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NEW YORK STATE BAR ASSOCIATION

Journal

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by Jonathan P. McSherry

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Michael E. Getnick
President

NYSBA

Patricia K. Bucklin
Executive Director

NEW YORK STATE BAR ASSOCIATION
Journal

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EUGENE C. GERHART
(1912 – 2007)
Editor-in-Chief, 1961–1998

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DEPARTMENTS

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MICHAEL E. GETNICK

The Honor Is Mine. The Credit Is Yours.

Having taken the oath of office in June of 2009, I end my term on May 31, 2010. It has been my honor to serve as your President of the New York State Bar Association.

I became the President at a time when large firms were laying off hundreds of employees and some were dissolving, solo and small firm lawyers were struggling to save their practices and law students faced mounting debt and extremely reduced job prospects.

Taking the oath of office, I announced the theme of my term: "Lawyers Helping Lawyers." I pledged that the Bar Association would do its utmost to be relevant to the needs of lawyers on an everyday basis and to make membership in our Association all the more valuable. At the same time, I pledged to keep our commitment to provide access to justice through our support for funding of civil legal services and the needs of the judiciary.

I am proud to report that, due to the generosity and skill of the lawyers who led our Committees and Sections and spearheaded our initiatives, we were able to deliver enhanced value to our members while serving the needs of those who depend upon our profession. That our membership grew to 77,000 during these dire economic times is a tribute to our staff and Committees such as Membership, led by Claire Gutekunst, and Finance, led by Dave Schraver.

In the space allowed me it will not be possible to describe each initiative and success that has occurred. I would like to highlight those I am extremely proud of in this, my final President's Message.

Lawyers Helping Lawyers

Our Committee on Lawyers in Transition, chaired by Lauren Wachtler, provided free webcasts to guide attorneys as they search for new jobs, revise resumes, brush up on interview skills and navigate career changes. Several hundreds of attorneys took advantage of these programs over the past year, and more programming is planned this year.

Ever mindful of the competitive law job market, we launched a new Career Center, where members can search job listings and post their resumes for free. This outstanding new resource on our Web site offers a powerful tool that matches job seekers with employers and recruiters. Attorneys will now have the right resources at their fingertips to conduct a thorough and successful job search. Equally important, employers and recruiters will have the ability to tap into the unsurpassed talent of New York attorneys.

To provide support and stress relief for our members who are struggling, particularly in light of the economy, we relied on our dedicated and compassionate Lawyers Assistance Program, chaired by Lawrence Zimmerman, which provided programming and resources to assist attorneys in need.

Our Special Committee on Solo and Small Firm Practice, led by Past President Bob Ostertag, issued its report outlining a comprehensive plan to help solo and small firm lawyers. We reached out to these practitioners and, in response to their feedback, we launched a new and improved solo/small firm resource center on our Web site, which includes forms, reference links, tips, and even our new blog, Smallfirmville. This practical resource, combined with our law practice management Web site and e-newsletters, including the new law practice technology e-newsletter T-News, keeps solo and small firm lawyers informed and provides a way for these practitioners to stay connected to the profession. To ensure that issues important to solo and small firm attorneys stay at the forefront, we have formed a Coordinating Council made up of representatives from key areas, including the General Practice Section, the Law Practice Management Committee, the Membership and Continuing Legal Education Committees, and other State Bar entities that offer programs and services to solo and small firm members.

Advocacy for the Profession and the Public

At the very first meeting of the House of Delegates during my term as President, we adopted a resolution calling for the amendment of New York's Domestic Relations Law to give same-sex couples the right to marry and to recognize civil marriages that

MICHAEL E. GETNICK can be reached at mgetnick@nysba.org.

have been contracted elsewhere. The report and resolution of our LGTB Committee, led by Michele Kahn, was joined by the Trusts and Estates Law Section. The presentation at the House made it clear that this was not merely a social issue but a matter of equal rights and due process of law.

Unfortunately, tens of thousands of New Yorkers do not have the protections, responsibilities and dignity associated with marriage. These same-sex couples lack basic legal rights in such critical areas as health care, hospital visitation rights and child custody issues. I do welcome the Obama Administration's recent initiative to issue new rules aimed at granting hospital visiting rights to same-sex partners, making it easier for same-sex partners to make medical decisions on behalf of their partners.

We were disappointed that the Senate failed to pass the same-sex marriage bill last year; however, we will continue to seek to secure the rights and dignity of all citizens of our State, and same-sex marriage remains a top legislative priority. In addition, the repeal of the federal Defense of Marriage Act became a part of our inaugural list of federal legislative priorities. Under the leadership of President-elect Stephen Younger, we have bolstered our advocacy in our nation's capital, thereby expanding the reach of our voice for New York's attorneys on that issue, as well as funding of civil legal services and other key legislation. Steve is moving so quickly that when I pass the baton to him on June 1, he will be on pace to become one of the best presidents our Association has ever had.

Over the past few months, we issued public statements, lobbied state and federal governments, and urged our members to speak out on a variety of issues, including the new power of attorney forms, the licensing of title insurance agents, caps on awards to victims of medical malpractice and attacks on lawyers who had represented Guantanamo Bay detainees. A joint task force of Section Leaders, led by Past President Kate Madigan, has worked with the Law Revision Commission and the Legislature, and it is my understanding that many of the problems caused by the new power of attorney forms will be resolved to our satisfaction. The Wrongful Conviction Task Force, formed by Immediate Past President Bernice Leber and ably chaired by Judge Phyllis Bamberger, is working with the Legislature on several bills that, because of their efforts, will now be presented with sponsorship by members of the Assembly and/or Senate.

The continuing challenge of inadequate funding for civil legal services combined with the tax on the judiciary continues. The recent proposals to increase court filing fees are inimical to the goals of Access to Justice.

We find it particularly troubling that fees levied in the past on the legal profession, namely the increase in the biennial registration fee, were swept into the State's general fund. Nearly $6.6 million, which by statute was set apart for indigent defense, was instead applied to the general fund, along with $9 million that was supposed to be used for civil legal services. We know, from Comptroller DiNapoli's report on sweeps, that once these funds are levied, they can be at any moment swept into the general fund for whatever purpose – and certainly not for the purpose for which they were intended.

The continuing failure to raise judicial salaries combined with the lack of funding for civil legal services is a two-pronged attack on our system of justice. For a judge to be paid one-third less than he or she was making 12 years ago is not an inducement to keeping the best on the Bench and encouraging others to follow. We are fortunate that increasing numbers of pro se litigants who cannot afford attorneys and the increased load upon the judicial system caused by these difficult economic times resulting in foreclosures, loss of housing and fundamental rights have not deterred our judges from giving their best to the administration of justice. We will continue to speak out on these and other issues that affect our profession and the clients we serve.

I am particularly proud of our efforts, led by Past President Vince Buzard, to bring a successful resolution before the ABA House of Delegates calling for the examination of any efforts to publish rankings of law firms and law schools. The need to seek action arose after *U.S. News & World Report* announced that this year it will publish local, state and national law firm rankings. Unlike ratings, these rankings will apparently list law firms in order, from best to worst, by number. We are concerned about the tremendous risk of sending misinformation to the public, which can influence the important decision of which law firm to hire. Per our resolution, the ABA will study the issue of credibility and criteria of information used in ranking, and we are working with the ABA in these efforts. In the interim, we continue to advise New York lawyers and law firms to exercise caution, keeping in mind the Rules of Professional Conduct in deciding whether to provide information for the purpose of ranking law firms, pending completion of the ABA's review.

The Good We Do

I am continually impressed by the generosity of our members who have donated hundreds of thousands of hours of pro bono service. This year, more than 1,400 of our Empire State Counsel members alone collectively provided nearly a quarter of a million hours. This honor and designation goes to members providing 50 or more hours of free legal services to the poor during the year. In 2009, our Empire State Counsel provided twice the number of hours of free legal services than in 2008. Our members have once again answered the call to do the public good, using their talents and time to help families keep their homes, represent domestic violence victims and get health care for children. If you donated 50 or more hours but did not apply for our Empire State Counsel program last year, I encourage you to apply if you

qualify in 2010. I would like to see us top this year's numbers.

To further recognize the good that lawyers do each day in communities all across our nation, we launched The Good We Do campaign. Through a blog, radio announcements, and various articles and public statements, we promoted the significant contributions made by the scores of attorneys across the state who donate their time, services and expertise to meet the ever-growing legal needs of low-income people and others who have been hard hit by the economic downturn. We know that pro bono service alone will not close the 85% access to justice gap, but each hour provided by our generous, compassionate members makes a significant difference in the lives of thousands of New Yorkers. The list of accomplishments and thank-yous goes beyond the pages permitted for this message. The accomplishments during my presidency are the result of the efforts of the membership and leadership. Our successes would not be possible without the fantastic staff under the leadership of our Executive Director, Patricia Bucklin. The honor to serve as your President has been mine, but the credit goes to all who have participated in our efforts. Thank you for the privilege of allowing me to serve as your President. ■

NYSBACLE

Tentative Schedule of Spring Programs *(Subject to Change)*

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

Tenant Screening and the Correction of Records
(5:30 pm – 7:30 pm)
May 11 New York City

Long Term Care
May 14 New York City
May 21 Albany

Practicing Matrimonial and Family Law in Chaotic Times – Part Two
(9:00 am – 1:00 pm)
May 14 New York City
May 21 Rochester
June 18 Albany

Beyond Brief Writing: Practice in the 2nd Circuit
(2:00 pm – 5:00 pm)
May 17 New York City

Meet the Justices of the Appellate Division for the Second Judicial Department
(program: 3:00 pm – 5:00 pm;
reception: 5:00 pm – 6:00 pm)
May 18 Brooklyn

2010 Legal Landscape: Public Sector Labor Relations
May 20 Albany

Starting Your Own Practice
May 21 New York City

Avoiding Ethical Pitfalls for Solo and Small Firm Practitioners
(5:30 pm – 8:30 pm)
May 25 New York City

Estate Planning After Divorce
(9:00 am – 1:00 pm)
May 26 Long Island
June 2 Albany; Buffalo
June 9 New York City; Rochester

Advanced Document Drafting for the Elder Law Practitioner
June 2 Westchester
June 3 Syracuse
June 8 Long Island
June 10 Buffalo
June 11 Albany
June 21 New York City

Real Problems, Real Answers: One Year's Experience With the New York Rules of Professional Conduct
(9:00 am – 12:35 pm)
June 4 Buffalo; Rochester
June 7 Westchester
June 9 New York City
June 10 Long Island; Syracuse
June 17 Albany
June 18 Ithaca

Planning, Drafting and Administration of Conservation Easements
June 4 Albany
June 14 New York City

Fraudulent Practices in Real Estate
June 8 Albany
June 16 New York City

Representing a Political Candidate
(9:00 am – 1:00 pm)
June 18 Westchester
June 22 Albany
June 23 Buffalo; Long Island
June 24 New York City; Syracuse

2010 Insurance Coverage Update
June 18 Albany; Long Island; Syracuse
June 25 Buffalo; New York City

Bridging the Gap
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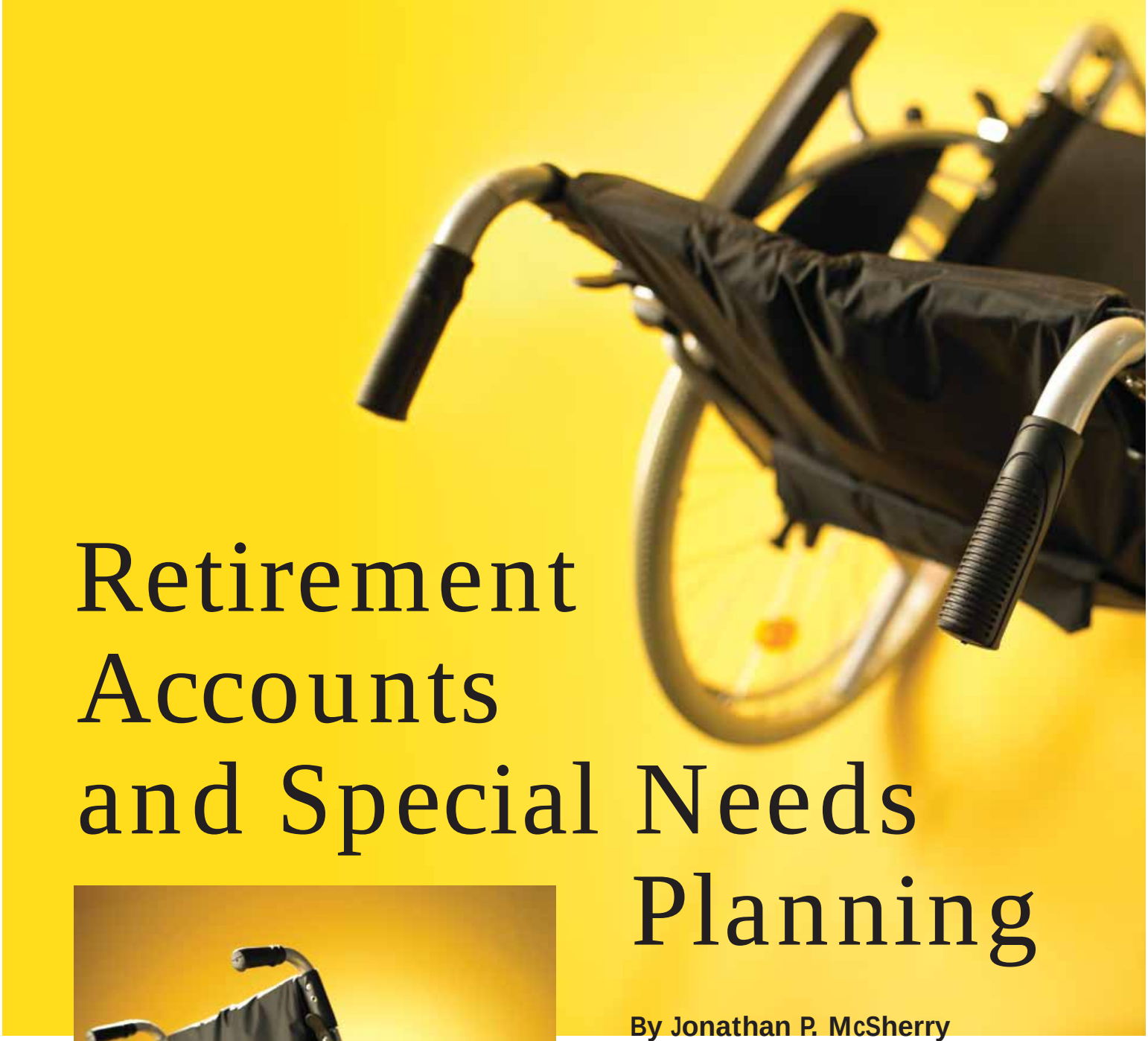

Retirement Accounts and Special Needs Planning

By Jonathan P. McSherry

Jonathan P. McSherry (mcsherry@delaneyoconnor.com) is an associate attorney at DeLaney & O'Connor, LLP in Syracuse, NY, where he works primarily in the fields of trusts and estates, elder law, and tax law. He is also a Certified Public Accountant and was formerly employed with PricewaterhouseCoopers, LLP in New York, NY. He is a member of numerous bar associations and serves on the Central New York Estate Planning Council.

It is not unusual to have a client who has a child or another relative who has some type of disability or special needs. For the purposes of this article, and in estate planning generally, "special needs" or "disability" refers to the many different circumstances that an individual may be facing. While the term is often associated with a physical, mental or developmental illness or impairment, it can also include a lack of sound financial judgment or discretion, a lack of discipline in planning for the future, or any other circumstances that would cause a client to view an individual as untrustworthy with money or otherwise unattractive as a beneficiary of the client's assets. Recognizing that unique planning will be needed to address an individual's special needs is very important. Therefore, it is critical that a planner and the client review and become familiar with the assets that will pass at the client's death as well as the beneficiaries to whom those assets will pass.

Problems When a Retirement Plan Passes to a Person With a Disability

Many problems can arise when retirement plan benefits pass to a beneficiary with special needs.

Ineligible for Government Benefits

The beneficiary may be receiving or expecting to receive some type of government benefit or assistance, such as Medicaid or a special housing allowance for persons with disabilities. In such a case, the beneficiary is likely relying on these benefits for support and health care. However, most government benefit programs have strict rules on the type and level of assets that a

recipient may have in order to qualify for these benefits. Therefore, leaving a retirement account directly to the beneficiary may cause the beneficiary to become ineligible for those benefits. Ineligibility could cause the beneficiary to lose benefits essential to his or her care. In many cases, the non-monetary benefits of the programs (*e.g.*, living in a home specifically designed for those with the beneficiary's disability) either cannot be replaced or cannot be obtained without greater expense and difficulty.

Unsound Financial Decisions
The client may view the beneficiary as a spendthrift or one who squanders his or her money without considering any present or future consequences. It could be that the beneficiary has shown in the past, through the use of prior gifts or otherwise, that he or she would not be capable of properly managing the retirement benefits or making sound financial decisions with respect to them. A client may not want to leave hard-earned retirement benefits to the beneficiary knowing that they will be spent quickly, unwisely, or wastefully.

Addiction
The beneficiary may have an addiction to alcohol, drugs, gambling, or some other destructive habit. In that case, leaving retirement funds to the beneficiary may not only result in a waste of the client's retirement benefits but it could also fuel the addiction and create more problems for the beneficiary.

Pending Divorce
The beneficiary may be going through unpleasant divorce proceedings. In that case, if the client dies before the divorce is final, there is a risk that some or all of the retirement benefits will not go to the beneficiary but will be awarded to the soon-to-be ex-spouse in the divorce settlement or be used to satisfy child support obligations. Most clients do not intend for their retirement benefits to go to their intended beneficiary's ex-spouse at the expense of their loved one.

Withdrawal of Entire Account Causing a Large Income Tax Liability
Unaware of or indifferent to income tax consequences, the beneficiary might withdraw all the funds in the account, or a significant portion thereof, at the time of receipt. Assuming the retirement plan is not a Roth IRA or another plan that uses post-tax dollars, this will cause the total amount withdrawn (less non-deductible contributions) to become income taxable in the year of withdrawal. Depending on the size of the account, this additional income tax can be very large and can greatly reduce the amount that the beneficiary will ultimately receive. If the beneficiary spends it all right away, he or she could be faced with a large tax liability and no funds to pay it.

The client may view the beneficiary as a spendthrift or one who squanders his or her money without considering any present or future consequences.

Planning Solutions When Special Needs Are Involved

To avoid the many problems that can arise when an individual with special needs is a potential beneficiary of retirement benefits, the planner and the client should always review available planning solutions before deciding what action should be taken. Examining the client's particular circumstances in conjunction with the different planning solutions helps the client to decide what method will best avoid unintended consequences.

Disinherit Person With Special Needs
One option is simply to disinherit the individual. If none of the retirement benefits will pass to the person with the special needs, then any harm that might have resulted from the gift will be avoided. Clients are free to leave their property to whomever they choose, with the exception in New York State of the spouse's right of election.[1] Therefore, disinheritance is the easiest and most inexpensive solution. Most clients find outright disinheritance to be harsh and unfair, however. Often, they are hesitant to harm their personal relationship with a loved one in order to protect their money when they are gone.

Designate a Trust as Beneficiary
Another option is to designate a trust as the beneficiary of the retirement benefits instead of the individual with special needs. Using a trust to receive and distribute retirement benefits has several advantages. Because retirement benefits are not given outright to the individual with special needs, the misuse of the funds by the individual is prevented. Instead, the funds can be invested properly and distributed over time. In addition, when payments are made, they can be made directly to the beneficiary or to third parties for his or her benefit. There are, however, limitations on the use of a trust, of which the client must be aware. Unless the trust qualifies as a pass-through trust for a designated beneficiary (see below for further detail), the entire retirement account balance will have to be paid out either (1) within five years of the end of

the calendar year of the account owner's death (if the owner died prior to his or her required beginning date) or (2) over the owner's remaining life expectancy as if the owner had not died (if the owner died on or after his or her required beginning date),[2] both of which may cause excessive income tax liabilities.

Structure the Plan to Pay Out Benefits Over the Life Expectancy of the Beneficiary

Planning for special needs individuals can also involve structuring a retirement plan to pay out its benefits over the life expectancy of the beneficiary. This option prevents the beneficiary from incurring excessive income taxes that would result if the beneficiary had withdrawn the entire account all at once. It also ensures that the beneficiary will have a steady stream of funds from the retirement account over his or her lifetime instead of allowing the beneficiary to withdraw and spend the entire account early on and be left with nothing in subsequent years. Be sure, however, that the beneficiary qualifies as one to whom the plan can be paid out over the beneficiary's life expectancy. If one selects a beneficiary that does not qualify, adverse income tax consequences could result.

One vehicle for accomplishing this is a life annuity. The retirement account balance can be used to purchase, upon the account owner's death, a single life annuity contract for the beneficiary. If the plan offers annuities, the account can be converted into and paid out as an annuity. If the plan does not offer annuities, it can purchase an annuity from an insurance company.[3] In either case, distributions will have to be made in accordance with Treasury Regulation § 1.401(a)(9)-6 ("Treas. Reg."). There are, of course, disadvantages to using an annuity and examples of these include poor investment return and lack of flexibility when more funds are needed during the beneficiary's life.

Two other methods available for paying out benefits over a beneficiary's life expectancy are naming a "pass-through" trust as the designated beneficiary and creating a special needs payback trust for a designated beneficiary, both of which are discussed below.

Pass-Through Trust as the Designated Beneficiary

A retirement account owner is free to name whomever he or she desires as a beneficiary of the retirement benefits. However, only when a plan has a "designated beneficiary," as defined under Treas. Reg. § 1.401(a)(9)-4, will the retirement benefits be paid out over the life expectancy of the beneficiary. A designated beneficiary is an *individual* who is designated as a beneficiary under the retirement plan either by the plan's terms or by the owner's affirmative election.[4] The mere fact that plan benefits pass to an individual under the account owner's will or by intestacy does not qualify the individual as a designated beneficiary.[5] The owner must make an affirmative election, which is filed with the plan sponsor (if the plan's terms do not name such individual).

Non-individuals, such as an estate, trust or charity, cannot be "designated beneficiaries."[6] If a non-individual is named a beneficiary, then the retirement account will be treated as having no designated beneficiary even if individuals are also named as beneficiaries.[7] The beneficiaries of a trust will be treated as the designated beneficiaries, except where the trust is named the beneficiary of the retirement account.[8] But this exception applies only if the trust qualifies as a "pass-through trust"; it does not apply to estates or charities.

A pass-through trust (also referred to as a "conduit trust" or "look-through trust") is a trust that is named by the retirement account owner as beneficiary of the retirement benefits. It must meet certain requirements under Treas. Reg. § 1.401(a)(9)-4, Qs&As-5 and 6 for the trust to serve as a conduit for the required minimum distributions being made from the retirement plan, which will ultimately go to the trust's beneficiaries. These requirements are the following:

1. The trust must be a valid trust under state law or would be but for the fact that there is no corpus.
2. The trust must be irrevocable, or it will by its terms become irrevocable upon the death of the retirement account owner.
3. The trust's beneficiaries (those with respect to the trust's interest in the retirement account benefits) must be identifiable from the instrument and must all be individuals.
4. Certain documentation must be provided to the plan administrator no later than October 31 of the calendar year following the calendar year of the account owner's death.[9]
5. If another trust is the beneficiary of the trust which is named as a beneficiary of the retirement benefits, then the beneficiaries of the second trust will be treated as designated beneficiaries if *both* trusts meet the preceding four requirements.

If a trust qualifies as a pass-through trust, the trust's beneficiaries (and not the trust itself) will be treated as the designated beneficiaries of the retirement plan and the retirement benefits can be paid out over a beneficiary's life expectancy. But note that the separate account rules cannot be used by the beneficiaries of a trust.[10] Therefore, if there are two or more beneficiaries, the annual required minimum distributions will have to be calculated and paid to the trust based on the shortest life expectancy of the trust's beneficiaries.[11]

Required Minimum Distributions

A qualified retirement plan must either distribute the entire account balance or begin making annual "required minimum distributions" (RMDs) to the account owner on or before the required beginning date.[12] If RMDs are

used, the entire account balance must be paid out over the life (or life expectancy) of the account owner or the joint lives (or life expectancies) of the owner and a designated beneficiary. The account owner's "required beginning date" is determined under IRC § 401(a)(9)(C). In general, the required beginning date is April 1 of the calendar year following the calendar year in which the owner reaches age 70 1/2 or that in which he or she retires.

If an account owner dies before the required beginning date, the entire account balance must be distributed within five years of the end of the calendar year in which the owner died unless the beneficiary of the account is considered a "designated beneficiary" (*i.e.*, all beneficiaries are individuals or the beneficiary is a pass-through trust). In general, if there is a designated beneficiary, the following rules will apply:

1. If the sole "designated beneficiary" is the account owner's spouse, then the balance can be paid out over the spouse's life expectancy.[13] RMDs will have to begin on or before the later of (i) the end of the calendar year following the calendar year of the account owner's death and (ii) the end of the calendar year that the owner would have reached age 70 1/2.[14]
2. If the "designated beneficiary" is not the account owner's spouse, then the balance may be paid out over the non-spouse beneficiary's life expectancy.[15] RMDs will have to begin on or before the end of the calendar year following the year of the account owner's death.[16]

If an account owner dies on or after his or her required beginning date (*i.e.*, distributions have begun), the remaining account balance may be paid out over the account owner's remaining life expectancy (as if the account owner had not died) if the beneficiary is not an individual. If the beneficiary is an individual, the balance may be paid out over the longer of the beneficiary's life expectancy and the owner's remaining life expectancy (as if the owner had not died).[17] The newly calculated RMDs will begin in the calendar year following the calendar year of the owner's death and the RMD for the year of the owner's death will be the amount that would have been distributed to the owner had he or she lived through the end of the year.[18]

The Third Party Supplemental Needs Trust

A third party supplemental needs trust is a trust created and funded by a third party for the benefit of a disabled individual. New York State authorizes the creation of such trusts under N.Y. Estates, Powers and Trusts Law 7-1.12 (EPTL). The intent of the trust is to supplement the disabled beneficiary's needs, while avoiding a lapse in the individual's eligibility for government benefits or assistance. A third party supplemental needs trust named by the retirement account owner as a beneficiary of his or her retirement benefits should be able to meet the requirements of Treas. Reg. § 1.401(a)(9)-4, Qs&As-5 and 6 and, therefore, the retirement benefits *could* be paid to the trust over the shortest life expectancy of the beneficiaries. Naming a third party supplemental needs trust as the beneficiary of retirement benefits is rarely advisable, however, and any planner should carefully evaluate the consequences before doing so.

Typically, an individual will create a third party supplemental needs trust as a testamentary trust to be created upon the individual's death under the terms of his or her will. Therefore, the testamentary trust will become irrevocable upon the retirement account owner's death.[19] Providing the plan administrator with a copy of the retirement account owner's last will and testament and proof of its probate by October 31 of the calendar year following the calendar year in which the retirement account owner died will satisfy the documentation requirement since the will is the governing instrument for the testamentary third party supplemental needs trust[20] (or alternative documentation can be provided[21]). Assuming the trust is valid under state law, the trust's beneficiaries will be viewed as the "designated beneficiaries" for purposes of calculating the RMDs if they are identifiable and all are individuals.

While a third party supplemental needs trust may satisfy the requirements of Treas. Reg. § 1.401(a)(9)-4, Q&A-5 and 6, so that the trust's beneficiaries may be treated as the retirement account's "designated beneficiaries," if such trust is not considered a grantor trust then the trust itself will be taxable on the RMDs to the extent that they are not actually distributed for the benefit of the disabled beneficiary. Since the disabled beneficiary is not the grantor of a third party supplemental needs trust, he or she could be treated as the owner of the trust only under IRC § 678(a).

IRC § 678(a)(1) provides that a third person is treated as the owner of any portion of a trust as to which he or she has the "power exercisable solely by himself to vest the corpus or the income therefrom in himself." IRC § 678(a)(2) treats the third person as an owner in certain circumstances where the third person has previously partially released or modified the IRC § 678(a)(1) power. The disabled beneficiary cannot have the IRC § 678(a)(1) power because doing so would disqualify the trust as a supplemental needs trust. Therefore, the disabled beneficiary cannot be treated as the owner of any portion of the trust and the trust will not be given grantor trust status.

