NEW YORK STATE BAR ASSOCIATION

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By Hon. George M. Heymann

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NEW YORK STATE BAR ASSOCIATION
Journal

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The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $200 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

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SEYMOUR W. JAMES, JR.

Our Legislative Priorities

Since our founding more than 135 years ago, an important part of our mission at the New York State Bar Association has been to promote reform in the law and facilitate the administration of justice. Our Sections and Committees do tremendous work sharing their expertise with policy makers at the state and federal levels, and their reports and recommendations are often approved by our House of Delegates and adopted as positions of the State Bar Association. In addition, each year we choose a handful of particularly important issues as legislative priorities that will be advanced by our leaders with the able guidance of our experienced Governmental Relations staff.

Ongoing Priorities

Our legislative priorities are developed through a process that invites recommendations from all of the Association's Sections and Committees. After an initial review by the Committee on Legislative Policy and the Committee on Federal Legislative Priorities, the Steering Committee on Legislative Priorities makes recommendations to the State Bar Executive Committee for its approval at our Fall meeting. This year in particular, we received a remarkably high number of proposals, and the process resulted in a very substantial and high-quality slate of priorities.

Judiciary

The integrity of New York's justice system is always a primary focus for the State Bar, and we will continue to support reforms that promote an independent, well-functioning judiciary. Our Report on the Impact of Recent Cuts in New York State Court Funding, released in 2012, outlined the various consequences of drastic cuts in the New York State Judiciary budget. We will continue our advocacy in this important area, to ensure that our courts have adequate resources to fulfill the essential role they play in our society.

Civil Legal Services

We support a dedicated revenue stream to ensure appropriate funding for civil legal services. The provision of legal assistance to people in need of basic life essentials is not only a moral imperative, but it also helps our courts run more smoothly – for all parties. In addition, we will continue to advocate for proper funding for the Office of Indigent Legal Services to allow it to carry out its mission and ensure that constitutional standards are met in criminal cases throughout the state. We continue our support for a package of bills intended to prevent wrongful convictions, particularly mandatory recording of custodial interrogations. We were pleased to learn that the New York City Police Department will begin recording all post-arrest interrogations in sex-crime and murder cases, and we are hopeful that this development will pave the way for legislation to be enacted during the 2013 legislative session.

Juvenile Justice

In addition, we continue our focus on New York's juvenile justice system. We support legislation that would require the audio and video recording of any interrogation of a child, as well as a provision that would increase the age of criminal responsibility to 18. New York is one of only two states in which children age 16 and 17 are prosecuted as adults, in spite of evidence that children under the age of 18 have a significantly diminished capability for reasoned judgment. Currently, children 16 and 17 cannot be prosecuted in the Family Court, where they would have access to valuable programs and services now available only for children charged as juvenile delinquents.

Nonprofits

We continue to support the Business Law Section's proposal to adopt policies and practices commonly used throughout the United States and to eliminate outdated provisions of New York's Not-for-Profit Corporation Law. The proposed reforms would modernize this law to encourage organizations to incorporate and maintain their investment assets in New York; to reduce unnecessary burdens related to formation and operation; and to streamline nonprofit governance in a manner consistent with meaningful oversight. The proposal would eliminate statutory "types" of not-for-profit corporations that create undue complexity and potential dissonance with the Internal Revenue Code, remove

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the need for pre-approval by various administrative agencies before formation and make the statutory framework for non-profit corporations and business corporations more consistent. We believe that these reforms would benefit the enormous and varied non-profit sector in New York State, which includes foundations, charities, health-care organizations, service agencies, clubs, cultural institutions, religious organizations, research and educational centers, chambers of commerce, economic development corporations and other organizations.

The Profession

Finally, we will continue our ongoing support for the legal profession, advocating policies that protect the independence of the judiciary, enhance access to the courts and promote the profession, and opposing proposals that pose disadvantages. We will continue our efforts to ensure that attorneys are able to protect clients' interests and effectively engage in the practice of law.

New Initiatives

In 2013, we will also work to support the recommendations included in a Criminal Justice Section report that was adopted by the House of Delegates in 2012. That report proposed implementing a process that would permit sealing individuals' records of conviction for certain offenses. Individuals convicted of certain drug crimes can currently seek to have their records sealed, but there is a broad range of non-violent, non-drug-related offenses for which this is not currently allowed. Under our proposal, individuals convicted of those offenses would be eligible to apply to the court to have their records sealed.

Ongoing Federal Priorities

At the House meeting in November, we also adopted our federal legislative priorities for 2013. We will continue to support appropriate funding for civil legal services at the federal level and the elimination of restrictions that dictate how recipients of Legal Services Corporation (LSC) funds can spend money received from non-LSC sources. We will continue to promote policies that protect the attorney-client relationship. In addition, we will continue to support the Rules Enabling Act rule-making process and to oppose the Lawsuit Abuse Reduction Act. This act would, through a process that is inconsistent with the Rules Enabling Act, reinstate a mandatory sanctions provision that was found to be counterproductive and, in fact, had been removed from the Federal Rules of Civil Procedure in 1993.

In addition, we will continue to advocate for repeal of the Defense of Marriage Act, and to support states' authority to regulate the tort system, legislation and funding to enhance civic education programs, and provisions at the federal level that promote the interests of the legal profession.

At the State Bar, we have also been working to focus attention on the potentially devastating impact on our federal courts and the LSC of the across-the-board cuts associated with sequestration. I expressed my concerns on this major issue in an opinion piece that was published in the *New York Law Journal* on September 26. On October 9, I submitted the piece to the New York congressional delegation, and our staff alerted the New York State Conference of Bar Leaders about the issue. We then submitted a letter on behalf of the State Bar and 15 local bar associations in the state, urging Congress to carefully consider the impact of sequestration on our courts and the delivery of legal services to people in need. In November, I was joined by several State Bar leaders on a trip to Washington, D.C., where we participated in 21 meetings with congressional representatives and their staff. We presented clear and specific information on the legal and business perspectives during these meetings, and, as this issue of the *Journal* goes to press, we are continuing to work with business leaders and legal services providers to help raise awareness of this important matter. We are hopeful that by the time of publication, our lawmakers will have agreed upon a constructive solution to avoid sequestration.

We have a very full slate of state and federal legislative priorities this year, and I want to thank all of you who submitted recommendations. I look forward to working with our Sections, Committees and Governmental Relations staff to advocate on behalf of these important issues. ■

Gary A. Munneke

1947–2012

Gary Munneke was a force of nature. On our trips to NYSBA's Annual Meeting, we would see Gary racing from seminar to meeting, to give introductory remarks, speak, or moderate a panel discussion. Gary was a law professor, chair of committees and member of boards, and a prolific writer and thinker on the past, present and future of the practice of law. He taught and mentored countless students, advised lawyers and deans, and maintained a web of friendships and connections such that he could get you a contact – or someone to write an article or even a treatise – with astonishing speed. He was smart, witty, sociable and just a lot of fun to be around.

In the scheme of Gary's accomplishments, his service to the *Journal* probably ranks as small. But his work was a great gift to the *Journal* and its readers.

Beginning in September 2008, Gary guest-edited two *Journal* issues a year – one on law practice management and one on solo and small firms. He gathered knowledgeable people who wrote about everything from ethics to billing, from technology to law office furniture. Two things all of these authors had in common were their concern for the future of the profession and their respect for Gary. Every time he sent out a call for articles, he received a great response. In 2010, the September issue stretched into October; he just had too much material, and it was all too good to leave any of it out. In July 2009, Gary joined the *Journal* Board of Editors, where he was a valued member. We will miss him.

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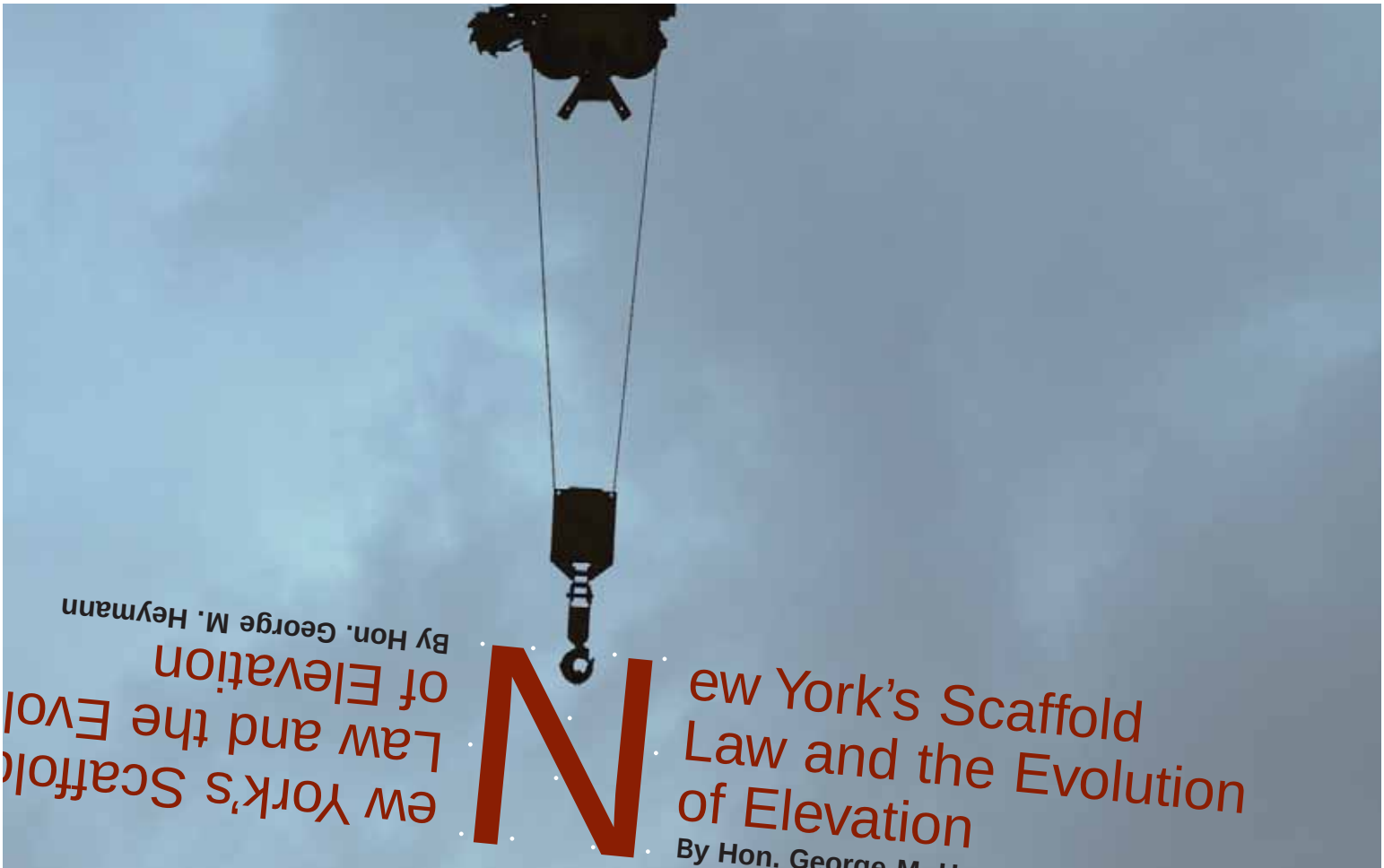


New York's Scaffold Law and the Evolution of Elevation

By Hon. George M. Heymann

Section 240(1) of the Labor Law, commonly referred to as the "Scaffold Law," is often invoked with respect to worker-related injuries that involve heights.

Enacted in 1921, § 240(1) "descended from the 1885 'Act for the protection of life and limb' which imposed liability on anyone 'who shall knowingly or negligently furnish and erect . . . improper scaffolding . . . .'"[1] The law was expanded in 1947 to include coverage for workers who fell from elevated devices other than scaffolds, and the title of the statute was changed from "Safe scaffolding required for use of employees" to the current "Scaffolding and other devices for use of employees."[2] A 1969 amendment placed responsibility for safety practices at construction / building sites squarely on "[a]ll contractors and owners and their agents."[3] In the final amendment, passed in 1981, owners of one- and two-family homes "who contract for but do not direct or control the work" were exempted.[4]

In the three decades since, courts in a myriad of cases have sought to interpret and clarify this statute, creating a body of law that is constantly evolving in the attempt to reconcile the often inconsistent decisions.

Despite the differences in interpretation and application, the first paragraph of § 240(1) is succinctly worded, containing two distinct criteria, each of which comes into play when an injured worker seeks recovery under this statute. In relevant part, Labor Law § 240(1) reads as follows:

> All contractors and owners and their agents, . . . [1] in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure [2] shall furnish or erect, or cause to be furnished or erected for the purpose of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed. (Numbers in [ ] added.)

Part one of this provision sets forth and limits the specific type of job that a worker must be doing at the time of his or her injury. The second part pertains to the various devices necessary to protect the worker from injury while in the performance of his or her duties. The list is not exhaustive because the language includes "other devices" employed to provide "proper protection."[5]

Note that the statute itself makes no mention of height or elevation differentials. Such language and its applica-

Hon. George M. Heymann is a former Judge of the New York City Housing Court and is Of Counsel to Finz & Finz, P.C. This article is dedicated to retiring Court of Appeals Judge Carmen Beauchamp Ciparick for her major contributions to this body of law.

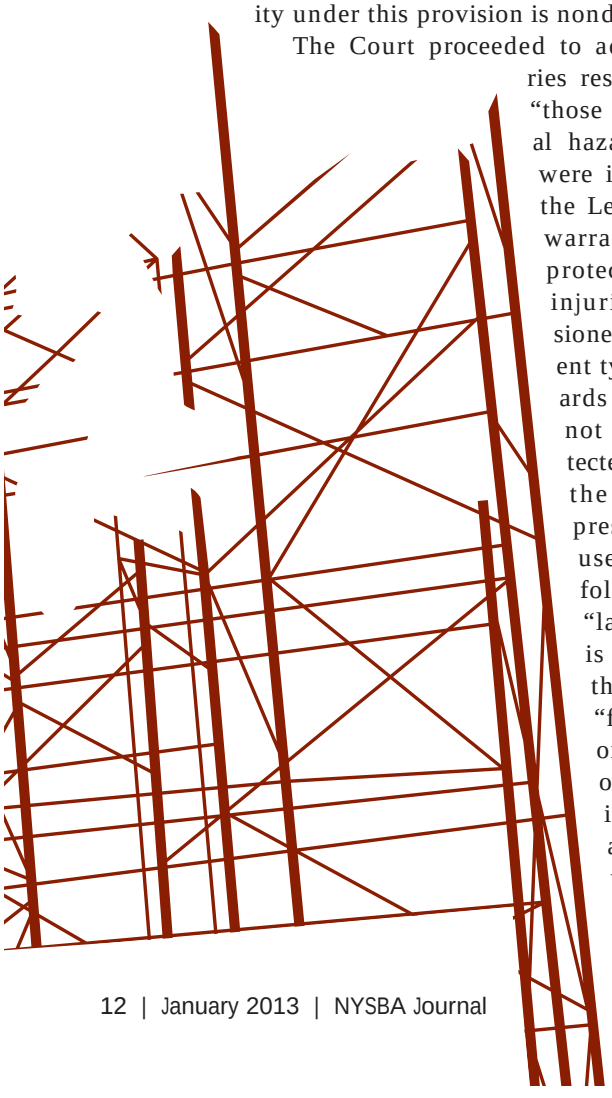
tion evolved from the courts, as the use of devices such as "scaffolds," "hoists" and "pulleys" refers to working above and/or the lifting or lowering of objects from one level to another. Similarly, there is no mention of "strict" or "absolute" liability, which was a term applied by the Court of Appeals, as will be discussed below.

Much has also been written with respect to the nature of the job undertaken, as well as whether "proper protection" was provided by the employer; whether, in fact, "proper protection" was required; and whether the absence of "proper protection" was the proximate cause of the resultant accident and injury.

This article will highlight the major decisions rendered by the Court of Appeals regarding Labor Law § 240(1) from 1991 to the present and include discussion of several recent Appellate Division and state Supreme Court cases.[6]

Rocovich

In *Rocovich v. Consolidated Edison Co.*,[7] the Court of Appeals stated that Labor Law § 240(1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed," and reaffirmed its earlier interpretation: The statute "impos[es] absolute liability for a breach which has proximately caused an injury."[8] Contributory negligence by the injured worker is of no consequence; the duty of an owner's liability under this provision is nondelegable.[9]



The Court proceeded to address injuries resulting from "those occupational hazards"[10] that were intended by the Legislature to warrant absolute protection, and injuries occasioned by different types of hazards that would not be protected. Because the statute prescribes the use of "scaffolding" and "ladders," it is "evident" that they are "for the use or protection of persons in gaining access to or working at sites where *elevation* poses a risk."[11] In considering all the devices listed, the Legislature "contemplated hazards" involving the force of gravity "because of a difference between the elevation level of the required work and a lower level . . . of the materials or load being hoisted or secured."[12] Determining that the hazards incurred were "special hazards," the Court "believe[d] that the Legislature has seen fit to give the worker the exceptional protection that section 240(1) provides."[13]

In this case, Rocovich, a construction worker, was removing and repairing the insulated covering on recessed pipes on the roof of the defendant's building. In the center of the recess was a trough, 18 to 36 inches wide and 12 inches deep, filled with about 5 inches of hot oil. As he was about to step across it, the plaintiff slipped and his right foot and ankle became immersed in the hot oil.

Based on its interpretation of the type of hazard that warrants protection under Labor Law § 240(1), the Court declined to apply it in the plaintiff's favor. While acknowledging that an elevation-related risk is not always determined by the extent of the elevation differential, the Court found it "difficult to imagine how plaintiff's proximity to the 12-inch trough could have entailed an elevation-related risk which called for any of the protective devices of the types listed in section 240(1)."[14]

Thus, because the nature of the plaintiff's job did not require any of the protective devices listed in the statute, his injury was not deemed to comport with the "thrust" of the statute's intent to protect against the risks involved in "relative differences in elevation."[15]

Ross

In *Ross v. Curtis-Palmer Hydro-Electric Co.*,[16] the plaintiff, Ross, was a welder who was working on welding a seam at the top of a 40- to 50-foot shaft. In order to weld the seam, a temporary platform was installed and Ross had to sit at the edge of the platform and "extend one leg forward against the top edge of the shaft and stretch forward and down with his upper torso and head to reach the seam that needed welding."[17] Ross had complained about working in this contorted position and had requested a ladder but was told that he had to use the platform. After approximately 22 hours working from the platform he experienced difficulty and pain when he tried, but failed, to straighten up. Despite subsequent surgery he remained disabled.

As in *Rocovich*, the Court of Appeals had to determine whether this was a hazard contemplated by Labor Law § 240(1). Here, the Court decided that the plaintiff's disabling back pain was not "the kind of harm that is typically associated with elevation related hazards,"[18] holding that the plaintiff's argument that his injury was "related to the effects of gravity" "misconstrues the import of our analysis in *Rocovich*."[19]

Again, the Court referred to "special hazards," emphasizing that these "do not encompass *any and all* perils that

may be connected in some tangential way with the effects of gravity."[20] They are limited to gravity-related accidents such as "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured."[21] The Court distinguished this case because the plaintiff's injuries did not flow directly from the application of the force of gravity to an object or person. Here, the "makeshift 'scaffold'" served the objective of the statute by preventing the plaintiff from falling down the shaft – a "device that did not malfunction and was not defective in its design."[22] The harm Ross suffered was not one contemplated by the statute and it would not be even if the device used was inadequate, defectively designed or malfunctioned.

Rodriguez and *Misserritti*

In *Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*,[23] the Court of Appeals, in a brief memorandum decision, dismissed the plaintiff's cause of action based on Labor Law § 240(1):

> Plaintiff in this case was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240(1). In placing a 120-pound beam onto the ground from seven inches above his head with the assistance of three other co-workers, Rodriguez was not faced with the special elevation risks contemplated by the statute.[24]

In 1995, in *Misserritti v. Mark IV Construction Co., Inc.*,[25] the Court of Appeals reaffirmed the limitations of seeking relief under the "scaffold law." The opinion, written by Judge Ciparick, continued the theme stated in *Rodriguez*, that injuries resulting from hazards that are not elevation-related are from "other types of hazards [that] are not compensable under the statute even if proximately caused by the absence of * * * [a] required safety device."[26] The wife of the decedent worker could not recover under Labor Law § 240(1) because the collapse of the fire wall he was working on was the type of "ordinary and usual peril a worker is commonly exposed to at a construction site and not an elevation-related risk subject to the safeguards prescribed" by the statute.[27]

The plaintiff-wife had sued on the theory that her husband had been hired to perform masonry work and that his injuries occurred when a completed concrete-block fire wall collapsed. She alleged that the defendant had a nondelegable duty to furnish the appropriate safety devices (i.e.: braces) to give the decedent the proper protection during his employment.

Once again, reciting the holdings and reasoning in *Rocovich* and *Ross*, the Court concluded:

> In this context, we construe the "braces" referred to in section 240(1) to mean those used to support elevated work sites not braces designed to shore up or lend support to a completed structure. * * * There is no showing that the decedent was working at an elevated level at the time of this tragic accident. Nor can it be said that the collapse of a completed fire wall is the type of elevation-related accident that section 240(1) is intended to guard against.[28]

Melo

Relying on its holding in *Misserritti*, the Court of Appeals denied recovery pursuant to Labor Law § 240(1) in *Melo v. Consolidated Edison Co. of NY*.[29] In this case, a steel plate was being hoisted to a vertical position at street level before being lowered over an unfilled trench. The steel plate was attached to the shovel part of a backhoe connected by a chain and hook at each end. The plaintiff, Melo, and a co-worker were directing the covering of the trench as the plate was being raised to a vertical position, perpendicular to the ground with the edge touching the ground. As they were maneuvering the steel plate, it became unhinged and fell on the plaintiff's foot and shoulder. The Court based its determination on the fact that the steel plate was resting on the ground.

While the force of gravity may have caused the steel plate to fall as it was being moved by an allegedly defective hoist, one of the safety devices enumerated in the statute, the steel plate was resting on the ground or hovering slightly above the ground – and thus was *not elevated* above the work site. Thus, it could not be said that the statute was implicated "'either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured.'"[30]

Narducci

Building upon *Rocovich*, *Ross*, *Rodriguez* and *Misserritti*, the Court of Appeals next addressed the issue of falling objects in *Narducci v. Manhasset Bay Associates*.[31] *Narducci* actually comprised two cases consolidated in one decision. In the first case, the plaintiff, Narducci, was removing steel window frames from the third floor of a fire-damaged warehouse. As he stood on a ladder working on a window frame, he saw "a large piece of glass from an adjacent window frame falling toward him."[32] Although he turned away, the glass hit him in the face and severely cut his right arm. He did not fall from the ladder, nor did the ladder malfunction in any way.

In the second, the plaintiff, Caparrelli, an electrician, was injured while installing fluorescent light fixtures into a dropped ceiling. He lifted the light fixture into the grid while standing halfway up an 8-foot ladder to reach the 10-foot ceiling. He was descending the ladder intending to relocate its position so he could secure the fixture, when the fixture began to fall. In an attempt to stop it from hitting him, Caparrelli reached out to hold it, but it slipped, cutting his right hand and wrist. Like Narducci, he did not fall from his ladder.

Both plaintiffs alleged that they should have been provided a scaffold to perform their jobs and, therefore,

were entitled to compensation under Labor Law § 240(1). Holding that absolute liability is imposed only after a violation of the statute has been established, contingent upon the contemplated hazards, not every worker who falls at a construction site and not every object that falls on a worker triggers the extraordinary protections of the statute.[33]

The Court distinguished between falling workers and falling objects, as each is a different type of hazard. While the former creates a hazard by working in an elevated situation where the worker might fall and be injured "in the absence of adequate safety devices,"[34] the latter is "associated with the failure to use a different type of safety device (i.e., ropes, pulleys, irons) also enumerated in the statute."[35] Because the risks are dissimilar, the hazards of one type of accident cannot be "'transferred' to create liability for a different type of accident."[36]

In denying Narducci's Labor Law § 240(1) claim, the Court found that the falling glass was the result of a preexisting building condition due to the fire and not the result of the absence of any securing or hoisting devices listed in the statute. The incident was "clearly a general hazard of the workplace"[37] and not one contemplated in the statute. Moreover, this was not an elevation-related accident because Narducci did not fall from his ladder; nor was it alleged that the ladder did not function properly. Thus, there was no causal connection between the ladder and the injury.

As to Capparelli, while his injury could be classified as "gravity related" it was not the type envisioned by the statute.[38] Although he was working on a ladder, standing approximately 4 to 5 feet off the ground to reach a 10-foot-high ceiling, there was no "hoisting" of the light fixture and no height differential between him and the falling fixture. In what appears to be a first for the Court, Judge Ciparick held that the exclusion of gravity-related accidents that can be distinguished from those intended by the Legislature "made [ ]the *de minimus* elevation differential in this case appropriate."[39]

Sixteen years later, Judge Ciparick revisited the issue of falling objects and *de minimus* elevation differentials in *Wilinski v. 334 East 92nd Housing Development Fund Corp.*[40]

In the joint cases of *Toefer v. Long Island Rail Road* and *Marvin v. Korean Air, Inc.*,[41] the Court of Appeals denied recovery under Labor Law § 240(1) where the injuries were the result of the plaintiffs' falling off flatbed trucks – while in the process of removing the cargo in the first instance and alighting therefrom in the second. The Court concluded that the flatbed trucks "did not present the kind of elevation-related risk that the statute contemplates."[42]

In both instances, the injured workers fell only 4 to 5 feet to the ground. The Court rejected their arguments that the safety devices listed in the statute would have prevented the respective accidents; therefore, Labor Law § 240(1) was not applicable.

Joblon and *Broggy*

As previously noted, Labor Law § 240(1) not only pertains to tasks that are elevation-related, it also limits the nature of the work to be performed in order for it to be implicated in seeking recovery thereunder.

In *Joblon v. Solow*,[43] an electrician was directed to install a clock on the wall of an office building. Because there was no outlet in that particular room, the plaintiff had to chop a hole through the concrete wall to the adjoining room and run electrical wiring from the electrical source to the hole. To accomplish this the plaintiff stood on a partially opened ladder leaning against the wall because, due to the dimensions of the room, the ladder could not be completely opened. Joblon's co-worker held the ladder securely while Joblon was performing his duties. At one point, however, the co-worker left the room, and Joblon ascended the now unsecured ladder to complete his task. While doing so, the ladder shifted, and Joblon fell backward, sustaining injuries.

The Court of Appeals was now confronted with the "highly elusive goal of defining with precision statutory terms within" Labor Law § 240(1), having found "that no precedent of this Court four-square controls the definition of the term 'altering' as used in" that statute.[44]

The Court found that Joblon's work was more complicated than merely standing on a ladder to hang a clock; the work he performed "was a significant physical change to the configuration or composition of the building."[45] The Court refused to limit relief only to construction sites because it "would eliminate possible recovery for work performed on many structures falling within the definition of that term but found off construction sites."[46] Here, the plaintiff's job was more than a simple routine activity – he made a "*significant* physical change to the configuration or composition of the building or structure. * * * It is not important how the parties generally characterize the injured worker's role but rather what type of work the plaintiff was performing at the time of the injury."[47]

Joblon is a prime example of how the different courts' definitions and interpretations of each element of Labor Law § 240(1) can yield differing results for the respective parties of a lawsuit involving this statute.

