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Message from the Outgoing Chair

By Jack C. Auspitz

When I first wrote this, the big news was that the "going rate" went up, again. Firms in Northern California and New York fall over each other to announce salary increases which will bring the pay of a first-year associate to between $125,000 and $160,000, depending on how you count. (Associates in my office always find a way to count our salaries as low as possible and everyone else's as high as possible.) Now, after the April collapse of the tech stocks, that raise seems very generous, if not downright spendthrifty.

Even so, a big raise for associates is nothing new. At the risk of, once again, dating myself (I recall when the IBM Selectric was considered a technology breakthrough), I am reminded of my third year in law school when the going rate went from $8,000 to $15,000. At that time, my wife Marion and I were living entirely on her salary, as an assistant to an oral surgeon, of $4,000. In Boston, this meant we could live in a two-bedroom apartment, own a car, and see every play that came to town (well, both plays that came to town). I assumed we could move to New York, double our spending and still put thousands of dollars in the bank. When we discovered the joys of mortgages and private schools, this assumption proved untrue. I, too, then joined the chorus demanding "more fairness" in salaries.

However, there does seem to be something different about this year's salary increases. Prior jumps in pay were once sheepishly explained by law firms as being efforts to help their associates meet the high costs of living in New York, as recognition of the intense number of hours they put in, as a way to help them pay off the increasing expenses of legal education, etc. This year the rate increases were frankly justified as a device to try to keep associates from leaving the law and becoming dot.commies. The troubling assumption is that the only reason younger people are willing to stay "in the law" is for the bucks. This impression is strengthened by spending a few minutes at the "greedy associates" website and reading item after item focused exclusively on salaries. Depression and cynicism seem even higher among associates who, as we do, specialize in commercial litigation with all its attendant stress.

Those of us longer in the profession should consider the myriad reasons for this apparent trend—what precisely is the source of this depression and cynicism? Perhaps it is not simply the character of (and the level of greed among) associates that has changed, but the profession itself. Law firms are increasingly run as businesses with uncompromising bottom lines and where concern for profit margins rule the day. Associates regularly refer to themselves as "FBUs" or fungible billing units. If that is how associates perceive themselves, and, indeed, are treated, then why not go to a dot.com where the financial rewards are potentially greater? The fact is that if fat paychecks alone were what drives associates, then they would not have chosen law as a career in the first instance.

The effort to keep people in the law by offering large pay raises seems to me to be ultimately destined for failure. (Okay, so that's just a tad self-serving, coming from someone who has to pay the raises.) Whether it is the current rash of e-holes or the investment banking hayride of the '80s, or the tulip mania, there is always a way to get rich faster than being a lawyer. We cannot offer the chance for huge amounts of capital and very early retirement that other fields can. On the contrary, especially in commercial litigation, our clients tend to reward trial skill and judgment that can only be developed with years of practice. While many of us can earn comfortable livings, no one will ever confuse our capital accounts with those of partners at Goldman Sachs. Nor, unless the ethical rules change dramatically, can we get rich on an IPO (I may well have to eat these words in the foreseeable future). Nor can we offer younger people a tension-free or less hassled life: litigation is the only field I know of where someone is paying your adversary hundreds and hundreds of dollars an hour for the sole purpose of proving that you are wrong in everything you say.

The only way that we can continue to keep the—you should pardon the expression—best and brightest in the courtroom as opposed to in the home office day trading, is provide them with both a reasonable level of financial comfort and with work that is challenging and interesting. If it's solely an auction to the highest bidder, law firms lose. However, if the terms are broadened to include intellectual interest and stimulation, maybe our profession is not out of the bidding yet.

Here, I believe, the Commercial and Federal Litigation Section can play an important role. Through our

Annual and Spring Meetings and our various seminars we demonstrate not only how to be a litigator but why such work can be intellectually exciting. Our recent Annual Meeting, ably chaired by our new Chair-Elect, Jay Safer, dealt not only with the skills necessary to present an excellent oral argument, but with the challenges and tactical decisions that make oral argument so exhilarating. Our Chair, Sharon Porcellio, presented an equally exciting program at our Spring Meeting at Niagara-on-the-Lake last May. The program on securities litigation on April 9th sponsored by our Securities Subcommittee delivered the same sense of excitement. I encourage you to invite more of your associates to become involved in these programs and in the Section.

Obviously, I am not suggesting that CLE can replace do-re-me. Nonetheless, we can, through our programs, help to show that there is more to the law than simply dollars, the AMLaw 100 notwithstanding. The work we do can be interesting, although it may be hard to persuade a first-year associate engaged in nothing but document production of that fact. We have to instill in young lawyers a sense that they are joining not just a business but an exciting profession (and by profession, I do not mean becoming part of an accounting firm).

The Commercial and Federal Litigation Section will continue to perform an important function in helping to show that the practice of litigation cannot only pay for groceries but can provide a rewarding and stimulating career. It is a career that rewards people intellectually throughout their lives. Can you name a single investment banker who is still active in that profession at the age of 60? 70? 80? By contrast, can you in 60 seconds name a dozen or more lawyers at each one of those ages who are at the peak of their careers? Of course you can.

I have enjoyed working with all of you throughout the past year on the many projects which our section is now undertaking which will bring home to our 2,000 members that there are rewards and professional satisfaction that practicing commercial litigation can offer which go beyond (but are not inconsistent with) money.

Message from the Incoming Chair

By Sharon M. Porcellio

Personal Touch

I am awed and privileged to follow my esteemed predecessors into this challenging and rewarding position as Chair of the New York State Bar Association Commercial and Federal Litigation Section, which I believe to be the most dynamic section of any bar association. I want to thank my predecessors for their boundless service to the Section and NYSBA in general and for the unselfish personal support and encouragement they have given to me. They represent all that is good about being a lawyer, especially a commercial litigator in the new millennium.

The awe of assuming this position comes from both the unique and overwhelming possibilities facing us as our pace continues to quicken in this age of instantaneous communication, constant contact and infinite information. We face new ethical issues through use of the Internet and e-mail for communicating with clients and for marketing. Use of the Internet raises other issues involving invasion of privacy, jurisdiction, protection of intellectual property and conduct of discovery of electronic information.

At the same time, I am privileged to serve at such an exciting time—the meeting of the information age and our well-founded traditions and rules. The possibilities and need for our input are endless. We will have the opportunity to shape the response of the existing, tried and true laws and precedents to uncharted territories.

As I begin my term, my goals are to continue our fine tradition of producing high quality substantive reports and educational materials on these current topics and developments in law. We should continue to set the standard for commercial litigators in New York State as well as across the country.

In order to continue our fine tradition, I want to expand participation by newly admitted attorneys and by attorneys across the state and even internationally. We had a great beginning on all of these efforts with our Spring Meeting at Niagara-on-the-Lake, Canada, which brought together attorneys from throughout New York State, from Canada and from different disciplines, thanks to the participation of our Corporate Counsel colleagues.

Increased use of technology, such as the Internet, e-mail, video-conferencing and our Section's interactive Web site will certainly facilitate our continued efforts. It is important to remember, however, that technology is only a means to accomplish our goals. What is truly important is the invaluable opportunity to meet and work with women and men from all stages of the profession on a personal level. That personal interaction is what will help new, and not so new, attorneys enjoy the challenge of dealing with the fast pace and ever-changing world of commercial litigation and to avoid the dreaded burn-out and dissatisfaction we know plagues our profession. The Commercial and Federal Litigation Section offers excellent opportunities to enhance practitioner's professional skills and knowledge through committees and Section meetings while affording interaction with colleagues throughout the state and even internationally.

Technology may add to the burdens of our profession but really is a tool for us to use. It is challenging our existing rules, but as active and interested members of the bar, we can and should have input on how the changing technology affects our day-to-day practice as attorneys as well as its impact on our clients. The Section will address the pressing issues mentioned above and others such as how to manage litigation involving cyberspace and what our professional/business model will look like in the new millennium. We plan to explore these issues with the continuing backdrop of personal involvement because despite all of the incredibly exciting and complex legal issues involved in our practice, I believe we derive the most satisfaction from working with and getting to know our talented and giving colleagues. Because the new technology affords us the opportunity to do so more than ever before, we should clearly harness its potential in that regard as well as in all the other exciting and economically rewarding ways. I look forward to working with you all this year.

From the Bench

By the Honorable Jack B. Weinstein

U.S. District Court Judge Jack B. Weinstein was honored with the Section's Stanley Fuld Award at the Annual Meeting in January. This is the acceptance speech he gave to the Section.

As I was coming in, one of the news people suggested that I make her day by indicating in a few words how badly I thought of the law. Of course, I turned her down. Although I must say, on reflection, that there are things in the law that the Bar permits that I can't understand. I am speaking of the vast amount of money available for building prisons and the little for the basic legal services needed to defend people. This is a shame on the American legal profession. But I'm not going to say anything more about that. That's not why I'm here.

Stanley Fuld is a much-admired and treasured friend. He's still cracking jokes at 93 in Florida. Fully a half a century ago, I was his law clerk. I can hardly believe that I am up here, and that I'm the recipient of this honor.

When I met Judge Fuld, I was a poor boy from Brooklyn who first saw a lawyer when I entered law school at Columbia. The first courtroom I saw was the Taj Mahal of justice, the New York Court of Appeals. Beneath that magnificent Albany courtroom were filed the unpublished memoranda of the Court of Appeals' greats. When I touched Cardozo's work, I could almost feel the power charged with the wisdom of New York's jurists, going back to colonial times and through to England's ancient courts of law and equity.

While on the bench, Judge Fuld transformed jurisprudence, constitutional law, and criminal procedure. He burnished every part of the law the Court of Appeals dealt with during the quarter of a century that he dominated that institution. My jurisprudence professor, Harry Jones, rightly called him one of the handful of the greatest common law judges of all times. Justice Douglas said that he made the Bill of Rights a living force again in New York. And I was privileged to have a close-up view of the man.

Judge Fuld was a perfectionist. Drafts by the score led to ever more research and rewriting. Only locking up the opinion in the bound volume stopped that polishing. Fuld's father was a proofreader for *The New York Times*, and I suppose it was in the genes. He would riffle through a memorandum and make correction after correction after correction on the pages his law clerks had reread over and over again to avoid just that agony. Stanley warned me that if I continued along the wayward path I was then on as his law clerk, I would never become a lawyer. My memoranda simply had too many typographical errors. Of course I took this warning to heart and gave up the practice, and I switched to the less demanding world of academia and the bench.

So when I became a judge, I tried, unsuccessfully, to measure up to Fuld's standards. As I finished each opinion, I had a mental image of Fuld taking out his pen to improve it, and I couldn't help thinking, "I know it could be better, Stanley, but I did the best I could." The New York State Reporter adored Fuld, so they would tolerate all his infinite corrections of galleys and page proofs. I tried the same thing when I became a judge, and shortly thereafter received a visit from a vice-president of West Publishing. He was kind enough not to point out that I was no Judge Fuld, but he made it clear that the West reporting system could not afford any such tinkering with proofs.

The law for Stanley Fuld was a beautiful mistress, never to be sullied. A clerk's mistake must have given him the same feeling one of us would have were a waiter to spill soup on a spouse's dress-up outfit. It physically pained him.

The first case I saw him work on was the *Stuyvesant Town* case.[1] He attempted to get a majority of the Court to agree that when an insurance company took federal funds to build a huge housing project on condemned land with state and local tax relief, it was engaged in state action and could not discriminate against minorities in selecting tenants. Judge Fuld lost that one, 4-3, but he established the rule that the United States Supreme Court in *Brown v. Board of Education*[2] mimicked only six years later, based in part on Fuld's dissent. That dissent begins as follows: "Undenied and undeniable is the fundamental proposition that distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality."[3] And it ends this way: "The mandate that there be equal protection of the laws, designed as a basic safeguard for all, binds us to put an end to this discrimination."[4]

My first case with Judge Fuld was a very simple criminal case. The defendant had been convicted in New Jersey on a felony indictment charging him with a $200 theft. The New Jersey distinction between a misdemeanor and felony was $20. In New York, the distinction was $100. The question was, did the New Jersey conviction constitute a first felony under the New York

second felony offender law? Working with Thomas Dewey, the head of the Appeals Board in Manhattan, Stanley Fuld had developed the legal theories that supported the destruction of New York gangs in the early 20th century. By the time Governor Dewey appointed him to the Court of Appeals in 1946, he had become the nation's preeminent prosecutorial theorist. In this case, he explained to me, and to the Court, and to other generations of judges, some of whom have forgotten the lesson, that it is the operative words of the statute upon which the indictment was drawn that necessarily defines and measures the crime. The defendant did not commit a felony under the New York second felony offender law. When I asked him what if the defendant had stolen a $1,000 gold coin, he said, "Jack, the answer would be the same. Look to the words of the statute." He brushed aside in that decision other earlier dicta that suggested the opposite result. "We can't be bound by dicta, Jack," he said. Of course, a couple of weeks later I pointed out that one of his proposed opinions cited as a holding what was really dicta. He said, "Who wrote that?" I said, "You did." He said, "If I wrote it, Jack, it's not dicta."

Today in this country we seem to be forgetting some of what Judge Fuld and other giants, like former prosecutor Chief Justice Earl Warren, taught us about the humanity and dignity of all of us and of each of us. Many members of the legislature, the executive branch, the public at large, and even some members of the Bar tend to treat criminal defendants, even when they are on their way to the death chamber, as less worthy of respect and procedural protections than a parcel of real estate.

Stanley Fuld's work still stands as a beacon. He lights the way for all of us who seek, however inadequately, to emulate his love of the law and enormous skill and to follow his quest for equal treatment for all who seek protection under the rule of law.

I want to thank you for the grace you grant to me, who is still trying to learn my way around the law and still trying to correct typographical mistakes, by permitting me to share, even for a moment, the glow of Stanley Fuld's eminence.

Thank you.

Endnotes

1. *Dorsey v. Stuyvesant Town*, 299 N.Y. 512, 87 N.E.2d 541, 14 A.L.R.2d 133 (1949).
2. *Brown v. Board of Ed.*, 349 U.S. 294 (1955).
3. *See Dorsey*, 299 N.Y. at 536 (quoting *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943)).
4. *See id.* at 545.

The Developing Right to Privacy in Federal Discovery: Does a Privacy Privilege Exist and Should It?

By David Axinn

A lawyer I know once quipped that there are three important privileges in civil practice: the attorney-client privilege, the attorney work product privilege and "none of your damn business." Although the objection that the requested disclosure is "none of your business" is not likely to impress many judges, it may have some success recast as a privacy objection or "privacy privilege." Presently, a privacy privilege is not recognized by the federal courts, but according to one court "there has been embryonic movement in that direction."[1] The state of California recognizes a qualified privacy privilege and various federal courts have at least nodded in that direction. Is such an objection recognizable in the federal courts?

Background

A formal privacy privilege has never been recognized by the federal courts, yet the courts are not foreclosed from creating one. Under Federal Rule of Evidence 501, when examining the basis for a new privilege in cases where federal law supplies the rule of law, the federal courts are directed to look to "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[2] In diversity cases and other cases in which the state law supplies the rule of law, Rule 501 instructs the federal courts to rely on the state law of privilege.

In addition to the federal common law of privilege, the Federal Rules of Civil Procedure have a built-in protection against overreaching discovery requests that impinge on the privacy of a witness. Federal Rule 26(c) provides that in limiting discovery, the courts "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[3]

The starting point for an analysis of privacy issues in federal discovery is *Whalen v. Roe*,[4] in which the Supreme Court first recognized the emerging role of the right to privacy as a limitation on the compelled disclosure of private facts. In *Whalen*, the Court considered a privacy challenge to the New York Controlled Substances Act which required doctors to file the names and addresses of all persons who obtained certain drugs pursuant to a doctor's prescription with the New York State Department of Health. A group of patients who regularly received those drugs challenged the statute, arguing that the law violated their right to privacy under the federal Constitution. In rejecting the claim, the Court clarified the privacy interests protected by the Constitution:

> The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.[5]

Applying the first type of privacy, protection against personal disclosure, the Court rejected the patients' privacy objection, finding that the risk of unwarranted disclosure of patient's information was outweighed by the state's reasonable interest in enforcing laws designed to minimize the misuse of certain drugs and "experimenting with possible solutions to problems of vital local concern."[6] Although the *Whalen* Court did not uphold the privacy challenge, its recognition that the Constitution provides protection against unwarranted disclosure of personal or private information would provide the basis for later decisions limiting discovery based on privacy objections. In addition, the Court's balancing of the private and public interests would become the framework by which federal courts would later consider claims of a privacy privilege.

Despite criticism that the federal privacy right against non-disclosure lacks clear parameters and is difficult to apply,[7] *Whalen* initiated a series of important federal cases recognizing the right to withhold private information from civil or governmental inquiry. The next significant challenge to disclosure of personal matters based on privacy grew out of the tangled web of tape recordings made by former President Nixon during his presidency. In *Nixon v. Administrator of General Services*,[8] Nixon challenged the constitutionality of the Presidential Recordings and Materials Preservation Act, which directed the Administrator of General Services to take custody of the original tape recordings of conversations made by Nixon while President. Nixon argued, among other things, that the Act violated his privacy rights by requiring the production of "extremely private communications between him and others, including his wife, his daughters, his physician, his lawyer, his clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files."[9] The Court found that, even though Nixon had a diminished privacy expectation as President, he had "a legitimate expec-

tation of privacy in his personal communications;"[10] however, it rejected the privacy challenge due in part to the relatively small portion of private papers in question and specific mechanisms in the Act designed to protect Nixon's privacy and to return private papers to him.

Among the first cases to apply the nascent federal right to privacy to discovery disputes in civil litigation was *Tavoulareas v. Washington Post Co.*[11] in which the president of Mobil Corporation and his son commenced a libel action against the *Washington Post*. After trial, the District Court issued an order to unseal certain portions of deposition transcripts and exhibits that had not been used at trial but contained proprietary and sensitive commercial information about Mobil. Mobil, which had intervened in the action, appealed the unsealing order arguing that the disclosure of Mobil's proprietary information violated its right to privacy.

On appeal, the D.C. Circuit faced the novel question of whether a right to privacy as articulated in *Whalen* and *Nixon* could be asserted by a corporation in a discovery dispute. While countless courts had previously issued protective orders limiting discovery of confidential or proprietary trade information by corporations, few, if any, had grounded such protective orders in a federal right to privacy. After examining the history of Fourth Amendment challenges by corporations to government searches and seizures, the Court concluded, "in the context of confidential discovery materials not used at trial, a corporation's privacy interest in nondisclosure is essentially identical to that of an individual."[12] Turning to the question of whether the right to privacy may be implicated in the discovery process, the Court answered in the affirmative, holding:

> In the discovery process, individuals are often forced by the court to disclose the kind of personal information deserving privacy protection under these decisions. An individual's constitutional privacy interest can thus be implicated by the discovery process to the same extent it is implicated by disclosure requirements of statutes.[10]

Having determined that privacy interests play a role in discovery, the Court balanced the *Washington Post's* interest in unsealing the deposition transcripts against the "severe intrusion"[14] on Mobil's privacy interests resulting from disclosure. The Court found that the First Amendment interest in the openness of court proceedings "must bow to the court's obligation to avoid a severe intrusion on Mobil's constitutionally protected privacy interest and to preserve the integrity of the discovery process."[15] The Court thus reinstated the seal on the unused transcripts.[16]

In more recent history, the privacy landscape has been altered by the Supreme Court's recognition of a psychotherapist-patient privilege in *Jaffee v. Redmond*.[17] Although the Court's finding of a new privilege was limited to confidential communications made by patients to licensed psychotherapists, the decision evinced the Supreme Court's willingness to apply the federal right to privacy to override the interests of parties in disclosure in civil litigation.

In balancing the public and private interests associated with recognizing the new privilege, the Court weighted the patient's expectation of privacy in psychotherapy against the needs of the discovery process and the common law precept that "the public . . . has a right to every man's evidence."[18] The Court found that "if the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation."[19] Thus, the Court recognized a psychotherapist-patient privilege, based in part on the "patient's interest in privacy,"[20] and in so doing, staked out new territory for privacy and confidentiality concerns in discovery. It is yet to be seen whether such a privilege will exert any "penumbral" effects on privacy objections in discovery. The remainder of this article will examine privacy concerns as they have evolved in different discovery contexts.

Medical and Drug Testing Disclosure Cases

Not surprisingly, one of the most fertile areas for the emergence of a privacy objection has been the disclosure of medical and drug testing information. In *Whalen* and later cases, the Supreme Court has expressly rejected the existence of a federal physician-patient privilege.[21] However, this lack of a physician privilege has not prevented the courts from recognizing the inherent sensitivity of medical records and extending privacy protection in many cases.

One of the first cases to examine the role of privacy concerns in discovery requests seeking medical records was *United States v. Westinghouse Electric Corp*.[22] In *Westinghouse*, the National Institute for Occupational Safety and Health (NIOSH), concerned about the adverse hazardous effects of contact with methyl ethyl ketone, served a subpoena on Westinghouse seeking medical records of all employees presently employed in an area of a Westinghouse facility where employees worked with the chemical. Westinghouse objected on privacy grounds, arguing that it would not produce the medical files without the "written informed consent" of the employees and an assurance from NIOSH that the contents of the records would not be disclosed to third parties. In response, NIOSH moved to compel.

On appeal from a decision of the Western District of Pennsylvania compelling production under the subpoena, the Third Circuit upheld the subpoena, but only after engaging in a *Whalen v. Roe* type balancing of the personal and public interests of the privacy objection. The Court reasoned:

> Information about one's body and state of health is a matter which the individual is ordinarily entitled to retain within the private enclave where he may lead a private life. It has been recognized in various contexts that medical records and information stand on a different plane than other relevant material.[23]

Considering the interests in full discovery, however, the Court found that NIOSH's mandate "to reduce the number and severity of work-related injuries and illness" outweighed "the minimal intrusion into the privacy which surrounds the employees' medical records."[24] However, the Court still gave weight to the employees' (but not Westinghouse's) privacy interests and required NIOSH to provide the employees, whose medical records it sought to examine, with prior notice of the discovery request to allow the employees "to raise a personal claim of privacy if they desire."[25]

More recently, the individual's privacy interests in medical records have been asserted in response to discovery in sexual harassment suits.[26] For example, in *Mann v. University of Cincinnati*,[27] a female student at the University of Cincinnati brought a sexual harassment case against the University and two teaching assistants. During discovery, counsel for the defendants served a subpoena pursuant to Rule 45 upon the Custodian of Records of the University's Student Health Services seeking the "complete medical file" of plaintiff. However, shortly after issuing the subpoena and without plaintiff or plaintiff's counsel's knowledge, University counsel visited the Health Office prior to the return date of the subpoena and reviewed plaintiff's medical file and copied certain pages. Plaintiff, without knowledge that an inspection had already occurred, promptly moved to quash the subpoena due to the private nature of the requested medical files.

The reviewing Magistrate judge quashed the subpoena, but ordered an *in camera* review of the medical file to examine plaintiff's argument that her medical files should not be disclosed based on her right to privacy. In response, the University argued that the review of plaintiff's medical files had been necessary "to discover whether other traumatic events in [plaintiff's] life could have caused all or part of the psychological distress she claims she suffered" as a result of the alleged sexual harassment.[28]

Upon reviewing plaintiff's medical file, the Magistrate judge concluded in a decision adopted by the district court that: "These records contain the most private medical and social information a woman possesses,"[29] noting that the records contained such information as the patient's history of menstruation, venereal disease and frequency of intercourse. The Magistrate reasoned:

> None of the aforementioned records are discoverable, because they have virtually no relevance to the issues in this case and the privacy interest in them is great. There can be no question that the aforementioned information is of such a private nature that a constitutional right to privacy exists. In a civilized society in the year 1993, where vast amounts of personal information are contained not only in medical files but in computerized data banks or other massive government files, much of which is personal in character and potentially embarrassing or harmful if disclosed, the constitutional right to privacy is surely as significant as the protection of commercial information specifically recognized by Rule 45(c)(3)(B)(i).[30]

As a result of these findings, the Court ordered the return of plaintiff's medical records and imposed limitations on further disclosure of the files. The Magistrate also ordered sanctions on defense counsel for its violation of plaintiff's privacy rights by inspecting and copying the plaintiff's medical records prior to the return date on the subpoena. On appeal of the sanctions, the Sixth Circuit affirmed, but denied that sanctions could be based on plaintiff's constitutional privacy interest in her medical files.[31] In so doing, the Court relied on a series of Sixth Circuit decisions rejecting the federal right to privacy as an independent cause of action in the federal courts.[32] However, the Court did not address the federal right to privacy as a basis for discovery objections. It is, therefore, unclear whether the decision will have wider impact on the invocation of privacy rights in the discovery process.

First Amendment Qualified Privacy Privilege

Although the right to privacy has appeared only recently as a grounds for objection in discovery disputes regarding medical files, in the First Amendment context a quasi-privacy privilege has existed for many years. For example, civil litigants seeking the identities of members or sympathizers of an organization or association have traditionally faced high barriers growing out of the Supreme Court's ruling in *NAACP v. Alabama* that the "[i]nviolability of privacy in group association

may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[33] As explained in *International Society for Krishna Consciousness, Inc. v. Lee*, "the right to one's own beliefs and associations is a fundamental constitutional freedom, and that compelled disclosure of those associations would violate that freedom."[34]

From the right of associational privacy established in *NAACP v. Alabama* has been derived a qualified privilege, which applies to compelled disclosure of an identity of an association's members or sympathizers as well its financial contributors.[35] To overcome First Amendment privacy interests set forth in *NAACP*, the party seeking the information must establish a compelling interest in the information that outweighs the privacy and First Amendment concerns.[36] In *Lee*, for instance, the plaintiff International Society for Krishna Consciousness (ISKCON) challenged the policies of the New York Port Authority and numerous airlines prohibiting ISKCON from leafleting and soliciting at airline terminals. During discovery, some of the defendant airlines served interrogatories on ISKCON seeking the identify of all of ISKCON's officers, directors, members, employees, devotees, adherents or agents. Defendants also sought the identification of all bank accounts, total average membership, ISKCON tax returns, monies received from solicitation and all donations as well as the identity of "each person who has claimed that he or she has been 'brainwashed,' 'programmed,' defrauded, cheated, kidnapped, assaulted or otherwise mistreated by ISKCON."[37] Defendants justified their interrogatories by arguing that the requests were relevant to the question of whether ISKCON activities were religious in nature and within the scope of First Amendment protections. Drawing on principles of First Amendment privacy, the Court found that the discovery requests had no relevance to the central issues of the case—whether the airline's prohibition of leafleting constituted state action—and, accordingly, found that the privacy interests of ISKON's members outweighed the need for the requested information.[38]

Tax Returns

Although not elevated to the status of privilege,[39] privacy concerns play a role in the federal courts policy against "the routine disclosure of tax returns as part of discovery."[40] For instance, in the Second Circuit, in order to compel disclosure of tax returns, the court must find that the returns are relevant to the subject matter of the action and, additionally, that there is a compelling need for the returns because the information contained therein is not otherwise readily obtainable.[41]

The stated rationale for the reluctance to compel production of tax returns has been varied, including the argument that liberal discovery of tax returns would discourage taxpayers "from reporting all of their taxable income to the detriment of the government."[42] Privacy concerns, however, also play an important role in this judicial policy. As the Southern District of New York noted in *Wiesenberger v. W.E. Hutton*,[43] "[p]eople are normally opposed to the invasion of their privacy by exposure of the details contained in an income tax return."[44] Similarly, the Court in *Smith v. Bader*, noted:

> The historic trend seems to stem in part from the private nature of the sensitive information contained therein, and in part from the public interest in encouraging the filing by taxpayers of complete and accurate returns.[45]

Thus, the interest of privacy plays some role in objections to the disclosure of tax returns, though it does not appear to have expanded to a broader protection against the disclosure of other sensitive financial information.

The California Experience

If a federal privacy privilege is ever recognized, it will probably first surface in the federal courts of California. The California state courts have a rich case law protecting individual privacy in the discovery process which, in some instances, has seeped up to the federal level. California's deference for privacy in civil discovery arises out of the California Constitution's Declaration of Rights, which specifically enumerates privacy as a protected right of the people.[46]

California courts, acknowledging the State's strong policy in favor of personal privacy, have found compelling reason to restrict discovery when privacy concerns are implicated.[47] Indeed, in *Cook v. Yellow Freight Sys. Inc.*,[48] the District Court for the Eastern District of California recognized a quasi-privacy privilege, though later courts subsequently limited *Cook*'s finding of a federal privacy privilege.[49]

Like many cases to explore privacy concerns, *Cook* considered the privacy rights in the context of a sexual harassment suit. Two former female employees of Yellow Freight System, Inc. brought action pursuant to Title VII of the Civil Rights Act of 1964 alleging sexual harassment by two Yellow Freight employees. As part of discovery, plaintiff propounded two interrogatories to Yellow Freight seeking, *inter alia*, the identities, addresses and phone numbers of certain Yellow Freight female employees who had worked with one of the two alleged harassers. Drawing on state decisions upholding privacy as a grounds for withholding discovery, the Court noted:

> [L]itigation has the tendency to make public the sort of information that individuals would otherwise prefer to keep private. Public disclosure, in the end, is not only natural and generally unavoidable but also necessary and healthy to a process so dependent on accuracy and truth. Nonetheless, the initiation of a law suit does not, by itself, grant plaintiffs the right to rummage unnecessarily and unchecked through the private affairs of anyone they choose. A balance must be struck.[50]

The Court then engaged in a balancing of the interests of the third party employees in maintaining the privacy of their names and address versus plaintiffs' need to identify other potential victims of sexual harassment at Yellow Freight. Like many courts before, the Court rejected complete nondisclosure of the private information, but limited the discovery. Plaintiffs were allowed to send letters, subject to Court approval, to the female employees seeking their consent to be contacted in relation to the lawsuit and ordering Yellow Freight to release the names and addresses of the female employees for the sole purpose of enabling plaintiffs' counsel to mail the approved letters.

