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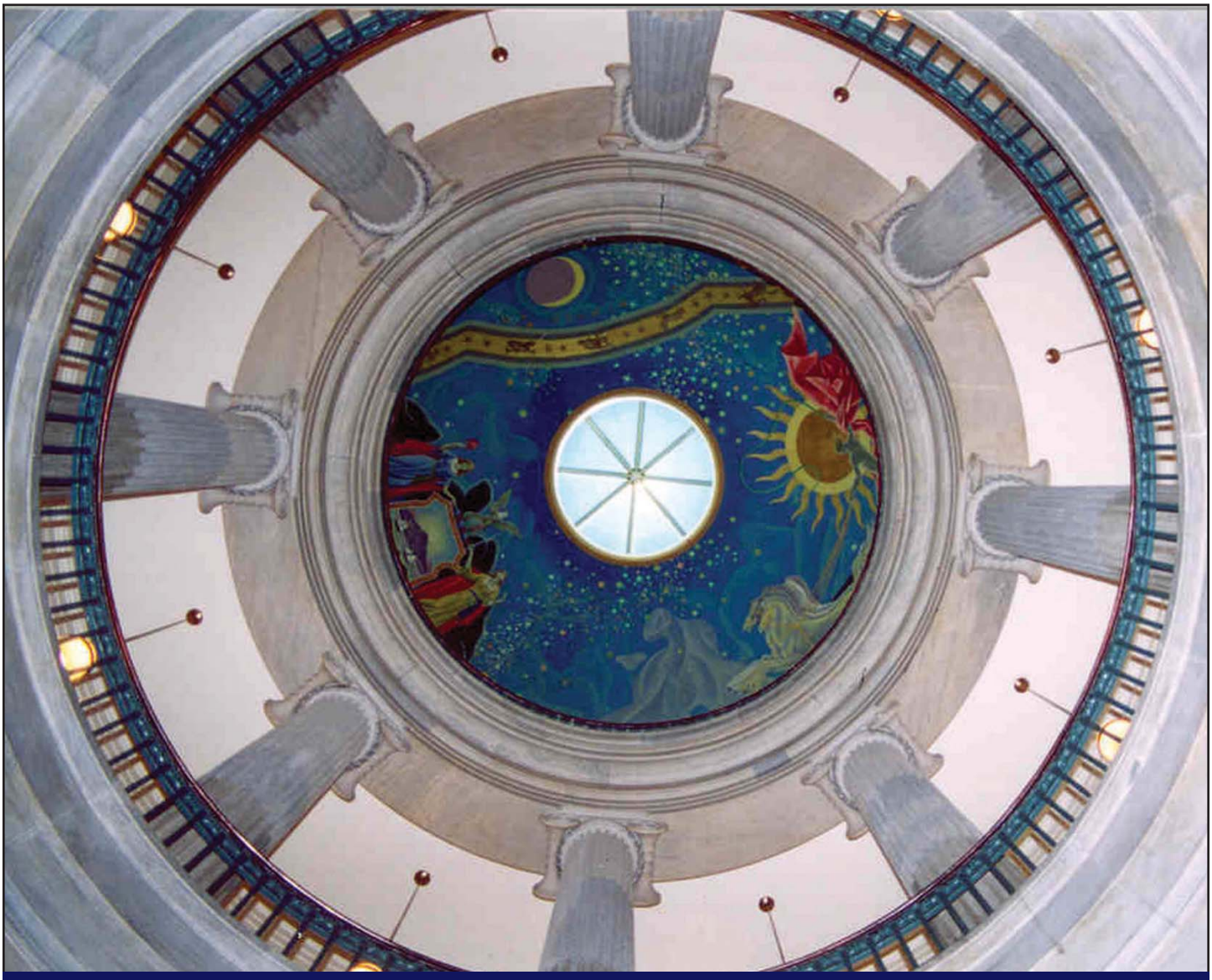
of the New York State Bar Association



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- Report on the Revised Uniform Arbitration Act
- Lawyer Advertising
- Discoverability of Communications Between Lawyers and their Experts

Commercial and Federal Litigation Section

2006-2007 OFFICERS

Chair:
Lesley Friedman Rosenthal
Lincoln Center for the
Performing Arts, Inc.
70 Lincoln Plaza, 9th Floor
New York, NY 10023
212-875-5125 (phone)
212-875-5122 (fax)
lrosenthal@lincolncenter.org

Chair-Elect:
Carrie H. Cohen
Office of the Attorney General
Public Integrity Unit
120 Broadway, 22nd Floor
New York, NY 10271
212-416-8242 (phone)
212-416-8026 (fax)
carrie.cohen@oag.state.ny.us

Vice-Chair:
Peter Brown
Thelen Reid Brown Raysman
& Steiner LLP
900 Third Avenue, 24th Floor
New York, NY 10022
212-895-2480 (phone)
212-840-2429 (fax)
pbrown@brownraysman.com

Secretary:
Susan M. Davies
Gregory P. Joseph Law Offices LLC
805 3rd Avenue, 31st Floor
New York, NY 10022
212-407-1208 (phone)
212-407-1274 (fax)
sdavies@josephnyc.com

Treasurer:
Vincent J. Syracuse
Tannenbaum Helpern Syracuse &
Hirschtritt LLP
900 Third Aveneue
New York, NY 10022
212-508-6722 (phone)
212-656-1916 (fax)
syracuse@thshlaw.com

Delegates to the House of Delegates:
Sharon M. Porcellio
Lippes Mathias Wexler Friedman LLP
665 Main Street, Suite 300
Buffalo, NY 14203
716-853-5100 (phone)
716-853-5199 (fax)
sporcellio@lippes.com

Lesley Friedman Rosenthal
Lincoln Center for the
Performing Arts, Inc.
70 Lincoln Plaza, 9th Floor
New York, NY 10023
212-875-5125 (phone)
212-875-5122 (fax)
lrosenthal@lincolncenter.org

Stephen P. Younger
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
212-336-2685 (phone)
212-336-2222 (fax)
spyounger@pbwt.com

Alternate Delegate to the House of Delegates:
Neil L. Levine
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12206
518-487-7600 (phone)
518-487-7777 (fax)
nll@woh.com

The *NYLitigator*

Editor
Bernard Daskal
Lynch Daskal Emery LLP
264 West 40th Street
New York, NY 10018

The *NYLitigator*

Student Editorial Board
St. John's University School of Law
W. Scott Holleman
Student Editor-in-Chief

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The 1,000 square foot mural, titled "Romance of the Skies," was painted in 1959 by Eugene F. Savage and appears in the lobby of the rotunda of the New York State Court of Appeals.

Message From the Chair

By Lesley Friedman Rosenthal

It is a pleasure to introduce this volume of *NYLitigator*, my first as Section Chair. My first encounter with this publication was, as good old Aunt Sadie might have said, before it was born, back when it was first a gleam in then-Section Chair and now-Association President Mark Alcott's eye.

Mark's vision for a Section journal was to create an outlet for all the good Section reports and other work that would otherwise not receive due attention and distribution after being completed by the authoring committee and considered by the Section Executive Committee. He placed the newborn *NYLitigator* in the capable hands of Cathi Hession, who set exceptional editorial standards for the publication that carry through to this day. I succeeded Cathi as Editor-in-Chief, and I vividly remember editing its pages while I was holding an actual baby—my own son, now 10—in my other arm.

NYLitigator has been, and remains, the Section's flagship publication, highlighting reports that have come out of committees, our "laboratories" of thought concerning judicial administration and potential enhancements to business jurisprudence in New York. Section Committees whose works are represented in this edition include the ADR Committee, the Committee on Professional Responsibility, the Bankruptcy Litigation Committee, and the CPLR Committee. These pages also report on the thrust of the Section's first-ever Leadership Conference in March 2006 and remarks from a most memorable Spring Meeting in May 2006 at Lincoln Center. Articles on topics of interest to our core audience of commercial litigators in New York State, commentary and reviews of recently published books round out the edition.

