and creative writing, as well as seminars in the subjects of academic courses; but they do not include any athletic activity or any course related to an athletic activity.

(c) The Average Effort Grade of a Student for any School year will be the simple average of all the Effort Grades of that Student for that year without regard to whether a course is for the entire School year or for more or less than the year: to wit, the quotient obtained by dividing the sum of all the Effort Grades by the number of Effort Grades.

(d) If the teacher of a course changes during the course, then the person teaching the course at the time the Effort Grade for that course is to be assigned will assign the Effort Grade for that course based on (i) that teacher's experience with the Student, (ii) collaboration, if possible, with the other teacher or teachers who taught the course during the period for which the Effort Grade is to be given, and (iii) if collaboration under item (ii) is not possible then on such information relevant to the Student's performance in the course as the teacher can obtain.

(e) If for any reason a teacher required to assign an Effort Grade does not do so, the Headmaster will assign the Effort Grade for the course based on (i) collaboration, if possible, with the teacher or teachers who taught the course during the period for which the Effort Grade is to be given, and (ii) if collaboration under item (i) is not possible, then on such information relevant to the Student's performance in the course as the Headmaster can obtain.

(f) The assignment of an Effort Grade (i) will be in the sole and absolute discretion of the person assigning the Effort Grade, (ii) will be final, binding and conclusive on all parties concerned, (iii) will not be subject to challenge, and (iv) will not give rise to or be grounds for any claim.

7. Succession

(a) If the School or any successor to this document and to the Fund (a "Successor") ceases to exist or ceases to offer grades 9 through 12, then another academic institution will succeed to this document and to the Fund in the manner of succession as set forth below.

A Successor must be a Qualified Educational Institution.

(b) If the School ceases to exist or ceases to offer grades 9 through 12 or ceases to be a Qualified Educational Institution, then _____ (the "First Choice") will succeed to this document and the Fund, *provided* that institution (i) exists, (ii) offers grades 9 through 12, (iii) is a Qualified Educational Institution, and (iv) accepts this document.

(c) If the First Choice does not succeed to this document, or if any Successor ceases to exist or ceases to offer grades 9 through 12 or ceases to be a Qualified Educational Institution, then an academic institution in the City of New York or Westchester County, New York, that offers grades 9 through 12 and is a Qualified Educational Institution and accepts this document will succeed to this document and the Fund. If more than one such institution is willing to accept this document and the Fund, then the successor will be chosen by lot. Succession under this item (c) will be administered by a court of competent jurisdiction.

(d) If there is no Successor to this document and the Fund under any of the foregoing procedures, then a court of competent jurisdiction will determine the disposition of this document and the Fund to achieve the objectives of providing academic scholarships to students in need of financial aid who are diligent, hardworking and persons of integrity.

8. Amendments

(a) This document may be amended by the School only with the written consent of [FOUNDER]; but if [FOUNDER] is dead or incapacitated, then this document may be amended by the School only with the written consent of his wife, [FOUNDER'S WIFE], provided she is alive and not incapacitated.

(b) Any amendment to this document (i) must not violate any provision of the Code, and (ii) must not authorize any conduct that would cause this document or the Fund to cease to be a charitable entity within the meaning of IRC § 501(c)(3).

(c) If because of death or incapacity or both, neither [FOUNDER] nor [FOUNDER'S WIFE] is available to consent to an amendment to this document, then this document may be amended by the School in accordance with an order of a court of competent jurisdiction after appeals, if any, and after all time for appeal has expired. The Fund will pay the cost of obtaining such order unless the School elects to pay that expense.

(d) In any event, no amendment to this document may expand the power of the School to amend it.

9. Section Headings

Section headings are for reference purposes only and will not in any way affect the meaning or interpretation of any provision of this document.

IN WITNESS WHEREOF, I have executed this document and I have established the Fund the ____ day of _____, 2____.

_____
FOUNDER

ACCEPTED:

[NAME OF SCHOOL]

By: _____

Name:

Title:

EXHIBIT A

_____, 2_____

[— Name of School —]

_____

_____

Gentlepeople:

We are the [STATE RELATIONSHIP TO STUDENT] of [NAME OF STUDENT] (the "Student"), who has been awarded, subject to our executing this agreement, an _____ Scholarship under the document attached hereto (the "Attachment," which term will include any future amendments thereto).

We have read that document and this agreement; we have consulted with an attorney about them; and we fully understand and accept their contents and the effect of those contents.