If the trust itself is subject to income tax on all or most of the RMDs, then creation of the trust will probably not be advisable since, at the federal level, a trust is taxed at the highest marginal rate at much lower levels of income than that of an individual. For calendar year 2010, a trust is taxed at the highest marginal rate of 35% for income above $11,200, while an individual is taxed at 35% for

income above $373,650 or $186,825 for married individuals filing separate returns.[22] Most clients will not be willing to pay such high taxes in order to get the retirement benefits paid out over the beneficiary's life expectancy.

The Special Needs Payback Trust Created for a Designated Beneficiary

At least one IRS Private Letter Ruling (PLR 200620025)[23] supports the position that an "individual retirement arrangement" (IRA) transferred, after the account owner's death, into a special needs payback trust for a designated beneficiary is entitled to receive payments of the IRA benefits over the life expectancy of the disabled beneficiary and is not a transfer that would cause the entire balance to become income taxable when assigned to the trust.

One IRS Private Letter Ruling supports the position that an "individual retirement arrangement" transferred, after the account owner's death, into a special needs payback trust for a designated beneficiary is entitled to receive payments of the IRA benefits.

Requirements for a Special Needs Payback Trust

The creation of a special needs payback trust is authorized by 42 U.S.C. § 1396p(d)(4) and N.Y. Social Services Law § 366(2)(b)(2)(iii). The beneficiary of such a trust must be "disabled," as defined in 42 U.S.C. § 1382(c)(a)(3), and must be under 65 years of age when the trust is created. The trust cannot be created by the disabled beneficiary but must be created by the disabled beneficiary's parent, grandparent, legal guardian, or by the court. Upon the disabled beneficiary's death, the state (*e.g.*, New York State Department of Health) must be reimbursed from the remainder of the trust for all amounts paid on behalf of the disabled beneficiary before any amounts are paid to the trust's remainder beneficiaries. Therefore, while the trust is funded with the disabled beneficiary's assets or income, care should be taken not to use those assets and income that are exempt under the Medicaid rules. If the requirements for a special needs payback trust are satisfied, the assets and income of the disabled beneficiary that are transferred to the trust will not be counted as available resources when determining his or her eligibility for Medicaid.

A trust that qualifies as a special needs payback trust under Social Services Law § 366(2)(b)(2)(iii) is considered a *first party* supplemental needs trust.[24] In New York State, drafting guidance for a supplemental needs trust, in general, can be found in EPTL 7-1.12. Sample language is provided in EPTL 7-1.12(e). Case law, such as *In re Morales*,[25] can also provide recommended language for a special needs payback trust.

Facts of PLR 200620025

This private letter ruling concerned an IRA account owner who died prior to his required beginning date. One of the four designated beneficiaries was the owner's disabled son whose eligibility for government benefits would lapse if he directly owned a portion of the IRA. On petition by the guardian of the disabled son, his mother, a state court authorized the creation of a special needs payback trust for the disabled son's benefit, in which the disabled son was the sole beneficiary of the trust during his lifetime and his guardian was the trustee. The trustee had the authority, in her sole discretion, to distribute to, or apply for the benefit of, the disabled son so much of the net income and principal as appeared advisable to her, as well as having the authority to accumulate any or all of the income with any undistributed income being added to principal. Upon the death of the disabled son, the remaining trust property would be paid first to the state, to the extent any assistance received by the disabled son from the state, and then the remainder, if any, would be paid to the disabled son's distributees, as determined by the state's intestacy laws. In addition, the mother disclaimed her contingent remainder interest as a distributee in the trust.

Transfer of the Right to Receive an IRA to the Special Needs Payback Trust Not Taxable

The IRS concluded in PLR 200620025 that the special needs payback trust was a grantor trust – which meant that it was treated as owned by the disabled son under IRC §§ 671 and 677(a). It then determined that because the special needs payback trust was a grantor trust, the transfer of the disabled son's right to receive a share of the IRA to the trust was not a sale or disposition of his share of the IRA for federal income tax purposes and, therefore, was not a taxable IRC § 691(a)(2) transfer.

In order to understand this ruling, we must first understand the basic rules governing "income in respect of a decedent" (IRD). The IRS has ruled that the balance in an IRA at the owner's death, less the owner's nondeductible contributions to the IRA, constitutes IRD.[26] Meanwhile, a person who receives IRD, which is not includible on the

decedent's final tax return, must include such IRD in his or her gross income *when that person receives it*.[27] A person who transfers a *right to receive* IRD, however, which that person received by reason of the decedent's death, must include the fair market value of the IRD in his or her gross income, even if the person has not actually received any of the IRD.[28]

Next, we must examine the grantor trust rules. If a grantor is treated as the owner of any portion of a trust, then he or she shall include the trust income attributable to that portion of the trust in computing his or her taxable income.[29] Under IRC § 677(a)(1) and (2), a grantor is treated as the owner of any portion of a trust whose income is or may be, in the discretion of the grantor or a non-adverse party and without the approval or consent of an adverse party, distributed to the grantor or held or accumulated for future distribution to the grantor. For these purposes, a non-adverse party is any party who is not an adverse party, while an adverse party is any person who has a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-exercise of the power that he or she possesses respecting the trust.[30] In PLR 200620025, the guardian-mother is a non-adverse party because she disclaimed her contingent remainder interest under the trust.[31]

If a grantor is treated as the owner of any portion of a trust, then he or she shall include the trust income attributable to that portion of the trust in computing his or her taxable income.

In PLR 200620025, the IRS did not state its reasoning as to why the special needs payback trust was a grantor trust, other than to cite IRC § 677(a). Therefore, its reasoning must be inferred from other sources. Under IRC § 677(a)(1) and (2), assuming all other requirements are met, the grantor is treated as the owner of the trust if the trustee does or may distribute income, or hold and accumulate income for distribution *to* the grantor. But a trustee of a special needs trust, at least in New York State under EPTL 7-1.12, is prohibited from making distributions directly to the grantor and can only make distributions to third parties *for his or her benefit*. Treas. Reg. § 1.677(a)-1(c) treats income as distributed to the grantor if it is or may be actually or *constructively* distributed to the grantor. Constructive distribution to the grantor includes payment on behalf of the grantor to another in obedience to his or her direction. We must then determine whether making a payment *for the benefit of* the grantor constitutes a constructive distribution to the grantor.

The U.S. Tax Court, in *Johnson v. Commissioner*,[32] noted that the legislative history of the 1954 Code explained that IRC § 677 "contemplates situations in which payment of trust income to *or for the benefit of* the grantor is either required under the terms of the trust or discretionary."[33] The court stated that a determination of whether a trustee was an adverse or non-adverse party only needed to be made if the payment of income was discretionary and that behind this distinction was a presumption that "there is a sufficient likelihood that the holder will exercise his power for the benefit of the grantor unless it would be detrimental to his own interests to do so."[34] Because it is presumed that the non-adverse party will exercise the power for the benefit of the grantor, the power should be attributed to the grantor.[35]

In *Estate of Sheaffer v. Commissioner*,[36] the U.S. Tax Court rejected the IRS's argument that application of IRC § 677(a) is based on the concept of a reserved interest or ownership rather than the receipt of benefit concept applicable under IRC § 61. The IRS argued that the grantor should be taxed on loan payments made by the trustee pursuant to the grantor's direction *in the trust instrument*, claiming that they were constructive distributions because they were paid in obedience to the grantor's direction.[37] The court stated that Treas. Reg. § 1.677(a)-1(c) "must be read to mean that a payment by a trustee to another, in obedience to a grantor's direction, must be *for the benefit of* the grantor in order to be taxable to him."[38] Otherwise, the court stated, the IRS's argument "would result in any and all distributions from a trust pursuant to the trust agreement being taxable to the grantor."[39] The court relied on the legislative history of IRC § 677 to support its reasoning and noted that IRC § 677 was meant to correspond to section 167 of the then-existing law "under which income is taxed to the grantor by reason of a power to vest the income in him *or to apply it to his benefit*."[40]

Based on the regulations and the Tax Court's reading of the legislative history, it could be argued that because a non-adverse party has discretion, without the approval or consent of an adverse party, to distribute income *for the benefit of* the grantor, the grantor should be treated as the owner of the trust. At least two such arguments can be made from a reading of Treas. Reg. § 1.677(a)-1(c), which provides that constructive distribution to the grantor includes payment on behalf of the grantor to another in obedience to his or her direction.

The first argument would be in response to those who would say that a payment made for the benefit of

the grantor is not necessarily made in obedience to the grantor's direction. One could argue that the regulation does not say that constructive distribution is *limited* to payments made in obedience to the grantor's direction, it only says that it *includes* them. It could also be argued, as the IRS did in *Sheaffer*, that the payments are made pursuant to the grantor's direction which the grantor stated in the trust instrument itself when he or she executed it.

The second argument is that the presumption (noted in *Johnson*) that a non-adverse party will exercise his or her power for the benefit of the grantor would suggest that any payments made by the non-adverse party on behalf of the grantor to another would be, or at least presumed to be, in obedience to the grantor's direction since the power is attributed to the grantor. It would be treated as if the grantor made the payments to another for his or her benefit.

Therefore, the fact that a non-adverse party *may* distribute income for the grantor's benefit should result in the trust being treated as a grantor trust with the income being taxed to the grantor, and not the trust, in accordance with IRC § 671. It would appear, based on its conclusion in PLR 200620025, that the IRS would agree with this reasoning. It is, however, important to note that the key to these arguments is that the trustee must be a *non-adverse* party and, therefore, cannot have any beneficial interest in the trust.

With grantor trust status, Revenue Ruling 85-13 becomes applicable. In that ruling, the IRS held that if a grantor is treated as the owner of a trust, then, for federal income tax purposes, he or she is considered to be the owner of the trust assets and a transfer of the grantor's assets to the trust is not recognized as a sale or disposition. Because there is no sale or disposition, the IRS concluded in PLR 200620025 that a transfer of the grantor's right to receive IRA benefits to the grantor trust will not cause inclusion of the grantor's entire share of the IRA in the grantor's income under IRC § 691(a)(2) at the time of the transfer.

RMDs to the Special Needs Payback Trust May Be Calculated Using Beneficiary's Life Expectancy

In PLR 200620025, the IRS concluded that the trustee of the special needs payback trust could calculate the annual required minimum distributions, pursuant to IRC § 401(a)(9), which would be made from the IRA to the trust by using the life expectancy of the trust's disabled beneficiary. The IRS did not provide much reasoning for its conclusion, however. Other than referring to the facts of the private letter ruling, including the representation that the trust was intended to qualify as a special needs payback trust under state and federal law to preserve the disabled son's eligibility to receive public benefits, and the IRS's earlier conclusion that the trust was a grantor trust, the IRS only recited the provisions of IRC § 401(a)(9) and the regulations (relating to RMDs).

It appears that the major factors behind the IRS's conclusion were that the trust was a grantor trust with its income being taxed to the grantor, who is the IRA account owner's designated beneficiary (the disabled son), and that the trust assets could only be used to benefit the disabled son and no one else during his lifetime. In addition, some or all of the remainder would probably have to be paid to the state as reimbursement for benefits paid to the disabled son and, therefore, that portion would actually be used for his benefit. Any excess remainder would pass to the individual's distributees upon his death.

One could argue that the disposition of the trust's remainder should not affect whether an individual's life expectancy may be used because, if the remaining IRA balance is withdrawn and distributed, upon the designated beneficiary's death, to the designated beneficiary's (or the trust's) beneficiaries, it should make no difference whether the RMDs were being paid through a trust or directly to the designated beneficiary. The intent of the rules is to prevent excessive deferral of income taxes on the IRA funds. If the entire balance is paid out on or before the designated beneficiary's death and the designated beneficiary is the only one who can benefit from the IRA funds during his or her lifetime, the rules should be satisfied and the trust should be allowed to use the life expectancy of the designated beneficiary. This argument assumes that the beneficiary qualifies as a "designated beneficiary" under Treas. Reg. § 1.401(a)(9)-4.

If the disabled beneficiary is one of two or more beneficiaries designated by the IRA account owner, then his or her share will need to be separated from the other beneficiaries' shares in order to make distributions of the disabled beneficiary's share to the special needs payback trust over the life expectancy of the disabled beneficiary. In such a case, the "separate account" requirements of Treas. Reg. § 1.401(a)(9)-8, Qs&As-2 and 3 must first be satisfied.

If the separate account requirements are not satisfied, the shortest life expectancy of all the designated beneficiaries will be used to determine the RMDs.[41] However, only those designated beneficiaries who remain beneficiaries as of September 30 of the calendar year following the calendar year of the IRA account owner's death will be used to determine the RMDs.[42] Therefore, any designated beneficiary who validly disclaims or cashes out his or her share by the applicable September 30 will not be considered.

Summary of Drafting Points for a Special Needs Payback Trust

When drafting a special needs payback trust for a designated beneficiary, keep two points in mind: the trust

must qualify (1) as a supplemental needs trust under EPTL 7-1.12 and (2) as a payback trust under 42 U.S.C. § 1396p(d)(4) and Social Services Law § 366(2)(b)(2)(iii). Also, the current beneficiary must be an individual and cannot be an estate, trust, or charity.

In addition to satisfying the threshold requirements of a special needs payback trust, the trust should be drafted to qualify as a grantor trust. One way to achieve grantor trust status is to ensure that the trustee is a non-adverse party so that the power to distribute income for the benefit of the disabled beneficiary will be attributed to the disabled beneficiary. If the desire is to have a family member act as trustee, then the person should not have a beneficial interest in the trust, whether vested or contingent. If the trustee would have such an interest, the trustee should validly disclaim it so that he or she can be considered a non-adverse party. This can become very important since a family member is often preferred to act as trustee because such person is more trusted, will be closer to the disabled beneficiary, and will be better able to understand the disabled beneficiary's circumstances and whether distributions should be made.

Conclusion

By spending a little time with a client to review the client's situation and inquire about the client's intended beneficiaries, the planner can help prevent some of the problems that can arise when an intended beneficiary has special needs. Since these problems can have negative consequences, both financial and emotional, it will be very beneficial to the client to avoid them. No matter what method is chosen to address these special needs, clearly some detailed planning will be needed. ■

"All the cases I've won are due to hard work, preparation, and superior courtroom skills. The losses are someone else's fault."

1. EPTL 5-1.1-A.
2. 26 U.S.C. § 401(a)(9) (IRC).
3. Treas. Reg. § 1.401(a)(9)-6, Q&A-4.
4. Treas. Reg. § 1.401(a)(9)-4, Q&A-1.
5. *Id.*
6. Treas. Reg. § 1.401(a)(9)-4, Q&A-3.
7. *Id.* But see separate account rules under Treas. Reg. § 1.401(a)(9)-8, Qs&As-2 & 3.
8. Treas. Reg. § 1.401(a)(9)-4, Q&A-5.
9. *See* Treas. Reg. § 1.401(a)(9)-4, Q&A-6.
10. Treas. Reg. § 1.401(a)(9)-4, Q&A-5(c).
11. Treas. Reg. § 1.401(a)(9)-5, Q&A-7(a).
12. IRC § 401(a)(9)(A).
13. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(b), (c)(2).
14. Treas. Reg. § 1.401(a)(9)-3, Q&A-3(b).
15. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(b), (c)(1).
16. Treas. Reg. § 1.401(a)(9)-3, Q&A-3(a).
17. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(a).
18. Treas. Reg. § 1.401(a)(9)-5, Q&A-4(a). See IRC § 401(a)(9) and the regulations thereunder for more specific rules pertaining to the calculation of RMDs and life expectancies.
19. Treas. Reg. § 1.401(a)(9)-4, Q&A-5(b)(2).
20. Treas. Reg. § 1.401(a)(9)-4, Q&A-6(b)(2); Rev. Rul. 2006-26, 2006-1 C.B. 939 (providing copy of account owner's will to the IRA trustee satisfies documentation requirement and trust's beneficiaries can be treated as the IRA's designated beneficiaries).
21. Treas. Reg. § 1.401(a)(9)-4, Q&A-6(b)(1).
22. Rev. Proc. 2009-50.
23. PLRs are directed only to the taxpayers who request them and IRC § 6110(k)(3) provides that they may not be used or cited as precedent.
24. EPTL 7-1.12(a)(5)(v). Note: This statute provides that the beneficiary of a supplemental needs trust may be the creator of such trust if the trust meets the requirements of N.Y. Social Services Law § 366(2)(b)(2). However, under § 366(2)(b)(2), the disabled individual may not create a payback trust. Therefore, the author presumes that, by using the term "creator," the legislature intended to provide that the beneficiary may be the one whose assets are used to fund the supplemental needs trust, as is the case with the payback trust under § 366(2)(b)(2), thus making it a *first* party supplemental needs trust.
25. N.Y.L.J., July 28, 1995, p. 25, col. 1 (Sup. Ct., Kings Co.).
26. Rev. Rul. 92-47, 1992-1 C.B. 198.
27. IRC § 691(a)(1).
28. IRC § 691(a)(2).
29. IRC § 671.
30. IRC § 672(a), (b).
31. The guardian / trustee would also have been considered a related or subordinate party under IRC § 672(c) because she was the disabled son's mother.
32. 108 T.C. 448, 484 (1997), *aff'd in part, rev'd in part*, 184 F.3d 786 (8th Cir. 1999).
33. *Id.* (emphasis added).
34. *Id.* at 484.
35. *Id.*
36. T.C. Memo 1966-126, 20.
37. *Id.* at 20–21.
38. *Id.* at 22–23 (emphasis added).
39. *Id.* at 23.
40. *Id.* at 21 (emphasis added).
41. Treas. Reg. § 1.401(a)(9)-5, Q&A-7(a).
42. Treas. Reg. § 1.401(a)(9)-4, Q&A-4.

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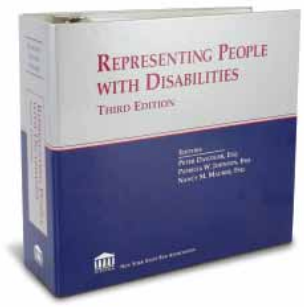

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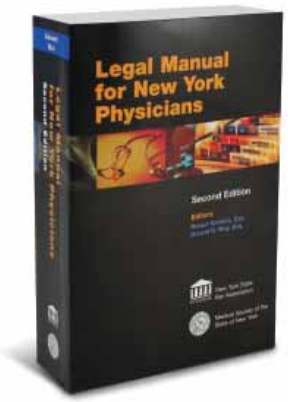

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The Producers

Introduction

In *The Producers*, Max Bialystock and Leo Bloom cook up a scheme to deliberately stage a musical flop on Broadway in order to pocket the money raised from their very heavily oversubscribed investors. Of course, their devious plan collapses when their musical *Springtime for Hitler* turns out to be a wild, albeit unintentionally campy, success.

In the world of electronic disclosure there are also producers, "producing parties," that are called upon to exchange electronic data, often referred to as "ESI."[1] The long-standing and prevailing wisdom in New York state court practice has been that the party requesting the disclosure, the "requesting party," must agree in advance to bear the costs incurred by the producing party in producing the requested electronic disclosure.[2] Only when this preliminary monetary issue is resolved by the requesting party agreeing to bear the cost is the producing party's obligation to furnish the electronic data triggered.[3]

Imagine my surprise to learn that producing parties may have benefited for many years as a result of a scheme rivaling Max and Leo's. What if, in fact, the rule that the requesting party must bear the costs associated with production of ESI (and other disclosure) is wrong? A recent decision by Justice Eileen Bransten of the Commercial Division, Supreme Court, New York County, *MBIA Insurance Corp. v. Countrywide Home Loans*,[4] takes aim at the accepted wisdom governing the allocation of costs associated with electronic disclosure and, indeed, disclosure of any matter in any medium.[5] Her analysis suggests that this "rule" may "stand[] on more precarious footing"[6] than the cases citing, and cited for, the rule suggest.

MBIA

In *MBIA* the party called upon to produce electronic disclosure, the producing party, moved for a protective order seeking, *inter alia*, "cost shifting of discovery expenses"[7] associated with its production of electronically stored data. The producing party argued "that the cost is the responsibility of the requesting party, while [the demanding party] argue[d] the responsibility is that of the producing party."[8]

Justice Bransten reviewed a number of frequently cited cases "settling the rule, relied upon by [the producing party], that the party seeking discovery should bear the cost incurred in the production of discovery material."[9] In order to assess the "footing" upon which the proposition that the "party seeking discovery should bear the cost incurred in the production" rests, Justice Bransten reverse engineered the cases cited as authority for this proposition. It is worth re-tracing her footsteps.

How Did We Get Here?

The acknowledged seminal case in New York state practice on electronic disclosure is Judge Leonard Austin's 2004 decision in *Lipco*,[10] wherein he correctly cited two Second Department cases, *Schroeder*[11] and *Rubin*,[12] as standing for the proposition that "cost shifting of electronic discovery is not an issue in New York since the courts have held that, under the CPLR, the party seeking discovery should incur the costs incurred in the production of discovery material."[13] *Schroeder* and *Rubin* both rested upon the same authority, and Justice Bransten identified the common ancestral citation:

> [E]ach trace back to *Rosado v Mercedes-Benz of North America, Inc.*, 103 A.D.2d 395, 480 N.Y.S.2d 124 (2d Dept 1984). *Rosado* supports a much narrower holding than the cited cases imply. There, the Court dealt with whether a party should be compelled to produce a translation of a German language document. Relying on First Circuit precedent, the Court applied the rule that "each party should shoulder the initial burden of financing his own suit, and based upon such a principle, it is the party seeking discovery of documents who should pay the cost *of their translation*" (*Rosado*, 103 AD2d at 398 [interpreting CPLR 3114 as opposed to CPLR 3103] [emphasis added]).[14]

What did *Rosado*, playing the role of Lucy (*Australopithecus afarensis*), actually say?

Rosado

Rosado addressed two issues related to the question of which party should bear the cost of producing certain material requested during disclosure in a product liability action. The material requested consisted of a trans-

lation from German into English of an eight-page product brochure and seven pages of schematics.[15]

The first issue involved the fact that requiring Mercedes, the producing party, to translate the documents would actually require it to create new documents, something the Second Department held could not be compelled pursuant to CPLR 3120:

> Through disclosure a party may be required to produce only those items "which are in the possession, custody or control of the party served." Such items must be preexisting and tangible to be subject to discovery and production. Accordingly, a party cannot be compelled to create new documents or other tangible items in order to comply with particular discovery applications. Here, the only document in [Mercedes's] possession was the German language VDO Schindling brochure. [Mercedes's] representative has averred that the company does not possess an English translation, and, absent extraordinary circumstances, [Mercedes] cannot be required to produce a translation not within its possession or control or to create one where none presently exists.[16]

Having determined that disclosure could not be compelled pursuant to CPLR 3120, the second, related issue was deciding which party would have to bear the cost of creating the new documents:

> Also significant in reviewing this particular plaintiff's application to compel translation is the general assumption enunciated by our brethren in the First Circuit, namely, that each party should shoulder the initial burden of financing his own suit, and based upon such a principle, it is the party seeking discovery of documents who should pay the cost of their translation. In our State, this policy is reflected in such statutory provisions as CPLR 3114, which requires that an examining party bear the cost of the translation of all questions and answers where the witness is non-English speaking, and also bear the cost of any experts necessary to assist the court in the settlement of questions in a foreign language.[17]

Having looked in part to the First Circuit for guidance, the Second Department concluded that the trial court had acted "within its discretion"[18] in denying the requested relief – that Mercedes bear the cost of the translation.

Thus, the origin of the rule that the demanding party bears the cost of production.

Meanwhile, in the First Department . . .

Next, Justice Bransten examined First Department authority, starting with the 2006 decision *Waltzer v. Tradescape & Co., L.L.C.*[19] While *Waltzer* confirmed "the principle that 'under the CPLR, the party seeking discovery should bear the cost incurred in the production of discovery material,'"[20] the First Department "declined to follow [the principle] and, instead, distinguished its facts on the basis that (1) it did not deal with *deleted* electronically stored material and (2) the information sought was readily available."[21] Moreover, the Appellate Division added that the "cost of an examination by [the producing party] to see if [material] should not be produced due to privilege or on

relevancy grounds should be borne by [the producing party]."[22]

Waltzer did not offer a citation for the principle that "as a general rule, under the CPLR, the party seeking discovery should bear the cost incurred in the production of discovery material."[23] The court pointed out that the case before it involved a different matter: "[H]ere we are not dealing with the retrieval of deleted electronically stored material, the data sought was on two CDs and readily available. The cost of copying and giving them to plaintiff would have been inconsequential."[24] The First Department then concluded: "The cost of an examination by defendants' [producing party's] agents to see if they should not be produced due to privilege or on relevancy grounds should be borne by defendants."[25]

Justice Bransten concluded her review with a very recent First Department case, *Clarendon*,[26] that "cast[s] further doubt to the general statement of law in *Waltzer* and *Lipco Elec. Corp.*":[27]

> There, the Appellate Division directed plaintiff to produce all of its claims files, adding that it saw "no reason to deviate from the general rule that, during the course of the action, each party should bear the expenses it incurs in responding to discovery requests."[28]

Clarendon modified a trial court order declining to permit the production of certain documents and directed instead that all relevant claims files be made available for inspection or copies be produced, "with each party bearing its own expenses."[29] Citing *Waltzer*, the First Department concluded: "We see no reason to deviate from the general rule that, during the course of the action, each party should bear the expenses it incurs in responding to discovery requests."[30]

Which general rule are we talking about?

Justice Bransten reconciled *Waltzer* and *Clarendon* and explained her decision in *MBIA*:

> Far from being an anomaly, [*Clarendon*] is consistent with *Waltzer* in that application of the relevant rule in both resulted in cost allocation determinations only when the electronically-stored information to be produced was not readily available. While producing readily-available electronically-stored information (*Clarendon* – all of an insurance company's claims files; *Waltzer* – data stored on 2 compact discs) will not warrant cost-allocation, the retrieval of archived or deleted electronic information has been held to require such additional effort as to warrant cost allocation. Furthermore, under CPLR 3103(a), the lodestar in granting a protective order granting allocation of discovery costs is the prevention of "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." Hewing to this principle and the applicable case law, it is eminently reasonable to refrain from allocating discovery costs at this juncture.[31]

Conclusion

Thus, two rules for two distinct situations. First, where the disclosure sought is readily available, the producing party bears the cost of production. Second, where the disclosure sought is not readily available, so that its production requires "additional effort," cost allocation comes into play. The final part of the decision suggests that the allocation of costs is properly accomplished by a motion for a protective order, at which time the court may direct the demanding party to bear the cost of production.

What does this mean for the electronic disclosure landscape? In the short term, perhaps confusion and disagreement in what was previously thought to be a settled area of the law.

If that is the case, and until such time as the issue is resolved, the concluding observation by the *Rosado* court bears mention:

> This court would be remiss, however, if it did not observe that this case constitutes a classic example of waste. The document at issue comprises a mere eight printed pages and seven pages of schematics in the German language. As such, the securing of an appropriate translator would neither be difficult logistically nor unduly burdensome financially. Indeed, the expense of the underlying motion and the prosecution of this appeal, both in attorneys' billing time and in the use of judicial resources, by far surpasses the outlay necessary for translation.[32]

Thus, two rules for two distinct situations. First, where the disclosure sought is readily available, the producing party bears the costs of production. Second, where the disclosure sought is not readily available, so that its production requires "additional effort," cost allocation comes into play.

As parties gear up to litigate electronic and other disclosure costs after *MBIA*, words worth remembering. After all, given the opportunity, the *Rosado* court would, no doubt, have imposed upon the squabbling parties before it the same finding imposed upon Leo Bloom at the end of *The Producers*: "incredibly guilty." ■

1. Electronically stored information.

2. *See, e.g., Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc. 3d 1019(A), 798 N.Y.S.2d 345 (Sup. Ct., Nassau Co. 2004).

3. *Id.*

4. 2010 N.Y. Slip Op. 20043, 2010 WL 519753 (Sup. Ct., N.Y. Co. Jan. 14, 2010).

5. *Id.*

6. *Id.* at *8.