The Section is indebted to Bernard Daskal, who has recently taken over Editor-in-Chief duties from Jonathan Lupkin. We hope you enjoy this edition of *NYLitigator*, the product of a most productive Section.

Editor's Note: On March 25, 2006, the Commercial and Federal Litigation Section of the New York State Bar Association hosted a leadership development conference at Lincoln Center for the Performing Arts.

Remarks to the Commercial and Federal Litigation Section Leadership Development Conference

By Mark H. Alcott

I am currently preparing to take the helm of the New York State Bar Association, and the Sections are the lifeblood of the Association. So anything that enhances the Sections is very dear to my heart. And nothing is closer to my heart than the Commercial and Federal Litigation Section, not only because it is one of the crown jewels of the NYSBA, but also because this is where it all began for me.

The theme of this conference is Section leadership development. You are looking at one bar leader who was developed in this Section, and has gone on to other leadership positions, culminating in the presidency of NYSBA.

In my brief remarks this afternoon, let me address three relevant issues:

First: How did it happen? How did I become a leader of the Section?

Second: What was it like? What did I do as a Section leader?

Third: How did I benefit from these leadership opportunities?

To begin at the beginning:

In my early years as a lawyer, my participation in bar activities was minimal. I had

- a practice to develop,
- a family to raise,
- clients to satisfy,
- court deadlines to meet.

While I managed to find a few openings, even then, in the fog of billable hours, to meet the lawyer's obligation—and my own desire—for public service, the NYSBA was not high on my list.

Then one evening, about 20 years ago, I was sitting at my desk, minding my own business, trying to get out a set of papers in response to an order to show cause served by a hyper-aggressive adversary, when I was interrupted by a call. There, at the other end of a speaker phone, were Bob Haig and Mike Cooper. I did not know either, although their names were familiar. How they got *my* name remains a mystery to this day.

Haig did most of the talking. (Some things never change.) He told me that the State Bar, of which I was a long-standing, albeit not very active member, was forming a new Section to focus on commercial and federal litigation—the New York equivalent, he said, of the American Bar Association's highly regarded Litigation Section. Haig and Cooper were, respectively, the Chair and Chair-Elect. They wanted me to chair a Section Committee: the International Litigation Committee.

That struck a responsive chord. International litigation was a great interest of mine; but, at the time, it was not a recognized field of practice—no treatises (although now there are dozens); no CLE courses (although now there are legions); and certainly no bar association committees. Here was a chance to make an impact in an unexplored area of the practice.

"[N]othing is closer to my heart than the Commercial and Federal Litigation Section. . ."

Without much ado—and, certainly, without much sense of what I was letting myself in for—I said "Yes."

Then Haig cleared his throat and said there was one further detail. Committees were obligated to produce three reports a year, on topics of current interest; and the committee chair, who would serve for a three-year term, had to make a commitment that those three annual reports would get done.

I have since learned that Haig has spent a lifetime obtaining excessive commitments like this. But in those days, what did I know? I said I would do it, and so began a 20 year adventure.

That very night opportunity knocked for another lawyer I know, of about my vintage, who was asked to chair another Section Committee. He said he was too busy just then, but maybe another time—and I do not think he has spent a tenth of an hour on Bar Association matters from that day to this. His loss.

In any case, I took on the assignment, and it was an exhilarating three years. Unlike some, who made the pledge to Haig, I saw to it that my Committee produced

nine (not ten, but not eight) reports over three years, on a variety of topics involving cross-border litigation and arbitration.

- All of them were approved by the Section;
- Several were approved by the House of Delegates of the State Bar, generating coverage in the legal and mainstream press; and
- One went all the way to the ABA, where it was approved by that Association's House of Delegates.

I am particularly proud of the latter. My committee recommended the creation of an International Criminal Court, and produced a persuasive report to that effect. Not my idea, but one that I championed. The ABA, always eager to seize and take credit for the ideas of others, jumped on the bandwagon. But they ultimately, albeit a tad begrudgingly, gave us credit, and I still have the article in the International Lawyer where they did so. 28 The Int'L Lawyer 475 (1994).

I knew I would enjoy the intellectual challenge of working with my committee to conceive, create and issue these reports. What I did not anticipate was how much I would enjoy debating them and sheparding them to approval, through the Section and the Big Bar; or how much I would enjoy and learn from the experience of sitting on the Section's Executive Committee, where, every month, we engaged in intimate dinner conversation with a leading federal or state judge, and then debated and voted on the reports and law reform proposals of other Section Committees.

"I knew I would enjoy the intellectual challenge of working with my committee to conceive, create and issue these reports."

At the end of those three years, I was asked to become a Section officer, on a three-year escalator to the position of Section Chair.

The request came from the incumbent Section Chair, Shira Scheindlin. You know her now as Judge Scheindlin of the United States District Court for the Southern District of New York, but then she was just a Section activist like me.

The request was formalized by Nominating Committee Chair Melanie Cyganowski. You know her now as Chief Bankruptcy Judge Cyganowski of the United States District Court for the Eastern District of New York, but she was then just a bar association colleague to me.

They told me my term as Section Chair would begin immediately after the term as Section Chair of Kevin Castel—you know him now as Judge Castel of the SDNY—and that I would be followed as Chair by Mark Zauderer—you know him now as the President of the Federal Bar Council. Kevin and Mark, likewise, were just Section colleagues in those days.

I said "yes." How could I say "no"? There was no turning back, and I have never regretted it.

And so, I became Chair of the Section; and among those who served on my Executive Committee were:

- Sid Stein—you know him now as Judge Stein of the SDNY;
- Nina Gershon—you know her now as Judge Gershon of the EDNY; and
- Andy Peck—you know him now as Chief Magistrate Judge Peck of the SDNY.

All of them were my Section friends and colleagues long before they became judicial luminaries.

I was Chair of the Section in the mid-90s. It was then one of the newer sections in the NYSBA. It had evolved from a NYSBA committee—the Committee on Federal Courts. So it is not surprising that, in its early year as a Section, we specialized in doing what a committee does best: studying issues in our field and writing reports that recommended reforms or changes in the law. The reports were of very high quality, and we became one of the most prolific Sections in that genre.

But there was something missing, and it was summed up by the remark of my predecessor, Kevin Castel: "Our members pay us $20-30 a year in dues. What are we giving back to them?"

That was very much on my mind when I became chair. And so, I innovated several new projects which would be relevant to our 2,000 members, most of whom were not involved in the writing of reports, and did not attend Executive Committee meetings. These included:

- The Spring Meeting, in a resort setting, crammed full of CLE programs, provocative debates, important speeches and enjoyable social events. Highlighting this event was a public service award, named in honor of—who else—our founder, Bob Haig. This event has become enormously popular.
- A task force on commercial litigation in the New York courts. It proposed the Commercial Division of Supreme Court. Then we worked with Chief Judge Kaye to implement the proposal. We became the godfather of the Commercial Division, sponsoring numerous programs and a continuing flow of ideas back and forth. This has been extremely important and beneficial to our members.

- *The NYLitigator*—our Journal. I still remember with pride, and cite in all my resumes, the article I wrote for the inaugural issue: 1 *NYLitigator* 1.
- The Fuld Award, at our Annual Meeting.

As Section Chair, I became more active in NYSBA-wide activities—professional, intellectual, political and social. I participated in meetings with other Section chairs, and came to know that extraordinary group of practitioners who are leaders in their respective fields. I attended the Section Chairs' annual dinner, the President's annual dinner and other key events of State Bar Week. I was invited to speak at numerous forums and panels and to lecture at CLE programs. I was sought after by the media and often quoted on important developments in my field—our field. I became known to, and I came to know, the leaders of the NYSBA.