Accordingly, in consideration of your awarding the Scholarship to [FIRST NAME OF STUDENT], we agree with you (the "School") as follows:

1. Notwithstanding any other agreement that we have with the School or any rule or regulation of the School or any brochure or other material issued by the School or any other understanding, whether written or oral, the Student is a student at will. The Student may resign from the School at will, and the School may suspend or expel the Student at will. We acknowledge that if the Student is suspended or expelled or otherwise ceases to attend the School, the Student's scholarship will terminate. Neither of us will assert any claim or permit any claim to be asserted on behalf of either of us or on behalf of the Student against the School or anyone else by reason of any such suspension, expulsion, or termination of the scholarship; and each of us waives any such claim on behalf of each of us and, to the extent permitted by law, on behalf of the Student.

2. We also understand that if the Student does not achieve the Effort Grades or the Average Effort Grade required under the Attachment, the scholarship will not be renewed. Neither of us will assert any claim or permit any claim to be asserted on behalf of either of us or on behalf of the Student against the School or anyone else by reason of (i) the assignment of any Effort Grade to the Student, (ii) the Student's Average Effort Grade, or (iii) non-renewal of the scholarship because the Student did not achieve the Effort Grades or the Average Effort Grade required under the Attachment; and each of us waives any such claim on behalf of each of us and, to the extent permitted by law, on behalf of the Student.

3. Further, neither of us will assert any claim or permit any claim to be asserted on behalf of either of us or on behalf of the Student against the School or anyone else by reason of any other matter arising out of or in connection with the Attachment or any decision, determination or other action under the Attachment pertaining in any way to the Student or to the scholarship awarded to the Student; and each of us waives any such claim on behalf of each of us and, to the extent permitted by law, on behalf of the Student.

4. If any claim described in item 1, 2 or 3 above is asserted against the School or anyone else, we will pay (i) all expenses (including, without limitation, legal fees, court costs, and the cost of appellate proceedings) that the School or any such other person incurs arising out of or in connection with that claim, and (ii) any judgment, damages or other amounts that you are required to pay or agree in settlement to pay on account of such claim.

5. Any person besides the School to whom item 1, 2, 3, or 4 applies is a third-party beneficiary of this agreement and is entitled to the benefit of all of our covenants and obligations under this agreement as if that person were a party to this agreement.

6. Our obligations under this agreement are joint and several, and they apply to the initial scholarship and to any renewals thereof.

7. This agreement may be amended only by an instrument in writing signed by the School and by us. The consents of the third-party beneficiaries of this agreement are not required for any amendment as long as the amendment does not adversely affect any of their rights.

8. This agreement will be governed by and construed in accordance with the law of the State of New York.

Very truly yours,

_____

Name:

_____

Name:

The undersigned, an attorney admitted to practice in the State of New York, confirms that s/he has examined the foregoing agreement and the Attachment thereto and has discussed them with and explained their contents and the effect of those contents to _____ and _____.

_____

Name:

ACCEPTED:

[NAME OF SCHOOL]

By: _____

Name:

Title:

[ATTACH COPY OF THE INSTRUMENT ESTABLISHING THE SCHOLARSHIP FUND]

_____

Author's Note: Richard W. Mertens, Esq. of Coughlin & Gerhart, Binghamton, New York, advised on the tax aspects involved in this article. Mr. Mertens cautions that tax attorneys may prefer more formal, traditional tax clauses than those in the sample scholarship program that follows. I greatly appreciate Mr. Mertens' advice and assistance.

I also acknowledge and appreciate the advice given by my wife, Anne, and by Cathleen Scanlan of the Massachusetts school system and John Van Leer and Julianne Puente of The Hackley School.

Language Tips

By Gertrude Block

Question: An Albany lawyer wants to settle a wager among members of his firm about whether to hyphenate the phrase *longtime adversary*. The answer will determine the winner of a small monetary wager.

Answer: Unfortunately, no money will be involved, for there is no definitive answer. *The American Heritage Dictionary of the English Language*, in its 1982 edition, favors the hyphen, but the 1986 edition of *Webster's New World Dictionary* lists only *longtime*. Because hyphens disappear when a phrase is used widely and frequently, the hyphen in *longtime* is now probably optional. The 1982 *AHD* favors *longstanding* and *long-winded*, but *Webster's New World* lists *longstanding* and *longwinded*. Both are currently often used without hyphens, although my computer spell-checker "corrects" *longwinded* while permitting *longstanding*.