7. *Id.* at *2.

8. *Id.* at *8.

9. *Id.* (citations omitted).

10. *Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc. 3d 1019(A), 798 N.Y.S.2d 345 (Sup. Ct., Nassau Co. 2004).

11. *Schroeder v. Centro Pariso Tropical*, 233 A.D.2d 314, 649 N.Y.S.2d 820 (2d Dep't 1996).

12. *Rubin v. Alamo Rent-a-Car*, 190 A.D.2d 661, 593 N.Y.S.2d 284 (2d Dep't 1993).

13. *Lipco Elec. Corp.*, 4 Misc. 3d at 1019 (citations omitted).

14. *MBIA Ins. Corp.*, 2010 WL 519753 at *8.

15. *Rosado v. Mercedes-Benz of N. Am., Inc.*, 103 A.D.2d 395, 480 N.Y.S.2d 124 (2d Dep't 1984).

16. *Id.* at 398 (citations omitted). The court did not reach the issue of "[w]hether VDO Schindling, which is not a party to this action, maintained an English version of its brochure is immaterial; only presently existing items within a *party's* possession, custody or control are susceptible to an application for production." *Id.* (citation omitted).

17. *Id.* at 398–99 (citations omitted).

18. *Id.* at 399.

19. 31 A.D.3d 302, 819 N.Y.S.2d 38 (1st Dep't 2006).

20. *Id.* at 304.

21. *Id.* (citation omitted) (emphasis added).

22. *Id.* (citation omitted). *See MBIA Ins. Corp.*, 2010 WL 519753 at *8 (citations omitted, discussing *Waltzer*) (emphasis added).

23. *Waltzer*, 31 A.D.3d at 304.

24. *Id.*

25. *Id.* (citation to comparison case omitted).

26. *Clarendon Nat'l Ins. Co. v. Atlantic Risk Mgmt., Inc.*, 59 A.D.3d 284, 873 N.Y.S.2d 69 (1st Dep't 2009).

27. *MBIA Ins. Corp.*, 2010 WL 519753 at *9.

28. *Id.* (citations omitted).

29. *Clarendon Nat'l Ins. Co.*, 59 A.D.3d at 285.

30. *Id.* at 286 (citation omitted).

31. *MBIA Ins. Corp. v. Countrywide Home Loans*, 2010 WL 519753 at *9 (citations omitted).

32. *Rosado v. Mercedes-Benz of N. Am., Inc.*, 103 A.D.2d 395, 399, 480 N.Y.S.2d 126 (2d Dep't 1984).

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New York State Consumer Protection Law and Class Actions in 2009: Part II

By Thomas A. Dickerson

In 2009, consumer protection law underwent a number of developments, including in the area of consumer class actions. The first part of this article, which appeared in the March/April issue of the *Journal*, reviewed recent consumer protection law cases; this second part looks at several consumer class action cases.

Sears, Television Sets, and Deceptive Price Matching

In *Dank v. Sears Holding Management Corp.*,[1] the Appellate Division, Second Department denied class certification in an action challenging Sears's "price matching"[2] policy. In particular, the appellate court found that the class plaintiff failed to establish the element of numerosity, his adequacy as class representative, and his class counsel did not create a conflict of interest. In an earlier decision,[3] the appellate court had affirmed the plaintiff's claims under N.Y. General Business Law §§ 349 and 350 (GBL). In the complaint, the plaintiff had alleged that Sears had a policy promising "to match the price on an identical branded item with the same features currently available for sale at another local retail store." Apparently, at three separate locations, the plaintiff requested that "Sears sell him a flat-screen television at the same price at which it was being offered by another retailer." However, at two of the stores, Sears denied the plaintiff's request on the basis that "each store manager had the discretion to decide what retailers are considered local and what prices to match." The plaintiff was able to purchase the television unit "at the third Sears at the price offered by a retailer located 12 miles from the store, but was denied the $400 lower price offered by a retailer located 8 miles from the store."

Deceptive Cell Phone Plans

In *Ballas v. Virgin Media, Inc.*,[4] the Second Department dismissed a class action commenced by cell phone users alleging that "pay as you go" cellular phone service violated contract law principles and GBL §§ 349 and 350. According to the plaintiffs, the defendant failed to disclose "either the requirement that subscribers to its phone services periodically 'top up' their accounts by paying additional sums of money to the defendant to increase the available balances on those accounts, or the consequences of failing to 'top up.'"

In *Morrissey v. Nextel Partners, Inc.*,[5] another case arising out of Supreme Court, Albany County, the court declined to certify a class of cell phone users. The plaintiffs alleged that the defendant cellular telephone service provider "systematically overcharged many of its subscribers in violation of consumer protection statutes as well as principles of contract law." The plaintiffs pointed to two specific areas where overcharging had occurred: (1) the method of crediting so-called bonus minutes to customers' accounts; and (2) the assessment of additional fees from subscribers with poor credit ratings. With respect to "bonus minutes," the plaintiffs alleged that such minutes, provided in the plaintiffs' service agreements, were in fact illusory. The plaintiffs' service agreements provided for a base level of 1,000 minutes on monthly usage, as well as 200 "bonus minutes." However, the plaintiffs never saw or were never provided the additional 200 minutes. In addition, the plaintiffs complained that subscribers with low credit scores on a "spending limit program" contract were charged fees in excess of those for which they had bargained.

The Artful Business of Telecommunications and Cable Providers

In *Corsello v. Verizon New York Inc.*,[6] a New York County trial court denied class certification in a trespass action brought by property owners seeking compensation from Verizon. The action arose out of the tricky business of establishing telecommunications infrastructure in New York City's congested and dense neighborhoods, where buildings are attached and access to streets is limited. One of the only ways Verizon is able provide service is by extending its telephone lines from the public way or street to individual homes and businesses, "which requires Verizon to place terminal boxes on the rear-walls of privately owned buildings." The plaintiff property owners complained that the rear wall terminals encumbered their property. Accordingly, they commenced an action under Transportation Corporations Law § 27 and pursuant to GBL § 349, seeking declaratory and injunctive relief, as well as monetary damages for trespass upon their property and deceptive practices that purportedly allowed the defendant to avoid paying the plaintiffs compensation for its invasion.

In another action, *Brissenden v. Time Warner Cable of New York City*,[7] a New York County trial court declined to certify a class of cable TV customers challenging the necessity of converter boxes and remote controls. According to the plaintiffs, Time Warner Cable engaged in unfair and deceptive business practices in violation of GBL § 349. The plaintiffs alleged that the cable company charged its basic cable customers for converter boxes that they did not need because they subscribed only to channels that were not subject to conversion. In addition, the plaintiffs pointed out that the cable company engaged in the practice of charging customers for unnecessary remote controls, regardless of their level of service.

The Enforceability of Microprint Contractual Provisions

In *Pludeman v. Northern Leasing Systems, Inc.*,[8] the trial court certified a class of small business owners, who had entered into lease agreements for point-of-sale equipment and then brought an action challenging the enforceability of concealed microprint disclaimers and waivers in the agreement. In 2008,[9] the New York Court of Appeals had upheld the plaintiffs' claims that the defendant had used "deceptive practices" and "hid material and onerous lease terms." Specifically, the plaintiffs said that the defendant's sales representatives would provide a one-page contract on a clipboard, which had the effect of concealing the three pages underneath. Apparently, one of the concealed pages included a number of microprint clauses, such as a no-cancellation clause, a no-warranties clause, an absolute liability for insurance obligations clause, and a late charge clause. In sustaining the plaintiffs' fraud claim against the individually named corporate defendants, the Court held that

> it is the language, structure and format of the deceptive lease form and the systematic failure by the salespeople to provide each lessee a copy of the lease at the time of its execution that permits, at this early stage, an inference of fraud against the corporate officers in their individual capacity and not the sales agents.[10]

Using a Class Action to Challenge Brokerage Account Maintenance Fees

In *Yeger v. E*Trade Securities LLC*,[11] the First Department declined to certify a class of brokerage customers who sought to challenge account maintenance fees. The plaintiffs had complained that E*Trade unlawfully assessed account management fees a day early. The appellate court, however, maintained that determining whether the early fee caused an individual class member actual damages depended "upon facts so individualized that it is impossible to prove them on a class-wide basis." Moreover, to recover under a breach of contract claim, the court held, "each class member would have to show that he or she would have avoided the fee had E*Trade collected it at the proper time." Since proving damages would be subject to a host of factors exclusive to the individual, the court concluded that "individualized issues, rather than common ones, predominate."

The Propriety of Backdating Renewal Memberships

In *Argento v. Wal-Mart Stores, Inc.*,[12] the Appellate Division, Second Department certified a class of customers who alleged that the defendant engaged in deceptive business practices in violation of GBL § 349. According to the plaintiffs, the company routinely backdated renewal

memberships at Sam's Club stores. This suspect policy allowed the company to charge members who renewed their memberships after the date their one-year membership terms expired, the full annual fee for less than a full year of membership.

Macy's Credit Card Holders and the Fine Print of Rewards Certificates

In *Held v. Macy's, Inc.*,[13] the trial court dismissed several causes of action in a class action brought by customers alleging that Macy's misled its charge card holders into believing they would obtain cost savings opportunities if they purchased Macy's merchandise. Specifically, the plaintiffs complained that the company had systematically failed to disclose that the Rewards Certificates they received as a benefit of card membership were "worth significantly less than customers [were led] to believe." The court dismissed the plaintiffs' claims under GBL §§ 349 and 350 because the literature Macy's disseminated to the plaintiffs expressly stated that the plaintiffs were not entitled to Rewards Certificates. In fact, the certificate clearly stated that it was a typical store coupon, which would be similar to a "free discount coupons disseminated to the general public in store flyers and not the functional equivalent of cash." ■

1. 59 A.D.3d 584, 872 N.Y.S.2d 722 (2d Dep't 2009).
2. *See, e.g., Jermyn v. Best Buy Stores, L.P.*, 256 F.R.D. 418 (S.D.N.Y. 2009) (certification granted to class action alleging deceptive price matching in violation of GBL § 349); *Jay Norris, Inc.*, 91 F.T.C. 751 (1978), *modified*, 598 F.2d 1244 (2d Cir. 1979); *Commodore Corp.*, 85 F.T.C. 472 (1975) (consent order).
3. *Dank*, 59 A.D.3d 584.
4. 60 A.D.3d 712, 875 N.Y.S.2d 523 (2d Dep't 2009).
5. 22 Misc. 3d 1124(A), 880 N.Y.S.2d 874 (Sup. Ct., Albany Co. 2009).
6. 25 Misc. 3d 1221, 2009 WL 368259 (Sup. Ct., Kings Co. 2009).
7. 25 Misc. 3d 108, 885 N.Y.S.2d 879 (Sup. Ct., N.Y. Co. 2009), *aff'd as modified*, No. 507875, 2010 WL 653090 (3d Dep't Feb. 25, 2010); *see also Saunders v. AOL Time Warner, Inc.*, 18 A.D.3d 216, 794 N.Y.S.2d 342 (1st Dep't 2005) (customers challenge cable converter box rentals; complaint dismissed; plaintiff "not aggrieved by the complained of conduct").
8. 24 Misc. 3d 1206(A), 890 N.Y.S.2d 70 (Sup. Ct., N.Y. Co. 2009).
9. *Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 489–90, 860 N.Y.S.2d 422 (2008).
10. *Id.* at 493.
11. 65 A.D.3d 410, 884 N.Y.S.2d 21 (1st Dep't 2009).
12. 66 A.D.3d 930, 888 N.Y.S.2d 117 (2d Dep't 2009); *see Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29 (E.D.N.Y. 2008) (customers asserts that membership renewal policy is deceptive trade practice and violates GBL § 349; class certification granted).
13. 25 Misc. 3d 1219, 2009 WL 3465945 (Sup. Ct., Westchester Co. 2009).

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How Can Courts Encourage Cooperation in Discovery?

By Steven C. Bennett

As the costs and burdens of discovery have mounted over the past decade, courts and commentators have increasingly urged cooperation between parties and their counsel as an essential remedy for the chaos and satellite litigation that may arise from large-scale, chiefly electronic, discovery projects. Cooperation can enhance efficiency for parties searching for relevant materials, prevent costly mistakes and misunderstandings, and permit sharing of best practices for improved technical operations. Amendments to the Federal Rules of Civil Procedure, adopted in 2006 after more than five years of study and drafting, essentially called on parties to "meet and confer" early in a case to discuss the creation of an efficient protocol for discovery.[1] In 2008, the American College of Trial Lawyers concluded that the civil discovery system was "broken" and called for reforms to decrease the costs and burdens of discovery on the judicial system and litigants.[2] In July 2008, the Sedona Conference issued a "Cooperation Proclamation," which encouraged parties to work together to improve the efficiency and effectiveness of the discovery process.[3]

Concise explanations of the merits of cooperation abound.[4] Courts, moreover, have repeatedly referred to the need for cooperation – and to the Sedona Cooperation Proclamation in particular – in judicial opinions on discovery motions.[5] In latest count, nearly 100 jurists across the country have signed on to the Sedona Cooperation Proclamation.[6]

Why then have parties and their counsel not broadly embraced the principle of cooperation in discovery? Why do the costs and burdens of discovery continue to mount? Why do courts have to hector parties and counsel repeatedly that they "should have cooperated" to avoid the problems that arise? This article briefly examines some of the reasons why parties may choose not to cooperate in the discovery process and suggests some techniques that federal courts might use to encourage cooperation and deter senseless conflict.

Requiring Competence

Reasoned discussion of sometimes complex and technical discovery issues requires competent counsel supported by client representatives with knowledge of the client's information and communications systems and record-keeping practices. To help ensure such competence, courts might identify essential points of competence and

mandate that counsel certify at the time of an initial court conference that they have established a system that can bring such competence to the task of negotiating discovery protocols in the case.

Courts might also insist that competent counsel continue the process of negotiations after the first discovery conference. Especially where a breakdown in communication occurs, a court may require that further discussions be preceded by sufficient internal fact-gathering and may also require a more specific form of certification from counsel that they have adequately consulted with their clients and are fully prepared to engage in meaningful negotiations.

Adopting the Settlement Privilege

In many cases, counsel can become distracted from the process of good-faith negotiations due to their concern that every word they write or utter may end up as fodder for a submission to the court. Letter-writing and email-writing campaigns can pull counsel into tit-for-tat exchanges that erode trust and stir up conflicts, rather than promote cooperation.

One remedy may be to apply a limited form of the settlement privilege to certain discovery negotiations.[7] A court could direct counsel to engage in negotiations and prohibit submissions from the parties regarding the substance of the negotiations, except for the terms of a successful deal. Parties may also voluntarily agree to apply the settlement privilege to other aspects of the negotiation process.

A particularly suitable application of the settlement privilege might involve the formulation of search terms. In many cases, parties apply a "black box" approach to negotiations over terms. The requesting party itemizes its list of proposed terms without any idea of the precision or recall effects of the terms (under- or over-inclusiveness). The responding party may object to specific terms, but there is often no detailed discussion of the effects of using specific search terms.

Under the cover of the settlement privilege, parties, counsel, and computer advisors might more freely discuss the terms that can effectively and efficiently retrieve the most relevant materials while minimizing the burden on the responding party. Indeed, such a system might encourage parties to share test results of various search alternatives and permit limited, targeted follow-up searches without the specter of claims of spoliation and related discovery violations.

Supervising Negotiations

Many courts and commentators assume that independent supervision of discovery negotiations must necessarily involve expensive and burdensome mediation or the services of a federal magistrate judge. That assumption, however, embodies the false premise that an entire negotiation needs to be supervised by a neutral to function effectively. In reality most of the time, a system of periodic "check-in" sessions, coupled with periodic availability of a neutral for more intense negotiating sessions, suffices. Accordingly, a court might direct or suggest the following supervision:

- At the very beginning of a case, the parties may be required to participate in a brief session during which a neutral reviews the character of the dispute and the abilities and preparations of the parties and counsel to determine whether they are ready to engage in successful negotiations. The neutral can help itemize the issues that the parties need to discuss and may suggest techniques to improve the efficiency of the process.
- Some form of "triage" may be applied by the court after consultation with the parties. Some cases may be so small and uncomplicated that they do not require extensive external supervision. Other cases, including fairly large matters with experienced counsel, a well-prepared support staff, and evidence of good cooperation, may also require little intervention. However, larger and more complex cases, where the parties and counsel do not demonstrate sophistication and a spirit of cooperation, may become candidates for early and continuous intervention by an experienced neutral.
- A mandatory mediation rule for all discovery motions, or at least for disputes of a certain size or type, may also be imposed.

To ensure quality neutrals, courts may begin developing a cadre of qualified neutrals through their own rosters of volunteers, but this can be an expensive and time-consuming process. A better option may be to reach out to alternative dispute resolution (ADR) service providers, which are beginning to develop lists of qualified neutrals familiar with the techniques and technology of

In many cases, counsel can become distracted from the process of good-faith negotiations due to their concern that every word they write or utter may end up as fodder for a submission to the court.

modern electronic discovery.[8] A court may also "tax" the costs of ADR services to the losing party in a litigation or even require a party to pay the cost of the mediation, if the mediation fails and the court is asked to resolve a discovery motion.

Courts may also wish to consider the "pay me now or pay me later" calculus involved in supervising the discovery process. It may be better to err on the side of early intervention in all cases, to identify the disputes that will require more attention than the norm. For these cases, a strict regimen of enforced deadlines for negotiations may, in the long run, save money and time for everyone involved in the discovery process.

Teaching by Example

Much of the hard work of discovery is done in forms that never become public. Judicial opinions most often focus on what can go wrong in discovery. Of course, many of those negative interactions are important. Parties and their counsel must understand the limits of what they can and cannot do.

But positive interactions may provide equally important – perhaps even more important – lessons and guidance. What are the forms of search protocols that have been agreed to by parties and approved by courts? What protective orders are standard, and what forms are used in unusual cases? Where parties agree on computer inspections, what framework or rule typically applies? These and dozens of other similar questions may be answered by publicizing helpful examples of discovery-related documents.

Courts might in fact encourage parties to identify helpful documents voluntarily. They might also institute a check-off system that could allow court administrators to designate useful documents on an electronic docket for inclusion in a database. Local bar and academic institutions might be enlisted to aid in such a project. Such forms do not need to have official status with the court. In fact, a court would always retain the authority to mold particular orders to the needs of an individual case.

In addition to offering forms of protocols and orders that can help the discovery process, courts might consider offering more active guidance on how to achieve cooperation during discovery. Bench, bar, and academic groups might also create short primers on the subject, perhaps an easily downloadable video illustration of a sample meet-and-confer session and a Rule 26 court conference. A court might even require that all parties and counsel who have not previously appeared before the court review the primer, much like the videos often shown to prospective jurors.

Creating a Shared Ethos

Reputation means a great deal in the legal profession. Attorneys who demonstrate creative, energetic, and sincere efforts to develop cooperative approaches to discovery should be rewarded with the kudos that can help burnish a lawyer's reputation. In addition to recognizing exemplary behavior in their opinions, courts might also cooperate with local bar groups to hand out annual awards. Even if courts could not formally participate in the award nomination process, the reinforcement of the values inherent in such awards, merely by the presence of judges at an award ceremony, could send a useful message.

The goal must be to create a new ethos of cooperation to reinforce the sense that the best lawyers are not just zealous advocates but are those who have learned the benefits that cooperation can deliver to their clients. Judges can help create that ethos in a host of ways, some of which are discussed in this article, while other ways have yet to be imagined and developed. In particular, judges can share their own views on what techniques may best promote that ethos through their judicial conferences, bar groups, guest lectures in law schools, and participation in the Sedona Conference and its various publications. Such efforts will be rewarded, not simply in the public recognition of superior judicial service but also in the benefits of an improved, more efficient judicial system. ■

1. *See* Fed. R. Civ. P. 26(f).

2. *See Interim Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* (Aug. 1, 2008), *available at* www.actl.com.

3. *See The Sedona Conference Cooperation Proclamation* (2008), *available at* www.thesedonaconference.org.

4. *See, e.g.*, William Butterfield, *The Case for Cooperation*, 10 Sedona Conf. J. 339 (2009); Steven S. Gensler, *The Bulls-Eye View of Cooperation in Discovery*, 10 Sedona Conf. J. 363 (2009).

5. *See, e.g., Capitol Records, Inc. v. MP3tunes, LLC*, 261 F.R.D. 44 (S.D.N.Y. 2009); *In re Direct Southwest, Inc., Fair Labor Standards Act (FLSA) Litigation*, Civil Action No. 08-1984-MLCF-SS, 2009 WL 2461716 (E.D. La. Aug. 7, 2009); *Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n*, No. 3:07-CV-449, 2009 WL 2243854 (S.D. Ohio July 24, 2009); *Dunkin' Donuts Franchised Rests. LLC v. Grand Cent. Donuts, Inc.*, No. CV 2007-4027, 2009 WL 1750348 (E.D.N.Y. June 19, 2009); *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418 (D.N.J. 2009); *Newman v. Borders, Inc.*, 257 F.R.D. 1 (D.D.C. 2009); *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134 (S.D.N.Y. 2009); *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403 (S.D.N.Y. 2009); *Covad Commc'ns Co. v. Revonet, Inc.*, 254 F.R.D. 147 (D.D.C. 2008); *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350 (S.D.N.Y. 2008); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

6. *See Judicial Endorsements (as of October 30, 2009)*, www.thesedonaconference.org.

7. Rule 408 of the Federal Rules of Evidence provides that offers to compromise a "claim" that is disputed as to "validity or amount," and "conduct or statements made in compromise negotiations," are not admissible as evidence. The Rule generally refers to settlement negotiations regarding substantive claims in litigation, but could be extended, by agreement of the parties, and/or order of a court, to include settlement of claims and disputes regarding discovery.

8. *See, e.g., E-Discovery Committee*, www.cpradr.org (panel of neutrals available to assist parties in resolving e-discovery issues out of court); *Court Appointed Special Masters/Discovery Masters*, www.jamsadr.com (listing similar capabilities).

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After *Godfrey v. Spano*: Is New York's High Court Ready to Recognize Out-of-State Same-Sex Marriages?

By Frank Gulino

In most of the nation, legally sanctioned marriage remains limited to the union of a man and a woman.[1] But in five states – three of which share a border with New York – marriage between members of the same sex has been legalized, either by judicial ruling or by legislation.[2] New York itself, though long at the forefront of legal innovation,[3] has not sanctioned same-sex marriage judicially or legislatively.

In 2006, the New York Court of Appeals, in *Hernandez v. Robles*,[4] declined to recognize the right of same-sex partners to marry in New York, leaving it to the Legislature to decide whether to grant such recognition.[5] But in the years since *Hernandez*, the Legislature has failed to enact a law that would permit marriage between members of the same sex. In fact, on December 2, 2009, the New York State Senate decisively rejected a bill that would have legalized same-sex marriage, effectively ending its prospects in New York until at least 2011, following the next legislative election.[6]

In the wake of a decision handed down in late 2009, however, New York's high court appears poised to recognize same-sex marriages legally contracted in other states. This article will examine that decision – *Godfrey v. Spano*[7] – as well as its implications for future recognition by the Court of Appeals of out-of-state same-sex marriages, the rule of law that will likely serve as the basis for such recognition, and a factual scenario that would put the issue squarely and unavoidably before the Court.

An Overview of *Godfrey v. Spano*

The genesis of *Godfrey* can be traced to the recognition of out-of-state same-sex marriages by an executive agency of New York's state government. In 2008, Governor David A. Paterson directed state agencies to grant recognition to same-sex marriages that were legal where they were performed.[8] But, even earlier, in 2006, the state's Department of Civil Service announced in a memorandum that it would allow same-sex spouses of state employees, legally married outside of New York, to have access to state health insurance benefits.[9] That memorandum, along with a contemporaneous directive by then-Westchester County Executive Andrew J. Spano authorizing county employees and agencies to recognize out-of-state same-sex marriages,[10] became the subject of taxpayer lawsuits. On January 22, 2009, the Appellate Division, Third Department dismissed the suit challenging the Civil Service Department's recognition of out-of-state same-sex marriages.[11] That suit, together with the challenge to County Executive Spano's directive, made its way to the New York Court of Appeals, where the two actions were decided under the rubric of *Godfrey v. Spano*.

In its *Godfrey* decision, handed down on November 19, 2009, the Court of Appeals upheld the dismissal of both suits, leaving in place the recognition of out-of-state same-sex marriages by state and county officials.[12] The majority limited its ruling to narrow grounds, finding no illegality in the executive actions at issue, and avoided the question as to whether the Court recognized same-sex marriages like those in the companion cases before it.[13] In her concurrence, however, Judge Carmen Beauchamp Ciparick – joined by two other judges – noted that she would have dealt with the question directly, expressing the view that "same-sex marriages, valid where performed, are entitled to full recognition in New York."[14] That concurrence, by three of the Court's seven judges, may portend how the Court will rule when faced squarely with the same question.

With the legalization of same-sex marriage in jurisdictions neighboring New York – including Massachusetts, Connecticut, Vermont and Canada[15] – as well as in New Hampshire, Iowa and the District of Columbia,[16] the issue of whether to recognize out-of-state same-sex marriages is likely to resurface in New York's courts before long. And depending on the factual scenario presented to the Court of Appeals, the resolution of that issue may well be unavoidable.

The taxpayer suits before the Court in *Godfrey* did permit a narrow ruling by the four-judge majority. The three concurring judges, however, considered the recognition issue before the Court and would have recognized out-of state same-sex marriage based on the state's "longstanding marriage recognition rule."[17] But the majority found it "unnecessary to reach [the] argument that New York's common-law marriage recognition rule is a proper basis for the challenged recognition of out-of-state same-sex marriages."[18]

The Common-Law Marriage Recognition Rule

The marriage recognition rule mentioned by both the majority and the concurrence in *Godfrey* will undoubtedly play a large part in the rationale for any resolution of the question by the high court. Under the rule, "[f]or well over a century" New York has recognized marriages solemnized outside of the state unless they fell into either of two exceptions: (1) marriages prohibited because they are contrary to the "positive law" of New York, that is, contrary to express prohibitions in New York law; and (2) marriages involving incest or polygamy, both of which fall within the prohibitions of "natural law."[19] Among the out-of-state marriages recognized by the state Court of Appeals under the recognition rule have been (1) a marriage between an uncle and niece; (2) common-law marriages valid under the laws of other states; (3) the marriage of a man and woman both under the age of 18 and valid under the law of the Province of Ontario, Canada; and (4) a "proxy marriage" valid in the District of Columbia, all of which would have been illegal if solemnized in New York.[20]

Applications of the Recognition Rule to Out-of-State Same-Sex Marriages

The *Godfrey* Concurrence

Tracing the marriage recognition rule to an 1881 decision by the high court, the concurrence in *Godfrey* would have applied the rule to recognize legal out-of-state same-sex marriages, finding that neither of the exceptions to the rule applied to same-sex marriages.[21] For the "positive law" exception to apply, Judge Ciparick said, a New York statute "must expressly convey a legislative intent to void a marriage legally entered into in another jurisdiction."[22] New York's legislature "has enacted no . . . law expressly forbidding the recognition of same-sex marriages performed in other jurisdictions or expressing any legislative intent that such marriages be voided,"[23] she said. Judge Ciparick also concluded that the "natural law" exception does not apply to same-sex marriages. That exception, which denies recognition to out-of-state marriages that are "abhorrent to New York public policy," has been invoked "only in cases involving incest or polygamy." She found no public policy in New York against same-sex marriage,[24] pointing out that "the laws of New York protect committed same-sex couples in a myriad of ways," both by statute and in decisional law.[25]

The concurrence observed, for instance, that New York statutory law permits same-sex domestic partners to (1) receive supplemental burial allowances for their deceased partners who were members of the military and were killed in combat; (2) have the same rights as spouses or next-of-kin to visit their partners in any hos-

pital, nursing home, or health care facility; and (3) elect how to dispose of a partner's remains.[26] The concurrence also noted that the Court of Appeals has recognized same-sex life partners as family members for purposes of challenging eviction proceedings and exclusion from housing set aside for married couples, and has permitted the same-sex partner of a biological parent, through adoption, to become a parent of the partner's child.[27]

The court also rejected an argument that the plaintiff's same-sex marriage was abhorrent to the public policy of New York.