Almost a decade after *Joblon*, a worker who sustained injury while cleaning the interior window in an office building could not recover under the scaffold law because he failed to establish the need for any safety device and, therefore, no liability could attach to the defendant.

In *Broggy v. Rockefeller Group, Inc.*,[48] the plaintiff window washer was not a steady building employee of the defendant but worked in various buildings, bringing his own bucket and tools to perform his duties. At the time of his accident, the plaintiff was not using a ladder but was standing on top of a desk to reach the top of the window – approximately 10 feet from the floor. The desktop was level with the sill, but the edge of the desk

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next to the window had a "gallery," a one-inch wide, four-inch high protective edge that projected above the desktop. As Broggy was washing the interior side of the window, a co-worker washing the outside of the same window signaled that he wanted to come inside. While lifting the bottom sash of the window, the plaintiff was standing with his left leg on the window sill and his right foot on the desktop. Expecting the bottom sash to remain open the plaintiff removed his hands, and the window suddenly "slammed down." To avoid injury to his foot, Broggy quickly moved his left leg. His instep got caught in the gallery causing him to fall backward onto the desktop and then the floor.

In his lawsuit, Broggy sought recovery on the theory that he was using the desk as an elevated platform or scaffold while doing commercial cleaning. He further alleged that the "defendants [ ] fail[ed] to provide plaintiff with the safety devices necessary 'to overcome the elevation differential of approximately four feet between the floor and the window so as to perform his task safely.'"[49]

The Court of Appeals pointed out that

> "altering" and "cleaning" are discrete categories of activity protected under section 240(1). Notably, in *Joblon*, we rejected the defendants' argument that only altering performed as part of a building construction job was covered by section 240(1). * * * The crucial consideration is not whether the cleaning is taking place as part of a construction, demolition or repair project, or is incidental to another activity protected under section 240(1); or whether a window's exterior or interior is being cleaned. Rather, liability turns on whether a particular window washing task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against.[50]

In this case, the plaintiff could not establish that a ladder was required to perform his duties and that he could not have successfully cleaned the windows from the floor level using extension poles with his wand and/or squeegee. Failure to show that "he stood on the desk because he was obliged to work at an elevation to wash the interior of the windows"[51] was fatal to his claim. The plaintiff did not, as a matter of law in this case, need protection from the effects of gravity.

Breaking With *Misserritti*

Query: Can a worker recover for his injuries that were neither caused by him falling nor from a falling object hitting him, where the injuries were a "direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential"?[52]

In *Runner v. New York Stock Exchange, Inc.*,[53] the Court of Appeals answered this issue of first impression in the affirmative. Unlike the previous cases discussed, Runner was in the process of *lowering* an 800-pound reel of wire down a set of four stairs. Using a makeshift pulley, Runner was at the top of the stairs holding on to a 10-foot rope acting as a counterweight while the reel of wire was descending the steps. As the reel began to pick up speed it pulled the plaintiff toward it, and he jammed his hands against a metal bar to which the rope was tied, causing his injuries.

The relevant inquiry here was whether the harm to the plaintiff-worker flowed directly from the application of the force of gravity to the object even if that object did not fall on the worker. The Court reasoned that had Runner been at the bottom of the stairs and the reel descended onto him causing injury, he would be protected by the statute. Therefore, since "the injury to plaintiff was every bit as direct a consequence of the descent of the reel," he should be entitled to the same legal recourse as if he were in its path and was injured as it rapidly descended.[54]

Finally, the Court held that the elevation differential was not *de minimus* "given the weight of the object . . . over the course of a relatively short descent."[55]

In October 2011, the Court of Appeals broke new ground in its departure from *Misserritti* by holding that a worker is not categorically barred from recovery under Labor Law § 240(1) where he or she "sustains an injury caused by a falling object whose base stands at the *same level* as the worker."[56]

In *Wilinski v. 334 East 92nd Housing Development Fund Corp.*, Judge Ciparick described how the "jurisprudence defining the category of injuries that warrant the special protection of Labor Law § 240(1) has *evolved* over the last two decades centering around a core premise: that a defendant's failure to provide workers with adequate protection from reasonably preventable gravity-related accidents will result in liability."[57]

Explaining the Court's progression of the cases discussed above, it was pointed out that while rejecting *Misserritti*'s "categorical exclusion" of injuries resulting from falling objects on the same level of the injured worker, it "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240(1) analysis."[58] Relying on *Runner*, the Court held that it is not "the precise characterization of the device employed" or whether it was the fall of the worker or an object falling on the worker, but whether injury was a direct consequence of the employer's failure to provide adequate safety devices to prevent accidents caused by a "physically significant elevation differential."[59]

Wilinski was injured during the demolition of the brick walls of a vacant warehouse. After the demolition of the floor and ceiling, two 10-foot vertical pipes, 4 inches in diameter, remained standing on the ground unsecured. They were not scheduled to be removed at that time. Although the plaintiff expressed his concerns to his supervisor about leaving the pipes unsecured, no measures were taken to secure them. Wilinski, 5 feet, 6 inches tall, was standing on the ground when debris from a nearby wall being torn down hit the pipes, causing them to fall approximately 4 feet before striking and injuring him.

Applying *Runner*, the Court precluded *Wilinski* from recovery, but not simply because he and the pipes were on the same level when he was struck. The harm flowed directly from the force of gravity generated by the pipes in their descent, and the 4-foot height differential was not *de minimus* as a result of that force. Notwithstanding that there was a "potential causal connection between the object[s'] inadequately regulated descent and plaintiff's injury,"[60] there still remained an issue of fact as to whether the plaintiff's injury was a direct consequence of the defendant's failure to provide adequate protection to prevent the pipes from falling. Thus, neither party was entitled to summary judgment.

The Court distinguished this case from others where summary judgment dismissal was warranted. Where objects that fall and injure workers are themselves the "target of demolition" it would be "illogical" to secure them as it would be "contrary to the objectives of the work plan."[61] Such was not the case here where the removal of the pipes was not part of that phase of the demolition project and thus should have been secured.

Only a month after *Wilinski*, the Court of Appeals applied the same rationale in *Salazar v. Novalex Contracting Corp.*[62] Here, the Court denied recovery to a worker who was injured when he stepped backward into a trench. The plaintiff, Salazar, was pouring and spreading concrete over a basement floor that contained 3 - to 4 - foot - deep trenches for pipes when he was injured. The plaintiff claimed that the defendant should have provided a protective device to cover the trenches. The Court held that to do so would be "illogical," "impracticable" and "contrary to the . . . work plans in the basement" because the goal was to fill these trenches with cement.[63] The defendant was entitled to summary judgment "given that Labor Law § 240(1) should be construed with a commonsense approach to the realities of the workplace at issue."[64]

In *Ortiz v. Varsity Holdings*,[65] the issue was whether Ortiz, who was injured when he fell to the ground off a 6-foot dumpster, was performing a job that created an elevation-related risk encompassed in the scaffold law. The defendants moved for summary judgment, claiming this was not such a case. The plaintiff asserted that his task of filling the dumpster and rearranging the contents therein as it filled up required him to stand on the 8-inch ledge at the top of the dumpster.

The Court held that neither side was entitled to summary judgment. Based on the record before it, the Court "[could not] say as a matter of law that equipment of the kind enumerated in section 240(1) was not necessary to guard the plaintiff from the risk of falling from the top of the dumpster."[66] Liability is contingent upon the failure to use, or the adequacy of, one of the enumerated devices, so a question of fact remained as to whether the task the plaintiff performed created an elevation-related risk of the kind these devices are intended to prevent. The Court also noted that "courts must take into account the practical differences between 'the usual and ordinary dangers of a construction site, and . . . the extraordinary elevation tasks envisioned by Labor Law § 240(1).'"[67]

Most recently, the Court of Appeals decided *Dahar v. Holland Ladder & Manufacturing Co.*[68] As in *Broggy*, the plaintiff's duties involved "cleaning." Here, the plaintiff was cleaning a 7-foot-high manufactured steel wall module prior to it being shipped to its final destination. It was necessary for the plaintiff to stand on a ladder to perform his task. While working, the ladder broke and the plaintiff fell to the ground. He sought recovery under Labor Law § 240(1) asserting that (1) he was "cleaning," one of the tasks enumerated in the statute; and (2) the wall module was a "structure." The Court rejected this argument, stating that it would expand the statute's coverage to "encompass virtually every 'cleaning' of any 'structure' in the broadest sense of the term" (i.e., an employee standing on a ladder to clean a bookshelf or a light fixture).[69]

Lower Courts Weigh In

In the nine weeks between July 19, 2012, and September 18, 2012, five Appellate Division decisions and two Supreme Court decisions were rendered with respect to issues pertaining to the application of Labor Law § 240(1).

In *Oakes v. Wal-Mart Real Estate Business Trust*,[70] "apparently the first extended analysis" of *Wilinski*,[71] the Appellate Division, Third Department, denied recovery to a worker injured in a force-of-gravity accident.

The supervisor of a construction project, Oakes' legs were crushed as he was walking between two steel trusses, each measuring 30 feet long by 52 feet in height and 1 foot wide. As he was checking the steel components, one of the vertically positioned trusses, standing on its 1-foot side, was struck by an unsecured bar joist being carried by a forklift, causing it to fall on top of him.

The appellate court distinguished this case from *Wilinski*, noting that "[i]n light of the Court[ ] [of Appeals's] continued reliance upon *Rodriguez* in [*Ortiz*] a case decided after both *Runner* and *Wilinski* it cannot be said that an elevation differential posed 'the special elevation risks contemplated by the statute' simply because the force of gravity acting on a heavy object caused severe injuries when the object fell."[72]

Here, the plaintiff was not only on the same ground level as the truss, he was approximately the same height or slightly taller. Thus, "[n]otwithstanding the substantial weight of the [10,000-pound] truss and the significant force generated as it fell due to the force of gravity, however, there was *no* elevation differential present here, let alone a 'physically significant elevation differential.' * * * Under these circumstances, plaintiff was exposed to 'the usual and ordinary dangers of a construction site, and [not] the extraordinary elevation risks envisioned by Labor Law § 240(1).'"[73]

In *Toney v. Raichoudhury*,[74] Toney was killed when a crate, one of six that had been unloaded from a flatbed trailer truck, fell and crushed him. The crates, each weighing approximately 2,000 pounds, were lifted off the truck by a crane and placed on the ground so that two crates would stand upright and parallel to each other. The workers would tilt the crates toward each other so they would touch at the top and then connect them with braces to form an "A." As Toney and a co-worker were tilting two of the crates, one shifted, causing both crates to fall. Neither crate was attached to the crane at that time.

The defendants moved for summary judgment on the ground that the falling crates were at the same level as the worksite where Toney was standing and did not constitute an elevation-related risk under Labor Law § 240(1). Unlike the falling pipes in *Wilinski* relied on by the plaintiff, the crates did not fall from a substantial height. The plaintiff argued that the fact that the falling crates and the deceased were at the same level was irrelevant because the crates were inadequately secured.

In rejecting the defendants' argument, the Supreme Court found that the failure to secure the crates before removing them from the crane was a violation of the statute. While the crates stood only about 9 inches above the decedent's head, the elevation differential was not *de minimus* considering their weight and the amount of force they were capable of generating over even a short distance. "Moreover, '[t]he sufficiency of an elevation differential and a fall from a height for purposes of [liability under the scaffolding law] cannot be reduced to a numerical bright-line test or an automatic minimum / maximum quantification.'"[75]

Cappabianca v. Skanska USA Building, Inc.[76] concerned a construction site accident. The plaintiff was cutting bricks with a stationary wet saw; the saw and its stand sat on a wooden pallet that lay on the concrete floor. The plaintiff was standing on an adjacent pallet of the same height, operating the saw using its foot pedal, arm lever and cutoff switch. To keep the blade and bricks cool and to provide lubrication while cutting, the saw sprayed water on them; the water was supposed to be directed to an attached tray. But the sprayer malfunctioned, the water sprayed all over and the floor became slippery. As a result, the pallet on which the plaintiff was standing shifted and he lost his footing, injuring his knee as it became caught between the two pallets.

In affirming dismissal of the plaintiff's Labor Law § 240(1) claim, the Appellate Division, First Department, held that his "accident could not give rise to liability under the statute because he was at most 12 inches above the floor and was not exposed to an elevation-related risk requiring protective safety equipment."[77]

The specified tasks enumerated in Labor Law § 240(1) must take place in [or on] a "building" or "structure," and what constitutes a "structure" requires determination on a case-by-case, fact-specific basis.

In *McCoy v. Abigail Kirsch at Tappan Hill*,[78] the Appellate Division, Second Department, determined that, under the facts of that case, the canopy under which a Jewish wedding ceremony was performed, a "chupah," qualified as a "structure" for the purposes of seeking recovery under Labor Law § 240(1). Here, the court noted that

> a structure, by implication, may include constructs that are less substantial and perhaps more transitory than buildings. * * * In this action, the chupah consisted of various interconnected pipes 10 feet long and 3 inches wide, secured to steel metal bases supporting an attached fabric canopy. A ladder plus various hand tools were required to assemble and disassemble the chupah's constituent parts in a process that would take an experienced worker more than a few minutes to complete. The chupah here is more akin to the things and devices which the courts of this state have recognized as structures than to the things and devices that have not be recognized as structures.[79]

Britez v. Madison Park Owner[80] concerned a plaintiff who was injured when he fell off a scaffold approximately 6 feet high. He had needed a scaffold to do taping work at the top of a 12-foot-high wall, but the only one available was a pre-assembled model that had no safety railings or mesh, which, the plaintiff alleged, would have prevented him from falling backward.

The court held that the plaintiff established *prima facie* entitlement to partial summary judgment on his liability claim under Labor Law § 240(1), because he demonstrated that the scaffold did not provide proper protection and he was not given any other devices to prevent him from falling. The defendants failed to establish that the "plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; [and] that he chose for no good reason not to do so."[81]

The Appellate Division, Second Department, affirmed the dismissal of the plaintiff's Labor Law § 240(1) claim in *Rodriguez v. D&S Builders, LLC*[82] as the plaintiff failed to raise a triable issue of fact. The defendants "established their *prima facie* entitlement to [summary] judgment [of dismissal] as a matter of law by demonstrating that the plaintiff's decedent was not exposed to an elevation related hazard inasmuch as, at the time the decedent was struck by a bundle of forms, the forms were not being hoisted or secured, and the decedent was working on a flatbed truck at the same level as the bundle of forms."[83]

In *Rivera v. Fairway Equities LLC*,[84] the plaintiff was injured when a metal hamper filled with sand fell on him after being lifted by a forklift off a flatbed truck. The plaintiff and two co-workers were instructed by their supervisor to hold a bag while sand was poured into it. When the sand would not pour out of the hamper, the operator of the forklift tried to shake the hamper by using a lever of the forklift which, allegedly, caused the hamper to tilt forward and fall on the plaintiff. The hamper was 3- to 4-feet tall and approximately

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3 to 4 feet off the ground while held aloft by the forklift. The plaintiff was employed by non-party Bolinet Construction, a sub-contractor hired to erect the building's cinder block walls. The operator of the forklift was employed by Miron Building Supply LLC, who supplied and delivered construction materials to the jobsite.

The plaintiff moved for partial summary judgment against Miron under Labor Law § 240(1). Miron contended that "the fall of the hamper from the forklift simply did not involve a fall from a height sufficient to warrant the special protections provided under Labor Law § 240(1)."[85]

The court held that

> in light of the heavy weight of the sand-filled hamper, the obvious force it generated in the three to four foot fall from the forks of the forklift, and the absence of any brace or other Labor Law § 240 device securing the hamper to the forklift, the plaintiff has demonstrated, as a matter of law, that Labor Law § 240(1) was violated. In opposition, Miron has failed to demonstrate the existence of a factual issue with respect to whether section 240(1) was violated. This finding, however, does not end the inquiry, as Miron also asserts that it may not be held liable because it was not an owner, contractor or agent under section 240(1).[86]

However, "[t]he absence of proof of a direct contractual connection with the owner or general contractor weighs against finding that Miron was delegated any authority by the owner or general contractor." Thus, the plaintiff's motion for partial summary judgment was denied.

Finally, the Appellate Division, First Department, in *Fabrizi v. 1095 Avenue of the Americas, LLC*,[87] addressed the element of foreseeability in all Labor Law § 240(1) cases as "an issue whose discussion . . . is long overdue."[88]

The plaintiff, an electrician, was overhauling a building's electrical system, which required him to run a galvanized steel conduit up through the building's floors. The conduit on each floor met and abutted the conduit from the floors below and above; these were held together by compression couplings. On each floor, the conduit rose several feet and was connected and attached to a "pencil box" by a compression connector. While drilling new holes for a pencil box's new location, the conduit fell from its compression coupling above, falling on top of the plaintiff's hand and causing injury. Prior to the accident, the plaintiff had requested screw couplings to hold the conduits in place during this task; these were never provided.

While agreeing with the majority that there was an issue of fact as to whether a protective device was required for the plaintiff to safely perform his duties and whether the defendant failed to provide such device, the concurring opinion focused on the aspect of foreseeability in all actions under the Scaffold Law.

> Absent a foreseeability requirement, then, we leave owners and contractors with no reasonable way to determine when the statute applies and therefore when they are required to provide the safety devices enumerated therein. After all, an accident cannot trigger the extraordinary protections of Labor Law § 240(1) merely because it is gravity related. Otherwise, virtually every accident would fall within the purview of Labor Law § 240(1), and defendants would never be able to forecast when safety devices are required. * * * [I]t is beyond cavil that in cases pursuant to Labor Law § 240(1) and, more particularly, as is the case here, cases involving injury by virtue of a falling object, the dispositive issue for purposes of the statute's applicability, is not as argued by defendants, whether an object falls from a permanent structure or whether at the time of injury the object was being hoisted or secured. Instead, the pertinent and indeed dispositive inquiry is whether it was reasonably foreseeable at the outset that the task assigned to a worker exposed him/her to a gravity-related hazard, so that he/she should have been provided with one or more of the safety devices required by the statute.[89]

Whether future decisions by the trial and appellate courts will incorporate the element of foreseeability remains to be seen, for, as the court noted, it "remains a point of contention in our very own department."[90]

Conclusion

Thus, we end where we began: Labor Law § 240(1) has been and continues to be a statute that will yield differences of opinions between the courts at all levels regarding the nature of a worker's tasks that fall within the statute; the devices, if any, to be provided and used to protect the worker; the nature and degree of the elevation and height differentials, vis-à-vis the worker and the distance he or she falls or that which an object falls causing injury to the worker; and, now, whether foreseeability must be an element to be considered.

In all actions predicated on Labor Law § 240(1), it is incumbent upon the courts to make every effort to ensure that the "ultimate responsibility" to safely protect the workforce remains where it belongs, with the owners and contractors of the construction sites, as the Legislature intended.[91]

Barring further clarity of the statute by legislative amendment, the courts will continue to confront the "highly elusive goal of defining with precision the statutory terms"[92] of the ever-evolving Scaffold Law. ■

1. Barry R. Temkin, *New York's Labor Law Section 240: Has It Been Narrowed or Expanded by the Courts Beyond the Legislative Intent?*, 44 N.Y. L. Sch. Rev. 45 (2000), n.31.

2. *Id.* nn.38, 42; Labor Law § 240(1).

3. Temkin, *supra* note 1, n. 47. *See Rocovich v. Consolidated Edison Co*, 78 N.Y.2d 509, 513 (1991) (the legislative purpose behind this enactment is to protect "workers by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor' ( ), instead of on workers, who 'are scarcely in a position to protect themselves from accident'").

4. Temkin, *supra* note 1, p. 47. Although not relevant to this article, the amendment further exempted architects and professional engineers "who do not direct or control the work for activities other than planning and design." Labor Law § 240(1)

5. Labor Law § 240(1); *see supra* note 3.

6. For additional comments on this subject, see N.Y. PJI - Civil, Vol. 1B, § 2:217 [Injured Employee – Action Under Statute Imposing Absolute Liability], pp. 425–89

7. *Rocovich*, 78 N.Y.2d 509.

8. *Id.* at 513; In *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280 (2003) the Court of Appeals noted that the words strict or absolute liability did not appear in the current statute or its predecessors. It was the Court that began to use that terminology in 1923 and its context here is different from its use elsewhere. Under these circumstances there must be a violation of the statute (i.e., failure to provide protective devices) and that said violation was a contributing or proximate cause for the worker's injury.

9. *Rocovich*, 78 N.Y. 2d 509.

10. *Id.* at 513.

11. *Id.* at 514 (emphasis added).

12. *Id.*

13. *Id.*

14. *Id.* at 514–15.

15. *Id.* at 515

16. 81 N.Y.2d 494 (1993).

17. *Id.* at 498.

18. *Id.* at 500.

19. *Id.*

20. *Id.* at 501 (emphasis in original).

21. *Id.*

22. *Id.*

23. 84 N.Y.2d 841 (1994).

24. *Id.* at 843–44 (citing *Ross*, 81 N.Y.2d 494; *Rocovich*, 78 N.Y.2d 509).

25. 86 N.Y.2d 487 (1995).

26. *Id.* at 490.

27. *Id.* at 489.

28. *Id.* at 491.

29. 92 N.Y.2d 909 (1998).

30. *Id.* at 911–12.

31. 96 N.Y.2d 259 (2001).

32. *Id.* at 266.

33. *Id.* at 267.

34. *Id.* at 268.

35. *Id.*

36. *Id.*

37. *Id.* at 269.

38. *Id.* at 270.

39. *Id.* However, in *Quattrocci v. F.J. Sciame Constr. Corp.*, 11 N.Y.3d 757, 758–59 (2008), the plaintiff was struck and injured by falling planks that were part of a makeshift platform used to facilitate the installation of an air conditioner over a doorway. There, the Court of Appeals held that the falling object liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured.

40. 18 N.Y.3d 1 (2011).

41. 4 N.Y.3d 399 (2005).

42. *Id.* at 408.

43. 91 N.Y.2d 457 (1998).

44. *Id.* at 460–61.

45. *Id.* at 465.

46. *Id.* at 464. The Court defined Astructure" for the purposes of Labor Law § 240(1) as Aany production or piece of work artificially built up or composed of parts joined together in definite manner."

47. *Id.* at 465.

48. 8 N.Y.3d 675 (2007).

49. *Id.* at 679.

50. *Id.* at 681.

51. *Id.*

52. *Runner v. N.Y. Stock Exchange, Inc.*, 13 N.Y.3d 599, 603 (2009).

53. *Id.*

54. *Id.* at 604

55. *Id.* at 605

56. *Wilinski v. 334 E. 92nd HDFC*, 18 N.Y.3d 1, 5 (2011).

57. *Id.* at 7 (emphasis added).

58. *Id.* at 9.

59. *Id.* at 10.

60. *Id.* at 11.

61. *Id.*

62. 18 N.Y.3d 134 (2011).

63. *Id.* at 140.

64. *Id.*

65. 18 N.Y.3d 335 (2011).

66. *Id.* at 339.

67. *Id.*

68. 18 N.Y.3d 521 (2012).

69. *Id.* at 526.

70. 99 A.D.3d 31 (3d Dep't 2012).

71. John Caher, *Parsing Recent Precedent, Panel Declines to Apply Gravity Liability*, N.Y.L.J., July 20, 2012.

72. *Oakes*, 99 A.D.3d at 39.

73. *Id.* at 39–40. (emphasis in original).

74. 36 Misc. 3d 1202(A) (Sup. Ct., Kings Co. 2012).

75. *Id.* at *8 (citations omitted).

76. 950 N.Y.S2d 35 (1st Dep't 2012).

77. *Id.* at 41.

78. 99 A.D.3d 13 (2d Dep't 2012).

79. *Id.* at 16–17.

80. 36 Misc. 3d 1233(A) (Sup. Ct., N.Y. Co. 2012).

81. *Id.*

82. N.Y.L.J., Sept. 14, 2012, p. 26, col. 1.

83. *Id.*

84. 36 Misc. 3d 1236(A) (Sup. Ct., Kings Co. 2012). Fairway and several other defendants did not appear in this action, and default was taken against them in an order dated June 1, 2009.

85. *Id.* at *3.

86. *Id.* (citations omitted).

87. 98 A.D.3d 864 (1st Dep't 2012).

88. *Id.* at 866.

89. *Id.* at 869, 872 (citations omitted).

90. *Id. See* Letters to the Editor, Foreseeability and Labor Law § 240(1) by David H. Perecman, Chair of the Labor Law Committee of the N.Y.S. Trial Lawyers Ass'n (N.Y.L.J., Sept. 27, 2012, p. 6, col. 4), in which he states his opposition to the inclusion of the element of foreseeability in Labor Law § 240(1) cases (" [T]he imposition of a foreseeability requirement runs counter to and will serve to defeat the guiding principles behind § 240(1). * * * [T]o actually graft on to the statute a concept like what is reasonably foreseeable would eviscerate the statute and create havoc.").

91. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991).

92. *Joblon v. Solow*, 91 N.Y.2d 457, 460–61 (1998).

BY DAVID PAUL HOROWITZ

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Not Sure If I Can Say Something

Introduction

With the holiday season over, January is a busy month for litigators, occasioned in large part by matters adjourned due to the near universal post-Thanksgiving malaise. With depositions back in full swing, we return to a previous topic.

In 2010 the Fourth Department issued its decision in *Thompson v. Mather*,[1] concerning the role of an attorney representing a non-party witness at a deposition. I managed to milk the topic for not one, not two, but three columns,[2] with just one trial-level decision having applied *Thompson* at that time – *Sciara v. Surgical Associates of Western N.Y., PC*.[3] I now return to that old chestnut to discuss a recent spate of trial-level decisions applying *Thompson* in the real world.

For those readers who do not obsess over the *Thompson* decision the way I do, the crux of the court's holding was:

> We agree with plaintiff that counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pre-trial deposition.[4]

The four trial courts applying the Fourth Department's holding in *Thompson* discussed herein are located in the First and Third Departments. As a reminder, where the Court of Appeals has not ruled on an issue, and one Appellate Division has ruled on the issue, that appellate court's holding is controlling throughout the state, including the trial courts in the other three departments:

> The Appellate Division is a single State-wide court divided into departments for administrative convenience and, therefore, the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule.[5]

With depositions back in full swing, we return to a previous topic.