Conclusion

If a privacy privilege exists in the context of discovery, it is in the earliest stages of gestation. Ever since *Whalen v. Roe*, there is little doubt that a federal right to privacy has taken root, which in certain cases, protects individuals from unwarranted disclosure of personal and private matters. Development by later federal case law has also made it clear that such a right to privacy applies directly to discovery in the federal courts, and in many instances, provides a legal basis for the withholding of information. At the present time, the federal courts tend to follow the balancing test established in *Whalen* and *Nixon*, weighing the individual's rights to be left alone and not have embarrassing or private facts disclosed versus the needs of the parties to the litigation to "have every man's evidence."[51]

Whether a broad privacy privilege in the federal courts should be developed is an open question. It is a fact of modern life that the zealousness of many lawyers tends to lead to excessive or unnecessary discovery as part of the attitude that successful litigation should leave no stone unturned. However, recent developments in federal courts suggest that there is a growing concern that despite the necessity of drawing out the truth in private litigation, there are times when "the public interest in preserving confidential information outweighs in importance the interest of a private litigant."[52] In the context of psychotherapy, medical files, affiliation with or contributions to groups or organizations, and tax returns, the courts have begun drawing the lines and appear to lean, however tentatively, in the direction of protecting litigant's privacy interests.

Endnotes

1. *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 550 (E.D. Cal. 1990) (citing cases wherein courts recognize individual's right to privacy during discovery). *See, e.g., Breed v. U.S. Dist. Court for Northern District of California*, 542 F.2d 1114, 1116 (1976) (speaking of need to balance "the invasions of [a] minor's right of privacy against the plaintiff's need for this information"); *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1023 (D.C. Cir. 1984) (stating that "all lawful privacy intrusions must be narrowly drawn and 'reasonably related in scope to the justification for their initiation'").
2. Fed. R. Civ. P. 501.
3. Fed. R. Civ. P. 26(c).
4. 429 U.S. 589 (1977).
5. *Id*. at 598-599.
6. *Id*. at 597.
7. *See, e.g., Williams v. Dep't of Veteran Affairs*, 879 F. Supp. 578, 582-83 (E.D.Va. 1995) (noting absence of clear guidance in determination whether right to privacy extends to disclosure of private, confidential information); *Khalfani v. Secretary, Dep't of Veterans Affairs*, No. 94-CV-5720, 1999 WL 13827, at *6 (E.D.N.Y. 1999) (stating that constitutional right to privacy with regard to medical records is "far from clearly established").
8. 433 U.S. 425 (1977).
9. *Id*. at 459.
10. *Id*. at 465.
11. 724 F.2d 1010 (D.C. Cir. 1984), *rev'd and remanded*, 737 F.2d 1170 (D.C. App. 1984).
12. *Id*. at 1022.
13. *Id*. at 1021.
14. *Id*. at 1025.
15. *Id*.
16 . The order was later vacated and remanded by the United States District Court for the D.C. Circuit for rehearing in light of a recent Supreme Court decision clarifying the "good cause" standard for issuing a protective order under state equivalents to Rule 26(c). 737 F.2d 1170 (D.C. Cir. 1984). On remand, the sealing order was reinstated by the District Court. 11 F.R.D. 653 (D.D.C. 1986).
17. 518 U.S. 1 (1996).
18. *Id*. at 9.
19. *Id*. at 11-12.
20. *Id*. at 17.
21. *Whalen*, *supra* note 4, 429 U.S. at 602, n. 28; *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 633 (S.D. Cal. 1999) (stating that person's medical profile is of utmost intimate nature, and there is reasonable expectation that it will remain confidential).
22. 638 F.2d 570 (3d Cir. 1980).
23. *Id*. at 577.
24. *Id*. at 579-80.
25. *Id*. at 581.

26. *See Doe v. Howe Military School*, Nos. 3:95CV206RM, 3:95CV240RM, 3:95CV453RM, 3:95CV717RM, 3:95CV818RM, 1997 WL 662504 (N.D. Ind. Sept. 30, 1997).
27. *Mann v. University of Cincinnati*, 114 F.3d 1188 (6th Cir. May 27, 1997).
28. *Mann v. University of Cincinnati,* 152 F.R.D. 119, 124 (S.D. Ohio 1993).
29 *Id.* at 125.
30. *Id.*
31. *Mann*, *supra* note 27, 114 F.3d at 1190.
32. *See J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) (concluding that "Constitution does not encompass a general right to nondisclosure of private information"; juveniles have no privacy right in their social histories prepared by state probation authorities); *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994) (rejecting inmate's claim that his constitutional right to privacy was violated by disclosure of his HIV infection to corrections officer); *Jarvis v. Wellman*, 52 F.3d 125, 126 (6th Cir. 1995) (holding that unauthorized release of rape victim's medical records does not rise to level of breach of right recognized as "fundamental" under Constitution).
33. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).
34. *International Society for Krishna Consciousness, Inc. v. Lee*, No. 75 Civ. 5388, 1985 WL 315, at *8 (S.D.N.Y. Feb. 28, 1985) (quoting *NAACP v. Alabama*, 357 U.S. at 460-62); *see also Cook*, *supra* note 1, 132 F.R.D. at 551-52.
35. *See Buckley v. Valeo,* 424 U.S. 1, 65-66 (1976).
36. *Id.*
37. *Lee*, *supra* note 34, at *2.
38. *Id.* at *10 (The court held the information was irrelevant since the plaintiff's claim was one of facial overbreadth. The court also stated that even if the information was marginally related, the interrogatories do not show that they are the only way to gain access to the information requested.).
39. *See Payne v. Howard*, 75 F.R.D. 465, 469 (D.D.C. 1977) (although 26 U.S.C. § 6103 and § 7213(a) only protect tax returns from disclosure while in hands of government, courts have broadly construed them to embody general federal policy against indiscriminate disclosure of tax returns from whatever source); *Cooper v. Hallgarten & Co.*, 34 F.R.D. 482, 483 (S.D.N.Y. 1964) (while tax returns are in governmental control there are criminal sanctions against disclosure).
40. *SEC v. Cymaticolor Corp.*, 106 F.R.D. 545, 546 (S.D.N.Y. 1985) (stating that decision to disclose is based upon balance between policy of liberal discovery and confidentiality of tax returns).
41. *Id.* at 547.
42. *Payne*, *supra* note 39, at 465.
43. 35 F.R.D. 556 (S.D.N.Y. 1964).
44. *Id.* at 557.
45. 83 F.R.D. 437, 438 (S.D.N.Y. 1979).
46. The California Constitution, Art. 1, Sec. X states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."
47. *See Davis v. Leal*, 43 F. Supp. 2d 1102 (E.D. Cal. 1999) (applying California state law of financial privacy); *Miskowitz v. Superior Court*, 137 Cal.App.3d 313 (Ct. App. 2d Dist. 1982) (protective order granted for personal financial information in deposition); *Board of Trustees of Leland Sanford Junior Univ. v. Superior Court*, 119 Cal.App.3d 516, 174 Cal. Rptr. 160 (Ct. App. 1st Dist. 1981) (writ granted to protect personnel file and misconduct investigation of professor).
48. *See generally Cook, supra* note 1.
49. *See Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1170 (C.D. Cal. 1998) (denial of motion to compel production of mediation brief is overruled); *Jackson v. County of Sacramento*, 175 F.R.D. 653, 654 (E.D. Cal. 1997) (*Cook* overruled when sheriff's personnel record was not granted privacy protection).
50. *Cook*, *supra* note 1, at 551.
51. *Jaffee, supra* note 17, at 9.
52. *Board of Trustees*, *supra* note 47, at 530.

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Update on Securities Litigation: Excessive Markup Claims Against Broker-Dealers

Introduction

This Report summarizes litigation techniques and strategies in the context of an undisclosed excessive markup claim against a broker-dealer. We chose markups as the basis for the action because markup disclosure has been the subject of a number of recent judicial, regulatory and legislative developments, and because of the relative complexity of the issues involved in prosecuting and defending such a claim. A markup is the premium a broker-dealer adds to the prevailing market price when selling an over-the-counter (OTC) security to a customer as principal.[1] Although determining the amount of a markup thus would appear to be a matter of simple arithmetic, determining the prevailing market price for a given security is anything but simple.

An excessive markup is one that bears no reasonable relation to the prevailing market price.[2] The rules of the National Association of Securities Dealers, Inc. (NASD) and the Municipal Securities Rulemaking Board (MSRB) prohibit securities firms from charging excessive markups;[3] these rules, however, may not be enforced by private parties. Consequently, a customer who claims to have been charged an undisclosed,[4] excessive markup typically brings an action against the securities firm based on the antifraud provisions of the federal securities laws.[5] Although the Second Circuit has recognized a private right of action under § 10(b) of the Exchange Act and Rule 10b-5 for undisclosed excessive markups, based on the so-called "Shingle Theory,"[6] at least one other circuit has avoided deciding that issue.[7] Even in the Second Circuit, the existence of the duty to disclose an excessive markup under either the Shingle Theory or some other basis, the materiality of the information, scienter, the customer's reliance and damages can be fertile grounds for litigation.

It is possible that litigation in this area will be confined to cases brought either by regulatory authorities or by private parties in class actions. Damages for such violations may be limited to the amount by which the markup is excessive as opposed to all causally related losses from a securities purchase, as in other fraud cases. Except in a class action context or in connection with large institutional purchases, damages from undisclosed excessive markups may not be significant enough to warrant litigation. Nevertheless, it is both useful and educational to review and summarize securities litigation techniques in this evolving area of securities law.

To the extent there will be litigation over markups, it will undoubtedly be factually intensive and present relatively complex and sophisticated issues. The amount of the markup has to be measured and evaluated against the backdrop of the relevant market. Although guidelines exist,[8] there are no set standards for what constitutes an excessive markup. As a result, whether a markup is excessive must be determined on a case-by-case basis.[9] The determination of the prevailing market price could require extensive discovery and engender multiple factual disputes. The case-by-case approach makes prediction of outcomes difficult, and a customer's sophistication may preclude any justifiable reliance. Thus, litigation in this area will draw on a wide panoply of securities litigation skills.

Possible Claims

Private parties do not have an implied cause of action for excessive markups under the NASD or MSRB rules.[10] Instead, these claims typically are brought as fraud actions for failure to disclose the excessive markup. Under the federal securities laws, a customer could bring such a claim as a violation of § 10(b) of the Exchange Act and Rule 10b-5.[11] The elements of a private cause of action under § 10(b) and Rule 10b-5 are: (1) in connection with the purchase or sale of a security, (2) the defendant, acting with scienter, (3) made a misstatement or (when there exists a duty to speak) omission of a material fact, (4) upon which the plaintiff justifiably relied, (5) that proximately caused the plaintiff damage.[12]

In a markup case, a plaintiff should allege both a material misstatement and omission. The former could be based on a theory of partial, misleading disclosure: When the securities firm discloses in its confirmation the total price of the transaction, but omits the amount of the markup, this statement could be misleading because it fails to disclose how much of the total price is the markup and how much is the market price of the security.[13] Under this theory of liability, this misstatement would be material if the markup were excessive.

An omission claim is premised on a duty to disclose the markup. This duty could arise as a result of the Shingle Theory, which posits that, among other things, sales of securities by firms to their customers carry the implied representation that the prices charged in those transactions are reasonably related to the price charged in an open and competitive market.[14] Or, it could arise as a result of a fiduciary or other similar relationship of trust and confidence,[15] or by contract.[16] Also, according

to these theories of liability, the omitted information would be material if the markup were excessive.

As Professor Coffee has written, the Shingle Theory offers a private plaintiff certain advantages: First, it creates a uniform rule that does not depend on local law, as do fiduciary relationships, and thus may be used in a class action, which requires typicality. Second, its implied representation affords the possibility of relief even when the relationship between the customer and the securities firm clearly lacks any fiduciary character.[17]

A customer also may seek relief under state law by bringing a claim for excessive markups as common law fraud.[18] The elements of a common law fraud claim in New York are: (1) a misrepresentation of material fact, (2) falsity of that representation, (3) scienter, (4) reasonable reliance, and (5) damages caused by such reliance.[19] One advantage to such a claim is New York's six-year limitations period for common law fraud.[20] Another advantage is a lower pleading standard, at least to the extent that neither the Private Securities Litigation Reform Act of 1995 ("Reform Act") [21] nor the Securities Litigation Uniform Standards Act ("Uniform Standards Act") [22] would apply.[23] At least one court, however, has held that the Shingle Theory is not part of New York's common law of fraud.[24] Other possible state law claims include breach of a fiduciary duty in failing to disclose the markup, as suggested in *Grandon* and *Press*,[25] or breach of contract, should there be an enforceable writing requiring disclosure of markups, as suggested in *Grandon* (the confirmation) and *Rauscher Pierce* (the financial advisory contract).

Determining the Prevailing Market Price

The key factual issue in a markup case will be to determine the prevailing market price, which is the basis used to compute the markup.[26] In defining the prevailing market price, the courts distinguish between dealers that are market makers and those that are not, between markets that are active and competitive and those that are not, and between dealers that "dominate and control" the inter-dealer market for a particular security and those that do not.[27] A market maker is a dealer that maintains a wholesale market in a security by continuously buying from and selling to other dealers for its own account.[28]

In the OTC market, there are two quoted inter-dealer prices for the same security, the "bid" price and the "ask" price, depending on whether the market maker is the buyer or seller of the security. The bid price is the price at which the market maker is willing to purchase the security from another dealer whereas the ask price is the price at which the market maker is willing to sell the security to another dealer. Under normal market conditions, the ask price is greater than the bid price. The difference between the bid and the ask prices is called the "spread." The spread is the compensation a market maker earns for placing its capital at risk in making a market in the security.

The courts permit an integrated market maker that risks its capital by continuously buying and selling a security in an active, competitive market[29] to look to prices it charges other dealers in actual sales transactions or, if no such prices are available, validated quotations as the best evidence of the prevailing market price.[30] In such markets, the market maker is permitted to keep the spread as well as charge a reasonable markup. In inactive, competitive markets,[31] the best evidence of the prevailing market price is the contemporaneous sales prices by market makers to other broker-dealers (non-market makers). Absent such sales, the lowest asked quotation may be used, provided it is properly validated by comparison with the firm's actual inter-dealer transactions. If quotations cannot be properly validated, then the firm's contemporaneous cost (preferably in transactions with other broker-dealers, as opposed to customers) may be used.[32] However, when a market maker dominates and controls the market for a particular security,[33] the best evidence of the prevailing market price is the price the firm paid to purchase the security.[34]

When a broker-dealer is *not* a market maker, and absent countervailing evidence, the best evidence of the prevailing market price for a security is the firm's contemporaneous cost, *i.e.*, the price the firm paid for the security in actual transactions closely related in time to the retail sale at issue.[35]

Determining Whether a Markup Is Excessive

The next step is to determine whether the markup is excessive. A markup is excessive when it bears no reasonable relation to the prevailing market price.[36] This determination is made on a case-by-case basis, taking into account all relevant circumstances.[37] Under the NASD interpretation, a reasonable markup generally should not exceed five percent of the prevailing market price,[38] and the SEC and NASD are on record that markups for debt securities should be substantially less.[39] On the other hand, undisclosed markups in excess of 10 percent of the prevailing market price generally are always fraudulent.[40]

Under the NASD interpretation, the relevant circumstances include the type of security involved, the availability of the security in the market (*i.e.*, the more liquid the market for the security, the lower the justifiable markup), the price of the security (*i.e.*, the higher the market price, the lower the justifiable markup), the amount of money involved in the transaction, disclo-

sure, if any, of the price or markup, the pattern of markups, and the nature of the dealer's business.[41] In *Press*, which involved the sale of a U.S. Treasury bill, the court listed as factors to be considered the expense associated with effecting the transaction, a reasonable profit for the dealer, the expertise provided by the dealer, the availability of the security in the market, the yield or price of the instrument, the resulting yield after subtracting the markup compared to the yield on other securities of comparable quality, maturity, availability and risk, and the role played by the dealer in the transaction.[42] In *Grandon*, which involved municipal securities, the relevant factors also included the best judgment of the dealer as to the fair market value of the securities at the time of the transaction and the total dollar amount of the transaction.[43] According to the MSRB, the most important factor in markups on municipal securities is the resulting yield to the customer.[44]

Because the determination of whether a markup is excessive is on a case-by-case basis, and the courts and regulators have refrained from becoming rate-setting bodies[45] the challenge to the attorney representing a customer who claims to have been charged an undisclosed excessive markup is to obtain the information necessary to apply the various relevant factors. We do not, however, mean to suggest that case law (including decisions by the SEC and NASD) has no value beyond listing the various relevant factors. An attorney considering bringing an undisclosed, excessive markup claim should, of course, review the cases to determine whether any of them have concluded that a similar markup was excessive under similar circumstances.

Potential Litigants

Plaintiffs or Claimants

The potential plaintiffs or claimants who may initiate litigation or arbitration proceedings alleging undisclosed excessive markups include both institutional customers, such as banks, insurance companies, pension funds and corporate treasury departments, as well as individual retail investors. The portion of the purchase price of securities attributable to an excessive markup is frequently too small in the case of a single retail customer to warrant litigation, leaving class representatives or institutional customers as the likely plaintiffs in securities litigation over markups.

Notwithstanding the greater economic incentive for institutional investors to initiate litigation or arbitration over markups, institutional customers may be reluctant to do so because of a close business relationship with, or even an investment stake in, the broker-dealer that executed the trades that would be the basis of the suit or arbitration claim. This inherent tension was illustrated in a recent decision not involving markups, but stemming from the securities class action brought against Cendant Corporation following Cendant's announcement that it had uncovered substantial accounting irregularities at the company.[46] There, the court determined that a group of plaintiffs known as the "Public Pension Fund Investors," comprised of the California Public Employees' Retirement System, the New York State Common Retirement Fund and the New York City Pension Funds, could not serve as lead plaintiffs on behalf of purchasers of a certain derivative security based on Cendant common stock.[47] The court reached this conclusion because those institutional plaintiffs were investors in the broker-dealer that underwrote the derivative security, a necessary defendant, and their investments were several times greater in value than their alleged losses.[48] Thus, the court found, these plaintiffs could not be expected to aggressively pursue any recovery from that broker-dealer on behalf of the class of derivative security holders.[49]

Although the damages an individual retail customer incurs from an excessive markup may be too small to warrant the expense of litigation, retail investors could seek relief in the form of a class action if the number of investors charged with an excessive markup on a particular security by a broker-dealer were sufficiently numerous, and all the claims typical. Retail investors have not hesitated to use the class action device in claims alleging that a particular broker-dealer systematically charged an undisclosed, excessive markup on a specific security or category of securities.[50] Any putative class action asserting violations of the federal securities laws based upon markups would be subject to the Reform Act and the Uniform Standards Act, both designed to combat perceived abuses in securities class actions.

The Reform Act applies to every securities class action that includes federal securities law claims. The statute requires a court to (i) appoint a lead or "most adequate" plaintiff, presumed to be the persons or group of persons with "the largest financial interest in the relief sought by the class,"[51] and (ii) stay discovery pending resolution of any motion to dismiss.[52] The Reform Act also mandates that plaintiffs comply with a heightened pleading standard pursuant to which they must (i) specify each misleading or false statement and why it is misleading or false, (ii) state with particularity all facts on which allegations made on information and belief are based, and (iii) detail facts that support a strong inference that the defendants acted with the required scienter.[53] In this regard, the *Press* court declined to interpret the Reform Act as imposing any greater pleading requirement for scienter than already exists in the Second Circuit when the intent of a corporate defendant is at issue.[54]

The Uniform Standards Act vests the federal courts with exclusive jurisdiction over virtually all securities

fraud class actions.[55] Specifically, it provides that any action maintained on behalf of more than 50 persons of prospective class members cannot be based upon the statutory or common law of any state if it alleges that a defendant made "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security" or "used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security."[56] The term "covered security" refers to the definitions in §§ 18(b)(1) and 18(b)(2) of the Securities Act of 1933.[57] Section 18(b)(1) defines a "covered security" as a nationally-traded security, such as one listed on the New York Stock Exchange (NYSE), the American Stock Exchange or NASDAQ.[58] Section 18(b)(2) includes securities issued by registered investment companies.[59] If an action within the Uniform Standards Act is filed in state court, the statute provides that it "shall be removable" to federal court, with the consequence that only federal causes of action apply.[60]

Defendants or Respondents

Possible defendants or respondents in actions based upon undisclosed excessive markups include the individual registered representative or trader who handled the execution of the orders for the securities transactions at issue and the broker-dealer with whom the registered representative or trader was associated. Plaintiffs or claimants may be hesitant to name individual brokers or sales personnel because the markup in question was not set by them, but by the trading desk or the employer to be used firm-wide, or they may be perceived as lacking the financial resources to pay any judgment. If a plaintiff or claimant believes that an undisclosed excessive markup was established not by his broker-dealer, but by his individual broker or trader with the knowledge and approval of the broker-dealer, the broker-dealer might be named, in addition to the broker or trader, as a controlling person under § 20 of the Exchange Act.[61] Unless the Uniform Standards Act applies, the broker-dealer in such a scenario also could be sued pursuant to the common law doctrine of respondeat superior, which holds a principal or employer liable for the acts of an agent or employee within the scope of the employee's duties.[62]

Factors in Forum Selection

In most cases, the appropriate forum for a markup dispute will be determined by the applicable customer agreement. Such contracts often require that the parties submit any disputes arising under the agreement to arbitration. Even if there is no agreement to arbitrate, a customer can usually elect to arbitrate a dispute with a broker-dealer before a self-regulatory organization (SRO), such as the stock exchange of which that broker-dealer is a member, or the NASD. Alternatively, a plaintiff who has not signed an arbitration agreement may file suit in federal court or state court, subject to the restrictions discussed above.

Arbitration is generally a faster and less expensive alternative to court actions due to the limited availability of discovery and motion practice.[63] Also, arbitration has the added benefit of confidentiality.[64] Parties to an arbitration have a better chance of keeping sensitive pleadings and other information private. In contrast, traditional court litigation offers the benefit of expanded discovery, which may be useful in developing proof of the excessiveness of the markup.

Federal Versus State Court

Federal court holds a number of advantages over state court as a forum for litigating a markup dispute. The principal advantage of federal court is the tendency toward more liberal discovery, which is critical to building a markup case. Not only are federal courts more accustomed to granting broad discovery but they can do so on a nationwide basis, which is more difficult to accomplish in state court litigation. Another advantage of litigating a markup dispute in federal court is the availability of the Shingle Theory (at least in the Second Circuit).[65] In state courts, the availability of the Shingle Theory is uncertain in the absence of definitive case law.[66] Thus, a litigant seeking to avail himself of the Shingle Theory, and who is within the statute of limitations of § 10(b), will want to bring his case in federal court.

Moreover, the federal courts are particularly advantageous when the claim is brought in the form of a class action. First, Fed. R. Civ. P. 23 is generally more liberal than state court rules on class actions.[67] Second, federal court allows for wider jurisdiction and venue, as well as broader service of process.[68] Third, because Fed. R. Civ. P. 23 has been in existence longer than state versions of the rule, federal judges have greater experience in applying it and there is more case precedent.[69] But as discussed earlier, under the new Uniform Standards Act, such an analysis will be unnecessary in most securities class actions alleging fraudulent markups, which are now required to be brought in federal court.

Arbitration

Arbitration clauses in customer agreements vary. Some clauses specify a particular forum but many give the customer the right to choose from two or three different arbitration forums.[70] It is important to evaluate the pros and cons of the available forums. Discussed below are two SROs that sponsor securities arbitrations and the respective attributes of each forum.

The NYSE has a six-year time limit for bringing claims.[71] This is an eligibility requirement, which precludes arbitration of a claim older than six years.[72] In

addition, its arbitration procedure requires that two of the three arbitrators be "public arbitrators" who are independent of the securities industry.[73]

NYSE procedures call for document discovery and "information exchange" prior to the arbitration hearing.[74] As with most arbitrations, NYSE arbitrators are reluctant to permit pre-hearing depositions unless the parties agree or it is necessary to preserve testimony. Thus, arbitration offers less ability for a claimant to develop the case through discovery. But some claimants' counsel prefer NYSE arbitration over other SROs because the NYSE administrators have a smaller caseload and, as a result, can give the claim greater attention as well as schedule a prompter hearing.

The NASD arbitration rules are similar to those of the NYSE.[75] For example, the NASD has the same time limit on eligibility as the NYSE.[76] Also, for claims of more than $50,000, no more than one of the three arbitrators can be affiliated with the securities industry.[77] Like NYSE panels, NASD arbitrators have greater expertise in securities matters than American Arbitration Association (AAA) arbitrators. This expertise is offset, however, by a possible bias derived from the presence of industry arbitrators on the SRO arbitration panels. The NASD's Neutral List Selection System attempts to eliminate some of that bias by automatically excluding arbitrators based on conflicts of interest identified within the NASD's database.[78] Any other potential bias can be assessed to some extent through use of the NASD's procedure of making available past awards of potential arbitrators.

Many claimants can make use of private arbitration forums such as the AAA. The AAA rules permit discovery of essential documents, but depositions are discouraged except in unusual cases, such as a witness's unavailability at the arbitration hearing.[79] The AAA also has a customized set of rules and a special panel of arbitrators for large, complex commercial cases, for which a markup case may qualify, as well as a custom set of rules for securities arbitration.[80]

Jurisdiction

Subject matter jurisdiction over a particular controversy involving markups will be determined by the nature of the claims asserted and whether a valid arbitration agreement exists. With respect to claims under the Exchange Act, subject matter jurisdiction is exclusive in the federal courts,[81] and will include, as we have seen, most class actions. In a federal action, state law claims may be brought as supplemental claims.[82] If there are only state law claims, and there is no diversity between the parties or the jurisdictional amount requirements are not met, then the action must be brought in state court.

The SROs sponsoring arbitration all have jurisdiction to hear controversies between members (including partners and officers of members) of the exchanges, and between customers and members.[83] In the absence of an agreement, a customer may still seek arbitration with an SRO member before any exchange that the member has joined.[84] NASD also provides for the determination of controversies with associated persons (*e.g.*, registered representatives of member firms).[85] In contrast, the jurisdiction of the AAA derives solely from the parties' agreement to arbitrate.[86]

Venue

In a federal or state court action, venue is determined in the first instance by the plaintiff. In the case of a dispute over venue, the court will look to such factors as where the claim arose, where the defendants reside or where they conduct their business to determine the appropriate locale.[87] Under the SRO rules, the Director of Arbitration is permitted to designate the time and place of the initial hearing.[88] Thereafter, the arbitrators make the determination.[89] Under the rules of the AAA, the parties can agree on the location of the arbitration hearings, which decision the AAA is obliged to accept.[90] If the parties cannot agree, the arbitrators will decide the venue.[91]

Broker-Dealer Defenses to an Excessive Markup Claim

Given the state of the law on excessive markups, a customer considering filing such a claim should anticipate facing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), as well as a motion attacking the sufficiency of the pleadings relating to fraud, under Fed. R. Civ. P. 9(b), or its state law equivalent. It is not enough simply to allege, in a conclusory fashion, that the markup is excessive.[92] Instead, a customer should allege specifically how the markup is excessive.[93] A broker-dealer faced with a markup claim should consider making such motions because a district court, at least in the Second Circuit, has authority to dismiss, as a matter of law, an undisclosed excessive markup claim, provided the court, in reaching that conclusion, analyzes all the relevant factors in the manner contemplated in *Grandon*.[94]

The primary defense that a broker-dealer can assert is that the claimant has failed to properly allege or prove, depending on the stage of the proceedings, an essential element of the two main theories of liability, fraud and breach of fiduciary duty. A broker-dealer could defend against the failure to disclose a markup by asserting that disclosure was not warranted for either lack of excessiveness or lack of a fiduciary relationship with the claimant. Also, a broker-dealer could base a defense on the lack of any reasonable reliance by the customer on the markup and the absence of any sci-

enter when the markup falls within the NASD's five percent guideline.[95] Of course, the defendant should always check the applicable statute of limitations.

Although the Second Circuit has embraced the Shingle Theory,[96] a broker-dealer nonetheless may wish to challenge it. According to Professor Coffee, the theory arguably conflicts with the Supreme Court's statement in *Basic Inc. v. Levinson* that "silence is not actionable unless there is a duty to disclose." [97] Moreover, it was never meant to be a substitute for a fiduciary or other similar relationship of trust and confidence,[98] but arguably was founded upon such a relationship.[99] Also, the Shingle Theory fails to distinguish between unsophisticated investors, typically individuals, and sophisticated investors, typically institutions, which deal with securities firms at arm's length, with neither side arguably making an implicit representation to the other.[100] Last, a split exists in the circuits, with the Fourth Circuit being acutely uncomfortable with the Shingle Theory and its consequences.[101]

Damages

One theory of damages in an excessive markup case is the difference between the fair and reasonable markup that should have been charged and the excessive markup actually charged. Another possible theory is the decline in the value of the security plaintiff would not have purchased but for the firm's affirmative material misstatements or omissions regarding the markup. As suggested earlier, outside of the class action context, these measures of damages, at least in retail transactions, may not be sufficient to warrant litigation.