"These judicial decisions and statutes," the concurrence concluded, "express a public policy of acceptance [of same-sex partnerships] that is simply not compatible with" the argument that the recognition of same-sex marriages, validly performed elsewhere, is "contrary to New York public policy."[28]

The Case of *Martinez v. County of Monroe*

The *Godfrey* concurrence echoes a 2008 decision of the Appellate Division, Fourth Department that was also based on an application of the marriage recognition rule, and which was the impetus for the directive by Governor Paterson instructing state agencies to recognize out-of-state same-sex marriages.[29] The issue in *Martinez v. County of Monroe* was the defendant-employer's denial of spousal health care benefits to a same-sex couple who had been legally married in Canada.[30]

Addressing the "positive law" exception to the marriage recognition rule, the *Martinez* court noted that the state Legislature "has not enacted legislation to prohibit the recognition of same-sex marriages validly entered into outside of New York."[31] The court added that the "natural law" exception to the marriage recognition rule was not applicable, noting that the "exception has generally been limited to marriages involving polygamy or incest, or marriages offensive to the public sense of morality to a degree regarded generally with abhorrence," which, according to the court, could not be said of the same-sex marriage before it.[32]

The court also rejected an argument that the plaintiff's same-sex marriage was abhorrent to the public policy of New York as articulated by the Court of Appeals in *Hernandez v. Robles.* The Fourth Department explained, "*Hernandez* does not articulate [a] public policy . . . but instead holds merely that the New York State Constitution does not *compel* recognition of same-sex marriages solemnized in New York."[33] The *Martinez* court pointed out that in *Hernandez* the Court had said that "the Legislature *may* enact legislation recognizing same-sex marriages . . . thereby indicat[ing] that the recognition of plaintiff's marriage is not against the public policy of New York."[34]

Unlike the "overwhelming majority of states," said the court, New York had not enacted legislation denying full faith and credit to same-sex marriages validly solemnized in another state pursuant to the federal Defense of Marriage Act (DOMA).[35] Congress had enacted DOMA in 1996, defining "marriage" as "a legal union between one man and one woman" and defining "spouse" as "a person of the opposite sex who is a husband or a wife."[36] DOMA also authorized states to decline recognition to same-sex marriages that might be valid in other states. But while more than 40 states have enacted analogues to the federal DOMA statute declining recognition to out-of-state same-sex marriages – so-called "mini-DOMAs" – New York is not among them.[37] Thus, the *Martinez* court concluded that the marriage of the plaintiff before it, valid under Canadian law, was entitled to recognition in New York in the absence of express legislation to the contrary.[38]

The New York Court of Appeals dismissed the defendants' motion for leave to appeal on procedural grounds – not on the merits.[39] But the nearly identical analysis of – and conclusion reached by – three of the seven judges of the Court of Appeals in *Godfrey* is a strong indication that the Court would have recognized the out-of-state same-sex marriage at issue in *Martinez* and is prepared to do so when that question next arises before it.

The Application of the Recognition Rule to a Same-Sex Spouse's Wrongful Death Claim

A scenario that is likely to put the issue of out-of-state same-sex marriage recognition squarely before the New York Court of Appeals is one where a surviving same-sex spouse, legally married in another state, seeks to maintain an action under New York law for the wrongful death of his or her spouse. The scenario is hardly speculative. As a matter of fact, it closely mirrors the facts and legal issue litigated in *Langan v. St. Vincent's Hospital*,[40] a case that reached the Second Department but did not reach the Court of Appeals on the merits. That case involved a gay couple, living and working in New York, who had been living together in an intimate relationship for some 14 years.[41] In 2000, the two men traveled to Vermont and entered into a same-sex civil union, which had been created by the Vermont legislature that same year.[42] The couple then returned to New York and continued what the Appellate Division called a "close, loving, committed, monogamous relationship as a family unit" until the death of one of them in 2002, following a car accident and two subsequent surgeries.[43]

The surviving partner commenced a lawsuit seeking recovery for wrongful death, wherein the defendant moved to dismiss on the ground that the plaintiff – "being of the same sex [as the decedent and, therefore,] incapable

of being married" – had "no standing as a surviving spouse" to maintain an action for wrongful death.[44] The lower court denied the motion, but a split panel of the Second Department reversed and dismissed the wrongful death claim.[45]

The *Langan* majority saw no reason to depart from precedent merely because the plaintiff and the decedent had entered into a civil union in Vermont.[46] In fact, the majority rejected the notion that the civil union was equatable to a traditional marriage so as to confer upon the plaintiff the right of a "surviving spouse" to maintain a wrongful death action in New York.

The majority explained its refusal to give recognition to the civil union of the plaintiff and the decedent, pointing out that the Vermont legislature specifically refused to allow same-sex couples to "marry" and went

> to great pains to expressly decline to place civil unions and marriage on an identical basis. While affording same-sex couples the same rights as those afforded married couples, the Vermont Legislature refused to alter traditional concepts of marriage (i.e., limiting the ability to marry to couples of two distinct sexes).[47]

Like the New York Court of Appeals in *Hernandez v. Robles*, the majority in *Langan* concluded that the redress sought by the plaintiff was an issue not for the courts but for the legislature.[48]

Since the ruling in *Langan*, Vermont became the first state to permit same-sex marriage legislatively.[49] Passed by the Vermont legislature in April 2009, the statute redefined marriage – formerly the "legally recognized union of one man and one woman" – as "the legally recognized union of two people."[50] Had the *Langan* plaintiff *married* his partner under the new Vermont law (or the law of Massachusetts or Connecticut, for that matter), the *Langan* court would have been squarely faced with the issue of whether to recognize out-of-state same-sex marriages. If and when such a scenario comes before the New York Court of Appeals, it will require the Court to face the recognition issue avoided by the majority in *Godfrey*.

Past challenges to the New York wrongful death statute by same-sex life partners have been unsuccessful at least in part because the plaintiffs were not "surviving spouses" of their deceased partners. The statute, section 5-4.1 of the N.Y. Estates, Powers and Trusts Law (EPTL), permits wrongful death actions to be commenced for the benefit of "distributees" of a decedent.[51] Distributees are, in turn, limited to the decedent's surviving spouse and certain blood relatives, including issue and parents.[52]

In rejecting attempts by unmarried same-sex partners to maintain wrongful death actions as the "equivalent" of a surviving spouse, New York appellate courts have deferred any expansion of the definition of "surviving spouse" under the governing statute to the legislature. For instance, in 1998, a split panel of the Appellate Division, First Department upheld a lower court's grant of summary judgment, dismissing the plaintiff's claim for the wrongful death of his same-sex partner of 20 years. In so ruling, the majority in that case, *Raum v. Restaurant Associates, Inc.*,[53] rejected a challenge to the constitutionality of the wrongful death statute as it applied to same-sex partners, concluding that the statute was constitutional and the plaintiff's remedy would require legislative intervention.[54]

The plaintiff in *Raum* had challenged New York's wrongful death statute in two ways. The first argument was that the statute is unconstitutional because it limits the right to maintain a wrongful death action to a surviving "spouse" and certain blood relatives, to the exclusion of same-sex partners in "spousal-type" relationships.[55] It was the plaintiff's position that "since he [was] barred from marrying [under New York law], his marital status, over which he had no control, should not be a barrier" to his recovery of wrongful death damages.[56] The plaintiff's second argument was that the term "surviving spouse" in the EPTL – defined as including a "husband or wife"[57] – should be read to include same-sex partners as well.[58]

The *Raum* majority held that the wrongful death statute does not unconstitutionally discriminate against same-sex partners, reasoning that the statute "operates without regard to sexual orientation, in that unmarried couples living together, whether heterosexual or homosexual, similarly lack the right to bring a wrongful-death action."[59] The appellate court also determined that the EPTL definition of surviving spouse as including a "husband or wife" is "clear and preclusive" and could not be read to include same-sex partners.[60] In the end the court concluded that "[s]ince it is not within the judicial province to redefine terms given clear meaning in a statute . . . plaintiff's sole recourse lies in legislative action."[61]

There was a vigorous dissent in *Raum* that would have reversed the lower court's grant of summary judgment to the defendants on the ground that the plaintiff was entitled to sue for wrongful death under the Equal Protection Clauses of the federal and state constitutions.[62] But the majority's affirmance remains law, as New York's high court never reviewed the *Raum* case on its merits.[63]

Inasmuch as the wrongful death cause of action is a creature of the Legislature, the basis in law for holdings like those in *Raum* and *Langan* cannot seriously be questioned. The courts in those cases followed long-standing precedent in avoiding a constitutional ruling, framing their rulings in terms of statutory construction.[64]

But now, with the legalization of same-sex marriage in other jurisdictions, including the neighboring states of Massachusetts, Connecticut and Vermont, same-sex partners married in those jurisdictions who seek to pursue wrongful death claims in New York will *be* "surviving spouses" and will not need to rely on arguments alleging some fictional spousal equivalency. As a result, the question will arise whether the New York Court of Appeals

will recognize the right of the survivor of a legal same-sex marriage – a surviving same-sex *spouse* – to maintain a wrongful death claim in New York. The *Godfrey* concurrence and its willingness to recognize out-of-state same-sex marriage based on New York's marriage recognition rule signals a likely affirmative answer.

Conclusion

In the absence of positive law prohibiting same-sex marriage, and inasmuch as same-sex marriage is neither incestuous nor polygamous, it seems that neither of the exceptions to the marriage recognition rule would preclude the New York Court of Appeals from recognizing a marriage between members of the same sex legally contracted in another jurisdiction. It is indeed difficult to envision the rationale for a refusal by the high court to recognize the right of a surviving *spouse*, whatever his or her sexual orientation, to sue as a "surviving spouse" under the state's wrongful death statute. The Court, in *Hernandez v. Robles*, certainly did not declare any public policy against same-sex marriage that could be cited as conflicting with the application of comity or the marriage recognition rule to grant the right of a surviving same-sex spouse to sue for wrongful death. On the contrary, as *Hernandez* stated unequivocally: "It is not for us to say whether same-sex marriage is right or wrong. . . . [Rather,] we believe the present generation should have a chance to decide the issue through its elected representatives."[65] Thus, in the absence of a conflicting public policy or a contrary statute, it appears that, in light of *Godfrey v. Spano*, the New York Court of Appeals *is* ready to recognize out-of-state same-sex marriages.

1. One scholar recently noted that "[f]orty-four states specifically forbid same-sex marriage by statute or state constitutional amendment" and that "[f]or all federal purposes, the Defense of Marriage Act (DOMA) provides that marriage is only between one man and one woman." Nancy Knauer, *Same-Sex Marriage and Federalism*, 17 Temp. Pol. & Civ. Rts. L. Rev. 421, 424 (2008).

2. The Supreme Judicial Court of Massachusetts recognized the right of same-sex partners to marry in *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). Connecticut recognized the right of same-sex couples to marry when its Supreme Court declared that the state's bar against same-sex marriage was unconstitutional in *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 957 A.2d 407 (2008). And the Supreme Court of Iowa ruled that a state statute limiting civil marriage to a union between a man and a woman violates the equal protection clause of the Iowa Constitution. *See Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). On April 7, 2009, Vermont became the first state to permit same-sex marriage legislatively. *See* Abby Goodnough, *Gay Rights Group Celebrates Victories in Marriage Push*, N.Y. Times, Apr. 17, 2009, *available at* http://www.nytimes.com/2009/04/08/us/08vermont.html?_r=1&hp. The statute redefined marriage under Vermont law – formerly the "legally recognized union of one man and one woman" – as "the legally recognized union of two people." Vt. Stat. Ann. tit. 15, § 8 (2009). And on June 3, 2009, New Hampshire's governor signed into law a bill, passed the same day by the state's legislature, that legalized same-sex marriage. The law became effective on January 1, 2010. *See* Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. Times, June 3, 2009, *available at* http://www.nytimes.com/2009/06/04/us/04marriage.html?_r=1&hp.

3. Keith J. Jones, *Being Green Doesn't Need to Be Taxing: How New York State Law Is a Vanguard for Using Green Infrastructure*, 29 Pace L. Rev. 499, 499 (2009).

4. 7 N.Y.3d 338, 821 N.Y.S.2d 770 (2006).

5. *Id.* at 361.

6. The State Senate's vote came hours after the Assembly had passed the gay marriage legislation by a vote of 88-51. Jeremy W. Peters, *New York State Senate Votes Down Gay Marriage Bill*, N.Y. Times, Dec. 2, 2009, *available at* http://www.nytimes.com/2009/12/03/nyregion/03marriage.html?_r=1&hp.

7. 13 N.Y.3d 358, 892 N.Y.S.2d 272 (2009).

8. The text of Governor Paterson's directive, issued by memorandum dated May 14, 2008, under the name of David Nocenti, the governor's counsel, is available at http://www.observer.com/2008/patersons-message-same-sex-marriage and at http://www.abcny.org/pdf/memo.pdf.

9. 13 N.Y.3d at 369–70.

10. The Westchester County Executive signed an order in 2006 directing county government officials under his jurisdiction to recognize legal out-of-state same-sex marriages "in the same manner as they . . . recognize opposite sex marriages for the purposes of extending and administering all rights and benefits belonging to these couples." *Id.* at 368–69.

11. *Lewis v. N.Y. State Dep't of Civ. Serv.*, 60 A.D.3d 216, 872 N.Y.S.2d 578 (3d Dep't 2009).

12. 13 N.Y.3d at 374, 376.

13. *Id.* at 374–76.

14. *Id.* at 377 (Ciparick, J., concurring). Chief Judge Jonathan Lippman and Judge Theodore Jones joined in Judge Ciparick's concurring opinion.

15. New York's international neighbor, Canada, has permitted marriage between same-sex partners for more than five years. *See In re Same-Sex Marriage*, [2005] 246 D.L.R. (4th) 193, 2004 WL 2749380 (Can. Dec. 9, 2004).

16. An ordinance recognizing same-sex marriages entered into in other states and countries – passed by the City Council of Washington, D.C., in May 2009 – took effect on July 7, 2009, after Congress failed to take any action against it. A.P., *Washington D.C., Recognizes Same-Sex Marriage*, N.Y. Times, July 7, 2009, *available at* http://www.nytimes.com/2009/07/08/us/08marriage.html?hp. On December 15, 2009, the capital's City Council then passed a bill legalizing same-sex marriage in the District of Columbia. Ira Urbina, *D.C. Council Approves Gay Marriage*, N.Y. Times, Dec. 15, 2009, *available at* http://www.nytimes.com/2009/12/16/us/16marriage.html?hp.

17. 13 N.Y.3d at 377 (Ciparick, J., concurring).

18. *Id.* at 377 (majority opinion).

19. *Martinez v. County of Monroe*, 50 A.D.3d 189, 191, 850 N.Y.S.2d 740 (4th Dep't), *motion for lv. to appeal dismissed*, 10 N.Y.3d 856, 859 N.Y.S.2d 617 (2008).

20. *Martinez*, 50 A.D.2d at 191–92.

21. *Godfrey*, 13 N.Y.3d at 378–80 (Ciparick, J., concurring) (citing *Van Voorhis v. Brintnall*, 86 N.Y. 18 (1881)).

22. 13 N.Y.3d at 378–79 (Ciparick, J., concurring) (citation omitted).

23. *Id.* at 379 (Ciparick, J., concurring) (footnote omitted).

24. *Id.* at 379–80 (Ciparick, J., concurring).

25. *Id.* at 380–81 (Ciparick, J., concurring).

26. *Id.* at 380 (Ciparick, J., concurring).

27. *Id.* at 380–81 (Ciparick, J., concurring).

28. *Id.* at 381 (Ciparick, J., concurring).

29. In his May 14, 2008, directive to state agencies ordering them to recognize out-of-state same-sex marriages (*see* note 8 *supra*), Governor Paterson made reference to the recently decided case of *Martinez v. County of Monroe*, 50 A.D.3d 189, 191, 850 N.Y.S.2d 740 (4th Dep't), *motion for lv. to appeal dismissed*, 10 N.Y.3d 856, 859 N.Y.S.2d 617 (2008), as the impetus for his direction that agencies "ensure that terms such as 'spouse,' 'husband' and 'wife' are construed in a manner that encompasses legal same-sex marriages." *See* http://www.abcny.org/pdf/memo.pdf.

30. 50 A.D.3d at 190–91.

31. 50 A.D.3d at 192.

32. *Id.* at 192 (citation omitted).

33. *Id.* (citation omitted) (emphasis in original).

34. *Id.* (citation omitted) (emphasis in original).

35. 50 A.D.3d at 192–93 (citing the federal Defense of Marriage Act, 28 U.S.C. § 1738C).

36. DOMA, 1 U.S.C. § 7 (2007).

37. *See* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143, 2165 (2005). *See also* Thomas Hoff Prol, *New Jersey's Civil Unions Law: A Constitutional "Equal" Creates Inequality*, 52 N.Y.L. Sch. L. Rev. 169, 180 & n.67 (2008) (federal DOMA became catalyst for enactment of mini-DOMAs in 41 states).

38. 50 A.D.3d at 193. The *Martinez* Court noted that the Court of Appeals, in *Hernandez*, had indicated that "the place for the expression of the public policy

of New York is in the Legislature, not the courts" and that, while the legislature may decide to prohibit the recognition of out-of-state same-sex marriages, "[u]ntil it does so, . . . such marriages are entitled to recognition in New York." *Id.* (citation omitted).

39. 10 N.Y.3d at 856.

40. 25 A.D.3d 90, 802 N.Y.S.2d 476 (2d Dep't 2005), *appeal dismissed*, 6 N.Y.3d 890, 817 N.Y.S.2d 625 (2006).

41. 25 A.D.3d at 96 (Fisher, J., dissenting).

42. *Id.* at 91; *see id.* at 97, 802 N.Y.S.2d at 481 (Fisher, J., dissenting). In 2000, nine years before it legalized same-sex marriage (*see* note 2 *supra*), Vermont had been the first state to permit same-sex partners to enter into civil unions that grant the partners to such unions a variety of rights similar to those enjoyed by heterosexual married couples. *See* Vt. Stat. Ann. tit. 15, §§ 1202, 1204 (2009).

43. 25 A.D.3d at 91.

44. *Id.* at 92.

45. *Id.*, *rev'g* 196 Misc. 2d 440, 765 N.Y.S.2d 411 (Sup. Ct. Nassau Co. 2003).

46. Indeed, the majority noted that it was only the dissent – and not plaintiff – that urged the notion that the Vermont civil union between plaintiff and decedent conferred spousal-type rights on the survivor. 25 A.D.3d at 94.

47. *Id.* at 94–95 (citations omitted).

48. *Id.* at 95.

49. *See* Abby Goodnough, *Gay Rights Group Celebrates Victories in Marriage Push*, *supra*, note 2.

50. Vt. Stat. Ann. tit. 15, § 8 (2009).

51. *See* EPTL 5-4.1(1). "Distributees," by definition, are those persons entitled to distribution of the property of a decedent not disposed of by will. EPTL 4-1.1(a).

52. EPTL 4-1.1(a)(1)–(7).

53. 252 A.D.2d 369, 675 N.Y.S.2d 343 (1st Dep't 1998).

54. *Id.* at 370.

55. *Id.*

56. *See id.* at 372 (Rosenberger, J.P., dissenting).

57. EPTL 5-1.2(a).

58. *See* 252 A.D.2d at 370.

59. *Id.*

60. *Id.*

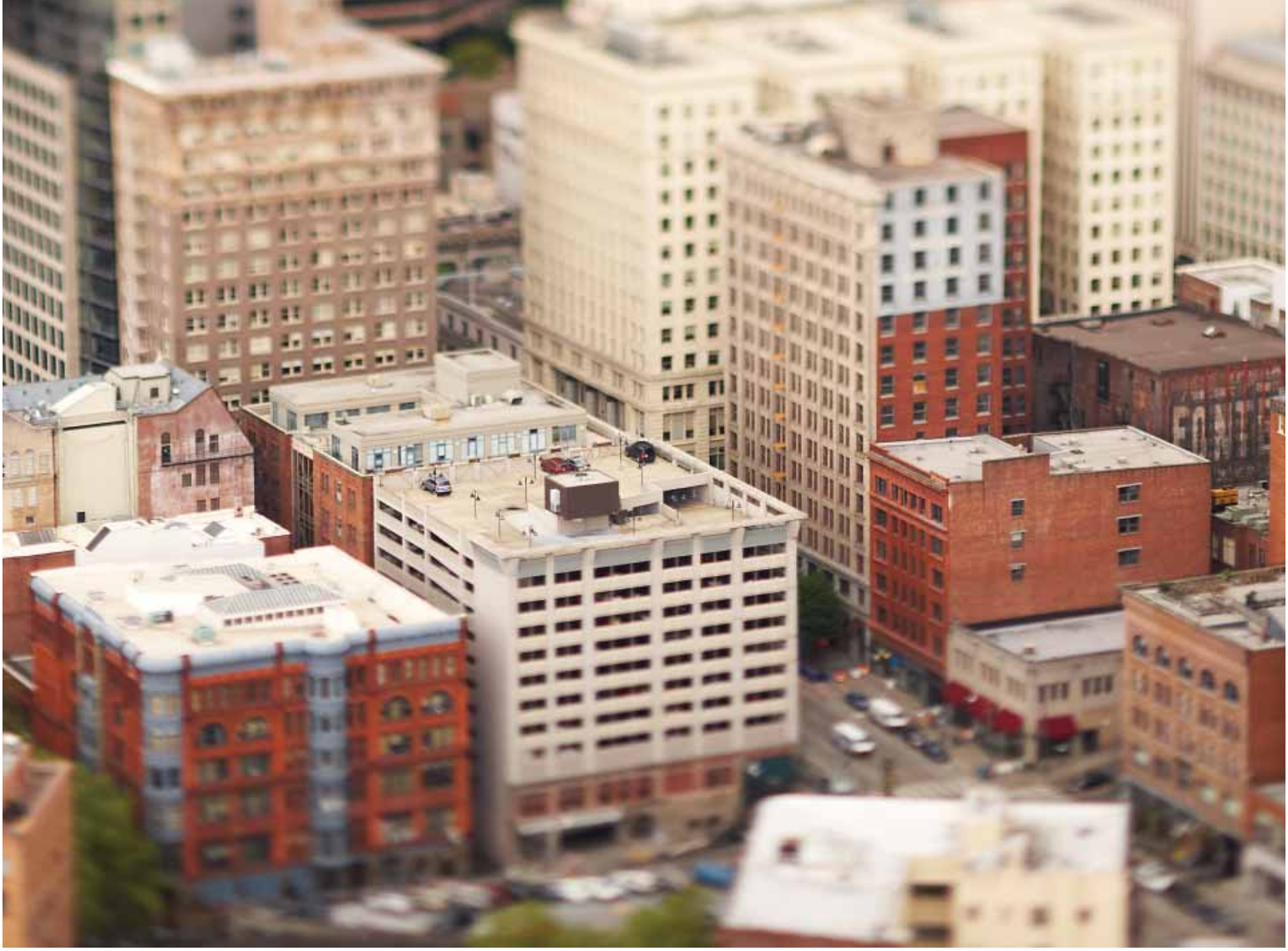
61. *Id.* (citation omitted).

62. *Id.* at 371 (Rosenberger, J.P., dissenting). The Equal Protection Clause of the federal Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The New York State Constitution's Equal Protection Clause similarly provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. Const. art. I, § 11.

63. After three attempts to seek review in the Court of Appeals were dismissed by the high Court on procedural grounds, no further efforts were made to pursue the *Raum* plaintiff's constitutional challenge to the New York wrongful death statute. *See Raum v. Rest. Assocs., Inc.*, 92 N.Y.2d 946, 681 N.Y.S.2d 476 (1998), *later proceedings*, 95 N.Y.2d 824, 712 N.Y.S.2d 449 (2000) (Mo. No. 543 SSD 25 & Mo. No. 682 SSD 30).

64. The New York Court of Appeals long ago pronounced it "well settled that issues of constitutionality should not be decided before they need be." *Peters v. N.Y. City Hous. Auth.*, 307 N.Y. 519, 527, 121 N.E.2d 529 (1954) (citations omitted). Still longer ago, the concept of judicial avoidance of ruling on a constitutional basis whenever possible was famously articulated by Justice Louis Brandeis in his concurrence in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341–56 (1936) (Brandeis, J., concurring). In that opinion, Justice Brandeis enunciated the rule that courts should avoid constitutional decisions whenever possible by deciding cases on narrower, nonconstitutional grounds. *Id.* at 347 (Brandeis, J., concurring) ("if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter"). *See* R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do*, 31 Loy. L.A. L. Rev. 167, 199 (1997).

65. 7 N.Y.3d at 366.



Discovery, and Its Absence, in Tax Certiorari Proceedings

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New York State lags behind the rest of the nation when it comes to the administration and appeal of property tax assessments. It also levies more local taxes, from more taxing jurisdictions, than almost any other state. In most states property tax appeals are resolved relatively quickly through informal negotiations, often without the participation of legal counsel at any stage. New York is among the leading litigation states, in which it is rare to achieve a fair and equitable result for a commercially owned property without extended litigation.

New York lacks tax tribunals and similar court forums dedicated to this highly specialized area of law, resulting in a patchwork of haphazard decisions spanning a period of many years and varying significantly from one part of

the state to another. These decisions tend to emphasize arcane procedural technicalities and offer either little or confusing guidance on valuation methodology, which is the core of any tax certiorari proceeding. Particularly shocking to many encountering the New York system for the first time, commercial tax appeals in many parts of the state commonly take a decade or more to be resolved.

This article provides a brief overview of the principles and operation of discovery in proceedings filed under Article 7 of the Real Property Tax Law (RPTL), more commonly known as tax certiorari proceedings. Discovery is one of the most perennially troubling and misunderstood areas of New York property tax law – for taxpayers, municipalities, and the judiciary – and accounts for a great many unnecessary delays in the resolution of these cases.

It is often assumed that a tax appeal, once filed in court, is to be treated like any other civil action in which discovery is available as of right. Either because of a lack of experience with such matters or in the hope that the taxpayer's counsel will not object, respondents frequently serve ordinary civil action disclosure devices pursuant to CPLR Article 31, as if they were entitled to such information as of right. Likewise, some trial-level judges, accustomed to overseeing as of right discovery in most other matters coming before them, will condone such efforts or even promote them by requiring counsel for the parties to complete form discovery schedules that were not designed for the administration of Article 7 proceedings.

A tax certiorari proceeding is essentially a battle over the value of real property as well as equity in assessment as compared with other taxpayers. Disputes may focus on any number of factors, such as rents, expenses, occupancy, capitalization of net income, and the ratio at which property is assessed, but in New York State the evidence to be presented at trial is generally an expert witness's opinion of value, which is provided in the form of a written report accompanied by oral testimony. Certiorari proceedings have little to do with disputed questions of what might have occurred in a particular fact pattern, in contrast to most other civil litigation. It is relatively rare for witnesses other than experts on value to play a role or for issues outside the normal scope of an appraisal to be considered by the court.

The most distinguishing – but frequently overlooked – feature of a tax certiorari matter is that it is a summary proceeding that falls under Article 4 of the CPLR and does not allow for discovery as of right, except that which is specifically offered under the Court Rules,[1] as will be detailed below. Notwithstanding the reality that these proceedings encounter extensive delays in many courts, municipal revenues and taxpayer monies were a paramount concern when the Legislature created the property tax law. The designation of these proceedings as summary proceedings was intended, in part, to focus on the battle over the ultimate value of the subject and to minimize the costs and delays that necessarily flow from as of right discovery under CPLR Article 31. Because the ultimate issue in a certiorari proceeding is the reliability of an expert witness's opinion of value, motions made pursuant to CPLR 408 should be scrutinized for true need; courts considering such motions must understand that in a broad sense all certiorari proceedings are quite similar in nature and the granting of special discovery in one proceeding will set a dangerous precedent for such discovery in thousands more.

A greater adherence to the clear design of the procedures for the exchange of information under New York law will result in the speedier administration of these matters and a reduction in legal costs incurred by municipalities – as well as easing clogged court calendars.