Where the Attorney Representing the Non-Party Witness Also Represents a Party

In prior columns I expressed the opinion that the holding in *Thompson* did not apply to the situation where an attorney representing the non-party witness also represented one or more parties in the same action. In *Alba v. New York City Transit Authority*,[6] Justice Michael B. Stallman in New York County concluded that the *Thompson* holding did not, in fact, apply where counsel representing the non-party also represented a party in the action:

> Commentators have suggested that *Thompson* does not address the situation, where a party's counsel represents the non-party as well, because a party's counsel may raise objections at trial. This Court agrees.
>
> "*Thompson* does not place any restrictions on the ability of an attorney representing a party to the action to represent a non-party at the deposition and to participate fully in that deposition. Thus, it is the hat worn by the attorney, rather than that worn by the witness, that controls the ability of the attorney to participate in a nonparty deposition." (David Paul Horowitz, May I Please Say Something?, 83 NY St BJ [6] at 82.) Otherwise, a party's counsel who is entitled to raise objections at a deposition would lose that right to object by virtue of the dual representation of a non-party.[7]

Where the Witness Acts as "[Parties] Agent"

In *St. Louis v. Hrustich, M.D.*,[8] Justice Michael C. Lynch ruled on a motion by defense counsel to compel a second deposition of the fiancé of the plaintiff in a medical malpractice action. The fiancé, a non-party, had testified at his deposition concerning certain medical treatment received by the plaintiff but was directed by plaintiff's counsel not to answer questions concerning conversations between the fiancé and plaintiff's counsel, regardless of whether or not the plaintiff was present when the conversations took place. The court explained the grounds for the motion:

> Now, defendants claim that [the fiancé's] communications with [plaintiff's counsel] are not protected by the attorney-client privilege because [the fiancé] is a non-party and is not represented by [plaintiff's counsel]. Further, defendants claim that plaintiff herself waived the right to assert that the attorney-client privilege attaches to any communications she had with her attorney while [the fiancé] was present. In defendants' view, [plaintiff's counsel] had no basis to object to [the fiancé's] testimony with regard to his conversations with counsel and he should therefore be compelled to reappear at a deposition.[9]

The court reviewed the proof submitted by the plaintiff in opposition to the motion:

> In response to defendants' motions, plaintiff submits an affidavit wherein she avers that "[i]n nearly all respects," she and [the fiancé], "treat one another as husband and wife." She explains that when she received the anonymous letter, she was "in great pain and unable to care for [herself] or to go about legal or medical assistance." She therefore "relied on the [fiancé] in this regard, and I am aware that [the fiancé] contacted an attorney on my behalf." Further, she explains that [the fiancé] took her to her medical appointments and meetings with her attorney and she avers that she, "certainly expected that all of our communications with counsel would remain confidential."
>
> [Plaintiff's counsel] submits an affirmation wherein he avers that his firm represents [the fiancé] and that both [the fiancé] and plaintiff signed a retainer agreement with the firm. He avers that when [the fiancé] first contacted him, plaintiff's medical condition, "prevented her from speaking for herself."
>
> [Plaintiff's counsel] avers that, "at all times, [he] regarded [his] communications with [the fiancé] to be confidential and covered by the attorney-client privilege with both of them." As an example of the services provided, [plaintiff's counsel] avers that his firm researched whether, based on the nature of his relationship with plaintiff, [the fiancé] could assert a loss of consortium claim against defendants.[10]

Based upon the proof submitted, the court denied the defendants' motion for a second deposition of the fiancé.

> As set forth above, this dispute arose because [plaintiff's counsel] would not allow [the fiancé] to answer any questions with regard to his communications with counsel. Generally, though a non-party witness has the right to be represented by counsel at a deposition, counsel may not object or otherwise participate in the deposition unless necessary to invoke a testimonial privilege. In this Court's view, [the fiancé's] deposition testimony, together with plaintiff's affidavit and [plaintiff's counsel's] affirmation, support plaintiff's claim that [the fiancé] was seeking legal advice when he contacted [plaintiff's counsel], thus, an attorney-client relationship existed between them. Further under the circumstances presented on the submissions, the Court concludes that [the fiancé] was acting as plaintiff's agent when he met with plaintiff and counsel. The communications were therefore privileged and [plaintiff's counsel] properly asserted the attorney-client privilege as the basis for his objection to [the fiancé's] testimony with regard to his communications with counsel.[11]

Where the Non-Party Witness Has a Privilege to Assert

Two cases applying *Thompson* arose where New York courts were asked to enforce a subpoena for a deposition in connection with an action pending in another jurisdiction.

In the first decision, *Morgan Keegan & Co., Inc. v. Eavis*,[12] Justice Lucy Billings ruled on a motion to quash a subpoena directing the non-party deposition of a journalist in connection with an action pending in New Jersey. The request for the subpoena had been granted *ex parte* by another justice and directed that the non-party appear in New York for deposition for use in the New Jersey action.

Justice Billings quashed the subpoena based upon the journalist's assertion of privilege pursuant to Civil Rights Law § 79-h. Citing *Thompson*, Justice Billings observed, in *dicta,* that the non-party's attorney would be unable to "object to questioning or otherwise participate in the deposition," which the journalist would have to assert himself.

In the second decision, *In re Quash Subpoena Ad Testificandum ex rel. Kapon v. Koch*,[13] Justice Michael D. Stallman also confronted a motion to quash a subpoena, brought under CPLR 3119,[14] which "provides that out-of-state subpoenas can be submitted to an attorney licensed to practice in New York, who may then issue a subpoena."[15]

After denying the motion to quash, Justice Stallman addressed the branch of the motion seeking a protective order concerning confidential information that might be disclosed in the course of the deposition:

> Nevertheless, petitioners' concerns about being required to disclose confidential information during their non-party definitions are not unfounded, in light of the Appellate Division, Fourth Department's decision in *Thompson v Mather*.[16]

Justice Stallman, following *Sciara*, held:

> "'Uniform Rules §§ 221.2 and 221.3 are not limited to parties but apply to deponents.' Thus, in the event that a question posed to a nonparty fits within the three exceptions listed in § 221.2, the nonparty's attorney is entitled to follow the procedures set forth in §§ 221.2 and 221.3." Thus, at the very least, counsel for a non-party witness at a deposition may object under the permitted exceptions set forth in the Uniform Rules for the Conduct of Depositions. (22 NYCRR 221.1 et seq.).[17]

Justice Stallman next addressed the right of the attorneys for other parties who might be adversely impacted by the disclosure of confidential information at the deposition:

> In the Court's view, the right of Kapon's counsel or Christoph's counsel to object at their non-party depositions pursuant to the Uniform Rules for the Conduct of Depositions does not provide reassurance against disclosure of the confidential information or trade secrets of AMC. After all, Kapon and Christopher were named individually in the subpoenas, and any significant prejudice caused in the event that a question calls for disclosure of AMC's confidential information or trade secrets would fall upon AMC.
>
> Therefore, this Court will permit Kapon's counsel and Christoph's counsel to object and the witnesses to decline to answer any question at the deposition on the ground that the answer would divulge confidential information or trade secrets of AMC. Every such question to which this objection is raised shall be marked for a ruling, which shall be made upon respondent's motion.[18]

Alternatively, Justice Stallman directed that the parties could agree to the appointment of a private referee or special master "to determine any objections raised at the non-party depositions."[19]

Conclusion

These four cases will not be the last word on the application of *Thompson*, and practitioners representing non-party witnesses should check for new decisions before representing their clients at depositions.

In the next issue, finally, this column will return to the topic of the disclosure of privileged and confidential information raised in last September's column, "I Thought That Was Confidential."[20] ■

1. 70 A.D.3d 1436 (4th Dep't 2010).
2. *Just Sit There and Be Quiet*, N.Y. St. B.J. (June 2011), p. 15; *May I Please Say Something*, N.Y. St. B.J. (Jul./Aug. 2011), p. 82; *You May Say Something*, N.Y. St. B.J. (Sept. 2011), p. 16.
3. 32 Misc. 3d 904 (Sup. Ct., Erie Co. 2011).
4. 70 A.D.3d 1436, 1438 (4th Dep't 2010).
5. *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663 (2d Dep't 1984) (citations omitted).
6. 37 Misc. 3d 838 (Sup. Ct., N.Y. Co. 2012).
7. *Id.* at *3–4.
8. 35 Misc. 3d 1232(A) (Sup. Ct., Albany Co. 2012).
9. *Id.*
10. *Id.* at *2.
11. *Id.* at *2–3 (citations omitted).
12. 2012 N.Y. Slip Op. 22310 (Sup. Ct., N.Y. Co. Mar. 2, 2012).
13. 37 Misc. 3d 1211(A) (Sup. Ct., N.Y. Co. 2012).
14. Effective Jan. 1, 2011.
15. *Kapon*, 37 Misc. 3d 1211(A), at *2.
16. *Id.* at *8 (citation omitted).
17. *Id.* at *8 (quoting *Sciara v. Surgical Assocs. of W. N.Y., PC*, 32 Misc. 3d 904, 913 (Sup. Ct., Erie Co. 2011).
18. *Id.* at *8–9.
19. *Id.* at *9.
20. N.Y. St. B.J. (Sept. 2012), p. 20.

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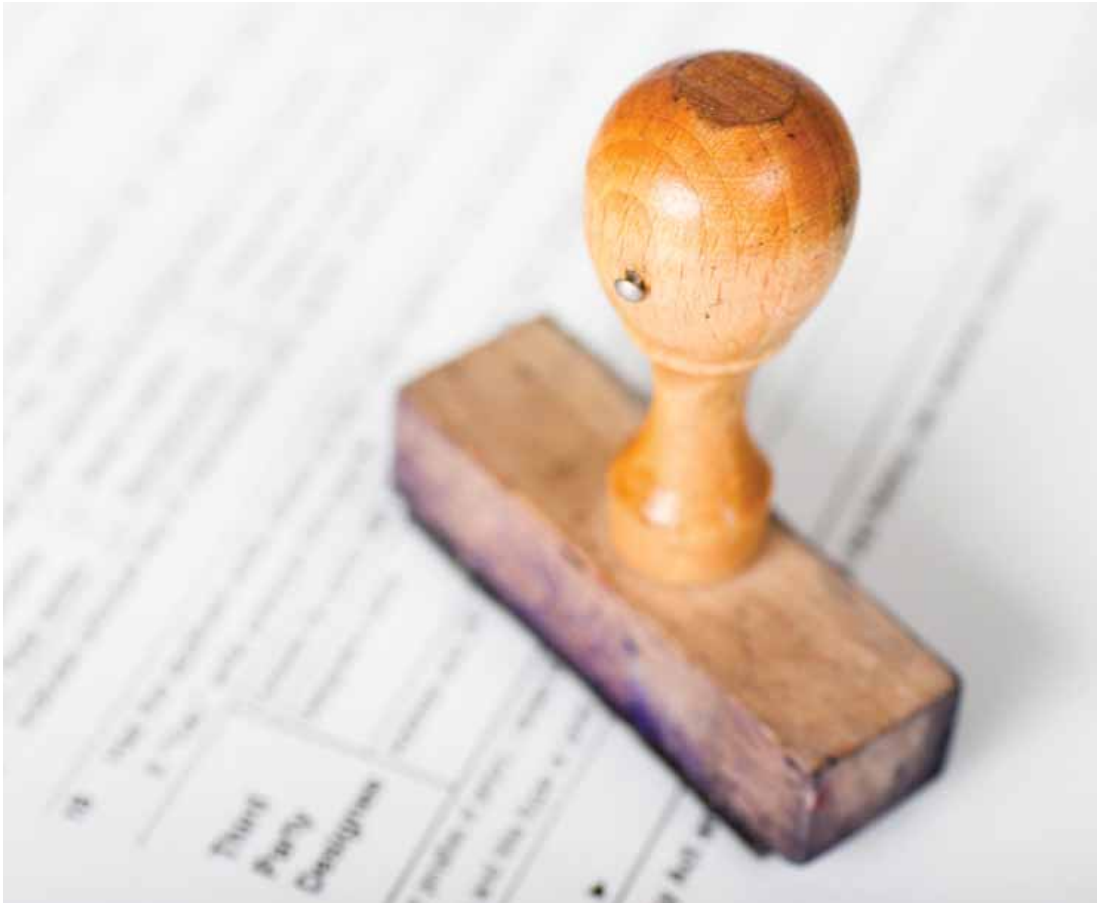

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Revisiting the Collateral Effects of Agency Determinations in Subsequent Legal Proceedings

By Ralph M. Kirk and Justin S. Teff

Advocates in administrative and arbitral forums, as well as civil trial counsel, need to keep in mind the potential collateral impact the determinations of such tribunals may have in state court and other legal proceedings. By virtue of the venerable doctrine of collateral estoppel, also known as issue preclusion, the findings of an agency or arbitrator can have effects that ripple far beyond that proceeding itself, even apart from the binding nature of the evidence one adduces at hearing.

Though the rule of general application is reasonably plain, the question of precisely which agency findings are to be accorded later preclusive effect, particularly with respect to New York's Workers' Compensation Board, can be difficult to answer. In *Auqui v. Seven Thirty One Limited Partnership*,[1] for example, a divided First Department reversed a state trial court's decision to give collateral estoppel effect to a prior workers' compensation finding regarding the claimant's period of causally related

disability. Now pending before the Court of Appeals, the case could potentially engender substantial relief or concern for attorneys in this area.

Yet given the general potential for preclusion pitfalls, and also the strategic advantages that these issues can at times bring to the litigation table, counsel for claimants on all fronts should understand the legal and practical intricacies of this subject. In a complex work-injury situation, there is often a disconnect between civil trial counsel and other attorneys handling not only the workers' compensation claim but also multiple ancillary claims on behalf of the injured worker. Because of the possible pitfalls and advantages, counsel handling various claims related to a particular work injury (or even other injuries involving the same injured worker) need to carefully coordinate and cooperate so as to obtain the most beneficial recovery and protect the client's overall interests.

The Modern Scope of Issue Preclusion

The familiar principle of collateral estoppel, today increasingly termed "issue preclusion," is a more particular form of the res judicata (or "claim preclusion") doctrine that precludes relitigation of particular facts and issues that have already been decided in a prior proceeding.[2] Because "the reappearance of an 'issue' is much more frequent than the reappearance of the whole 'claim,'" issue preclusion tends to "operate[ ] on a broader plain and hence with more influence" than the overarching res judicata doctrine itself.[3] The collateral estoppel principle, like its companion, serves the dual functions of fairness to the parties in litigation and avoidance of undue burden on the courts, by mandating finality once a person has had his or her day in court and a matter has been duly decided.[4] Primarily a creature of common law, it eschews rigidity in rule and application, necessitating instead a searching *sui generis* inquiry in each instance it is sought to be invoked.

Issue preclusion may be invoked only against one who was a party or in privity with a party to the prior action. Of course, one who was not a party to the prior proceeding has not had a fair opportunity to be heard on or to contest the finding now sought to be declared binding in perpetuity. Next it is required that there be a true "identity of issue" between a fact or conclusion determined in the prior action and the fact or conclusion sought to be relitigated.[5] As will be seen, this prong and its attendant peculiarities in the administrative context are the primary concern of *Auqui*. Finally, the party against whom estoppel is invoked must have had a "full and fair opportunity" to litigate the issue in the first proceeding.[6] The full and fair opportunity test involves a pointed inquiry into the tribunal and the precise process from whence the prior determination issued.[7]

New York courts have held that determinations made by administrative agencies may be accorded subsequent estoppel effect,[8] a development often traced to the decision of the Court of Appeals in *Ryan v. New York Telephone Co.*[9] *Ryan* involved the use of a determination of the Department of Labor in the unemployment insurance context to preclude prosecution of various aspects of a subsequent state court action as a result of the findings that had been made by the agency.[10] The Court explained in *Ryan* that the doctrines of res judicata and collateral estoppel could operate to give "conclusive effect to the quasi-judicial determinations of administrative agencies . . . when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law."[11] As a rule, the agency decision must be considered final in order to later be deemed preclusive.[12]

The Court provided further clarification and reinforcement in three decisions handed down on the same day. In *Allied Chemical v. Niagara Mohawk*, the Court gave specific guidance relative to the "multifaceted inquiry" involved in determining "whether an agency proceeding was 'quasi-judicial.'"[13] As is generally the case with issue preclusion, the Court held in *Halyalkar v. Board of Regents* that estoppel would not apply if an issue was not actually litigated in the prior proceeding.[14] And in *Staatsburg Water Co. v. Staatsburg Fire District*, the Court reaffirmed that, in the administrative context, it is necessary that one be both a party to the prior proceeding and have a full and fair opportunity to litigate the fact or issue in question.[15] In the years since there has been expanded use

of administrative decisions as preclusive in subsequent proceedings, particularly state court actions.

For example, the courts have determined that findings of the Workers' Compensation Board may later be given estoppel effect.[16] The rules mostly accord with those customary to issue preclusion. For one, the courts have held that the party to be bound must also have been a party (or in privity) to the Board proceeding.[17] Interestingly, this can come up even in situations where a case has been referred by the court to the Board,[18] as the Board itself has stricter rules as to who is a party of interest for purposes of hearing participation.[19] Said party must likewise have had a full and fair opportunity to litigate the point,[20] and it is required that the Board actually rule on the fact or issue for it to later be binding.[21] As intimated, the identity of issue prong is where the matter grows more complex.

Identity of Administrative Issue

In general, an agency's findings may have estoppel effect in other legal proceedings. What has posed greater difficulty is which agency findings to accord such preclusive effect. The subject arises in the state court context, as well as in the context of other agencies' subsequent proceedings, where the parties are, or the agency itself is, sought to be bound by prior findings; fortunately the governing principles are largely the same.[22]

Agencies, like courts, hold hearings and render findings of fact as well as ultimate conclusions of fact and law. In the usual issue preclusion analysis, it should not matter whether the proposed estoppel involves a pure finding of fact or an ultimate combined conclusion of fact and law.[23] Indeed, "if the legal theory in both actions is the same and there are no significant differences in the facts upon which both theories are based, identity of issue is generally satisfied."[24]

A dilemma arises, however, because each administrative agency is set up for a particular purpose, with its own governing policy considerations and, more important, its own enabling statute, legal definitions, and agency standards. While an agency's adjudicative procedures will likely be more or less as those in an ordinary trial, the ultimate conclusion it reaches relative to any given issue (often a mixed question of fact and law) may by definition contain elements or factors that vary from what might constitute the same nominal conclusion in a different context. Thus, it is likely not reasonable to merely remove the nominal conclusion of the agency and mechanically apply it to find an identity of issue without further inquiry.

Faced with reconciling traditional collateral estoppel mandates with the realities of the administrative process, the courts imported a legal distinction from the civil law context, specifically the principle of *Hinchey v. Sellers*.[25] *Hinchey* addressed whether the conclusion of a New Hampshire state tribunal would be given preclusive effect in a later New York action, despite the fact that the ultimate issue of "permission" had different technical legal standards in each action.[26] The Court of Appeals held that because of the differing standards, the ultimate conclusion of the sister-state court could not, in and of itself, have preclusive effect in the New York action; yet the underlying findings of fact that constituted the conclusion may indeed have such effect.[27]

The courts met the issue in the administrative context in *Engel v. Calgon Corp*.[28] In *Engel*, the petitioner claimed that because the New York Labor Department Unemployment Insurance Appeal Board had previously found him to be an employee for purposes of his unemployment insurance claim, the State Division of Human Rights (SDHR) was thereafter precluded from reaching a different legal conclusion in its own forum.[29] The Third Department disagreed. The court cited *Hinchey* with approval and held that a distinction exists between an agency's findings as to "pure or evidentiary facts," which will have estoppel effect, and an "ultimate fact, or . . . a mixed issue of fact and law," which is not accorded such effect (and in this case was not binding on the SDHR).[30] Because the ultimate conclusion was one committed to the unique discretion of the agency, there could be "no identity of issue" for purposes of collateral estoppel effect in the subsequent proceeding.[31] In a brief affirmation, the Court of Appeals referenced the decision in *In re Guimarales*,[32] which used essentially the same distinction in the arbitral context.[33]

In the workers' compensation arena, a few early appellate cases determined without extended difficulty that a finding of the Board regarding the proper employer would have collateral estoppel effect in a third-party personal injury action arising out of the work injury.[34] In the 1997 case of *Lee v. Jones*,[35] the question was again whether a decision of the Board as to the employer-employee relationship should have preclusive effect in a subsequent state court action. Here the plaintiffs argued against estoppel on the basis that the legal standards used by the Board to determine the issue were different from those contained in the Labor Law. The Third Department rejected this concept and, in affirming the *Engel* distinction, explained, "In this case, it is not the Board's ultimate determination of no employment relationship that is being considered for preclusive effect. Rather, the focus is properly on the underlying purely factual determinations . . . ."[36] *Lee* was followed in principle in *Akgul v. Prime Time Transportation*,[37] a case involving a Labor Law action and a prior determination of employment by the National Labor Relations Board.

While the results of the inquiry have differed through the years, the general rule has been consistent. An administrative or arbitral finding of pure evidentiary fact can be binding in subsequent proceedings (whether in state court or before a different agency), but an ultimate fact/conclusion is not, in and of itself, entitled to preclusive effect.

Evidentiary Versus Ultimate Facts – The *Auqui* Problem

Unfortunately this does not resolve the entire dilemma, as the distinction between which findings are pure evidentiary facts, as opposed to ultimate facts / conclusions, is not always simple to discern, and yet is critical to the analysis. The Appellate Panel's split decision in *Auqui* is emblematic of this difficulty.

Typically, a workers' compensation claim will remain open (which is to say, within the continuing jurisdiction of the Board) for many years. As a result, during the life of the claim, including any initial controversy involved, the Board may have occasion to pass on a myriad of possible relevant litigated issues. Such can include and surround the occurrence of an accident or development of a condition, employment relationship, sites of injury, period and extent of disability (both temporary and permanent), and effects of pre-existing or subsequent / consequential injuries or conditions, to name only a few.

As noted, the *Auqui* dilemma concerns the line of demarcation between mere evidentiary facts, which are binding, and ultimate facts / conclusions, which in and of themselves are not binding. The courts have not provided durable guidance as to what characteristics are possessed by an ultimate fact that would serve to distinguish it from an evidentiary fact.

For example, the courts have taken no issue with giving estoppel effect to a prior finding of the Board: (1) that the plaintiff was standing on the ground, not a ladder, when he fell;[38] (2) as to the status of the general contractor on the job site;[39] (3) that the plaintiff failed to demonstrate that her injuries were the result of a fall from a ladder;[40] (4) as to the validity of an insurance policy exclusion;[41] and (5) that the plaintiff's aggravated back injury was causally related to the accident.[42] Incidentally, the Second Department has countenanced a trial court's use as preclusive in a third-party action of a prior finding of the United States Department of Labor (Administrative Law Judge and Benefits Review Board) that the claimant had not suffered a heart attack in the course of his employment.[43] In contrast, there seems no doubt that the issue of employer-employee relationship is an ultimate conclusion of the Board, which is not in itself entitled to preclusive effect, though the underlying factual findings may themselves have such effect.

The *Auqui* Case

The claimant in *Auqui*, a delivery person, was injured in the course of employment on January 24, 2003, when a sheet of plywood fell from a building under construction.[44] The claimant filed a workers' compensation claim, in which wage-replacement benefits were awarded, as well as a personal injury action in Supreme Court in 2004 against the third-party building owner, Seven Thirty One Limited Partnership. In early 2006, a Workers' Compensation Law Judge (WCLJ) in the compensation claim determined, after litigation, that the claimant had no further causally related disability with respect to the work injury after January 24, 2006.

The Board itself affirmed this finding on appeal. In 2009, the defendants in the personal injury action moved to preclude the plaintiff from relitigating the duration of his injury-related disability, as the issue had previously been tried and determined in the compensation proceeding.

Supreme Court granted the defendant's collateral estoppel motion, and the plaintiffs appealed.

A divided First Department panel reversed the trial court.[45] Citing *Engel* and *Akgul*, the three-member majority noted the established distinction between evidentiary facts and ultimate facts, and held that the Board's decision as to period of causally related disability was an ultimate fact, which could not be accorded estoppel effect.[46] The majority explained that the Law Judge's decision was "not, nor could it be, a definitive determination as to whether plaintiff's documented and continuing injuries were proximately caused by defendants' actions."[47]

A two-member dissent disagreed, opining that as all elements for estoppel had been met, the trial court was correct in its determination.[48] While the dissent did not disagree with the principle of law as stated by the majority, the decision of the WCLJ as to the period of disability, in its opinion, was a finding of evidentiary fact that should be entitled to preclusive effect.[49] The dissent reasoned in part that such a finding was based not upon interpretation of complex rules or statutes, but upon a plain decision among conflicting factual evidence; as such, it was an evidentiary, not an ultimate, fact.[50]

The case is currently pending before the Court of Appeals. As is often the situation, the Court could decide the case on a very fact-specific basis, but it might also take a broader view and use the opportunity to provide some concrete guidance for future analysis of this issue. Given the volume of litigation in the courts, the value of the estoppel motion is likely to increase over time, as will the value of any delineated guidance.

For one possibility, it would not be unreasonable for the Court to suggest, even as a general proposition, that if a Board finding is rendered with reference to any legal definition or standard whatsoever, it is likely an ultimate fact / conclusion as opposed to an evidentiary fact. Specific findings would still require careful analysis, as general categories of Board findings (e.g., an accident arising out of and in the course of employment) could conceivably fall into either category, depending upon the precise foundation for the decision.

Under this type of analysis, it is arguable that findings of the Board relative to causally related disability, in most instances, are ultimate facts. While a finding that the claimant has absolutely no ongoing disability after a certain date may be largely factual, depending on its basis, any finding as to degree of disability or permanency made by the Board is characteristically based upon application of

the Board's particular rules, standards and practices, and hence should not be accorded preclusive effect.

In workers' compensation, findings as to level of disability, whether temporary or permanent, are in most instances an amalgamation of Board standards and practices, as well as its unique promulgated medical/impairment guidelines (which differ from AMA Guidelines).[51] Findings as to permanent disability or loss of earning capacity especially are rendered according to unique guidelines and, moreover, are combined with a subjective WCLJ assessment of the personal vocational elements of a worker's loss. Because such findings are made with reference to the Board's particular legal rules, promulgated standards, and common practices,[52] they are arguably ultimate facts which do not possess an "identity of issue," namely, the decision to be made in state court.

Perhaps another reason why Board findings as to period and extent of disability do not bear an identity of issue is that WCL § 123 provides the Board with continuing jurisdiction over all claims, including the authority to reopen them, subject to certain statutory limitations, and even to modify prior findings. In practice, the Board can and often does make findings relative to change in condition, even after a finding of no further continuing disability. Put another way, causality of ongoing disability is always in issue in workers' compensation claims, absent a full and final settlement under WCL § 32. In a sense this is a reverse application of the rationale utilized by the Court in *Bissell v. Town of Amherst*[53] (while the jury is constrained to a single assessment, the Board is not). In this instance, given the Board's continuing jurisdiction, there is no true identity of issue as between the state court's one-time assessment and the Board's findings on causally related disability through the date of that assessment.

Practical Implications

Given the law in this area, best practice effectively mandates close cooperation among counsel handling various aspects of complex injury litigation and associated or ancillary claims. The number of remedies available to an injured worker is relatively large, along with potential for subsequent estoppel traps. Maximizing recovery, both short and long term, as well as minimizing risk, is part of an overall strategy for moving from occurrence to conclusion, recognizing that "conclusion" may involve collateral benefits for life. Also, apart from the untoward possibility of literal preclusion, carefully managed administrative findings can often be used to a client's advantage to narrow issues and promote quick resolution of various claims. For these and other reasons, coordination, from the outset, is indispensable to properly protect the client, on all fronts.

The Spectrum of Post-Injury Claims

In addition to the possible state court action, the disabled worker often must work through myriad other potential claims and/or entitlements, which are frequently handled by separate counsel. Therefore, all counsel in the client's action must possess at least a general understanding of some more common short- and long-term remedies that are often suggested to (or even required to be filed by) the injured worker.

For example, an injured worker who is totally disabled from his past relevant work, but not all forms of work, may qualify for both workers' compensation and simultaneous unemployment insurance benefits. A person injured in a work-related motor vehicle accident may have a claim for workers' compensation, which is primary in such situations, and also for residual wage loss and other benefits under New York's no-fault insurance scheme. At times an injured worker will make a claim with the State Division of Human Rights or Equal Employment Opportunity Commission relative to events arising in the course of employment. Various municipal police and firefighters can be entitled to full wage replacement benefits under General Municipal Law §§ 207-a and 207-c. Injured workers rendered unable to engage in their past relevant work or any substantial and gainful employment on a long-term basis may be entitled to state retirement benefits, disability or otherwise, as well as Social Security Disability (SSDI) and/or SSI benefits.