The latter theory, however, is worthy of further discussion. If, under this theory, the plaintiff would *not* have purchased the security at issue, or any security with similar risk characteristics, the plaintiff would, as a result of the misrepresentation or omission, have been induced to have taken on a heightened investment risk. This risk would be that the investment would likely not turn out to be profitable, unless the price rose sufficiently to offset the excessive markup. If the price of the security were to fall, further injuring the plaintiff, the question would be whether the plaintiff was proximately damaged by the undisclosed excessive markup, or by factors not sufficiently related to the markup so as justify recovery under the loss causation rules.

Should the plaintiff seek to recover the decline in price as damages, the defendant might respond that the plaintiff was proximately injured by economic events unrelated to the markup, and, therefore, the loss causation rules bar recovery for the decline in price.[102] The plaintiff may respond, however, that securities he would have purchased but for the fraud would not have declined. For example, if the plaintiff had been seeking to purchase an OTC security with a fair and reasonable markup, and an index of such securities reveals that a plaintiff so invested would not have suffered price declines over the relevant period, the plaintiff's monetary injury might be deemed to be sufficiently related to the markup violation to justify recovery for the price decline. An appropriate index of OTC securities thus could become a benchmark of appropriate damages. The so-called "index-adjusted" approach has been applied in the Second Circuit in a series of decisions in *Rolf v. Blyth, Eastman Dillon & Co., Inc.*[103] No markup case to date, however, appears to have applied this strategy. On the other hand, the plaintiff could reasonably argue, under this hypothetical, that his losses were the result of his purchase of an investment with unsuitable attributes — this would be true even if the security itself were not unsuitable. This argument would implicitly view excessive markup claims as a species of a suitability violation, a theory unsuccessfully advanced in *Banca Cremi*.[104] Were a court (or arbitration panel) inclined to view excessive markups in such "unsuitability" terms, index adjusted damages, at least under current Second Circuit law, might be a potential remedy.

Discovery

Discovery will be necessary for both sides in litigation involving excessive markup claims against a broker-dealer. As in any litigation where securities claims are at issue, the defendant should seek as much information as possible to establish that the plaintiff is a sophisticated, experienced investor. Establishing sophistication is particularly pertinent in markup cases because a broker-dealer may base a defense on the lack of reasonable reliance by the customer on the markup, as in *Banca Cremi*.

To establish sophistication—while at the same time undercutting plaintiff's assertion that he reasonably relied on the markup—the defendant should seek all documentation with respect to plaintiff's investment history and experience. For example, the defendant should seek all opening account documentation, option or margin agreements, and monthly statements for any and all brokerage accounts that the plaintiff maintains or maintained at all other firms. The opening account documentation and option or margin agreements will reflect the plaintiff's net worth, including liquid assets, investment objectives, investment experience (*i.e.*, years in the market and where else accounts are maintained), educational experience, income, risk tolerance, and employment status.[105] While plaintiffs often portray themselves as unsophisticated investors of moderate means who have little or no experience in the markets, the opening account documentation with the broker-dealer at issue, or with any other firms with whom the plaintiff has maintained accounts, may help to refute

the plaintiff's claims and establish that the plaintiff is indeed an experienced, sophisticated investor who did not really care about the markup.[106]

Obtaining the monthly statements from the other brokerage firms with whom the plaintiff maintains, or has maintained, accounts may also help to undercut the plaintiff's reliance argument. The monthly statements may reflect that the plaintiff has invested previously in the same types of securities that are at issue.[107] While obtaining opening account documentation and monthly statements from the other brokerage firms with whom the plaintiff has maintained accounts may be difficult, in that the plaintiff may have either discarded such documentation or may take the position that such documentation is not relevant in the present matter (and therefore object to the production of such documentation), the broker-dealer should serve subpoenas on the other broker-dealers with whom plaintiff continues to maintain, or has previously maintained, accounts.

In addition to seeking opening account documentation and monthly statements for brokerage accounts, a defendant should also seek other information from the plaintiff such as bank records and tax returns to establish the plaintiff's net worth, assets, and income. These factors are all germane to establishing sophistication, although the plaintiff will invariably object to the production of such documentation on the grounds of burden and relevance.

While the defendant will seek to discover all documentation pertaining to sophistication and reliance, the plaintiff will want to discover all information relating to each of the factors used to determine the prevailing market price and whether the markup is excessive.[108] Accordingly, the plaintiff will want to discover all of the daily blotters, daily or monthly reports, trade confirmations and order tickets for the defendant's proprietary trading and other accounts reflecting any and all purchases or sales for each of the securities at issue in the litigation as well as for similar securities. The data should be sought in both paper and electronic form to facilitate analysis. As stated above, determining the prevailing market price is contingent upon the market involved (competitive, active, etc.), the role in which the defendant is playing with respect to the security in question (market-maker, non-market-maker, etc.), and the type of security involved (municipal securities, other forms of debt securities or equity securities).

Information and documentation relating to the defendant's trading accounts will enable the plaintiff to determine the price(s) at which the defendant acquired the security from a customer or other dealer and the price(s) at which the defendant sold the security to its customers, other dealers, or market makers. More general market information relating to the security may be available from the NASDAQ or National Quotation Bureau, which publishes the Pink Sheets for Bulletin Board stocks and Blue Sheets for Bulletin Board debt. This information will assist in establishing whether the market is active and competitive or dominated and controlled by the defendant. Other relevant information to seek is whether the transaction was a riskless one, in which case even a market maker is not entitled to the spread, the firm's compliance manuals and memoranda, disciplinary history, Form BD (as amended), Forms U-4 and U-5 for the registered representatives, correspondence with regulators, exception reports on markups, any recordings or notes, and the firm's damage analysis.

Conclusion

The law applicable to undisclosed, excess markup claims is still evolving. The Supreme Court may one day decide the continued viability of the Shingle Theory. Securities regulators and the courts have been reluctant to establish any bright line for markups, presumably out of concern of becoming rate setting bodies, as the Second Circuit expressed in *Grandon*.[109] But the SEC also has retreated from requiring broker-dealers to disclose all markups on the confirmations sent to customers, although it has proposed such amendments to Exchange Act Rule 10b-10 in the past.[110] Instead, the SEC has been urging the industry toward more price transparency in the debt markets[111] and the House of Representatives has recently joined the effort with the Bond Price Competition Improvement Act of 1999.[112] Whether increased price transparency will eliminate undisclosed excessive markups in debt transactions will have to await future developments. In the meantime, counsel considering an undisclosed, excess markup claim should bear in mind the points raised in this report.

Endnotes

1. *See SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1469 (2d Cir. 1996) (stating that a markup is the difference between the retail price and the prevailing market price of the security); *see also Banca Cremi, S.A. v. Alex Brown & Sons, Inc.*, 132 F.3d 1017, 1033 (4th Cir. 1997); *Bank of Lexington & Trust Co. v. Vining-Sparks Securities, Inc.*, 959 F.2d 606, 613 (6th Cir. 1992); Similarly, a markdown is the discount subtracted by the broker-dealer from the prevailing market price when it purchases an OTC security from a customer as principal. For simplicity, this Report will only discuss markups, but the same concepts apply to markdowns.
2. *See Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 190 (2d Cir. 1998) (stating that a markup is excessive when it bears no reasonable relation to the prevailing market price); *See also infra* notes 33-44 and accompanying text.
3. *See* NASD Conduct Rule 2440 (stating broker-dealer shall buy or sell at a fair price and not charge more than a fair commission or service charge); MSRB rule G-30 (requiring prices charged by a municipal securities dealer be "fair and reasonable, taking into consideration all factors").
4. The rules of the Securities and Exchange Commission (SEC) require broker-dealers to disclose the amount of markups in cer-

tain circumstances. *See, e.g.*, 17 C.F.R. §§ 240.10b-10(a)(2)(ii)(A) & (B); (a)(8)(A); *id*. § 240.15g-4; *Banca Cremi,* 132 F.3d at 1033 (stating that securities brokers are required to disclose markups in equity securities, but not for debt security in a riskless transaction); *Grandon*, 147 F.3d at 192-194 (holding broker-dealers have a duty to disclose markups on municipal bonds when those markups are "excessive").

5. *See* § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 10b-5. Other theories of liability include common law fraud, breach of contract or breach of fiduciary duty. *See infra* notes 13-17 and accompanying text.

6. *See Press v. Chem. Inv. Servs. Corp*., 166 F.3d 529 (2d Cir. 1999) (treasury securities); *Grandon*, 147 F.3d 184 (municipal securities); *First Jersey Sec*., 101 F.3d 1450 (OTC equity securities). *Accord Bank of Lexington & Trust Co.,* 959 F.2d 606 (6th Cir. 1992) (zero coupon bonds); *Ettinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 835 F.2d 1031 (3d Cir. 1987) (same). The Shingle Theory is discussed *supra* notes 4-5 and *infra* notes 20-21.

7. *See Banca Cremi*, 132 F.3d at 1036 (assuming, but not deciding, such a private right of action exists).

8. *See, e.g*., NASD Interpretation IM-2440 (setting forth the NASD's policy that markups in equity transactions generally should not exceed five percent of the prevailing market price); Zero-Coupon Securities, Exchange Act Release No. 24368, 1987 SEC Lexis 2005 (Apr. 21, 1987) (stating the SEC's position that markups on debt securities, including municipal securities, generally are expected to be lower than markups on equity securities).

9. *See, e.g., Grandon*, 147 F.3d at 190; *see also Banca Cremi*, 132 F.3d at 1033.

10. *See, e.g., Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 181 (2d Cir. 1966) (holding that a violation of rules adopted by an exchange does not imply a private right of action).

11. Also, a customer could bring a suitability claim. *See Banca Cremi*, 132 F.3d at 1027.

12. *See Press*, 166 F.3d at 534; *Banca Cremi*, 132 F.3d at 1027 (in deciding whether to bring a securities fraud claim under § 10(b) and Rule 10b-5, a potential plaintiff or claimant also must consider the relevant statute of limitations, namely that a claim must be brought within one year after the discovery of the fraud or within three years of the fraud. Moreover, fraud must be pleaded with particularity, as required by Fed. R. Civ. P. 9(b)).

13. This theory was advanced by the plaintiff in *Grandon*, but, because the lower court did not rule on it, the Second Circuit instructed that it be addressed on remand. 147 F.3d at 194.

14. *Id*. at 189 (citing *Charles Hughes & Co. v. S.E.C.*, 139 F.2d 4347, 437 (2d Cir. 1943)).

15. *See Press*, 166 F.3d at 534 (stating that a seller only has a duty to disclose the specifics of a markup . . . when there is either a fiduciary relationship with the complaining party or when the markup is excessive); *Grandon*, 147 F.3d at 189 (stating that the MSRB's goal of protecting customers from unfair prices and excessive markups "can be achieved through other means," including that prices charged by a municipal securities dealer be fair and reasonable, taking into consideration "all relevant factors." The factors include the dealer's judgment and the resulting yield to the customer).

16. *See SEC v. Rauscher Pierce Refsnes Inc*., 17 F. Supp.2d 985, 993 (D. Ariz. 1998) (stating that the contract between the parties could have created a fiduciary relationship due to its ambiguities).

17. *See* John C. Coffee, Jr., *Shingle Theory: Time For Repair?*, N.Y.L.J., Oct. 8, 1998 at 5, 6 (hereinafter "Coffee"). *See also Fekety v. Gruntal & Co.,* 595 N.Y.S.2d 190 (N.Y. App.Div. 1st Dep't 1993).

18. *See Manela v. Garanta Banking Ltd*., 5 F. Supp.2d 165 (S.D.N.Y. 1998) (stating that the elements of common law fraud claims are largely the same as those of Rule 10b-5 claims, except there is no "in connection with" requirement).

19. *May Dep't Stores Co. v. International Leasing Corp., Inc*., 1 F.3d 138, 141 (2d Cir. 1993) (*citing Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970-971(2d Cir. 1987)); *Granite Partners, L.P. v. Bear, Stearns & Co. Inc.*, 17 F. Supp.2d 275, 286 (S.D.N.Y. 1998).

20. N.Y. CPLR 213 (stating in subsection (8) that an action based upon fraud is to be commenced within six years from the time the plaintiff, or the person under whom he claims, discovered the fraud, or could with reasonable diligence have discovered it).

21. Pub. L. No. 104-67, 109 Stat. 737 (1995).

22. Pub. L. No. 105-353, 112 Stat. 3227 (1998).

23. As in federal court, however, claims alleging fraud in the New York state court must be plead with particularity. *See* N.Y. CPLR 3016(b).

24. *Granite Partners, L.P. v. Bear, Stearns & Co., Inc*., 96 Civ. 7874, slip op. at 75-86 (RSW) (S.D.N.Y. July 26, 1999). This case suggests that any excessive markup claim under state common law should be based on misleading or partial disclosures, and not on an implied duty to speak. *Id*. at 80. *Cf. Manela*, 5 F. Supp.2d 165 (permitting, but not deciding, state common law fraud claims for excessive markups).

25. Under New York common law, the fiduciary obligation that arises between a broker and a customer is "limited to matters relevant to affairs entrusted to the broker," *Press*, 166 F.3d 536 (quoting *Rush v. Oppenheimer & Co*., 681 F. Supp. 1045, 1055 (S.D.N.Y. 1988)), and includes "'the duty to use reasonable efforts to give [the customer] information relevant to the affairs that [had] been entrusted'" to the broker, *id.* (quoting *Conway v. Icahn & Co., Inc*., 16 F.3d 504, 510 (2d Cir. 1994)). The *Press* court further held that disclosure of the amount of a markup falls into the "grey area" of "possible insignificance and possible significance," *id*., and declined to hold that all markups must be disclosed in the course of a normal purchase of a Treasury bill security due to the fiduciary nature of the seller-purchaser relationship, *id*. at 537. The court, however, also indicated that the point could be revisited should New York law evolve in a manner that indicates more disclosure is warranted. *Id. Cf. Fekety*, 595 N.Y.S.2d at 190-91 ("a broker does not, in the ordinary course of business, owe a fiduciary duty to a purchaser of securities").

26. In Notice to Members (NTM) 92-16 (Apr. 1, 1992), available on the Internet at Books On Screen, the NASD set forth guidelines for determining the prevailing market price in principal equity transactions with retail customers. NASD Regulation, (visited Nov. 18, 1999) <http://www.nasdr.com/2610c.htm>. In transactions involving government and other debt securities (besides municipal securities), the NASD has submitted to the SEC a similar, albeit controversial, interpretive proposal. Exchange Act Release No. 40, 511, 63 Fed. Reg. 54,169 (Oct. 8, 1998). For municipal securities, the MSRB has set forth a number of factors it considers relevant in determining whether the price is "fair and reasonable." MSRB rule G-30; MSRB Interpretations of Rule G-30, "Report on Pricing" (Sept. 26, 1980).

27. *See First Jersey Sec*., 101 F.3d at 1469-70; *see also First Independence Group, Inc. v. S.E.C.,* 37 F.3d 30, 32 (2d Cir. 1994) (referring to NASD markup policy); *see generally Orkin v. S.E.C.*, 31 F.3d 1056, 1063-64 (11th Cir. 1994) (describing "the NASD . . . 5% markup policy as an interpretation of Article III, Sections 1 and 4 of the NASD Rules").

28. *See id*., Exchange Act § 3(a)(38). Some market makers also have retail customers and are known as "integrated market makers."

29. An active, competitive market is one in which more than one market maker has daily or frequent inter-dealer trades at competitive prices and no one market maker dominates and controls that trading activity by accounting for a large portion of the volume. Generally, securities traded through NASDAQ/NMS are

deemed to trade in this type of market. *See* NTM 92-16 at 3. NASD Regulation, (visited Nov. 18, 1999) <http://www.nasdr.com/2160c.htm>.

30. *See First Jersey Sec.*, 101 F.3d at 1469; NTM 92-16 at 3. NASD Regulation, (visited Nov. 18, 1999) <http://www.nasdr.com/2160c.htm>.

31. An inactive, competitive market is one in which there are only a few market makers, none of whom dominates or controls trading in the security. Also, there may be very little activity in the security (*i.e.*, infrequent transactions, constant inside quotations). Such securities may be said to trade "by appointment." NTM 92-16 at 6. NASD Regulation, (visited Nov. 18, 1999) <http://www.nasdr.com/2160c.htm>.

32. *See* NTM 92-16 at 6.

33. Unlike the types of markets described above, a dominated and controlled market lacks any genuine competition, and the trading by one market maker (or two or more market makers willfully acting together) accounts for a substantial percentage of the volume and number of transactions. *See First Jersey Sec.* F.3d at 1469-70; NTM 92-16 at 5.

34. *See First Jersey Sec.*, 101 F.3d at 1469.

35. *See Grandon*, 147 F.3d at 189. Similarly, when a market maker sells a security in a riskless principal transaction, the SEC and the NASD (at least) take the position that the firm must use its contemporaneous cost as the prevailing market price. The reason a market maker is not allowed to keep the spread in such transactions is because the firm has not placed its capital at risk. *See* Kevin B. Waide, Exchange Act Release No. 30561, 1992 WL 90342 (SEC Apr. 7, 1992). *Cf. Press*, 166 F.3d at 535 (characterizing the sale in that case as an "essentially riskless transaction," but faulting the plaintiff for failing to produce evidence that the fee he paid was inappropriate compared to fees on other riskless transactions).

36. *See Grandon*, 147 F.3d at 190.

37. *See id*.

38. *See* NASD IM-2440 at 4351. This policy serves as a guideline and not a rule, and markups less than five percent of the prevailing market price may be excessive depending on the circumstances.

39. *See Grandon*, 147 F.3d at 190-91; *Banca Cremi*, 132 F.3d at 1033; *Rauscher Pierce*, 17 F. Supp.2d at 997-1000.

40. *See First Jersey Sec.*, 101 F.3d at 1469.

41. *See* NTM 92-16 at 2. The NASD lists similar factors in its proposed interpretation on the application of its markup policy to government and other debt securities (besides municipal securities). 63 Fed. Reg. at 54,170.

42. *See Press*, 166 F.3d at 535.

43. *See Grandon*, 147 F.3d at 190-91.

44. *Id*. at 190. (The SEC has confirmed that the yield to maturity calculation disclosed on the customer confirmation must take into account any markup). *See The Bond Market Association*, 1998 SEC No-Act LEXIS 822 at *8 (Aug. 24, 1998); *See also*, *MSRB Interpretations of Rule G-30, "Report on Pricing,"* (Sept. 26, 1980), MSRB Manual (CCH) ¶ 3646, at 5160 (the resulting yield to the customer is the "most important" factor in determining whether the price (including the markup) of a municipal security is fair and reasonable).

45. *See Grandon*, 147 F.3d at 193 (where the SEC and MSRB have declined to impose such rules, it is not for the Court to become a rate setting body).

46. *In re Cendant Corp. Litig.*, 182 F.R.D. 144, 146 (D.N.J. 1998) (the company's stock price dropped 46% the next day and upwards of 64 shareholder suits were filed against Cendant).

47. *Id*. at 149.

48. *See Id*.

49. *Id*. at 149 ("The Court simply does not believe nor find that the [Public Pension Fund Investors] can overcome this substantial conflict of interest and fully protect the interests of the [class of holders of the derivative securities]"). Nevertheless, the court found that the Public Pension Fund Investors could serve as lead plaintiffs on behalf of the holders of the other Cendant securities involved in the action. *Id*.

50. *E.g., Press*, 166 F.3d at 523 (Appellant Press filed their appeal with an indication that he was suing on behalf of himself and others similarly situated vis-à-vis a class action, but the district court did not address whether the class was certified); *Grandon*, 147 F.3d at 186 (a class action for securities fraud against Merrill Lynch, Pierce, Fenner & Smith, Inc.).

51. 15 U.S.C. § 77z-1(a)(3)(B); 15 U.S.C. § 78u-4(a)(3)(B).

52. 15 U.S.C. § 77z-2(f); 15 U.S.C. § 78u-4(b)(3).

53. 15 U.S.C. § 78u-4(b).

54. *See* 166 F.3d at 538. *Cf. In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 985 (9th Cir. July 2, 1999) (interpreting the Reform Act as imposing a higher pleading standard).

55. *Securities Litigation Uniform Standards Act of 1998*, Pub.L. No. 105-353, §§ 101(a)(1), 101(b)(1), 112 Stat. 3227, 3228 (November 3, 1998).

56. *Id*. at 3227-32.

57. Pub. L. No. 105-353, §§ 101(a)(1), 101(b)(1), 112 Stat. 3227, 3230, 3232 (1998).

58. 15 U.S.C. § 77r(b)(1) (1998).

59. 15 U.S.C. § 77r(b)(2) (1998).

60. Pub. L. No. 105-353, §§ 101(a)(1), 101(b)(1), 112 Stat. 3227, 3228, 3230 (1998).

61. 15 U.S.C. § 78t (1998).

62. *See, e.g., Adams v. New York City Transit Auth.*, 211 A.D.2d 285, 626 N.Y.S.2d 455, 460 (1st Dep't 1995), *aff'd*, 88 N.Y.2d 116, 643 N.Y.S.2d 511, 666 N.E.2d 216 (1996).

63. *See generally* 9 U.S.C. § 7 (1951) (limiting discovery in arbitration).

64. *United States v. Gullo*, 672 F. Supp. 99, 103 (W.D.N.Y. 1987) (discussing the confidentiality of arbitration).

65. *See Granite Partners, L.P. v. Bear Stearns & Co. Inc.*, 58 F. Supp. 2d 228, 262 (S.D.N.Y. 1999) (explaining the Shingle Theory); Bissell v. Merrill Lynch & Co., 937 F. Supp. 237, 246 (S.D.N.Y.1996) (defining the Shingle Theory).

66. *See Granite Partners*, 58 F. Supp. 2d at 255-258 (declining to apply the Shingle Theory to an excessive markup claim based on the New York common law of fraud).

67. 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 13.02 (3d ed. 1992) (hereinafter "Newberg & Conte").

68. Fed. R. Civ. P. 4.; D. Berger & H. Newberg, *Franchise Litigation: Class Action and Multidistrict Litigation*, Franchise Litig. & Legis. 159 (NYPLI 1971).

69. Newberg & Conte, *supra*, note 67.

70. Logan & Young, *Securities Arbitrations*, Litigation 38, 39 (Winter 1995).

71. *See* NYSE Arbitration Rule 603, reproduced in New York Stock Exchange Guide (CCH), § 2603 at 4314.

72. *See id*.

73. *See* NYSE Arbitration Rule 607, § 2607 at 4314-15.

74. *See* NYSE Arbitration Rule 619(a), § 2619 at 4319-21.

75. *See* NASD Code of Arbitration Procedure Rules 10000 *et seq.*, reproduced in NASD Manual (CCH) at 7501-7632 (further information is available on the Internet at www.nasdr.com).

76. NASD Code of Arbitration Procedure Rule 10304 at 7573.

77. NASD Code of Arbitration Procedure Rule 10308 at 7574-78.

78. NASD Code of Arbitration Procedure Rule 10308(b)(4) at 7576.

79. *See* AAA Commercial Arbitration Rules 31, 33; W. Barret, *Arbitration of a Complex Case*, 41 Arb. (Apr. 1990).

80. Rule 1 of the AAA Supplementary Procedures for Large Complex Disputes requires both parties' consent or a court or administrative order to use the Supplementary Procedures for Large Complex Disputes. *See also* AAA Securities Arbitration Rules (these rules, and other information, are available from the AAA on its Web site at www.adr.org).

81. 15 U.S.C. § 78aa (1987); 28 U.S.C. § 1331 (1976).

82. 28 U.S.C. § 1367 (1990).

83. E.g., NASD Code of Arbitration Procedure Rule 10101 at 7511-12.

84. *Id*.

85. *Id*.

86. AAA Commercial Arbitration Rules 6, 7.

87. *See* 15 U.S.C. § 78aa (1987); 28 U.S.C. § 1391 (1992).

88. *See, e.g.*, NASD Code of Arbitration Rule 10315 at 7583.

89. *Id*.

90. AAA Commercial Arbitration Rule 11.

91. *Id*.

92. *See Grandon*, 147 F.3d at 193-94 (stating that since allegations of fraud must be pled with particularity, a plaintiff must plead with particularity the facts that show the markup to be excessive).

93. *See Press*, 166 F.3d at 535; *Rauscher Pierce*, 17 F. Supp.2d at 995-1000 & n.13.

94. *See Press*, 166 F.3d at 535-36; *Grandon*, 147 F.3d at 193 (relevant factor include, among others the availability of the security on the market; the price or yield of the security; the nature of the broker, dealer or municipal securities dealer's business).

95. *See Banca Cremi*, 132 F.3d at 1027-37.

96. *See Grandon*, 147 F.3d at 189-90; *Banca Cremi*, 132 F.3d at 1035-36.

97. 485 U.S. 224, 239 n.17 (1988). *See Chiarella v. United States*, 445 U.S. 222, 228 (1980); *Speed v. Transameica Corp.*, 99 F. Supp. 808, 829 (Del. 1951).

98. *See Chiarella v. United States*, 445 U.S. at 228 (1980).

99. *See Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2d Cir. 1943).

100. Coffee, *supra*, note 17 at 5.

101. *Banca Cremi*, 132 F.3d at 1035. In the Second Circuit's view, although the Shingle Theory only supplies the duty to disclose, a broker-dealer commits securities fraud in violation of § 10(b) of the Exchange Act and Rule 10b-5 by charging customers undisclosed excessive markups. *See Grandon*, 147 F.3d at 190. In other words, once the plaintiff shows that the markup is excessive, every other element of the federal securities fraud claim arguably is presumed—materiality, scienter, reliance, causation and damages. It is this consequence of the Shingle Theory that made the Fourth Circuit "acutely uncomfortable." *See Banca Cremi*, 132 F.3d at 1035. Given the Shingle Theory's vulnerability, Professor Coffee suggests that the SEC either replace it by requiring disclosure of markups in all transactions, or update it by grounding the duty to disclose upon the NASD and MSRB rules that prohibit excessive markups, instead of upon some implied representation. *See* Coffee, *supra*, note 17 at 5.

102. *See generally* Steckman and Conner, *Loss Causation Under Rule 10b-5, a Circuit-by-Circuit Analysis: When Should Representational Misconduct be Deemed the Cause of Legal Injury Under the Federal Securities Law?*, Securities Reform Act Litigation Reporter, Vol. 5, No. 6, at 897-956 (Sept. 1998).

103. 424 F. Supp. 1021 (S.D.N.Y. 1977), *aff'd in part, remanded*, 570 F.2d 38 (2d Cir. 1978) ("*Rolf II*") (remanding for assessment of damages per formula set forth by Second Circuit), *opinion amended*, 1978 WL 4098 (2d Cir. May 22, 1978), 1979 Fed. Sec. L. Rep. (CCH) § 96,919 (S.D.N.Y. 1979) ("*Rolf III*") (on remand, computing damages as set forth in *Rolf II*), *aff'd in part and rev'd in part*, 637 F.2d 77 (2d Cir. 1980) ("*Rolf V*") (modifying damage formula set forth in *Rolf II* and reversing *Rolf III* on damage computation), No. 73 Civ. 2967 (Slip Op.) (S.D.N.Y. 1980), 1981 WL 1646, 1981 Fed. Sec. L. Rep. (CCH) § 98201 (S.D.N.Y. June 24, 1981) (on remand, computing damages as directed in *Rolf V*), further decision, No. 73 Civ. 2967 (Slip Op.) (S.D.N.Y. 1981).

104. *See Banca Cremi,* 132 F.3d at 1031-33.

105. *See Myers v. Finkle*, 950 F.2d 165, 167-68 (4th Cir. 1991).

106. *See Banca Cremi*, 132 F.3d at 1029. There, the court rejected the plaintiff bank's argument that it was an unsophisticated investor. The court found that the bank's assets of $5 billion, its extensive investment experience, and its finance-oriented employees all helped buttress the defendant's assertion that the bank was a sophisticated investor.

107. *Id*. at 1025. The court noted that the plaintiff had been courted by other securities firms for its CMO (collateralized mortgage obligations) business and was authorized to engage in these transactions. It is unclear whether these transactions with other brokerage houses occurred but this evidence was cited by the court as proof of the plaintiff's sophistication.

108. *See Grandon*, 147 F.3d at 187. *See, supra*, notes 9-10. Defendants too should not hesitate to use subpoenas to obtain any relevant information from third parties.

109. *See Grandon*, 147 F.3d at 184.

110. *See Banca Cremi*, 132 F.3d at 1033. After several years, the SEC withdrew the proposal, stating that there were alternative ways to achieve the same result with fewer adverse side effects.

111. *See* Testimony of Arthur Levitt, Chairman, SEC, before the House Subcommittee on Finance and Hazardous Materials, available at www.sec.gov/news/testmony/tsty0499.htm (Mar. 18, 1999); www.sec.gov/news/testmony/tsty1398.htm (Sept. 29, 1998).

112. *See* H.R. 1400, 106th Cong. (1999). On June 14, 1999 the House of Representatives passed this bill and it has been referred to the Senate Committee on Banking. Specifically, this legislation would amend the Exchange Act to require the SEC to adopt rules and take other action to assure the prompt, accurate, reliable and fair collection, processing, distribution and publication of transaction information with respect to debt securities (other than exempted securities). The SEC and the industry support this bill.