Discovery in Summary Proceedings

Tax certiorari proceedings are summary proceedings that allow for the common forms of discovery only upon leave of the court on motion. The primary purpose of a summary proceeding is the simple, speedy and inexpensive determination of a given case.[2] Article 7 proceedings restrict discovery because the goal of a summary proceeding is to not "inordinately delay" the claim.[3] Ironically, tax certiorari proceedings are often the longest-running court matters of all, so curbing discovery consistent with the CPLR's design is well advised.

Civil practice rules typically provide for full disclosure of all matter that is material and necessary in the prosecution or defense of an action. However, tax assessment proceedings commenced pursuant to RPTL Article 7 are within Article 4 of the CPLR, and thus are generally governed by the discovery rules set forth in CPLR 408,[4] along with a few specific options provided under the RPTL and Court Rules. Accordingly, in a tax certiorari proceeding, any analogy to negligence actions, contract claims, and any other law pertaining to ordinary civil actions is improper.[5]

The strict rules of evidence applicable to trials do not rigidly apply in proceedings to review tax assessments.[6] Instead, the parties are to be confronted with competent and material testimony in the form of expert witnesses and their appraisals.[7] As a result, evidentiary material in certiorari proceedings is regularly reduced to a battle of expert opinions. Discovery does not play the same role in Article 7 proceedings as it does in typical CPLR matters.

As previously mentioned, in an Article 7 proceeding, as in all summary proceedings, disclosure is generally allowed only by leave of court.[8] Requiring such leave of court to obtain disclosure is consistent with the "summary" nature of the proceeding due to the inherent delays involved in the discovery process.[9]

Two related disclosure devices are expressly permitted in a special proceeding without a prior court order under CPLR 408. These are the notice to admit facts under CPLR 3123 (specifically referenced in CPLR 408) and the admission of ratio under RPTL § 716.

The CPLR notice to admit allows for the parties to further narrow the issues requiring trial and may serve as a kind of stipulation among the parties on matters such as the parcel identification, size of the property, that the assessment was properly challenged, and so on. Its purpose is to

> [e]liminate from litigation factual matters which will not be in dispute at trial . . . and . . . it may not be used to request admission of material issues, or ultimate or conclusory facts.[10]

Absent a timely denial of the matters included in a notice to admit, they are generally deemed admitted for the purposes of trial. The notice to admit may not be used as a substitute for other disclosure devices.[11]

granted only when "ample need" is shown.[15] Information sought to be disclosed must be considered "material and necessary."[16] The test is one of usefulness and reason, and must be construed to reduce delay.[17] Where the contested issue is relatively simple or ancillary to the main dispute and the cost of conducting disclosure is not justified, no "ample need" for disclosure is demonstrated.[18] In deciding such motions, courts are to remain mindful that the ultimate goal of the petitioner and the respondent is to introduce a credible overall value conclusion by their respective experts and not to prove every underlying fact that might have led to such conclusion. Outside of tax certiorari proceedings, professional appraisers must render such value conclusions every day, usually without the benefit of every item of data they might wish to examine.

Courts frequently deny discovery requests made pursuant to CPLR 408, which stands in contrast to the liberal approach taken toward most civil discovery requests. This occurs particularly when municipalities attempt to discover business information from petitioners. Information frequently sought by municipalities includes the taxpayer's business plans and production figures. Traditionally, courts have been very reluctant to grant such discovery requests.

Valuation of property is determined by its condition as of a valuation and status date pursuant to local and state law — not on the basis of some future contemplated use.

The notice to admit ratio is a similar device. Specifically provided for within the Real Property Tax Law, it allows the petitioner to serve upon the respondent a demand to admit the ratio at which other real property in the assessing unit is assessed (sometimes referred to as the "equalization rate" or "level of assessment").[12] The notice may specify a ratio as long as it is not in excess of 95%. If the respondent does not deny that such ratio is correct within 15 days or such further time as the court may allow, the percentage is deemed admitted for trial. While it may seem simple enough for the respondent to serve a denial and preserve the issue of ratio for trial, counsel must consider the consequences: if the petitioner later proves its stated ratio to be correct or lower and the respondent lacked a sufficient basis for the denial, the respondent is responsible for the reasonable costs of the experts and attorneys required to present such proof.[13] It has been further held that the basis for a denial of ratio must be bona fide, and even a study to this effect may not be sufficient if only cursory.[14] The cost so incurred by the municipality may be significant. One of the most expensive expert witness assignments in a tax certiorari trial is the commissioning of a ratio study, and the respondent's counsel is well advised to consider the potential cost related to a denial of this notice.

Limitations on Discovery Pursuant to CPLR 408

The standard to be applied by the court for summary proceedings under CPLR 408 is that disclosure should be

Business information and related financial information is generally not directly related to the value of the realty and is quite different from rental revenue. Information relating to a taxpayer's business plans as well as production figures for factories located on the property has not been discoverable.[19] This denial of access has extended to studies prepared by petitioners in connection with past, current or future development, alteration and demolition of their realty and improvements, and new construction. Requests for quantities and costs of production for products produced at the taxpayer's plant have also been denied by courts.

Such documentary material has been denied because it was immaterial and not relevant to the valuation proceeding at hand.[20] Instead, courts have held that such information seems more relevant to the question of a petitioner's business plans than the value of real estate. Valuation of property is determined by its condition as of a valuation and status date pursuant to local and state law – not on the basis of some future contemplated use.[21] However, not all requests for documentation are denied by courts. Documents regarding costs of constructing a petitioner's single-family residence were deemed to be material and necessary, for example.[22]

Depositions are treated no differently than any other discovery device in an Article 7 proceeding; thus, a municipality is not entitled to take testimony by deposition without a court order.[23] Depositions tend by their nature to introduce unwarranted delay in the Article 7 proceedings, which are intended to be summary;[24] and only in rare circumstances will a deposition be needed to establish evidence necessary to arrive at a competent valuation. As noted earlier, professional appraisers render valuations in their daily practice without the use of depositions or similar devices. Courts will generally seek to determine if a deposition is necessary to a party's case before granting such a request.[25]

Review of discovery requests made by the petitioner is equally stringent. Disclosure is limited to a determination of the correctness of the assessment and not to a review of what the assessor did or how the assessor arrived at a particular conclusion. Thus, the formulas or policies or mental processes used by assessors are not relevant to the issues raised and may not be discovered.[26] Accordingly, access to notations by the municipalities' assessment staff as to the significance or insignificance of reported transfers has not been granted.[27]

Requests for discovery of computation sheets and guidelines or reports showing fractional assessment rates used by assessors have also been denied. Courts have reasoned that such assessment ratio guidelines are not material and necessary as the formulas or policies used by assessors are irrelevant to the issues raised in the judicial proceeding authorized by RPTL Article 7. Thus, the disclosure of certain material such as assessment field books, notes, and calculations has been denied as unnecessary to a resolution of the fairness of the final assessment and because such disclosure would constitute an impermissible inquiry into the processes that were used by the assessors in arriving at their determinations.[28] Because the methods used in making a specific assessment are irrelevant in New York State, disclosure of these methods cannot be said to relate to the *product* of the assessor, which is the only issue in an Article 7 proceeding. Courts have further reasoned that disclosure of such documents would likely result in requests to have the assessors explain their notations and calculations, thereby severely impeding them in the performance of their statutory duties.[29]

Furthermore, in a case in which an interrogatory was granted to the petitioners, disclosure was allowed only for a specific question concerning the fixed equalization rate of the town; thus, the interrogatory was very limited.[30] This court reasoned that the limitation was necessary to safeguard against the possibility of any unauthorized probing activities on behalf of the petitioners but wanted to afford them the opportunity to seek the answers to specific questions.[31] Numerous proceedings are brought every year to review municipal tax assessments. To subject the assessors to examinations before trial would severely impede the proper performance of their statutory duties.

Petitioners have also been granted leave to take depositions of the State Board of Equalization and Assessment (SBEA) in Article 7 proceedings. However, such petitioners were only allowed to question the SBEA concerning the allegedly voluminous and complex facts forming the basis of the agency's assessments so as to simplify the issues for trial in the interests of judicial economy. Petitioners were not entitled to examine the SBEA's assessors as to the mental processes and formulas they used in arriving at their determinations.[32]

Court Rule § 202.59

Income and Expense Provisions

One very limited opportunity for as of right discovery in Article 7 proceedings is found within Court Rule § 202.59. Compliance by petitioners with § 202.59 is the primary means by which respondents may gather useful information in tax certiorari proceedings involving income-producing properties. This section applies to every Article 7 proceeding in the state, except for those in New York City, where Court Rule § 202.60 is applied instead.[33]

This rule provides that, before the note of issue and certificate of readiness are filed, the petitioner must have

served, in triplicate, a verified or certified statement of the income and expenses of the property for each tax year under review or submit a statement that the property is not income producing. The failure to have served and to file the income and expense statement as required for income-producing properties pursuant to Court Rule § 202.59(b) requires striking the note of issue. In cases where more than four years have elapsed since the inception of the case, the matter must be dismissed because the defective note of issue cannot be fixed, except where good cause is shown within such four-year period.[34]

Income and expense statements need not be filed and served prior to filing a note of issue where a property is not "income-producing,"[35] however. Such property is a "property owned for the purpose of securing an income from the property itself";[36] a cooperative or condominium apartment building is considered income-producing property.[37]

Issues have arisen under the circumstance where the business property is "owner occupied," meaning that the petitioner itself is present on the premises and personally operates the business resident thereon. An owner-occupied business property shall be considered income producing as determined by the amount reasonably allocable for rent, but the petitioner is not required to make an estimate of rental income.[38] In other words, "income" refers to arm's-length, bona fide, rental income and therefore implies a lease of some or all of the premises; it does not refer to business income from an enterprise that takes place on the premises. (Properties that would generally *not* be considered income producing, such that they would not require production of a statement, are typically owner-occupied facilities and vacant land.) Accordingly, courts have repeatedly denied motions by respondents seeking income and expense statements where the property is owner-occupied.[39]

For example, a motion to compel a petitioner to supply a certified statement of income and expenses has been denied because the petitioner was the owner / occupier of several airport rental car concession facilities.[40] The court noted that the petitioner's business income and expenses were "irrelevant to the valuation" of the rental facilities.

Another example was an owner-occupied golf course; it was not an income-producing property and, thus, its owner was not required to verify its business income and expenses prior to the filing and service of a note of issue, because the owner's income was produced by commercial business conducted on the property and not directly by the real estate.[41] However, while the golf course owner was not required to verify its business income and expenses *prior* to the filing and service of a note of issue, the trial court deemed an income and expense statement relevant and material to the appraisal of the golf course, and therefore discoverable.[42]

Audit Provisions

In addition to the income and expense statement, respondents are entitled to an audit of a petitioner's financials if timely and properly requested. In practice, audits are quite rare and are generally sought only where the income and expense statement strongly suggests a specific issue that requires further probing. The service of the income and expense statement gives respondents 60 days to request, and 120 days to complete, "for the purpose of substantiating petitioner's statement of income and expenses," an audit "of the petitioner's books and records for the tax years under review."[43] Failure of the respondent to request or complete the audit within the time limits is deemed a waiver of the right to audit.

If respondents fail to request an audit of a petitioner's books and records within 60 days after service of the statement of income and expenses, they have waived that privilege and are thereafter estopped from challenging the accuracy of the information supplied by the petitioner.[44] However, if the petitioner fails to respond to an audit request and does not furnish its books and records within a reasonable time after receipt of the request, or otherwise unreasonably impedes or delays the audit, the case may be dismissed.[45]

The scope of the audit is often quite broad. The petitioners' books and records, general ledgers, balance sheet accounts and all other financial documents "for all years in question" shall be made available as needed by the auditors, subject to any confidentiality agreement proposed.[46] This approach has been supported by ample authority, including the policy underlying the enactment of CPLR 3140 and Court Rule § 202.59, as well as Generally Accepted Auditing Standards, Generally Accepted Accounting Principles, and the American Institute of Certified Public Accountants Professional Standards ("AICPA Standards").[47]

The Exchange of Appraisals

Pursuant to Court Rule § 202.59(g), appraisals are required of both parties before trial.[48] The chief administrator of courts is required to adopt rules governing the exchange of these reports.[49] Appraisal-exchanging statutes were enacted to make appraisals in "proceedings for condemnation, appropriation or review of tax assessments" more readily available and to serve as an "aid in the expeditious disposition of such proceedings."[50] Not only does this assist disclosure, it allows opposing counsel to adequately prepare for an effective cross-examination of a party's expert witness, therefore abbreviating proceedings that may dig into complex property issues.[51]

The appraisal reports must contain a statement of the method of appraisal relied on and the conclusions as to value reached by the expert, together with the facts, figures and calculations by which the conclusions were reached. If sales, leases or other transactions involving

comparable properties are relied on, then they must be set forth with sufficient particularity so as to permit the transaction to be readily identified. The report must contain a clear and concise statement of every fact that a party will seek to prove in relation to those comparable properties. The appraisal report should contain photographs of the properties under review and any comparable property that is relied on by the appraiser, unless the court directs otherwise. The report should not leave items to be guessed at by the reader or filled in by the appraiser through testimony at trial.

The appraisal's importance cannot be overemphasized. The appraisal reports set the parameters for expert testimony at trial. An inadequate appraisal report may be excluded and, along with it, any trial testimony by the expert who prepared it. Upon the trial, expert witnesses are limited in their proof of appraised value to details set forth in their respective appraisal reports. Any party who fails to serve an appraisal report as required is precluded from offering any expert testimony on value.[52]

However, upon the application of any party on such notice as the court shall direct, the court may, upon good cause shown, relieve a party of a default in the service of a report, extend the time for exchanging reports, or allow an amended or supplemental report to be served upon such conditions as the court may direct. After the trial of the issues has begun, any such application must be made to the trial judge and shall be entertained only in unusual and extraordinary circumstances.

Locally Mandated Income and Expense Requirements

In addition to the income and expense requirements of Court Rule § 202.59, some municipalities require all property owners to file income and expense statements, regardless of whether they have filed a tax appeal. In New York City, the Department of Finance requires owners of income-producing property to electronically file an annual income and expense statement.[53] The Department of Finance is authorized to impose substantial monetary penalties for a failure to file. The failure to file a timely income and expense statement may also result in a denial by the Tax Commission to review a property's tax assessment.[54]

In Yonkers, any person or entity owning or leasing income-producing property is required to file an annual income and expense statement.[55] Even if a specific property does not require a filing due to its circumstances, the property owner must still file an exclusion form. If the property owner fails to take any action, there are three main penalties: a financial penalty not to exceed 3% of the assessed value of the income-producing property; dismissal of any complaints that may be pending with the Board of Assessment Review; and the City Assessor can subpoena the owner's books and records relevant to the income and expenses of the property and can request a court order forcing the owner to furnish the required income and expense statement together with the books and records regarding the property. The City Assessor's Office is also entitled to recover its costs and expenses, including attorney fees.

Courts have specifically held early disclosure requirements to be unenforceable, allowing petitioners who have met the statutory requirements of the RPTL to obtain judicial review of their realty assessments.

Additionally, the City of Mount Vernon enacted Local Law No. 4 in 1990, which requires owners of income-producing real property to file an annual income and expense statement with the Commissioner of Assessment by the first day of February every year.[56] If the statement is not timely filed, the Commissioner may compel production of relevant books and records by subpoena or apply for a court order requiring the owner to furnish the income and expense statement as well as related books and records.[57] Local Law No. 4 further specifies that, where a property owner fails to provide the requisite statement on time, "the Board of Assessment Review shall deny any complaint in relation to the assessment of such property by such owner."[58]

The legality of such local requirements has come under fire and been held unconstitutional in certain respects. The Legislature has set forth procedures and requirements for administrative review of property assessments for judicial review in RPTL Article 7. Some of the penalties sought to be enforced by certain local municipalities have been deemed to unconstitutionally usurp this state legislative authority.

The Municipal Home Rule Law, authorized by the Legislature, specifies that local governments may not enact local laws "inconsistent with the provisions of the constitution or . . . any general law."[59] Additionally, Article IX of the New York State Constitution empowers local governments to adopt laws relating to "the levy, collection and administration of local taxes," so long as those enactments are "consistent with laws enacted by the legislature."[60] Based on this legislative authority, courts have decided that municipalities, in the absence of action by the Legislature, cannot enforce early disclosure requirements in a manner that restricts judicial review of property assessments.

Courts have specifically held early disclosure requirements to be unenforceable, allowing petitioners who have met the statutory requirements of the RPTL to obtain judicial review of their realty assessments notwithstanding their breach of local requirements.[61] Mount Vernon Local Law No. 4, which penalizes noncompliance with its filing requirement by restricting the availability of administrative correction of tax assessments, has been deemed inconsistent with statutory authority and therefore unenforceable.[62]

Additionally, the Legislature requires disclosure of an income and expense statement only upon request by the local board, which differs from Local Law No. 4 in various respects.[63] First, the Legislature does not deem a failure to forward financial information "*to the assessor*, prior to creation of the tentative assessment roll, a bar to obtaining a reduction."[64] Instead, it merely requires disclosure to the board during administrative review. Consequently, mandating that petitioners also file a pre-assessment income and expense statement pursuant to Local Law No. 4 in order to obtain judicial correction of their final assessments effectively adds a condition to judicial review not contained in RPTL Article 5 or 7.[65]

Discovery in Article 7 Proceedings Must Remain Limited

Article 4 Proceedings Are Not Intended for Extensive Discovery Practice

The nature and purpose of summary proceedings are such that disclosure will rarely be granted.[66] Introducing extensive discovery practice to an Article 7 summary proceeding would disrupt the entire time frame set up by the drafters of Article 7. While it may well be that certiorari proceedings already tend to be extraordinarily lengthy, and have long since departed from the notion of "summary" proceedings, they represent a huge percentage of the proceedings within the court system and upon municipal attorneys' desks. With taxpayers routinely appealing the assessment of many thousands of parcels each year, there simply are not sufficient resources to allow the scope of discovery permitted in ordinary civil actions. The plethora of discovery motions standard in New York civil practice are unknown to Article 4, which "does not envision any interlocutory motion practice during a special proceeding except for motions to dismiss on points of law."[67]

The usual motions allowed under the CPLR do not apply to summary proceedings due to the intended accelerated pace of such proceedings.[68] This is a logical extension "of the legislative concept that special proceedings can be determined as though they were themselves motions rather than as plenary actions."[69] Ordinary discovery practice would run contrary to the concept of summary proceedings, which were established to create a speedy and equitable procedure for both the taxpayer and municipality. The exchange of information in Article 7 proceedings must be accomplished as efficiently and sensibly as the law allows, always remaining focused on the ultimate objective: arriving at an estimate of market value and the resulting assessment. Courts should bear these principles in mind whenever faced with discovery requests in Article 7 proceedings.

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1. 22 N.Y.C.R.R. pt. 202.
2. *See Haskell v. Surita*, 109 Misc. 2d 409, 439 N.Y.S.2d 990 (N.Y. Civ. Ct. 1981).
3. *See Tankoos-Yarmon Hotels, Inc. v. Smith*, 58 Misc. 2d 1072, 299 N.Y.S.2d 937 (App. Term, 1st Dep't 1961).
4. *Xerox Corp. v. Duminuco*, 216 A.D.2d 950, 629 N.Y.S.2d 568 (4th Dep't 1995).
5. *Singer Co. v. Tax Assessor of Vill. of Pleasantville*, 86 Misc. 2d 631, 633–34, 382 N.Y.S.2d 628 (Sup. Ct., Westchester Co. 1976) (this Westchester County court specifically held that an analogy to negligence actions would not be proper in a tax certiorari proceeding).
6. *People ex rel. Congress Hall v. Ouderkirk*, 120 A.D. 650, 105 N.Y.S.134 (3d Dep't 1907).
7. *See People ex rel. Batt v. Rushford*, 81 A.D. 298, 80 N.Y.S. 891 (3d Dep't 1903).
8. CPLR 408.
9. *Plaza Operating Partners Ltd. v. IRM (U.S.A.) Inc.*, 143 Misc. 2d 22, 23, 539 N.Y.S.2d 671 (N.Y. Civ. Ct. 1989) (the court held "discovery tends to prolong an action and is therefore inconsistent with the expeditious nature of a special proceeding").
10. *Lewis v. Hertz Corp.*, 193 A.D.2d 470, 597 N.Y.S.2d 368 (1st Dep't 1993).
11. *Jonas v. Liberty Lines Transit, Inc.*, 142 A.D.2d 554, 530 N.Y.S.2d 36 (2d Dep't 1988).
12. RPTL § 716(1).
13. RPTL § 716(2).
14. *Conifer Baldwinsville Assocs. v. Town of Van Buren*, 68 N.Y.2d 783, 506 N.Y.S.2d 853 (1986).
15. *Antillean Holding Co. v. Lindley*, 76 Misc. 2d 1044, 352 N.Y.S.2d 557 (N.Y. Civ. Ct. 1973).
16. *Saratoga Prop. Dev. v. Assessor of City of Saratoga Springs*, 62 A.D.3d 1107, 1108, 879 N.Y.S.2d 234 (3d Dep't 2009) (citing *Food Fair v. Bd. of Assessment Review of Town of Niskayuna*, 78 A.D.2d 335, 337, 435 N.Y.S.2d 378 (3d Dep't 1981).
17. *Id.*
18. *See In re Shore*, 109 A.D.2d 842, 486 N.Y.S.2d 368 (2d Dep't 1985).
19. *Gen. Elec. Co. v. Macejka*, 117 A.D.2d 896, 498 N.Y.S.2d 905 (3d Dep't 1986).
20. *Id.* at 897.
21. *Adirondack Mountain Reserve v. Bd. of Assessors*, 99 A.D.2d 600, 471 N.Y.S.2d 703 (3d Dep't), *aff'd*, 64 N.Y.2d 727, 455 N.Y.S.2d 744 (1984).
22. *Saratoga Prop. Dev.*, 62 A.D.3d at 1107.
23. *Atkinson v. Trehan*, 70 Misc. 2d 612, 613, 334 N.Y.S.2d 291 (N.Y. Civ. Ct. 1972).
24. CPLR 403(b) ("the primary function of a special proceeding is summary disposition").
25. *See Katz Buffalo Realty, Inc. v. Anderson*, 25 A.D.2d 809, 270 N.Y.S.2d 12 (4th Dep't 1966) (court stated that an examination of the Village Assessor should only be allowed if it is "material and necessary").

26. *425 Park Ave. Co. v. Fin. Adm'r of the City of N.Y.*, 69 N.Y.2d 645, 511 N.Y.S.2d 589 (1986); *City of Amsterdam v. Bd. of Assessors*, 91 A.D.2d 809, 809, 458 N.Y.S.2d 44 (3d Dep't 1982).

27. *City of Amsterdam*, 91 A.D.2d at 809.

28. *Id.*

29. *Id.* at 810.

30. *Blooming Grove Props., Inc. v. Bd. of Assessors*, 34 A.D.2d 953, 954, 312 N.Y.S.2d 85 (2d Dep't 1970).

31. *Id.*

32. *Nat'l Fuel Gas Distrib. Corp. v. State Bd. of Equalization & Assessment*, 86 A.D.2d 707, 707, 446 N.Y.S.2d 544 (3d Dep't 1982).

33. N.Y. Court Rule § 202.60 is practically identical to N.Y. Court Rule § 202.59 in terms of income and expense reports, the filing of the note of issue, audits, the exchange of appraisals, and the use of appraisal reports at trial. The only difference between the two rules is that § 202.59 holds that a party may only demand a pretrial conference after having filed the note issue, whereas § 202.60 holds that no note of issue may be filed until the preliminary conference has been held.

34. RPTL § 718(2)(d); *see Eastgate Corp. Park, LLC v. Bd. of Assessment Review*, 54 A.D.3d 1036, 1036, 865 N.Y.S.2d 249 (2d Dep't 2008) (affirming the dismissal of the petition because "the petitioner made no showing of good cause to excuse the errors . . . and did not make any attempt to correct the defects within the strictly-enforced four-year period set forth in RPTL 718(2)(d)").

35. N.Y. Court Rule § 202.59(b) (Tax Assessment Review Proceedings in Counties Outside the City of New York: Statement of Income and Expenses).

36. N.Y. City Admin. Code § 11-208.1(e).

37. N.Y. Court Rule § 202.59(b) (Tax Assessment Review Proceedings in Counties Outside the City of New York: Statement of Income and Expenses).

38. *Id.*

39. *Ardsley Country Club v. Assessor of Town of Greenburgh*, 24 Misc. 3d 1118, 879 N.Y.S.2d 319 (Sup. Ct., Westchester Co. 2009); *see also White Plains Props. Corp. v. Tax Assessor of City of White Plains*, 58 A.D.2d 653, 396 N.Y.S.2d 68 (2d Dep't 1977).

40. *Avis Rent A Car Sys., Inc. v. Town of Rye*, 131 A.D.2d 568, 568, 516 N.Y.S.2d 286 (2d Dep't 1987).

41. *See Ardsley Country Club*, 24 Misc. 3d at 1118; *see also* N.Y. Court Rule § 202.59.

42. *See Ardsley Country Club*, 24 Misc. 3d at 1125; *see also* N.Y. Court Rule § 202.59.

43. N.Y. Court Rule § 202.59(c); *see Ames Dep't Stores, Inc. v. Assessor of the Town of Greenport*, 276 A.D.2d 890, 891, 714 N.Y.S.2d 362 (3d Dep't 2000) (this rule is "designed to afford the other party or parties adequate time to examine and test the accuracy of the facts contained in the statement, and ultimately utilized in the appraisal." In this case, "having failed to request an audit pursuant to this regulation, respondents waived that privilege").

44. *Georgian Court Apt. Masis Parseghian v. Assessor of the Town of Orangetown*, 182 A.D.2d 978, 980, 582 N.Y.S.2d 533 (3d Dep't 1992); *see also* N.Y. Court Rule § 202.59(c).

45. N.Y. Court Rule § 202.59(c).

46. *Miriam Osborn Memorial Home Ass'n v. Assessor of City of Rye*, No. 17175/97, 791 N.Y.S.2d 871, 2004 WL 1656500 (Sup. Ct., Jul. 22, 2004).

47. *Id.*

48. N.Y. Court Rule § 202.59(g). The Uniform Trial Court Rules provide for the exchange and filing of such appraisal reports upon filing a note of issue and certificate of readiness. As mentioned above, § 202.59 applies to the exchange and filing of appraisal reports in tax assessment review proceedings in counties outside the City of New York, § 202.60(g) applies to the exchange and filing of appraisal reports in tax assessment review proceedings in counties within the City of New York, and § 202.61 applies to the exchange of appraisal reports in eminent-domain proceedings.

49. CPLR 3140 (Disclosure of appraisals in proceedings for condemnation, appropriation or review of tax assessments).

50. *White Plains Props. Corp. v. Assessor of the City of White Plains*, 58 A.D.2d 871, 871–74, 396 N.Y.S.2d 875 (2d Dep't 1977), *aff'd*, 44 N.Y.2d 971, 408 N.Y.S.2d 500 (1978).

51. *Id.* at 871–72.

52. N.Y. Court Rule § 202.59(h) (Use of appraisal reports at trial). (However, upon good cause shown, the court may "relieve a party of a default in the service of a report, extend the time for exchanging reports, or allow an amended or supplemental report to be served upon such conditions as the court may direct").

53. City of New York, Real Property Income and Expense Statements (2010), http://www.nyc.gov/html/dof/html/property/property_info_rpie.shtml ("Owners of income-producing properties that have an actual assessed value of more than $40,000 are required to file annual Real Property Income and Expense (RPIE) statements with Finance, unless the properties are specifically excluded from the filing requirements by law.").

54. NYC Finance, Real Property Income and Expense, *available at* http://www.nyc.gov/html/dof/html/pdf/rpie/rpiefaqv2.pdf ("The law provides that the New York City Tax Commission will deny a hearing on an Application for Correction of the Tentative Assessed Valuation for the upcoming tax year, for any property for which an income and expense schedule was required, but not filed by the deadline.").

55. City of Yonkers, Local Law No. 9 of 1993.

56. *Fifth Ave. Office Ctr. Co. v. City of Mount Vernon*, 89 N.Y.2d 735, 738, 658 N.Y.S.2d 217 (1997) (discussing Mount Vernon City Charter § 226-a).