In nearly all instances, entitlement in the collateral claim will be determined by virtue of specific findings of fact and law, made by an administrative body at some level (or possibly an arbitrator), that have the potential to later be deemed preclusive. The various available claims tend to travel on disparate tracks as time progresses from the date of injury. These collateral claims, and the issues attendant to their resolution, are often handled at a fast pace with multiple administrative proceedings to determine the respective rights of recovery.

Preclusion Pitfalls

Considering the administrative finding's potential for perpetual significance, relevant counsel, with coordination and cooperation, should together chart an overall strategy to obtain the most beneficial results for the client.

Here, the primary tension is between the client's immediate needs and the larger potential compensatory recovery often offered by the state court action. The in-depth nature of full recovery litigation – extending not only to loss of earning capacity and medical benefits, but also to pain and suffering, damages for permanent limitation of activities and enjoyment of daily life, and derivative causes of action – is often in stark contrast to the immediate needs of the injured worker to secure sustenance during the pendency of the primary claim. The collateral claims, on the other hand, tend to move at a faster pace and indeed are generally geared toward providing more immediate forms of compensation to the injured party (though many can also provide lifetime benefits). The collective goal is, of course, to strike the most intelligent balance between immediacy and long-term potential.

The attorney handling the administrative claim(s) should not embark upon determination of any critical element of a claim involving a third-party action without prior input from the third-party attorney and a comprehensive evaluation of the potential consequences it may have on the primary claim. The preclusion potential leaves open the possibility, at all turns, that administrative counsel might unwittingly tie the hands of the third-party attorney, who in most instances is handling the claim with the larger potential recovery. While illustrations abound, suffice it to note that an issue determined with preclusive effect may in itself, or together with other uncontroverted facts, provide the basis for summary judgment of a major part of the entire civil court action.

The collective inquiry, then, is which issues can and should be submitted for administrative determination and when. Given the Board's continuing jurisdiction over all claims, many times administrative litigation can be deferred, if beneficial, for any number of reasons, without substantially detracting from the client's immediate quality of life. The risk of obtaining an adverse finding on any given point or issue must, as noted, be very carefully balanced against the client's immediate needs and the possible benefits of such a finding in the short term. At the same time, some administrative findings are rather easy to obtain, and third-party counsel, in coordination with administrative counsel, should also consider whether there is persuasive value in obtaining such a finding from the agency.

Persuasive Advantages

In the majority of state court actions, the defendant(s) will not be a party to the client's workers' compensation claim, and hence, the claimant cannot technically demand that the compensation findings have preclusive effect. Consider, however, that there is persuasive value to such a finding, whether or not the particularized issue or the parties to litigation are precisely the same. Even if not technically binding, there is no reason to assume that an administrative finding is incorrect as a matter of fact and/or law; and fair and reasonable resolution of any claim, and not a trial, is the goal of all litigants. Carefully used, administrative findings can have persuasive value at settlement conferences, in negotiations with the carrier, in mediation and arbitration of claims, and even at trial. And for overburdened civil trial courts, the significance not just of the preclusive effect but also of the possible persuasive value of administrative findings, cannot be overstated.

Understanding the Finding

Communication with administrative counsel can also shed light on the nature and context of the administrative finding in question, which can often be esoteric, for purposes of determining whether all elements of estoppel – in addition to identity of issue – have truly been met.

A good illustration, especially germane to workers' compensation, comes by way of the Fourth Department in *Telesco v. Bateau*,[54] which reversed a trial court's decision to grant preclusive effect to a Board finding that the plaintiff's back condition was not causally related to a March 1994 accident. The court explained that the Board's finding had been made in the context of a dispute between two insurance carriers solely over apportionment of liability. Because the "[p]laintiff had no stake in the Board's determination . . . 'application of the doctrine of collateral estoppel under the circumstances of this case would violate basic notions of fairness.'"[55]

The situation in question occurs frequently in compensation cases, particularly given the Board's continuing jurisdiction over all claims. Over the course of a working life, a worker might sustain multiple injuries, and insurance carriers in the different claims will seek division, or apportionment, of ongoing liability. In most cases, the claimant will receive the same level of benefits irrespective of the apportionment, and hence has no cause to expend substantial energies during the litigation between insurance carriers. In *Telesco* the court reasonably determined that given this reality, the claimant did not have a fair opportunity to litigate the issue for purposes of the estoppel doctrine.

Many administrative findings have such peculiar intricacies, so coordination between third-party and administrative counsel can be of great assistance in determining whether collateral estoppel is truly a fair and appropriate assertion under the circumstances.

Conclusion

Whatever the Court's precise decision in *Auqui*, it will not detract from the need for close and careful coordination between all counsel responsible for the injured worker's claims. While coordination at the conclusion of the third-party action is common, relative to issues of consent, liens and offsets, and equitable contribution, a review of the legal and practical intricacies of the collateral estoppel doctrine in the administrative context underscores the benefits of commencing this relationship earlier rather than later. In so doing, an intelligent balance can be struck between the worker's immediate needs and the potential for future recovery, and the claimant's various attorneys can rest assured they have protected the client on all possible fronts. ■

1. 83 A.D.3d 407 (1st Dep't 2011).
2. *See generally*, Restatement (Second) of Judgments §27, *et seq.* (1982).
3. *See* David D. Siegel, New York Practice, 3d ed., § 443, at 716.
4. *See* Siegel, *supra* note 3, § 442, at 714; also *Schwartz v. Public Administrator*, 24 N.Y.2d 65, 69 (1969).
5. *See Schwartz*, 24 N.Y.2d at 71.
6. *See id.*
7. *See id.* at 72; *also* Siegel, *supra* note 3, §467, at 750–55. The burden of demonstrating an identity of issue falls on the proponent of the estoppel, whereby the burden shifts to the opponent to demonstrate the absence of a full and fair opportunity to litigate the issue. *See Schwartz*, 24 N.Y.2d at 73.

8. *See Ryan v. N.Y. Tel.*, 62 N.Y.2d 494 (1984); *Brugman v. City of N.Y.*, 64 N.Y.2d 1011 (1985) (preclusive effect given to administrative determination of the New York City Employees' Retirement System denying application for accidental disability status, to dismiss a subsequent tort action arising out of the same occurrence). The Restatement supports granting preclusive effect to administrative determinations. *See* Restatement (Second) of Judgments §83 (1982).

9. 62 N.Y.2d 494; *see* Siegel, *supra* note 3, § 456, at 732; *see also* Jay Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?* 55 Fordham L. Rev. 63 (1986). It is also clear that collateral estoppel may be applied in the context of arbitration. *See, e.g., In re Ranni*, 58 N.Y.2d 715 (1982); *In re Guimarales*, 68 N.Y.2d 989 (1986); Restatement (Second) of Judgments §84 (1982).

10. *Ryan* was the subject of fairly heavy criticism, and some commentators have questioned the general wisdom of granting preclusive effect to administrative determinations, particularly given the lack of pre-trial discovery or strict application of the rules of evidence, which is the norm in administrative forums. *See generally* Carlisle, *supra* note 9.

11. *Ryan*, 62 N.Y.2d at 499. In the wake of *Ryan*, the Legislature amended Labor Law § 623 to provide, subject to very limited exceptions, that "No finding of fact or law contained in a decision rendered pursuant to this article by a referee, the appeal board or a court shall preclude the litigation of any issue of fact or law in any subsequent action or proceeding," effectively overruling *Ryan*, but only in the unemployment insurance context.

12. *See* Restatement (Second) of Judgments § 83, cmti. A, E (1982). This requirement largely involves the exhaustion of administrative remedies within the particular agency context, and may include, but does not mandate judicial review.

13. 72 N.Y.2d 271, 276–77 (July 7, 1988).

14. 72 N.Y.2d 261 (July 7, 1988); *also D'Arata v. N.Y. Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659 (1990) (noting, "Generally, for 'a question to have been actually litigated' so as to satisfy the identity requirement, it 'must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding'" [citations omitted]). An exception to this principle exists in cases where a particular finding was so integral to the prior judgment, even if not specifically litigated, that to find otherwise in the present proceeding would undermine the very foundation of the prior judgment. *See* Siegel, *supra* note 3, § 464 at 745-6 (citing *Statter v. Statter*, 2 N.Y.2d 668 (1957) and *Pray v. Hegeman*, 98 N.Y. 351 (1885)).

15. 72 N.Y.2d 147 (July 7, 1988). The Court of Appeals had also enunciated this principle in its decision in *Liss v. Trans Auto Sys.*, 68 N.Y.2d 15 (1986).

16. *See, e.g., Vogel v. Herk El. Co.*, 229 A.D.2d 331 (1st Dep't 1996); *Langdon v. WEN Mgmt. Co.*, 147 A.D.2d 450 (2d Dep't 1989); *Lee v. Jones*, 230 A.D.2d 435 (3d Dep't), *lv. denied*, 91 N.Y.2d 802 (1997).

17. *See Liss, 68 N. 4. 2d 15* (collateral estoppel held not to apply to one who was not a party to Board proceeding); *also Tounkara v. Fernicola*, 63 A.D.3d 648 (1st Dep't 2009); *Callaghan v. The Point at Saranac Lake*, 83 A.D.3d 1177 (3d Dep't 2011).

18. As between the courts and the Compensation Board, the Board has primary (though not entirely exclusive) jurisdiction to determine the issue of employment relationship and whether an injury occurred in the course of employment, and frequently the courts will refer the issue(s) to the Board for determination in the first instance. *See O'Rourke v. Long*, 41 N.Y.2d 219 (1976).

19. *See Liss*, 68 N.Y.2d 15.

20. *See Langdon*, 147 A.D.2d 450.

21. *See Caiola v. Allcity Ins. Co.*, 257 A.D.2d 586 (2d Dep't 1999); *Weitz v. Anzek Constr. Corp.*, 65 A.D.3d 678 (2d Dep't 2009); *Vitello v. Amboy Bus Co.*, 83 A.D.3d 932 (2d Dep't 2011).

22. In some instances, the issue of estoppel as between agencies (or a municipality) relative to ultimate determinations of eligibility for benefits, has been specifically addressed. In *Balcerak v. County of Nassau*, 94 N.Y.2d 253 (1999), the Court held that a determination by the Workers' Compensation Board that an injury is work-related does not, "by operation of collateral estoppel, automatically entitle an injured employee to General Municipal Law § 207-c benefits." The Court agreed identity of issue was lacking, as "the two statutory systems do not necessarily examine and determine the same issue, in the same way, and under the same protocols, procedures and conditions."

23. Collateral estoppel applies equally to findings of fact and mixed conclusion of fact and law. *See* Restatement (Second) of Judgments § 27. It does not apply to "unmixed" issues of law. *See McGrath v. Gold*, 36 N.Y.2d 406 (1975); *see also* Restatement (Second) of Judgments § 28, cmt. B (1982).

24. *See* Carlisle, *supra* note 9, at 75.

25. 7 N.Y.2d 287 (1959).

26. *See id.* at 293.

27. *See id.* at 293–94. The Court performed a searching inquiry of the underlying facts and, finding that the essential elements had been met in the New York case by virtue of these findings, determined collateral estoppel to be applicable.

28. 114 A.D.2d 108 (3d Dep't 1986).

29. *See id.*, at 109–10.

30. *See id.*, at 110, 112.

31. *See id.*, at 112.

32. 68 N.Y.2d 989 (1986).

33. In *Guimarales*, 68 N.Y. 2d at 991, the Court stated explicitly: "The Appellate Division and the Appeal Board erred in not giving collateral estoppel effect to the arbitrator's factual findings regarding claimant's conduct and to his conclusion of insubordination . . . The Appeal Board and the ALJ, although bound by the arbitrator's factual findings regarding claimant's conduct and his conclusion of insubordination, were free to make their independent additional factual findings and form their own independent conclusion as to whether such conduct constituted 'misconduct' for purposes of unemployment insurance."

34. *See Langdon v. Wen Mgmt. Co.*, 147 A.D.2d 450 (2d Dep't 1989); *Vogel v. Herk Elevator Co., Inc.*, 229 A.D.2d 331 (1st Dep't 1996).

35. 230 A.D.2d 435 (3d Dep't), *lv. denied*, 91 N.Y.2d 802 (1997).

36. *See id.* at 438.

37. 293 A.D.2d 631 (2d Dep't 2002).

38. *See Rigopolous v. Am. Museum of Natural History*, 297 A.D.2d 728 (2d Dep't 2002).

39. *See Singh v. Congregation Bais Avroham K'Krula*, 300 A.D.2d 567 (2d Dep't 2002).

40. *See McRae v. Sears, Roebuck & Co.*, 2 A.D.3d 419 (2d Dep't 2003).

41. *See D'Angelo v. State Ins. Fund*, 48 A.D.3d 400 (2d Dep't 2008).

42. *See Sheppard v. Blitman/Atlas Bldg. Corp.*, 288 A.D.2d 33 (1st Dep't 2001).

43. *See De Simone v. South African Mar. Corp., S.A. Morgenster*, 82 A.D.2d 820 (2d Dep't 1981).

44. *Auqui v. Seven Thirty One Ltd. P'ship*, 83 A.D.3d 407 (1st Dep't 2011).

45. *See id.* at 408.

46. *See id.*

47. *See id.*

48. *See id.* at 409–12.

49. *See id.* at 410–11.

50. *See id.* at 411.

51. *See* Workers' Compensation Board Medical Guidelines (June 1996 ed.); *see also* New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity (2012 ed.), *both available at*: http://www.wcb.ny.gov/content/main/hcpp/ImpairmentGuidelines/ImpGuideOverview.jsp.

52. To illustrate, an injured worker must be opined fully disabled from all forms of work that could hypothetically exist in the world, as opposed to one's prior line of work or reasonable substitutes, to be totally disabled under Board standards. Often, a finding of disability relative to the spine, temporary or permanent, is made with reference to very particular, and unique, medical criteria. *See* Workers' Comp. Bd. Med. Guidelines (June 1996 ed.), p. 26-7. Often the degree of disability decided upon by the WCLJ is based largely upon the lifting restrictions outlined by the various physicians, and how these restrictions fit into the practice and parlance of workers' compensation.

53. 18 N.Y.3d 697 (2012).

54. 299 A.D.2d 852 (4th Dep't 2002).

55. *See id.* at 853–54.

Routine Violations of Medical Privacy in Article 81 Guardianship Cases: So What or Now What?

By Joseph A. Rosenberg

Introduction

Each day in courtrooms throughout New York State, and indeed the United States, judges are asked to decide whether to appoint a guardian for an alleged incapacitated person (AIP) with the power to make decisions about the AIP's property management and personal needs.[1] In New York, the standard for appointing a guardian under Article 81 of the N.Y. Mental Hygiene Law (MHL) requires clear and convincing evidence of two main elements: that a guardianship is necessary to provide for a person's personal needs and property management, and the person either consents to the appointment or is found to be incapacitated.[2] Medical evidence is not necessary to prove that a person is incapacitated and needs a guardian.[3] Although medical information can be an important piece of the guardianship "puzzle," it may be prejudicial and obscure the primary inquiry under Article 81: what are the functional capacities of the person alleged to need a guardian, and does the person have functional limitations that he or she does not fully understand or appreciate, and as a result place the person at risk of harm?[4]

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Anecdotal evidence suggests that many, if not most, guardianships are resolved in a generally decent manner, with genuine care and concern for the person who is alleged to be incapacitated and in need of a guardian. However, the "loose use" of medical information creates the risk that medical privacy rights are routinely violated. This is not only a cause for concern in that unauthorized disclosure of private health-related information is unlawful and damaging to a person, but it also may shift the predominant frame of a guardianship from a functional assessment to a medical diagnosis. Excessive reliance on medical evidence can result in a court order that appoints a guardian without a full exploration of less restrictive alternatives that may be available and sufficient. Consider the following scenarios:[5]

• Adult Protective Services (APS) filed a petition to appoint a guardian for a single woman in her mid-80s, based on an investigation conducted by an APS psychiatrist. The petition alleged that the woman could not make decisions about her property or personal needs, including health care decisions. At the beginning of each visit, the APS psychiatrist allegedly obtained the woman's consent to meet. The discussion leading to the patient's "consent" was brief and the psychiatrist did not advise her that the information he was gathering might be used in a guardianship petition and at a hearing. Although the APS psychiatrist testified that the person was incapacitated and needed a guardian, the petition was dismissed because the court found that the person had the capacity to execute advance directives and had an adequate informal support system. The testimony of the psychiatrist was permitted and the psychiatric affidavit remained part of the public record.

• A hospital filed a petition for a guardian to be appointed for a man in his 60s who was brought to the hospital by his family when he became disoriented while shopping at a local supermarket. In support of the petition, the hospital included medical information relating to alleged psychiatric issues and substance abuse. The hospital also alleged that the person could not be safely discharged to his home and asked for a guardian with the power to sell his residence in the community and place him permanently in a nursing home. The court found the person had the capacity to consent to the appointment of a guardian, but only with limited powers for a limited period of time, and required that the guardian facilitate a discharge back to his home in the community with appropriate home care and case management.

• A nursing home filed a petition to have a guardian appointed for a woman in her 80s who had been living at home in an apartment. After a mild stroke required the woman's hospitalization and rehabilitation in a nursing home, the petitioner alleged that the woman needed a guardian due to her dementia and psychiatric issues. The petition asked that the guardian be granted the power to relinquish the AIP's apartment and keep her in the nursing home. The court appointed a guardian with the power to release the person's apartment and place her permanently in the nursing home.

• A parent filed a petition to be appointed guardian for his 21-year-old daughter, whose struggles with psychiatric issues required her to reside in a residential school. The school provided medical information that was used to support the petition, and the daughter's psychiatrist submitted an affidavit that was attached to the petition. The petition requested a guardianship with full powers and for an unlimited duration. Although the daughter's functional capacity was relatively high and she may have been able to function independently over time, the court appointed the parent as guardian with broad powers for an unlimited duration.

These cases represent a microcosm of those decided pursuant to Article 81 of the MHL. This statute, which was enacted in 1983, has been justifiably lauded as a pioneering piece of legislation because it moved the focus of the need for a guardian from a medical model to a functional model and looks at the capacity of the person to make decisions and perform activities of daily living.[6]

The adult guardianship population in New York and the United States is rapidly becoming more diverse, and demographic patterns point to substantial increases in the number of people who may need a guardian due to mental health issues, age-related diseases that affect cognition (e.g., Alzheimer's disease and other dementia-related conditions), mental illness, and / or developmental disabili-

ties.[7] The case vignettes described above reflect this diversity. Petitioners can include government agencies, hospitals, nursing homes, or family members – and the statute also authorizes any other person or entity concerned with the welfare of the person alleged to need a guardian to file a petition. Those people alleged to need a guardian represent a diverse group: the elderly woman, who became the subject of an APS investigation, who had an adequate support system in place; the older person who had a history of financial problems and substance abuse being forced out of his residence and into a nursing home; the elderly woman whose guardian was authorized to release her apartment and place her in a nursing home; and the young adult who suffered from mental disease and a lack of maturity. The reasons for bringing a guardianship proceeding are also illustrative: protection against possible financial exploitation; discharge to a nursing home; sale of a residence in the community and permanent placement in a nursing home, and assurance that a parent would have legal authority to make all major decisions for a child beyond the age of 21. Despite their variety, these cases have two commonalities: (1) medical information was included as part of the petition and used in ways that violated the medical privacy of the person alleged to need a guardian, and (2) all of the cases could have been resolved without filing a petition for guardianship.

In recent years, a great deal of attention has been paid to the "back end" of guardianships.[8] This phase of a guardianship relates primarily to the duties of a guardian, the duration of the guardianship, and the filing of initial, annual and final reports which are reviewed by court examiners and approved by the guardianship part or court. In addition, judicial oversight is crucial to assure that the powers being exercised remain appropriate and necessary, and that the person is residing in the least restrictive setting reasonable under the circumstances.[9]

However, relatively less attention has been paid to issues at the "front end" of guardianships, which is the point at which unnecessary guardianships can be avoided.[10] These issues include the standard for appointing a guardian, pleading requirements, possible alternatives to a guardianship, the nature and quality of notice to the AIP and interested parties, circumstances under which an attorney must be appointed, the scope of the court evaluator's role, and the use of medical information to support a petition to appoint a guardian – whether in the form of medical affidavits, records, or testimony.

Article 81 is a functional statute that includes important components of due process. The standard for the appointment of a guardian is clear and convincing evidence. The pleadings must include a plain-English notice to the AIP; the court must hold a hearing at which the AIP must be present, unless the court dispenses with this requirement; and the court must appoint a court evaluator or an attorney for the AIP. The rules of evidence apply in contested hearings. Courts are required to consider alternatives to a guardianship before appointing a guardian. The statute requires particular findings of fact and provides for a variety of arrangements that include limited guardianships – both in scope and duration.[11]

Yet, even under Article 81, routine disclosures of medical information create a dual risk. One is that a person's medical privacy will be violated, and the other is that the statutory mandate to view the case through a functional and least-restrictive-means framework will be subordinated to a medical diagnosis. These violations may occur throughout the various phases of a guardianship case, including the "front end" in pleadings, during the pre-hearing investigation stage when the parties prepare their evidence, and while the neutral court evaluator assesses the allegations and prepares recommendations to the court. These violations may continue at the hearing and, if a guardian is appointed, throughout the "back end" of the guardianship, in the guardian's initial and annual reports. These violations may be relatively benign and in reality few people may see, know, or care about the private medical information that remains in court files and digital records for many years. But the failure to adequately safeguard and protect private medical and health care related information might not only violate the dignity and privacy rights of the AIP but also result in a guardianship that is unnecessary.

> The concept of the least restrictive alternative is central to the rights of people who are subjected to guardianship proceedings; it is codified in Article 81.

The question is not whether medical evidence should ever be part of a guardianship case. Indeed, if it is relevant, probative, material, and admissible, then it may very well help a judge, and possibly a jury, make a decision. Rather, the real questions concern whether there are sufficient safeguards to prevent violations of a person's medical privacy rights and under what circumstances, if any, should medical information be disclosed and admitted into evidence during the various phases of an Article 81 guardianship. In addition to violating a person's medical privacy rights, the loose use of medical information may help perpetuate vestiges of the *medical* model of guardianship, which has been repudiated over the course of the last quarter century in numerous reports and studies.[12] Medical information and diagnosis may potentially be detrimental to the person alleged to need a guardian

in that it may enable a petitioner (and the court) to relegate a *functional* assessment and potential alternatives to a guardianship[13] to a secondary consideration. Thus, health care facilities (i.e., hospitals and nursing homes) and government agencies (i.e., APS) may file a guardianship proceeding instead of exploring meaningful support services, such as case management and discharge planning, resulting in unnecessary guardianships that further strain the resources of the guardianship system.[14]

In addition, and perhaps more important, to have a guardian appointed to make decisions is to experience a "civil death." It deprives a person of the fundamental rights that define our personhood. It deprives a person of the right to forge an individual path in the world, however flawed and imperfect, as part of a larger community. It is those precious and fundamental rights that are essential for human growth and development.

The Tension Between Functional and Medical Evidence

Guardianship deprives a person of fundamental liberties that are protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[15] The United Nations Convention and Optional Protocol on the Rights of Persons With Disabilities (UN Convention) also includes far-reaching provisions and a framework for protecting fundamental human rights for people with disabilities.[16] A guardianship should be used only as a last resort when less restrictive alternatives have been exhausted. If a court decides that a guardian is necessary, the U.S. Constitution and Article 81 require that the guardian be granted only the minimum powers that are necessary. Article 81 provides for an array of due process protections, including:

- detailed notice and pleading requirements;
- a functional framework that does not require medical information;
- the appointment of a neutral court evaluator or attorney for the person, in every case;
- consideration of less restrictive alternatives to a guardianship;
- a mandatory hearing;
- the right to invoke the Fifth Amendment protection against self-incrimination;[17]
- clear and convincing evidence of the need for a guardian and the person's consent or incapacity;
- required findings of fact; and
- tailored guardianships that are monitored after 90 days and annually.

The concept of the least restrictive alternative is central to the rights of people who are subjected to guardianship proceedings; it is codified in the opening legislative findings and purpose section of Article 81:

> The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable . . . in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.[18]

The stakes of a guardianship proceeding are extremely high. The outcome of a guardianship directly affects the AIP's right to make decisions about fundamental aspects of life such as where to live,[19] health care and medical treatment,[20] social environment,[21] and management of finances and property.[22] The right to live independently, with appropriate support, is essential for a person to be fully recognized as such under the law. In Article 81 cases, the question often arises whether a person should continue living at home in the community, return to a community residence from a hospital or nursing facility, or continue to reside in a health care facility or other institutional setting. Article 81 mandates that a person under a guardianship be given the opportunity to remain living in, or return to, the community provided it is reasonable.[23]

The right of people with disabilities to live independently in the community was recognized by the U.S. Supreme Court in *Olmstead v. L.C. by Zimring*.[24] In *Olmstead*, the Court held that under the Americans With Disabilities Act (ADA), individuals with disabilities have a right to "the benefits of community living" if the placement is appropriate, it is not opposed by the "affected" individual, and the placement could be reasonably accommodated without a fundamental altering of the program providing the services.[25] Under the ADA, the segregation of individuals with disabilities within institutions constitutes discrimination, and the ADA's "integration regulation" requires reasonable accommodations in a community-based setting.[26]

The right to independent living under Article 19 ("Independent living and being included in the community") is also a key provision of the UN Convention. The UN Convention focuses on a person's legal capacity and rejects substitute decision making and guardianship in favor of a support model of decision making.[27] There is a symbiotic relationship under the UN Convention between the Article 19 mandate for independent living and Article 12, which provides that persons with disabilities shall have equal recognition before the law and be entitled to the support necessary to "exercise legal capacity."[28]

The standard for appointing a guardian has evolved along with societal notions of incapacity, the understanding that disability is as much a social construct as a personal challenge, our knowledge that the capacity to make decisions is local and not global, and the value we place on autonomy over protection. The concept of disability has, and continues to be, defined under a variety

of rubrics, not all of which are mutually exclusive. Medical, legal, and functional needs are all accepted "prisms" through which a person's capabilities can be assessed. The "support of legal capacity" model under Article 12 of the UN Convention situates all people along a continuum of support.[29]

The medical evidence dilemma reflects the tension between autonomy and protection that is at the core of guardianship cases and also illuminates the larger, evolving movement away from a medical model to a functional framework, which may ultimately culminate in the support model envisioned by Article 12 of the UN Convention. A requirement that medical evidence must be offered to establish incapacity or disability may violate a person's civil rights and result in an erroneous determination that does not reflect the functional ability and capacity of the person. In contrast, appointing a guardian based merely on factual evidence that is anecdotal may risk ignoring or minimizing medical conditions that are causing the person's limitations and that might be temporary or responsive to treatment.[30]

The functional capacity framework of Article 81 looks primarily at the person's capacity to manage activities of daily living.