This Report was prepared by the Section's Committee on Securities Litigation. It was prepared by Stephen P. Younger (Chair) and Andrew J. Wertheim, with the assistance of Paula Bosco, Harold K. Gordon, Charles J. Hecht, John Henry, Melanie Jenkins, Anessa Karney, Joseph Punturo, Richard Spinogatti, John Singer, Sheryl Stoessel and Daniel J. Sullivan. The Report has been adopted by the Section.

Ethics Update: Recent Developments and Safe Navigation: A Panel Discussion

The Section's 1999 Spring Meeting featured a panel discussion about trends in ethics entitled: Ethics '99: An Update on Recent Developments and Guide to Safe Navigation. *The Program Chair was Jack C. Auspitz, Morrison & Foerster and the Moderator was Mark C. Zauderer, Solomon, Zauderer, Ellenhorn, Frischer & Sharp. Panelists included Ira H. Block, Senior Vice President, Legal Affairs and General Counsel of the New York City Off-Track Betting Corporation; Martin Garbus, Frankfurt, Garbus, Klein & Selz; Professor Leonard Orland, University of Connecticut School of Law; Allan M. Pepper, Kaye, Scholer, Fierman, Hays & Handler; Susan Brotman, Gentile, Brotman & Benjamin; Hal R. Lieberman, counsel to Beldock, Levine & Hoffman; The Honorable Barrington D. Parker, Jr., United States District Court for the Southern District of New York; The Honorable Charles E. Ramos, The Supreme Court of the State of New York, New York County—Commercial Division; and David N. Ellenhorn, Solomon, Zauderer, Ellenhorn, Frischer & Sharp.*

Mark C. Zauderer: We read from time to time about horrible examples of lawyers who have done something wrong, perhaps taking client funds, or things of that ilk. This is what the public sees and perhaps associates with the word "ethics" when they talk about lawyers. But for most experienced practicing lawyers, these kinds of ethical issues have very little relevance. Rather, we practice in a milieu in which we are constantly faced with our own conflicts. These conflicts revolve around a responsibility to differing groups. Above all, we have a duty of zealous advocacy and loyalty to our clients, as well as a duty to the court.

If I take a position in a case beyond the bounds of proper advocacy, I am doing something wrong. On the other hand, if I fail to perceive where that line is and do not come close enough to it, am I serving my client? Am I simply currying favor with the judge and not acting in my clients' interest? All of these decisions, which are hard enough without these tensions, are made doubly hard by the fact that we are in a situation where we are asked to be our own judge and jury.

Our judicial colleagues are called upon all the time to make decisions in difficult matters about which reasonable people can differ. After making those decisions, perhaps there's an appeal. Should the appellate court disagree, there is a reversal, and that is the way our system functions.

For the practicing lawyer, there is no such safe harbor. We must be our own judge and jury. We are called upon constantly to make difficult decisions. These decisions are typically made in situations where there is no turning back. Sometimes they are made on the spur of the moment and need to be supported 100 percent, because if we don't, we may be subject to sanctions, discipline, or worse. I suggest we think about not only what is the right answer in any particular circumstance, but also about getting to the right answer and doing it in a way that serves our clients, does justice for our system, and is fair to ourselves.

Hal R. Lieberman: I am not going to speak about ethics generally, but I am going to say a few things by way of an update on the subject of conflicts of interest. I hope that you understand that what I am going to say about recent developments in conflicts of interest is not comprehensive by any means. Conflicts of interest is a big subject and one that we are constantly studying. If you do any kind of litigation, and even if you do not, I think that conflicts of interest is an area that affects every aspect of the practice of law.

Broadly speaking, you can think of conflicts of interest in terms of four categories. The first category is personal and business conflicts of interest. Essentially, the principle code provision is Disciplinary Rule 5-101.[1] Within the rubric of what I would call "personal" and "business conflicts" there are two additional subcategories. These are the advocate witness rule[2] and business dealings with clients.[3]

The second category, the one that is probably the most common and frequently dealt with in case law, is concurrent representation conflicts. These are the problems involved in representing two or more clients.[4] The principle rule here is Disciplinary Rule 5-105.[5]

The third category, which is, in a way, an adjunct of the second category, is an area I call "former client problems."[6] Again, it is multiple-client representation but, in this case, it is where there is successive representation. The principle rule in the code is Disciplinary Rule 5-108.[7]

The final area that lends itself to categorization is what I would call "third-party conflicts."[8] They are conflicts involving the possible influence or effect on representation by a third party, either through paying the lawyer's fee or in some other way influencing the representation.[9]

Another category, which I will not spend any time on, can be described as "issues conflicts."[10] Those are conflicts in which a lawyer, for example, may be advo-

cating a position which could harm another client's interests.[11] These usually occur in a context where it is either a controlling jurisdiction or an appellate context where there will be an effect on the representation of another client as a result of the advocacy of an issue or position.

Now, before I talk about personal conflicts, I do want to say something that I meant to say at the outset. The world is changing and it's going to change somewhat significantly in a few weeks or maybe a month or so when the Administrative Board amends the Code of Professional Responsibility.[12]

As you may know, there has been a whole raft of proposed amendments to the lawyers' code. This will further update and amend the lawyers' code to bring it into closer conformity with the model rules.[13] We have now, through the Crane Commission's work,[14] substantially improved and upgraded the code. Some of the things that I am going to say to you are going to change. Also, the case law is going to change due to the impending changes in the code. So you should, if you take nothing else away from this meeting, at least be prepared to look at and study carefully the changes in the Code when they are adopted by the Administrative Board.

Anyway, I want to come back to what I wanted to say about "personal conflicts." These conflicts between the lawyer and his or her client come in all shapes and sizes. Let me just mention a few instances in New York that illustrate how a lawyer's personal financial business or other interest can result in an impermissible conflict of interest.

One instance or example of this kind of conflict arose in a case which I actually had the opportunity to prosecute in the disciplinary context, along with Loretta Preska, who is now a judge in the Federal District Court. It involved a man named Thomas Ryan.[15] It was a product of a decision in the Suffolk County Surrogate's Court which found that a lawyer had drafted a series of successive wills and codicils for the decedent and that, as the years went by, he and his wife assumed greater and greater fiduciary roles in the estate without any true justification for it. It was a classic case of overreaching. Of course, there was no opportunity to find out whether the decedent really understood or had knowledge of what was going on. The Appellate Division took the findings of the Surrogate's Court in Suffolk County, applied collateral estoppel and publicly censured the lawyer for his conflict in connection with the representation or the drawing of the wills and codicils.

The second example I want to give is a recent example which actually results from New York State Bar Opinion 694.16 A real estate lawyer was trying to enter into, or sought advice about entering into, an agreement with a broker in which the lawyer would agree to represent both the lender and the purchaser for an overall reduced fee.

The opinion stated that this arrangement was not valid. This opinion further illustrated three different types of conflicts. First of all, it illustrated the problem with the lawyer's ongoing financial interest in referrals from the broker, which I think is an obvious situation of a personal or financial conflict. Second, it also illustrated the problems with representing the lender and the purchaser. Finally, it illustrated the problem of representing differing interests in the same matter. As a side note, there is also a possible third-party conflict problem because of the control or interference by the broker in the attorney-client relationship.

The last item I want to mention with respect to personal conflicts is an amendment to the code that has generated a lot of interest. That amendment is Disciplinary Rule 10-102(A)(7). It simply says, "No romantic involvement with matrimonial clients."[17] I think this is a rule that is going to be broadly interpreted. It is a rule that had been discussed for a number of years. There were proposals for a less stringent rule along these lines, or possibly an ethical consideration, but it was decided, and I think correctly so, that symbolically as well as practically it was important to have a specific rule on romantic involvement with clients.

The fact that New York and other states are adopting these kinds of rules illustrates the concerns that the Bar, the courts, and the public have about professionals entering into relationships with clients in the context of representation. This is particularly true in the matrimonial area where the stakes are high and emotions and vulnerabilities are exposed.

I want to quickly mention the advocate witness rule.[18] It is an offshoot of the personal conflicts problem in which a lawyer may be required to withdraw when that lawyer becomes a necessary witness. There are really three reasons for this rule. They are: the unfairness to the other side when a lawyer becomes an unsworn witness, the unfairness to the lawyer's own client when the lawyer cannot provide important testimony for the client, and the unfairness to the lawyer's own client if the lawyer's testimony will be adverse to the client's interests.[19]

There are four exceptions to the rule, which are set forth in Disciplinary Rules 5-101(B) and 5-102(A), and I don't want to go into the specifics of the exceptions.[20] The last exception, dealing with substantial hardship, is the one that receives the most attention.[21] If a lawyer can show that he would create a substantial hardship to the client and that hardship outweighs the potential harms that I've just described, the courts will allow

lawyers to testify even though they are advocates for their client's cause.

The *Fairview* case best illustrates the above premise.[22] In that case, a lawyer represented the plaintiffs in a breach of contract action and the lawyer had played a central role in negotiating the contract. The lawyer made statements in correspondence that were actually helpful to the defendants, and, therefore, the defendants were probably going to call the lawyer as a witness in favor of their position. It is an obvious situation in which a lawyer cannot proceed. In this case the lawyer was not allowed to proceed as an advocate because not only was the lawyer going to be called as a witness, but the lawyer was going to be called as a witness in a way that was going to be harmful to the lawyer's own client. That put the lawyer in an absolutely untenable position as an advocate, and the court properly said the lawyer could not perform those roles. Another case I urge you to look at, *United States v. Kliti*.[23]

Now, let's turn to "concurrent representation," which is really the heart of conflicts issues that most lawyers confront.[24]

Judge Ramos, who is on this panel, was the trial judge on a case called *Jamaica Public Service Company v. AIU Insurance Company*.[25] The case was decided by the New York Court of Appeals. It involved a lateral move by a young associate. The Court of Appeals held that the plaintiff's law firm would not be disqualified, even though this lawyer had been an affiliate of the defendant's firm.[26] There are two reasons for this result and they relate to the former client conflict rule.

The former client conflict rule, DR 5-108, has two prongs. The first prong is that a lawyer, who currently represents a client where there is a substantial relationship to the former representation and the current representation is adverse to the former representation, can only proceed if there is full disclosure and informed consent.[27] The second prong is that a lawyer in a law firm will not be allowed to proceed if there is likely to be use of confidences or secrets unless there is informed consent.[28]

In this case, the New York Court of Appeals said surprisingly, that there was no substantial relationship between the lawyer's former work for the defendant's affiliate and the current litigation.[29] This was probably true, but the lawyer essentially made disclosures to his current law firm and to his current client about inside information with respect to his former client, the company that was represented by the defendants.[30] The court did not feel this was detrimental to the adversary since the information that was disclosed was either generally known or a matter of public information because the information had been published in trade periodicals or regulatory filings.[31] This decision is controversial. It suggests that the New York Court of Appeals is taking a more liberal position on conflicts than perhaps it has in the past. The fact of the matter is that it's a decision that I think is important because it does reflect the direction that the New York Court of Appeals may be going in the area of concurrent representation and former client representation.

Another case that I think is significant in New York is *Swift v. Ki Young*,[32] and I think that case illustrates another important point about conflicts in concurrent representation. It was a case that involved the buyer and seller of real estate retained by the same lawyer. The lawyer obtained both parties' consent to the representation as well as a release. The deal eventually went sour and the lawyer was sued for malpractice.[33] I know that a lot of lawyers take the position that they can represent both sides in a transaction if they simply assume the role of scrivener, but it's a dangerous practice and this is certainly an illustration of how dangerous the practice can become.

The Appellate Division found that the transaction was one-sided in favor of the buyers.[34] Therefore, even if the parties had consented to the dual representation, the court said that it was a question of fact for the jury as to whether the lawyer could have adequately represented both sides and whether he adequately represented the buyers in this transaction.[35] It's interesting because Disciplinary Rule 5-105, the primary rule relating to concurrent conflicts, says: There are certain situations in which lawyers can go forward in potential conflict situations and represent a client or clients, where there is full disclosure and informed consent.[36] But there are some conflicts that are simply non-waivable, no matter how much informed disclosure is obtained.[37] This case illustrates the fact that it is inherently impossible for a lawyer to adequately represent both sides.

If you've got a transaction in which the terms have not been negotiated fully, or even partially, involving key issues, such as price or other conditions that are central, and the lawyer purports to represent both sides, how is it possible to obtain informed consent?

I think the court is saying here, and I think it's a lesson we need to absorb, that you simply can't assume every conflict is waivable just because there is informed consent.

The next case I want to talk about with respect to concurrent representation is one of the most interesting cases in New York to be handed down in the last ten years or so. It's a case that came out of the Southern District of New York, *Strategem Development Corp. v. Heron International, N.V.*[38] It's an important case because it involves, for corporate and commercial lawyers in particular, the question of conflicts in representing cor-

porate family members which is a so-called "hot potato concept." This was a 1991 decision written by Judge Cram, in which the law firm of Epstein Becker represented Strategem as plaintiff against a company called Heron Properties concerning an alleged breach of a joint venture agreement to develop certain properties.[39]

Prior to the filing of the lawsuit, Epstein Becker had been representing a company called Fidelity Services Corporation and Fidelity Services was a wholly owned subsidiary of Heron. The representation by Epstein Becker was in an unrelated labor arbitration; "unrelated," that is, to the real estate matter that became the subject of litigation between Strategem and Heron. Parenthetically, I should say, there is some evidence in the record that Epstein Becker had also represented Strategem in the past. Putting that aside, at some point prior to the commencement of the suit against Heron, Epstein Becker informed Heron of its representation of Strategem and its intention to resign as Fidelity's, the subsidiary's, counsel on the day it filed Strategem's complaint against Heron.[40]

Heron never consented to this arrangement nor was it ever asked to do so. Strategem and, apparently, Epstein Becker, just felt they were okay as long as they resigned from the representation of Heron on the day that there was actual litigation instituted. Now, following the institution of litigation, Heron moved to disqualify and Epstein Becker argued that there was a violation of the conflicts provisions regarding multiple representation where the differing interests of the client's adversely affected the lawyer's independent judgment. Judge Cram decided that the duty of undivided loyalty applies with equal force where the client is a subsidiary of the entity to be sued.[41] The court then held that if the representation of Stratagem and Heron or its subsidiary was simultaneous, clearly it would violate the per se rule that is to say, you can't sue your own client.[42] Judge Cram found that the representation was simultaneous and adverse because Epstein Becker had been preparing for litigation for some time while continuing to represent Heron. In other words, they were preparing for litigation on behalf of Strategem against their own client, Heron. This is on the assumption that Heron and Fidelity Services were the same client.[43] The court concluded that Epstein Becker had a concurrent conflict which required their disqualification. Epstein Becker should not have proposed to drop Heron like a "hot potato." Rather, it should have declined to sue Heron on behalf of Strategem. You don't drop an existing client like a "hot potato." That is where that particular phrase comes from in the context of conflicts of interest.

The decision has generated a bit of consternation, especially among large firms with many corporate clients. In 1995, the American Bar Association produced a formal opinion, Opinion 95-390, on the subject of the conflicts in the corporate family.[44] In a recent decision with six in the majority, one concurring in part and three dissenting, the ABA Committee on Ethics and Professional Responsibility opined that a parent/subsidiary should not automatically be treated as one client and that "a lawyer who represents a corporate client is not only by that fact necessarily barred from representation that is adverse to a corporate affiliate of that client in an unrelated matter."[45] But even under that relaxed standard, a lawyer, in my judgment, simply can't accept the representation without consent of the corporate client if the circumstances are such that the affiliate should also be considered a client of the lawyer.[46] In any case, a lawyer is advised strongly in these situations to discuss the matter with her corporate client before undertaking such a representation,[47] or they may wind up before a court that decides that Judge Cram is absolutely correct and the lawyer is disqualified.

Turning now to third-party conflicts and screening, the principle here is avoiding interference with the attorney-client relationship by a third party. The classic illustration of that is the *U.S. v. Gotti* case in a criminal action against various members of an alleged crime family.[48] The United States government sought to disqualify a number of defendants' attorneys based upon prior associations with that organization. Two lawyers were disqualified based on the nature of their house counsel services to the alleged crime family and their presumed inability to provide unconflicted independent representation to their individual clients.[49]

Another important case in the area of former client conflicts that raises the issue of screening and imputed disqualification is called *Kassis v. Teacher's Insurance Annuity.*[50] The facts were interesting and significant from a number of standpoints. The plaintiff's counsel was a firm called Weg & Meyers, and they represented a plaintiff in litigation for approximately five years.[51] There was a young associate named Arnold, who was admitted in January of 1996 to practice law, and had worked on the case for about one year. When he resigned from Weg & Meyers, he joined the firm of Thurm & Heller, which was the defendant's counsel.[52] Arnold had participated in the taking of four or five depositions in the case.[53] As time went by and the trial date approached, there was a need to respond to discovery on the part of the plaintiff, which had been somewhat dilatory, apparently, in responding to discovery demands.[54] At that point, on the eve of trial, the firm of the plaintiff which had been dilatory in responding to discovery, moved to disqualify the defendant's firm, Thurm & Heller. They argued that Arnold's presence in the firm created a conflict which should be imputed to the entire defendant's firm, despite the fact that the defendants had carefully and, apparently with reasonable effect, created a Chinese Wall between

Arnold and the rest of the firm as to this case.[55] The Appellate Division, held by a 3-2 vote that the screening remedy, the Chinese Wall remedy will be read into Disciplinary Rule 5-105(D) and permitted Thurm & Heller to stay in the case.[56]

That's significant because in New York there isn't a recognized screening remedy unlike other jurisdictions that take a more liberal approach in the Model Rules.[57] The only screening remedy in New York is in Canon 9, Disciplinary Rule 9-101 with respect to the "revolving door" issue of government lawyers going to private practice and vice versa.[58] The understanding being that we want a more liberal approach so that people will be encouraged to go into public service and not be penalized.[59]

This is the first case at the appellate level where the court has basically read into the Code an opportunity for screening. The factors that were considered by the majority are as follows: First, this motion to disqualify occurred very late in the litigation; if it had been five years earlier, it might have been looked at little bit more favorably.[60] Second, the Appellate Division looked at the delay that this motion was going to cause and decided it would be rewarding plaintiff for his delay in discovery.[61] Third and most significantly, there was no reason to doubt the effectiveness of Thurm & Heller's screening proposal.[62] Thurm & Heller had fully and openly appraised Weg & Meyers of the steps it was going to take earlier when Arnold came to the firm. The Appellate Division viewed the motion to disqualify as an obvious litigation ploy calculated to give the plaintiff an unwarranted advantage.[63] We've all talked about the fact that in litigation some motions are made for strategy purposes, and certainly there are many disqualification motions that have been denied, primarily at the federal level, because of litigation tactics. But this is the first time the Appellate Court has allowed screening, and came right out and said essentially that this is what is going on here.

The two judges who dissented focused on Arnold's heavy involvement in the case, the fact that he was involved in so many depositions, and the inherent likelihood that confidences will be shared in a small-firm setting.[64] And I gather that Thurm & Heller is a 26-lawyer firm. So it's a very close case because there is a greater likelihood of sharing of information in a smaller setting than in a large firm where people don't even necessarily know some of the other people in the firm. In any event, we'll all see what the Court of Appeals has to say.[65]

The last point I want to make is that there is a recent rule change to make law firms more responsible for compliance with the code.[66] Essentially, that rule requires that all law firms have conflicts systems in place. It's in the context of the discipline of law firms. It's the same notion as requiring that law firms all have appropriate fiduciary accounting systems to make sure that client funds are segregated.[67] It is a subject of separate and potential discipline if a law firm doesn't have in place a conflicts check system which ensures that upon the intake of a new matter, there is a check done of prior engagements to ensure that the law firm hasn't represented anybody that may create a conflict of interest. The rule does not specify the nature of the conflicts system, but obviously, it contemplates the use of modern technology and having an adequate database and all of the other aspects that would go into a reasonable conflicts system.[68] It doesn't matter, under this rule, whether there has ever been an actual conflict problem or a violation of another rule. It's simply a violation of the rules not to have an adequate system in place. I think that is an important development and one that we all should be aware of in New York. It's a prophylactic measure and one that has significance to any lawyer who practices law.

Motions to Disqualify

Hon. Charles E. Ramos: When the court is confronted with motions to qualify, the first question to ask is, why is this motion being made, in a strategical sense? For example, is this motion being made for reasons other than the need to disqualify counsel? I am not going to allow ethical considerations in the same manner that a discipline committee would. As Judge Parker said, the court is going to make a determination based upon the court's needs, the people's needs, and the clients' needs. Given these concerns, something other than disqualification may result, allowing the case to go forward.

Mark C. Zauderer: We always hear that lawyers litigate motions to disqualify as a tactical maneuver. Do you share that view and, if so, who else but the adversary is going to raise the issue in the first place to bring it to the court's attention?

Hon. Barrington D. Parker, Jr.: Well, there are two separate arenas in which those problems arise. My experience is that disqualification motions don't come up frequently in civil cases. However, when there is a problem, it tends to just jump out at you like a sore thumb. I think I've had one, perhaps two, serious disqualification motions. I think the lawyers and the Bar tend to be fairly good on these issues.

There is a different set of considerations in criminal cases. There is a Court of Appeals doctrine that requires the U.S. Attorney to raise certain issues and to make certain applications and certain motions when certain situations are presented. For example, in the *Gotti* case[69] that I had we started off with 20 defendants. There had been literally years of grand jury investigation, both on the state and federal level. A very substantial number of

people were called to the Grand Jury, in many instances from companies that were controlled or owned by the defendants. And so, you initially have the same lawyers showing up representing multiple witnesses before Grand Juries. Later, the same lawyers were representing individuals who, it appeared, would be cooperating witnesses and perhaps indicted defendants. There was a lot of sorting out to do. But the flexibility you have in criminal cases is much less than you do in civil cases.[70] The Second Circuit has made it clear that they take the unsworn witness[71] issue seriously. Once the government alleges that a lawyer is on tape, or we know that a lawyer was speaking with an alleged defendant about representing people with conflicting interests, it's very hard for the court to effectively delve beyond that. In this type of situation the rules requiring disqualification are fairly clear.[72]

Prof. Leonard Orland: I just wanted to end by asking my judicial colleagues if either one of them would contemplate, given the timing of this particular request to disqualify, the possibility of having an ex parte hearing under seal to try and ascertain more about the basis for the late filing of the motion to withdraw?

Hon. Charles E. Ramos: I did once. Obviously, the other side consented, an odd position. It was interesting.

Hon. Barrington D. Parker, Jr.: In the real world the conversation will go like this: Your courtroom deputy will say, "Judge, the lawyers want to see you and someone wants to see you ex parte."

If it's a firm, you'll get a couple of partners. And they'll come in and say: "Judge, we're very embarrassed to tell you this, but we have analyzed the situation, we've thought about it, we've worked on it and we have concluded that we are operating here under conflict. I'm embarrassed to tell you, we knew the facts for a number of, since such and such a date, but for a variety of reasons I can go on if you want, we've now realized that it is inappropriate for us to try this case."

And then the judge will ask: "Well, what's the general nature of the problem?"

The law firm will usually reply, "We realize that just prior to the representation, we had received information that may create an attorney-client problem. We are concerned that there are issues of information that we received that has created this conflict."

Going in any kind of aggressive or extensive way into what happened is fraught with danger because the court most likely cannot get to the bottom of it, nor are the tools to do so available since it has to be done ex parte.

In criminal cases, there are some different considerations. You frequently receive ex parte submissions. Unfortunately, in a civil context knowledge and one's ability to define the facts is very problematic.

Susan Brotman: How about referring the issue of the conflict to another judge?

Hon. Barrington D. Parker, Jr.: That doesn't really solve the problem, because there is still the issue of divulgence of confidences. Referring the matter to another judge won't necessarily solve this issue. In this situation the other judge has the same problem.

What you really need to know is some information from the slippery former employee who went to see the lawyer in the firm. Then the court must determine whether to hold a hearing? Direct the parties to submit affidavits? Swear the former employee in?

Hon. Charles E. Ramos: I'll tell you what I'd do. I'd listen to what the parties have to say. Then I'd say no grounds for qualification exist. After which, the case would proceed.

Ethics and Witnesses

Mark C. Zauderer: Mr. Ellenhorn, isn't the fact-finder at trial entitled to know what the witness' recollection was so that the jury can draw its own conclusion about what they mean?

David N. Ellenhorn: The fact-finder is not entitled to anything that the lawyers don't want him to know. He will know what the lawyers bring out, consistent with the Rules of Evidence, etc.

My experience is that witnesses, or parties who become witnesses, whose testimony is overly manufactured or rehearsed will fall apart. Assuming your adversary is at least as good as you are, the testimony will fall apart, and ultimately will not be convincing.

No matter how rehearsed witnesses are, relentless cross-examination will destroy them, or at least undercut them. In addition to any ethical considerations, it is in your own self-interest that your clients or your witnesses have a degree of spontaneity and sincerity, that they really know and believe what they're saying, and that it is their own testimony.

The way in which they present it is in your hands. Your role is not to create the testimony, but to shape it and make it appealing and somewhat coherent. It's your play, you're the director, and you've got to direct the actors.[73]

But ultimately, even if you were unethical enough to create the testimony, if the witness doesn't really believe what he's saying, then the testimony will probably fall apart.

It is an oversimplified strategy to just leave it to the witness. In addition to good ethics, it would be good practice to prepare the witness in a manner that is not overzealous.

Martin Garbus: As a judge, if you really want to change the way lawyers violate these ethical standards, then you have to go after those lawyers who do it continuously and relentlessly. The Bar Association doesn't even get to the root of it; and if you don't get to the root of it, then you're encouraging lawyers to stretch ethics a bit. I look upon this whole ethical issue and question of standards as something that has to come from trial judges before you can talk about it reasonably among lawyers.

Judge Parker, when you sit in on a case, you know that you often hear fantasy that came out of a lawyer's office. It is not uncommon practice for a witness to exquisitely skip past 17 inconsistent statements, Grand Jury testimony and physical evidence. When a witness makes previous inconsistent statements, Judge Weinfeld could find that he is telling the truth now, even though he wasn't telling the truth before. On the other hand, there are certain cases where that isn't true.

Hon. Barrington D. Parker, Jr.: If it's a criminal case with trial jurors, where the witness is a defense witness, my experience has been that, typically, a rather well-prepared, reasonably smart U.S. Attorney will get up, cross-examine the witness, and demonstrate the inconsistent statements for the jury to evaluate. If it's a bench trial, I have a good nose for someone who is not telling the truth. As a remedy for this situation, I write closed findings and conclusions.

David N. Ellenhorn: Implicit in your remarks is the suggestion that the judges go further in some disciplinary sense.

Martin Garbus: Not necessarily in the disciplinary sense, because I think the disciplinary rules and what goes on in the courtroom are somewhat different. I think when judges are involved in a situation where it's clear there is perjury in the courtroom, they share it with all of us in a way which reminds lawyers of their ethical obligations.

Mark C. Zauderer: Since this kind of conduct goes on in a closed room, we can all assume that there is a line between proper and improper conduct in witness preparation. However, we may differ where that line is to be drawn. How can we, as a profession, monitor and improve the situation?

Hal R. Lieberman: Actually, there was one very prominent case, the *Friedman* case that discusses all of the above issues.[74] The dialogue that just took place between the judge and Mr. Garbus is important. In my opinion, there is no doubt that judges are in the best position to assess and report perjury and subornation of perjury. There is also no doubt that judges are reluctant to do so for a variety of reasons. However, judges are required to report serious misconduct related to a lawyer's integrity, and that obligation is honored on the bench both at the state and federal levels.

It is my experience, from talking to judges, that there are grave misperceptions about the implications of reporting attorney misconduct. Judges either feel that the disciplinary system wouldn't do anything about it or, alternatively, that if they reported misconduct the lawyer would be disbarred. As a result, there is tremendous reluctance to report misconduct, which is unfortunate for the judicial system.

Mark C. Zauderer: Judge Ramos, there is a relevant case from the Eastern District of Pennsylvania that's been the subject of much discussion.[75] In this case, Judge Gwothmey laid down his rules for proper conduct in depositions and dealt with the issue of improper witness coaching. One of the rules stated was that when a witness testified, if there was to be a break, there could be no discussion between the witness and the lawyer during the break, even if there might be days or weeks in between. In your view, is this rule appropriate, and would it help solve the problem?

Hon. Charles E. Ramos: I think that rule is being informally adopted in New York County. I just had this very issue come up in an EBT this week. The attorney was appalled that his adversary had spoken to a witness during the break in a deposition, and it just took a stern look from me to get everybody on the right track. That's pretty much the way things are being conducted now, and I don't know if it's just a result of my colleague in Pennsylvania. I think the feeling is that woodshedding of the witness should stop before the deposition.

Mark C. Zauderer: Professor Orland, wouldn't this rule deprive the witness of a constitutional right to counsel between adjournments of the deposition?

Prof. Leonard Orland: Unless the witness is a criminal testifying in his own defense, I don't see a problem.

Judge Shainswit: I see a problem. It's one thing to tell the attorney he can't talk to me or his client over a 15-minute break. However, if the break is overnight, over the weekend, or over a couple of weeks, it would seriously deprive the witness of his right to counsel.

Mark H. Alcott: In Delaware, the rule is that from the moment the witness is sworn until the deposition is concluded, you cannot counsel the witness in a substantive way.[76] Justice Ramos, I do not believe that this is the practice in New York County.