"As Section Chair, I became more active in NYSBA-wide activities—professional, intellectual, political and social."

After completing my service as Section Chair, I became the Section's delegate to the House of Delegates.

At the requests of two NYSBA presidents (Max Pfeifer and Josh Pruzansky), I chaired two Special Committees: the CLE Special Committee and the Special Committee on Administrative Adjudication. Each wrote elaborate reports and made extensive proposals, many of which were implemented.

I did not seek any of these slots; I was appointed by others, without warning. They were enormously challenging and satisfying. Only then did I seek and obtain positions. First, I became an at-large member of the Executive Committee. Then I became a Vice President from District 1. Each of these made me a member of the Executive Committee and the House of Delegates. These are extraordinary bodies, and my membership thereon puts me at the cutting edge of the most profound issues affecting our profession.

What are the benefits? Most are obvious from what I have said; others are less so.

(1) First and foremost, a network of relationships with an exceptional group of people, many of whom have become my close friends.

(2) Engagement in, and impact on, the most important issues of the day.

(3) A very high profile in professional circles.

(4) Becoming well known to and respected by judges, court administrators and public officials.

(5) Referrals of new matters, and acquaintances with highly skilled lawyers to whom I can refer matters.

(6) An international reputation.

One anecdote that reflects much of what I have said: Last week, I was asked to address a major conference of lawyers in Buenos Aires. I had to reject it, because I am already committed to giving a speech, that same day, in Shanghai.

So, it has been a great ride; and, as the songwriter said, the best is yet to come.

Mark H. Alcott, a senior litigation partner at Paul, Weiss, Rifkind Wharton & Garrison, is the President of the New York State Bar Association. In 1994-95, he served as Chair of the Commercial and Federal Litigation Section of the New York State Bar Association.

Editor's Note: On May 5-7, 2006, the Commercial and Federal Litigation Section of the New York State Bar Association held its 2006 Spring Meeting at Lincoln Center for the Performing Arts. The title of the 2006 Spring Meeting was "The Art of Commercial Litigation." The Meeting was chaired by Section Chair Leslie Friedman Rosenthal, who is Vice President, General Counsel, and Secretary of Lincoln Center for the Performing Arts, Inc. On May 6, 2006, the Section presented the Robert L. Haig Award for Distinguished Public Service to the Honorable John M. Walker, Jr., Chief Judge of the United States Court of Appeals for the Second Circuit. The Award was presented to Judge Walker by the Hon. Pierre N. Leval, Circuit Judge of the United States Court of Appeals for the Second Circuit.

Presentation of the Commercial and Federal Litigation Section's Robert L. Haig Award for Distinguished Public Service to Hon. John M. Walker, Jr.

By Hon. Pierre N. Leval

I heard it told earlier this week that philosophers ponder whether there is such a thing as too rich, or too thin, or, in the case of an introductory speech, too short. (I have perhaps already gone on too long.) An equally tantalizing question is whether there can be such a thing as a person who is too fine, or a record of public service which is too distinguished. If so, John Walker surely tests the boundaries. It is difficult to imagine a more distinguished record of public service—or a finer person.

John has been my dear and valued friend for over 20 years, since he joined me as a judge of the United States District Court. My high opinion of him dates from much earlier—from a time when I knew him only as a litigation adversary. I will take a couple of minutes to tell you that story because I think it will have special resonance for an audience of litigators.

When I was in private practice, I was appointed *pro bono* to handle the appeal of a defendant convicted in a massive 17-defendant narcotics conspiracy case. He received a substantial prison sentence.

My defendant was at most peripheral. Unquestionably, telephone records established that in a two-week period he had made about 20 telephone calls to the main defendant, who was a major drug dealer. When I studied the record however, I was astonished at the absence of evidence that those contacts involved narcotics. As I argued, it was sheer speculation whether the relationship concerned narcotics. I tried on the appeal to convince the court that the evidence was legally insufficient. I failed. The Court of Appeals affirmed.

I went back to the district court, and moved for reduction of sentence. It was an unusual motion—a motion not likely to succeed. It was premised on the high likelihood that the defendant had been erroneously convicted of a crime he did not commit. I meticulously laid out all the evidence to show how speculative was the inference that my defendant was involved in narcotics.

The judge—not surprisingly—denied my motion out of hand, but added casually that I had misrepresented the record, as there was substantial additional unspecified evidence of the defendant's guilt not mentioned in my papers. I was distraught that the judge had impugned my integrity. I went to see the Assistant United States Attorney—frankly not expecting to receive sympathy, much less assistance, from one who had no reason to help me. To my astonishment, the Assistant responded most graciously. The evidence, he confirmed, was exactly as I had stated it; and he would willingly put that in an affidavit to the court. That is John Walker—a class act. For the last 20 years that I have been his colleague, I have never seen him deviate from that honorable standard.

"It is difficult to imagine a more distinguished record of public service—or a finer person."

John Walker's record of public service to the United States has been exceptional. As I mentioned, he served early in his career as an Assistant United State Attorney, and was one of the stars of the great Southern District office. After a few years in private practice, he became Assistant Secretary of the Treasury for Enforcement and Operations, supervising the entire Treasury's law enforcement bureaus: Secret Service, Customs, and Alcohol & Tobacco—to name a few. He was awarded the Treasury's highest distinction. In 1985 he became a district judge in the Southern District of New York, and in 1989, a judge of the United State Court of Appeals. In 2000, he became Chief Judge.

His judicial record has been extraordinarily fine. He has produced a huge body of finely tuned, thoughtful, well-crafted, responsible opinions, covering virtually every area of the vast jurisdiction of the federal courts. To become Chief Judge, all you need is seniority. But to be a

great Chief Judge, you need immense doses of humility, tact, patience, humor, intelligence, imagination, energy, perseverance, persuasiveness, and the respect of your colleagues. John is richly endowed with all of those. His tenure as Chief Judge of our court has been spectacularly successful.

"[B]uilding on his vast judicial experience, Judge Walker served on numerous educational missions to teach around the world about the huge value of judicial independence."

John's record of public service goes way beyond service to the United States. Immediately following his graduation from law school, he was awarded a two-year Asia-Africa Public Service Fellowship to Botswana. He worked there compiling a codification—a sort of Restatement—of the unwritten tribal law of the Tswana Nation. He went to the tribal villages, painstakingly interviewing the tribal elders who served as judges, putting carefully constructed hypothetical questions so as to extract the principles of the customary tribal law, which he later compiled.

No matter how simple the structures of society, legal problems inevitably find their way to complexity. I have tried to imagine John's intricate hypothetical questions, put to the tribal elders.

A entrusted with the care of B's cow, ties the cow to a tree, and goes off to hunt crocodiles. The cow lies down in the shade of the tree. C, wishing to sleep in the shade where the cow is lying, unties the cow, which escapes and tramples D's melon patch. The cow frightens E, who is carrying on her head a jug of water belonging to F. F's jug falls and breaks.

Is D or F owed an indemnity by A? By B? By C? By E?

Who now owns the cow?

More recently, building on his vast judicial experience, Judge Walker served on numerous educational missions to teach around the world about the huge value of judicial independence. He was part of a delegation of United States judges invited to confer with the Supreme Court of China. He traveled to Bahrain to advise the judicial leadership of 15 Arab nations on the rule of law. He has lectured on constitutional law at the Iraqi Constitutional Conference. And he has made three visits to Albania to help the democratic leadership of that struggling country develop a judicial system.

John Walker is certainly a distinguished and outstanding public servant—not only of the United States, but of the world.