When the evidence presented to prove the need for a guardian involves both a person's psychiatric condition and history, two main problems arise. First, admission of this evidence "[p]oses a significant risk of unfair prejudice to the plaintiff in light of the persistent and evasive stigmatizing effects of psychiatric diagnoses."[31] Second, "[f]act finders are likely to misuse psychiatric evidence, particularly when offered through expert witnesses, because they have few tools to independently evaluate such evidence and thus may overvalue the significance of psychiatric diagnoses for the resolution of factual questions."[32]

The functional capacity framework of Article 81 looks primarily at the person's capacity to manage activities of daily living, including decisions about finances and health care. The standard for appointing a guardian under Article 81 has two essential components: The guardianship must be necessary, and the person must either consent or found to be "incapacitated."[33] A court must not appoint a guardian if there are adequate alternatives that are less restrictive and adequately meet the person's needs, which would make the guardianship unnecessary.[34] Under the statute, the term "incapacitated" means the person (1) has limitations that interfere with activities and decisions of daily living, (2) does not understand the nature and consequences of his or her limitations, and (3) is therefore at risk of harm.

Although Article 81 has many of the positive attributes of the functional approach, the inappropriate use of medical evidence creates the risk of violating the medical privacy rights of the person alleged to need a guardian. The consequences of these violations may depend in large part on the context of the case and the circumstances of the person. Greater awareness of medical privacy would help Article 81 fully realize its stated intent to base guardianship on a person's functional capacity and reinforce respect for the complete legal recognition of each person's rights, dignity, and legal capacity.

Protections Against Disclosure of Medical Information That Affects the Guardianship Population

Privacy is of great value in our society, and medical privacy in particular enjoys multi-layered levels of protection under various laws that govern disclosure by health care entities and individual providers. These include the right to medical privacy, protection against disclosures by entities under the federal Health Insurance Portability and Accountability Act (HIPAA) and the MHL, as well as evidentiary privileges such as the physician-patient privilege.[35]

Medical Privacy Rights Under the U.S. Constitution and State Constitution Apply to Individuals Alleged to Need a Guardian

The U.S. Supreme Court has recognized a right of informational privacy under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[36] Two broad categories are recognized within the right to privacy: the right to autonomy, which protects personal choices from unwarranted interference from the government; and the right to maintain the confidentiality of private information.[37] In *Whalen v. Roe*,[38] the Court held that although there was a constitutional right of privacy, a computerized record of prescriptions for controlled substances maintained by the State of New York did not violate those rights, as it contained adequate protection against disclosure and did not affect an individual's decision to obtain a prescription.

Federal courts in the Second Circuit have held that this constitutional right "[i]n avoiding disclosure of personal matters" applies to the medical information of a person with HIV,[39] a prisoner with HIV who is a transsexual,[40] and a person with sickle-cell anemia.[41] Although courts agree that determining if a person's medical privacy rights have been violated under the Constitution requires a case-by-case analysis, in *Matson v. Board of Education of the City School District of New York*,[42] the Second Circuit held that the standard requires that the person have a serious medical condition that, if disclosed, would bring "opprobrium," such as disgrace, discrimination, and intolerance.[43] *Matson* involved a

music teacher with fibromyalgia who was investigated by the Board of Education of the City of New York (BOE) for potential abuse of its sick leave policy. In the course of its investigation, the BOE posted her condition on its website, and the *New York Times* ran an article about her situation. The court held that her privacy rights were not violated in that fibromyalgia was not fatal, did not involve a psychiatric disorder, was not the kind of condition that if disclosed would result in societal stigma and discrimination, and that any adverse consequences the teacher suffered were due to her abuse of the sick leave policy, not her medical condition. The dissent in *Matson* criticized the majority for imposing an unduly restrictive standard, particularly in the procedural posture of deciding a motion to dismiss the complaint.[44]

Assuming a particular medical condition is sufficiently serious and subject to societal discrimination, the question of whether disclosure is reasonable requires analysis of the government's interest in public health and whether action was taken to minimize the disclosure of private information.

Although not specifically mentioned in the New York State Constitution, New York courts have held that the scope of the right to privacy protected under the state constitution is broader than the U.S. Constitution.[45] The N.Y. Court of Appeals has not specifically ruled on the question of disclosure of medical records, although it has upheld the requirement under New York City law that the name and address of a person obtaining an abortion be included on the pregnancy termination document filed with the Department of Health, as it furthered a governmental interest in maternal health and made it easier for government officials to retrieve a person's health records.[46]

Applying these standards to guardianship cases, the requirement that a condition be "serious" would appear to be satisfied if a case involved the disclosure of medical information supporting a finding of incapacity and that a guardianship was necessary. To the extent that particular medical conditions relate to a person's mental capacity to make decisions, disclosure could trigger the required level of disgrace, discrimination, and intolerance required by *Matson*. For example, if a medical affidavit accompanies a guardianship petition and includes information related to a condition such as Alzheimer's disease, Parkinson's disease, or a history of substance abuse, a person suffering from these potentially disabling conditions is protected from discrimination under the ADA. Each of these is serious, potentially fatal, and if revealed could subject a person to discrimination and intolerance. A person's reasonable expectation of privacy should not diminish or disappear merely because a government agency or health care facility files a petition for guardianship, or a court decides the person is incapacitated and appoints a guardian.

HIPAA and the MHL Limit the Circumstances Under Which Covered Entities May Disclose Protected Health Care Information in Guardianship Proceedings

The release of medical records is subject to the requirements of HIPAA,[47] which preempts state law unless the state law provides greater privacy protection to health-related information than HIPAA. For example, prior to HIPAA, a person who brought a medical malpractice action was deemed to have placed his or her medical condition at issue, and therefore impliedly consented to the disclosure of medical information to the defendant's attorney. However, HIPAA's provisions require separate authorization by the plaintiff before a defendant's attorney is permitted to obtain protected health-related information. Otherwise, the information is not admissible.

A patient or the patient's authorized representative (e.g., a person named in a HIPAA release, a court-appointed guardian with the power to access health care information, or an agent under a health care proxy) must consent prior to the disclosure of medical records by a covered entity under HIPAA.[48] Exceptions to these requirements include disclosures required by law, which include but are not limited to requests made in the course of a judicial proceeding. Such disclosure may be in response to a subpoena, court order, or other process related to the proceeding.[49]

Although HIPAA includes a number of exceptions to its general rule of non-disclosure, the failure to follow the HIPAA procedures will result in the exclusion of the medical records or information, and potentially a fine. The N.Y. Court of Appeals has held that a hospital's release of medical records to a state agency in an Assisted Outpatient Treatment (AOT) proceeding pursuant to MHL § 9.60 (a.k.a. Kendra's Law) violated HIPAA, as the disclosure was not authorized by the person who was the subject of the proceeding, and there was no judicial process in the form of a court order or subpoena.[50] In *In re Miguel M.*, the records provided to the AOT administrator did not meet any of the exceptions recognized under HIPAA – that is, for purposes of treatment or pursuant to a court order or other judicial or administrative process. The Court also held that the AOT program did not fall within the public health exception under HIPAA and the Privacy Rule, and moreover, that the records were not admissible, distinguishing the AOT context from a criminal context in which courts have admitted medical records to prove that a crime has been committed. In a subsequent case with virtually identical facts, a lower court held that *Miguel M.* applied retroactively, ruling that the medical records at issue were not admissible since they were disclosed without the patient's consent and without a court order or subpoena.[51]

Under Article 81, health care facilities that initiate guardianship proceedings routinely disclose medical information without the consent of the patient or an authorized representative. Such disclosure may occur at the very beginning stage of a guardianship proceeding, with the filing of the petition, in which case, the disclosure often continues throughout all stages of the guardianship. All the while, sensitive health care information is disclosed freely, without the AIP's consent or a court order.

Evidentiary Privileges Protect Disclosure and Admission of Medical Evidence in Guardianship Proceedings

Evidentiary privileges govern the relationship between a health care professional (and other disciplines such as social workers) and a patient/client/consumer.[52] The physician-patient privilege did not exist at common law and New York was the first jurisdiction to enact a physician-patient statutory privilege in 1828. Although subject to some criticism, this privilege is firmly embedded in the public policy of New York.[53] The privilege safeguards disclosures by individual providers and entities under the theory that "privilege in the courtroom will encourage disclosure in the sickroom."[54] The physician-patient privilege protects information obtained by a physician who attends to a person in his or her professional capacity, whether the information is communicated to the physician or based on the physician's observations.[55] A physician-patient relationship is created when professional services are rendered and accepted by the patient pursuant to an express or implied contract.[56] The privilege applies regardless of whether the information is in the form of testimony or record.[57] And it is construed broadly, although there are exceptions for review of records by a court evaluator in an Article 81 case,[58] examinations related to employment (unless the physician affirmatively treats or recommends treatment),[59] cases involving guardianship or custody of abused or destitute children, reports made concerning suspected abuse and neglect of children, where the physical and mental condition of a decedent is at issue, and for certain public health purposes.[60]

> When the petitioner is a hospital, nursing home, or other covered entity, the practice of including medical information as part of the petition violates HIPAA.

The privilege is not waived merely because a person has to defend against an action that places his or her medical or psychiatric condition at issue, even if the plaintiff or petitioner claims that the person's medical condition is "in controversy" and subject to discovery.[61] This applies directly to Article 81 guardianships, where a person who is alleged to need a guardian is not making a claim or putting his or her medical condition at issue, at least initially, but is defending allegations made in the petition by a government agency, health care facility, person, or other entity.

Typically, a person who is alleged to need a guardian may interact with a variety of physicians and other health care professionals who initiate contact with the person in a therapeutic context and may be subject to an evidentiary privilege. This sort of involuntary physician-patient relationship can pose special challenges in a guardianship, as it may not fit neatly within the traditional conception of a treating physician.

The Use and Abuse of Medical Information in Guardianship Proceedings: A Double-Edged Sword

The disclosure of medical information in a guardianship case creates a risk that the person's medical privacy rights will be violated and the health-related information will be admitted into evidence that may not be causally connected to the person's functional capacity and might distort the need for a guardian based on a medical diagnosis.

Conversely, the use of medical evidence and testimony in guardianships may be necessary to assure that any possible determination of incapacity is not the result of side effects from medication, depression, or other conditions that if properly treated will resolve the problems causing the person's incapacity.[62]

Under Article 81, a guardian can be appointed only if it is necessary and the person consents or is found to be incapacitated.[63] The element of necessity requires a finding that the person is at risk of harm if a guardian is not appointed. If alternatives to a guardian are available and sufficient, the guardianship may not be necessary, and the petition must be dismissed.[64] The secondary element of either consent or a finding of incapacity requires that the person either have the capacity to make an informed decision about the nature and consequences of having a guardian appointed or be found incapacitated. Incapacity is defined as a person's lack of awareness and understanding of how limitations that interfere with decisions about property and personal needs may put the person at risk of harm.[65] Notably, a finding of incapacity cannot be based, for instance, on inability to pay rent or provide for one's needs, or the questionable wisdom or even self-destructive nature of "bad" decisions. Rather, it must be based on the absence of a knowing or informed choice about the decisions that may lead to harmful consequences.[66] If a court finds that a guardianship is not necessary – e.g., if adequate alternatives exist or the person is not at risk of harm – the petition must be dismissed, even if the person is found to be incapacitated.

Article 81 requires that certain information be included in the petition, such as a "description of the [AIP's] functional level, including [the AIP's] ability to manage the activities of daily living, behavior, and understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living."[67] Witnesses may be family members or friends, professionals that have come into contact with the person or health care personnel who may base their assessment on a medical diagnosis. Although this evidence can and should primarily be factual and anecdotal, medical information and diagnoses continue to have a significant, if not primary, role in Article 81 cases. However, medical evidence is not required, either as part of the petition or at the hearing.[68]

The use of medical evidence depends in large part on the context, the reasons for its use, and the role of the person requesting access to those records. In an uncontested proceeding, courts may have the discretion to relax evidentiary rules, although that may still be problematic in that the privacy rights of a person may be violated. In a contested guardianship hearing, the full panoply of objections and evidentiary requirements apply, and courts will deny motions to admit medical records and testimony into evidence.[69] In some cases, a court will order that the hearing be closed to the public and the case record sealed.[70]

Using Protected Medical Information in Support of the Petition May Violate HIPAA, the Physician-Patient Privilege, and Distort the Focus on Functional Capacity and the Least Restrictive Alternative

There is risk that the privacy rights of the AIP may be violated when the order to show cause and petition are filed. The petitioner may be a hospital or nursing home, and the petition may contain the AIP's medical information obtained from the facility's medical records or records of treating physicians at the facility. Although Article 81 explicitly states that medical information is not required to be included in the petition, the order to show cause must inform the person that the court evaluator may request a court order to inspect medical or psychiatric records and that the AIP has the right to object to this request.[71] In this very common scenario, a court may strike a medical affidavit attached to the petition because it violates a person's medical privacy rights under HIPAA, the physician-patient privilege, or other applicable privacy laws.

When the petitioner is a hospital, nursing home, or other covered entity, the practice of including medical information as part of the petition violates HIPAA.[72] In *In re Derek*,[73] a case decided under Article 17-A of the Surrogate's Court Procedure Act but directly applicable to Article 81, the court removed medical affidavits that were attached to the petition, as required by the statute. The court held that the affidavits violated HIPAA but denied the motion to dismiss as there was sufficient non-privileged information to state a cause of action.

If medical information from a treating physician is included as part of the petition, it may also violate the physician-patient privilege.[74] Even when the purpose of the petition is to secure an appropriate placement for a patient in a facility, medical records and the testimony of treating physicians are not admissible.[75] In *Tara X*,[76] a contested adversarial proceeding in which the privilege had been asserted, a daughter alleged in the Article 81 petition that her mother had various psychiatric conditions that made her incapacitated. She attached affidavits from a physician who had treated her mother during a prior hospitalization, and reports of "medical personnel" who had "attended" to the mother prior to that hospitalization. The court evaluator requested access to the AIP's medical records and permission to retain an independent physician to consult. The respondent AIP asked the court for a protective order to prevent admission of the medical records and also opposed the request of the court evaluator.

The court referred to the strong public policy in New York, which supports the physician-patient privilege, noting that the purpose is "[t]o encourage its citizenry to seek medical treatment for any physical or mental condition without fear of the public ridicule or disgrace that might result from a disclosure of any such condition."[77] Although the privilege is not absolute, there are

very limited exceptions, including the use of medical records by a court evaluator in guardianship matters to assist in the investigation of the case as well as potential disclosure under some circumstances.

The court in *Tara X* denied a motion by the court evaluator to discover medical records because it would reduce due process protection for the AIP to a level below that of other civil litigants and ordered that medical information attached to the petition be removed and sealed. The holding in *Tara X* affirmed the vitality of the physician-patient privilege and the duty of the court to honor the privilege.

A petitioner who seeks disclosure of medical records by subpoena subsequent to filing the petition implicates a variety of protections against disclosure of medical information. In granting a motion to quash the subpoena served on a local agency of NYSARC Inc., the court noted that this was a case of first impression. As the New York State Office of People with Developmental Disabilities certified the local agency, the records were protected under MHL § 33.13. As a covered entity, the local ARC agency was subject to HIPAA, which requires that medical records be held confidential unless the patient consents to or a court orders disclosure. The court also held that the records were protected under the physician-patient privilege. Notably, the court emphasized that medical evidence is not required in an Article 81 proceeding, and there was ample non-privileged information to prove the need for a guardian.[78]

Using medical information in the petition potentially violates laws protecting medical privacy and may also have the effect of allowing the petitioner to minimize or ignore the statutory requirement to provide information about the person's functional capacity and to fully explore whether alternatives to a guardianship are available.[79] In turn, this frames the guardianship in terms of medical diagnosis, enabling the petitioner to avoid taking responsibility for meaningful discharge planning or a case management plan that meets the needs of the person, without the appointment of a guardian. Even if a guardianship is necessary, medical information substitutes for a description of the person's capacity to perform activities of daily living and make decisions. Instead of guardianship being a last resort, it becomes a means for providing case management and discharge planning, often to the detriment of the person.

Disclosure of Medical Records to the Neutral Court-Appointed Investigator: A Sound Practice That Balances the Need for Relevant Information and Privacy Concerns

Under Article 81, the court evaluator plays a pivotal role in the proceeding and has broad-ranging powers, including the duty to protect the property and interests of the person alleged to need a guardian.[80] As the neutral "eyes and ears" of the court, the court evaluator is in a unique position to shape how the case unfolds. It is critical that the court evaluator attempt to limit unnecessary disclosures of medical information, fully explore the availability of less restrictive alternatives, promote the use of evidence related to functional capacity and, if it is necessary to appoint a guardian, recommend that the court grant only those powers that are necessary and appropriate.

Article 81 strikes a balance between the court evaluator's possible need to review medical records and the importance of protecting the medical privacy rights of the person alleged to need a guardian.[81] A court evaluator may request a court order to review medical records, and if the court issues an order, it is only for the limited purpose of assisting the court evaluator in his or her investigation.[82] The court may order the disclosure of these records to the court evaluator, notwithstanding the physician-patient privilege, the psychologist-patient privilege, or the social worker-client privilege provisions of the CPLR.[83] However, the authority of the court may be limited by federal and state laws that impose different standards for the disclosure of particular kinds of records, such as records of patients in alcoholism and substance abuse facilities, HIV-related information, and records of patients in mental hygiene facilities.

Article 81 draws an important distinction between the use of medical records to assist the court evaluator and their admissibility as evidence in court.[84] This recognizes that while medical records might be helpful in a court evaluator's assessment, they are not always essential and should not be disclosed unnecessarily or automatically be deemed admissible. The court evaluator should initially only disclose relevant records to the court in-camera. Unless the court directs otherwise, the court evaluator should discuss medical-specific diagnoses and medications only in a separate addendum to the court evaluator report.

If the court orders that medical records be disclosed to the court evaluator, the court may also direct such further disclosure of those records upon the request of the petitioner or the attorney for the person alleged to need a guardian.[85] This disclosure may be limited to pre-hearing discovery, as with Article 31 of the CPLR, or extend to admission as evidence at the hearing.[86] Although the court evaluator's report may be admitted into evidence if the court evaluator is subject to cross examination, that does not mean medical records and information obtained by the court evaluator are similarly admissible.[87] The court evaluator can apply to the court to retain an independent medical expert where it is necessary and appropriate,[88] which may be necessary in order to avoid a breach of the AIP's physician-patient privilege. If insufficient medical information is available and the court evaluator needs that information, an independent medical expert may help determine if the AIP is incapacitated. A court may deny a request by the court evaluator for an order that grants access to medical records on the basis that it would deny the AIP constitutionally protected due process rights.[89]

The court is also authorized, in uncontested proceedings and for good cause shown, to relax the rules of evidence. This discretion, as noted by the court in *Tara X*, reflects the balance between the more traditional "best interests" approach to guardianship and the "adversarial" approach embodied in modern guardianship statutes that provide enhanced protection of the rights of the person alleged to be incapacitated. However, relaxing the rules of evidence may create a potential problem for a person who needs, and does not object to, a guardian. If the person has the capacity to consent to the appointment of a guardian, a court may appoint one based on a finding of necessity and consent. This makes a finding of incapacity unnecessary and medical evidence and testimony would not be required. Concerns about medical privacy are equally present in an uncontested proceeding, if private medical information is part of the proceeding and remains in the court file as a public record.

Article 81 draws an important distinction between the use of medical records to assist the court evaluator and their admissibility as evidence in court.

Testimony by Physicians and Other Health Care Professionals to Support the Appointment of a Guardian

The physician-patient privilege and other similar evidentiary privileges apply in contested Article 81 cases.[90] Under Article 81, medical testimony is not required in all cases and may not be admissible unless the person waives the physician-patient privilege or places his or her medical condition at issue.[91] For example, a person placed her mental condition at issue when she included a doctor's report in her motion to dismiss the Article 81 petition, notwithstanding her assertion that the sole purpose of the report was to rebut the allegations of her examining physician.[92] A person does not waive the physician-patient privilege by failing to object to the testimony of a physician who treated the person in the hospital if the physician relies on his or her notes and not the person's medical records.[93]

If the privilege has not been waived, the testimony of a treating physician should be excluded.[94] Functional evidence alone can be sufficient to meet the statutory standard for appointing a guardian. Even if the testimony of the treating physician is not admissible, the court may appoint a guardian based on the testimony of, say, the person's children that their mother could not manage her medical, personal, and financial needs.[95]

The traditional confines of the physician-patient privilege may not adequately protect disclosures of private medical information when the person alleged to need a guardian has interacted with physicians and other health care professionals who serve in a variety of roles. The testimony of a non-treating physician is not subject to the privilege and is admissible provided it is material, relevant, and probative and not excludable on other grounds. In *In re Marie H.*,[96] a case involving a psychiatrist who was part of a mobile emergency response team, the AIP moved to strike the testimony of the psychiatrist on the basis of the physician-patient privilege. The psychiatrist was acting pursuant to a statutory "Comprehensive Psychiatric Emergency Program," which authorized participating psychiatrists to involuntarily commit a person who was found to need immediate care and treatment and who posed a danger to herself or others due to a psychiatric condition. The court analyzed the nature and responsibilities of the psychiatrist's role and found that it was closer to that of a police officer making an arrest than a treating physician. This decision was supported by statutes that created a relatively well-defined role for the psychiatrist acting within the scope of emergency circumstances with specific protocols and remedies. The psychiatrist was acting to protect the safety and well-being of the person, serving as part of the rescue component of a structured response that included treatment by other psychiatrists and providers at the institution to which the person was taken.

The Special Case of the APS Psychiatrist as Investigator and Witness: A Treating Physician Subject to Evidentiary Privilege or a "Guardianship Specialist" Fulfilling the Agency's Protective Function?

Federal law requires states to provide Adult Protective Services.[97] APS is generally responsible for providing information, referrals, and assurance that services are available to individuals who are unable to manage their property or personal care. The agency works to provide for vulnerable individuals' personal needs and protect them from dangerous circumstances arising from neglect or abuse, particularly those who have no one able or willing to provide needed assistance.[98] Adult protective services have a legal duty to provide necessary care and services to eligible adults.[99]

APS must provide an array of support services designed to assist vulnerable adults who are at risk of harm to remain in the community and avoid institutionalization. Additionally, APS is required to prevent or resolve cases of neglect, exploitation or abuse by enhancing the person's capacity to function independently. It

may investigate allegations or provide services to a vulnerable person,[100] and decide that it is necessary to file a guardianship petition. When a psychiatrist employed by APS is part of the investigation, roles may be blurred. Information gathered from the AIP in an arguably therapeutic context may later be used as evidence in a guardianship proceeding. The methods by which APS obtains this information, and its use in guardianship cases, raises issues related to medical privacy and the scope and application of the physician-patient privilege.

Two significant practices involving APS raise serious concerns as to violations of the liberty interests and medical privacy rights of vulnerable elders. When APS is unable to gain access to a person, perhaps because the person does not want to cooperate for fear of being placed in an institution or having a guardian appointed, APS may utilize an *ex parte* process that culminates in an order granting access to the vulnerable elder's residence. The purpose of this visit is ostensibly limited to assuring that the person is not in danger. It is improper for APS to use evidence obtained as part of this *ex parte* process in a guardianship case.

In re Eugenia M.[101] involved a 95-year-old woman whose landlord contacted APS and reported *inter alia* that her cooperative apartment was in need of repairs. A psychiatrist for APS met with Ms. M in March 2007. In early 2008, the City of New York Department of Social Services, the parent agency of APS, initiated an Article 81 guardianship proceeding and a hearing was scheduled for February 8, 2008. Ms. M thought the hearing was scheduled for February 6, in part because the return date was "faint" on the order to show cause, and traveled to the courtroom alone by public transportation, despite the winter cold.

The hearing was adjourned, and after several months, the petitioner requested that the matter be further adjourned as Ms. M refused to allow the APS caseworker into her home. The additional adjournment would allow APS to obtain an "Order to Gain Access" to Ms. M's apartment, which in turn would allow the APS psychiatrist to evaluate Ms. M. The court denied the request because the Order to Gain Access is intended to be used only to assess a person's need for protective services, which APS had already done. It is also appropriate only if there is no other opportunity to observe and evaluate the person. Here, Ms. M left her apartment on a daily basis to shop, which would afford APS a sufficient opportunity to interact with her.

Ms. M's court-appointed attorney argued that APS was using the adjournment and possible Order to Gain Access as a pretext to gather additional evidence to support its guardianship petition because the nine-month delay had rendered APS's evidence stale. After the court denied the motion for an adjournment, the petitioner commenced its case with one witness, the APS psychiatrist, who testified based on the single meeting with Ms. M. The psychiatrist testified that Ms. M's apartment needed some repairs, some of which had not been done because Ms. M reported that she had previously been overcharged for repairs, further noting that Ms. M had food in the refrigerator, her grooming was "passable," and that she told him that she paid her own bills, did her own banking, shopping, and cooking, and had health insurance. The court dismissed the petition, finding that the evidence established that Ms. M's only functional limitation was an unsteady gait, and that the threat of a future eviction did not support the appointment of a guardian.

Outside the *ex parte* context, a similar practice that raises medical privacy and evidentiary privilege concerns is the use of APS psychiatrists to obtain information to be used in a guardianship petition. Usually, the APS caseworker is familiar with the AIP, having worked on his or her case. Next the APS psychiatrist becomes the primary investigator, assesses the person's need for guardianship, and ultimately becomes the primary witness for the petitioner. The APS petition will routinely recite that the person voluntarily consented to be interviewed by the psychiatrist. Ironically, the information obtained from the voluntary interview becomes the basis of the psychiatrist's testimony that the person who provided "informed consent" needs a guardian with broad powers, including those related to medical and health care decisions. A person may have the capacity to consent to a meeting with an APS psychiatrist but not have the capacity to make decisions about property management and personal care, but the nature of consent is actually fairly complex. This casts doubt as to whether such consent is truly informed, knowing, and voluntary.

As a threshold matter, it is doubtful that the psychiatrist provides sufficient information to the AIP for the AIP to form the predicate for an informed decision. The psychiatrist is employed by APS, and APS is charged with protecting those in need, including diagnosing and improving their circumstances. The psychiatrist will not only perform an assessment and evaluation for those purposes, but the information obtained may also be the basis for bringing a guardianship proceeding, in part for precisely those decisions relating to the informed consent that the APS psychiatrist is trying to obtain. Even if the APS psychiatrist does provide that information, a truly informed consent would require that the person understands the role of the psychiatrist within APS, the mandate of APS, and the nature and scope of a guardianship proceeding.[102]

The extent to which the APS practice of using a psychiatrist as a "guardianship specialist" violates medical privacy depends, at least in part, on a number of factors. Assuming there is a constitutional right of medical privacy, does the person have a reasonable expectation of privacy when meeting with an APS psychiatrist in an arguably therapeutic context? Can the APS psychiatrist be characterized as a "treating physician" subject to the physician-

patient evidentiary privilege or, alternatively, does the psychiatrist owe a duty of confidentiality to the person?

Generally, the existence of a privilege favors the "exclusion of the evidence."[103] "[T]he decision as to what values to recognize through the law of privileges is a difficult one."[104] Conventional wisdom holds that due to the narrow scope of the physician-patient privilege, the APS psychiatrist is an "examining" physician to whom the privilege does not apply. However, a closer examination of the APS mandate suggests that the role of the APS psychiatrist may be within the scope of the evidentiary privilege that attaches to treating physicians. Consider the following characterization of the APS role:

> The Commissioner is likewise charged with arranging for medical and psychiatric services to evaluate and whenever possible to safeguard and improve the circumstances of adults with *serious impairments*.[105]

The psychiatrist "visiting" Ms. M on behalf of APS was charged with carrying out the APS mandate to evaluate, safeguard, and improve Ms. M's circumstances. A treating physician is defined as one who provides diagnosis or medical treatment pursuant to an explicit or implicit agreement.[106] Although the APS psychiatrist is not providing services under a standing order from a physician, pursuant to the agency's statutory mandate, the psychiatrist is both diagnosing and attempting to remediate the person's medical condition. Although APS is required to conduct an investigation upon receiving a report of a vulnerable person at risk, in the guardianship context, the psychiatrist often, if not always, seeks to obtain consent to meet with the person.