Hon. Charles E. Ramos: It has become the practice in the Commercial Division.

Last Questions

Mark C. Zauderer: Mr. Block, suppose you are representing a party in a commercial case. You are the plaintiff's lawyer, you bring the lawsuit, and you have a very tough but good real estate developer client who has been giving you increasing business over the last two years.

You sue the defendant and he has 20 days to answer the complaint. His lawyer calls you 18 days later and asks you for an adjournment. Previously, you had a conversation with your client who said to you, "Look, if he gets a lawyer and he asks you for an adjournment, don't give it to him." What do you do?

Ira H. Block: Are you asking me this as a practical question or as an ethical question?

Mark C. Zauderer: As a real life question.

Ira H. Block: I don't think it's an ethical problem. I think I would tell my client that when it comes down to basic matters of civility in litigation, he's going to have to defer to my judgment.

Mark C. Zauderer: What if the question is made not in the context of the initial answer to the complaint, but in the context of a later motion? It's virtually certain that any judge would give an adjournment for counsel to prepare an initial answer. Some courts set it up so that the clerks give a party their first adjournment. Suppose you're dealing with a motion for summary judgment and your client says, "Look, I know they may need an adjournment, but your are not to give more than ten days on this motion." Should you follow that instruction? Is this the lawyer's decision or does the client have a right to make such a decision?

Hon. Charles E. Ramos: I think the question is whether there is an ethical obligation to extend professional courtesies. I think that you shouldn't be deliberately discourteous to your adversary, but there may be legitimate reasons why you might not want to grant a particular extension. For example, time may be of the essence in litigation.

Hon. Barrington D. Parker, Jr.: I think it is very clear that where simple professional courtesies are involved, like granting extensions of time, the lawyer should reserve the decision for himself or herself.

Robert M. Hallenbeck: Let's assume that I am counsel for a large corporation on the West Coast, and I have a firm in New York that handles all of my New York matters, including products liability or real estate. Let's also say the billings average a modest $10,000 to $20,000 per year, but all of my work goes to your firm. A particular matter ends on a given day, and as time goes by, months may have passed since the last representation. The question is, at what point do you treat me as a former client? How do you deal with me, and when do you let me know? Also, what do your internal conflict check systems look like to identify this problem of an active client, an inactive client, or a former client?

David N. Ellenhorn: If there is no active case or matter pending, I suppose that you're a former client by definition. However, it depends on the context in which it is going to arise.

Robert M. Hallenbeck: Is that so regardless of my subjective intent and regardless of my belief that you are still my law firm because I always call you?

David N. Ellenhorn: Assuming there is no retainer-type arrangement, from the lawyer's point of view, you are a former client.

Lawrence N. Weiss: In reference to your previous hypothetical concerning professional courtesies, I would like to add that New York civility guidelines explicitly say two important things. One is that you should extend professional courtesies, and the other is that these guidelines are not ethical obligations and are not, therefore, subject to disciplinary practice.[77] Therefore, in a certain sense, there is a laundry list of bad things that you're free to do, including deny an extension of time. Although it is uncivil to behave in this manner, it is not unlawful or unethical. However, it is not usually beneficial to deny an extension of time because your adversary will go to the judge and inform him or her of your action, which will leave the judge with a bad taste in his or her mouth.

Mark C. Zauderer: Let me just offer one final thought. I think it's worth remembering that with all we've heard in the popular press about lawyers, we still are a profession. There is a special quality to what we do day-in and day-out when we practice law, and all of us struggle over the kinds of issues that we've heard mentioned today. I hope that you, like me, will take pride in the fact that we are guided by sets of principles in what we do regardless of what others in the outside world may think from time to time.

Endnotes

1. Model Code of Professional Responsibility DR 5-101 (1994) (stating that an attorney may be disqualified as counsel when his business, financial or personal interests conflict with a current client). *See also City of Poughkeepsie v. WR Grace and Co.*, 158 A.D.2d 647, 648 (2d Dep't 1990) (discussing attorney's clear and unequivocal requirement not to accept as representation where they are personally involved).
2. Model Code of Professional Responsibility DR 5-102(B) (1994) (stating that a lawyer may not continue as counsel when it becomes apparent that his testimony may be prejudicial to his client). *See also Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 68

(2d Cir. 1990) (prohibiting an attorney from representing a party in an action in which the attorney would be called as a witness).

3. *See People v. Ortiz,* 76 N.Y.2d 74, 75-76 (1990) (discussing the conflict of interest arising out of the attorney's relationship with a former client); *People v. McDonald*, 68 N.Y.2d 1 (1986) (stating client representation and opposing business dealings involve conflicts of interest rising to the level of ineffective counsel).

4. *See In re Gold,* 240 A.D.2d 74, 75-76 (App. Div., 1st Dep't 1998) (suspending an attorney for representing both sides in a loan transaction); *Fiandaca v. Cunningham*, 827 F.2d 825, 829 (1st Cir. 1987) (holding that when concurrent clients have opposing interests disqualification should follow).

5. Model Code of Professional Responsibility DR 5-105 (1994) (requiring an attorney to refuse or withdraw from representation when interest of another client may impair professional judgment). *See Raymond v. Raymond*, 662 N.Y.S.2d 1016, 1017 (1997) (discussing the impairment of professional judgment of an attorney when representing two clients with conflicting interests).

6. *See People v. Alicea*, 61 N.Y.2d 23, 29 (1983) (conflict arising due to attorney's relationship with a former client); *See also Walden Fed. Savings and Loan Ass'n v. Village of Walden*, 622 N.Y.S.2d 796, 797 (1995) (holding former representation resulting in the acquisition of information valuable to a present client is grounds for disqualification).

7. Model Code of Professional Responsibility DR 5-108 (1994) (provides that a lawyer shall not, without consent of the former client after full disclosure, represent a client whose interests are adverse to the former client).

8. Nancy J. Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, Rev. Litig. 585 (1997) (third-party representation is defined as, "representation in which the lawyer is paid or otherwise furnished by someone other than the client). *Id*.

9. Model Code of Professional Responsibility DR 5-107 (1994) (a lawyer shall not, except with the consent of the client after full disclosure, accept compensation or anything of value from one other than the client).

10. Model Code of Professional Responsibility DR 5-105 (providing that a lawyer shall decline proffered employment by a potential client if his judgment is likely to be adversely affected, or if the interests of another client will be adversely affected).

11. *See supra* note 10.

12. Patrick M. Conners, *Professional Responsibility,* 48 Syracuse L. Rev. 793, 816 (1998) (discussing the "proposed amendments are the product of the Special Committee to Review the Code of Professional Responsibility and are warranted to clarify or update existing provisions and eliminate or modify rules that no longer comport with the reasonable and legitimate expectations of clients, lawyers and society in general").; *See also* Patrick M. Conners, *Professional Responsibility,* 49 Syracuse L. Rev. 679 (1999) (stating that although the appellate divisions have not approved the proposed amendment to the New York Code of Professional Responsibility, they are expected to take action in the imminent future).

13. *Id.* at 816.

14. Catherine Richardson, *President's Message*, 68-Nov. N.Y. St. B.J. 3 (1996).

15. *In re Thomas L. Ryan*, 189 A.D.2d 96 (App. Div., 1st Dep't 1993) (holding that the defendant is guilty of professional misconduct and the appropriate sanction is public censure).

16. N.Y.S. Bar Association Committee on Professional Ethics, Opinion 694, Aug. 25, 1997 (3-97).

17. Model Code of Professional Responsibility DR 1-102(A)(7) (1994) (stating that a lawyer or law firm shall not begin a sexual relationship with a client during the course of the lawyer's representation of the client in a domestic relations matter).

18. *See supra*, note 2.

19. *See Bullard v. Coulter,* 246 A.D.2d 705 (3d Dep't 1998) (stating that a lawyer must withdraw from his or her representation of a client during litigation if it appears that he or she "ought to be called as a witness"). *See Burdett Radiology Consultants v. Samaritan Hosp.,* 158 A.D.2d 132 (3d Dep't 1998) (stating that the subject testimony must be necessary, it is not simply based upon whether the lawyer's adversary intends to call him or her as a witness).

20. Model Code of Professional Responsibility DR 5-101(B) (1994) (stating that a lawyer may not act as an advocate if the lawyer knows or it is obvious that the lawyer will be called as a witness on behalf of the client unless (1) the testimony will relate solely to an uncontested issue (2) the testimony will relate solely a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition (3) if the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the law firm (4) the lawyer as advocate can testify to any matter if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case) DR 5-102(A) (same exceptions as laid out in DR 5-101(B)).

21. Model Code of Professional Responsibility DR 5-101(B)(4) (1994) (lawyer may act as advocate and also testify to any matter if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case).

22. *Fairview at Old Westfield, L.P. v. European American Bank,* 186 A.D.2d 238 (2d Dep't 1992).

23. *U.S. v. Kliti*, 156 F.3d 150 (2d Cir. 1998) (holding that a client has a constitutional right to be represented by an attorney who is free from conflicts of interest).

24. *See People v. McDonald*, 68 N.Y.2d 1 (1986) (holding that an attorney's concurrent representation of the defendant and victim constitutes a conflict of interest). *But also Corbelli v. Smith & Reddy*, 198 A.D.2d 760 (App. Div., 4th Dep't 1993) (holding that no conflict of interest is established unless the existence of a prior attorney-client relationship is established).

25. *Jamaica Public Service Co. v. AIU Insurance Co.,* 92 N.Y.2d 631 (1998).

26. *Id.* at 638.

27. Model Code of Professional Responsibility DR 5-105(B) (1994) (permits an attorney to continue to serve both clients if differing interests are present, so long as both clients are permitted and do consent to the continued multiple representation); *See* N.Y.S. Opinion 674, New Formal and informal opinions (1995).

28. Model Code of Professional Responsibility DR 5-108(A)(2) (1994) (if the attorney is in possession of other relevant secrets of one client, which were communicated without the knowledge of the other client, and which are material to the full disclosure necessary to obtain consent, full disclosure may not be possible without the consent of the client adversely affected by proscriptive disclosure of the secret); *See also* N.Y. State Opinion 628 at 6-7 (1992).

29. *See Jamaica*, 92 N.Y.2d at 636-637.

30. *Id.* at 637, n. 1 (discussing how the court in dictum distinguishes secrets from confidentiality. The court opined that: "Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.").

31. *Id.* at 637-38.

32. *Swift v. Ki Young*, 242 A.D.2d 188 (App. Div., 1st Dep't 1998); *See also In re Manshul Const. Corp*., 228 B.R. 532, 544, 33 Bankr. Ct. Dec. 921 (Bankr. S.D.N.Y. 1999); *Kassis v. Teacher's Ins. and Annuity Ass'n*, 93 N.Y.2d 611, 617 (1999); *Clinard v. Blackwood*, 1999 WL 976582 (Tenn. Ct., App. 1999) (for evaluation and application of this opinion).

33. *See Swift*, 242 A.D.2d at 188.

34. *Id.* at 192.

35. *Id.* at 194.

36. *Fisons Corp. v. Atochem North America, Inc.*, No. 90CV1080, 1990 U.S. Dist. LEXIS 15284, at *13 (S.D.N.Y. Nov. 14, 1990) (discussing the requirements of full disclosure and informed consent); *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 133 F.R.D. 425, 428-429 (S.D.N.Y and E.D.N.Y. 1990) (discussing legal standards governing disqualification of an attorney).

37. *See In re Gould*, 207 A.D.2d 98, 100 (App. Div., 1st Dep't 1998) (discussing situations where an attorney may not represent both parties in an action); *Lewis v. Pension Plan*, No. 90CV2970, 1992 WL 390239 (E.D.N.Y. Dec. 10, 1992) (discussing the requirements that an attorney must establish to represent both parties in an action).

38. *Stratagem Development Corp. v. Heron Intl., N.V.*, 756 F. Supp. 789 (S.D.N.Y. 1991).

39. *Id.*

40. *Id.* at 791.

41. *Id.* at 792; *See Glueck v. Jonathan Logan, Inc.*, 512 F. Supp. 223, 227 (S.D.N.Y.), *aff'd*, 653 F.2d 746 (2d Cir. 1981) (holding that the firm representing the trade association could not also represent individual client in suit against corporation belonging to association); *See also Rosman v. Shapiro*, 653 F. Supp. 1441 (S.D.N.Y. 1987) (disqualifying defendant's attorneys because firm represented closely held corporation in which plaintiff and defendant each held 50% of the stock); Samuel R. Miller, Richard E. Rochman, and Ray Cannon, *Conflicts of Interest in Corporate Litigation*, 48 Bus. Law. 141, 182 (November 1982) (stating that the parent and subsidiary are one client for conflicts purposes).

42. *Stratagem*, 765 F. Supp. at 793. *See also* Alan M. Koral and Walter Lucas, *Defending the Individual Management Party Under State Law*, *Litigating Employment Discrimination Cases 1997*, 565 PLI/Lit 235, 277 (June 1997) (suing the parent company of a client prior to ending the relationship with the subsidiary client is a breach of duty to the client); *See* Ronald D. Rotunda, *Sister Act: Conflicts of Interest with Sister Corporations*, 1 J. Inst. for Study Legal Ethics 215, 222 (1996) (to sue a present client violates the duty of loyalty).

43. *Stratagem* at 793.

44. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-390 (1995); S*ee also* Charles W. Wolfram, *Corporate-Family Conflicts*, 2 J. Inst. for Study Legal Ethics 295, 331 (1999) (discussing that in 1995, the Formal Opinion passed by a slim majority); *See* Michael Sacksteder, *Formal Opinion 95-390 of the ABA'S Ethics Committee: Corporate Clients, Conflicts of Interest, and Keeping the Lid on Pandora's Box* , 91 NW. U. L. REV. 741, 752 (Winter 1997) (passed in 1995, the members struggled for over two years on how to resolve the conflict over corporate family conflicts).

45. *Stratagem*, 765 F. Supp. at 1 (stating, "The fact of corporate affiliation, without more, does not make all of a corporate client's affiliates into clients as well").

46. *Id.; See* Lara E. Romansic, 11 Geo. J. Legal Ethics 307, 308 (Winter 1998) (consent is required where the circumstances are such that the affiliate should also be considered a client of the lawyer); *See also* Ronald D. Rotunda, *Conflicts Problems When Representing Members of Corporate Families*, 72 Notre Dame L. Rev. 655, 689 (1997) (even if consent is unnecessary, the law firm should still secure the knowledgeable consent of the client).

47. *Stratagem*, 765 F. Supp. at 2 (". . . In the absence of a clear understanding otherwise, the better course is for a lawyer to obtain the corporate client's consent before the lawyer undertakes a representation adverse to its affiliate").

48. *U.S. v. Gotti*, 9 F. Supp. 2d 320 (S.D.N.Y. 1998), *aff'd*, 155 F.3d 144 (2d Cir. 1998) (holding the disqualification of two defendant's counsel due to their prior representation of co-defendants that may adversely affect the quality of representation of their current client and may make them unsworn witnesses).

49. *Id.* at 325-29.

50. *Kassis v. Teacher's Insurance and Annuity Assoc.*, 243 A.D.2d 191 (1998), *rev'd* 93 N.Y.2d 611 (1999) (Court of Appeals held that erecting of a "Chinese Wall" was inconsequential and defendant's burden in rebutting the presumption that Arnold possessed material knowledge in the case was not met. The Court of Appeals began its analysis by applying DR 5-105's imputed disqualification rule stating that ". . . where an attorney working in a law firm is disqualified from undertaking a subsequent representation opposing a former client, all the attorneys in that firm are likewise precluded from such a subsequent representation opposing a former client. *Id.* at 616. In addition, the Court of Appeals requires that "attorneys remain faithful to the fiduciary duties of loyalty and confidentiality owed by attorneys to their clients, the rule of imputed disqualification [also] reinforces an attorney's ethical obligation to avoid the appearance of impropriety." *Id*. at 616. However, the disqualification rule is not irrebuttable. "The party seeking to avoid disqualification must prove that any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation." *Id*. at 617. "Demonstrating that no significant client confidences were acquired by the disqualification, however does not wholly remove the imputation of disqualification from a law firm. Because even the appearance of impropriety must be eliminated, it follows that even where it is demonstrated that the disqualified attorney possesses no material confidential information, a firm must nonetheless erect adequate screening measures to separate the disqualified lawyer and eliminate any involvement by that lawyer in the representation." *Id*. at 618. In this case, the court found that the disqualified attorney had extensive participation in the defense of his prior firm's client and therefore had material confidences. Therefore, the entire firm had to be disqualified regardless of the "Chinese Wall." In essence, the Court of Appeals does recognize the validity of "Chinese Walls" but only to remove the appearance of impropriety. The only question as to whether a firm can avoid disqualification is whether the disqualified lawyer had material information.)

51. *Id.* at 192.

52. *Id.* at 193.

53. *Id.*

54. *Id.* at 192.

55. *Id.* at 193.

56. *Id.* at 197.

57. Model Code of Professional Responsibility DR 9-101 (1985).

58. *See* New York State Bar Association Committee on Professional Ethics, Opinion 708, Sept. 15, 1998 (52/52a-97) (describing the rule in DR 9-101(B)(1) which attempts to protect the integrity of attorneys by preventing them from using public offices to secure private clients); *See also* New York Formal and Informal Opinions, Opinion 638, Dec. 9, 1992 (4-92) Modifies: N.Y. State 492 (1978), N.Y. State 502 (1979) (describing certain amendments made to the New York State Code of Professional Responsibility); *See also* Charles W. Wolfram, Modern Legal Ethics 458 (1986) (examining the dangers of public governmental lawyers favoring certain clients who could later become private practice clients).

59. *See generally* New York State Ethics Commission Advisory, Opinion No. 98-10 (describing the dilemma of having to deal with public service and private practice when there is a financial obligation).

60. *See supra,* n. 50 at 197 (1998) (describing the issue in a particular instance), *See also People v. Cook*, 82 Misc. 2d 875, 876 (explaining what type of information is to remain confidential).

61. *Id.* at 192.

62. *Id.* at 193-94.

63. *Id.* at 192.

64. *Id.* at 199.

65. Put in extensive note about of the Court of Appeals decision to reverse and the criteria it used and what factors it looked to. The preceding 5 paragraphs are only going to stay in the text (because the case was reversed) if there can be a very substantive note detailing the Court of Appeals' decision.

66. *See* Model Code of Professional Responsibility DR 5-105(e) (1994). (Section 1200.24 of the Disciplinary Rules of the Code of Professional Responsibility states: "A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with section 1200.24(d) of this Part. Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of section 1200.24(d) of this Part occurs, shall be a violation by the firm. In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of section 1200.24(d) of this Part by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of section 1200.24 (d) of this Part").

67. *Id.*

68. *Id.*

69. *See U.S. v. Gotti,* 9 F. Supp. 2d 320 (S.D.N.Y. 1998), *aff'd* 155 F.3d 144 (2d Cir. 1998).

70. *See* Lee I. Sherman, *Immediate Appeal From Counsel Disqualification in Criminal Cases*, 25 Wm. & Mary L. Rev. 131 (1983), (discussing how disqualifications of counsel are used and allowed more often in a *Stand By Your Client?: Opinion 95-390 and Conflicts of Interest in Corporate Families* civil context than in criminal cases); Bruce Green, *Special Issue Institutional Choices in the Regulation of Lawyers: Conflicts of Interest in Litigation: The Judicial Role*, 65 Fordham L. Rev. 71 (1996) (discussing the burden on criminal defendants to prove the attorney conflict impaired his representation, a burden rarely met, even where the lawyer violated the applicable rules of professional conduct); Gary Lowenthal, *Successive Representation By Criminal Lawyers,* 93 Yale L.J. 1 (1983) (discussing differences in judiciary responses to burden of proof requirements between civil and criminal cases).

71. *U.S. v. Cruz*, 1995 U.S. Dist. LEXIS 10972 (S.D.N.Y. 1995) (disqualifying attorney based on his role as unsworn witness).

72. *U.S. v. Locascio*, 6 F.3d 934 (2D Cir. 1993); *U.S. v. Gotti*, 9 F. Supp. 2d 320 (S.D.N.Y. 1998) (stating that a defense attorney who is implicated in events that may become subject of government's proof becomes an unsworn witness and is not an appropriate advocate).

73. *See* Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 Cal.L.Rev. 379, 387 (1987).

74. *In re Friedman*, 196 A.D.2d 280, 284 (1st Dep't 1994), *cert. denied*, 513 U.S. 820 (1994) (disbarring an attorney who knowingly allowed witness to give false testimony and did not reveal fraud to court or to parties); *In re Friedman*, 1996 WL 705322, *10 (E.D.N.Y. 1996) (disciplining attorney who advised a client to commit perjury).

75. *See Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D.Pa. 1993) (holding that lawyer and client may not confer during course of deposition unless conference is for purpose of determining whether privilege should be asserted, and are not entitled to confer about document shown to witness during deposition before witness answers questions about it); *But see In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614, 620 (D.Nev. 1998) (declining to adopt *Hall* and stating that the decision goes too far and strict adherence to its holding would violate right to counsel); *In re PSE&G Shareholder Litigation*, 726 A.2d 994, 997 (N.J. Super. Ct. Ch. Div. 1998) (disagreeing with *Hall* and stating that the permissibility of attorney-client conferences during depositions should be examined on a case-by-case basis); *State v. King*, 1999 WL 506748, *5-6 (W.Va. 1999) (stating that adherence to *Hall* would "subject a person to unfettered inquiry into anything which may have been discussed with the client's attorney, all in the compliance to rules. . . . [This] is a position this Court declines to take").

76. Del. R. Ch. Ct. R. 30(d)(1). The rule states, in pertinent part:

> From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given, except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order, or (B) suggest to the deponent the manner in which any questions should be answered.

77. N.Y.R. Stds. Civility, Part 1200 App. A (stating that "A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of their clients' interests. . . . In the absence of a court order, a lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be affected. . . . Upon request coupled with the simple representation by counsel that more time is required, the first request for an extension to respond to pleadings ordinarily should be granted as a matter of courtesy.").

Mediation Advocacy: Representing Clients in Mediation

The Section's 1999 Spring Meeting included a panel discussion on Mediation Advocacy: How to Represent Clients in Mediation. *The moderator was Professor Harold I. Abramson, Professor and Vice Dean, Touro College School of Law. The mediator was David W. Plant, Fish & Neave. The panelists included Christine Lepera, Rubin, Baum, Levin, Constant & Friedman; Paul D. Montclare, Montclare & Wachtler; Carroll E. Neesemann, Morrison & Foerster; and Lauren J. Wachtler, Montclare & Wachtler.*

LAUREN WACHTLER: The name of our program is "How To Represent Clients in Mediation." We chose to do this because a lot of attorneys are familiar with the arbitration process.

I want to say at the outset that mediation is very different from arbitration. As lawyers, we're often used to representing people in arbitration where it seems more like a trial. We utilize advocacy, evidence and somebody ultimately renders a decision.

Mediation is not like that at all. I think a lot of us are uncomfortable with the process. As Judge Crane can tell you, mediation is something that is starting to come to the forefront of our court system. Also, as Judge Schackman can tell you, there is a growing trend towards mediation.

PROF. HAROLD I. ABRAMSON: I want to provide some background information as representing clients in a specialized forum is an area that a lot of attorneys have not had a chance to practice in regularly.

As practicing attorneys, we know the "the routine" of representing clients in our forums, whether it be a trial, motion, deposition, or some kind of conference. Skills-based training programs and experience have given us a good sense of the routine.

However, the routine for representing clients in mediation is not as well established. In fact, there is no widely adopted routine for representing clients in mediation. We are still trying to figure out how best to represent clients effectively.

As a mediator, I see a diversity of strategies that attorneys and clients bring into the mediation process, and some of those strategies are more effective than others.

I have concluded through my experiences that there are several things that we can say are settled. The first has already been mentioned, that mediation is growing in use.[1] It is becoming a valuable option for resolving certain types of client disputes.[2] We are also seeing these programs come up in connection with court administrative programs.[3] Finally, we are seeing attorneys, with increasing frequency, turn to mediation without the assistance of a court-connected program realizing that it may provide a good solution.[4]

The definition of mediation is simple; any time a third party assists others resolve a dispute, we have a mediation.

Another basic definition is that mediation is simply a continuation of the negotiation process. There is a close link between what goes on when you are trying to negotiate a resolution and what finally goes on before the mediation. It's really a simple continuation of that process.

Mediation is not whenever a third party tries to assist somebody in resolving disputes. A mediator brings special skills, expertise and training.[5] Only when there is someone with that special training, that knows what special techniques to use, do you have something called a "mediation."

Now, it has already been mentioned that mediation is not arbitration. For those of us in the field, trying to distinguish between arbitration and mediation is incredibly infuriating and exhausting.[6] They are as different as day and night. There is no connection between arbitration and mediation. Each process is radically different. Arbitration is an adjudicatory process.[7] The arbitrator makes the decision. In mediation, the mediator does not make a decision.[8] The mediator is there to facilitate the process. The people who make the decisions are the clients. The mediator is just there to structure the process.

However, there is another process that bears some relation to mediation. It is called a settlement conference.[9] When we go before a judge to represent a client in a settlement conference, we once again have a third party assisting in the resolution of the dispute. There are at least eight differences between mediation and settlement conferences, even though they're both geared toward the settlement of disputes.

First, the inquiry by the neutral is different. What judges look for in a settlement conference tends to be different from the kinds of information than a mediator will look for.

A judge is looking for a settlement based on the legal positions in the pleadings that have been submitted. The mediator explores much broader interests. This leads to the second difference, the kind of settlements that come out of those processes can be quite different.

A settlement conference could be geared toward the legal positions and the legal rights. The kind of solutions that come out of mediation may be the very kind of solutions that judges do not even have the authority to order because they are based upon a broader set of interests and a broader set of considerations.

Also, the training is different. Judges go to judges' school, while mediators go to mediation school. It's a different kind of training that each third party receives.[10]

The fourth difference is that the settler in mediation is different from the decisionmaker in a settlement conference. In a properly structured mediation, the mediator will not decide the dispute at a later point. The mediator will facilitate efforts to try to resolve the dispute, and if successful, great. If not, then you will go back to some kind of adjudicatory or other type of process.

Fifth, the role of the client tends to be quite different in the two processes. The client tends to have more of a passive role in the settlement conference.[11] The clients have a much more active role in mediation than we are accustomed to seeing in many types of settlement conferences.

Sixth, the tools that mediators and judges use in an effort to settle the case tend to be different.[12]

Seventh, the amount of time spent is different.[13]

Lastly, client preparation is different for a settlement conference than for a mediation.

As a last note, some foundational knowledge is an asset. It is crucial to have a thorough knowledge of the theory and practice of negotiation. The skills used preparing for or participating in negotiations apply equally to preparing for and participating in mediations. A second useful skill to have is an understanding of the mediation process. Finally, another piece of information that can be useful in representing clients in mediation is understanding the range of dispute resolution options. Over the last 20 years, processes such as mini-trials[14] and summary jury trials[15] have become prevalent. Other unconventional methods of arbitration such as "final offer arbitration"[16] or "high/low arbitration"[17] have also been used. It is always good to understand alternative paths should the initial dispute resolution fail.

My prediction is that over the next ten years we are going to find representation of clients in mediation becoming a much bigger part of the practice of law.

One issue that comes up at the beginning is who is going to do mediation and how do you select the mediator.

One issue that comes up with selecting mediators is what kind of credentials the mediator should have. Clearly, the mediator should have training in mediation. I keep emphasizing the word "mediator," not just as an attorney who has had experience settling cases, but as a trained mediator.

One issue that comes up is whether the mediator should be somebody that has substantive expertise. If your field is intellectual property, you should find somebody who is an intellectual property lawyer as well as someone trained in mediation. If your area has to do with financial affairs, you should have someone who is an expert on banking and financial affairs, letters of credit and other kinds of financial tools.

This continues to be an area of debate and discussion. Some people say that the key is having someone who is an expert in the process and the substance is irrelevant. Other people say that you really need to have someone who knows the substance and they'll figure out the process.

Obviously, this debate continues and I feel that you really need someone with the expertise in the process, and substantive experience.

I think that it is better to have someone who has an acquaintance with the field, like intellectual property or financial affairs, because if you have someone who is too deeply involved in the field, that person may have difficulty staying in the role of a mediator. That person may start crossing the line and start serving more as an evaluator by providing an evaluation in a case. That may or may not be welcomed in the mediation process.

On the other hand, it is really helpful to have someone who knows the setting so that they know the language and know how to frame the issues.

The debated issue that comes up is whether or not you want a mediator that is a facilitator or an evaluator. There is a lot of literature on this, and a huge number of programs on the subject.

An evaluation style of mediation[18] is when you expect the mediator to offer some evaluation of the case. The way it comes up is that the attorney asks for an evaluation of the case so the parties will understand.

The concern with the evaluation process, and why it's considered to be controversial, is that when you

know the mediator is going to engage in evaluation at some point, how that changes the conduct of the mediation. The parties and attorneys may now feel a need to start acting strategically in the hope of convincing the mediator to offer a favorable evaluation.

For those followers of the facilitator process,[19] the concern is that such an attitude can corrupt the mediation process and lose some of the benefits.

There are other people who will argue that we need that evaluation because we need someone to knock some sense into the other client. While it is a valuable mechanism, mediation is not the place to look for it.

The place to use it is called an early neutral evaluator.[20] A person comes with a substantive expertise who understands that his or her task is to provide a kind of evaluation for the parties.