It is a great honor for me to present the Commercial & Federal Litigation Section's Robert Haig Award for Distinguished Public Service to a truly distinguished public servant—John M. Walker, Jr.

Reforming the Administration of Justice in Emerging Democracies—A Role for the Bar

By Hon. John M. Walker, Jr.

Tonight I want to talk to you about the serious problem of dysfunctional judicial systems abroad, particularly in the emerging democracies and economies of the world. And then I am going to suggest how, as lawyers and members of the New York State Bar Association's Commercial and Federal Litigation Section, you might assist in dealing with this problem. And finally, I will close with why I think you would want to play a leadership role in this endeavor.

First some background.

You are litigators in a mature system of law that vindicates the will of the people that disputes of all kinds be resolved in a way that is prompt, effective, and fair. Ours is a legal system that prides itself on process. The manner in which disputes are resolved is at least as important as the outcome. We know that justice must not only be done; it must be seen to be done, and with fairness and impartiality. And the fact of the matter is that our judicial system, with all of its blemishes, works. It has the confidence of the citizenry, by and large, and is the envy of the world.

There are many reasons why this is so, and I don't have time to mention them all. But they include the nature of our legal education, the traditions of the bench and bar, the high standards of professional competence and integrity that are demanded of lawyers and judges, our insistence that rules and codes of conduct be adhered to, and, more generally, the strong habits of litigating and of judging built upon two hundred years of tradition. In our system, when reforms are needed, they are forthcoming. Lawyers and judges in this country share an understanding of how the system ought to work and they insist that it do so. In short, we have a profound and fully developed culture of law and of litigation. And at the center of this culture, indeed the bedrock of our system of laws, is the idea and the reality of an independent judiciary.

The late Chief Justice Rehnquist, with good reason, called our independent judiciary the crown jewel of our constitutional democracy. An independent judiciary, a judiciary free from corruption and improper influence, is fundamental to our society of ordered liberty. Hamilton said in *Federalist No. 78* that "[t]here is no liberty, if the power of judging be not separated from the legislative and executive powers. . . . Liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments." And as former Justice Sandra Day O'Connor has said, "judicial independence is not an end in itself, but a means to an end. It is the kernel of the rule of law, giving the citizenry confidence that the laws will be fairly and evenly applied."

Why do I open these remarks with a familiar hymn of praise to our independent judiciary? I do so because when one looks over the legal systems of the world, an independent judiciary is more the exception than the rule. It is virtually non-existent in autocracies where so-called "justice" belongs to the dictator. And, in democracies newly emerging from totalitarianism, true judicial independence is frequently still an aspiration.

It is no accident that many emerging countries are seeking to model their judiciaries, with necessary variations, upon the principles of judicial independence that Americans hold dear. As you have heard, I have had the opportunity to see how some of the legal systems elsewhere in the world operate and the picture is not always pretty.

"[T]he fact of the matter is that our judicial system, with all of its blemishes, works."

In China, even the Supreme People's Court has recognized the existence of what they call "local protectionism": The unwillingness of local courts to rule against established local interests. This is epitomized by a pattern of "telephone" justice which is the practice whereby a judge telephones the local communist leader for advice on how to decide a case.

In Albania a few years back, a Chief Justice was removed from office by a powerful Prime Minister and a compliant parliament after eight minutes of deliberation for his audacity in holding a conference of judges to promote the idea of judicial independence.

A former Chief Justice of an Asian nation learned of his removal by reading it in the newspaper. And in the Philippines under Ferdinand Marcos, the Minister of Justice unabashedly argued that justice for the people occurs when the judiciary follows the executive. And based on my experience, these examples are not isolated phenomena.

Corruption and other threats to the independence of many of the world's judiciaries are not confined to the problem of an overbearing or controlling executive or political party. Individualized corruption occurs as well. In our country, such judicial criminality is rare and when

it is uncovered, the consequences tend to be swift and severe. But in many countries, and to varying degrees, improper influences on judging are tolerated. Corruption also occurs in more subtle ways: it occurs whenever a judge favors a particular interest—whether personal, political, or financial—over the dictates of the law. The result is that litigants do not always get just results, citizens' trust in their legal system is undermined, and the rule of law is compromised.

Several prominent organizations have recognized the need for action to combat judicial corruption broadly defined. The World Bank is vitally interested in the problem of corruption generally in developing countries. Obviously, it does not want to see its lending programs frustrated by corruption in business and government. In denouncing corruption, the Bank's former President, James Wolfensohn, spoke of the demand in country after country for action to deal with the problem which "diverts resources from the poor to the rich, increases the cost of running businesses, distorts public expenditures, and deters foreign investors."

"[I] can think of no reason why the New York State Bar Association should not immediately undertake to offer the services of New York lawyers on a pro bono basis to assist with the reforms of these foreign legal systems."

The current president of the Bank, Paul Wolfowitz, has recognized that the general problem of corruption in business and government generally cannot properly be addressed in any country unless the judiciary of that country is healthy and functioning properly, without the taint of corruption among its judges. The World Bank is currently devoting its energy and resources to judicial and legal reform in the countries to which it lends and proposes to lend.

The American Bar Association is also very active in this area. My trips to Albania were sponsored by the ABA's Central European and Eurasian Law Initiative, known as CEELI. CEELI was formed after the Berlin Wall came down and, over the past 15 years, has placed permanent legal representatives in Eastern Europe, the Middle East, and Central Asia to advise on legal and judicial reform. The Departments of Justice and State also support international prosecutorial and court reform initiatives. And the Judicial Conference of the United States, on which I sit, has a Committee on International Judicial Relations which coordinates international judicial reform activities.

As these organizations have recognized, transforming the judiciaries of developing countries is essential to preserve liberty and to allow democracy to flourish. It is also, not coincidentally, good for business in this country and for the world economy. The task is a formidable one and it will take time; old habits learned under totalitarian regimes must be broken. Judges must be taught to abide by ethical codes. Improper incentives must be removed. Judges need to be paid a reasonable wage to reduce temptations. Judges must not be subject to removal from office or other disadvantage because of unpopular decisions. Judges in turn must learn what it means to be truly independent and to issue rulings, if the law requires it, against the powerful and elite interests of their society.

As I stand here tonight, I can think of no reason why the New York State Bar Association should not immediately undertake to offer the services of New York lawyers on a pro bono basis to assist with the reforms of these foreign legal systems. You have the knowledge and the resources to assist them. The type of assistance that is often needed does not involve complex issues of international or comparative law. Nor does it require extensive knowledge of the laws or governmental systems of the nations in need of aid. Instead, what is needed is simply a familiarity with the general principles underlying a properly functioning system of justice free of improper influences. These principles are not unique to any one Nation's judiciary; they are universal and applicable to all legal systems. Thus, despite the wide variety of cultures, histories, and political structures in the countries in need of aid in this area, what is necessary is the development of structures, mechanisms, and practices with which you are already familiar.

Here is just a partial account of the specific work that is needed to foster judiciaries and legal systems that will serve the public with integrity, competence, promptness, fairness, and transparency:

- the promulgation and enforcement of codes of conduct for judges and lawyers;
- the development of the means to monitor compliance with ethical constraints and to enforce them;
- urging the passage of legislation and promulgation of rules to promote impartial judicial administration and drafting these laws and rules;
- the training of judges on judicial independence and freedom from improper influence;
- ensuring that judicial protections against removal from office and diminishment of pay are in place and urging fair compensation for judges; and
- the development of strong reform-oriented bar associations and law schools.