In noun-phrases, hyphens can be said to be an interim phase between a two-word phrase and a compound noun. The word *mailman* was at one time written as *mail man*; then it became *mail-man* and finally *mailman*. *Baseball* came into the language as *base ball*, then was hyphenated, and is now written as one word. *Hair cut* was eventually shortened to *haircut*. Persons who frequently use a word-pair will write it as one word: If you are a racquetball enthusiast, you probably write *racquetball*; windsurfers probably write *windsurf* (which my spell-checker permits, though it hyphenates *windsurfers*). As lawyers, you may write as a single word legal terms that lay persons hyphenate, if they use them at all.

Words with attached suffixes are also tricky. Which of the following do you write with a hyphen? *Copout, knockout, dropout, blackout, timeout*? Although my spell-checker hyphenates none of these compound words, *timeout* is often hyphenated, for words with touching vowels often retain hyphens.

In words with attached suffixes, frequency of use decides whether they are written as one word or retain hyphens. Other than that explanation, only personal preference governs. For example, William Sabin, author of *The Gregg Reference Manual* (Seventh Edition), permits *kickoff*, but hyphenates *sign-off* and *sound-off*. The *Manual* allows *carryover* and *crossover*, but hyphenates *once-over* and *voice-over* (probably because the latter two have touching vowels). Inexplicably, the *Manual* permits *followup* and *stowaway*, but hyphenates *go-between*, *get-together*, and *break-through*.

Prefixes readily drop their hyphens unless touching vowels would cause mispronunciation. The *un-* prefix is a good example (*uninteresting*, *uninhibited*, and *unavailable*). But for a long time *cooperation* resisted the deletion of its hyphen, as did *coordination*; and *de-emphasis* is still usually hyphenated to avoid *deem* being pronounced as it looks. In *loophole*, the central *ph* might otherwise sound like an *f*. On the other hand, words like *regeneration, immaturity, misrepresentation, and inalienable* readily dropped their hyphens. You may recall that *inasmuch* and *notwithstanding* were at first hyphenated. I predict that the word *e-mail*, which the *Journal* correctly still hyphenates, will eventually drop its hyphen.

However, sometimes hyphenation is necessary to avoid ambiguity. Consider the differences in meaning of the following word pairs when hyphens are added:

- Extra judicial duties
- Extra-judicial duties
- A reformed contract
- A re-formed contract
- A little used car
- A little-used car
- Recovered furniture
- Re-covered furniture

From the Mailbag

A Fredericksburg, Va., reader submitted a question about hyphens. He asked whether technologies that need a long time to develop are referred to as *long lead-time technologies* or *long-lead-time technologies*. The answer is that the second phrase is correct because multiple modifiers are hyphenated whenever they modify a noun as a unit instead of separately. Other illustrations of multiple modifiers are *an open-and-shut case*, *a hard-to-answer question*, and *the one-and-only reason*. But when only two of the three modifiers are to be read as a unit, indicate that by a hyphen; for example, *a well-known legal rule, a twelve-member law firm, a well-documented legal argument.*

Like many rules (both legal and grammatical) this one has an exception: When an adverb ending in *-ly* modifies a noun as part of a unit, it is not hyphenated; for example, *currently standard speech*, *clearly offensive language*, and *a patently absurd argument*. (Incidentally, the *a* in *patently* is pronounced like the *a* in *date*, not—as it is often pronounced—like the *a* in *patent-leather shoes*; nor are the two words related in meaning.)

Herman Melville obliquely discussed hyphenation when he expostulated on the "Fast-Fish and the Loose-Fish Doctrine" in the following passage from *Moby Dick*:

> • I. A Fast-Fish belongs to the party fast to it.
>
> • II. A Loose-Fish is fair game for anybody who can soonest catch it.
>
> These two laws touching Fast-Fish and Loose-Fish, I say, will, on reflection, be found the fundamentals of all human jurisprudence; for notwithstanding its complicated tracery of sculpture, the Temple of the Law, like the Temple of the Philistines, has but two props to stand on. . . .
>
> But if the doctrine of Fast-Fish be pretty generally applicable, the kindred doctrine of Loose-Fish is still more widely so. What are the Rights of Man and the Liberties of the World but Loose-Fish? . . . . What is the great globe itself but a Loose-Fish! And what are you, reader, but a Loose-Fish and a Fast-Fish, too?
>
> *Writings of Herman Melville* 6:398 (Harrison Hayford ed. 1988.)