It is therefore arguable that the APS psychiatrist should honor the person's expectations of privacy and also be subject to the physician-patient privilege, at least to the extent that the psychiatrist is involved in diagnosis and any kind of therapeutic relationship. Unlike a personal injury case, in the context of a guardianship proceeding, the person alleged to be incapacitated is not placing her own medical condition at issue. The case is brought "against" the person, and the petitioning party in New York has the burden of proving that the guardianship is necessary and the person either consents or is incapacitated as defined by the statute. A distinction between the APS psychiatrist's interaction with a potential AIP and a more conventional relationship between a psychotherapist and patient is that, typically, a conventional patient consults the psychotherapist for diagnosis and treatment, whereas APS initiates contact with an AIP pursuant to a statutory mandate.[107]

The privilege that attaches to communications between patient and physician or psychiatrist is subject to a number of exceptions, including when it occurs for reasons other than treatment.[108] The intended protective function of APS may require that a petition for guardianship be filed if the person is having difficulty providing for his or her needs, although guardianship should be only a last resort after sufficient efforts have been made to provide necessary services to the person. The purpose of the guardianship would ostensibly be to prevent harm to the vulnerable person and assure that he or she receives and continues to receive sufficient services. Assuming that alternatives to a guardianship have been fully explored, but to no avail, these arguments would support the view that the APS psychiatrist is not subject to the physician-patient privilege.

Yet there remains something quite troubling about this relationship and the medical professional's use of information obtained during the course of the APS investigation. Under Article 81, medical evidence is not necessary, and non-privileged evidence that is relevant and material to a person's functional capacity and the standard for appointing a guardian is sufficient and favored by the statute. The rationale for using a psychiatrist to obtain information for APS is therefore weaker, and at least requires that diagnostic and other medical information obtained by the psychiatrist be excluded. A better alternative would be to rely on testimony from the APS caseworker regarding the AIP's functional capacity.

Recommendations to Prevent, Manage, and Resolve Violations of Medical Privacy in Article 81 Guardianships

Although Article 81 is a "functional capacity" statute, it falls short of the emerging support model envisioned by Article 12 of the UN Convention that recognizes a person's full legal capacity regardless of disability. The support model would replace the guardianship incapacity framework with a "co" or "facilitated" structure for supportive decision making. Article 81 includes many provisions that respect a person's autonomy and protect due process, privacy, and liberty interests that are at stake for individuals who are alleged to need a guardian. However, the permissive use of medical information perpetuates the medical model of guardianship and creates the risk that medical privacy rights are routinely violated. Consequently, it may also impede a full exploration of functional capacity and alternatives to guardianship.

The following recommendations are intended to improve Article 81 through a combination of proposed amendments and suggested "best practices." The ultimate goal of these recommendations is to move Article 81 closer toward a completely functional framework that utilizes a support model, which ultimately will replace the notion of incapacity and guardianship with the model of "partnered" or "facilitated" decision making required under Article 12 of the UN Convention.

1. Prior to filing an Order to Show Cause and Petition, attorneys for petitioners should conduct a complete investigation in order to fully assess the person's functional capacity and determine whether alternatives to a guardianship are available and sufficient. They should thoroughly assess the need for a guard-

ian and determine to the greatest extent possible if the person has the capacity to make decisions. This assessment should focus on the statutory standard, explore potential alternatives to a guardianship, highlight the person's functional abilities rather than medical diagnoses, and use the statutory powers as a checklist.[109]

2. When drafting the petition, the attorney for the petitioner should include as much of the statutorily required information as possible. Under § 81.08(a), the petition is supposed to include specific information, including the following most relevant to these recommendations:
   - Describe the person's functional capacity based on his or her ability to manage activities of daily living.
   - Include specific information about events, actions, or occurrences that create a risk of harm, and indicate that the person does not appreciate or understand the limitations that interfere with his or her ability to provide for personal needs or property management.[110]
   - Explicitly connect the person's needs and functional capacities to the powers sought.[111]
   - Identify and describe resources that may be available as alternatives to the guardianship.[112] If none exist, describe specific actions taken by the petitioner that would constitute due diligence in exploring these potential alternatives.
   - Include any other information that would help the court evaluator.[113] This existing statutory requirement implicitly requires that the petitioner view the petition from the perspective of the court evaluator, at least with respect to making sure that a guardianship is necessary and there are no sufficiently reliable alternatives available.
   - Do not include medical information without a court order. Medical information is not required to be included with the petition. The statute's emphasis on functional capacity and medical privacy protections suggest, and may require, that medical information not be included with the petition.
3. Suggested "best practices" for judges:
   - Do not sign the Order to Show Cause if the petition does not include the required elements described above.
   - Prior to accepting a petition that includes protected or privileged medical information, require the petitioner's attorney to submit an affirmation explaining the need for medical information, explain why evidence of functional capacity is not available or sufficient, and formally request a court order to include medical information with the petition.
   - As part of an order granting the request to use medical information (whether made by the petitioner or the court evaluator), require the protected or privileged information to be in a separate document, perhaps as a "medical information rider" to the petition, or an addendum to the court evaluator report, so that it may easily be separated and sealed from the publicly available case documents.
   - Exclude medical information and evidence from the hearing, unless there is insufficient evidence related to the person's functional capacity, or the medical information is necessary and appropriate in order to make the required findings and decisions, assure that the person's medical diagnosis and medication regimen is accurate and therapeutic, or for any other reason that would be helpful to the court or to the person. The goal is to more sharply focus the hearing on the person's functional capacity, potential alternatives to a guardianship, and the least restrictive alternative.
   - Disseminate rules for court evaluators regarding the use of medical information. These rules would emphasize that the assessment is a functional one and not a medical diagnosis. The rules would also require a court order for the court evaluator to obtain medical information and disclose it to other parties. In addition, the court evaluator would be permitted to include medical diagnoses, medications, treatment, and other protected information only in a separate addendum to the court evaluator report, unless otherwise ordered by the court or the court record is sealed.
4. A party seeking to introduce medical evidence that may infringe on a person's medical privacy rights should be required to make a proffer of necessity. The court may either rule on the proffer as part of a pre-hearing written motion or hear oral argument on the issue prior to the hearing or on the hearing date.
5. Require APS to focus more on functional capacity in its guardianship assessment and petition process, rather than basing its assessment, petition, and testimony too much on medical diagnosis.
   - Clarify the role of physicians, psychiatrists, psychologists, and social workers employed by APS who provide services to a person, and when they are acting in their professional capacity as an APS service provider, subject them to their profession's evidentiary privileges. Prior to a decision by the Department of Social Services or other "parent" agency of APS to file a petition for guardianship, these professionals should follow a protocol to obtain informed consent, which specifically states the purpose of the meeting (i.e., Is it a therapeutic relationship that gives rise to an evidentiary privilege or is the purpose

to assess the person's capacity to determine whether a guardianship is warranted?). If the purpose is assessing the need for a guardian, and the person does not fully understand the nature and consequences of the consent, the APS professional must terminate the meeting and may not gather information that may be used "against" the person in a guardianship proceeding. The goal would be to encourage these professionals to work with the person to achieve the statutory goals of APS, rather than gather evidence for a guardianship case from an unsuspecting person who is vulnerable and may not understand the nature and consequences of the APS employee's role. If the professional who may be subject to an evidentiary privilege is assessing the need for a guardian (i.e., acting as a "guardianship specialist" rather than a medical, psychological, or social work professional), the person should be permitted to testify only in that capacity, rather than as a professional who can diagnose and opine as to appropriate treatment of the person.

- When an APS investigation involves an APS-employed psychiatrist or other professional who may potentially infringe on the person's medical privacy or be subject to evidentiary privileges, the professional must obtain meaningful informed consent from the person. If the professional does not believe that the person has the capacity to understand the potential consequences of providing information to the professional, no further discussion should be allowed. If the psychiatrist or health care professional is truly acting as a "guardianship specialist" for APS rather than in his or her capacity as a medical professional, that person should be precluded from testifying at the hearing as a medical expert or about medical information. A better alternative would be to have APS fully explore services that may avoid the need for a guardianship. If a guardianship petition is filed as a last resort, APS should have a caseworker, not a psychiatrist, testify about the AIP's functional capacity.

6. Amend the last clause of § 81.07(b)(3), by replacing "the court shall not require that supporting papers contain medical information" with "the petition, and any supporting papers, shall not include medical information without a court order."
7. Amend Article 81 terminology generally to more precisely reflect a focus on a person's legal capacity, rather than her incapacity or deficiency.[114] Throughout the statute, replace the term "alleged incapacitated person" with "person alleged to need a guardian" and replace the term "incapacitated person" with "person with a guardian."

Conclusion

Article 81 should continue moving toward becoming a fully functional capacity statute that emphasizes functional capacity, requires that alternatives to a guardianship be fully explored prior to appointing a guardian, and raises the threshold for including medical information with the petition and at the hearing. If a court determines that medical evidence is necessary, there should be uniform procedures to ensure that a person's medical privacy rights are protected. Ultimately, both the medical and functional models of guardianship based on a person's incapacity should be replaced by a support model that recognizes the full legal capacity of the person, and identifies areas in which assistance is needed, without a finding of incapacity. ■

1. Under Article 81 of the MHL, the person is initially referred to as an "Alleged Incapacitated Person" (AIP) and if a guardian is appointed, an "Incapacitated Person" (IP). If the person consents to the guardianship, the court order will generally refer to the person as a "person in need of a guardian" (PING).

2. MHL § 81.02(a)(2).

3. *See, e.g., In re Ardelia R.*, 28 A.D.3d 485 (2d Dep't 2006) (testimony established that frail 82-year-old woman did not understand or appreciate the consequences of her limitations where APS found her at her home without running water, food, electricity, or heat, she was diagnosed with dementia, hypertension, and coronary artery disease, could not cook, wandered from home, did not know her income, where she banked, and despite substantial savings, was behind on her utility bills).

4. The statute states that "'[f]unctional level' means the ability to provide for personal needs and / or the ability with respect to property management." MHL § 81.03(b).

5. The facts have been altered in these composite cases to protect privacy, although all of the facts and documents in these and virtually all Article 81 cases are matters of public record, available for anybody to see, unless the case file is sealed under MHL § 81.14.

6. Although Article 81 can be used to appoint a guardian for any person who is found to need a guardian, regardless of his or her particular functional capacity or medical condition, Article 17-A of the N.Y. Surrogate's Court Procedure Act (SCPA) is an alternative guardianship statute that follows a medical model and is limited to people with developmental disabilities, autism, traumatic brain injuries, and other enumerated conditions. SCPA 1750-a. Article 17-A was initially enacted in 1969 primarily for parents of children with developmental disabilities who were reaching the age of majority, and has not been amended in any significant way. Article 17-A lacks most, if not all, of the due process protections of Article 81, as well as its flexibility, powers, and nuances. Courts have borrowed from the framework of Article 81 to fashion remedies that would pass constitutional muster or that are otherwise permitted under Article 81. *See, e.g., In re Mark C.H.*, 28 Misc. 3d 765 (Sur. Ct., N.Y. Co. 2010) (in a case involving guardianship for person whose medical diagnosis was belied by his functional capabilities, court discussed history of Article 17-A within constitutional and international human rights framework, and imposed monitoring requirements to assure that the person's needs were being met by a guardian and by a substantial trust established for his benefit); *In re Yvette A.*, 27 Misc. 3d 945 (Sur. Ct., N.Y. Co. 2010) (court held that under Article 17-A terms and restrictions in best interests of person can be imposed on guardian and imposed initial and annual reporting requirements on guardian of the person). Although the focus of this article is on Article 81, my analysis applies with equal force to Article 17-A.

7. Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 Stetson L. Rev. 143, 150 (2007) (noting that guardianship population will grow and be more diversified, and that approximately 7–8 million individuals have intellectual disabilities, affecting 10% of families).

8. *See, e.g.*, Naomi Karp & Erica Wood, *Guarding the Guardians: Promising Practices for Court Monitoring* (AARP 2007); Pamela B. Teaster et al., *Wards of*

the State: A National Study of Public Guardianship, 37 Stetson L. Rev. 193 (2007) Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 Stetson L. Rev. 867 (2002).

9. A guardian appointed under Article 81 must complete and file an initial 90-day report and subsequent annual reports, which are reviewed by a court examiner and approved by a judge. MHL §§ 81.30, 81.31. If the guardian is a family member or " lay" guardian, it is likely that an attorney will be required to assist with reporting, or the court examiner will have to provide assistance or at least review corrected reports. If the guardian is a "professional" appointed from the Part 36 fiduciary list of appointees, that person may not be available for another case that may involve greater need. Finally, when a guardian is appointed, payment for the petitioner's attorney, the court evaluator, the attorney for the person under the guardianship (if any), and the court examiner must be made from the assets of the person.

10. There have been three major guardianship "summits" in the United States, each resulting in findings and recommendations. The 1988 and 2001 Wingspan Conferences gathered together a multi-disciplinary group of experts and produced comprehensive recommendations. *See* Comm'ns on the Mentally Disabled & Legal Problems of the Elderly, Am. Bar Ass'n, *Guardianship: An Agenda for Reform*, 13 Mental & Physical Disability L. Rep. 274 (1989) (summarizing substance and recommendations of Wingspread Conference); A. Frank Johns & Charles P. Sabatino, *Wingspan – The Second National Guardianship Conference*, 31 Stetson L. Rev. 573 (2002); Marshall B. Kapp, *Reforming Guardianship Reform: Reflections On Disagreements, Deficits, and Responsibilities*, 31 Stetson L. Rev. 1047 (2002) (noting the presence of widespread disagreement among Wingspan participants, mostly revolving around the tension between adversarial and therapeutic approaches). The National Guardianship Network organized the "Third National Guardianship Summit: Standards of Excellence" at the University of Utah S.J. Quinney College of Law in Salt Lake City on October 12–15, 2011. The conference focused on "post-appointment guardian performance and decision-making." *See* Guardianship Summit http://www.guardianshipsummit.org.

11. The functional model represents an improvement over the traditional medical model, which relied primarily on medical diagnosis as the basis for appointing a guardian. Although it has many positive aspects, to the extent that a functional model of guardianship requires a finding of incapacity, promotes the role of courts, and focuses on limitations and deficits, it falls short of the nondiscriminatory aspirations of the support model of the United Nations Convention and Optional Protocol on the Rights of Persons with Disabilities. 46 ILM 443 (2007), *at* http://www.un.org/esa/socdev/enable/rights/convtexte.htm (last visited Apr. 9, 2012) (UN Convention). The UN Convention was signed by President Barack Obama on July 24, 2009, 74 Fed. Reg. 37923 (July 24, 2009), but has not yet been ratified by the U.S. Senate. Nevertheless, the UN Convention and other international treaties and documents are relevant when analyzing potential human rights violations that may arise in guardianship cases. For a fuller discussion of the international framework within the context of an SCPA Article 17-A case, see *In re Mark C.H.*, 28 Misc. 3d 765, 783–88 (Sur. Ct., N.Y. Co. 2010).

12. *See, e.g.*, A.B.A. Comm'n on Law and Aging, *Guardianship Law & Practice*, *at* http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html (last visited Apr. 9, 2012).

13. Alternatives to guardianships include various supports such as home health aides, visiting nurses, adult day care, and senior centers and advance directives such as a power of attorney for property decisions, a health care proxy or living will for health care decisions. MHL § 81.03(e).

14. Guardianship courts play an important and largely constructive role in assuring that vulnerable individuals brought before them, and their constitutional rights, are protected. Occasionally, the protective function of the court comes at the expense of the person's rights of self-determination and autonomy. A guardianship can be expensive and utilizes scarce judicial resources. Guardianships also provide a source of compensation for court-appointed guardians and court examiners, and fees are generally paid from the assets of the person for whom a guardian has been appointed. Compensation and appointments are governed by "Part 36 Rules," N.Y. Comp. Codes R. & Regs. tit. 22, pt. 36, which became effective on June 1, 2003 and were enacted in response to two reports issued by the Office of Court Administration in 2001 that verified the need for reform (the Inspector General's Report on Fiduciary Appointments in New York and the Report of the Commission on Fiduciary, referred to as the "Birnbaum Commission"). Another report that described the impact of the new appointment regime under Part 36, Development of a New Fiduciary Appointment System, was issued on February 9, 2004 by the Office of Court Administration, Guardian and Fiduciary Services. The text of the rules and reports are *at* http://www.nycourts.gov/ip/gfs (last visited Apr. 10, 2012).

15. *See, e.g.*, *In re Grinker*, 77 N.Y.2d 703 (1991) (holding that predecessor statutes to Article 81 lacked protection for fundamental liberty interests protected under the U.S. Constitution); *In re Fisher*, 147 Misc. 2d 329 (Sup. Ct., N.Y. Co. 1989) (describing constitutional infirmities of conservator and committee statutes that preceded Article 81); *In re Doe*, 181 Misc. 2d 787 (Sup. Ct., Nassau Co. 1999).

16. 46 ILM 443 (2007), *at* http://www.un.org/esa/socdev/enable/rights/convtexte.htm (last visited Apr. 9, 2012). Among the key provisions in the UN Convention are Article 12, "Equal recognition before the law," Article 19, "Living independently and being included in the community," and Article 22, "Respect for privacy."

17. *In re A.G.*, 6 Misc. 3d 447 (Sup. Ct., Broome Co. 2004).

18. MHL § 81.01.

19. *See* MHL § 81.22(a)(9).

20. *See* MHL § 81.22(a)(8); *see also* N.Y. Pub. Health Law art. 29-CC (authorizing guardian to make health care decisions as surrogate with power to make decisions to refuse or withdraw life-sustaining treatment).

21. MHL § 81.22(a)(2).

22. *See* MHL § 81.21 (authorizing a wide array of property management powers, including the power to make transfers, gifts, and establish trusts). *See also Helen Hayes Hosp. v. DeBuono (In re Shah)*, 95 N.Y.2d 148 (2000) (Article 81 guardian has power to engage in Medicaid planning, including transfers of assets to herself).

23. MHL § 81.22(a)(9).

24. *Olmstead v. Zimring*, 527 U.S. 581 (1999).

25. *Id.* at 599.

26. 28 C.F.R. § 35.130(d).

27. UN Convention, *at* http://www.un.org/esa/socdev/enable/rights/convtexte.htm (last visited Apr. 9, 2012). The U.S. Department of Justice is actively seeking to enforce the requirements of *Olmstead*. *See* http://www.ada.gov/olmstead/index.htm (last visited Apr. 2, 2012). *See also Disability Advocates, Inc. v. N.Y. Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149, 154 (2d Cir. 2012) (holding that plaintiff lacked standing to bring action under the "integration mandate" of the ADA to challenge failure of New York State officials to place residents of adult homes who had serious mental illnesses in the community).

28. UN Convention.

29. Under Article 12 of the UN Convention, the person retains capacity as a legal matter and the support structure is designed, as is Article 81, to promote decisions by the person. Any "co" or "facilitated" decision would be based on the person's preferences, wishes, and values. Article 81 comes close to Article 12 in its functional approach, mandate to explore alternatives to a guardianship, and requirement that the guardian make decisions based on a subjective understanding of the person's wishes, and only utilize a best interests approach if the person's wishes are not known or ascertainable.

30. *See, e.g.*, Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 Fordham L. Rev. 1177 (1994) (explaining the critical role a psychiatrist can play in identifying the existence of a medical condition that may be causing cognitive impairment and recognizing when interventions such as adjusting medication may alleviate problems, for example when depression is an underlying cause). The assessment of incapacity by judges, lawyers, and health care professionals may be unreliable due to pretext and "sanism." *See* Michael L. Perlin, *"Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. Contemp. Legal Issues 3 (1999).

31. Deirdre M. Smith, *The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation*, 31 Cardozo L. Rev. 749, 753 (2010).

32. *Id.*

33. MHL § 81.02(a).

34. MHL § 81.02(a)(2); *see, e.g.*, *In re May Far C.*, 61 A.D.3d 680 (2d Dep't 2009) (appointment of guardian reversed where person made sufficient arrangements for meeting her needs, including executing a power of attorney).

35. Liability under tort law for invasion of privacy is another layer of potential protection, but beyond the scope of this article. These "privacy torts" include intrusion upon another's seclusion and public disclosure of private facts. A physician or other health care professional in a confidential relation-

ship may incur tort liability through an unauthorized disclosure of confidential information.

36. *See, e.g., Whalen v. Roe*, 429 U.S. 589 (1977) (computer record of prescriptions for controlled substances); *Nixon v. Admin. of Gen. Serv.*, 433 U.S. 425 (1977) (presidential papers). The U.S. Supreme Court has also found a broader right to privacy in a variety of other contexts. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003) (right to consensual sexual contact between people of the same sex); *Roe v. Wade*, 410 U.S. 113 (1973) (right to choose abortion); *Griswold v. Conn.*, 381 U.S. 479 (1965) (right to obtain contraception).

37. *O'Connor v. Pierson*, 426 F.3d 187 (2d Cir. 2005) (holding that Board of Education did not have legitimate interest in demanding private medical records from teacher with a serious illness in matter involving sick leave, explaining that when a "legislative burden" infringes on privacy rights, the court will apply intermediate scrutiny and only permit it when the government has a substantial interest that outweighs the privacy interest).

38. 429 U.S. 589 (1977).

39. *Doe v. City of N.Y.*, 15 F.3d 264, 267 (2d Cir. 1994).

40. *Powell v. Schriver*, 175 F.3d 107, 110 (2d Cir. 1999).

41. *Fleming v. State Univ. of N.Y.*, 502 F. Supp. 2d 324 (E.D.N.Y. 2007).

42. 631 F.3d 57 (2d Cir. 2011).

43. *Id.* at 66. Prior to *Matson*, the standard for finding a right of medical privacy had only required a "serious medical condition." *See O'Connor*, 426 F.3d 187.

44. *Matson*, 631 F.3d at 72–73 (Straub, J., dissenting).

45. *See e.g., Rivers v. Katz*, 67 N.Y.2d 485 (1986); 1-12 New Appleman New York Insurance Law § 12.06.

46. *Schulman v. N.Y. City Health & Hosps. Corp.*, 38 N.Y.2d 234 (1975).

47. 42 U.S.C. § 1320d; 45 C.F.R. pts. 160–164 (the entire privacy rule is at http://www.hhs.gov/ocr/hipaa). Under HIPAA, the release of medical records and information is authorized, *inter alia*, pursuant to a court order or to a personal representative who is defined as a person with the legal authority to make health care decisions. For a summary of HIPAA, see U.S. Dep't of Health & Human Services Office of Civil Rights Privacy Brief, *Summary of the HIPAA Privacy Rule, at* www.hhs.gov/ocr/privacy/hipaa/understanding/summary.pdf). Note that other federal statutes govern matters related to medical privacy, including the Privacy Act, 5 U.S.C. § 552a (federal agencies); *see FAA v. Cooper*, 132 S. Ct. 1441 (2012) (holding that definition of "actual damages" under the act is limited to pecuniary damages), and the Americans with Disabilities Act; *see* 42 U.S.C. § 12101 (no federal employees).

48. *See, e.g., In re Mougiannis*, 25 A.D.3d 230 (2d Dep't 2005) (court held that court appointed guardian was a qualified person under HIPAA, but that health care agent was authorized only to obtain records related to duties as agent).

49. 45 C.F.R. §§ 164.508, 164.512(e).

50. *In re Miguel M.*, 17 N.Y.3d 37 (2011). Protections similar to HIPAA that apply to facilities operated by the Office of Mental Health and the Office of People with Developmental Disabilities can be found at MHL § 33.13.

51. *In re Dolan (Lisa O.)*, 33 Misc. 3d 870 (Sup. Ct., Nassau Co. 2011).

52. *See, e.g.*, CPLR 4507, 4508.

53. *Dillenbeck v. Hess*, 73 N.Y.2d 278.

54. *People v. Sinski*, 88 N.Y.2d 487 (1996) (in criminal prosecution against person involving prescription drugs, court discussed purposes and exceptions to physician-patient privilege and held that it excluded information from doctors who provided the prescriptions to the defendant).

55. *Sinski*, 88 N.Y.2d at 491 (citing Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4504:1, at 628 (1992)).

56. *Heller v. Peekskill Cmty. Hosp.*, 198 A.D.2d 265 (2d Dep't 1993).

57. *Dillenbeck*, 73 N.Y.2d at 284.

58. MHL § 81.09(d).

59. *Heller*, 198 A.D.2d 265.

60. *See Sinski*, 88 N.Y.2d 487.

61. *Dillenbeck*, 73 N.Y.2d at 280–81 (plaintiff in personal injury case sought medical records of defendant from hospitalization on day of car accident to determine blood alcohol level, but court held protected by physician-patient privilege).

62. *See* Roca, *supra* note 30, at 1177.

63. MHL § 81.02(a).

64. *See, e.g., In re May Far C.*, 61 A.D.3d 680 (2d Dep't 2009) (reversing appointment of guardian where AIP made adequate arrangements for her affairs, including executing a power of attorney when she had sufficient capacity); *In re Nellie G.*, 38 A.D.3d 547 (2d Dep't 2007) (reversing appointment of independent guardian where daughter was agent under springing power of attorney, which was available resource rendering appointment of a guardian unnecessary, and allegation that daughter had engaged in questionable transaction involving AIP's real property was unfounded where daughter did not benefit and transaction did not adversely affect AIP's interests); *In re Mildred M.J.*, 43 A.D.3d 1391 (4th Dep't 2007) (petition dismissed where AIP had the capacity to execute advance directives and family relationship did not create presumption of undue influence nor a confidential relationship so as to shift burden of proof); *In re Isadora R.*, 5 A.D.3d 494 (2d Dep't 2004) (order appointing guardian reversed where agent appointed under health care proxy and power of attorney was properly carrying out plan for care of person and management of property); *In re Albert S.*, 286 A.D.2d 684 (2d Dep't 2001) (court refused to appoint guardian because health care proxy agents were acting consistently with provisions of living will, and court lacked authority to impose additional requirement for termination of life-sustaining treatment that was not contained in advance directives).

65. MHL § 81.02(b).

66. *See, e.g., In re David C.*, 294 A.D.2d 433 (2d Dep't 2002) (Commissioner of DSS petitioned for appointment of a guardian after an eviction proceeding initiated based on failure to pay rent and maintain the apartment properly, court reversed jury finding that person was incapacitated and held "[a] precarious housing situation and meager financial means do not, without more, constitute proof of incapacity . . ."); *In re Tait*, N.Y.L.J., May 31, 1994, p. 28 (Sup. Ct., N.Y. Co.) (even if a person is mentally ill, eccentric, has poor personal hygiene and lives in squalor, there must be clear and convincing evidence that the person is incapacitated as defined in the statute); *In re Presbyterian Hosp. (Early)*, N.Y.L.J., July 2, 1993, p. 22 (Sup. Ct., N.Y. Co.) (guardian not appointed for elderly woman who recognized the potential for harm if she refused placement in a nursing home or did not allow home care attendants to assist her).