57. *Id.*

58. *Id.*

59. *Id.* at 740 (citing N.Y. Municipal Home Rule Law § 10(1)(ii)).

60. *Id.* (citing to N.Y. State Const., Art. IX, § 2(c)(ii)(8), which states "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to . . . [t]he levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature").

61. *Id.*

62. *Id.* at 743 (petitioners "who have met the statutory requirements of RPTL articles 5 and 7 can obtain judicial review of their realty assessments notwithstanding their breach of Local Law No. 4. To hold otherwise would impose preconditions to review that are inconsistent with the RPTL and, thus, violate the Municipal Home Rule Law and article IX of the State Constitution").

63. *Id.* at 741 (RPTL § 525(2) (Hearing and determination of complaints and ratification of assessment stipulations).

64. *Id.*

65. *Id.*

66. *Plaza Operating Partners Ltd. v. IRM (U.S.A.) Inc.*, 143 Misc. 2d 22, 23, 539 N.Y.S.2d 671 (N.Y. Civ. Ct. 1989).

67. *Goldman v. McCord*, 120 Misc. 2d 754, 754, 466 N.Y.S.2d 584 (N.Y. Civ. Ct. 1983); *see also* CPLR 404 (Objections in point of law); CPLR 7804(f) (Procedure: Objections in point of law).

68. *See Goldman*, 20 Misc. 2d 754.

69. *Id.* at 754.

"Hey, I'm all about being reasonable."

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The views expressed in the article are those of Judge Bellacosa and do not reflect the views of the New York State Bar Association.

Point of View: Time to Reform Judicial Reform

(*Quis custodiet ipsos custodes?* Who will watch the watchdogs?)

By Joseph W. Bellacosa

In my opinion, the marketing marquee "reform" has lost its buzz as a call for change – at least in one corner of the judicial arena. Thirty-three years ago, the Commission on Judicial Conduct was created to reform the investigation and discipline of judicial misconduct. Now, New Yorkers need a transparent accounting of how that body and its staff conduct their public responsibilities, which affect judges throughout the state.

In 1977 as part of a set of reforms – a constitutional package involving appointment of judges to the Court of Appeals and centralized administration and financing of the courts – the cumbersome and creaky Court on the Judiciary was replaced by an independent Commission on Judicial Conduct (COJC).

This extra-judicial entity is invested with the exclusive power to investigate and prosecute matters of judicial misconduct and to impose appropriate disciplinary sanctions. When its decision is final, its adjudicative work becomes public and is subject to an exclusive judicial review process – appeal to the Court of Appeals only in very limited circumstances.

Right from the start, some structural problems arose from the comprehensive sweep of the Commission's authority over *all* judges in New York State, including judges of courts of record, whether appointed or elected, and the mass of lower local court judges of the towns and villages (police and traffic court–types with lesser and inferior jurisdiction). All judges are placed in the same COJC fishbowl (or apple barrel), even though some local lower-level judges are not even attorneys.

One unintended consequence of this one-size-fits-all approach is the skewing of the public perception of the magnitude and nature of judicial misconduct. The COJC has capitalized on the relatively more numerous lower court judges' misdeeds, which has fostered the notion of serious and pervasive judicial misconduct. Its numerous prosecutions (with attendant media publicity on determinations of lower court judicial misconduct) and its annual reports have led the public to believe there are a lot more bad apple judges and more problems of misconduct than is empirically true. The distorted picture has generated a regrettable misimpression of the Judicial Branch and its function that adversely and unfairly affects the reputations generally and individually of judges of courts of record – the higher courts. This, in my opinion, also contributes to a diminishment of respect for the overall integrity of the judicial process.

By and by, after the tension of the start-up years – the late '70s and early '80s – with the rather broad-reaching town and village justices' ticket-fixing scandal petering out, matters started to get reasonably sorted out and settled down. The COJC seemed to be functioning as

originally contemplated, though here and there episodic dust-ups continued to occur among the judges, their membership organizations and the Commission operation. But these problems seemed less systemic and more ad hoc – involving policies or rules of conduct applied to individual cases. Generally, institutional tension between the independent COJC and judges is inevitable and cannot be avoided entirely.

Because of recent developments, however, this is a good time for a fresh examination of the COJC. The whole environment has been roiled and tensions escalated, as I see it, because judges and the judicial branch of government have been demoralized by a host of non-conduct–related, extra-Commission events. High on the list is the failure of the other two branches of government to provide adequate compensation to judicial officers.[1] It has been 11 years since the judiciary last received an increase in pay, which implies a disdain and disregard for an entire branch of government, which is not lost on the public and media, who feed that attitude.

Against that background, the COJC has further undermined respect for the weakened branch. I have come to the view that the Commission has gone astray because hardly any structural or operational checks and balances are in place – that is, no one is watching the watchdogs.

My perspective is informed by my multidimensional angles of experience as well as by my personal opinion and judgment. (It is at least a "3D" look-see, the revived *Avatar*-like movie and TV rage of our day and culture.)

I was Clerk and Counsel to the Court of Appeals from 1975 to 1983. I observed and aided the then–Chief Judge (Charles D. Breitel, the principal force behind the court reforms of that era) in the technical drafting, construction and implementation of the 1977 constitutional regimes. To be sure, my role was subordinate, on the back lot so to speak, working along with many other far more significant officials.

Later, I moved to the front lines and onto the main stage, during the '80s and '90s, as Chief Administrative Judge (promulgator of the Rules of Judicial Conduct) and Associate Judge of the Court of Appeals (the institution with exclusive judicial review of COJC determinations via appeals taken at the instance of aggrieved and sanctioned judges). In those two posts I was directly and intensely engaged in reviewing some of the COJC's work and activities.

The third phase of my look-see, during the Decade of the Aughts to present, has involved watching essentially from the sidelines as a citizen and lawyer (with one notable exception[2]). The subject of judicial discipline and the operation of COJC have remained areas of high interest and concern for me because the theoretical structure and the practical applications are both important and fascinating.[3]

To illuminate, I now advert to two recent developments, related but quite distinct. The first was New York City Corporation Counsel Michael Cardozo's proposal in December 2009,[4] and the second, one week later, was the Court of Appeals decision in *In re Gilpatric*.[5] They startled me out of my retirement reveries and have led me to believe that the 1977 reform, however well intentioned and reasonably well executed, has "jumped the shark." The COJC's billowing power is headed in the wrong direction and needs to be subjected to structural checks and balances with a piercing spotlight of transparency. Simply stated, reform itself needs reform.

The classical Latin aphorism I invoked to subtitle this article was uttered and applied historically long before even our country's founders adopted it as one of the new republic's foundation pillars of good governance.[6] Experience has proved that the separation of powers principle, the diversified allocation and distribution of cross-checking balance levers, is the firmest bedrock anyone could imagine for the proper administration of human institutions of governance.

So how did the judicial disciplinary process escape that equalizing supervision? However it happened and however long it has persisted, it is a crucial missing link that deprives the COJC process of the legitimacy that comes from independent accountability and transparency.

The Commission on Judicial Conduct is structurally and practically devoid of meaningful checks and balances because the ultimate Court of Appeals appellate review (the only judicial oversight, which, though plenary, pertains only to exceptionally appealed cases) is limited to those few adverse determinations against judges in end-stage situations. Healthy sunlight is not let in through that narrow lens of the Court of Appeals cases.

Actually, the more important question is, What are the Commission and its (occasionally excessively) zealous staff up to in the earlier stages? Consider that investigations and unsuccessful prosecutions get no meaningful external supervision or review.[7] No one has appeal rights as to those early critical stages where enormous damage and irreparable harms may be inflicted on unseen judges and the judicial process.

Yet, the Commission boldly boasts, in its annual reports and in most of its appeal briefs, that the Court of Appeals overwhelmingly (statistically correct as to the relatively few that get to the Court) accepts and approves of its formal *Determinations* (when and if they get that far along in the process). This is perhaps false or at least misleading advertising, suggesting that there is broader Court of Appeals approbation of the COJC's activities than is actually the fact. Thus, the question is, Is any independent entity reviewing and overseeing the COJC's *investigations* and *prosecutions*? In my loose translation of the venerable Latin maxim posed at the outset (Who is

guarding these guardians?), and with all due respect to the individual Commission members, I would earnestly submit that no one is conducting an institutional and independent level of scrutiny at those critical early stages of Commission and staff activity.

As I noted earlier, two recent developments jump-started my heightened concern. One was Corporation Counsel Michael Cardozo's misguided suggestion (number six in his list of 10 proposals), uttered on the occasion of his acceptance of the Cyrus Vance Award from the Fund for Modern Courts. I was a member of the audience and was somewhat stunned by the proposition that the Office of Court Administration, through the good and powerful offices of the Chief Administrative Judge (a post I proudly occupied 25 years ago), should file complaints with the COJC against judges for "failure to file" reports relative to the 60-day pending cases tabulations. That proposal, along with the rest of his bold proffer, was published and publicized in the *New York Law Journal*; a firestorm of critical responses ensued.[8]

Such a notion suggests to me that the word "reform" has become oxymoronic. The tattletale role would transmogrify the roles of OCA and the CAJ from *helper* to judges (as originally intended) to routine whistleblower against the interests of judges. Nothing I can think of would be more counterproductive than seriously considering such an imprudent suggestion. It should be rejected summarily and emphatically because the OCA should not become a routine collaborator with the COJC in accusing judges.[9]

The jurisdictional tentacles of the Commission over these last four decades have been expanding as it is.[10]

The COJC's encroachments on the principle of judicial independence have begun to tip the balance of the always-desirable accountability it was intended to provide concerning the relatively rare instances of judicial misconduct, especially by judges of courts of record and superior jurisdiction. The question should be asked, however, at what sacrifice and at whose expense? The COJC's probes, initial investigations and incomplete or failed prosecutions are sealed off against any checks and balances of accountability as to what and how it exercises its powers and judgments.

Mr. Cardozo's suggestion number six should be scrutinized through yet another prism – the OCA or CAJ as the proposed source of the complaint to the COJC. No amount of disclaimed non-judgmentalism and expressed neutrality will be able to discount or deflect the impact – the official "oooomphh" – that such a routine referral will carry with it. Any handoff by the CAJ is inescapably freighted against the allegedly time-mismanaging judge. The subtext of such referrals will always include: "I, the CAJ, cannot manage or handle this 'allegedly' incorrigible judge with all the power I have as CAJ, but I discern enough basis and concern to refer it to you, COJC, to take it over and grind it – and the judge – through your investigatory and disciplinary process." No more need be said about the tilted playing field of such referrals.

Within a week of Mr. Cardozo's proposal, my revered[11] Court of Appeals added a new complication.[12] As noted earlier, *In re Gilpatric* modified and cut back on the *In re Greenfield*[13] bright-line demarcation between administrative activities and sanctionable misconduct. The COJC can now investigate and prosecute administrative activities under the category of delays in decision rendering. To be sure, the Court of Appeals added that "not every case involving caseload delays will rise to the level of misconduct." That caveat, however, will provide no comfort to judges subjected to even the preliminary investigatory scrutiny of the Commission. Nor will it deter imprudent investigations generated by unfounded complaints rooted in strategic or retaliatory agendas of litigants, lawyers or public officials.[14] This precedential authorization hangs a sword of Damocles precariously, unfairly and unnecessarily over countless judges. This is overkill for the subject area of conduct in question. It is disproportionate and is being placed in unchecked hands, irrespective of the attempt to qualify the sweep of the rule in the description of the holding. One only has to read the headline and lead in the NYLJ story on the report of *In re Gilpatric* to appreciate the impact of the ruling.[15]

Further, it is no answer that the Court of Appeals might eventually review (and pass on) the rare appeal by a judge against whom a full proceeding has ended in an adverse determination. That stage is too late and too little for most judges subjected to the irreparable injury and debilitating investigation and blotch on their careers

and service records. No check-and-balance entity or procedural stepladder exists with the capacity to uncover error or lack of prudence in how the Commission and its staff exercise this wide swath of new probing power. That alone is reason for pause, re-examination and course correction of the COJC's runaway authority.

Enough time has passed since the enactment of this initially constructive disciplinary reform in 1977 that a plenary re-examination of the structure and its operation makes sense. The annual reports of the Commission do not transparently expose what is really going on behind the scenes at the staff and even early preliminary Commission supervisory level (necessary and appropriate confidentiality rules contributing to some of that, to be sure). Skepticism about the "spin" of such self-generated and inherently non-independent reports is entirely appropriate. Nor do those reports and the self-laudatory Commission press releases on adjudicated cases, nor the paucity of Court of Appeals's across-the-board rulings, provide a full-face, peripheral or back-story exposition of the impact (and damage in my view) to the fair application – and on the indispensible principle – of judicial independence. Fairness to individual judges (investigated, charged or adjudicated) and faithfulness to judicial process independence require something better than what is now erupting.

I could not agree more that accountability, transparency and appellate checks and balances are needed as to the conduct of judges and their public duties. Correspondingly however, on the goose-gander axiom, those civic governance virtues should be demanded of the watchdog as well.

Cicero always closed as he began, and so shall I: "*Quis custodiet ipsos custodes?*" ■

1. *Lippman v. Paterson*, __ N.Y.3d __ (Feb. 18, 2010).

2. While a nostalgic tilt stemming from the privilege of my joyful service in the Judicial Branch for over 30 years is obvious, an overt disclaimer is still worth declaring in connection with this piece. I undertook a professional representation in a COJC matter on behalf of an accused judge in 2008–2009 as *pro bono* counsel with another retired judge, the Honorable John Martin, S.D.N.Y. The Honorable Michael Ambrecht, though ultimately exonerated by the Commission after a full and expanded proceeding, was *de facto* removed from his judicial office by the Governor's refusal to re-appoint Judge Ambrecht. *See Censure Advised for Judge Whose Personal Lawyer Appeared in Court*, N.Y.L.J., Nov. 10, 2008, p. 1, col. 3; *Letters to the Editor*, N.Y.L.J., Nov. 20, 2008, p. 2, col. 4; *see also Judge's Ouster Raises Independence Issue*, N.Y.L.J., June 8, 2009, p. 6, col. 1.

3. On October 17, 2009, Court of Appeals Sr. Associate Judge Carmen Beauchamp Ciparick, as Visiting Jurist in Residence at St. John's School of Law, gave the Joseph W. Bellacosa Lecture on "Judicial Independence and the Commission on Judicial Conduct" (to be published).

4. *10 Suggestions for Court Reform*, N.Y.L.J., Dec. 7, 2009, p. 6, col. 4.

5. 13 N.Y.3d 586, 2009 WL4794212 (2009).

6. *Myers v. United States*, 272 U.S. 52 (1926). In his dissent, Justice Brandeis noted, "The doctrine of separation of powers was adopted . . . not to avoid friction, but . . . to save the people from autocracy." *Id.* at 293. *See* Melvin I. Urofsky, Louis D. Brandeis, A Life (especially ch. 23, p. 571 *et seq.*).

7. The redacted and generalized COJC annual reports are not transparent checks or balances of independent value as to pre-determination activity or cases.

8. *See, e.g., Cardozo's Comments Insulting, First Department Justices Say*, N.Y.L.J., Dec. 17, 2009, p. 1, col. 4; *Cardozo's Court Reform Suggestions Are Misguided, Misplaced and Insulting*, N.Y.L.J., Dec. 17, 2009, p. 2, col. 1.

9. There are extraordinary individual instances where a referral for founded wrongdoing is necessary. *See e.g., In re Gelfand*, 70 N.Y.2d 211, 518 N.Y.S.2d 950 (1987), where I, as Chief Administrative Judge, referred a serious matter to the Chair of the COJC that resulted in removal of a judge from office.

10. See *In re Gilpatric*, 13 N.Y.3d 586, the December 2009 ruling from the Court of Appeals, retreating from the ruling in *In re Greenfield*, 76 N.Y.2d 293, 551 N.Y.S.2d 1177 (1990) (bright-line demarcation between administrative delay and misconduct). I am not alone in this particular concern, as even Commission members (usually in rueful but admonitory dissent) have expressed some legitimate concerns from time to time (i.e., Commissioner Richard Emery). *See Panel Rebukes City Judge Over 2006 Campaign Improprieties*, N.Y.L.J., Dec. 4, 2009, p. 1, col. 3.

11. My lifelong reverence for the Court of Appeals springs from 25 years of service in various roles at the greatest Court on this planet. Lest anyone conclude that I nostalgically yearn for my old role, let me reassure readers that from day one of my retirement as a judge in 2000 to now 10 years down the road, I am quite a contented unaffiliated free spirit. So I include this rare expression and commentary as a singularly focused serious concern, and not as an erstwhile dissent.

12. *See Judicial Tardiness Can Trigger Discipline, Ruling Concludes*, Dec. 16, 2009, N.Y.L.J., p. 1, col. 4.

13. 76 N.Y.2d 293. Another disclaimer: I voted for that *per curiam* opinion.

14. *See* Joseph W. Bellacosa, *The Retaliatory Removal of a Judge*, The Jurist, Fall-Winter 2009–2010, p. 3; *see also supra* note 1.

15. *See Judicial Tardiness Can Trigger Discipline*, *supra* note 12.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I know we are told that attorneys have a responsibility to do pro bono work. My question is, why?

Sincerely,
Questioning Attorney

Dear Questioning Attorney:

Your inquiry gave members of our Professionalism Committee the opportunity to review some good answers offered by others. One of the best was written by William J. Dean, the Executive Director of Volunteers of Legal Service. He addressed the question in his column "Pro Bono Digest" in the *New York Law Journal*, published January 2, 2004.

Mr. Dean points out that attorneys who are admitted to the bar are given a monopoly. We have exclusive access to the courts to represent others and to practice law, but with this privilege comes a commensurate responsibility. He states, "We have a professional obligation to perform pro bono work on behalf of poor people who otherwise will have no access to the courts, or other legal services."

Mr. Dean quotes Robert A. Katzmann, editor of *The Law Firm and the Public Good* (The Brookings Institution/The Governance Institute, Washington D.C., 1995). Judge Katzmann now sits on the Second Circuit Court of Appeals. He made the following observation:

> "[T]he very reason the state conferred such a monopoly was so that justice could best be served – a notion that surely means that even those unable to pay . . . can expect legal representation. A lawyer's duty to serve those unable to pay is thus not an act of charity or benevolence, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the profession effective control of the legal system."

Mr. Dean further notes that lawyers are privileged members of society. "We are well-educated, articulate and know how to get things done in an increasing complex world." The Professionalism Committee believes that this answers the assertion by some that the problem of not having professional representation is really not a problem at all, because the poor have the opportunity to appear for themselves, pro se. The reality, however, is that most poor people do not have the required education or training to effectively represent themselves. The courts' efforts to make the justice system more accessible to the unrepresented is admirable, but cannot assure access to justice for those financially unable to afford an attorney.

> And we have an ethical obligation to do pro bono work. The ethical obligation is central to the teachings of all religions and secular philosophies. To cite two passages from the Bible: "Justice, justice shall ye pursue all the days of your life." (Deuteronomy.) "He who has compassion on the poor lends to the Lord, and He will repay him for his good deeds." (Proverbs.) And from the Koran, "Indeed! Allah commands justice, kindness."
>
> It is found in the values imparted to us by our parents; by our finest teachers; by the people we admire most in life; in the great works of literature.
>
> It is found in the inscriptions on our court buildings: "Equal Justice Under Law." (United States Supreme Court.) "The true administration of justice is the firmest pillar of good government." (Supreme Court, New York County.) "Justice is denied no one. . . . Equal and exact justice to all men of whatever state or persuasion." (Criminal Court, New York County.)

Can anyone doubt that the need exists? Other than attorneys, who else can fill this need?

What do we get out of doing pro bono work? We are promised that pro bono work will enrich our lives in ways that money can't buy. Mr. Dean quotes U.S. Court of Appeals Judge Frank M. Coffin from his essay included in *The Law Firm and the Public Good*:

> "[P]ro bono service emerges as a beacon of opportunity; opportunity to work one-on-one with human clients, to gather new experiences of interest to others . . . to generate new pride in legal work . . . [and for younger lawyers] the early assumption of greater responsibilities, thus stimulating confidence, the ability to organize time, and maturity."

The Committee hopes this answers your question, especially since Rule 6.1(a)(1) of the Rules of Professional Conduct strongly encourages 20 hours of pro bono work each year. Think about doing so; you won't regret it.

The Forum, by
George Nashak
Queens, NY

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I practice in a small town in upstate New York. I am a general practitioner and my one large client owns a local business that employs many local residents. Upon graduation from law school, I hung out my shingle 15 years ago. Other than the three years I spent at law school, I have lived in town all of my life. When working for my clients, including the local business owner, I frequently find myself on the opposite side of neighbors or people I grew up with in contract negotiations, small claims actions, collections matters and employment issues. While I understand that I am an advocate and need to ensure that my clients' interests are protected, it seems that my neighbors fail to understand that I work for the other side. Needless to say, this makes me uncomfortable, especially in matters where the other side does not hire counsel. I tell them that I do not represent their interests, but it seems like it falls on deaf ears. Is there anything I need to do to protect my clients, as well as myself, when this situation arises?

Signed,
Walking a Tightrope

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Ravi Kumar Agarwal
Jonathan Mark Agudelo
Arlene Ayodele Akiwumi-assani
Melissa Rachel Alberts
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Mitchell Samuel Alhadeff
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Lorie Anne Durrant
Kristen Dale Farris
Gretchen Rae Fuhr
Nicholas Anthony Fusco
Dylan Sean Gallagher
Kevin Barrett Getnick
Jessica M. Gorman
Brian Shaffer Gray
Christiana M. Hadzoglou
Jennifer Kavney Harvey
Shana Stephanie Heaney
Tracy L. Hennige
Adam Charles Hover
Meredith Anne Ireland
Tichina La'toya Johnson
Erin Shannon Keeler
Sania Waheed Khan
James Craig Knox
Lauren Dipace Konsul
Alaina Kathleen Laferriere
Daniel Michael Leinung
Allyson Beth Levine
Christopher Andrew Liberati-Conant
Michael W. Macomber
Caitlin Marie McGowan
Andrew Lawrence McNamara
William C. Meacham
Jeremy Scott Mis
Alexander Hassan Monticello
Gail Melissa Mulligan
Jason Alexander Murphy
Michael Julian North
Kevin Bhagavatula Ramakrishna
Tiffany Brianne Redies
Victoria Ann Reimann
Richard Neal Scheunemann
Michael William Shanley
Jennifer E. Simmons
Haohao Song
Matthew Jean Stockl
Alejandro Garcia Taylor
Brenna Carole Terry
Robert Carl Vanderbles
Paul Anthony Wolpert

FOURTH DISTRICT

Devin Anderson
Danielle N. Audette
Michael John Carota
Michael David Dematteo
Jeffrey Amans Ellsworth
Carl Gerard Falotico
Jennifer Marie Hollis
Jessica Erin Keenan

Eric Michael Kile
Michelle Liberty
Matthew Paul Miller
George Theodore Stiefel

FIFTH DISTRICT
Courtney Anne Abbott Hill
William S. Baker
William Andrew Barton
Blaine T. Bettinger
Roger P. Bonenfant
Emily M. D. Brown
Emily M. D. Browne
Andrew Christopher Brunsden
Ashleigh Jennings Burrows
Daniel New Cafruny
Michael Callan
Robert Raymond Calli
Thomas Casella
Joseph Michael Cirillo
Alexander Delgado
Jason Raymond Denny
Richard Edward Derrick
Kristy B. Frame
Sean Timothy Garvey
Bryan Nicholas Georgiady
Bryan Georgiady
Donald Richard Gerace
Derek Matthew Harnsberger
Patrick Michael Hennessy
Elizabeth Hoffman
Elizabeth Anne Hoffman
Julia B. Joyce
Matthew Grant Jubelt
Melody Domenica Kight
Ashley Nichole Leconey
Ashley LeConey
Robert J. Lydford
Paul George Lyons
James P. Mahoney
Michael P. Maloney
Anthony A. Marrone
Jimmie C. McCurdy
Paul McGregor Midey
Gregory Milewski
Gregory M. Milewski
James Joseph O'Shea
Bradley Wayne Oastler
Luis Emilio Ormaechea
Aimee Marie Paquette
Melissa Sue Patton
Jennifer M. Pautz
Christian T. Payne
James John Pergolizzi
Sarah Cumbie Reckess
Ian Anderson Rennie
Thomas Russell Schepp
Jeffrey John Schiano
Douglas H. Squire
Nicole Theresa Staring
Paul Stylianou
Tashia A. Thomas
Cara Connell Vecchione
Mark Christopher Visker
Mark Visker
Mark Edward Welchons
Kristen L. Wilson
Eva Wojtalewski
Eva K. Wojtalewski
Cory A. Zennamo

SIXTH DISTRICT
Sian Eluned Allen
Abigail N. Campanie
Vanessa Mari Castano
Michael Everett Corradini
Jacquelyn Cymerman
Melissa Kay Dobson
Katelyn Reid Dumont
Emily R. Pawlowski
Kristen Marie Quaresimo
Craig Michael Sweicki
John McGregor Tuppen

SEVENTH DISTRICT
Eric James Bach
Eric Bach
Carly Dirisio Brown
Christopher William Brown
Stephanie M. Campbell
Jeffrey D. Casey
Amy L. Christler
Jared Kimball Cook
Spencer John Cook
Cory DeCresenza
Cory A. Decresenza
Justin Joseph Doyle
Jillian Kay Farrar
Robin L. Folts
Stacyann Simone Freckleton
Daniel Gruttadaro
Edward A. Gucker
Erin Kathryn Hanlon
Holly McGraw Havens
Michael Edward Hickey
Michael E. Jonascu
Scott J. Kadien
Shaina Kovalsky
Meredith Monti Boehm Lamb
Letty L. Laskowski
Stephanie Noel Leonardo
Kristin Maureen Lowe
William Quigley Lowe
Jennifer Anne Lunsford
Jennifer Lunsford
Tara E. Lynch
John Ahmed Mancuso
George Edward Martin
Catherine B. Meyers
Susan Jane Michel
Mark Salvatore Muoio
Jeremy V. Murray
Lea Nacca
Steven Paul Nonkes
Thomas Kevin O'Gara
Christopher Michael Palermo
Sean Matthew Pease
Gregory L. Piede
Emina Poricanin
Ryan S. Quinn
Lindsay A. Rabitz
Vilavanh Melanie Rajaphoumy
Victoria Anne Schmidt
Samantha Peters Smith
Stephanie Marie Stare
Javier R. Tapia
Vivek John Thiagarajan
Joy Catherine Vanriper
Michael Joseph Wegman
Michael Whalen
Michael Frederick Whalen
Daniel Stowell Williford
Fiona Wolfe
Persis Siching Yu
Laura Zuber