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payments for cotton began to smell rotten/ Twas a mugging of poor Uncle Sam."); *United States v. Ven-Fuel, Inc.*[16] ("So while the Government will no doubt be annoyed,/ We declare the conviction null and void.").

A federal magistrate found a defendant guilty of "creating a physically offensive condition" for taking off his wet clothes in a nearly deserted parking lot at Lava Beds National Monument. District Judge McBride set aside the conviction because the magistrate did not record the proceedings.[17] In doing so, the judge quoted a limerick from defense counsel's brief. For defendant, the opinion represented good news and bad. The good news: The court set aside the conviction for the petty crime. The bad news: The opinion itself was small consolation. The opinion's short limerick:

> There was a defendant named Rex
> With a minuscule organ for sex.
> When jailed for exposure
> He said with composure,
> *De minimis non curat lex.*

A Kansas judge sentenced a prostitute to probation with the following:

> This is the saga of _____ ____ _____,
> Whose ancient profession brings her before us.
> On January 30th, 1974,
> This lass agreed to work as a whore.
> Her great mistake, as was to unfold,
> Was the enticing of a cop named Harold.
>
> * * *
>
> From her ancient profession she'd been busted,
> And to society's rules she must be adjusted.
> If from all this a moral doth unfurl,
> It is that Pimps do not protect the working girl!

The judge who wrote this doggerel was censured for exposing defendant to public ridicule and scorn.[18] Make that the *former* judge who wrote this doggerel.[19]

In *Limerick Auto Body Inc. v. Limerick Collision Center Inc.*,[20] a concurring limerick played on the litigants' names: "'Limerick Auto' and 'Limerick Collision'/ Are so close one may clearly envision/ That the two were the same,/ So a limerick I frame,/ And join in my colleagues' decision."

Some judicial verse is more infamous than famous. *Joyner v. Guccione*[21] falls into the former category:

> T'was the night before Christmas and all through the prison,
> inmates were planning their new porno mission.
> While the December issue of *Penthouse* was hitting the stands,
> the Minister of the Mandingo Warriors was warming his hands.
> For you see, the publishers had promised a pleasurable view
> of the woman who sued the President too.
> The minute his *Penthouse* issue arrived
> the minister ripped it open to see what was inside.
> But what to his wondering eyes should appear
> not Paula Jones' promised privates but only her rear.
> Life has its disappointments. Some come out of the blue.
> But that doesn't mean a prisoner should sue.

Those who find *Joyner* funny laugh only because the judge was so outrageous. But even when poetry in motion is clever and harmless, the losing sides will believe that the court treated them and their arguments frivolously. And readers will conclude that the court spent more time scripting the verse than deciding the case correctly.

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18. *See In re Rome*, 218 Kan. 198, 200–201, 542 P.2d 676 (1975) (per curiam) (reciting Judge Rome's poem).
19. *See State ex rel. Comm'n on Judicial Qualifications v. Rome*, 229 Kan 195, 623 P.2d 1307 (per curiam), *cert. denied sub nom. Rome v. Kansas*, 454 U.S. 830 (1981).
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The Legal Writer

Poetic Justice: From Bad to Verse

By Gerald Lebovits

Chief Judge Cardozo once wrote about a practice he erroneously believed was interred: "In days not far remote, judges were not unwilling to embellish their deliverances with quotations from the poets. I shall observe towards such a practice the tone of decent civility that is due to those departed."[1] But what about judges who fancy themselves as poets and write opinions in verse? That practice, still alive, should be buried without eulogy.

Poetic justice is always entertaining but rarely poetic or just. Rhyming verse in opinion writing is surprising because "humor in the form of doggerel verse . . . can undermine judicial opinions as sources of law."[2] Missing from verse is the key to a reasoned judicial opinion: a clearly articulated holding supported by precedent. Also typically absent from judicial poetry is equal metric footage. The chapter and verse of most poetic justice, in other words, is bad law and bad poetry. Arkansas Justice Smith agreed: "[I]f all the versifying justices were compelled to eat their words, the punishment would be poetic justice!"[3] Why are so many opinions in verse? Because some judges have too much time on their hands.