67. MHL § 81.08(a)(3).

68. *See, e.g.*, MHL § 81.07(b)(3); *In re Bess Z.*, 27 A.D.3d 568 (2d Dep't 2006); *In re Q.E.J.*, 14 Misc. 3d 448 (Sup. Ct., Kings Co. 2006); *In re Higgins (England)*, N.Y.L.J., Oct. 6, 1995, p. 27 (Sup. Ct. Suffolk Co.).

69. *See, e.g., In re Q.E.J.*, 14 Misc. 3d 448 (Sup. Ct., Kings Co. 2006).

70. MHL § 81.14; *see In re Astor*, 13 Misc. 3d 1203(A) (Sup. Ct., N.Y. Co. 2006) (court sealed medical, psychological, and nursing records, as well as court evaluator's reports, and documents that contained confidential information such as Social Security and financial account numbers; court proceedings concerning any confidential information would be closed to the public and press); *In re A.J.*, 1 Misc. 3d 910(A) (Sup. Ct., Kings Co. 2004) (on motion of court evaluator, court closed courtroom and sealed the record where husband and wife who were alleged to be incapacitated feared their son who had physically and financially abused them).

71. MHL § 81.07.

72. *See In re James B.*, 25 Misc. 3d 467 (Sup. Ct., Delaware Co. 2009) (agency certified by state agency to provide services for people with developmental disabilities).

73. 12 Misc. 3d 1132 (Sur. Ct., Broome Co. 2006).

74. *See, e.g., In re Goldfarb*, 160 Misc. 2d 1036, 1043–44 (Sup. Ct., Suffolk Co. 1994) (court held that affirmation of treating physician attached to petition would have violated physician-patient privilege, except that respondent placed her medical condition at issue).

75. *In re Q.E.J.*, 14 Misc. 3d 448.

76. *In re Tara X*, N.Y.L.J., Sept. 18, 1996, p. 27 (Sup. Ct., Suffolk Co.).

77. *Id.*

78. *In re James B.*, 25 Misc. 3d 467.

79. MHL § 81.08(a)(3); *In re Mary J.*, 290 A.D.2d 847 (3d Dep't 2002) (allegations in petition were sufficient where they described the alleged incapacitated person's physical problems, memory impairment, need for assistance in performing activities of daily living, and lack of understanding of the nature and consequences of her inability and limitations).

80. MHL § 81.09.

81. The AIP must be advised in the "legend" of the order to show cause that the court evaluator may be granted permission to inspect medical records and of the right to object by telling the judge that the court evaluator should not be given permission. MHL § 81.07(c). This right to object may only be meaningful if the AIP has retained an attorney, or has the right to be appointed an attorney under MHL § 81.10.

82. *See, e.g., In re Kufeld*, 51 A.D.3d 483 (1st Dep't 2008) (affirming court's decision to grant court evaluator's request for order to access medical records as they would assist in investigation, especially in light of allegations by AIP's nephew of duress and coercion against the AIP and AIP's allegations of incapacity in self-petition).

83. MHL § 81.09(d).

84. MHL § 81.09.

85. MHL § 81.09(d).

86. *In re Goldfarb*, 160 Misc. 2d 1036, 1041–42 (Sup. Ct., Suffolk Co. 1994).

87. MHL § 81.12(b); *Goldfarb*, 160 Misc. 2d at 1043.

88. MHL § 81.09(c)(7).

89. *In re Tara X*, N.Y.L.J., Sept. 18, 1996, p. 27 (Sup. Ct., Suffolk Co.).

90. MHL § 81.09(d); *In re Goldfarb*, 160 Misc. 2d 1036.

91. *In re Rosa B.-S.*, 1 A.D.3d 355 (2d Dep't 2003*); In re Bess Z*, 27 A.D.3d 568 (2d Dep't 2006) (court excluded testimony of treating physician, but held that testimony established by clear and convincing evidence that the person was likely to suffer harm because she could not care for her medical, personal, and financial needs and did not understand the nature of her limitations).

92. *In re Goldfarb*, 160 Misc. 2d 1036.

93. *In re Maher*, 207 A.D.2d 133, 143 (2d Dep't 1994).

94. *See, e.g., In re Bess Z.*, 27 A.D.3d at 568 (testimony of AIP's treating physician violated physician-patient privilege, but other evidence sufficiently clear and convincing to appoint guardian*); In re Seidner*, N.Y.L.J., Oct. 8, 1997, p. 25, col. 3 (Sup. Ct., Nassau Co.) (excluding medical evidence to which AIP objected based on physician-patient privilege and dismissing petition for lack of evidence).

95. *In re Rosa B.-S.*, 1 A.D.3d at 356.

96. *In re Marie H.*, 25 A.D.3d 704 (2d Dep't 2006).

97. 42 U.S.C. §§ 1397–1397F.

98. N.Y. Social Services Law § 473(1) (SSL); N.Y. Comp. Codes R. & Regs. tit. 18, pt. 457 (N.Y.C.R.R.); *see also* http://www.ocfs.state.ny.us/main/psa/; 97 ADM-2.

99. *See, e.g., Dan R. v. Bane*, 199 A.D.2d 322 (2d Dep't 1993) (local commissioner of Department of Social Services required as part of protective services to serve as representative payee for persons receiving SSI who are unable to manage their own finances).

100. Adult protective services are available to all adults who meet the following non-financial eligibility criteria: unable to provide necessary food, clothing, or medical care, access public and private benefits, or protect oneself from physical or mental injury, neglect, maltreatment, or financial exploitation. The person must be at risk and need protection from actual or potential harm. No other person or agency must be able or willing to provide the needed assistance. SSL § 473(1); 18 N.Y.C.R.R. § 457.1(c)(1), (2), (3); 90 ADM-40.

101. *In re Eugenia M.*, 20 Misc. 3d 1110(A) (Sup. Ct., Kings Co. 2008).

102. One court has called the practice of trying to assess on a case by case basis the validity of a waiver in this context a practice "fraught with peril and fallibility." *In re Goldfarb*, 160 Misc. 2d 1036, 1040 (Sup. Ct., Suffolk Co. 1994).

103. Steven I. Friedland et al., Evidence Law and Practice 792 (3d ed. 2007).

104. *Id.* at 793.

105. *In re Eugenia M.*, 20 Misc. 3d 1110 (A); see SSL § 473(1)(b) (emphasis added).

106. *Heller v. Peekskill Cmty. Hosp.*, 198 A.D.2d 265 (2d Dep't 1993).

107. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1 (1996) (upholding claim of psychotherapist-patient privilege where police officer sought services from a clinical social worker subsequent to shooting in which he was involved). The client or patient of a social worker may invoke an evidentiary privilege under CPLR 4508.

108. *See* David P. Horowitz, 4-12 Bender's New York Evidence – CPLR 4-12 (2012).

109. MHL § 81.02, § 81.02(a) (standard for appointing a guardian); § 81.03(e) (available resources that are alternatives to a guardianship); § 81.21 (property management); § 81.22 (personal needs).

110. MHL § 81.08(a)(4), (5).

111. MHL § 81.08(a)(6).

112. MHL § 81.08(a)(14).

113. MHL § 81.08(a)(15).

114. Article 81 made great strides by using "incapacity" and "incapacitated person" instead of the labels "incompetency" and "incompetent" that were used in the predecessor Article 78 "Committee" statute. However, in the ensuing two decades, societal awareness of the importance of language has increased, and it is time to update the statute and use language that does not reflect negatively on the person or suggest that the person's legal capacity is not entitled to full recognition under the law. For example, New York has replaced the term "mental retardation" with "developmental disability" or "intellectual disability" in state agencies, statutes, and regulations.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I recently received a $10,000 retainer to represent a client (Daniel Developer) in a real property development project. I anticipate the project will take about a year to 18 months to complete. I will be billing on an hourly basis every two months. It has been my practice to put these retainers in my escrow account but in discussing the matter with a couple of fellow attorneys, one expressed the opinion that these retainers should not be put into the escrow account and instead should be deposited into our firm's operating account. The other attorney said that the retainer payment belongs to the client and must be put into an escrow account. Which is it?

In addition, could I enter into a "flat fee" or "minimum fee" payment arrangement with Daniel Developer?

With regard to fee amounts, it has been my firm's practice to increase billing rates at the beginning of each calendar year. Am I required to inform Daniel Developer once our new billing rates take effect?

Last, if for some reason I do not use up the retainer given to me by Daniel Developer, am I required to refund the remaining amount to him?

Sincerely,

Andrew Advocate

Dear Andrew Advocate:

As set forth below, the New York Rules of Professional Conduct require that all financial transactions with clients be handled carefully by lawyers and law firms who must keep contemporaneous records. Moreover, be it for fees or other funds received from or on behalf of clients, lawyers and law firms must communicate what services they will provide, or have provided, to the client, as well as funds received from or disbursed on behalf of clients. Having said that, as long as the lawyer or law firm advises the client that the retainer payment will be treated as if it were earned at the time of the payment and that any unearned portion will be refunded to the client, New York allows the fees to be deposited into an operating account.

By far, the proper handling of client funds is one of the most sensitive ethical issues that attorneys face every day. Attorneys are reminded time and time again – from the moment they are admitted to practice – that there are strict procedures in place governing how an attorney handles money received from a client and, in particular, retainer fees meant to pay for legal services. Although attorneys should be intimately familiar with each and every part of the Rules of Professional Conduct, special attention must be given to Rule 1.15, which deals with, among other things, preserving identity of funds and property of others, fiduciary responsibility, and the prohibition against comingling and misappropriation of client funds or property. To use the words of Professor Roy Simon, "Rule 1.15 is the longest and most strictly enforced rule in New York's Rules of Professional Conduct." *See* Simon's New York Rules of Professional Conduct Annotated 598 (2012).

Rule 1.15(a) prohibits comingling and misappropriation of client funds or property and states that "[a] lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own." The lawyer must maintain separate accounts for funds that are the client's property. *See* Rule 1.15(b). Generally speaking, retainers paid to an attorney are not considered a client's property, which means that retainers should not be deposited into an escrow account. As stated by one commentator, to the contrary New York "*requires* a lawyer to deposit advance retainer fees in the lawyer's own account (or the law firm's operating account) unless the lawyer and client have agreed that the lawyer may deposit them in the lawyer's or law firm's trust account." *See* Simon at 600 (emphasis added); *see also* N.Y. St. Bar Ass'n Op. 816 (2007). Opinion 816 is instructive since the Committee on Professional Ethics found that "[i]f the parties agree to treat advance payment of fees as the lawyer's own, the lawyer may not deposit the fee advances in a client trust account, as this would constitute impermissible commingling." *Id.*

Accordingly, the payment you received from Daniel Developer for his upcoming real estate project appears to be an advance retainer, and therefore belongs to you and no longer to him. The attorney you spoke with who said that the retainer should be placed in your firm's operating account is correct, and you should no longer be depositing retainer payments into your firm's escrow account. Once the retainer is deposited in the operating account, the funds are outside the control of the

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client and its creditors and are under the control of the lawyer. The obligation to return an unearned part of a retainer is a separate matter (which we will address below). In essence, there is a debtor/creditor relationship between lawyer and client. But, as they say, "the devil is always in the details" so that isn't necessarily the end of our answer.

Perhaps this engenders some controversy, but it has been suggested that lawyers should open a third account dedicated to retainers. While it is important that we emphasize again and again that a third account is not required and that it is perfectly acceptable to deposit retainers in the operating account, a third "retainers only" account may have certain advantages that outweigh any additional bookkeeping burdens it may create. There are always bookkeeping issues when funds are deposited into an escrow account or an operating account. More often than not when an attorney deposits retainers into an escrow account (which should not be done), the attorney may lose track of which are the retainer funds and which are client escrow funds and before you know it the attorney is dipping into his or her account because the attorney believes these really are the retainer funds when in fact they are not. This sort of comingling would also constitute the misappropriation of client funds. The problem of putting retainer funds into the general operating account is, again, a bookkeeping issue. Funds in an operating account usually get spent – particularly by the small firm or single-practitioner firm. These funds get used for taxes, payroll, whatever. Granted attorneys should have the discipline not to do that but, they often lose track of which are the retainer funds and which are not. As seen in the example, if in fact the attorney is "fired" after a couple of weeks, he or she has to return the unused retainer. If the retainer funds have been spent out of the operating account, the attorney may not have the money to return unused retainer fees to the client.

The benefit of the third account is that funds are put in that account and withdrawn only as earned. Furthermore, the client has no control over these funds (as opposed to an escrow account), so if the attorney and client "split up" and the disenchanted client tells the attorney that the attorney cannot pay himself or herself, the attorney would be permitted to retain such funds as payment for services rendered. Retainers deposited in an escrow account are, arguably, client funds. They are "off limits" to the lawyer once the client says no you cannot pay yourself from the retainer, thus sacrificing the whole idea of having a retainer. If the retainer funds are deposited in the third type of account, the funds remain the attorney's and, pursuant to the well-drafted retainer agreement, the attorney may pay himself or herself. And, as opposed to putting retainer funds in a general operating account and perhaps having them dissipated, the balance of funds will be there to return to the client.

Your question mentioned escrow accounts, so it is important to point out the recent decision by the Court of Appeals in *In re Galasso*, 19 N.Y.3d 688 (2012). There various disciplinary charges were upheld against a lawyer who failed to detect the looting of his firm's escrow account by the firm's bookkeeper – who also happened to be his brother. The Court faulted the attorney for breaching his fiduciary duty to pay or deliver escrow funds, failing to supervise a non-lawyer employee, being unjustly enriched by the use of clients' funds for his personal benefit and failing to provide appropriate accounting to his firm's clients. "[A]lthough [the attorney] himself did not steal the money and his conduct was not venal, his acts in setting in place the firm's procedures, as well as his ensuing omissions, permitted his [brother] to do so"; and "[he] ceded an unacceptable level of control over the firm accounts to his brother, thereby creating the opportunity for the misuse of client funds." *Id.* In light of *Galasso*, we cannot stress enough the need for attorneys to implement and maintain strict financial controls and consistently maintaining those controls through regular supervision of the firm's staff, especially in matters involving the financial affairs of both the law firm and the clients it represents.

Your remaining questions provide us with an opportunity to discuss Rule 1.5, which governs fees and division of fees. Rule 1.5(a) states:

> (a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

Furthermore, Rule 1.5(d)(4) provides:

> (d) A lawyer shall not enter into an arrangement for, charge or collect:
> (4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable

> minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated . . .

We should first turn to your questions whether it is appropriate to enter into a "minimum fee" payment arrangement with Daniel Developer and whether you are required to return to him the unused portions of the fee received from him. Rule 1.5(d)(4) incorporates, amongst other things, the finding by the Court of Appeals in *In re Cooperman*, 83 N.Y.2d 465 (1994) which essentially put an end to nonrefundable fees in New York holding that they generally violate a lawyer's obligation to return any unearned fee upon withdrawal. Although nonrefundable retainers are not permitted, *Cooperman* allows lawyers to charge a minimum fee "as long as the minimum fee is refunded if the work is not completed." *Id.*

The $10,000 payment you have received from Daniel Developer for his real estate project would be reasonable depending on the scope of the project and how much time it will take you to complete the tasks necessary to fulfill the objectives of your representation. If it is reasonable to expect that the legal services required to achieve your client's objectives would cost $10,000, then qualifying the $10,000 payment as a minimum fee would be reasonable under these circumstances. The factors outlined above as per Rule 1.5(a) are instructive in the determination of what would qualify as a reasonable fee. However, if for some reason Daniel Developer terminated your representation or you decided to withdraw from the representation before completing the project or triggering payment of the minimum fee, then you must refund whatever part of the minimum fee has not been earned, because nonrefundable retainer fees are prohibited.

Your letter mentions that it is your firm's practice to increase billing rates at the beginning of each calendar year (like many firms) and asks if you are required to inform Daniel Developer of any fee increases by your firm. Rule 1.5(b) states:

> A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

Comment [2] to Rule 1.5 provides:

> When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writing in certain cases. See 22 N.Y.C.R.R. Part 1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

As Comment [2] suggests, the length of time of the relationship between the lawyer and client is a primary factor in determining the required level of understanding between the lawyer and client as to what fees and expenses will be incurred in connection with a given representation. If Daniel Developer happened to be a longtime client of your firm, then there should be a regular understanding between him and your firm as to the scope of the representation and the basis or rate of the fee and expenses for which he will ultimately be responsible. If, however, Daniel Developer is a new client, you must almost immediately establish a written understanding as to fees and expenses, which may be done by way of the required letter of engagement prescribed in 22 N.Y.C.R.R. part 1215.

In any case, when firms have a practice of annually increasing rates during the course of a representation, the firm should give advance notice to the client in the retainer agreement or engagement letter sent to the client at the outset of the representation by using language such as the following:

> We review our rates from time to time and may adjust them periodically, without notice to our client, based upon our determination of the value of each individual's services in the legal marketplace in which we serve our clients.

This puts the client on notice of your firm's practice and opens the door to a negotiation for a different arrangement if the client objects to the practice. Since you anticipate that Daniel Developer's project will take a year to 18 months to complete, we believe that your firm's practice of raising rates annually must be disclosed in the engagement letter or retainer agreement sent to Daniel Developer.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.,
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP, and
Peter V. Coffey, Esq.,
Englert, Coffey, McHugh & Fantauzzi, LLP

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Athanasia Apostolakos
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Eva-maria Aronovitch
Arthur H. Aufses
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Sean Kenneth Cowell
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Ara A. Basmajian
Cherell La'dana Beddard
Joseph John Bestreich
Brian Patrick Boland
Patrick Seamus Brand
Steven Joseph Cacciola
Christopher Michael Casa
Giovanna Condello
Jason Michael Corrar
Michelle Angela Davis
Caterina L. Dazzo
Maegan Lynn Delguidice
Noelle Faith Eberts
Seth Engel
Robert Steven Fernez
Riquet Figaro
Greg Taylor Fishkin
Marisa Erin Fox
Chester Gittleman
Bradley Craig Gutkin
Christopher Paul Hampton
Patrick Harkins
Patrick Ryan Harkins
Anabia Hasan
Melody Hobebesion
Catherine Donnell Hulme
Angela G. Iannacci
Rezwanul Islam
Ginu Jacob
Hosana Crystal Jean-etienne
Keri A. Joeckel
Pushpam Treasa Kalliath
Ashish Kapoor
Sean Kelly
Daniel Mark Kessler
Michael Morris King
Chava Eva Klein
Hansary Laforest
Stephanie Lagoudis
Rachel Wyzan Lasry
Paul H. Lee
Susan S. Loucks
Ralph J. Macchia
Elie Joel Mansdorf
Anthony John Matinale
Maureen Allison McGrath
Aaron Eitan Meyer
Alexandra Kim Michalowicz
Kenny Michel Milord
Kristen Marie Mitaritonna
Daniel Mitzner
Lilian Wanjiku Mungai
Michael David Nacht
Michael David Nathan
Ijeoma O. Nduka
Lauren Caitlin O'Connor
Michael Joseph Paglino
John Thomas Piccinnini
Joseph Anthony Plati
Kamil Podlinski
Ashley Christina-marie Pope
Diego Quinones
Nicholas Rakesh Ramcharitar
Matthew Evan Rappaport
Gregory J. Rigano
Tina Marie Rizzo
Andrew Saintanasse
Lisa Allison Schwartz
Marianne Simoni
Erin Lindsay Sussman
Nicholas Thomas Terzulli
Eric Michael Wahrburg
Daniel Thomas Weglarz

ELEVENTH DISTRICT

Anita Nana Aboagye-Agyeman
Christopher Shannon Adkins
Spero Michael Andreopoulos
Jonathan Arias
Nikolaos Dimitrios Athanasopoulos
Jeffrey Lyn Baldwin
Denise Arlene Biderman
Frumit Ita Birnbaum
Andra Diana Jasmine Brumberg
Elizabeth Cordoba
Aaron Todd Deacon
Jason Dey-chao Zorrilla
Edwin Montague Ferguson
Shante Nicole Freckleton
Brendan Michael Gage
Huidian Hu
Maureen Ann Hussain
Natalie Kachkarov
Rakshita Koirala
Courtney Whitlock Leonard
Craig Sandy Levine
Lauren Helen Lostritto
Yi-Liang Lu
Amy Luo
Patrick John McIlwain
Lauren Ashley Mitchell
Mona Bahiyyih Moayad
Nelson Javier Mongui Rojas
Dzevat Paljevic
Jiho Park
Brent Matthew Reitter
George San Vincent
William Sciales
Tea Solomonia
Danielle Melissa Stringer
Ema Gloria Takeda
Damian A. Treffs
Nicole Wittman

TWELFTH DISTRICT

Steven Michael Altmann
Jenelle Shamira Boyd
Amanda Lynn Helfrich
Jonathan Robert Miller
Olgerta Munga
April A. Newbauer
Tammy Toni O'Hara
Orlando Angel Rodriguez

THIRTEENTH DISTRICT

Marisa Nikita Atherton
Joseph H. Cucco
Nicole Gabriele
Victoria Ledeneva
Sujean Song Lee
Thomas Sebastian Mirigliano
Mary Christine Morrone

OUT OF STATE

Fnu A Rong
Ozgun Emre Akinci
Tanell Lakea Allums
Mian Ahmed Asad
Yoshiyuki Asaoka
Stephanie Marie Asous
Hilary C. Atkin
Osama Mahmoud Audi
Vasily Averin
Danielle Maiolo Bacco
David Patrick Badour
Audrey Baidoo
Andrew Foster Bain
Jayne Rosalie Baldwin
Tobias Francis Bannon
Paula Barrachina
Astrid Charlotte Barth
Tuna Basak Belet
Geoffrey Bestor
Jacqueline Ann Bevilaqua
Lloyd Craig Birnbaum
Nickolas Martin Boecher
Kimberlee S. Bogen
Francois Bohuon
Elizabeth McCraw Bonney
Liam Y. Braber
Alexandra Lynn Branzburg
Marine Albane Bressand
Scott A. Browdy
Thomas Granville Burgess
Clara Burtenshaw
Edward Thomas Butkovitz
Nicholas Dometie Butovich
Miranda Dee Carolan Callaghan
Pietro Calzavara
Emir Cami
Nicoletta Carapella
Maria Gloria Cardarelli
Catherine Therese Carey
Alexander Stearly Carmichael
Daniel John Carollo
Raymond Cashen
Vijit Singh Chahar
Virginia Kar-kar Chan
Matthew Foster Chandler
Caleen Tanabe Chanyungco
Jessica Lynn Charniga
Lu Chen
Yuanjing Chen
Maisa Chiang
Junghee Cho
Tony Tun-yin Chow
Hao Chu
Caleb Chee Wei Chua
Joseph Angelo Clark
Joan Denise Clay
Douglas Macarthur Clemmons
Andrea Lee Clowes
Erva Cockfield
Kimberly Dawn Perrotta Cole
Matthew Paul Colletti
Irina Constantin
Albert Conte
Jonathan Ross Cooper
Nicholas Cropp
Sandy Ann Curko
Clinton Eugene Curtis
Milan Vikram Dalal
Caroline Elizabeth Darman
Rohini De Silva
Joseph Owen Decampo
Elouise Dellit
Neal Devan Desai
Pallavi Devaraj
Ryan Michael Deverin
Elliot Ross Diamond
Nicole Andrea Disalvo
Ina Alexandra Alcantara Dominguez
Xiaojie Dong
Lisa Donohoe
Maria Luwalhati Casanova Dorotan
Eugene Driker
Jun Du
Gary M. Edelson
Brad Stephen Ehrlichman
Edna Estime
Samantha Noelle Evans
Shawn R. Farrell
Samantha Pearl Ferdinand-Davis
Nicole Rose Fernandes
Dina Sewell Finkel
Deborah Jane Frangello
Sara Elizabeth Frankel
Jamil Sharif Fraser
Tracey Ai-him Fung
Priscilla J. Gabela
Eva Rivka Gardner
Arnold Bennett Glenn
Sarah Elizabeth Godfrey
Peter Bernard Goldman
Lilya A. Gorbach
Roger Norris Gordon
Ferdinand Graf
Nicholas Glenn Green
Mark Scott Gregory
Laurie Ellen Grier-Mulvenna
Rong Guan
Audrey Hage
Ziad Haider
Jennifer Ann Hall
Dongwook Han
Mi Hee Han
Lief Norgaard Haniford
Meghan Adele Hayden
James B. Heaton
Katherine Gates Heidbrink
Eleanor Bronyn Heubach
Derek Edward Hines
Man Hei Alexander Ho
Chloe Ines Holzman
Nettie Ann Horne
Rebekah Lockie Horowitz
Rosemary Elizabeth Hort
Yin-ching Hsueh
Jiayun Huang
Peter Christopher Hughes
Enga Kameni Innocent
Anthony Joseph Interlandi
Jordan Blair Isrow
David John Jacobs
Boshen Jia
Mark Dennis Yang Chua Joven
Jeong Hyun Ju
Helena Eva Marie Jung
Joseph David Kamenshchik
Satoko Kametaka
Mekhman Karimov
Alison Lyn Karmelek
Michelle Rachel Katz
Roman Katz
John Patrick Keeney
Daniel Hurley Kennedy
Andrea Levin Kim
Christine Ji-ihn Kim
Julia Haeyoung Kim
Nam Hee Kim
Brian Andrew Kirlew
Anna Kitsos
Simon Lee Knopf
Junya Kobayashi
Allison Marie Korodan
Christopher Joseph Kotarba
Yu-hua Kuo
Andrew David Kupinse
Isaac Langleben
Ryan John Larkin
Anastasia Christina Latsos
Frank A. Lauletta
Eric Douglas Lavers
Hilma Lawrence
Geoffrey Lawson
Eun Nyung Lee
Eun Suk Lee
Hsin I Lee
Hyun Jin Lee
Naomi Rachel Lehr
Pamela Ann Leskar
David Levine
David Jack Levy
Dean Lindale Lewis
Li Li
Huaying Liu

Jennifer Christine Liu
Anthony William Locascio
Benjamin Joshua Locke
Yuxin Lu
John Lucas
Jian Luo
Edward Joseph Mahar
Alexander Rudolf Malbin
Andrea Mantovani
Franklin Haas Matranga
David Edward McGuinness
Silvia Elena McKearin
John McMullan
Shing-Horng Mei
Deneal Michaels
Sarah E. Miller
Gaetano Alberto Mina Di Sospiro
Heidi Sasha Mohammed
Corbin J. Morris
Michael Patrick Murtagh
Karen Myszka Ostberg
Norey Lee Poquiz Navarro
Dustan Neyland
John Nicodemo
Robert Grant Niznik
Youngjin Noh
Justin Michael Nye
Thomas Francis Joseph O'Mullane
Folasade Charlotte Ogunmekan
Jose Florante Mogol Pamfilo
Parvan Petrov Parvanov
Emily Sara Pasternak
Priscilla Lindsey Pellecchia
Garth Gaff Philippe
Bui Van Quang
Patrick Joseph Quinn
Prashanthi Rao Raman
Lu Ran
Aniruddh Ravi
Matija M. Repolusk
Alison Melani Reynolds
John Rochman
Wendy Eileen Rutter
Ariel Lia Schneier
Edward W. Schroll
Rachel B. Sherman
Joseph Slaughter
Maura Abeln Smith
Tracy Ann Snow
Jennifer Snyder
Ryan Douglas Stai
Timo Steinbiss
Megan Ruth Sterback
Toneta Sula
Alexandra Jean Swifte
Chun-ju Tai
Ke Xin Cheryl Tan
Adaeze I. Udoji
Karyn Rita Weingarten
Harris Adam Weinstein
Elizabeth Redchuk Wellborn
Audra Marie White
Kirsten Kelly Wood
Harlan York
Madeline Zuckerman

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I arrived at my office early one morning last week and found an unsolicited email on my server from Dr. Adam Zappel. In the email, Dr. Zappel wrote that a friend gave him my email address, and that he needs my help. Dr. Zappel had sought my representation in a prospective medical malpractice case and included information inculpating himself in the misdiagnosis of a 14-year-old, Tim Trouble, who as it turned out had been regularly indulging in his parents' liquor cabinet. What he thought was a simple case of alcohol poisoning, turned out to be an untreated burst appendix, which if not removed, could have resulted in Tim's death. Dr. Zappel wrote in his email to me that he had a drug problem at the time and had been regularly taking painkillers when he made the error. Worse, Nurse Hailey Honest witnessed the event and has said she will testify against him if the suit arises. This occurred where Zappel is in current residence, St. James Infirmary.