My own personal opinion is that you should separate the evaluation benefit from the facilitative process. On the other hand, it is an area of continuing debate and discussion and some people do like mediators that engage in evaluation.

Who pays for it? Usually they split it half and half, but it's really up to the parties to negotiate.

There are lots of ways to select a mediator. There are rosters that are put together by different organizations, including CADRE, and the AAA.[21] Also, the End Dispute has a roster. Don't forget in the international area, there is the ICC.[22] You can go to these groups and get access to names of people who have expertise.

One strategy that I heard one attorney recommend, which I thought had an enormous appeal, is to go to the other attorney and ask them to come up with a list of three names. If that person comes up with names of respectable people who have the credentials and experience, then you select one of their names.

Then you know the other attorney is really going to respect and honor the process because now you will be using their mediator. The key is having someone who has the credentials and experience.

Mediation rules are available. I don't think it makes that much of a difference, whether you chose one set of rules as compared to another. It's purely a voluntary process.

No matter how the rules are written, the fact remains that if you don't like what's happening, you just pack up and leave. There is nothing that keeps you in the process like it does with arbitration.

Confidentiality is a big issue.[23] I think as an attorney representing clients in mediation, you need to be aware of that issue. One of the things that will happen is that you get a copy of the confidentiality agreement, hopefully in advance of the mediation, so you can read it and figure out whether it provides you the security that you need for having the kind of confidential process that you want. Rule 408[24] is obviously available, but this contract goes beyond what 408 does in *The Federal Rules of Evidence*.[25] The recommendation is that you have a separate agreement that creates a confidential process which creates a wall between the mediator and the judge.

Of frequent concern is whether or not the mediator and the judge (in a court-connected program) will contact the judge and reveal what has been happening. In a properly conducted mediation there will be absolutely no communication. The only thing that will ever be reported back is whether the dispute is settled or not settled, and nothing more.[26]

Preparing for the mediation is a bit different than preparing for other procedures. First we have the issue of discovery. Here, there is an interesting dynamic between the arbitration process issue as the alternative, where discovery is typically not done,[27] and in the litigation process where, the U.S. model[28] is to have extensive discovery. The trick here is to determine how to settle a case without knowing everything while in your legal upbringing you are told to know everything. When we get into any kind of settlement process including the mediation process how are we able to settle the case without knowing everything? The way I like to describe is that you have a dark room at the beginning of the case and discovery works to turn on a few lights.

The good of discovery is to be cost-efficient while, at the same time, doing enough to reap the benefits and prevent the process from having to be repeated.[29]

One of the techniques to conquer when trying to keep the costs down is having parties agree in advance rather than filing papers.[30] Another technique is to have them agree in advance to exchange certain critical documents.

Agreeing to limit discovery devices is another example of trying to keep costs down. For instance, allowing only one deposition of a key witness is a good idea if you are pursuing mediation. Another way is to pledge total cooperation over a finite period of days or weeks. When the period expires, provide that the next step will be mediation. You should be creative when trying to keep the costs down.[31]

Another issue in preparing for the mediation is determining what the attorney needs to do before he or she meets with the client. This is the homework an attorney does in the office.

The second thing an attorney should do to keep costs down is study the ADR provider. In a case, you are assigned a mediator, so you should get some information about the mediator.[32] You should try to sort out any potential conflicts of interest and find out what style the mediator uses in mediation.[33]

Prior to the mediation, the mediator may ask for a description of what has happened so far,[34] also known as "briefing papers."[35]

Because the content of briefing papers is not regulated, a good piece of advice is to call the mediator first. You should ask if the mediator requires briefing papers, and if so, what should be included.[36] Some mediators will allow you to submit whatever you wish, while others ask for only the pleadings. Other mediators submit questions and request an answering document of no more than ten pages. There is a purpose behind each question asked. The first five questions are designed to give the mediator some background information.

Sometimes the questions are geared to persuade the parties and the attorney into a settlement process. Questions such as: what have you already done to try and settle the case and what do you think is the holdup in this case work to promote settlements? Although many times these types of questions do not result in useful information, sometimes they do help put people in a different mindset in preparation for the mediation. Even if they do not give the mediator the full information, at least they have had the discussion in preparation for the mediation. These are very important questions to explore with your client and should be discussed in preparation for mediation.

The next task is to prepare the negotiation plan. This is the single most important task.[37] Like any negotiation, you need to develop some kind of plan and an analysis of what is going on in the case. Preparing a negotiation plan is an important and critical ingredient to representing clients in mediation.[38] Your negotiation strategy affects everything that happens thereafter.[39] It affects the tone and content of the briefing paper you file and the opening statement that you give.

The way you prepare the client for mediation will be affected as will the role and expectations of the client in the mediation itself.[40] The plan will affect the way you, as the attorney, behave in the mediation.

Who should attend the mediation is another big question. The first determination to be made is whether or not the client should be present. Many mediators choose to have the client present.[41] Some mediators will not have a mediation session unless the client is present.[42] Having the client present makes mediation a distinctive process. If you choose not to have the client present, you may as well go into the settlement conference with the judge or negotiate with the other attorneys.

The idea behind mediation is to create a different kind of process; something that is different than other legal processes we are accustomed to using.[43] The main difference in mediation is having a client present who is actively participating.

The ideal client is someone who will appear at the mediation with a broad perspective. It is someone that can see the big picture. Seeing things from a business perspective, the client comes with a broad settlement authority and knowledge of the dispute.[44] But, the client will not be so intimately involved in the dispute that he or she can no longer see the case with any degree of objectivity. You want a client knowledgeable, but too much knowledge can be detrimental. You want a client who has considerable communication skills and will show off as a good witness. A good witness will give the other attorney a sense of what will happen if there is not a settlement and the witness has to testify.[45] But finding a client with these attributes may be a challenge.

What's more, even if you have such a client, he or she may not want to come to the mediation. A client may be too busy or have more pressing matters. Also, the client may be from out of town or out of the country.

Finding the right person is not easy. If you have the wrong people at the table, the mediation will not succeed regardless of thorough preparation by the parties and attorneys.[46]

The responsibility split between the attorney and the client leads to another issue of whether or not the attorney should be present.

There are three different models that have been explored. One is to have the attorney present, but only as a silent advisor.[47] The attorney is there, but the client is doing all of the work with the attorney only helping in extreme circumstances.

Another model considers having the attorney serve, in a sense, as a silent partner. The client sits behind the attorney who is the dominant force in the process.

The third model is where the attorney and client are co-participants. In this model, both the client and the attorney are there as partners sharing and dividing the responsibilities. This model is most preferred by mediators.

Who should be in the audience at a mediation?[48] Who are you pitching all this to? Do you pitch it to the mediator or do you pitch it to the other client? There are different views on who the audience should be in a mediation.

Some believe you should pitch to the mediator because the mediator is the one who structures the process. You want to work out a good relationship with the mediator thereby allowing the mediator to engage in strategic moves that will be favorable to you.

Another view is where the mediator serves as a facilitator.[49] This works where you want the clients talking to each other. Having the clients meet and interact with each other is a unique opportunity presented by mediation.

Often, clients have never spoken or they have not spoken in several years. When they do get together, they sometimes discover that they can actually talk to each other either because they want to work things out, or because they are under the supervision of an attorney.

When you do get to mediation, who speaks first, the client or the attorney? This issue appears once the mediation begins and you have agreed to both give opening statements as a part of the process. Some feel that the attorney should speak first.[50] They believe it is the attorney's case. He or she was hired to advocate and is the one that needs to control the process along with the client.[51] Others suggest that the client should speak first because that is what makes the process different. Mediation is client-centered and client-friendly. It is a process designed to get the client involved in a dispute in a way that the client is often unable to do in other forums.[52] For this reason, the client should speak first and tell his or her story.[53]

The last issue an attorney should think about in advance of a meeting with the client is the confidentiality factor. It is not about whether the process itself will be confidential, but instead whether you want to withhold certain information, like trade secrets, from the mediator.[54] There may also be other kinds of highly sensitive information that you may decide should not be disclosed at the outset of mediation. As you feel more comfortable with the mediation, you may begin to reveal the information to the mediator.[55]

QUESTIONS

QUESTION: On written submissions, do you ever ask if the parties submit something to you ex parte; that is, something that only you'll see and not show to the other side?

PROF. HAROLD I. ABRAMSON: My practice is to have them sent confidentially to me, not the other attorney. Sometimes, though, they want it sent to the other attorney and that's fine. I arrange it so that it will never be disclosed to the other party unless they specifically consent to do so. I do this in the hope that people will be more candid in their briefing paper.[56]

QUESTION: Sometimes mediators meet separately with each side before the actual mediation. Have you ever done that, do you find it a useful practice, and for what reason?

PROF. HAROLD I. ABRAMSON: My personal opinion on that is it's not a good idea to meet separately, in advance, with the parties.

MS. STONEHART: This is a practice we call "spinning" the mediator. Parties try to figure out how to get a favorable relationship and try to provide prejudicial information. What I do, which is quite common for mediators to do, is have a pre-mediation meeting with the attorneys, and make sure they know how to go about the discovery process and other issues that may need to be resolved in advance of the mediation.[57]

CHRISTINE LEPERA: Another possibility is that after the main conference, or joint conference caucus,[58] the mediator will meet privately with both sides[59] and attempt to shuttle diplomacy back and forth. In those private caucuses, I've seen it done fairly effectively, where the mediator is not necessarily evaluating, but if they have some knowledge of the area they can compose very pointed questions which can illustrate and help the party facilitate their own evaluation of their strengths and weaknesses.

PROF. HAROLD I. ABRAMSON: We are in a period of transition and enlightenment when we talk about mediation. The court-connected mediation programs have played a vital role[60] in furthering mediation because judges often indicate which cases are good for mediation.[61] Another innovation that has increased the use of mediation is the role of ADR organizations. Attorneys can call these organizations to become educated about the process. In addition, an organization could call the other attorney and ask them if they are interested in mediation. This removes from the dynamic which attorney called the other one first. It doesn't necessarily mean you have a weak case. In fact, it could indicate just the opposite.

MR. TELLUM: There's also the CPR.[62] The CPR is really like the AAA,[63] except it doesn't really administer arbitrations. It helps find a neutral party and is sponsored by a number of large corporations and law firms in the United States. Corporations take a pledge that they will go to dispute resolution before going to court. If both sides have taken the pledge, or one side has taken the pledge, they are contractually obligated to try mediation or ADR first. There is no issue as to whether your case is strong or weak.

PROF. HAROLD I. ABRAMSON: When attorneys draft agreements, they can include ADR clauses that include mediation as an initial step, which furthers mediation.

One thing I want to highlight is that a lot of interesting issues were discussed during the joint session where the mediator worked at improving the communication between the two parties and claimant and respondent.

The decision to go into a caucus is of critical importance.[64] It is a crucial moment in mediation. There are three different philosophies as to what to do with this moment. The first philosophy is that you're going to caucus for a very selective purpose.

There are two other competing philosophies. Some mediators engage in a caucus right after the opening statements which is called an "all-caucus model." That is done at the very moment that the parties and attorneys complete their opening statements. The attorney or the mediator then meets with each party and his or her attorney, and they may never see each other again, nor have any contact with each other until the agreement has been worked out. The downside to this approach is the concern that it interferes with the ability of the clients to communicate with each other and possibly work it out on their own.

There is a third approach, which is a relatively new approach, of which there has been considerable debate. It is what we might call the "no-caucus model."[65] The concern is that the caucus will interfere with the ability to rebuild the relationship. People often become very suspicious about what goes on in those caucuses. As mediators, we are very cognizant that this is a huge moment in mediation. We are very careful to maintain neutrality when meeting with both groups. We take precautions to ensure that when confidential information is picked up in one caucus, the information is not accidentally transmitted to the party in the second caucus.

Mediation is designed to bring in what is called "broader interests."[66] By bringing in other non-financial issues at mediation, we hope to bring about a speedy resolution.[67] This is some of the promise and potential in mediation that can lead to closure.

There is a sixth role for attorneys in mediation. After the mediation sessions are complete, there is a familiar task left for the attorneys.

If the mediation was successfully completed, the attorneys will begin the task of drafting the settlement agreement. Attorneys play a vital role by ensuring that the settlement agreement actually reflects what came out of the mediation.[68]

If the mediation did not settle the dispute, the attorney has the responsibility of continuing towards arbitration. Also, the attorney could suggest other alternatives to arbitration or going to court as a way to try to bring the conflict to a close.

Once the conflict is resolved, the mediator should never let the parties leave the table without a signed agreement.[69] When the agreements are signed, they should be exchanged. The mediator should remain available in case there are any substantive differences.[70] This is to facilitate any final touches that may have to be provided.

If the conflict is not resolved, the mediator could call the parties within a few days and see how they are doing. Often, the following day, somebody has changed his or her mind and is now willing to talk.

When looking at arbitration, the mediator should make sure the parties take into account the cost and length of arbitration as well as how disruptive it may be. After considering these factors, the party must offset those costs against the value of a settlement. One method is to use a type of baseball arbitration at the end of mediation. If one side wants $600,000 and the other is willing to pay $400,000, ask both for their last best number. The mediator should have the agreement signed with a blank for the dollar figure. This would allow the mediator to pick one number and add it to the agreement with both sides initialing the change.

Evaluation must also take place. Mediation is not done with the mediator using a right or wrong type of evaluation, but rather through the simple means of asking questions.[71] The mediator should ask the parties what they think are the strengths and weaknesses of their respective cases.[72] The mediator should not state his or her opinion but rather get the parties into a dialogue, including how much it may cost to litigate the case. This will get the information onto the table without the mediator actually taking a position on the matter.

Some mediators also use a "decision tree."[73] When using a decision tree, the mediator will sit down with the parties and actually map out the alternatives and probabilities of success. He or she will discuss the outcomes for each branch without actually saying the likelihood of success.[74] He or she will turn to the parties and ask their feelings about the likelihood of success.

The mediator should set the tone by helping people decide other issues that are not as threatening to them. If these other issues reinforce a future relationship when the issue of money is raised, it may be easier to resolve. One party may not be in as good a position at that moment because of other things that have already been accomplished.

Timing is also a very important issue when faced with mediation. Mediation could take as little as three hours or as long as a full day. At the end of the day, the mediator will have a better idea as to whether or not he or she needs to schedule multiple sessions.[75] If clients

are coming in from out of town, you should ask them to clear a couple of days, even though you are only scheduling one day for the actual mediation. In complex cases you tend to need more than one day and often more than two days.[76] You may even end up with a number of sessions which stretch over a few weeks or more. This still may help resolve the issues to the betterment of the parties.

The mediator should designate a person whose main responsibility is to stop the mediation. This is done when an impasse is reached and the parties cannot figure out where to go next.[77] An alternative to an impasse is to adjourn the mediation and give the parties some homework. The mediator then sets a tentative date to meet again.

In multiple sessions, it is a good idea to make follow-up calls to the parties.[78] These calls will allow the mediator to see how the parties are doing. Sometimes the mediator will find the parties are ready to talk again. Sometimes he or she will find they have settled because the mediation sent them in a new direction with the capabilities to settle on their own without further assistance from a mediator.

PAUL D. MONTCLARE: Finally, the lawyers, at the end of a long day, can talk to each other. This can be done either right after the mediation session or the next day by the phone. They can try to explore some creative solutions. Ultimately though, it is up to the clients to settle.

CHRISTINE LEPERA: It is relatively difficult to settle something in a one-day session. You will probably see more of a parallel track mediation process because you cannot keep court litigation stayed for a period of time.[79] The courts will not allow it. This is especially true in federal court. Since cases often do settle, the parties are just advancing the process more intently by keeping a parallel track going.

Endnotes

1. Isabelle Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. Disp. Resol. 55 (1995) (stating that mediation is both increasingly popular and advantageous). *See also* Leonard L. Riskin & James E. Westbrook, *Dispute Resolution and Lawyers*, 143 (2d ed. 1998).
2. Tim K. Klintworth, *The Enforceability of an Agreement to Submit to a Non-Arbitral Form of Dispute Resolution: The Use of Mediation and Neutral Fact Finding*, 1995 J. Disp. Resol. 181 (1995), *citing Annapolis Professional Firefighter Local 1926 v. City of Annapolis*, 642 A.2d 889 (Md. Ct. Spec. App. 1994) (noting that various methods of ADR, such as mediation and neutral fact-finding, have long been recognized as equally beneficial methods to resolve disputes); *see also* Nancy Thoennes & Jessica Pearson, *Predicting Outcomes in Divorce Mediation: The Influence of People and Process*, 41 J. Soc. Issues 115 (1985).
3. The use of court-connected mandatory mediation programs has risen dramatically. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 154.021-.023 (1999). Some states have legislation allowing judges to mandate mediation in some areas of law. Mont. Code Ann. § 39-71-2401 (1999) (workers' compensation).
4. *See generally* Thomas Stipanowich. *The Multi-door Contract and Other Possibilities*, 13 Ohio St. J. on Disp. Resol. 303 (1998) (mediation has gained widespread popularity as the premier instrument of the community justice and court-connected ADR movements). *See also* Ann C. Hodges, *Dispute Resolution Under the Americans With Disabilities Act: A Report to the Administrative Conference of the United States*, 9 Admin. L.J. Am. U. 1007 (1996) (stating that the author elicits several benefits; for example, mediation enables parties to resolve disputes and maintain continuing relationships) (hereinafter "Hodges").
5. *See generally* James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 Clinical L. Rev. 457 (examining the process of how to gain proficient skills in the mediation process); *see also*, Joseph B. Stulberg & B. Ruth Montgomery, *Design Requirements for Mediator Development Programs*, 15 Hofstra L. Rev. 499; *see generally* J. Stulberg, *Taking Charge/Managing Conflict* 1-133 (1987) (mentioning various types of methods, scenarios and practical skills to help create a more conducive setting for mediation).
6. *See generally* Jay Folberg and Alison Taylor, *A Comprehensive Guide To Resolution Conflicts Without Litigation* 130 (1984); Lon L. Fuller, *Mediation-Its Forms and Functions*, 44 S. Cal. L. Rev. 305, 308 (1971); *See also* Ann M. Haralambie, *Alternatives to Litigation*, 12 Family Advocate 52 (1990) (meticulously evaluating the specific difference between arbitration and mediation).
7. *See* S. Isabella Chung, *Developing a Documentary Credit Dispute Resolution System: An ICC Perspective*, 19 Fordham Int'l L.J. 1349, 1361 (1990) (noting that "arbitration remains a fundamentally adjudicatory process"). *See also* Thomas Carbonneau, *Symposium: Achieving Justice In Arbitration*, 65 Tul. L. Rev. 1303, 1303-1304 (1991)(discussing arbitral autonomy).
8. *See* John Feerick, et.al., *Standards of Professional Conduct in Alternative Dispute Resolution,* 1995 J. Disp. Resol. 95, 104 (1995) (discussing the Joint Committee Standards of Conduct for Mediators, Standard I, which defines mediation as facilitation and begin with a commitment to party self-determination, highlighting that the mediator's role is to assist the parties come to their own resolutions and accommodations of each other).
9. For an in-depth analysis of the differences between mediation and settlement conferences, *see* Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 Am. J. Comp. L. 871 (1997) (hereinafter "Tyler").
10. *Cf.* Bobby Marzine Harges, *Alternative Dispute Resolution Symposium: Mediator Qualifications: The Trend Toward Professionalization*, 1997 B.Y.U. L. Rev. 687 (1997), *with* American Arbitration Association, Department of Education and Training, *A Guide For The Commercial And Construction Arbitrator* (1982).
11. *See* Eric Galton, *Representing Clients In Mediation* 25-30 (1994) (describing the role of clients and lawyers in the mediation process). *See also* Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 Ohio St. J. on Disp. Resol. 269, (1999) (discussing article's descriptions of client's active role during mediation).
12. *Cf.* Bruce Burton, Regulatory Takings, *Private Property Protection Acts, And The "Moragne Principle:" A Proposal For Judicial-Legislative Comity*, 49 S. C. L. Rev 83, 115 (1997) *with* Catherine Cronin-Harris, *Alternative Dispute Resolution: What the Business Lawyer Needs to Know*, 605 PLI/Lit 697, 700 (1999) (describing mediation and arbitration tools, respectively).

13. *See* Tyler, *supra* n. 9 at 871 (evaluating the time and scope differentials of both arbitration and mediation). *See also* Hodges *supra* note 4, at 1075.

14. Mini-trials are a hybrid form of negotiation, mediation and arbitration. *See* Douglas M. Parker & Phillip L. Radoff, *The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes,* 38 Bus. Law 35 (1982); Douglas A. Henderson, *Avoiding Litigation With the Mini-Trial: The Corporate Bottom Line As Dispute Resolution Technique*, 46 S.C. L. Rev. 237 (1995).

15. Summary jury trials entail a short form presentation of the case made to an advisory jury, which then renders a non-binding verdict. Counsel may question the jurors about their decision. *See generally* Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 Fed. Rules Dig. 461 (1984); Glenn Newman, *The Summary Jury Trial as a Method of Dispute Resolution In the Federal Courts*, 1990 U. ILL. L. Rev. 177 (1990) (stating that in recent years the summary jury trial has gained widespread use).

16. *See* Richard W. Laner & Julia W. Manning, *Interest Arbitration: A New Terminal Impasse Resolution Procedure For Illinois Public Sector Employees*, 60 Chi-Kent. L. Rev. 839 (1984) (discussing final offer arbitration generally, and stating that the final offer approach seeks to increase the cost to the parties of failing to reach an agreement by eliminating the arbitrator's ability to compromise issues, substituting a winner-take-all outcome); *see generally* Amy Farmer & Paul Pecorino, *Bargaining with Informative Offers: An Analysis of Final-Offer Arbitration*, 27 J. Legal Stud. 415 (1998) (discussing final-offer arbitration).

17. *See* Richard M. Calkins, *Mediation: The Gentler Way*, 41 S.D. L. Rev. 277, 284 (1996) (discussing high-low arbitration and stating that parties protect themselves by negotiating a high-low to any award made) (hereinafter "Calkins").

18. *See* Ralph R. Mabey, et. al., *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR,* 46 S.C. L. Rev. at 1263-65 (1998) (describing the process of neutral evaluation and how it is more formal than the actual mediation stage) (hereinafter "Mabey"); Rita Lowery Gitchell & Andrew Plattner, *Mediation: A Viable Alternative to Litigation For Medical Malpractice Cases*, 2 Depaul J. Health Care L. 421, 431 (1999) (stating the evaluative mediator's job is to probe, make assessments, make predictions about what will happen in court and the impact of non-settlement of the parties' interests, develop proposals, and urge the parties or push them to accept a proposal or settlement option).

19. *See* Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties From the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. Disp. Resol. 53, 54 (1997) (describing how the neutrality style of mediation tends to focus on the actual mediation process and neglect the substantive element of the agreement); Ellen A. Waldman, *The Evaluative-Facilitative Debate In Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 Marq. L. Rev. 155, 156-157 (1998) (stating advocates of a pure facilitative style maintain that evaluative mediation is oxymoronic, and that it vitiates the neutrality and destroys the rapport necessary for truly productive interactions).

20. *See* Mabey, *supra* n. 18, at 1263-5 (describing the process of neutral evaluation and how it is more formal than the actual mediation stage); Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition,* 6 Geo. Mason L. Rev. 255, 281 (1998) (stating that an early neutral evaluator refers to an individual hired by one or both of the parties to review and assess the evidence in a case in order to assist the parties in reaching a negotiated settlement).

21. *See* Ronald J. Offenkrantz, *Arbitrating RICO: Ten Years After McMahon*, Colum. Bus. L. Rev. 64-66 (1997) (describing the general rules of the organization).

22. *Id.*

23. *See generally* Nichola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations,* 24 Seton Hall L. Rev. 70, 199 (1993) (describing reasons why one would want to enter into a confidentiality agreement with the other party to the mediation); *see also* Alan Kirtlyn, *The Mediation Privilege's Transition From Theory To Implementation: Designing a Dedication Privilege Standard To Protect Mediation Participants, the Process, and the Public Interest,* 1995 J. Disp. Resol. 1, 33 (1995) (stating that the American Bar Association encourages mediators to have the parties sign a confidentiality agreement) (hereinafter "Kirtlyn"); *but see id.* at 11 (stating that confidential material will not be absolutely protected).

24. Fed. R. Evid. 408.

25. *See id.; see also* Kirtlyn, *supra* note 23, at 13 (describing the differences between Fed. R. Evid. 408 and the rules of discovery pertaining to mediation).

26. *See* Mabey, *supra* note 18, at 1281 (describing what the mediator will or will not report back to the court at the outset of the mediation process).

27. *See generally WWOR-TV, Inc. v. Local 209, NABET-CWA*, 166 F.3d 1203 (2d. Cir. 1998) (describing the differences between discovery in arbitration and under the Federal Rules of Evidence); *see also Coppinger v. Metro-North Commuter R.R.*, 861 F.2d 33, 39 (1988) (stating that in arbitration the Federal Rules of Evidence do not apply and that discovery is more restrictive).

28. Fed R. Evid. 408.

29. *See generally* G. Hans Sperling, *New London Arbitration Rules: Paradise regained*?, 21 Mar. Law. 557 (1997) (discussing discovery and cost efficiency).

30. *See generally* Calkins, *supra* n. 17, at 281 (noting that one benefit of mediation is the cost of mediation compared with the cost of pretrial discovery and trial of a case).

31. *See* Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 Ohio St. J. on Disp. Resol. 865, 872-875 (describing the financial benefits of mediation).; *See also* John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 Ohio St. J. on Disp. Resol. 813 (1999) (evaluating costs of court mandating mediation).

32. Yaroslav Sochynsjy, *Alternative Dispute Resolution: How to Use It to Your Advantage*, Mediation Chapter 12 of California ADR Practice Guide, CA 13 ALI-ABA 397, 410 (1996) (hereinafter "Sochynsjy").

33. *Id.*; *see also* Calkins, *supra* n. 17, at 303 (1996).

34. *Id.,* at 413; *see also* Calkins, *supra* n. 17, at 310 (discussing the preparation for mediation).

35. Mark A. Buckstein, *An Introductory Primer on Pre-Litigation: ADR Counseling for the Outside Lawyer*, 1997 J. Disp. Resol. 35, 38 (1997).

36. Commentary, *Mediation Preparation and Advocacy, Alternatives*, CPR Institute for Dispute Resolution f/k/a Center for Public Resources/CPR Legal Program, 12 Alternatives to High Cost Litig. 99, 102 (Aug. 1994) (hereinafter "Commentary").

37. James B. Chaplin, *Eminent Domain Cases in Trial Court Mediation*, C975 ALI/ABA 377, 386 (Jan. 1995) (hereinafter "Chaplin"); Danny G. Shaw, *Tips From the Litigator: Mediation Advocacy: Enhance the Likelihood of Success Mediation for your Client*, 45 LA.B.J. 140, 144 (1997) (hereinafter "Shaw").

38. Howard D. Venzie, Jr., *What the Business Lawyer Needs to Know About ADR: Some Guidelines for Effective Advocacy in Mediation*, 13 PLI/NY 391, 393 (1998) (noting the need for serious preparation in mediation) (hereinafter "Venzie").

39. Commentary, *supra* n. 36, at 107.

40. *See* Shaw, *supra* n. 37, at 144.

41. *See generally* Venzie, *supra* n. 38.

42. *See* Calkins, *supra* n. 17, at 311; *see also* Chaplin, *supra* n. 37, at 387.

43. *See* Commentary, *supra* n. 36, at 102.

44. *See* Sochynsjy *supra* n. 32, at 411 (persons attending the mediation should have the broadest settlement authority); *see also* Chaplin, *supra* n. 37, at 387 (the person who attends the mediation must have full settlement authority).

45. *See* Calkins, *supra* n. 17, at 311 (stating that each side can evaluate the effectiveness of witnesses); Richard H. Silberg, *Mediation Advocacy, What the Business Lawyer Needs to Know About ADR*, 770 PLI/Comm 669,678 (PLI Com. L. & Prac. Course Handbook Series PLI Order No. A0000W, 1998) (a good witness will show the other attorney the strength and credibility of such persons' potential testimony if the dispute is not settled and proceeds to arbitration or trial) (hereinafter "Silberg").

46. *See* Calkins, *supra* n. 17, at 281 (explaining how it is a difficult task is to get all the interested parties together at the table at one time).

47. *See* Sochynsjy, *supra* n. 32, at 416 (some mediators will only communicate with the parties, leaving the attorneys outside the room to give advice only on legal matters).

48. Steven N. Taurke, *Legal Malpractice: Techniques to Avoid Liability*, 609 PLI/Lit 743,768-69 (PLI Lit. & Admin. Prac. Course Handbook Series PLI Order No. H0-003Q 1999) (the real audience is the opposing party and your client) (hereinafter "Taurke").

49. *Id.* at 768 (the mediator is not in a mediation as a decisionmaker but rather as a facilitator).

50. *Id.* at 758.

51. *Id.* at 766.

52. *See* Sochynsjy, *supra* n. 32, at 414.

53. *See id.*

54. *See* Calkins, *supra* n. 17, at 296.

55. *See* Commentary, *supra*, n. 36 at 102.

56. *See* D.C. Circuit Appx. Rule III (stating that the attorney shall "submit to the mediator a position paper . . . stating their views on the key facts and legal issues in the case").

57. *See Wade v. Commission for Lawyer Discipline*, 961 S.W.2d 366 (Tex. App Houston, 1st Dist. 1997) (referring to the pre-meditation meeting as the process where the clients were together in one room and talked about settlement).