Several New York State opinions have been written in rhyme. *People v. Sergio*[4] mimicked Clement Clarke Moore's "A Visit from. St. Nicholas":

> 'Twas Game Six of the Series when out of the sky,
> Flew Sergio's parachute, a Met banner held high.
> His goal was to spur our home team to success,
> Burst Beantown's balloon claiming Sox were the best.
> The fans and the players cheered all they did see,
> But not everyone present reacted with glee.
> "Reckless endangerment!" the D.A. spoke stern.
> "I recommend jail—there a lesson he'd learn!"
> Though the act proved harmless, on the field he didn't belong,
> His trespass was sheer folly, and undeniably wrong.
> But jail's not the answer in a case of this sort,
> To balance the equities is the job of this court.
> So a week before Christmas, here in the court,
> I sentence defendant for interrupting a sport.
> Community service, and a fine you will pay.
> Happy holiday to all, and to all a good day.

One unreported New York opinion considered whether a pet donkey violated a residential zoning ordinance. The opinion concludes with the moral: "Though defendant is not guilty, there is a lesson to be learned by inconsiderate pet owners whose neighbors' tempers burn. When nothing else succeeds, and as a last resort, as in the case at hand, they'll drag your ~~ass~~ to Court. 'donkey'"[5]

A Manhattan small-claims opinion[6] was written in rap because "At a Party DJ Ed Lover was a 'No Show.'" The final stanzas: "The Court can award no money to the claimant/ Remy's and his posse's proof was insufficient/ So substantial justice requires judgment for defendant./ (Not to worry the court will keep its day job/ This rap will probably make true Hip/Hop artists take a sob.)"

To read seven national classics of poetic justice, six civil, the seventh and last criminal, see *In re Love*[7] (rhyming to Edgar Allan Poe's "The Raven": "The bird himself, my only maven, strongly looked to be a raven."); *Mackensworth v. American Trading Transportation Co.*[8] ("The motion now before us has stirred up a terrible fuss./ And what is considerably worse, it has spawned some preposterous doggerel verse."); *Fisher v. Lowe*[9] (barking up Joyce Kilmer's classic "Trees": "Flora lovers though we three,/ We must uphold the court's decree."); *Jenkins v. Commissioner*[10] ("Ode to Conway Twitty": "Twitty Burger went belly up/ But Conway remained true./ He repaid his investors, one and all/ It was the moral thing to do."); *Nelson v. State*[11] ("In petition for post-conviction relief,/ The petitioner herein expounds his grief."); *Wheat v. Fraker*[12] ("'Foul, foul play,' the defendant cried:/ 'That I by kinsman be not trammeled/ Let the issue again be tried/ Before another jury impanelled.'"); and my all-time favorite, *Brown v. State*[13] (explaining that a trial judge once told Georgia appellate Judge Evans at a "convivial" gathering that if Judge Evans were ever to reverse him again, the opinion should be in verse).

Missing from verse is . . . a clearly articulated holding supported by precedent.

Sometimes little reason exists to set an opinion in verse. The court in *Anderson Greenwood & Co. v. NLRB*[14] ("We hope this attempt at a rhyme, perhaps two,/ Has not left this audience feeling too blue."), used verse because two precedents—a case named "Tire" and another named "Wire"—rhymed. Two courts needed no reason at all to versify: *United States v. Batson*[15] ("Some farmers from Gaines had a plan./ It amounted to quite a big scam./ But the

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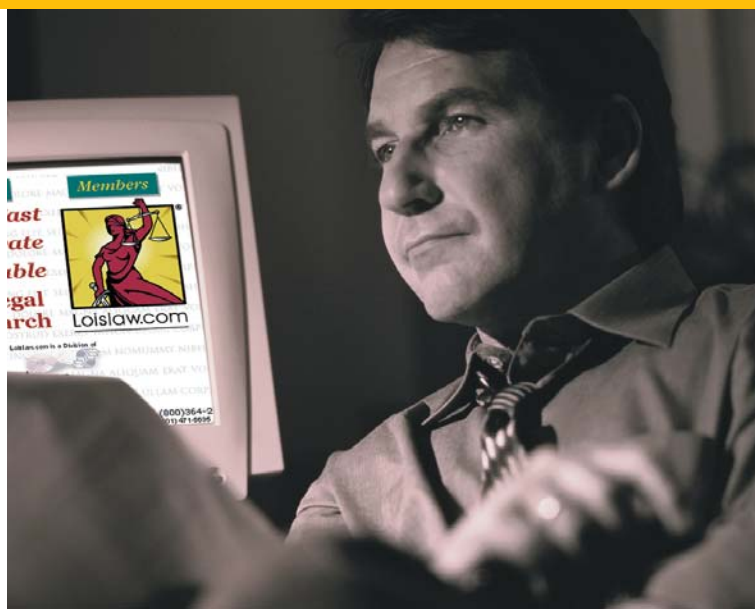

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