And the list goes on. In short, all of the fundamental elements of an honorable bench and bar with which we are familiar must be brought into the culture of legal systems in places that have not had the benefit of two centuries

of experience with a successful constitutional democracy and its attendant system of laws. Remember, what we consider to be part of a basic civics lesson is often novel and alien to citizens of countries emerging from totalitarian rule. They have not been raised to respect the rule of law or even understand it, much less expect their judicial officers to safeguard it against government officials, criminals, or special interests who hope to improperly influence their decisions. Thus it is your day-to-day participation in the American legal system that best prepares you to offer assistance to those nations striving to instill the same ideals that we hold dear into their own legal systems. What must be done will vary, of course, from country to country. The work requires that foreign views be understood and respected. Each country has its own needs and will pose its own set of challenges. But the importance of independent judiciaries to the future of our interconnected world transcends national boundaries and cultural differences.

As I close, I want to tell you why I think you should undertake such a project. There are really two reasons.

First, lawyers today are increasingly representing clients that do business throughout the world, including emerging democracies, and I don't have to tell you that the client who brings its goods and services to a developing country will want its legal system to be prompt, fair, and effective. So you should take an interest in what I am offering you tonight for purely professional reasons.

Second, and just as important—if not more so—your contributions will take you beyond the normal routines of your practice. You will have to think in new ways and face new challenges. It will help define you as a person, and perhaps it will enable you to say to your children and grandchildren that you tried in this way to leave this world better off than you found it.

The fact is that, like it or not, none of us exists in isolation; each of us is part of the world community of peoples and nations. Let me close with the words of John Dunne, penned in 1623:

> No man is an island, entire of itself; Every man is a piece of the continent, a part of the main. If a clod is washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were;
>
> Any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.

Thank you very much.

Editor's Note: The following was penned by Associate Judge Albert M. Rosenblatt of the New York Court of Appeals as part of his presentation at the Lawyers & Lyrics portion of the Commercial and Federal Litigation Section's Spring Meeting.

ALBERT M. ROSENBLATT
May 6, 2006 at Lincoln Center
(Cole Porter)

♬

"I get no kick from champagne . . . ."
(or, in the hands of the wrong lawyer):

Your deponent neither acquires
nor receives any podiatric incentive
from a carbonated
liquid compound defined in
Section 3 of the Alcohol & Beverage
Control Law of the State of New York.

* * *

♬

So tell me why should it be true . . . .
That I get a kick out of you.

—Therefore, you are hereby requested to produce any and all correspondence and logs, including but not limited to e-mails, letters, and recorded conversations in order to establish a suitable explanation as to the reason the party of the first part receives a podiatric incentive from the party of the second part.

♪

♬

Lane Violation: Solving a Mountainous Problem as if it Were a Molehill

By Craig Rokuson

For almost 30 years,[1] there has been an uneasy tension between Congress' power under Section 5 of the Fourteenth Amendment,[2] the power granted to the states under the Eleventh Amendment,[3] and the Supreme Court's power under *Marbury v. Madison*.[4] In the past ten years, that tension has become more pronounced.[5]

In *City of Boerne v. Flores*,[6] the Supreme Court held that while Congress has broad power under Section 5, that power is only remedial.[7] In other words, Congress cannot find any new substantive Fourteenth Amendment rights under Section 5.[8] Cases following *Boerne* have attempted to draw the line between remedial and substantive measures taken by Congress under Section 5.[9] In order to determine whether a law is substantive or remedial, a Court must determine whether the law exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[10] Until 2003, whenever the Court utilized this test, it found statutes passed under Section 5 to be unconstitutional.[11]

In 2003, in *Nevada Dept. of Human Resources v. Hibbs*,[12] the Court for the first time since it announced its test in *Boerne* upheld a Section 5 statute.[13] In the majority's opinion, Congress was utilizing its remedial power in the gender discrimination context.[14] The Court pointed to a history of gender discrimination, citing the examples of women being prohibited from tending bar and practicing law, and the present stereotypes utilized in leave benefits.[15] Because of that evidence, Congress was not substantively creating a new right, but enforcing an already recognized one.[16]

In 2004, the Supreme Court, in *Tennessee v. Lane*,[17] found state abrogation in the context of access to the courts for the disabled to be a valid exercise of Congress' Section 5 power. It stated that when a state threatens a recognized Fourteenth Amendment fundamental right, a searching judicial inquiry is necessary.[18] However, only two fundamental rights have been recognized as incorporated into the Fourteenth Amendment.[19] Title II of the Americans with Disabilities Act ("ADA") deals with discrimination against the disabled in government services.[20] While the act covers discrimination which has no relation to fundamental rights,[21] Justice Stevens, in his majority opinion, did not think it necessary to decide whether Congress can abrogate under Title II in its entirety.[22]

Obviously, a limited ruling like this creates more questions than it answers.[23] Lower courts now know that states can be sued under Title II of the Americans with Disabilities Act, but can a disabled person sue a state for money damages under any other provisions of Title II?[24] The thesis of this article is that while the Court used an "as applied" analysis, *Lane* actually makes it significantly easier for a disabled person to bring a claim against a state under Title II. Part I of this article examines, in depth, the *Lane* opinion. Part II looks at the cases decided after *Lane* and concludes that a significant amount of disagreement exists between the circuits. Part III suggests that, after *Lane*, an argument now exists that Congress can in fact abrogate under Title II in its entirety. Part IV argues that *Lane* reveals the practical difficulties in applying the congruence and proportionality test to legislation under Section 5, and further argues that a test which recognizes Congress' power to interpret the Fourteenth Amendment would be more in line with the text and intended functioning of that Amendment.

I. *Tennessee v. Lane*: Title II Is (Partially) Valid Under Section 5

In *Lane*, plaintiffs George Lane and Beverly Jones filed an action for both equitable relief and money damages against the State of Tennessee.[25] Lane, a paraplegic, alleged that he was compelled to appear in court, and had to crawl up the stairs of a county courthouse which had no elevator.[26] On his second trip to the courthouse, Lane refused to crawl up the stairs again or be carried up by court personnel, and subsequently was arrested and jailed for failure to appear.[27] Jones, who is also a paraplegic, alleged that, as a court reporter, she was not able to access several courts, and had lost job opportunities and an opportunity to participate in the judicial process.[28]

The question before the Supreme Court was whether Title II abrogation was unconstitutional.[29] Justice Stevens wrote the majority opinion for the Court, joined by Justices Breyer, Ginsburg, O'Connor, and Souter.[30] He began by stating that Title II deals with more fundamental services than Title I.[31] Justice Stevens put great weight into the fact that Congress held extensive hearings on Title II and made specific findings.[32] He then proceeded to apply Title II to the test set forth in *Boerne* for when Congress can abrogate a state's sovereign immunity.[33] There are two prongs to the Boerne test: 1) whether Congress unequivocally expressed intent to abrogate state immunity and 2) whether Congress acted pursuant to a grant of constitutional authority.[34] The first prong of this test was easily satisfied.[35] However, the pressing question was whether this was a valid abrogation under the Fourteenth Amendment.[36]

Justice Stevens reaffirmed Congress' broad abrogation power under the Fourteenth Amendment.[37] While Congress can enact prophylactic legislation that is only designed to combat conduct that is solely discriminatory in effect,[38] it cannot, under section 5, enact "substantive

changes in the governing law."[39] The Court then went through the steps set out in *Boerne.*[40]

The first step was to identify the constitutional right or rights that Congress sought to enforce when it enacted the legislation.[41] Title II was enacted to protect two constitutional rights: irrational discrimination against the disabled[42] and, as applied to this case, to protect access to the courts.[43] Justice Stevens stated that Title II would only be valid if it was enacted to protect constitutional rights.[44] It was undeniable, in the Court's view, that Title II was enacted to combat a history of unequal administration of public services. After quoting several studies and congressional hearings, Justice Stevens concluded that there was sufficient evidence for Congress to use its prophylactic power.[45] The Court also concluded that, because access to the courts called for a more searching judicial review, it was easier to find a pattern of state constitutional violations.[46] However, it did not limit its review of studies and hearings to the fundamental right of access to the courts.[47]