58. *See* Alaska R. Civ. Proc. 100 (stating that after joint conference, the mediator may meet with the parties separately).

59. *Id.* (stating that after joint conference, the mediator may meet with the parties separately).

60. *See generally* Mabey, *supra* n. 18 (demonstrating court annexed mediation in the bankruptcy area).

61. *See In re Authorization of Court Annexed Mediation in Chancery, Circuit and County Courts*, 1996 Miss. LEXIS 595 (Miss. 1996) (approving a pilot program in the Mississippi court system that would explain to complainants and defendants, and encourage them to pursue the mediation option).

62. CPR Institute for Dispute Resolution.

63. American Arbitration Association.

64. *See* Julie Heintz, *Mediating Instead of "Mediating,"* 75 U. Det. Mercy L.Rev. 333, 334 (1998) (discussing the importance of caucusing).

65. *See* Calkins, *supra* n. 17, at 310 (noting that some mediators like to keep the parties together throughout, and not use separate caucuses).

66. *See* Catherine Cronin-Harris, *Primer on ADR Statutes and Cases*, Com. L. & Prac. Course Handbook Series. 770 PLI/Comm 449, 552 (1998) (stating that a mediator employing a broad approach emphasizes parties' interests over their positions and proposes solutions designed to accommodate those interests) (hereinafter "Cronin-Harris"); *see also* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Neg. L. Rev. 7, 35 (Spring 1996) (stating that a broad or problem solving approach brings out both the economic and non-economic interests of parties) (hereinafter "Riskin").

67. *See* Riskin, *supra* n. 66, at 43 (stating that the broad approach can both increase the likelihood of settlement and reduce the time necessary for mediation).

68. *See* Robert B. Fitzpatrick, *Non-Binding Mediation of Employment Disputes: An ADR Method that is Consistent with the American Promise of Fairness*, C902 ALI-ABA 847, 861 (April 28, 1994) (stating that settlement agreements should be written on the spot).

69. *See id.* (stating that parties should not leave without signing the settlement agreement); *see also* Charles P. Lickson, *The Use of Alternative Dispute Resolution in Intellectual Property, Technology-Related or Innovation-Based Disputes*, 55 Am. Jur. Trials 483, § 37 (1995) (stating that absent any such writing, it is not unusual for a dispute to arise at some late point over whether or not an agreement had in fact been reached).

70. *See* Silberg, *supra* n. 45, at 689 (stating that mediator should remain available to facilitate the resolution of any problems which may arise in converting an agreement in principle into a binding settlement agreement).

71. *See* Cronin-Harris, *supra* n. 66, at 552.

72. *See* Silberg, *supra* n. 45, at 673.

73. *See* David P. Hoffer, *Decision Analysis as a Mediator's Tool*, Note, 1 Harv. Neg. L. Rev. 113, 134 (Spring 1996).

74. Marjorie Corman Aaron & David P. Hoffer, *Using Decision Trees as Tools for Settlement*, CPR Institute for Dispute Resolution f/k/a Center for Public Resources/CPR Legal Program, 14 Alternatives to High Cost Litig. 71, 73 (June 1996) (discussing the use of decision trees for determining the likelihood of success).

75. *See* Taurke, *supra* n. 48, at 787.

76. *See* Silberg, *supra*, n. 45 at 675.

77. *See* Taurke, *supra* n. 48, at 788; *see also* Mark R. Privratsky, *A Practitioner's Guide to General Order 95-10: Mediation Plan for the United States District Court of Nebraska*, 75 Neb. L.Rev. 91, 112 (1996) (as a general principle, the worst case scenario is that the parties cannot agree. The mediator declares a deadlock and the case is put on the trial calendar).

78. *See* Silberg, *supra* n. 45, at 676.

79. *See* Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs*, 68 Am. Bankr. L.J. 55, 75-6 (Winter 1994); *see also* Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges & Lawyers*, A Joint Project of the Federal Judicial Center and the CPR Institute for Dispute Resolution, Federal Judicial Center, 1996 WL 797360 (F.J.C.) (emphasizing the importance of ADR use in the public justice system).

Pro Bono Innovations: A Report on Associate Externships and Fellowships

In an innovative effort to meet their professional duty of providing pro bono representation and assisting their community with much needed legal services, 11 private law firms in New York City have sponsored associates to work full-time on pro bono matters, usually by rotating the associates in and out of outside legal services provider organizations.[1] Whether described as pro bono externships, internships, fellowships,[2] or rotation programs, these full-time pro bono positions generally allow associates to work full-time with legal services organizations for a period ranging from two months to two years. The Pro Bono and Public Interest Committee of the New York State Bar Association's Commercial and Federal Litigation Section (the "Committee")[3] has reviewed a variety of these programs by discussing them with the law firms that sponsor them, as well as with the participating associates and legal services provider organizations. As reflected in this report, the Committee has found these programs to be effective and efficient in providing critical pro bono legal services to the community, while also improving the firm's pro bono culture. The Committee strongly urges law firms and corporate law departments[4] throughout the state to consider establishing such a program as one aspect of fulfilling their professional obligation to provide pro bono legal services to those members of the community who otherwise would not have access to them.

Description of Programs

The programs are divided into two groups: externships and fellowships.[5] The primary difference between the two is their length: the eight externships are two-to-six months in length, while the three fellowship programs last one-to-two years. In addition, unlike the externships, which all pay the participating associates his/her regular firm salary, the fellowships are not uniform in the salaries that the firms pay the participating associates—the primary cost to the firm for sponsoring an externship or fellowship.

Externships

Eight of the eleven full-time pro bono programs in New York City are externships. Typically, in a pro bono externship, a law firm selects a volunteer associate to work full-time for a two-to-six month period at the office of a legal services provider organization designated or approved by the firm. At the end of the period, the associate returns to the firm and another associate takes his or her place, after a brief overlap to assist continuity between externs. The firm continues to pay the associate's salary and benefits, which remain at the level of the associate's class, during the rotation period.

Firms see a variety of benefits stemming from the programs. They are a good way to supplement the pro bono work of lawyers at the firm; they heighten the visibility of pro bono work at the firm; they help the firm recruit new associates; they provide skills training and professional development for the associates; they improve associates' morale; they assist legal services provider organizations who are fighting to survive under the recent cutbacks in public funding; they enhance the reputation of the firm; and they impress the firms' clients. Associates view it as an opportunity to gain valuable legal experience, while "doing good" at the same time. Moreover, by focusing a substantial effort in one place, the externship provides both the associate and the firm with the opportunity to make a significant contribution—a tangible difference—in the good work of one public interest organization.

Three of the eight externship programs fund two externs simultaneously, one for litigators and one for non-litigators, thus ensuring that the externships appeal to all department groups of the participating firms. The following paragraphs describe the eight pro bono externship programs, beginning first with the three "litigation/corporate" externship programs of Cleary Gottlieb Steen & Hamilton; Skadden, Arps, Slate, Meagher & Flom; and Weil, Gotshal & Manges. The report then reviews the externship programs of Chadbourne & Parke; Kramer, Levin, Naftalis & Frankel; LeBoeuf, Lamb, Greene & MacRae, L.L.P.; Milbank, Tweed, Hadley and McCloy; and Willkie Farr & Gallagher.

The Dual Litigation/Corporate Externships

The dual litigation/corporate externships of Cleary Gottlieb Steen & Hamilton; Skadden, Arps, Slate, Meagher & Flom; and Weil, Gotshal & Manges sponsor two externships each: one for litigation associates and one for corporate associates. All three programs place their corporate extern with the Lawyers Alliance for New York ("Lawyers Alliance"). According to Lawyers Alliance's Executive Director, Sean Delaney, these programs have eliminated the need for the Lawyers Alliance to hire junior staff attorneys, allowing it to focus its resources on its programs and senior staff attorneys.

Cleary Gottlieb Steen & Hamilton

Non-Profit Providers: MFY Legal Services
Lawyers Alliance for New York
Length of Externships: Four months.

Cleary Gottlieb Steen & Hamilton ("Cleary Gottlieb") has two externship programs: a litigation-oriented one at MFY Legal Services (MFY) and a transactions-oriented one at Lawyers Alliance. Associates from

Cleary Gottlieb do four-month "rotations" at each organization. There is always one associate working at each office. The outgoing extern generally passes his or her caseload on to the incoming extern, although outgoing associates occasionally retain externship cases when they return to Cleary Gottlieb.

Partners from Cleary Gottlieb have been involved with MFY Legal Services since the 1960s. The externship program dates back at least to 1975. The focus of MFY's legal work is on providing legal assistance to tenants facing eviction, and the externs spend a significant portion of their time in Housing Court. One former extern, who had handled an average of about 15 to 20 cases at a time, stated that he had a lot of autonomy in handling cases, including interviewing potential clients and determining which ones had meritorious cases that should be pursued. He estimated that during his externship he made 15 to 20 appearances in front of a judge, including 5 or 6 formal motions and one trial.

MFY is happy with the program because the Cleary Gottlieb attorneys are helping with the agency's case load, and the clients are very pleased with the legal services they are receiving. Lynn Kelly, MFY's Executive Director, is impressed with the program, as all of the externs are very good, experienced (sometimes senior-level) associates. Such experience is critical because, even though MFY heavily supervises each extern, its supervisor/staff ratio of about one supervisor to 11 case handlers precludes it from starting from the ground level with "greener" lawyers. Externs often must learn "on the job." Ms. Kelly also appreciated the different perspective that Cleary Gottlieb externs bring to the agency's intake and staff meetings in which the externs participate during their MFY tenure.

Lawyers Alliance is committed to community development work and mainly handles transactional and financial legal work for non-profit organizations. The organization relies heavily upon attorneys in private law firms taking cases on pro bono, but also has a legal staff which provides direct legal assistance. Cleary Gottlieb established the externship program with Lawyers Alliance in 1990. Cleary Gottlieb envisioned it as a means of getting involved with the economic side of community development and providing corporate associates with more opportunities to participate in pro bono work, which generally tends to be litigation-oriented.

Alan Bromberger, the former Executive Director of Lawyers Alliance, reported that the Cleary Gottlieb externship program is a fantastic program for the organization. The program greatly increases the capacity and expertise of Lawyers Alliance, as externs tend to be mid-level (third or fourth year) associates with experience in transactional work. In addition to the benefit of an additional attorney in the office, Mr. Bromberger cited the advantage of developing an ongoing partnership with Cleary Gottlieb, through which the firm has provided support to his organization.

George Grumbach, the partner in charge of pro bono activities at Cleary Gottlieb, spoke very positively about the externship programs. He said that the externs unanimously report their externships to be excellent learning experiences. One Cleary Gottlieb extern at MFY felt overwhelmingly positive about his MFY experience, describing it as a "win-win" situation for all involved—MFY, himself and Cleary Gottlieb. From his perspective, it was an excellent experience that greatly improved his skills and made him an all-around better lawyer. David Parish, another Cleary Gottlieb extern at Lawyers Alliance summed up the experience well: "Externships educate lawyers in the for-profit sector about non-profit law" and encourage lawyers to do more.[6]

Skadden, Arps, Slate, Meagher & Flom

Non-Profit Providers: Legal Aid Society (Volunteer Division)
Lawyers Alliance for New York.

Length of Externships: Four months.

Skadden, Arps, Slate, Meagher & Flom ("Skadden") sponsors two Skadden associates—a litigator and a non-litigator—to serve at the Volunteer Division of the Legal Aid Society ("Legal Aid-Volunteer") and Lawyers Alliance, respectively. Skadden modeled these fellowships on its successful externship program with the Washington Legal Aid Society that has been running out of Skadden's Washington, D.C. office for approximately six years.

The Skadden externships are geared toward third and fourth year associates, and it is possible that the externship will be open to second-year associates in the future. Each rotation lasts four months, and Skadden has tried to avoid gaps between the in-going and out-going externs. The externs' responsibilities at the two not-for-profits vary greatly, depending on the externs' interests and needs of the not-for-profits. For example, Bill O'Brien, Skadden's first litigation extern at Legal Aid-Volunteer, requested and received a caseload that allowed him to spend most of his time working in the office's Housing Development Unit representing tenant associations in litigation in New York State courts and part of his time representing individual tenants in Housing Court. The second extern, Troy Elder, wanted to work on elder law issues; Legal Aid-Volunteer, which does not have a full-time elder law attorney, but whose clients have elder law issues, happily obliged, and was very impressed with Mr. Elder's work, according to Marlene Halpern, Legal Aid-Volunteer's pro bono supervisor. At Lawyers Alliance, Jim Mathie, Skadden's first corporate extern, primarily worked on establishing a family childcare network—drafting the contract, researching the potential pitfalls, and directing a seminar to a network of settlement houses on implementation of the network. He

also advised non-profits on a host of corporate law issues, including certificates of incorporation, bylaws and bankruptcy.

Mr. O'Brien complimented Legal Aid-Volunteer on its excellent mentoring, saying that the office's close supervision of his work made formal training unnecessary, even in the confusing world of Housing Court. His supervising attorney at Legal Aid-Volunteer, Andy Leher, added: "Supervising a motivated, quick learner does not require 10 to 12 hours per day." Lawyers Alliance also conducted seminars and made their lawyers available for Jim Mathie, who reveled in the high levels of responsibility that he received on his matters.

According to Ron Tabak, who is of counsel to Skadden and head of its pro bono program, the associates selected for each externship are highly valued, and the externships serve as a reward for their good work. However, the primary goal of the externships is to help the firm's pro bono program as a whole. Mr. Tabak expects the externs (i) to develop expertise in a pro bono practice during their externships, (ii) upon their return to the firm, to become mentors to others at the firm interested in the practice, and (iii) to persuade other Skadden attorneys to overcome understandable trepidation about serving clients outside the immediate confines of the attorney's expertise. The program is also expected to strengthen the firm's recruiting success because the program attracts lawyers hoping to participate in the program.

The externships also help with associate development because they allow associates to gain experience earlier in their careers. In addition to brief writing and court appearances, Mr. O'Brien attended tenant association meetings, at which he honed his skills in conveying complex litigation strategy to clients in plain language—a skill on which Mr. O'Brien intends to draw heavily now that he is expected to deal with clients more regularly as a mid-level associate.

All involved are very impressed with Skadden's externship programs. Mr. O'Brien believed the program came at a great time in his development, as he was given substantial responsibility at Legal Aid-Volunteer at a time when he was transitioning from a junior to mid-level associate. Mr. Mathie enjoyed seeing the great projects on which New York public interest lawyers have been working. Mr. Lehrer of Legal-Aid Volunteer found Mr. O'Brien to be "fantastic" and "super helpful," and commented on the benefit of having a full-time associate of the caliber often found at Skadden. Legal Aid-Volunteer's pro bono supervisor, Marlene Halpern, confirms that the Skadden program has worked very well. She expressed interest in other firms replicating Skadden's program with her office. Sean Delaney of Lawyers Alliance states that the externships allow him to steer resources to hiring additional senior staff attorneys and financing Lawyers Alliance's programs.

Weil, Gotshal & Manges

Non-Profit Providers: Legal Services for New York City—Brooklyn Branch
Lawyers Alliance for New York

Length of Externships: Three months.

Weil, Gotshal & Manges ("Weil Gotshal") is the latest firm to establish an externship program, having started its program in October 1999. Similar to Cleary Gottlieb's and Skadden's programs, Weil Gotshal sponsors two externships, one for junior litigation associates serving Legal Services for New York City—Brooklyn Branch ("Legal Services"), and one for junior corporate and real estate associates serving Lawyers Alliance on transaction-oriented projects. The externships are each three months long, allowing a total of eight associates to participate annually.

Weil Gotshal indicated in a firm-wide memo that it established the externships for several reasons:

> First and foremost, the firm has always recognized its obligation to provide significant pro bono services to the community and the pro bono externship is a very efficient way to fulfill this obligation. By focusing a substantial effort in one place, the firm is able to make a significant impact—to really make a difference—in providing pro bono services to the community. The externship also provides an excellent opportunity for those associates with a personal commitment to pro bono to fulfill that desire in a meaningful way. By doing exclusively pro bono work for a period of time, associates will be able to see their efforts really making a difference.[7]

The litigation and corporate externships enhance Weil Gotshal's longstanding relationships with Legal Services and with Lawyers Alliance, respectively. Weil Gotshal has been matched with Legal Services through the Volunteers of Legal Service program, taking referred matters on a pro bono basis. In addition, a Weil Gotshal partner serves as the Board Chair for Legal Services, which provides civil legal services to poor people in New York City. Similarly, Weil Gotshal has been a major supporter of Lawyers Alliance in pro bono hours and financial donations.

Another benefit of Weil Gotshal's externships is the experience that the associates will gain from their work with the non-profits. The litigation extern will spend much of his/her time in the courtroom, seeking orders of protection in Family Court, litigating benefits, unemployment and social security/disability issues at administra-

tive hearings, representing individual debtors in Bankruptcy Court and tenants facing eviction in Housing Court, and arguing Article 78 motions in New York's Supreme Court and Appellate Division. The corporate extern will do incorporations, applications for tax exemption, by-law drafting, contract and lease negotiations, mergers of non-profits and financial organizations, and workouts. The corporate extern also will give employment law advice and assist in structuring complex economic development projects and in developing low-income housing using tax-exempt bonds and low-income housing tax credit. The firm describes the value of this experience in the following manner:

> The skills and knowledge acquired by [litigation] associates during their rotation at Legal Services will enhance their abilities as lawyers. Spending much of their time in the courtroom, associates will be able to receive the kind of hands-on experience, dealing directly with clients, judges and adversaries, that ordinarily is not available to junior associates. . . . [T]he skills and knowledge acquired by [corporate] associates during their rotation at Lawyers Alliance will enhance their abilities as lawyers. Once they return to the firm, the associates will be able to supervise others in their new area of expertise, thereby expanding the breadth of interesting pro bono opportunities available to lawyers in the corporate department.[8]

Both Legal Services and Lawyers Alliance are happy with the Weil Gotshal externships. Steven Bernstein, Legal Services' Executive Director, said the program was "going great," and believed that a three-month rotation could accomplish a lot with co-counseling, selective training sessions, and close supervision. Sean Delaney of Lawyers Alliance was impressed with the commitment that Weil Gotshal's firm management made to the program, as set forth in the firm-wide memo quoted above. Mr. Delaney credited the memo with alleviating associates' fear that externship participation would damage their long-term interests at the firm; indeed, the memo encouraged associates' participation in the externship program as one way they could show initiative in their own professional development. To ensure that the externship is valuable to both extern and non-profit, Lawyers Alliance offers periodic introductory workshops on oft-occurring client issues, as well as giving each extern a first-week orientation that includes a sampling of Lawyers Alliance's 19 different publications overviewing its practice.

Jordan Stern, Weil Gotshal's first corporate extern and a class of 1998 associate, sees the position as "an opportunity to immerse myself in the city and to work on issues important to New York."[9] During his first month at Lawyers Alliance, Mr. Stern has worked on a spinoff and dissolution and advised a non-profit organization trying to start up a charter school. After only one month, he feels "fully integrated." He relies on his firm experience for corporate law issues and on his Lawyers Alliance supervisors for non-profit issues. Already he feels a broader sense of accomplishment than he typically feels back at the firm, as his work at Lawyers Alliance goes more directly towards the betterment of community.

The Single Externship Programs

Chadbourne & Parke

Non-Profit Provider: The Door's Legal Services Center
Length of Externship: Six-to-ten weeks.

In February 1998, Chadbourne & Parke ("Chadbourne") established its externship program with the Door's Legal Services Center (the "Door"), a multi-service youth center established to provide preventive, enrichment and medical programs to over 5,500 adolescents annually, focusing on the unmet legal needs of these low-income clients. While volunteering at the Door for six-to-ten weeks, a Chadbourne associate lightens the Door's in-house attorneys' caseload, which includes issues involving family law, such as foster care, paternity, child support, divorce, orders of protection, neglect and abuse, and custody; immigration, centering around the rights of undocumented young people; public assistance; health care and other entitlement benefits; education; labor and employment; and consumer fraud. Initially, the extern generally handles public assistance matters, and then branches out to other areas as the externship progresses. The extern is typically interviewing his/her first set of clients by the beginning of the second week.

Externs continue to receive their class's compensation and benefits during the externship, and are expected to attend departmental, practice group and all-attorney meetings, as well as remain in touch with the firm's pro bono partner, Bernard McCarthy. Past externs have come from the firm's corporate finance, project finance, New York transactions and litigation practices. All associates are eligible for the externship, although from a training perspective it is most appealing to junior associates.

Chadbourne's program is periodic in that it attempts to fill the outgoing extern's position at the Door as soon as possible, but does not constrain itself to having no gaps. This approach gives the firm more flexibility, which it has found to be necessary given associates' fluctuating workloads, but is a greater strain on the Door. Although the Door would like to alter this arrangement, the externship's benefits to the Door are worth the inconvenience. Michael Williams, a staff attorney at the Door, stated that the recent Chadbourne externs have quickly assimilated

to the new environment, and are viewed as regular members of the Door's staff during their externships–no small achievement given the change in practice. To assist with the assimilation, the Door's staff supervise the extern closely, maintain an open-door policy for the extern's questions, and provide manuals on topics relevant to many of the typical problems experienced by the Door's clients.

Chadbourne established the program to help the firm recruit new associates, to heighten the visibility of pro bono at the firm, to increase the firm's pro bono hours, to enhance the firm's reputation generally, impress clients and improve associate morale. Mr. McCarthy confirms that these goals have been achieved.

Jennifer Johnson, an extern from mid-October 1998 to Christmas 1998 and currently a fourth-year corporate finance associate at Chadbourne, echoes Mr. McCarthy's enthusiasm for the program. During her externship, she helped over 30 young people with housing, immigration, family law, and public assistance issues, and found herself at the INS, welfare centers and Housing Court on various occasions. Although there was no formal training, she relied on the open-door policy of the Door's resident experts in these substantive law areas. Since returning to the firm, she happily has promoted the program.

Kramer, Levin, Naftalis & Frankel
Non-Profit Provider: South Brooklyn Legal Services
Length of Externship: Four months.

In the fall of 1998, Kramer, Levin, Naftalis & Frankel ("Kramer Levin") established an externship at South Brooklyn Legal Services (SBLS). The firm places volunteer associates at SBLS for four-month rotations. The externship is open to second- through fourth-year associates, but exceptions are made: recently, a first-year associate whom the firm felt had the maturity and confidence to do the job was selected.

Externs primarily represent tenants in Housing Court, ensuring that the externs receive abundant courtroom experience. "The program fills a training gap," says litigation partner and Pro Bono Committee Chair Jeffrey S. Trachtman. "We can provide research and writing experience at the firm as well as exposure to big case discovery—the paper side of a case—but it is unusual to provide associates with this much in-court and direct decision-making experience."[10] Externs have daily contact with clients, opposing counsel and judges.

Because housing work often focuses on negotiations, the externship is not limited to litigation associates, and Kramer Levin corporate attorneys have expressed interest in volunteering. Not surprisingly, the program has been well received by partners and associates alike. According to Mr. Trachtman, the externship even helps in recruiting new associates.

Jonathan Fried was Kramer Levin's first extern. Of his experience in Housing Court, Mr. Fried says, "I never felt as vital to my client's needs and as satisfied by my lawyering." He confirms that "opportunities for hands-on client advocacy, both in and out of the court, are only infrequently available to junior associates at a large corporate firm. However, at South Brooklyn, they are the order of the day." In addition to courtroom experience, externs receive plenty of negotiation and settlement experience. This experience, combined with direct client contact and responsibility, "helps make the externship appropriate for transactional attorneys, as well as litigators," according to Mr. Trachtman.

The externship experience can be a real boon to the extern's professional development. Mr. Fried confirms this: "First, by being completely responsible for all client contact and communication with adversaries, my ability to recognize, develop and understand legally relevant facts is substantially increased. Second, I am a far better advocate after several months of appearing before judges and conferring with my adversaries. . . . Overall, I believe the confidence that comes from making my own calls in my own cases is the greatest asset I have gained through this externship."

LeBoeuf, Lamb, Greene & MacRae, L.L.P.
Non-Profit Provider: South Brooklyn Legal Services
Length of Externship: Three-to-four months.

Since 1987, LeBoeuf, Lamb, Greene & MacRae, L.L.P. ("LeBoeuf Lamb") has sponsored an externship program through which second- to fifth-year associates work for three to four months on housing litigation at South Brooklyn Legal Services (SBLS). Although still on LeBoeuf, Lamb's payroll, the externs work out of SBLS's offices, sometimes returning to the firm after hours to take advantage of its research facilities. Externs rotate through SBLS's offices one at a time, with a week of overlap to maintain continuity.

Partner Cynthia R. Shoss, who heads LeBoeuf, Lamb's pro bono practice, explains that, in addition to improving courtroom skills, the heavy load of housing cases that an extern handles—usually about 40 cases—draws on and improves negotiation skills, because many cases are settled out of court. Accordingly, LeBoeuf, Lamb's externship program is not just for litigation associates; associates from the corporate, insurance, and utilities departments also have participated.

Associates generally value their externships. Indeed, one LeBoeuf, Lamb associate who had participated in the program left the firm for SBLS. Another former extern—John Aerni, now a partner at LeBoeuf—sits on SBLS's board. Through the externship program, LeBoeuf, Lamb has developed a close working relationship with SBLS. As a result, other attorneys at the firm work with SBLS on other pro bono matters, including housing cases.

John C. "Chip" Gray, SBLS's Project Director, views the externship program as one of the "most successful" pro bono activities in which he has ever been involved. (Indeed, it has been so successful that SBLS recently established the externship with Kramer, Levin, Naftalis & Frankel modeled on the LeBoeuf, Lamb program.) Mr. Gray explains that the externship program avoids what he sees as a potential pitfall of some pro bono programs in which one outside lawyer handles a single case: a high ratio of training time to working time. In contrast, SBLS's externs become increasingly productive over the course of their four months at SBLS, and get through a lot of cases as a result. Mr. Gray also credits LeBoeuf, Lamb's senior partner level commitment to the program as an important ingredient in its success.

In addition, LeBoeuf, Lamb offers shorter externships as part of its summer program. Summer associates who spend at least 12 weeks at the firm can spend two of those weeks working for one of several legal services provider organizations. These organizations have included the Federal Public Defenders, as well as Mental Hygiene Legal Services and various other Legal Services offices. Summer associates also may propose a legal services provider organization of their choosing for approval by the firm, an option that resulted in one summer associate working for the NAACP Legal Defense and Education Fund, Inc.

LeBoeuf, Lamb views its externship programs as good training for associates, an effective tool for recruiting new associates, and a means of demonstrating the firm's commitment to providing pro bono services.

Milbank, Tweed, Hadley and McCloy

Non-Profit Provider: Various organizations of the associates' choosing

Length of Externship: Two months.

Milbank, Tweed, Hadley and McCloy ("Milbank") offers all of its incoming associates the opportunity to spend two months of their first year doing pro bono work full-time, while receiving full compensation and benefits from the time they start. Associates who participate in the program alert Milbank's pro bono partner, Joe Genova, in the Spring before their arrival, and state a preference for the nature of the work and the organization (or organizations) with which they would like to work. Most associates work at non-profits, and Mr. Genova assists them with the arrangements. The only "catch" for the associates is that they must begin the program the Monday after the July bar exam—a necessary deadline because of the firm's need to staff the often busy Fall season and its desire to have externs participate in a week of mandatory off-site training when the rest of their class has arrived. Over the past few years, six to eight associates have taken advantage of Milbank's offer.

Most participants choose work of an adversarial nature, but participation is not limited to litigators. The program provides junior associates with an opportunity to take on significant responsibilities. Mr. Genova typically discusses the program with the host/collaborating non-profit, pushing for adequate supervision and training.

Not surprisingly, the program has been a useful means of recruiting attorneys. Several program participants with whom we spoke praised the program, which they saw as an important factor in their decision to work at the firm. Several participants were happy that the program was held early, as they felt more confident when they started work for paying clients at the firm, were able to keep pace with their classmates, and found themselves seeking out pro bono matters. Shane Heskin worked at New York Lawyers for the Public Interest (NYLPI) last summer, assisting in the development of a potential class action involving deaf public school students and the schools' refusal to instruct the deaf students in ASL. The experience has led Mr. Heskin to join a city-wide disabilities task force and to investigate possible pro bono work in the area. His office mate, Dan Perry, spent his two months at Legal Aid Society's Capital Defense Unit, and was impressed with the high quality of legal representation that the Unit provided its clients. Upon his return to the firm, Mr. Perry took on an indigent's appeal of his first-degree assault conviction.

Milbank calls its program an internship, not an externship. Although the structure of the Milbank program does not lend itself to development of an ongoing relationship between the firm and legal services provider organizations in the same manner as the rotating externships, Milbank is able to "spread the wealth": over the past decade, Milbank has sent associates to over 20 different organizations including New American (NYANA), Advocates for Children of New York, Pro Bono Net, New York Legal Assistance Group, the Capital Defense Unit of Legal Aid, Housing Works, Brooklyn Legal Services A, NYLPI, Lawyers Alliance, and Lambda Legal Defense Fund ("Lambda"). Lambda, which had an extern in 1998, was impressed with the externship, noting that Milbank attorneys, who were more experienced than the intern, made valuable contributions by consulting with the intern during the program. Kim Sweet, a supervising attorney at NYLPI, for whom Mr. Heskin interned in August and September of last year, found Mr. Heskin to be very helpful and would welcome another Milbank intern.