Currently, I represent Our Savior Hospital, where Dr. Zappel previously worked. Our Savior's administrator suspects Dr. Zappel may be planning a qui tam case alleging that Our Savior is engaged in up-coding cases of the common swine-flu to a more deadly flesh-eating disease.

I believe that it would be in Our Savior's interest to know that Dr. Zappel may be embroiled in litigation and had a substance-abuse problem. I am also worried that the unsolicited information in the email may conflict me out of defending the qui tam case.

I checked the Rules of Professional Conduct under Rule 1.18 which states that I cannot represent a client with interests materially adverse to those of a prospective client in a substantially related matter if I received information from the prospective client that could be "significantly harmful" to the prospective client. But, I also read that a person who gives adverse information without "any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship . . . is not a prospective client."

I believe that the information I learned about Dr. Zappel could be harmful to him, and that the cases are substantially related since they both concern alleged misdiagnoses. My question to the Forum: is Dr. Zappel a prospective client?

Sincerely,
Vera Decent

In Memoriam

Joseph A. Baum
Flushing, NY

William S. Calli
Utica, NY

Luanda E. Cavaco
Broad Brook, CT

Benjamin S. Clark
West Cornwall, CT

Morris A. Cohen
Tucson, AZ

Raymond J. De Silva
Jamesville, NY

Allan B. Ecker
Houston, TX

William N. Ellison
Watkins Glen, NY

Dana Mora Feldman
Colleyville, TX

Andre L. Ferenzo
Roslyn, NY

Lucia A. Ferrara
Cohoes, NY

Frank T. Gaglione
Williamsville, NY

Jackie Gallers
Bronx, NY

Drayton Grant
Rhinebeck, NY

William E. Griffin
Bronxville, NY

Robert A. Harlem
Oneonta, NY

Lionel G. Hest
New York, NY

Theodore T. Jones
Albany, NY

Charles Chulwon Khym
Flushing, NY

Martin Lerner
Melville, NY

Leonard Lustig
Islandia, NY

Alan Marcus
Forest Hills, NY

Dennis A. Maycher
East Rutherford, NJ

Gary A. Munneke
White Plains, NY

Daniel J. O'Neil
Poughkeepsie, NY

Stuart M. Pearis
Vestal, NY

Arnold J. Rabinor
Lido Beach, NY

Norman Robbins
Roslyn Heights, NY

James E. Rolls
Buffalo, NY

Maria Salapska
Phoenix, AZ

John Jospeh Slavin
Floral Park, NY

Jock M. Smith
Tuskegee, AL

David L. Snyder
Tarrytown, NY

Thomas W. Stanisci
Huntington, NY

Jack M. Steingart
East Rockaway, NY

Harold Stern
Hartsdale, NY

Sol M. Wasserman
Yonkers, NY

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: This question is about a charging document. Please comment on the grammar of the complaint, which follows:

> On such date, Defendant, did intentionally, knowingly, or recklessly, operate or assume actual physical control of a vehicle upon a public way while under the influence of alcohol in an amount sufficient to impair his ability to care for himself and guard against casualty; **and/or** did operate or assume actual physical control of a vehicle upon a public way thereby committing the offense of operating a vehicle under the influence of an intoxicant in violation of section 12345 **and/or** 678910 of the HRS.

Answer: The grammar of the complaint is very bad; it suffers both from archaic language (for example, "did intentionally . . . ," which reads as if copied from an old copy book) and bad punctuation. But its worst fault is ambiguity, due to the twice-used phrase *and/or*.

Many lawyers think that the phrase *and/or* is a useful shortcut, indicating that several meanings are possible. And lay dictionaries concur. For example, *Webster's Third New International Dictionary* defines *and/or* as: "Words on either side of a term [that] can be taken either together or individually." So the term "cats and/or dogs" can include one of three possible meanings: (1) *both cats and dogs*, (2) *only cats*, and (3) *only dogs*.

The phrase *and/or* does seem useful as a shortcut. The American Law Reports (the A.L.R., specifically 118 A.L.R.1367), for example, approved of *and/or*, saying that it was useful because it avoided alternative, roundabout language like "or both or any combination thereof." The A.L.R. added that *and/or* is a "deliberate amphibology" that is, a purposely ambiguous expression that is useful in its "self-evident equivocality," a phrase also used by more than one court. (I withhold comment on the lack of clarity in the explanation.)

But *and/or* is useful as a shortcut only when there are just two alternatives, one on each side of the diagonal slash. If the choice involves more than two terms, however, misunderstanding is almost inevitable.

One case illustrates the problem: The issue was whether the evidence proved that the plaintiff "had sustained an unusual strain in his left side and back, (or) a hernia on his left side *and* (*or*) [emphasis added] a stretching and tearing of the ligaments in his back." (*Wichita Falls & S.R. Co. v. Lindley*, 143 S.W.2d 428, 432 (Tex. Civ. App. 1940.) (Just try to figure that out!)

In the complaint our correspondent sent, it is true that there were only two possibilities involved, one on either side of the *and/or.* But the drafter of the document inexplicably placed a semicolon before *and/or,* indicating that the language that followed was not connected to *and/or*. It is possible that the drafter of the complaint intended *and/or* to refer back to an "either/or" passage at the beginning of the complaint, but that is grammatically impossible due to the distance from that language. So the phrase *and/or,* instead of being a useful shortcut, was an impediment to clarity.

This document is a textbook example of when to avoid *and/or*. As regular readers of this column may recall, lawyers who send me questions about *and/or* have consistently been warned to avoid using the phrase in legal writing B in which clarity is much more important than brevity.

But perhaps the most important reason to avoid *and/or* is that many judges vehemently dislike it. The least inflammatory objection is that the expression is "misleading and confusing." But a significant number of judges are passionately opposed to *and/or*. It has been dubbed "slovenly," "a meaningless symbol," a "linguistic abomination," and "that janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy to express his precise meaning or too dull to know what he did mean."

And if that is not enough to deter you from using it when you appear before a judge, you cannot be dissuaded!

Potpourri

Some time ago a reader contributed another example of ambiguity he had noticed in the prescription for eyedrops his ophthalmologist had given him. The instructions for using it read, "Three or four drops in each eye every day. You can't use too much of the drops."

The reader's dilemma: Does the word *can't* mean "it's impossible (to use) too much"? Or does *can't* mean "you should not use too much"? That ambiguity is inherent in the negative form of the modal verb *can*. Although the affirmative form *can* means "able to" the negative form permits either of the two meanings above. (Perhaps this person ought to notify his ophthalmologist about it.)

Another reader recalled Ed Asner's appearance on *Saturday Night Live* some time ago. In one skit, Asner portrayed an engineer in the process of retiring from his job as chief engineer at a nuclear power plant. His parting instructions were, "You can't add too much water to the generator." The very next day, one of those engineers, who thought the direction meant it was impossible to add too much water to the generator, was liberally pouring water into the generator, when the other associate engineer passed by. He believed that the chief engineer's word *can't* in the direction "can't add too much" meant "should not add too much."

So they stopped pouring and called the retired chief engineer for an explanation. Furious at the intrusion on the first day of his retirement, the engineer shouted, "Stop pouring the water! It'll rust hell out of the pipes!"

Now, that's clear!

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elements of its case. You need show only that the plaintiff failed to prove one of its prima facie elements.

As the defendant, you may obtain summary judgment if you prove any affirmative defense you've pleaded in your answer. If the affirmative defense comprises more than one element, you'll have to prove that there's "no triable issue of material fact as to each element."[10]

The Non-Moving Party's Burden

Once the defendant meets its initial burden on summary judgment, the plaintiff may show material facts in dispute, thus warranting a trial to resolve those disputes.[11] If the defendant has proven in its summary-judgment motion all the elements of an affirmative defense, the plaintiff in its opposition papers may submit facts that "negate any single element of the defense."[12] Don't include speculation or conclusions. Be specific.

More on Affidavits

In the last issue, the *Legal Writer* provided an overview of writing affidavits — the document practitioners use most often to move for summary judgment.

An affidavit is a legal, written document in which the individual (the affiant) attesting to the information in the affidavit (the facts) swears under oath and subject to the penalty of perjury that the information in the affidavit is true.

The first sentence of your affidavit should conform to the following: "I, Jane Watson, being duly sworn, state that the following is true under the penalty of perjury." The next sentences should be contained in consecutively numbered paragraphs. Each paragraph can have several sentences, but the fewer the better. Write short sentences and short paragraphs. Each numbered paragraph should have one unifying thought. Some believe that each consecutively numbered paragraph may contain one sentence only. We disagree.

Use affidavits persuasively to present your version of the facts. Affidavits allow you to piece together the facts of the case in one document for the reader that counts most: the court. You may refer to other documents — which you've attached as exhibits — in the affidavit to substantiate the facts of your case. In an affidavit, you can point to and elaborate on the favorable facts about your case. Sometimes, depending on your case, you might also have to explain away the unfavorable facts in your case.

Writing and editing affidavits for your summary-judgment motion can be a time-consuming process. After speaking with your client or witness or expert, or all these individuals, you'll need to capture the information they've told you and create separate affidavits. Submit the affidavits to each affiant to make sure that the information contained in the affidavit is correct. Make changes to the affidavit — by adding or deleting information — depending on the affiant's suggestions and edits. Ideally, you'll want to do several edits. Determine whether you need to fill in any gaps in the evidence. You determine the gaps in the evidence on the elements of the claim(s) or defense(s) and the corresponding facts you'll need to prove the elements of the claim(s) or defense(s).

Write the affidavit in the first person — from the affiant's point of view.[13] Typically, practitioners, not the affiants themselves, write the affidavits in support of their summary-judgment motions. Practitioners do this because most affiants aren't lawyers familiar with the elements of a case, don't know what's relevant or irrelevant, and don't know how to write persuasively. The attorney writing the affidavit should try to make it sound as if the affiant is speaking. If you make the affidavit sound like a lawyer wrote it, the affidavit "will be less credible."[14]

Attach relevant documents as exhibits. The affiant should refer to these documents and explain them as if the witness were testifying at trial. Doing so is necessary because witnesses must make the documents admissible as if they were offered at trial. The *Legal Writer* will discuss in greater depth in the upcoming issue(s) the various documents you may refer to in your affidavits, such as examination before trial (EBT) transcripts, business records, and other documents.

Make sure that the affiant is available to work with you on writing and editing the affidavit. You might need to work around the affiant's schedule. You might need to submit supplemental, opposing, or reply affidavits to address, explain, or include facts not addressed, explained, or omitted in your affiant's affidavit. Some witnesses might not want to cooperate with you in this affidavit-writing process. They might be non-parties who have no stake in the outcome of the case and don't care whether you lose or win the case. Anticipate these problems, and plan accordingly.

The drafts you prepare with your client are protected work product not subject to disclosure. Non-client affiants don't have the same privileges. Your communications with other affiants might be subject to disclosure — information your adversary might request that you turn over.

Don't use form affidavits. What's missing from form affidavits are the specific, non-conclusory facts you need to add about your case. Without support for the facts in the affidavit, you might lose your motion. Besides, form affidavits are replete with "legalistic terminology, archaic verbiage, and insider legal jargon."[15] If you must use form affidavits, edit them to eliminate the verbiage, jargon, and legalese. Taking the time to edit form affidavits will pay dividends. Tailor each affidavit to each case without resorting to cut-and-paste jobs. Even if your firm prefers the traditional legalese,[16] advise your supervisor or colleagues that "recent research show[s] that a majority of judges prefer a modern, direct writing style without legalese."[17]

Change archaic language to plain English. Here are some suggestions.[18] "Duly sworn" becomes "sworn" or "under oath." "Deposes and says" becomes "states." "Affirm" becomes

"state." "Herein" becomes "here" or "in this affidavit." "The undersigned" becomes "me," or use the name of the person signing the affidavit. "Subscribed" becomes "signed."

You know the affidavit is older than you are when you see this language at the end of the affidavit: "Further Affiant Saith Naught" or "Further Affiant Sayeth Not." Eliminate these expressions. They're peculiar and unnecessary. Just use "signed."[19]

Don't include legal arguments in affidavits. Legal arguments have "no evidentiary value."[20]

But sometimes you'll need to include legal words or legal standards. For example, you might want to have your medical expert offer an opinion in terms of a medical standard. That's fine, so long as you have your expert explain things in non-conclusory English: "I believe to a reasonable degree of medical certainty that Jane Watson did not suffer a serious physical injury. The only injury she sustained was a torn toenail cuticle one centimeter long."

CPLR 3212(b) provides that one of the moving affidavits must include a statement attesting to the validity of the movant's claim or defense or to the invalidity of the other party's claim or defense. Also, "[t]he affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts."[21]

Focus on material — instead of immaterial — facts in your affidavits. As we explained in the last issue, moving for summary judgment is appropriate when no dispute exists about the material facts of your case. You don't want to confuse the court with unimportant facts. Including immaterial facts will invite your adversary to respond and will create confusion.

Because writing affidavits takes time, know your time limit in moving for summary judgment. In the last issue, the *Legal Writer* discussed some of the time constraints you have in moving for summary judgment.[22]

Know the specific court rules. If you're submitting a summary-judgment motion in the Commercial Division Part in New York Supreme Court, for example, the moving party must submit a statement of material facts with separately numbered paragraphs.[23] The nonmoving party must provide a counterstatement of material facts.

Some component parts of affidavits are required. Some component parts aren't necessary, but litigators include them out of tradition.[24] Here are the parts of an affidavit: (1) the caption; (2) the affidavit's title; (3) the state and county where the affiant signed the affidavit; (4) the affiant's name and qualifications in offering the information contained in the affidavit; (5) the basis for the affiant's knowledge; (6) the facts; (7) the signature line, including the address and telephone number; and (8) the jurat.[25]

Under CPLR 2101, all court-filed documents must contain a caption, the attorney-of-record's (or the pro se litigant's) indorsement (the name, address, and telephone number of the attorney of record or the pro se litigant's information if a party is appearing pro se) and signature, and a verification.[26]

The Caption

In preparing the affidavit for your summary-judgment motion, use the same caption you've used in the same litigation to identify your case: Use the caption you prepared for the complaint or the answer. The caption should be in the upper left-hand corner of the page. In the caption, "set[] forth the name of the court, the venue, the title of the action, the nature of the paper and the index number of the action if one has been assigned."[27] If you know the name of the assigned judge or justice, include that information as well.[28] Sometimes you'll get an affidavit from a witness when no litigation is pending in the case. In that situation, you wouldn't have or need a caption.

The Title

Give the affidavit a title. The title should identify the affiant. *Examples:* "Affidavit of Adam Johnson"; "Affidavit of Clarissa Moses." If you want to be concise, cut out unnecessary words. *Better examples:* "Adam Johnson's Affidavit"; "Clarissa Moses's Affidavit." If you're using the affidavit in support of your motion or in opposition to your adversary's summary-judgment motion, include it in the title. *Example:* "Adam John's Affidavit in Support of Defendant's Summary-Judgment Motion." *Example:* "Clarissa Moses's Affidavit in Opposition to Plaintiff's Summary-Judgment Motion."

The State and County

Identify the state and the county where the affiant signed the affidavit. In archaic affidavits, you might see "s.s." to the right of the location. The "s.s." means "so sworn."[29] Eliminate it. It adds nothing to your affidavit.

The Affiant's Name and Qualifications

The opening lines of the affidavit should identify the affiant's name and "qualifications to give the affidavit."[30] State that the affiant has personal knowledge of the facts in the affidavit. If any part of the affidavit is based on the affiant's information and belief, state that the affiant believes the information to be true and give the affiant's source of belief.

The Basis of the Affiant's Knowledge

You'll need to show how the affiant has "personal knowledge of the facts stated in the affidavit."[31] Some practitioners believe that it's acceptable to state in a conclusory way that the affiant has personal knowledge of the facts in the affidavit. Worthless is an affidavit that doesn't state the affiant's basis of knowledge. Explain to those reading the affidavit — your adversary, the court, other witnesses, and other parties — why the affiant knows what the affiant knows. You'll need to show the reader(s) how the affiant is connected to the case.[32] The affiant might be, among others, a person who signed the contract in dispute, an eyewitness, an expert, or "the custodian of the records the affidavit proves up."[33]

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The Facts

The body of the affidavit contains the facts. There's no hard-and-fast rule about the length of this section. Include as many facts as you need to support your motion or to oppose your opponent's motion and to win the relief you're seeking. But be concise and succinct. Less is always more.

Some useful pointers:

1. Make sure that your facts support each legal element(s), claim(s), or defense(s) you need to advance.
2. For each separate part of your facts, have separate headings to help the reader understand where you're going.
3. Under each heading, start each paragraph with a topic sentence giving your point.
4. Tell the story chronologically.
5. Tell a story. Use story-telling techniques to engage your reader.
6. Don't throw in the kitchen sink. Limit the atmospherics; get to what's relevant.
7. Use the key words your witness used during your interview.
8. Limit your acronyms, and explain them if you use them.
9. No legalisms.
10. Don't be conclusory.
11. Your facts must be in admissible form.
12. Use your specific facts to force your opponent to rebut them in its opposition papers or to concede.

The Signature Line

The signature line is self-explanatory. Have the affiant sign the affidavit. Type or print the affiant's name beneath the signature.[34] Have the affiant sign in front of a notary public.

Every paper you file with the court — including affidavits — must contain the name, address, and telephone number of the attorney of record.[35] Parties appearing pro se must give their name, address, and telephone number on affidavits.[36]

The Jurat

Jurat means "to swear." By signing an affidavit, the affiant swears to a notary public that the affidavit's contents are true. Affidavits must be notarized. A notary public must sign and stamp an affidavit "[a]fter confirming the affiant's identity and watching the affiant sign the affidavit."[37] *Example:* "Sworn and signed before me, a notary public for the State of New York, on November, 26, 2012." Right underneath this, include a line for the notary public to sign the affidavit. Underneath the signature, type or print the notary public's name. If you don't know the notary public's name, leave a space for the notary to write his or her name. Not all affiants will sign their affidavit in your office in front of a notary public of your choosing. Also, leave a space for the notary's stamp (or seal, if the notary is fancy). Most notary stamps will indicate when the notary's commission expires. To ensure that the notary public's stamp includes when the notary's commission expires, include the following language on the affidavit: "My commission expires: [date]." The notary can fill in the date.

If you submit an unnotarized affidavit to the court, a patient and understanding judge will allow you to correct the error.[38] But — surprise — not all judges are patient and understanding.

Translator's Affidavit

If the affiant does not speak English, you'll need an English affidavit and a translator's affidavit. At trial, a non-English speaking witness may not give testimony without an English translator. The translator helps the court, the attorneys, the parties, and other witnesses understand what the witness is saying. The same concept applies to summary-judgment motions. The evidence you proffer in your motion — your affidavits — must be in admissible form. Under CPLR 2101(b), "[w]here an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate." Without a translator's affidavit, a court will find a witness's English affidavit facially defective and inadmissible.[39]

In the upcoming issue(s) of the *Journal*, the *Legal Writer* will also discuss, among other things, the various nuances to putting together summary-judgment motions, including writing affirmations, opposing summary-judgment motions, cross-moving for summary judgment, and replying to opposition papers. ■

GERALD LEBOVITS (GLebovits@aol.com), a New York City Civil Court judge, teaches part time at Columbia, Fordham, and NYU law schools. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's email address is GLebovits@aol.com.

1. 1 Byer's Civil Motions at § 77:04 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.), *available at* http://www.nylp.com/online_pubs/index.html (last visited Nov. 26, 2012).
2. CPLR 3212(h).
3. CPLR 3212(i); CPLR 214-d.
4. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 37:160, at 37-22 (2006; Dec. 2009 Supp.)
5. *Id.* § 37:161, at 37-22.
6. *Id.* § 37:172, at 37-22.
7. *Id.* § 37:174, at 37-23.
8. *Id.* § 37:174, at 37-23.
9. *Id.* § 37:181, at 37-23.
10. *Id.* § 37:201, at 37-24.
11. *Id.* § 37:210, at 37-25.
12. *Id.* § 37:211, at 37-25.
13. Kamela Bridges & Wayne Schiess, Writing for Litigation 127 (2011).
14. *Id.* at 129 (quoting Steven D. Stark, Writing to Win: The Legal Writer 167 (1999)).
15. *Id.* at 125.
16. *Id.* (citing Wayne Schiess, *When Your Boss Wants It the Old Way*, 12 Scribes J. Leg. Writing, 163, 165–66 (2008–2009); Wayne Schiess, *What to Do When a Student Says "My Boss Won't Let Me Write Like That,"* 11 Persps.: Teaching Leg. Research & Writing 113, 114 (2003)).
17. *Id.* (citing Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 Leg. Writing 183 (2010)).
18. *Id*
19. *Id.* (quoting Joseph Kimble, *Nuts to "Further Affiant Sayeth Naught,"* Mich. B.J. 48, 48 (Sept. 2004)).
20. Barr et al., *supra* note 4, § 37:283, at 37-31.
21. CPLR 3212(b).

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22. If the court doesn't set a date, a party may move for summary judgment "no later than 120 days after the filing of the note of issue, except with leave of court on good cause shown." *Harrington v. Palmer Mobile Homes, Inc.*, 71 A.D.3d 1274, 1275, 900 N.Y.S.2d 152, 154 (3d Dep't 2010); *accord* CPLR 3212(a).

23. 22 N.Y.C.R.R. 202.70(g), Rule 19-a.

24. Bridges, *supra* note 13, at 124.

25. *Id.* at 126.

26. Affidavits need not contain a separate verification.

27. CPLR 2101(c).

28. 22 N.Y.C.R.R. 202.5(b), applicable to New York Civil, Supreme and County Courts.

29. Elizabeth Fajans, Mary R. Falk & Helene S. Shapo, Writing for Law Practice 113 (2004).

30. Bridges, *supra* note 13, at 126.

31. *Id.* at 126.

32. *Id.*

33. *Id.*

34. CPLR 2101(a).

35. CPLR 2101(d).

36. *Id.*

37. Bridges, *supra* note 13, at 127.

38. Barr et al., *supra* note 4, § 37:263, at 37-29.

39. David Paul Horowitz, 2012 Motion Practice Update, New York State Judicial Institute, 12th Jud. Dist. Legal Update Program 1, 28 (Apr. 18, 2012) (citing *Reyes v. Arco Wentworth Mgmt. Corp.*, 83 A.D.3d 47, 54–55, 919 N.Y.S.2d 44, 50–51 (2d Dep't 2011); *but see Yi v. JNJ Supply Corp.*, 274 A.D.2d 453, 454, 711 N.Y.S.2d 906, 907 (2d Dep't 2000) (considering affidavit from non-English speaking witness without translator's affidavit in opposition to summary-judgment motion despite no excuse for failing to provide the translator's affidavit).

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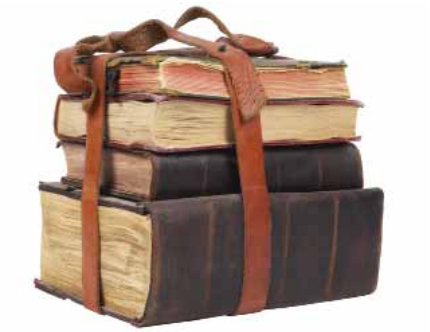

Drafting New York Civil-Litigation Documents: Part XXI—Summary-Judgment Motions Continued

In the last issue, the *Legal Writer* presented an overview of summary-judgment motions, discussing the advantages and disadvantages to moving for summary judgment, how courts search the record, and the evidence needed to support a summary-judgment motion.

In this issue of the *Journal*, we continue our overview of summary-judgment motions. We'll discuss the burdens each party has in moving, opposing, and cross-moving for summary judgment and how to compose affidavits in support of and in opposition to a summary-judgment motion.

The Plaintiff's Summary-Judgment Motion: The Burden of Proof

The Moving Party's Burden

The moving party — the party moving for summary judgment — has the initial burden of proof to establish, with facts, each element of a claim or counterclaim. Let's assume that the plaintiff is moving for summary judgment. To prevail, the plaintiff must show that it's entitled to judgment as a matter of law.[1] *Exception:* In some actions — such as strategic lawsuits against public participation (SLAPP actions)[2] and in limited cases involving licensed architects, engineers, and landscape architects[3] — the burden is on the non-moving party in a summary-judgment motion.

If the moving party fails to show evidence proving each element of a claim or counterclaim — its prima facie case — a court will deny the summary-judgment motion, even if the non-moving party proffers no proof in opposition to the motion.[4]

The plaintiff also has the burden to disprove the defendant's affirmative defenses.[5]

The Non-Moving Party's Burden

As the defendant, you oppose the plaintiff's summary-judgment motion by submitting opposition papers. Don't assume that the court will deny the plaintiff's motion if the plaintiff fails to prove its prima facie case. Explain in your opposition papers how the plaintiff failed to prove its prima facie case.

After you've fully explained in your opposition papers that the plaintiff hasn't met its initial burden, demonstrate — with evidence — that a triable issue of material fact exists. Thus, explain to the court that a trial is necessary.

If the plaintiff satisfies its initial burden to establish, with facts, each element of a claim or counterclaim, the burden then shifts to you, the non-moving party, to offer admissible evidence showing "one or more disputes of material fact."[6] If you, the defendant, meet your burden as the non-moving party, a court will deny the plaintiff's summary-judgment motion.

To meet your burden as the non-moving party, you need to do more than just deny the facts in the plaintiff's summary-judgment motion. Be specific. Don't just dispute facts for the sake of disputing them. Don't dispute immaterial facts. The plaintiff's facts must entitle the plaintiff to a judgment. The facts must be material.

Produce evidence — don't just say that evidence exists — to rebut the facts and show that a trial is necessary. Don't be conclusory. Show; don't just tell.

Don't assume you'll defeat the plaintiff's summary-judgment motion by relying on facts in a new, unpleaded affirmative defense — a defense that wasn't included in your answer. To prevent problems with your unpleaded defense, cross-move to amend your answer to include the new defense.[7] The court might consider your unpleaded defense if the defense doesn't surprise or prejudice the plaintiff and if both sides have an opportunity to address the defense.[8] Your defense must have merit, too.

> Worthless is an affidavit that doesn't state the affiant's basis of knowledge.

The Defendant's Summary-Judgment Motion: The Burden of Proof

The Moving Party's Burden

Assume that the defendant is moving for summary judgment. As the moving party, the defendant must offer evidence that negates the plaintiff's claim. The defendant has the initial burden of (1) showing "[e]vidence of facts inconsistent with one or more prima facie elements of plaintiff's case; or (2) establishing, with facts, each element of a complete defense or defenses."[9]

In your motion, you may demonstrate that the plaintiff has failed to prove one or more of the prima facie

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