Turning to whether Title II was an appropriate response to this discrimination, Justice Stevens found it necessary to limit the scope of the inquiry.[48] Because it reaches such a wide variety of official conduct, the Court decided to look at Title II just as it applies to access to the courts. [49] As applied, the Court found a long-standing and still persistent unequal treatment of disabled persons in the courts.[50] Further, this discrimination had not been remedied by past legislative efforts; therefore, additional prophylactic measures were warranted.[51]

The Court found that the remedy was also sufficiently tailored in that the only changes the states were forced to make were "reasonable" ones.[52] The duty to accommodate and make these reasonable changes was consistent with the fundamental right of access to the courts.[53] Justice Stevens concluded that, as applied, Title II was a valid exercise of congressional power.[54]

Justice Souter, joined by Justice Ginsburg, submitted a concurrence, which mentioned some examples of judicial endorsement of discrimination of the disabled.[55] He welcomed the Court's decision as a step away from that endorsement.[56]

Justice Ginsburg, joined by Justices Souter and Breyer, also submitted a concurrence of her own.[57] In her opinion, she spoke about how Title II, as applied, does not offend any principles of federalism.[58] She did not see why it was necessary, as suggested by Justice Scalia, to prove that each state had committed constitutional violations before enacting legislation under section 5 of the Fourteenth Amendment.[59] Justice Ginsburg pointed out that members of Congress would be reluctant to point out their states as constitutional violators.[60] It was enough that Congress was able to show that there was a history of constitutional violations across diverse parts of the country in various levels of government.[61]

Chief Justice Rehnquist, joined by Justices Kennedy and Thomas, filed a dissenting opinion.[62] The Chief Justice could not differentiate this case from *Garrett*,[63] in which the Court held that Congress did not validly abrogate sovereign immunity with respect to Title I of the Americans with Disabilities Act.[64] He concluded that Title II actually "'substantively redefine[s],' rather than permissibly enforces, the rights protected by the Fourteenth Amendment."[65] The Chief Justice reached this conclusion by subjecting Title II to the three-step test announced in *Boerne*.[66]

The Chief Justice recognized the difficulty in identifying the constitutional right at issue in Title II because it protected many constitutional rights of disabled persons.[67] However, the Chief Justice accepted the "as applied to access-to-the-courts" scope of rights announced by the majority opinion.[68] The next step was to determine whether Congress had identified a history of state constitutional violations.[69] Here, Chief Justice Rehnquist did not believe Congress had identified widespread violations of due process.[70] The Chief Justice found that most of the evidence put forth by Congress did not apply to access to the courts.[71] In addition, even if this evidence were considered, much of it did not rise to the level of unconstitutional discrimination by the states.[72] First, in the Chief Justice's view, any discrimination by non-state governments cannot be examined.[73] Second, any anecdotal evidence is also irrelevant.[74]

The Chief Justice then examined the congressional evidence as it applied to access to the courts.[75] He stated that there is nothing in the legislative record to indicate that disabled persons were systematically denied access to the courts[76] and found it telling that the majority was only able to cite to two reported cases finding a disabled person's access to the courts violated.[77]

According to the Chief Justice, the only evidence left was anecdotal evidence which was supplied not to Congress, but to a task force.[78] Furthermore, even if this anecdotal evidence could be considered, an architecturally inaccessible courthouse does not rise to the level of a constitutional violation because a violation occurs only when a person is actually denied access.[79] The Chief Justice concluded that there was little or no evidence of constitutional violations and that there was certainly no evidence of a pattern of violations.[80]

The final step in the inquiry is to "ask whether the rights and remedies created by Title II are congruent and proportional to the constitutional rights it purports to enforce."[81] The Chief Justice characterized Title II as requiring "special accommodations for disabled persons in virtually every interaction they have with the State."[82] Because Title II requires state action, it does far more than enforce the Fourteenth Amendment's Equal Protection guarantee against irrational discrimination against the disabled.[83] Also, due to the fact that Title II applies to all public services, it is not solely tailored to the access to courts.[84] The Chief Justice also took issue with the "as ap-

plied" approach, stating that in the congruence-and-proportionality test, the Court must measure the scope of the constitutional rights that the statute purports to enforce.[85] It is here that Justice Rehnquist accuses the Court's analysis as creating a hypothetical statute.[86]

"The circuits have all tried to 'follow' Lane, but it seems that there are different ideas as to what 'following' this ruling constitutes."

Finally, even if the Court was correct and Title II could be tested "as applied," it cannot be seen as congruent and proportional because, even in absence of a due process violation, it subjects states to lawsuits if they fail to make reasonable modifications to facilities.[87] In the Chief Justice's view, Congress did nothing to limit abrogation to cases where there would be a likely due process violation.[88]

Justice Scalia submitted his own dissent.[89] After a very brief review of the Court's section 5 jurisprudence, Justice Scalia expressed his dissatisfaction with the Court's congruence-and-proportionality test.[90] According to Justice Scalia, a test like this has a way of turning into a vehicle for implementation of individual judge's policy preferences.[91] Justice Scalia then suggested his own test for section 5 of the Fourteenth Amendment, which would limit Congress to simply *enforcing* the provisions of the Fourteenth Amendment and not issuing any broader prohibition.[92] The two contexts in which Congress may enforce the Fourteenth Amendment are those that create a cause of action through which a citizen may vindicate his Fourteenth Amendment rights[93] and those which impose requirements related to the facilitation of enforcement, like reporting requirements.[94]

Justice Scalia also stated that section 5 should be given a more expansive scope in the racial discrimination context.[95] In the racial context, Justice Scalia would be deferential to Congress, subject to certain requirements.[96] If those requirements are met, the constraints would be no tighter than the Necessary and Proper Clause.[97] When congressional regulation is not aimed at racial discrimination, Congress should only be able to enforce the Fourteenth Amendment and not go beyond.[98]

Finally, Justice Scalia applied his new test to the facts of the case and, unsurprisingly, decided that providing disabled access to all public buildings couldn't possibly seen as a means of enforcing the Fourteenth Amendment.[99]

Justice Thomas, a dissenter in *Hibbs*, submitted a very brief dissent, in which he disavowed any reliance on *Hibbs* in the Chief Justice's dissent.[100]

What did *Lane* really say? Just two years earlier, in *Garrett,* four of the Justices who joined with Justice O'Connor to form the majority in *Lane* dissented to the Court's ruling that Congress could not abrogate state sovereign immunity under Title I of the Americans With Disabilities Act. In other words, in an area that a state need only pass a rational basis test, employment, Justices Breyer, Stevens, Ginsburg and Souter found both a history of unconstitutional discrimination and that Title I is tailored to address that unconstitutional discrimination. It is a safe assumption that these four justices would hold under the entirety of Title II, which involves governmental services, Congress can validly abrogate as well. However, as the Chief Justice mentioned, Title II protects not just access to the courts, but also public buildings like public hockey arenas. To gain the vote of Justice O'Connor, the majority had to limit its holding only to access to the courts.

The circuits have all tried to "follow" *Lane*, but it seems that there are different ideas as to what "following" this ruling constitutes.