EIGHTH DISTRICT
Yasmin W. Adamy
Daniel James Altieri
Amanda Amendola
Karen Marie Andolina Scott
Samuel Allan Ark
Serra Aygun
Laurie A. Baker
Rachel Sara Baldassaro
Erin Keen Belka
Monika Bhatt
Brian J. Bogner
John William Brill
Evan Bussiere
Evan Yates Bussiere
Helene M. Cali
Kelly Kathleen Carlsen
Janette Rebecca Clarke
Antoinette S. Clay
Daniel Kevin Comerford
Michelle Ann Cooke
Kelly Cosentino
Sean W. Costello
Christina Marie Cotter
James Alan Davis
Kurt Raymond Denniston
Emily Ann Dillon
Ryan Matthew Donovan
Daniel Francis Dovi
Joshua Lawrence Dudeck
Kelly E. Eagen
Jennifer Anne Ehman
Amber A. Engel
Kevin John Espinosa
Anna Mariel Falicov
Patricia A. Fay
Sameera Fazili
Matthew S. Feldman
Samuel Shawlwitz Feuerstein
Gabrielle Suzanne Foley
Jeffrey Fuchs
Emily Fusco
Sarah Rebecca Galvan
James Righter Gardner
Peter Austin Gathings
Richard Frederic Gioia
Amy Lynn Goerss
Kelly A. Gruber
Alexander Lysle Gruel
Daniel Gvertz
Ryan Daniel Haggerty
Ian M. Harrington
Justin Richard Hartman
Joshua Michael Henry
Sabrina A. Hill
Darcy Lauren Hirsh
Christina G. Holdsworth
Tristan D. Hujer
Daniel Timothy Hunter
Eric James Hurd
Jill Melanie Hurley
Brian James Hutchison
Michael Thomas Jablonski
Ian Marshall Jones
Rene Juarez
Amy Jessica Kaslovsky
Devon Michael Kelly
Matthew John Kibler
Shaina Arielle Kovalsky
Julie Elizabeth Kruger
Alma Lillian Lafferty
Paul Thomas Lavoie
David Michael Lee
Brendan Sean Lillis
Arlow Michael Linton
Michael John Locicero
Paul R. Loudenslager
Ryan Maclean
Charles W. Malcomb
Scott David Mancuso
Brian Douglas Manning
James Douglas Marky
Steven Anthony Marshall
Eve Marie McClurg
Roslyn Lynette McLin
Neha Mehra
Jennifer Marie Morgan
Rebecca Mudie
Adrienne Michelle Muia
Richard John Murajda
Katherine A. Murak
Chad Edward Murray
Christopher Gilbert Murrer
Andrew David Oppenheimer
Gerald E. Paradise
Kristin D. Pierce
Nicholas Matthew Preusch
Theresa Prezioso
Seth David Pullen
Neil Edward Reddien
Cheryl M. Reed
Sarah P. Rera
Anthony Louis Restaino
Antonio Louis Restaino
Danielle Marie Restaino
Michael Edward Reyen
Michael Reyen
Matthew Lawrence Ritenburg
Matthew Joseph Rosno
Corey Joseph Rossi
Corey Rossi
Brent Stevens Salevsky
Pamela Susan Schaller
William Lee Sherlock
Ashley Rae Small
Jennifer Marie Smith
Marnie E. Smith
Michael a. Smith
Victoria L. Smith
Aaron Michael Streit
Tuo-yu Su
Kimberly L. Sweet
Nicole E. Talev
Rebecca L. Town
Aparna Vannarath Balakrishnan
Francis Paul Vellano
Melissa L. Vincton
Lucas Michael Walker
Stephen John Wallace
Chanel T. White
Anna Michelle Zornek

NINTH DISTRICT
Anthony D. Altamuro
Gregory Barber
David W. Bavoso
Cliffith Daniel Bennette
Jennifer L. Bienenstock
Kathleen Lyons Bloom
Erin Marie Burke
Lawrence J. Candee
Sara Elizabeth Chase
Wayne Alan Cimons
Wayne Cimons
Donna Lynn Cook
Laura Lynn Curley
Michelle Maria De Giorgio
Darlene De Jesus
Arti K. Desai
Christopher Adam Ditata
Saori Endo
Jonathan T. Engel
Christopher Joseph Exias
Maher Alex Fakhouri
Erin Leigh Fogarty
Naomi Roslyn Galtz
Ryan Jonathan Gilman
Julian Charles Glatt
Stephen Robert Heath
Samiera Hussain-Akhtar
Jennifer D. Janelle
Sujata Mukesh Jhaveri
Frank R. Jimenez
Karen Lee Johnson
Theodore T. Jones
Jeffrey Nicholas Kauten
Sarah Rachel Levin
Eric J. Mandell
Deborah Vinecour Marshall
Morgan Ross McCord
Katherine Laura McCrink
Serena Maria Mentor
Anna Zwierz Messar
Teresa Milano
Jay Martin Miller
Michael Denis Murphy
Lauren M. Nagle
Benjamin Natter
Christopher Shea O'Donnell
Justin Blake Olshan
Donato Palumbo
Moumita Rahman
Douglas Lawrence Ray
Warren Paul Reiss
Terence Sullivan Reynolds
Henry Rothenberg Rouda
Sheeba Ann Roy
Frank M. Rutigliano
Angela May Sapienza
Matthew Ian Schiffhauer
Joseph Anthony Servino
Jane Silverman
Stefanie A. Sovak
Brian Christopher Stroub
Jade Marie Turner
Angela E. Turturro
Paul W. Valentine
Gregg Lawrence Verrilli
David Ryan Weiner
Edgar Richard White
Amy L. Zamenick
Steven D. Zecca

TENTH DISTRICT
Lindsey Albinski
Rachit Anand
Ashley Andrews-Santillo
Michael Anthony Armao
Marisa Ann Aronson
Han Sheng Beh
Sean Joseph Belfi
Brett Jameson Bennett
Lindsay Alyse Bernstein
Karen L. Bertram
Inez-Mary Beyrer
Matthew Scott Bezerman
Joseph Ray Bjarnson
Regina E. Brandow
Katherine Ann Breazier
Samantha Leader Brooks
Deidre J. Byrne
Kelly Ann Carpenter
Tatyana Chigirinsky
Alexander Todd Coleman
Marijan Cvjeticanin
Marissa Daidone
James Robert Deverna
Matthew Robert Diament
John Ryan Dicioccio
Frank Gustave Dispirito
Emmet Daniel Donnelly
Robert R. Dooley
Danielle Erin Drayer
Joseph Steven Dujmic
Laura Kay Eckman
Thomas William Elrod
Joshua Lee Epstein
Michael Scott Epstein
Nongqiang Fan
Crysti D. Farra
Nicole Paula Femminella
Heather Ann Fig
Gregory Blake Fine
Jennifer Marie Frankola
Keith Christopher Fudge
John B. Fulfree
Enrico N. Gallo
Andrew Reed Garbarino
Ariella Tamar Gasner
Dana Elizabeth Gold
Edward Walter Guldi
Etan Hakimi
Edmond Joseph Hakimian
Cheryl M. Helfer
Adina Herman
Brian William Hine
Jessica Sarah Horowitz
Daniel R. Howard
Ian Davis Hucul
Matthew D. Itkin
Alexandria Jean-Pierre
Todd Matthew Jones
Lauren Julie Kalaydjian
Reout Kallati
Bo Young Kang
Jason Lewis Kaplan
Irina Anatolyevna Karlova
Jennifer Karrmann-Granai
Jennifer Neman Kashanian
Shahram Kashanian
Richard Gary Kaufman
Brian Robert Kenney
Jeffrey Steven Klausner
Katherine Kocienda
Michael Adam Kriegal
Douglas Lloyd Kurz
Matthew Josef Kutner
Jaime Laginestra
Evan David Lerner
Arlene Rachel Levitin
Deepali V. Lugani
Katherine Mary Maguire
Joanna Malikouzakis
Peter Stephen Massaro
Allison D. Matthews
Christina Marie McGreevy
Kellie Ann McKenna
Brendan Thomas McVey
Adam Scot Meiskin
Steven John Messina
Robert Andrew Miklos
Joseph Peter Militello
John Christopher Moellering
Joseph Mogelnicki
Curtis R. Morrison
Peter Nicholas Napolitano
Ryan Scott Napolitano
Adam Richard Nichols
Mahir Nisar
Marcus O'Toole-Gelo
Alexander C. Pabst
Lauren Ann Padian
Blair Alexandra Parsont
Christopher Passavia
Riddhi Sharad Patel
Steven Lawrence Penaro
Lauren Marie Pennisi
Mikhail Pinkusovich
Kyle Thomas Pulis
Mark David Richardson
Michele Ribeiro Rita
Richard Anthony Rodriguez
Daniel A. Rudolf
Meghan Louise Rudy
Aaron Michael Ryne
Eric Jason Sandman
Richard Martin Santos
Aigul E. Sarvarova
Adam John Sasiadek
Andrea Katherine Scampoli
Elan Jared Schefflein
Joseph John Scheno
William L. Schleifer
Carolyn Lydia Schoepe
Daniel Joseph Schor
Stephen S. Sharon
Yelena Sharova
David L. Sherwin
Ronnie Simhon
Mark Elliot Sobel

Elizabeth Streelman
Caroline A. Sullivan
Pedram Aaron Tabibi
Lauren E. Thoden
Camaker Audria Thomas-Heyward
Catherine M. Troy
Michael Paul Turi
Cherice Patrice Vanderhall
Xiaonan Shannon Wu
Christopher Xuereb
John Francis Yoon

ELEVENTH DISTRICT
Sara Ann Ali
Stephanie Elaine Ali
Margaret Mary Allen
Rose Lee Amandola
Mariya Aminov
Ala Amoachi
Joy Tolulope Anakhu
Chisom Charlene Ananaba
Nicole Marie Aratoon Lane
Jonathan Bartov
Georgia Beziani
John Eugen Boneta
Kathryn Meryl Brittle
Elizabeth Anne Broderick
Darin Lunsford Brown
Karyn Eve Bulow
Siddiquah Chaudhury
Tatyana Chigrinsky
Nathan David Decorpo
Michele Detherage
Joanna Kathleen Donbeck
Robyn L. Enes
Thomas I. Fan
Rygo E. Foss
Shanaz Gannie-ali
Rose M. Garcia
Michal Gasparski
Thomas J. Gerrity
David R. Gerson
Katie Giusti
Mark David Goldstein
Barbara Hamilton
Ting Han
Alice Yvonne Hawks
Seoyoun Huh
Clara Ann Ignich
Maritanna Isakov
Olga Iskhakova
Beth Michelle Kaufman
Alexander Keblish
Joseph Anthony Kellermann
Hana Kim
Thomas Yu Hao Lai
Xiaolan Lan
Michael Lavner
Elan Layliev
Ho Jai Lee
Robert Michael Link
Kaylie Sharon Lotzof
Jeffrey S. Mailman
Adam J. Markou
Petra H. Maxwell
Anat Maytal
Angelica Marie McKessy
Zvi Merling
Elizabeth Louise Meyer
Douglas Ryan Michaels
Levan Natalishvili
Timothy James O'Meara
Elizabeth G. Orrico
Brian Michael Padgett
Paul Andrew Pagano
Yuzhe Pan
Faye Young Park
Constantina Perdikologos
Tiana Peterson
Marisol Ramos
Franco Michel Rinaldi
Phillip Curtis Robinson
Arsenio David Rodriguez
Elizabeth Erin Schlissel
Charles Patrick Scholl
Jonathan Selkowe
Brooke Lauren Sharpe
Milana Shimanova
Albert Dongjin Shin
Jessica Audrey Spector
Tenaja Thomas
Gail Torodash
Michael Tsan
Mia Unger
Erin Elaine Valentine
Rosette Vartanian
Christina Nancy Villecco
Jason Leor Mordechai Wand
Jeremy Scott Weinstein
Tara Whelan
Fredrika Alberta Wilson
Carly Beth Wiskoff
Linkai Zhou

TWELFTH DISTRICT
Daniel Decederfelt Adams
Anna Isabel Arkin-Gallagher
Rachel Esther Berlin
A. Casey Burke
Kevin Chan
Catherine Aileen Crane
Russell Curtiss Crane
Jonathan E. Dodge
Sarah J. Dreisinger
Rebecca Tama Engel
Danielle Erica Epstein
Michelle Miriam Herman
Barry B. Huang
Ashley L. Kaper
George Alexandros Kottas
Jeanne Kwak
Alan Harris Liskov
Lindsey Mae McPheeters
Kristy Ann O'Neill
Thelma Akpene Ofori
Kelechi Onwuchekwa
Colleen Marie Phillips
Argilio Rodriguez
Erin Galper Schechter
Alison Tracy Schimel
Aaron N. Solomon
Samia Ann Temsah
Jennifer Ann Uhrowczik
Anne Marie Venhuizen
Michael A. Vicario
Philip Anthony Wells

THIRTEENTH DISTRICT
Kelsey Elizabeth Beckner
Louis Belfiore
Jenna Lauren Caldarella
David Choi
Jeanna M. Dellaragione
Natalie Paige Didonna
Alyssa Christine Farruggia
Philip John Furia
Peter Santannera Garnett
Olga Lankios-Cruz
Beata Rojek
Andrew Roger Schimler
Marc Lewis Schwartz
Liza Jin Kyung Sohn
James Patrick Thompson
Stephen Tremer
Stephen Anthony Tremer
Patricia Patterson Werschulz

OUT OF STATE
Nadia Elaine Abadir
Mark Francis Panlasigui Abaya
Asha Abraham
Sarah Marie Abramowicz
Crystal Nicole Adam
Minyoung Jinny Ahn
Catherine M. Aiello
Najman Alexander Aizenstad
Olubukola O. Akinsanya
Michael Louis Akman
Isabel Haydee Albino
Carolyn Anne Alenci
Heidi Sarah Alexander
Juraj Alexander
Raehan Shaheda Ali
Micole Allekotte
Malachi Jack-alexander Alston
Christopher Thomas Anderson
Michael Thomas Anderson
Stuart Joseph Anderson
Atiq Saifuddin Anjarwalla
Taichi Arai
Christopher John Archer
Jeremy Emmanuel Attuil
Keane Eric Aures
Michelangelo Attilio Avidano
Mahmoud Awad
Takahiro Azuma
Edward Nerses Babayan
Douglas Francisco Borges Mac Badder
Bumjoon Bae
Justin Paul Bagdady
Jesse Martin Baker
Kristen Elizabeth Baker
Nikolay Agapiyevich Balayan
Scott Nicholas Baldassano
Aurore Alice Barde
Nicholas Scott Barnhorst
Melissa Ann Barone
Juan Miguel Barragan
John Martin Barry
Garrett Ari Barten
Bartholomew Anthony Basi
Jennifer Kathleen Bealer
Tina Marie Beaumier
Otilia Ludovic Bebwa
Mathew William Beckwith
Oleh Olexandrovych Beketov
Elizabeth Anne Bell
David Elisha Bennett
Riley Conrad Berg
Ryan L. Bergeron
Joelle Adrienne Berle
Jonathan Andrew Berman
Matthew Ryan Berman
Adam Jacob Bernstein
Cecile Marie Bertaux
Sarah Scherer Bertozzi
Jingshuang Bi
Carl Bilicska
Susan Eileen Billheimer
Mark William Birdsell
Birch Mackay Blair
Erica Paige Blau
Elizabeth Kathrine Blickley
Dina Blikshteyn
Todd Matthew Blodgett
Elan Julius Blum
Giovanni Bo
Michal Karol Bobrzynski
Brandon Ying Kit Boey
Margaret Alice Bomba
Valerie Bonventre
Emily Susan Boothroyd
Jasman Boparai
Sylvia Fait Borenstein
Nicole Borofsky
Andrew J. Borsen
Stephani Luciana Bouvet
George Allen Boyan
Yigit Bora Bozkurt
John Anthony Bracken
Alina Rebecca Bricklin-Goldstein
Nathan Douglas Briggs
Monica Claire Brown
Christopher Michael Bruno
Jesse Michael Brush
Field Stuart Brussel
Kelly Jane Bunch
Amy Peluso Burns
Tiana Marie Butcher
Christopher Sinon Byrnes
Natalie E. Campbell
Marc Andrew Campsen
Ian T. Canterbury
Huifeng Cao
David Joseph Carey
Elizabeth Ross Carr
Rebecca Lynn Carrier
Alex Peter Carver
Marta Marie Castaing
Shawna Virginia Castells
Julian Joseph Castignoli
Edmund John Caulfield
Diana Askeland Cerretani
Alicia P. Chalumeau
Casey Thomas Chamra
Shara Marie Chang
Brett Maurice Charhon
Huifang Chen
Tao Chen
Ting-yu Chen
Ray C. Cheng
Edwin Otis Childs
Jeeil Choi
Sarah Bridget Chopnick
Rabih Choueiri
Nahiyan Chowdhury
Eric Robert Christensen
Mara Patrice Codey
Jamie Lynn Coleman
Elliott Llompart Coley
Davida L. Connon
Jonathan Michael Nicholas Cook
Julian Cornelius
James Lyndell Cotton
Gregory James Couillou
John-paul Hughes Cournoyer
Robert Mihran Cox
Lynn Marie Creamer
Kelly Deeanne Curtin
Travis Grahn Cushman
Magdalen Czykier
Ellen Frances D'Angelo
Natalie Fay Dallavalle
Alexander Swanson Daniels
Amba Mitra Datta
Amal Ujjval Dave
Marianna Elizabeth Davila
Allison Clark Davis
Christina Renee Davis
Suzanne Joy Dawley
Christopher Michael De Bono
Chirag Kishor Dedania
Allison Stephanie Defranco
Wendy Lu Degroff
Wendy DeGroff
Robert Louis Delicate
Madhura Dhananjaya Deshpande
Mirta Desir
Pierre Alain Joseph Dessein
Ralf C. Deutlmoser
Paula Janelle Dillon
Inbal Djalovski
Bruce Whitney Dona
Rebecca Maria Donnarumma
Allison Mary Donohue
Megan Kathleen Donovan
Jennifer Elizabeth-moore Dooley
Eliot James Dorazio
Katherine Brooks Doty
Anthony James Dragone
John Dicaterino Dunne
Elizabeth Anne Durkin
Gregory Todd Dutton
Gregory Peter Dworkowitz
Josie Anne Dykstra
Holly Jean Edwards
Janice S. Edwards
Latoya S. Edwards
Mariana Eguiarte Morett
Stephanie Englert
Andrew Thomas Eskola
Kow Abaka Essuman
Pierre-Olivier Etique
Frederick Falkson
Christy Katelyn Farr
Jessica Dara Feinberg
Jason Marc Feldman
Francisco Jose Ferreiro
Montserrat Ferrer De Sanjose
Jason Robert Finkelstein
Brian Henry Fischkin
Matthew Attwood Flanagan
Jorel Hayes Foerster
David Scott Fortune
Ariel Marie Fox
Molly Webster Fox
Brendan Franich
Joseph Benjamin Fray
Lisbeth Ann Freeman
Amos Emory Friedland
Benjamin Jared Friedlander
Eric Brandon Fugett
Yasuhiro Fujii
Stephen Anthony Fuller
Andrew Jesse Furman
Daniel Eric Furshpan
Yang Gao
Clark Starr Gard
Robert D. Garson
Ramon Elmerito Abordo Gatchalian
Ramon Elmerito Abordo Gatchalian
Matthew Francis Gately
Bonnie Lynn Gaudette
Augustin Jean Marie Gaujal
Joseph Randall Gay
Raymond Carl Gencon
Jason Thomas George
Vera Jehangir Ghadiali
Alicia Lynn Giglio
John Erol Gilbert
Crystal Lynn Gilliam
James A. Gillis
Andrew Anthony Girdhari
Maurice Giro
Pasquale L. Givelekian
Rita Glasionov
Wallace Anthony Glausi
Elizabeth Francesca Gluck
Mary Elizabeth Godfrey
Michael Scott Goldenberg
Scott Franklin Goldman
Maria E. Gomez
Paloma Gomez
Amita Gopinath
Michael Gerald Gordon
Adam Joel Gorod
Jennifer Gottlieb-Elazhari
Arnaud Antoine Gouachon
Claire Louise Graham
James Garrett Greenspan
Robert Olin Greffenius
Jaclyn Hillary Grodin
Wenjing Guan
Maria Cristina Guardia
Christina Alicia Guarneri
Nicholas Carlos Guerra
Edna Doris Guerrasio
Caitlin Guilford
Neeraj Kumar Gupta
Anna Kaarina Haapanen
Michael A. Haber
Aarash Andre Haghighat
Shannon Margaret Haley
Gergana Ivanova Halpern
Logan Christi Hambrick
Julia Carolyn Hamilton
Rebecca Jane Hammer
Nathalie Marie-odile Hammink
Elizabeth Lee Hampton
Qian Han
William Michael Hanes
Andrew Crawford Harding
Marissa Paige Harris
Sarah Mehbooba Hasan
Mark Andrew Hauck
Claudia E. Haupt
Edward Andrew Hawthrone
Robert Nelson Hayes
Hiromasa Hazama
Fang He
Xuemei He
Jesse Reuben Heath
Gareth James Hedges
Megan Jean Heller
Richard Alan Hellings
Jordan A. Hellman
Luis Amadeo Hernandez Situ
Florence Michelle Anne-marie Heuschen
Brian Paul Hiller
Katherine Joy Holland
Scott Craig Hollander
Jonathan Herndon Homer
Ahruhm Hong
Takeshi Horikomi
David Moses Horn
Katherine Elizabeth Houren
Kai-yu Hsu
Yichun Hua
Dehao Huang
Will Allen Hueske
Eun Sang Hwang
Jason Alan Hyne
Yosef Ibrahimi
Sonia Iliyanova Ignatova
Phillip Okey Igwe
Marian Jiwon Im
Kengo Ishinabe
Kenji Ishizuka
Noriko Itai
Toshimi Itakura
Jad Ghassan Itani
Amaka Itegboje
Chigusa Iwata
Amanda Elizabeth Jackson
Leah Nicole Jacob
Steffen Gottlieb Jacobsen
Bhaveen Ranjit Jani
Aaron Fong Jaroff
Sabrina Sharif Jawed
Myriah V. Jaworski
Lindsay Marie Jenkins
Julie Jenssen
Dana Jentzsch
Eric Jesse
Jaime Lee Johns
Veronica Anne Richter Johnson
Ashley Anne Jolissaint
Abigail Morgan Jones

Magnus Conrad Adam Jones
Joonhyung Jun
Jove Juzmeski
Vanessa Cecile Kaczmarek
Richard Shane Kagan
Dennis Yenkai Kao
Daniel Ari Kapner
Jacob Raffel Karabell
Sarah Louise Karpinski
Caoilfhionn Pauline Kavanagh
Kengo Kawai
Jorge Jesus Kawas Mejia
Kazuya Kawashima
Fiona Jeannette Kaye
Bryan Stephen Keighery
Robert Edward Kelly
Paul McCrae Kerlin
Adam Samuel Kessler
Amber Zia Khan
Haris H. Khan
David Christopher Kiebler
Elizabeth Hyun Kim
Hyun Yong Kim
Jang Hee Kim
Ki Tae Kim
Richard Won Kim
Seon Jeong Kim
Sylvia Young Kim
Wookbai Kim
Darren Bernens Kinkead
Joshua Adam Kipnees
Devon Michaela Kirk
Andrew Russell Kirkpatrick
Amanuel Kiros
Miles Edward Kitchin
Lindsay Michelle Kitzinger
Adiel Kiviti
Justin Lee Klein
Mitchell Brandon Klein
Sebastian Yat Fung Ko
Nobutaka Komiyama
Myungjin Koo
Theodore Lawrence Kornobis
Jacqueline Burke Kort
Maria Mikhailovna Kosova
Charles Ross Koster
Ryo Kotoura
Amanda Lynn Koulousias
Weijie Kelvin Kow
Scott Jeremy Kraemer
Phillip Aaron Kresge
Steven Aaron Kroll
Melissa Anne Ku
David Hudson Kunes
John Andrew Kupiec
Zachary Ross Kurland
Grace Chuman Kwok
Sooyeun Kwon
Ted Byung Kwon
Marine Catherine Lacreuse
Frederick Hongsuck Lah
Daniel Yucheung Lai
Diana Lakic
Matthew David Francis Lambert
Alan Greg Landy
Adrien Marie Lane
Richard David Lane
Margot Gilliane Laporte
Shawn Michael Latourette
Robert Edward Latta
Silvia Lattova
Matthew Lay
Katsiaryna Lazouskaya
Aliaksandr Lazouski
Khoa Dang Le
Kim Thien Le
Alison Lecker
Chang On Lee
David James Lee
Dong Jik Lee
Emerson Hijune Lee
Heejin Lee
Seokho Lee
Soyoung Lee
Young Eun Lee
Alex Daniel Leibowitz
Elisabeth Marie Leimbacher
Jessica Beth Leinwand
Vivian Lekkas
Stephanie Marie Lemos
Andrew Duane Lendrum
Xavier Leroux
Michael Francis Lettiero
Sean Kenneth Letz
Joshua David Levin
Julia Ann Levin
Zachary Jonah Levine
Macey Woodard Levington
Galen Robert Lewis
Katherine E. Lewis
Chongming Li
Honglin Li
Qijun Li
Shirley Xiao Li
Zihua Li
Bernadette Wei Wei Liew
Ann Moniot Lilienthal
Brendan Michael Lill
Cheryl Lin
Daniel Marc Lindenberg
Jingjing Liu
Zhenfeng Liu
Tamir Livschitz
Monica Tan Liwag
Christopher Donald Liwski
Kelly Alexis Lloyd
Rebecca Jean Lobenherz
Jaime Diane Loda
Emily Martha Loeb
Stephanie Lynn Lomurro
Tereza Lopes Cavalcanti De Oliveira
Daniel Michael Lorenzo
Anthony Thomas Losardo
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Stephanie Louise Nachtrieb
Kaya Namba
Annaka Nava
Annaka Begley Nava
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Sang-jin Oh
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Yaser R. Othman
Leo Dennis Owens
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Heidi Madeleine Pease
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Jennifer Lee Petelle
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Luce T. Pierre-Russo
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Arianne Rose Plasencia
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Przemyslaw Piotr Polaski
Uros Dragoslav Popovic
Justin Joseph Poppiti
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Jacob D. Press
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Olha Prymak
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Adam Putter
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Gregory Anthony Randazzo
William Venable Rapp
Sherief Abbas Rashed
Colin Joseph Ratterman
Courtney Christine Ray
Daniel Moshe Raymon
Winter Lynn Raymond
Kamil Elaine Redmond
Gregory Michael Reilly
Colin Walter Reingold
Kurt Richard Rempe
Tiffany Rex
Roberto Luis Reyes Gaskin
Molly Margaret Reynolds
Deanna Marie Rice
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Allison Beth Robbins
Michael Brett Roberts
Kara Beth Roseen
Michael Joel Rosenberg
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Jessica Leigh Rosenthal
Christyn Lynn Rossman
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Kajetan Rozga
Claire Elizabeth Ruckert
Lindsey Christine Rutherford
Sylvia Krystyna Rutkowska
Jan Martin Rybnicek
Sinjini Saha
Cassidy Lind Saitow
Makoto Sakai
Victoria Louise Salisbury
Suvarna Sudhir Sampale
Scott Sandler
David Nathan Sankar
Nathan Cardiel Santamaria
Daniel Louise Saperstein
Elena Petrovna Sauber
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Michael Joseph Schewe
Julia Adina Schiller
Lowell Jacob Schiller
Norbert Michael Schlund
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Kierstan E. Schultz
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Tariq Farag Siyam
Eliot Levi Skolnick
John Joseph Skuletich
Kerry Elizabeth Slade
Gabriel Laurence Slater
Joseph Peter Slawinski
Ashley Beth Slobodkin
Kim Noelle Smaczniak
George Andrew Smiltins
George Smiltins
Angelle Cheri Smith
Rosemary Friedman Smith
Summer Christine Smith
Jeffrey Scott Snell
Joseph Edward Snow
Peter Soares
Hassan Sohbi
Jiyoun Son
Min Gyu Song
Bret John Sonnek-Schmelz
Christina Josephine Sorbera
Kayte Kelleher Spector-bagdady
Ashley Elizabeth Sproat
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Joseph Starbuck Steere
Alison Irene Stein
Gary Steiner
Gary Robert Studen
Jessica Willow Sucherman
Molly Katherine Suda
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Masato Suzuki
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Mahsa Tajipour
Yasuhito Takahashi
Wei Tan
Darren H. Tanaka
Takashi Tanazawa
Leah Eleanor Tarantino
Amanda Lou Taylor
Delceta Bloise Taylor
Mirlande Telfort
Haben Habte Tesfai
Jonathan Testa
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Katherine Yicheng Thorpe
Laura Torchio
Laura Allison Torchio
Roda Romina David Torres
Amy Sara Towle
John M. Trani
Thomas Holmes Trapnell
David George Trethowan
Alexis Robb Trimas
Terence Trinh
Emanuele Trucco
Joey Tsai
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Alexander Van Gaalen
Sebastian Benjamin Vaneria
Mariya Dmitrievna Varavva
Sreenivas Vedantam
Asha Venkataraman
Maryann Natalie Veytsman
Sameep Vijayvergiya
Christopher Jan Visser
Florence Vogele
Eric Maximillian Waage
Melissa Caryn Wagshul
Adam Winslow Waite
Harjot Kaur Walia
William Earl Wallace
Hui-chuan Wang
Na Wang
Sarah Kathleen Ward
Tara Lynn Waters
Daniel Ferdinand Weber
Oliver David Welch
Nicholas Daniel Wells
Aidan Renee Welsh
Walter Brendan Welsh
Danielle Weslock
Cindy Whang
Meryl Ann White
Allen Elbert Whitt
Sarah Lauren Wieselgren
Jennai Shelby Williams
Mark Lander Williams
Shari Deneen Williams
Yolanda Yakima Williams
Christine Elena Williford
Leah Elaine Witters
Canby Biddle Wood
Nicola Carlene Woodroffe
Stephanie Jeanne Woodward
Alyssa Morgan Worsham
Davis Lee Wright
Jonathan Robert Wright
Peng Wu
Ronald Ping Hei Wu
Ruyu Xu
Betty Xi Yang
Chien-min Yang
Jingzhang Yang
Min Yang
Sung Jin Yi
Hadas Yonas
David Alexander Yontz
Heidi Sangyun Yoo
Jun Kul Yoo
Sunghwan Youn
Grant Clinton Young
Calvin Yu
Michelle Qihan Yu
Shing Ming Yu
Lisa Yun
Sung Jo Yun
Max Nicholas Zacker
Cristina Diana Zamora
Maureen Anne Zatarga
Ulviyya Agha Salim Zeynalova
Jianhua Zhang
Lei Zhou
Xiaowei Zhu
Benjamin Howard Zilbergeld
Travis Joseph Zolliner
Felipe Ziegler Zugno
Bianca Esther Zuniga-goldwater
Tamara Lee Zurkovsky

and law clerk? They'll reward your thoughtlessness when they write their decision. If you decide to bind your brief, make sure the binding prevents the judge from reading the brief. Every time the judge turns the page, the brief should snap shut. When submitting the brief, include a paperweight to hold the brief open. The judge might think it's an exhibit.