Willkie Farr & Gallagher

Non-Profit Provider: MFY Legal Services

Length of Externship: Four-to-six months.

Willkie Farr & Gallagher ("Willkie") has had an externship program with MFY Legal Services since 1989. The Willkie externship is open to associates in their second through fifth year, but the participants are generally in their third or fourth years. Each rotation lasts from

four to six months, during which the externs receive their regular firm pay and benefits. Although the externship is open to associates in all practice areas—the firm has had externs from its corporate, real estate, and other non-litigation departments—most of the externs have come from the litigation department. The externs exclusively represent tenants on housing issues and public benefits related to housing.

Willkie manages the program to permit a several-day overlap between externs, so as to ensure the outgoing extern spends several days with the incoming extern. The extern is buddied with a senior MFY staff attorney, sharing court dates for the first two weeks to introduce the extern to Housing Court. MFY also holds informational lunches to discuss changes in the law and other topics relevant to its practice.

Lawrence Kamin, the past chair of Willkie's pro bono committee, sees the externship program as an effective way to provide legal services to the poor. He noted that the lawyering is better when an attorney is focusing on the problem full time, and that sending an extern to MFY is ultimately more efficient than having the firm handle cases on a piecemeal basis. Mr. Kamin also believes that the externship is beneficial because it allows the extern a closer involvement with the community being served. In addition, the externship assists in associate development because the associate works more independently and learns to make strategic/tactical decisions on his/her own. For example, Jim Doyle, a third-year at Willkie who completed his externship last summer, was in court three-to-four days a week and found the caseload and pace of litigation a challenge. He reports having greater confidence in taking over cases now that he has returned to the firm and a renewed commitment to doing pro bono work.

Willkie has an excellent relationship with MFY that stems from the success of the externship program. A Willkie partner is a member of the MFY Board. Lynn Kelly, MFY's Executive Director, is happy to have two externs–one each from Cleary Gottlieb and Willkie—simultaneously, as the two similarly situated associates provide each other with a good support system. Much is accomplished in a short period of time because the firms send experienced lawyers who are highly motivated and capable of learning quickly. These associates bring a new perspective to her organization, and she is confident that both sides learn from the cross-pollenization. Indeed, according to Ms. Kelly, "from MFY's perspective, lawyers who have worked in the trenches with us meeting the vital needs of poor clients become long-term supporters of pro bono and legal services."

Fellowships

Three New York City firms—Fried Frank Harris Shriver & Jacobson; Sullivan & Cromwell; and Winthrop, Stimson, Putnam & Roberts—sponsor fellowships whose primary distinction from the externship programs described above is their service length of one or two years. Otherwise, the fellowships differ substantively enough from each other that their description is best left to the individualized treatment below.

Fried Frank Harris Shriver & Jacobson

Non-Profit Providers: NAACP Legal Defense and Educational Fund, Inc.
Mexican American Legal Defense and Educational Fund

Length of Fellowship: Two years.

Fried Frank Harris Shriver & Jacobson (Fried Frank) offers unique pro bono fellowships with NAACP Legal Defense and Educational Fund, Inc. (NAACP LDEF), and the Mexican American Legal Defense and Educational Fund (MALDEF), two organizations with which Fried Frank has worked extensively in the past. The principal goal of the fellowships is to demonstrate that a strong commitment to social justice can go hand-in-hand with a career as a business or commercial litigator. Thus, the fellows spend two years with the firm as regular associates and then two years with the non-profit.

For the first two years of the programs, the fellows are assigned to the Fried Frank litigation department. During these first two years, the fellows are treated like all other incoming associates for most purposes, including compensation, benefits, training, assignments and reviews. One major distinction between the fellows and the firm's other associates is that the fellows are guaranteed to spend at least 20 percent of their time at Fried Frank on pro bono matters. The fellows are also given fellowship mentors, who are partners in the litigation department. Finally, the fellows benefit from the training that Fried Frank offers to all of its associates—the primary reason why the program begins at Fried Frank, as the non-profits later receive trained mid-level associates. Hector Villagra, a fellow who has been at MALDEF's Los Angeles office since April 1999, doubts that he could have handled his MALDEF workload as quickly or effectively without the extensive training he received while at Fried Frank. In addition to the on-the-job training at Fried Frank, Mr. Villagra benefited from countless lawyer presentations on topics such as legal research, document drafting, and depositions; two NITA trial-training sessions, and several CLE programs. He noted that he was given special attention as a fellow.

During the third and fourth years, the fellows go to either NAACP LDEF's New York headquarters or to one of MALDEF's regional offices, and receive compensation and benefits from Fried Frank at the same level as other NAACP LDEF and MALDEF attorneys. Because Fried Frank sponsors a fellow for each organization each year, in future years there will be junior and senior fellows at the non-profits at the same time, thus easing the transi-

tion from firm to non-profit. Fellows at both non-profits participate in nearly every phase of hands-on litigation in state and federal court, from client interviews to drafting motions, involving many areas of civil rights law. The NAACP LDEF fellow focuses largely on employment, education, housing, voting rights and criminal justice issues, while the MALDEF fellow is expected to gain expertise in two out of five substantive areas—employment, education, immigrants' rights, political access and public resource equity—and the fellow is asked to indicate a preference. Mr. Villagra has focused primarily on education issues, monitoring consent decrees already in place and litigating California's Proposition 227, which abolished bilingual education.

Both fellows are also involved in non-litigation advocacy: the NAACP LDEF fellow may speak at public forums or work with community-based organizations to help them advocate on their own behalf; and the MALDEF fellow may speak on either of the fellow's two areas of expertise, including educational advocacy (responding to the media and speaking at public forums) and legislative advocacy (analyzing proposed legislation and testifying before legislative bodies upon request).

A committee comprised of representatives from Fried Frank, NAACP LDEF and MALDEF selects fellowship candidates who demonstrate sincere interest in both corporate and public interest litigation. After completing the four-year program, a fellow may return to Fried Frank as a fifth-year associate. A fellow's ability to remain at either NAACP LDEF and MALDEF is limited by the non-profit's needs and resources at the time of the fellowship's completion.

Sullivan & Cromwell

Non-Profit Provider: Not applicable. Program run in coordination with the Pro Se Office for the United States District Court for the Southern District of New York (S.D.N.Y.)
Length of Fellowship: One year.

Since 1989, Sullivan & Cromwell has sponsored a pro bono fellowship program to help provide representation for indigent pro se plaintiffs with actions pending in the United States District Court for the S.D.N.Y.

The fellowship developed out of Sullivan & Cromwell's participation in the Pro Bono Panel of the Southern District of New York. Theoretically, law firm members of the Panel agree to accept assignment each year of two or three cases brought by indigent pro se plaintiffs in civil cases that have been identified by a judge of the court as being of sufficient merit to justify assignment of counsel. The cases include prisoners' rights and other civil rights actions, employment discrimination litigation and a wide variety of other matters covering subjects from defamation to securities fraud.

The Sullivan & Cromwell fellowship is filled by an attorney who is completing a one- or two-year judicial clerkship. The attorney must apply for a permanent position as a Sullivan & Cromwell associate and meet the firm's standards for employment. The fellow spends one year representing civil pro se indigent plaintiffs on a full-time basis, selecting cases primarily from the case files of pro se litigants regularly kept in the S.D.N.Y. Pro Se Office. Less frequently, the fellow accepts representation of pro se litigants who directly solicit the fellow's or firm's assistance or whose case has been referred to the fellow for representation by the presiding judge. The fellow handles all phases of litigation, including motion practice and trials. The fellow also continues to work on ongoing cases handled by former fellows. The transitions from the old to the new fellow have been basically seamless: past fellows often remain part of the litigation team and are available (as are all Sullivan & Cromwell lawyers) to advise and consult on tactics, strategy, questions of evidence, procedure and other matters, as needed. Indeed, other Sullivan & Cromwell associates often become the fellow's co-counsel, thus spreading the valuable litigation experience throughout the firm and allowing the fellow to take on the representation of additional clients.

The fellow is a full-time employee of Sullivan & Cromwell whose pay and benefits are the same as other firm associates employed after a clerkship. The fellow is provided with office space, and secretarial and other services. It is understood that the lawyer accepting the fellowship is prepared and expected to remain at Sullivan & Cromwell at the conclusion of the fellowship as a regular associate in the firm's litigation group.

Through the fellowship, the firm has developed a particular expertise in prisoner civil rights litigation and has successfully advanced and argued issues of wide-ranging importance in this area.

According to Lois Bloom, the head of the S.D.N.Y.'s Pro Se Office, the court has been very pleased with the fellowship and hopes that other firms will replicate Sullivan & Cromwell's program, which has helped to address a specific need of the court in an efficient manner.

The fellows themselves have uniformly praised the program as "an extraordinary opportunity for any young lawyer." Penny Shane, the program's first fellow, who recently became a partner at the firm, found the "clients' gratitude and growth, after years of confusion about how to proceed and frustration at their prior dealings with the legal system," to be her favorite part of the program. A recent fellow summed up benefits of the Sullivan & Cromwell program as follows:

> The fellowship is an ideal means for addressing the great need for private attorneys to donate time to pro se cases. Because my mandate was to devote my entire year to pro bono work, I was freed from any burden to weigh how

much time to allocate to pro bono versus paying work. In addition, I developed an expertise in this area and was able to draw on the experience of past fellows so that I was not forced to reinvent the wheel (as I might have if I had been taking cases on an ad hoc basis). Finally, Sullivan & Cromwell provided its full firm resources to these cases, giving me the ability to litigate them completely, without the concerns for cost-cutting that are endemic to publicly financed Legal Services corporations. As a result of all these factors, everyone wins: the litigant is given a meaningful opportunity to be heard in a federal court, the pro se docket in the Southern District is reduced, a young attorney gains incredible experience, and a law firm helps to fulfill its professional commitment to donate its resources to the public good.

Winthrop, Stimson, Putnam & Roberts
Non-Profit Provider: Various organizations of the associates' choosing
Length of Fellowship: One year.

For several years, Winthrop, Stimson, Putnam & Roberts ("Winthrop Stimson") has sponsored a one-year fellowship for an incoming first-year associate. Interested incoming associates submit proposals to work for a legal services provider organization of their choosing, and the firm generally awards the fellowship to one associate. Rather than choose between two particularly compelling proposals last year, however, the firm awarded the fellowship to two associates, who worked with the Sanctuary for Families' Center for Battered Women in New York City, and the Equal Justice Initiative, a capital defense project in Montgomery, Alabama.

A recent fellow, Erin Raccah, worked with the advocacy organization National Partnership for Women and Families. As a fellow, Ms. Raccah not only reviewed and drafted amicus briefs (including several Supreme Court amicus briefs concerning certiorari petitions), but she also spent a substantial portion of her time on legislative activities, primarily related to health care reform. These activities included drafting and reviewing legislation, lobbying (including drafting congressional testimony), and presenting legislative updates to interested governmental and private groups. Ms. Raccah reports that her legislative experience has been very valuable in her work advising clients about ERISA and other employee benefits legislation as part of Winthrop Stimson's employee benefits practice.

Donna Lenhoff, General Counsel for the National Partnership, praised Winthrop Stimson's fellowship program for its generosity and flexibility. Ms. Lenhoff emphasized that it is more beneficial to the National Partnership to have a lawyer on the organization's staff than to have to work with outside pro bono counsel. In addition to the value of receiving a full year's worth of a lawyer's time, these benefits include the deeper knowledge of the organization that an in-house lawyer develops and the added flexibility the organization has to direct an in-house lawyer's work to best serve the organization's needs at any given time. Moreover, Ms. Lenhoff pointed out that because outside counsel's conflicts checks can be time consuming, it often is not practical to retain outside counsel for short-term litigation tasks, such as reviewing an amicus brief to decide whether the National Partnership should sign it.

Winthrop Stimson pays fellows half of a first year associate's salary, plus full benefits. After their fellowships, fellows start at the firm as first-year associates. Winthrop Stimson values the program not only for the experience the fellows gain, but also because it provides the firm with the opportunity to create new relationships, and augment existing relationships, with legal services provider organizations. Ms. Raccah adds that the program was a factor in her decision to join Winthrop Simpson, because it demonstrated the firm's strong commitment to pro bono activities.

Critique of Programs' Value

The accounts collected and compiled in this report indicate that the pro bono positions described above are an effective way in which private law firms and corporate law departments can team up with public interest law providers to achieve a mutually beneficial result. These programs have many benefits, including:

- effectively promoting the firms or companies;
- providing valuable experience to junior attorneys;
- attracting other attorneys to the firms or companies, as competition for the best legal talent requires firms and corporate law departments to distinguish themselves with programs such as these externships and fellowships;
- impressing clients or customers;
- assisting firms and corporate law departments to obtain better quality pro bono work;
- allowing firms and corporate law departments to gain expertise in particular pro bono areas, as returning lawyers serve as valuable resources to other attorneys looking to provide pro bono services in the area of the returning associates' expertise; and
- raising awareness of social issues often overlooked in large corporate law practices.

The positions are not without their flaws, which are largely the result of the firms' and legal services provider organizations' conflicting interests. For example, the shorter-term externships allow more associates to participate and thus arguably improve firm culture more than the longer term positions; however, these shorter term positions are potentially less productive for the non-profit organization, because new externs must be trained every few months, start-up time is multiplied, and associates leave the positions just as they begin to master them. The fellowships, on the other hand, address this issue by extending their programs to one or two years. However, these longer fellowships come at the cost of having fewer lawyers participate in the program—a significant drawback, given that an oft-stated purpose of these pro bono positions is to improve a firm's pro bono culture.

There are other issues: for instance, the substantive law expertise that associates gain during their externship is unlikely to be directly applicable to the firm's practice, or that associates' workload may make it difficult for certain associates to free themselves up for the experience. In addition, most firms attempt to overlap their in- and out-going associates, but occasionally the overlap must be abbreviated. Other potential areas of concern include the non-profit's lack of support services, physical plant space, or technological resources to which associates have become accustomed.

Despite these issues, the pro bono positions clearly assist the non-profits more efficiently than individual pro bono work, which is much more spotty. The positions do not alleviate the obligations of each attorney at the participating firm to perform pro bono work, but the positions do enhance a firm's contribution to those serving the community's less fortunate. Legal services offices with whom we spoke are extremely enthusiastic about the programs, finding the programs to be far more effective than having cases spread out over several people working at law firms, because they add an attorney to the legal services office who focuses on the work of the office full time. SBLS's Chip Gray recently noted:

> The externship program overcomes a central problem in big-firm lawyers doing pro bono work for Legal Services clients. It provides pro bono attorneys with the time and close supervision they need to handle efficiently a high volume of complicated cases in a field of law in which they have no prior experience. The substantial effort required of our staff to training pro bono pays off in the effective handling of a large number of cases, not just one or two. . . . The rotating associate program reflects pro bono work at its best: substantial firm and Legal Services resources focused to provide excellent representation to a high volume of clients with major problems, not scattered on a whole variety of peripheral issues.[11]

In addition, even though turnover and supervision remain issues with these programs, most legal services provider organizations confirmed that externs received critical support from past externs who had returned to the firm, allowing the non-profit to focus its resources elsewhere. Former externs thus continue to contribute to the program.

Arguably, a firm's contributing financially to a legal services office would be a more efficient way to meet the legal needs of the impoverished; however, efficiency is not the only goal of these programs. As Mr. Kamin of Willkie Farr recently noted: "Giving money is probably the most effective way to provide help, but it has nothing to do with a lawyer's obligation to do pro bono work, and doesn't form a bond between the lawyer and the community."[12] Steven Horowitz, the chair of Cleary Gottlieb's community legal assistance committee, echoes this sentiment: "We could give $150,000 to the organization directly, but we want to build a relationship with the non-profit and to bring the expertise back to the firm."[13]

Finally, several of the non-profit organizations noted the benefit of having large-firm lawyers working side-by-side with the non-profits' in-house attorneys. Past externs become long-term supporters of pro bono generally and of their externship host particularly—a vital connection for all non-profits hoping to continue pursuing their causes well into the next millennium.

Recommendations

Given the current crisis in funding legal services to the poor, the effective manner in which the externships and fellowships alleviate some of the legal services provider organization's burdens, and the need to strengthen each lawyer's commitment to performing pro bono, the Committee strongly encourages law firms and corporate law departments to consider establishing such programs.

Conversations with the programs' participants reveal important considerations that might be easily overlooked in setting up such a program. First, high-level management at both entities must support the program, because assigned attorneys must be free to start the externships on schedule, and the legal services provider must be prepared to make a serious commitment to the training and supervision of the externs and fellows. Firms and law departments must send a clear message to attorneys that participation in an externship or fellowship will not harm their long-term interests. As mentioned above, Weil Gotshal sent an unequivocal message via a firm-wide

memo that the firm would view externship/fellowship participation positively in its review of associates.

Second, the firm or law department and the legal services provider organization must strive to iron out the details of the arrangement in advance so that the externship or fellowship program meets everyone's needs and expectations. The critical issue is determining the length of the externship or fellowship—it must be long enough to be valuable to the legal services provider, but not too long so as to jeopardize an attorney's professional development or to preclude other attorneys from participating. It is also important for the firm or law department and the legal services provider to agree on the level of attorney that will be participating in the program.

In addition to communicating before the positions are established, communication remains critical during the course of the programs, particularly for feedback as to how the programs are working and how the program's efficiencies can be improved. Firms and law departments should consider allowing the legal services provider some input into the process of selecting the externs or fellows. This would enable the non-profits to better match incoming attorneys' expertise with the work of the organization and might assist in smoother transitions. Performance evaluations by the non-profit might also alleviate any concerns of the legal services provider of being left out of the process.

Third, early selection of individual extern candidates and early scheduling of externships diminish last-minute haggling as to whether an attorney can be spared and ensures that an attorney will not be dragging baggage to the externship. Firm and law department practice groups should be given sufficient notice of the unavailability of a future extern.

Finally, the efficiency of the programs can be improved by extending support services and technological assistance to the legal services provider. The financial strains on these providers have caused them to cut back support staff and to delay updating their offices' technology. Providing such assistance to the cash-strapped organizations would extend the effectiveness of the externs and fellows. Firms and law departments should also consider contributing financially to the non-profit to defray the costs of supervising the externs.

Most participating non-profits with whom we spoke were open to establishing similar externship and fellowship programs. In addition, New York State has a wealth of non-profits that would benefit from full-time extern pro bono programs like the ones detailed above. Firms and corporate law departments interested in establishing such externship or fellowship relations with non-profits can call Anthony Cassino, Pro Bono Director, Department of Pro Bono Affairs, New York State Bar Association (518-463-3200), for further guidance.

Endnotes

1. New York is not alone in these programs. Such programs have become successful in Washington, D.C., Boston, San Francisco, and Minneapolis. Victoria Rivkin, *Associate "Externships" Benefit Nonprofits and Large Firms*, N.Y.L.J., Apr. 19, 1999, at 1.
2. The firm-sponsored positions detailed in this report should not be confused with either (i) the Skadden Fellowship Program, through which the law firm of Skadden, Arps, Slate, Meagher & Flom ("Skadden") sponsors attorneys not associated with Skadden to work at public interest organizations throughout the nation, or (ii) the National Association of Public Interest Law (NAPIL) fellowships, for which many private law firms have agreed to pay portions of the salaries of attorneys not associated with the law firms, who also work at public interest organizations throughout the nation. The fellowships detailed in this Report involve firms' allowing their own associates to practice pro bono full-time.
3. The Committee's mission is to promote pro bono and public interest activities among the private bar. The Committee's work in issuing this Report fits squarely within this mission.
4. Although the Committee is unaware of any corporate law department that has an externship or fellowship program, the positive aspects that law firms perceive as resulting from these full-time pro bono positions also should apply to corporate law departments. It is noted that attorneys working in corporate law departments have the same pro bono obligations as do attorneys working in law firms or solo practices.
5. Although Milbank, Tweed, Hadley and McCloy (Milbank) calls its program an "internship," given its similarity to the externship programs described in this Report, the Committee has included Milbank's program under its review of externships.
6. Rivkin, Associate "*Externships*," N.Y.L.J., Apr. 19, 1999, at 4.
7. William J. Dean, *Pro Bono Digest: Weil Gotshal Creates Pro Bono Externships*, N.Y.L.J., Sept. 13, 1999, at 3 (quoting the firm-wide memo).
8. *Id*.
9. *Id*.
10. William J. Dean, *Pro Bono Digest: Expansion of Externship Program*, N.Y.L.J., Nov. 6, 1998, at 3.
11. Dean, *Expansion of Externship Program*, N.Y.L.J., Nov. 6, 1998, at 3.
12. Rivkin, *Associate "Externships"*, N.Y.L.J., Apr. 19, 1999, at 1.
13. *Id.*

This Report was prepared by the Section's Pro Bono and Public Interest Committee. The Report has been adopted by the Section.

November 1999

APPENDIX A: OVERVIEW OF PROGRAMS

PRIVATE LAW FIRM	TYPE OF PROGRAM	NO. OF POSITIONS	LEGAL SERVICES ORGANIZATION	LENGTH OF POSITION	TYPE OF WORK	ROTATION	ATTORNEY'S COMPENSATION
Chadbourne & Parke	Externship	One	The Door's Legal Services Center	Six-to-ten weeks	Litigation/corporate mix	Periodic rotation	Full salary and benefits of class
Cleary Gottlieb Steen & Hamilton	Externship	Two	MFY Legal Services Lawyers Alliance for New York	Four months	Litigation Corporate	Continuous rotations	Full salary and benefits of class
Fried, Frank, Harris Shriver & Jacobson	Fellowship	Two	NAACP Legal Defense and Educational Fund, Inc. Mexican American Legal Defense and Educational Fund	Two years	Litigation Litigation	Continuous rotations	Salary and benefits equal to other staff attorneys at not-for-profits
Kramer, Levin, Naftalis & Frankel	Externship	One	South Brooklyn Legal Services	Four months	Litigation	Continuous rotation	Full salary and benefits of class
LeBoeuf, Lamb, Greene & MacRae, L.L.P.	Externship	One	South Brooklyn Legal Services	Three-to-four months	Litigation	Continuous rotation	Full salary and benefits of class
Milbank, Tweed, Hadley and McCloy	Externship[1]	Open to all incoming associates	Various organizations of the associates' choosing	Two months (from August to October only)	Varies, depending on the non-profit chosen	No rotation	Full salary and benefits of class
Skadden, Arps, Slate, Meagher & Flom	Externship	Two	Legal Aid Society (Volunteer Division) Lawyers Alliance for New York	Four months	Litigation Corporate	Continuous rotations	Full salary and benefits of class
Sullivan & Cromwell	Fellowship	One	Not applicable. Program run in coordination with the Pro Se Office for the United States District Court for the Southern District of New York	One year	Litigation	Continuous rotation	Full salary and benefits of class
Weil, Gotshal & Manges.	Externship	Two	Legal Services for New York City—Brooklyn Branch Lawyers Alliance for New York	Three months	Litigation Corporate	Continuous rotations	Full salary and benefits of class
Wilkie Farr & Gallagher	Externship	One	MFY Legal Services	Four-to-six months	Litigation	Continuous rotation	Full salary and benefits of class
Winthrop, Stimson, Putnam & Roberts	Fellowship	Two	Various organizations of the associates' choosing	One year	Varies, depending on the non-profit chosen	No rotation	Half of first-year's salary and full benefits

1. Although Milbank, Tweed, Hadley and McCloy calls its program an "internship," given its similarity to the externship programs described herein, the Committee has included this program under its review of externships.

Collections and the Enforcement of Money Judgments

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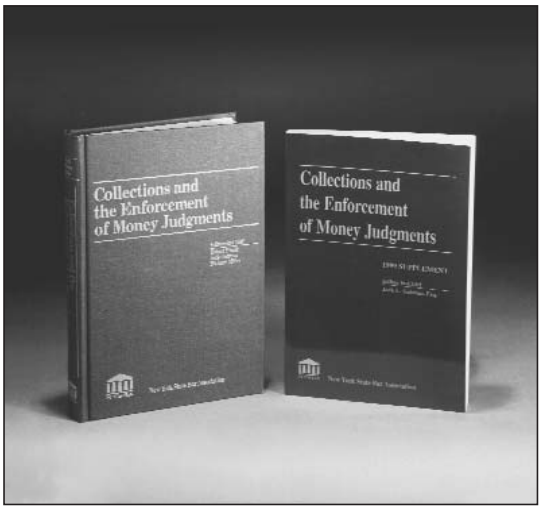

This book provides detailed guidance in the field of debt collections and enforcement of money judgments. From the determination of proper party defendants, claim and collection evaluation and preliminary investigation, through demands on the debtor, litigation alternatives and litigation procedures, *Collections and the Enforcement of Money Judgments* offers assistance at every step.

1986; Supp. 1999 • 467 pp., hardbound • PN: 4030

List Price: $90 (incls. $6.67 tax)
Mmbr. Price: $75 (incls. $5.56 tax)
(Prices include 1999 Supplement)

Contents

Book Review

***Business and Commercial Litigation in Federal Courts*,** edited by Robert L. Haig, West Group, 1998, 6 volumes, 6,690 pages with two form diskettes. Reviewed by Gerald G. Paul.

This is a remarkable work. Edited by Robert L. Haig, founding Chair of the Commercial and Federal Litigation Section of the New York State Bar Association, this six-volume treatise is indispensable for even the most experienced practitioners.

The treatise's 80 chapters, authored by some 150 federal judges and practitioners, cover every conceivable facet of commercial litigation in federal courts. In addition to comprehensive treatments of all procedural phases of a lawsuit, the work includes some 28 chapters devoted to substantive areas of the law—from antitrust and securities to patents, ERISA, labor law and products liability. Moreover, the authors engage in extensive discussions of strategic considerations that must be evaluated in the course of a litigation. Finally, many chapters conclude with a practice checklist and a set of appropriate forms. The forms, as well as jury instructions, are also contained on computer disks that accompany the six volumes and may be adapted by practitioners for particular cases.

The enormous breadth of this treatise should not be off-putting. While many litigators dread consulting indices to treatises that seem to lead nowhere, the detailed table of contents in *Business and Commercial Litigation in Federal Courts* provides a user-friendly overview of each chapter. For example, if one is attempting to determine the proper venue for a RICO claim, a quick perusal of the Table of Contents to Chapter 3 (Venue, Forum Selection, and Transfer," by Gary P. Naftalis and Michael S. Oberman) leads the reader to Section 3.5 (Special Venue Statutes), (b) (Particular Claims), and (9) (RICO), where a concise discussion of the venue provision of the RICO statute may be found, along with footnotes to applicable case law.[1] Or, say one is trying to ascertain how to go about effecting service of process in a federal action on a corporation based in France. A quick look at the Table of Contents to Chapter 17 (Litigating International Disputes in Federal Courts," by no less an authority than former U.S. Secretary of State Warren Christopher and Louis B. Kimmelman) leads the reader to Section 17.3 (Service of Process), (c) (Hague Service Convention), where the authors discuss the scope of the Hague Service Convention, the methods of service available, and practical considerations that counsel for plaintiffs should consider in assessing their options. Other handy finding tools include the tables in Volume 6, among them a table of all 25,000 cases cited in the treatise and tables of all statutes and rules cited, along with references to the sections and/or notes in the treatise where each item is mentioned.

This magnificent reference package is sponsored by the Section of Litigation of the American Bar Association. The authors, who include several former ABA Presidents and chairs of the Section of Litigation, are leading commercial litigators who have achieved particular distinction in the areas they cover. Having this treatise in your library or your office provides a rare opportunity to pick the brains of the very best lawyers in the country familiar with the particular issue that is troubling you. The ABA and West Group, and especially Robert L. Haig, can be enormously proud of what they have achieved.

Endnote

1. Happily, the index to *these* volumes is not frustratingly circular. Under "RICO," one finds the following listing: "Venue, generally, §§3.5(b)(9), 69.10." (Section 69.10 refers to a portion of the substantive chapter on RICO entitled "Jurisdiction, Venue and Preemption.)

Gerald G. Paul, a partner at Flemming, Zulack & Williamson, LLP, is a former Chair of the Commercial and Federal Litigation Section of the New York State Bar Association and serves as a member of the Association's House of Delegates.

NYLitigator's Desk

We are pleased to bring you this edition of *NYLitigator* which includes almost a year's worth of material from our Section.

The Section was led by Jack C. Auspitz during 1999-2000. Jack's column highlights some of the challenges facing our profession as we enter the new millennium. You will find in these pages reports of our Section, including one involving securities litigation. Also presented here are excerpts of transcripts from informative panel discussions presented by the Section over the past year. We also include an article on the developing "privacy privilege" in federal discovery.

NYLitigator thanks Robert Beckerlegge, the Student Editor-in-Chief, and his staff at St. John's University School of Law for their help in bringing this edition to life. We also welcome the participation of Natasha Filipovic, the newly appointed Student Editor at St. John's, who will be assisting us with the next edition.

Finally, we apologize for the delay in getting this edition to press. The birth of my son James in May was only the latest in a series of "developments" which slowed us down. We anticipate the publication of the next edition of *NYLitigator* before the Annual Meeting. Thanks for your continued support. As always, we welcome reactions and comments and invite the submission of manuscripts for publication in upcoming issues.

Margaret A. Dale

REQUEST FOR ARTICLES

If you have written an article and would like to have it published in *The NYLitigator* please submit to:

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Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information, and should be spell checked and grammar checked.

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