II. Cases After *Lane*: Confusion in the Circuits

Since *Lane,* several district courts have taken up the question of whether Congress can validly abrogate under Title II in the context of a disabled person seeking admission to a state bar.[101] In *Roe v. Johnson*,[102] the Southern District of New York held that "because of the absence of legislative findings establishing a pattern of unconstitutional discrimination in this context, this application of Title II is not a valid exercise of congressional power under Section 5 and does not abrogate a state's Eleventh Amendment immunity."[103] The Western District of Texas was faced with the same question in *Simmang v. Texas Bd. of Law Examiners*, and held the same way, stating that the holding in *Lane* was founded squarely on the source of the right asserted.[104] There, the court found that the Texas Board of Law Examiner's refusal to provide double time for plaintiff taking his bar examination did not amount to a deprivation of a fundamental right.[105] Both cases did not find *Lane* to speak on anything but the right of access to the courts.[106]

Several cases have also been decided in regards to discriminatory treatment of disabled prisoners, and in *Miller v. King*, the Eleventh Circuit held that Title II did not properly abrogate in that context.[107] Under the *Boerne* test, the right at issue was plaintiff's Eighth Amendment right against cruel and unusual punishment.[108] The second step requires the court to determine whether Congress has identified a history and pattern of unconstitutional discrimination by the states.[109] Here, the Eleventh Circuit concluded that *Lane* had put forth enough history of unconstitutional discrimination as it applied to all public services.[110] Therefore, every Title II claim satisfies the second step of the *Boerne* inquiry.[111] However, Miller's claim was thrown out under the third prong: Title II would substantively change the Eighth Amendment, in that the Eighth Amendment is a negative guarantee (that authori-

ties will abstain from cruel and unusual punishment) and Title II is a positive obligation to accommodate individuals with disabilities.[112] The court found that Title II was not a prophylactic protection of the Eighth Amendment's guarantee because it applied to, "any service, program, or activity provided by the prison."[113] Because of that, Title II, in this context, did not validly abrogate sovereign immunity.[114]

In *Cochran v. Pinchak*, a divided panel of the Third Circuit held that a blind prisoner who was denied talking books, a talking watch, a useable lock and a walking cane could not sue New Jersey under Title II.[115] In applying the *Boerne* test, the court first noted that the plaintiff asserted the right to be free from invidious discrimination.[116] Second, the court accepted that *Lane* discussed discrimination in public services generally, not just in context to access to the courts.[117] Therefore, the court concluded that under *Lane*, Title II in its entirety satisfies the second part of the *Boerne* analysis in that Title II was passed in response to a history of unconstitutional discrimination by the states.[118]

The final step of the *Boerne* analysis was a problem for the *Cochran* court. Unlike *Miller*, the Third Circuit did not analyze plaintiff's claims under Title II in the context of the Eighth Amendment, but rather the Equal Protection Clause of the Fourteenth Amendment.[119] The court discussed the *Turner* principle: that courts should practice judicial restraint in cases involving prisoners' rights.[120] The *Cochran* court stated that all of the prison's actions could be rationally related to a legitimate governmental interest: canes, tapes and tape players could be turned into weapons, and a talking watch could be distracting to other prisoners.[121] Because states are permitted to classify disabled people in this way, and Title II reaches disabled people in all governmental services and programs, Title II was not proportional to the discrimination it sought to eradicate.[122] Therefore, the remedy of abrogation was not constitutional.[123]

Chief Judge Sciria disagreed with the majority's third prong assessment in his dissent. He began by stating that simply because a statute passed by Congress under its Section 5 power reaches conduct that is permissible under the Fourteenth Amendment, the statute is not automatically unconstitutional.[124] The Chief Judge agreed with the majority in that Congress had put forth evidence of a pattern of unconstitutional discrimination, but he also cited specific instances of discrimination against disabled prisoners.[125] The Chief Judge then focused on the "reasonable modifications" remedy.[126] Because Title II only required reasonable modifications, those modifications were only required when the person seeking modification was otherwise eligible for the service.[127] Furthermore, because the modification requirement could be satisfied in a number of ways,[128] Title II was appropriately targeted to a legitimate end, and was thus congruent within the meaning of the *Boerne* test.[129]

Finally, in the prison context, Judge McMahon of the Southern District of New York took a broad interpretation of *Lane* in *Carrasquillo v. City of New York*.[130] Without analysis, he stated that *Lane* stood for the proposition that Congress could validly abrogate under the ADA.[131] It appears that Judge McMahon believes that in any context, the states cannot claim sovereign immunity. The complaint was dismissed, however, because the plaintiff did not exhaust administrative remedies.[132]

The broadest reading given to *Lane* by far was that of the Ninth Circuit in *Phiffer v. Columbia River Corr. Inst*.[133] There, without much analysis, the Ninth Circuit found *Lane* to be consistent with its earlier decision that Congress could validly abrogate under any claim brought under Title II.[134] Judge O'Scannlain agreed that *Lane* was consistent with the Circuit Court's *en banc* opinion in *Dare v. California*,[135] but did warn that there was tension between the Ninth Circuit's Title II interpretation and the guidance of the Supreme Court, in that *Lane* called for a case-by-case inquiry.[136] In *Dare*, the Ninth Circuit found a history of unconstitutional discrimination in all areas of public service, very similar to that found in *Lane*.[137] However, with respect to the final prong, the court gave great deference to Congress, saying that its findings were sufficiently extensive and related to the provisions of the ADA so as to make the ADA a congruent and proportional exercise of Congress' Section 5 power.[138]

The districts of Maryland and Connecticut have engaged in similar reasoning as the *Roe* and *Simmang* courts: if the right asserted is not fundamental, Congress cannot abrogate.[139] In *McNulty v. Board of Education*, the Maryland district court found that Title II did not abrogate state sovereign immunity in the educational context.[140] The Fifth Circuit has also hinted that it will not allow abrogation under Title II if the right asserted is not fundamental.[141]

The Northern District of Ohio, in *Haas v. Quest Recovery Services*, has engaged in similar reasoning, concluding that there is no valid Title II abrogation if plaintiff's claims sound in equal protection and not due process.[142] In *Haas*, disabled plaintiff was sentenced to two six-day stays at a drug and alcohol treatment facility.[143] She alleged that the facilities did not contain reasonable accommodations for her, such as an elevator or handicapped toilets and showers.[144] Because there was no allegation of deprivation of due process, plaintiff's claim that she was treated differently from non-disabled people sounded in equal protection, and therefore she could not sue the state under Title II.[145]

There seem to be three schools of thought emerging after *Lane*. The first camp believes that Congress can only abrogate under Title II if a fundamental right is violated.[146] The second camp believes that, under *Lane*, Congress has identified a history of unconstitutional discrimination against the disabled and thus focuses much of its *Boerne* inquiry on the tailoring requirement.[147] The third camp, a camp of one, holds that Congress can validly abrogate

under the entirety of Title II, and believes *Lane* did not disturb that holding.[148]

III. *Lane*, Without Further Direction from the Supreme Court, Allows a Plaintiff to Sue a State for Money Damages Under Title II

When enacting the ADA in 1990, Congress certainly put forth evidence of exclusion of the disabled in more contexts than just access to the courts.[149] However, Justice Stevens did not rely solely on evidence of a deprivation of access to the courts when satisfying the second step of the *Boerne* inquiry, speaking of voting, marriage, public education, the penal system, and abuse of those committed to state mental hospitals.[150] Justice Stevens ended his congruence inquiry by concluding that Congress' conclusion that discrimination persists in the area of public services,[151] coupled with the extensive legislative record of disability discrimination, made it clear that Congress could enact prophylactic legislation in the public services context.[152]

"[W]hile the result in Cleburne *may sit well with those who support the rights of the disabled, this case actually set back the rights of disabled persons in the long run."*

Was there enough evidence to identify a pattern of unconstitutional behavior by the states solely on the basis of exclusion from access to the courts?[153] In reading *Lane*, it appears not.[154] Justice Stevens noted several shortcomings in the access to the courts context, but in the end, it seems that either there was not enough evidence to make out the pattern of unconstitutional behavior or the majority wanted to make clear that in the context of public buildings and services, the entirety of Title II survives step two of the *Boerne* test.[155] Justice Stevens noted that several states still do not allow persons with disabilities to serve as jurors.[156] He also cited several cases: a deaf criminal defendant denied interpretive services,[157] mobility impaired litigant excluded from a courtroom proceeding on the second floor of an inaccessible courthouse,[158] blind people excluded from jury service,[159] and deaf people being excluded from jury service.[160] Justice Stevens also mentioned that Congress took testimony from persons with disabilities who spoke of the inaccessibility of the courts.[161] Finally, he noted that a task force had heard numerous examples of exclusion of people with disabilities from judicial services and programs.[162] However, in Justice Stevens' view, this was not enough. In this context, unlike his tailoring inquiry, where he subjected Title II solely to an "as applied" analysis,[163] the Court did not examine Title II as an undifferentiated whole.