Non-gender-neutral writing is like a bump on the road that focuses travelers on the trip rather than the destination. Make the judge dwell not on your content but on why you used "he" or "she." If you're not sure whether to use "she," "he," or "it," use all three, like so: "s/he/it." There's nothing like a few "s/he/its" to make your brief look exactly like that.

Boilerplate doesn't work, and that's why you should use it. Your brief should look like a cut-and-paste job.

> The longer your brief, the less the judge will understand your case.

Reuse large portions of your brief from another brief you've written. Another tactic is to regurgitate a brief an intern wrote 10 years ago, and neither update nor check the old citations. Go green: Recycle your arguments. Diligent judges know that clients and cases are unique. You need to disabuse them of the notion that your client's case is unique.

Get an intern to photocopy your brief. Make sure the text on the photocopies is crooked and distorted. Have the intern photocopy half of each page. You'll leave the judge wondering what's missing.

Rule #2: Maintain Order With Disorder.

Winners pick and choose their issues and arrange them in order of strength. Loser wannabes include as many issues as they can think of and arrange them in alphabetical order. Like a law school exam, a brief is all about issue spotting, no? Besides, if you don't include all the atmospherics, you won't preserve issues for your appeal. Having many issues means you've thought about your case in depth. Put substantive issues first. Leave dispositive issues for the end. Save jurisdictional issues for the last page. Doing so will catch the judge's attention. Not.

Don't organize your arguments. Let the judge figure out what's important. That's not your job. If you're dealing with a conscientious judge, raise facts and issues not in the record.

When it comes to standards of review, who needs standards? Don't tell the judge what standard to use. Judges know what standards apply. If they don't, so much the better. If someone at your firm forces you to discuss legal standards, mix them up. Judges appreciate an enlightened discussion about why they have the discretion in the interests of justice to disregard a constitutional statute whose plain language is not subject to reasonable debate.

A brief is mystery writing in disguise. Leave the main point for the last line of the last page. You want to stun the judge.

Divert the judge's attention from real arguments and focus instead on bogus ones. Instead of making legal arguments, make only policy arguments, regardless of any binding authority that rejects the policy you suggest. Or avoid policy arguments altogether. Policy is for politicians.

Include at least one argument that doesn't pass the laugh test. It's helpful if the argument is outrageous. Putting a smile on the judge's face: Priceless.

Judges need much structure. That's why your brief shouldn't have any. Don't include headings or subheadings. No need to tell the court in what direction you're headed. Forget IRAC or any other organizational tool you've learned. Your law professors made you learn that stuff to make their job easier when they graded exams — and to help you win cases. If losing is your goal, forget what the experts told you.

Never weave a theme or theory of the case into the brief. Themes and theories tell the judge what your case stands for — something about which your judge should remain clueless. A confused judge means a happy client. And happy clients want you to write about why your adversary is a jerk, not about pretentious and arcane themes and theories.

Invert the parties' names. Write "appellee" when you mean to write "appellant." Never use your client's name or your adversary's name. But if you must, use acronyms. If your client's name is "Olivia Knight," use "OK" throughout your brief. If the appellant's name is "Bob Smith," write "BS."

Because good writing is planned, formal speech, avoid outlining and editing, and use contractions and abbreviations.

Include many facts. Leave nothing out. Be sure to mention a witness's eye color, social security number, and family history. Including every irrelevant fact, person, place, and date will guarantee that the court won't know whether the case involves a tort, a contract, or a constitutional wrong. Arrange the facts in reverse chronological order. Don't even think about techniques of storytelling, making your client come alive, and offering a succinct, concise procedural history from your client's perspective.

Misstate the law. Make it up if the court's holding favors your client. Logic tells you that the law can be so wrong. Don't explain how the law applies to your client's facts. The law is what it is. You can't change anything about it. Avoid common sense. If you pretend that you want to win and you decide to integrate law and fact, start the sentence as follows, "In my humble opinion . . . ." Every judge will know that true enlightenment will come at the end of the sentence. That's why you're guaranteed to lose in the end.

When you've lost all hope, and things seem to be going your way

despite all your efforts, or lack thereof, throw all the pages to the brief down a flight of stairs, collect them, and submit them in the order the pages fell on the floor. Every case is a puzzle waiting to be solved.

Rule #3: Quote Other Judges and Lawyers Because Your Ideas Don't Matter.

No one wants to hear what you have to say. Someone smart said it before. Just repeat it. Using lots of long quotations means you didn't do independent research and analysis. Make your lack of effort obvious. Block quotations are essential in a loser brief. They waste tons of space. And no one reads them. The less the judge reads, the likelier you'll lose. When you quote, misquote. How else will you know whether the judge read your brief? Make sure you quote dicta, not holdings. Also, quote language that sounds good, even if the case goes against your client's position — and even if the case facts are different from your case. If you've read it before, it must be true. Don't bother checking other authorities. Quote all the language from the source. Include everything. Regurgitate the holdings of the case, paragraph by paragraph. Take the holdings from the headnotes. Better yet, quote from the headnotes.

Rule #4: Citations Are for the Lame and the Weak.

Miscite your authorities. Get the volume of the reporter right, but forget page numbers. Close enough is good enough, unless your goal is to lose by winning. If a decision is longer than one page, never give the pinpoint citation. Your goal is to make it so difficult for the judge to find any morsel of accuracy that the judge will turn to your adversary's brief.

String cite whenever possible. If you have 20 cases for the same proposition, add them all. To show that you're smarter than the judge — a losing and therefore effective strategy — cite after every proposition in your brief, even for obvious statements. But don't cite the record below. Pointless.

Nor should you cite much legal authority. Judges are busy skeptics. It's fun to make them and their law clerks research from scratch. If they don't, and they probably won't, you're halfway to your losing goal line.

Never write the name of the case correctly. Pick one party and leave the other one out of the citation. Annoying the court will help you lose.

Don't cite the official reporters. Make the judge and law clerk find the correct citation. You just know they won't.

If you cite, don't explain why your citations are relevant. Mention that the cases are on point, but don't say why. If you try to explain the case, make the case more complicated than it is. If you want to be analytical and fancy, start every paragraph with "My adversary's argument is mendacious and ridiculous." And never use parenthetical explanations after citations. Parentheticals just throw judges a curve.

Don't cite binding cases from your jurisdiction. Cite oral decisions. Cite and quote only from dissenting and concurring opinions. Don't cite constitutions, statutes, or other laws.

Never attach the hard-to-find cases or the law you've cited.

Rule #5: Being a Lawyer Means Knowing How to Break the Rules.

The more rules you break, the greater your chances of losing. If the judge presiding over your case limits your brief to 15 pages, ignore the page limit. Rules are made to be broken. The judge obviously doesn't know that more is better. Exceed the limit. Make it 25, 50, 100, or more pages. The longer your brief, the less the judge will understand your case. Hauling heavy briefs will give the judge the excuse not to read your brief. Besides, most judges can't concentrate for more than 10 minutes at a stretch. And judges will usually fall asleep — they call it "deliberating" — by the mid-afternoon from all the hard work they've done digesting their two-hour lunches. The longer and more boring the brief, the faster you'll get the judge to deliberate over your brief.

If you're a stickler for the rules, condense your 100-page brief to fit a 15-page limit. It doesn't matter whether the text is too small to read. It'll give the judge an opportunity to take out a magnifying glass and see your case for what it really is: a loser.

Deadlines are for deadbeats. The more important it is to the court or your adversary for you to file a brief on time, the more you should be late. That's why, when you get a project, you shouldn't start early.

Don't include a table of contents or a table of authorities. Including either one of them, or including both of them, means you're a showoff.

Rule #6: Make It Personal.

If you've tried all the above rules, and you still haven't lost, go for the jugular. Attack the court, opposing counsel, and your adversary with insults, condescending language, snide remarks, irony, and humor. Destroy them: Denigrate their intelligence, motives, and integrity. Tell them how you really feel. Assail the court's earlier decisions. Pour it on like salt on a wound. Critique your adversary's writing skills. It's obvious you went to the better law school. Don't be deferential to the court. We all know that the judge isn't the sharpest tool in the shed, just the more politically connected. If you choose to be deferential, make it sound phony: Use "respectfully" a lot. If you do that, the court might not sanction you for frivolous litigation.

Losing briefs are those that demonstrate how the court is conspiring with your adversary against your client and you personally. Use the phrase "in cahoots" often.

Tell the court that your adversary is a "liar" who likes to tell "fanciful fairytales." From then on, call your adversary "My opponent's 'esteemed' attorney." If your adversary responds in kind, keep fighting back. Hit below the belt. Judges love it when both parties take off the gloves. You'll entertain your judge, who'll place bets with court personnel on which lawyer will end up the bigger loser.

Rule #7: Bury the Bad Stuff.

Losers concede nothing. Fight to the end, especially on the little things that don't matter. How else will the judge know that you're passionate about the case?

Include only the facts favorable to your client. Hide unfavorable facts. A judge who thinks you're sleazy will reward you with the loss you seek.

Bury the bad cases — the ones that go against your client's position. If you've found a case that goes against your argument, don't mention it. Let your adversary find it. No point in talking about one meaningless case when you have 20 other cases on your side. Let the law clerks do some research. They get paid to do your research. And they get unlimited access to Westlaw and LEXIS. You don't. Count yourself fortunate if you never get a chance to address unfavorable cases later.

Don't cite the record. The past is the past.

Rule #8: You're a Lawyer, Not an Editor.

Lawyers don't have time to spellcheck, proofread, or cite check. Time is money for lawyers. But for judges, seeing typos in a brief is like having a cellular phone go off in a quiet courtroom to the doleful Ramones' "I Wanna be Sedated" ballad. Don't sweat the details. It's the big stuff that counts in a brief. Use typos to signal that you're a busy and successful lawyer — albeit a loser — with a great practice.

Repeat your arguments every chance you get. That will guarantee that the judge won't care even if you're right on the law. Belabor the obvious.

No need for clarity or brevity: Hapless virtues.

Don't begin paragraphs with topic sentences or draft transitions to connect paragraphs.

Punctuation is important, but not in a losing brief. You've never learned the difference between a comma, period, semicolon, and colon. No reason to start now. To make your brief stand out, challenge yourself to write a sentence that covers an entire paragraph. Stream of consciousness means you've thought about the case.

Handwritten edits will do. Put arrows and stars for the judge to follow your argument. You want your work to stand out; show the judge that you didn't put the effort to proofread. If you want to look like you care, handwrite the page numbers in black ink in the bottom left-hand corner, right near the brief's binding. Finding the page numbers is half the fun in reading a brief.

Misspell your client's name. Misspell the judge's name. If you can't remember the judge's name, call the judge "Mr.," especially if the judge is a woman.

Rule #9: Be Superficial: It's Not the Substance That Counts.

Write emotionally: Show the judge what matters. Because understatement is persuasive, be sure to exaggerate. Details are what convince, so be conclusory.

Don't tell the court what relief you seek. If by some mishap you win, you'll at least get the relief you neither need nor want.

In a losing brief, the question presented should be several paragraphs long. You've got lots of questions, and judges always think they have lots of answers. Write the question in a way that the judge will respond with a definite "maybe."

In your facts section, include facts that aren't in your argument section. Include facts that aren't in the record. If you must cite the record, direct the judge to the wrong page. A quicker way to lose: Don't cite facts at all. Argue law but never fact. Don't explain how the case reached the appellate court. Don't explain what happened at trial.

In your summary of the argument, write only one or two sentences detailing what your case is about. If you must summarize, make sure your summary is longer than your entire argument section.

The heading and subheadings, if you include any, should be objective and neutral. You want the judge to think you're honest and fair — and wrong.

> If you choose to be deferential, make it sound phony: Use "respectfully" a lot. Obfuscate with jargon.

Label your headings "Introduction," "Middle," and "Conclusion."

Start every argument in your opening by predicting what your adversaries might say. Then don't say why they're wrong.

In your reply briefs, don't respond to your adversaries' arguments. Restate everything you've already mentioned in your brief. Or, even better, raise new arguments.

Rule #10. When All Else Fails, Confuse Them With Words.

Write like a real lawyer. Confound with legalese: "aforementioned," "hereinafter," "said," "same," and "such." Obfuscate with jargon: "the case at bar" or "in the instant case." Bore with clichés: "wheels of justice"; "exercise in futility"; and "leave no stone unturned."

Treasure nominalizations: Turn powerful verbs into weak nouns. Although nominalizations are wordy and abstract, relying on them is good for losing. *Examples:* Use "allegation" instead of "allege," "violation of" instead of "violating," and "motioned for" instead of "moved."

Metadiscourse is verbal throat clearing. That's why you need to know about this device. Every chance you

get, use "it is important to remember," "it is significant to note," "it should be emphasized that," and "it goes without saying that." Use "it is well settled" and "it is hornbook law" to describe what the less-educated might call a split in authority.

Use the passive voice everywhere: Be obtuse about who's doing what to whom. Write "The victim was murdered by the defendant" instead of "The defendant murdered the victim." When the issue is who murdered the victim, obscure the actor altogether: "The victim was murdered" should suffice.

Grammar — adverbs, adjectives, nouns, pronouns, agreement, parallelism, sentence fragments, verb tenses, fused participles, and gerunds — is a big blur for some lawyers. Keep it that way. Who knew about modifiers? Don't learn the difference between "who" and "whom" and "that" and "which." Mixed metaphors will set you apart from your adversary: Your brief will cause the judge to close the barn door after a horse shut it.

Throw in adjectives and even some adverbial excesses. Use "clearly" and "obviously," especially when your point isn't at all clear or obvious.

Use plenty of acronyms, especially those you never define.

Be cowardly. Include doubtful, timid, and slippery equivocations, phrases, and words: "at least as far as I'm concerned," "generally," "probably," "more or less," and "seemingly." That's how you show what a lousy case you have.

Instead of writing in the positive, write in the negative. Appellate judges, who themselves love expressions like "This case is remanded for proceedings not inconsistent with this opinion," will identify with expressions like "This case is not unlike . . . ."

Have fun and play with language. Create run-on sentences. Combine complicated, multisyllabic words. Construct long sentences — learned lawyers do that all the time.

Employ foreign words. It behooves you to replace English words with French, Italian, and Spanish. If you're educated, use Latin. The judge will think you're sui generis.

Redundancy is necessary in a losing brief. Two or more words are better than one. Use the following: "advance planning," "few in number," and "true facts."

Reach for a thesaurus every chance you get. Use different words to mean the same thing. Forcing the judge to expend energy reaching for a dictionary leaves little time for the judge to read your brief.

Talk about freedom, justice, equity, and the American dream. Bring up the U.S. Constitution even if your case has nothing to do with a constitutional issue.

Include at least one rhetorical question in each paragraph. Isn't that a good way to tell the judge you're a LOSER?

Conclusion

Writing a bad brief takes preparation and practice. The preparation begins during law school. Few things academic apply to practicing in the real world. Lawyers must know the real rules to writing a bad brief — the things you never learned in law school and, likely, the things no one will teach you when you practice law.

If a winning brief makes it easy for the judge to rule for you and want to rule for you, the loser's goal is to make it hard for the judge to rule for you and to make the judge want to rule against you.

If you're unlucky enough to have smart, honest colleagues edit your brief, ignore their suggestions. Accuse them of being egotistical to deflect any notion that they're offering helpful comments. And disregard all comments offered by your partner or supervisor. Their comments might be subversive — and actually favor your client.

Sometimes judges will feel so sorry for you that they'll wade through your brief to find a nugget of merit. You might have a chance to win — er, lose — after all. But if losing is your goal, just read your brief, typos and all, at oral argument. ■

1. In case you win despite following the foolproof advice in this column, the Legal Writer suggests some more articles. They'll help you lose your next case: Sarah B. Duncan, *Pursuing Quality: Writing a Helpful Brief*, 30 St. Mary's L.J. 1093, 1132–35 (1999); James W. McElhaney, *Twelve Ways to a Bad Brief*, 82 ABA J., Dec. 1996, at 74; Jane L. Istvan & Sarah Ricks, *Top 10 Ways to Write a Bad Brief*, N.J. Law. 85 (Dec. 2006); Eugene Gressman, *The Shalls and Shall Nots of Effective Criminal Advocacy*, Crim. Just., Winter 1987, at 10; Peter J. Keane, *Legalese in Bankruptcy: How to Lose Cases and Alienate Judges*, 28 Am. Bankr. Inst. J. 38 (2010); Alex Kozinki, *The Wrong Stuff: How You Too Can . . . Lose Your Appeal*, 1992 BYU L. Rev. 325, 325–29 (1992); Paul R. Michel, *Effective Appellate Advocacy*, 24 Litig. 19, 22–23 (Summer 1998); William Pannill, *Appeals: The Classic Guide*, 2 Litig. 6 (Winter 1999); Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. Rev. 431, 433–37 (1986); Harry S. Silverstein & Edwin C. Ruland: *How to Lose an Appeal Without Really Trying*, 4 Colo. Law. 831 (1975); Harry Steinberg, *The 10 Most Common Mistakes in Writing an Appellate Brief*, N.Y.L.J., Aug. 31, 2009, at S4; Susan S. Wagner, *Making Your Appeals More Appealing: Appellate Judges Talk About Appellate Practice*, 59 Ala. Law. 321 (Sept. 1998); Joseph F. Weis, Jr., *The Art of Writing a Really Bad Brief*, 43 Fed. Law. 39 (Oct. 1996).

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at Columbia Law School and St. John's University School of Law. He thanks Alexandra Standish, his court attorney, for her help with humor. Judge Lebovits's e-mail address is GLebovits@aol.com.

EDITOR'S NOTE

In our March-April issue, the district court in *Schneider v. Rusk* was cited as having stripped Ms. Schneider of her U.S. citizenship because of her marriage to a German citizen (Karen DeCrow, "The Opportunity to Be Part of the World: Legal Cases for Gender Equality" March-April 2010 *Journal*). That is incorrect. Ms. Schneider, a naturalized U.S. citizen, was denied a U.S. passport because she had continuously resided in a foreign country for more than a three-year period. This ruling was later overturned by the U.S. Supreme Court. We thank Cheryl Dunn Soto of San Francisco for bringing this to our attention. The full text of her letter is posted on the *Journal* blog.

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Is it ever proper to use pled as the past tense for plead instead of the more usual form pleaded?

Answer: This question has been asked and answered previously in this column, but recent e-mails indicate that it is time to discuss it again. To answer the reader's question: either *pleaded* or *pled* is grammatical, but the large majority of the public choose *pleaded*, so that is preferable. Only lawyers – and journalists writing about legal matters – continue to use *pled*, perhaps because the law relies on precedence, and casebooks contain numerous decisions in which the past tense *pled* is preferred. In these, one is as likely to read, "The defendant pled guilty," as "The defendant pleaded guilty."

The verb *plead* came into English as *pleiden*, the Middle French verb for "plead," during the period following the Norman Conquest of 1066. When the French invader William of Normandy won a victory over the English in the battle of Hastings, he burned and pillaged southeast England.

French nobles and the upper classes then settled in and re-built England, and the French language permeated the Anglo-Saxon word stock, forever changing the English language. For a while it looked as if the French language would erase the English language. However, English eventually prevailed, but it was permanently expanded and enriched by French and Latin word stock.

At first the past tense *pled* held its own against *pleaded*. It was listed in the *Oxford English Dictionary*, along with *pleaded*, as early as 1305 with the (now obsolete) meaning "to contend in debate or to litigate." In 1598, it appears in Spenser's "Faerie Queene" and as recently as 1721 it is cited in Ramsay in the sentence "My mind, indulgent, in the favor pled." After that, *pled* disappears from O.E.D listings.

Currently, the *New York Times* style book does not list *pled*, and the Associated Press style book labels it "colloquial." It could be argued, however, that *pled* is a logical choice as the past tense of *plead*, for that past tense is used for analogous verbs that rhyme with *pled*. There is *led* for "lead," *bled* for "bleed," and *read* (pronounced "red") for "read." On the other hand, *deeded* is the past tense of *deed*, but that choice is understandable given the alternative.

The following has nothing to do with the reader's question, but you may have noticed that the same journalists who use the past tense *pled* seem more likely to misspell the past tense of *lead*. Apparently, influenced by the similar spelling and pronunciation of the *noun* lead, news journalists often write sentences like, "The quarterback lead (pronounced "led") his team to victory."

Question: I often wonder where the expression *by and large*, which means "on the whole" or "for the most part," comes from. Can you help?

Answer: To answer this question, I had to turn to the "authorities," but those readers who are sailors could probably answer it without help. My etymological dictionary (Weekley's *Etymological Dictionary of Modern English*) says somewhat cryptically that the original sense of the phrase is nautical, but that it is now often figurative. Its original meaning was "to the wind and off it," a not-very-helpful definition.

More useful was the O.E.D. definition, which explains that the phrase *by and large* means "to the wind" (within six points) and "off the wind." The most recent citation of the phrase was in *Frazer's Magazine*, VIII, 158 (1838): "They soon find out one another's rate of sailing, by and large." The phrase is thus peripherally related to the phrase "to lie (lay) by," originally a nautical term meaning "to come almost to a stand, either by backing sail or by leaving only enough sail to keep the vessel's head straight."

That answer seemed more than sufficient for my non-sailor correspondent and enough to please other readers curious about its etymology.

Potpourri

The staid and reliable *New York Times* was perhaps the last major publication to refuse to use *Ms.* That left the *Times* in the awkward position of identifying Gloria Steinem as "Miss Steinem, editor of *Ms. Magazine* (as Nancy Gibbs pointed out in her essay in *Time* magazine, October 26, 2009). After that, even the conservative grammarian William Safire called for surrender, but the *Times* refused on the grounds that "Ms." was not "common usage." Not until 1986, when "Ms." had by-passed the older title "Mrs.," did the *Times* finally relent.

The following snippets, garnered from the press, are noteworthy because in each case the journalist fails to say what he means, but the reader understands exactly was meant although it was not said:

> The quarterback didn't have the best game in the world. You never do sometimes. (Football coach)
>
> I never go there. Nobody goes there; it's too crowded.
>
> Twenty new houses will be open to tour-goers on Sunday. All of the homes reside in this county.
>
> The ball is now in the states attorneys' park.
>
> Many economists say home builders and buyers remain skiddish about the mortgage market. (The market is "skiddish," the buyers are skittish.)

Future additions to your vocabulary?

> "Cyberchondriac": A person who fears the worst after using the internet to diagnose her ailment.
>
> "Petri-dish ready": the self-description of organizations hoping to get stimulus money for scientific research – an analog of "shovel-ready."

Gertrude Block is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

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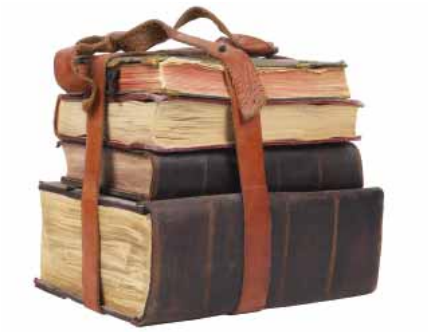

Writing Bad Briefs: How to Lose a Case in 100 Pages or More

Writing a really bad brief — a brief so bad you're sure to lose your case — is a skill few attorneys acquire. Only a select few can do that more than once or twice in a lifetime.

You might wonder why you'd ever want to lose a case. Perhaps you hate your client. Let's face it: Some clients are scam artists, especially those who don't pay you. Perhaps you hate your client's case. On an ethical level, the world will be better off, frankly, if some of your clients lose. Or perhaps you like your client, but you realize that your client will lose sooner or later. You might want to throw your client's case before your legal fees grow too high. Or perhaps you're in league with your adversary. The job market is tough, after all; maybe you're trying to get a job at your adversary's law firm. Or perhaps you want to ingratiate yourself with a judge who'll probably rule against your client anyway. Lawyers need to think about their next case, don't they? Or perhaps you've learned that your client has shallow pockets, and you need to cut your losses and move on before your firm downsizes you. That can happen a lot these days.

The reasons you might want to lose are many, and writing a bad brief is a key to losing. For those lawyers who want to lose — and lose big — this column's for you.[1]

Rule #1: Ugly's in the Eye of the Beholder.

Stimulate readers visually. Make sure you have a bad cover. Because first impressions count when it comes to briefs, judges will notice a bad cover. They'll assume that if you don't care about presentation, you probably won't care about getting the law right. Include a border, preferably with a seasonal motif. Flowers and snowflakes add a great touch. If the court has specific requirements about how the cover should look, ignore those rules. Judges have little sense of style anyway.

Then reverse the caption. If, at the trial level, the People of the State of New York had prosecuted the defendant, make it look on appeal as if the defendant-appellant is suing the People. If you include a caption, use a typeface like Old English Text or any other font that looks like hieroglyphics. Omit your firm's name and your name if you want to disassociate yourself from your loser client.

It'll be easier for your client to go down in defeat if you leave little white space on a page. The white space is the space in the margins and between words, sentences, and paragraphs. The more words you put on a page, the greater your chances of losing. Judges will know right away that they're reading a losing brief. No need for margins. Margins were created for legal-writing teachers to critique your work in law school. Judges, too, need margins because their eyesight has dimmed over the years, so don't give them any. Your goal is to make sure the judge won't read your brief.

The more typefaces in your brief, the more you'll distract the judge from finding any good arguments your client might have. You're closer to losing than you think if your brief looks like a ransom note. Challenge yourself to write each paragraph in a different typeface. If you really want to signal that you and your brief are losers, write each sentence in a different typeface: one in Times New Roman, another in Courier, and a third in Garamond. When neon lights fail, bold, underline, and italicize, preferably all at once, and all in quotation marks. How else are you going to emphasize your lack of forthcoming content, show sarcasm, and prove your paranoia? Then uppercase as many words as you can. Capitalizing excessively makes your writing memorable, albeit unreadable.

Black ink signals professionalism. Don't use it, unless you want to win. Make your brief ugly by using baby pink or sky blue ink. The judge will notice the cute feminine or masculine charm.

If you want to irritate a judge, don't include page numbers at the bottom of each page. Judges should know how to count.

Include lots of footnotes, all in a small typeface. That'll cause the judge to dwell on the irrelevant red herrings in your case. Burying substantive arguments in footnotes is how you'll get judges and their law clerks to make law, even if the law they'll make favors your adversary. Great law started in the footnotes. Ask any Supreme Court clerk.

To lose, don't bind your brief. If you must bind it, use a rubber band or string. That'll help the judges lose some or all the pages. Or bind the brief with a metal clip with razor-sharp edges. You spilled blood writing the brief. Why shouldn't the judge

CONTINUED ON PAGE 56

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