Stevens' congruence analysis is a coup of sorts for those who support abrogation under the ADA. Because the Court has declined to assign any heightened level of scrutiny to discrimination against the disabled, thus keeping them a non-suspect class, finding constitutional violations in discriminatory treatment is very difficult.[164] To prevent an equal protection claim from going forward against it, all the government needs to allege is any set of facts that would make it conceivable that it discriminated against the disabled for a legitimate governmental purpose.[165] Of course, saving money is a legitimate public purpose; thus so if the government did not want to make a hockey rink wheelchair accessible, it can. The only limits on discrimination against the disabled, and all other classes subject only to rationality review, are that they cannot be either arbitrary or irrational,[166] or based on bare animus.[167] Of course, the rational basis test can be failed, such as in *Cleburne v. Cleburne Living Center, Inc*.[168] In *Cleburne*, a Texas city denied a special use permit to a home for mentally challenged people.[169] One by one, Justice White turned down the city's purported justifications for this denial: negative attitudes of property owners, junior high school students harassing the occupants, the fact that the house would have been on a flood plain, legal responsibility, and the size of the house.[170] The latter justifications were not legitimate because the city did not force fraternity houses, hospitals, or nursing homes to even apply for a permit from the city.[171]

However, it can be argued that *Cleburne* gave all subsequent state and local governments a list of interests that they should refrain from stating in order to pass through this lowest level of scrutiny. So, while the result in *Cleburne* may sit well with those who support the rights of the disabled, this case actually set back the rights of disabled persons in the long run.

Contrary to the rationality test set forth in *Cleburne*, Justice Stevens' opinion in *Lane* characterized much of the discrimination against the disabled as evidence of unconstitutional action.[172] The Court did not discuss whether the discrimination it listed was rational or not.

Now that *Lane* has been handed down, an argument exists that abrogation under the entirety of Title II is constitutional. One thing to remember is that before *Lane* was decided, almost every federal circuit court of appeals in America held that Title II did not validly abrogate because it failed the congruence portion of the *Boerne* analysis.[173] Chief Judge Sciria, in his dissent in *Cochran*, put forth the "abrogation in its entirety" argument.[174] In applying the *Boerne* test to any claim under Title II, first, the asserted right will be the right to be free of invidious discrimination.[175] Second, under *Lane*, a court in "the second camp," described earlier, will always find Congress has put forth sufficient evidence of a history of unconstitutional discrimination by the states. This step used to be where many claims fell, illustrated by the Court's opinion on Title I abrogation in *Garrett*.[176] The final step is the tailoring analysis.[177] It seems that under any claim, Title II's "rea-

sonable modifications" provision makes it possible that the statute is not overbroad in its application.[178] According to *Lane,* many factors must be considered in deciding whether a modification is reasonable, such as whether it fundamentally alters the service provided, whether the individual seeking modification is otherwise eligible for the service, whether the cost is unduly prohibitive, and whether historic preservation would be threatened.[179] So, then, a court could make the reasonableness determination after the litigants are in court.[180] When in court, if the right asserted is not fundamental (voting and access to the courts), then the court can take that fact into account in determining whether a modification called for is reasonable. In the context of fundamental rights, even more difficult modifications should be viewed as reasonable, because of the importance of the right asserted.[181] If the modification is reasonable, then the litigant can also collect money damages from the state.

IV. *Lane* and the Cases Attempting to Follow It Reveal the Practical Difficulties in Applying the *Boerne* Test

Abrogation in entirety is a step in the right direction, but the *Boerne* test had to be seriously manipulated and novelly applied to reach that conclusion. The fear expressed by Justice Scalia in his dissent in *Lane* seems to be realized: the *Boerne* test has become a vehicle for judges to implement their own policy concerns.[182] However, Justice Scalia's suggested remedy ignores both the text and the tenor of the Fourteenth Amendment. But is there a workable test that can both be objectively administered and does not offend the command of section 5?

The *Boerne* test led to an odd and unpredictable result in *Lane*. The congruence portion of the *Boerne* test analyzed Title II in its entirety,[183] and the tailoring portion only considered Title II as it applied to access to the courts.[184] In addition, it is clear that after *Lane*, circuit and district courts are confused as to how *Lane* was decided and what its holding was.[185] *Lane* can be seen as a realization of criticisms of the congruence and proportionality test.

The first criticism deals with the text, structure, and function of the Fourteenth Amendment. Section 5 states that Congress has the power to enforce the provisions of the Fourteenth Amendment.[186] This means that Congress, not the Supreme Court, is primarily responsible for enforcing the Fourteenth Amendment, and that Congress is now granted more power to enforce that amendment against the states.[187] The Rehnquist Court has been very careful to not settle anything more than the case before it in its decisions, so there are many areas under the Fourteenth Amendment on which the Court has not spoken.[188] The problem is that the Court is using *stare decisis* to invalidate congressionally found protected classes.[189] For example, the Court has assumed that the same level of scrutiny should be afforded to both mental retardation and physical impairment.[190] However, while in *Cleburne* the Court explained its reasoning for setting scrutiny for mental retardation at rational basis,[191] the Court has never made clear why physical impairment should receive only rational basis scrutiny.[192]

In addition, under the Fourteenth Amendment, Congress and the Court must work together to enforce its guarantees. If Congress cannot interpret the Constitution, then the Court really loses its power under *Marbury* because its holdings will not be enforced. An example of this is *Brown v. Board of Education*, which ended "separate but equal" accommodations in schools.[193] *Brown*'s holding was not universally followed until Congress passed the Civil Rights Acts of 1964 and 1968.[194] Congress had to interpret *Brown* in order to pass this legislation.

Finally, the meaning of the Equal Protection Clause is changing.[195] For example, in *Grutter v. Bollinger*, Justice O'Connor wrote that she hoped that 25 years after the opinion, race would receive full Equal Protection, even in cases analyzing affirmative action.[196] In addition, court-made tests are constantly changing.[197] A doctrine which changes over time should be left to a branch of government which can actually monitor those changes. The Court is ill-equipped to trace the changing parameters of the Equal Protection Clause.[198]

The second criticism deals with the requirement of a legislative record. In his dissent in *United States v. Lopez*, Justice Souter stated that the court requiring legislative findings is akin to Congress passing legislation mandating long Supreme Court opinions.[199] The Constitution states that Congress shall keep a journal of its proceedings.[200] However, it by no means mandates a certain degree of completeness in Congress' legislative records, beyond minimal requirements.[201] In addition, there are more constitutional violations than just those which appear on a congressional record.[202] Interest groups have knowledge of these violations, and so do the legislators themselves.[203] Simply because a violation does not appear on a legislative record does not mean a violation did not occur.[204] There is also the issue of judicial competency to question the factual bases for legislation.[205]

Finally, there is the legitimacy question. Equal protection enactments are usually political, and because the *Boerne* test can be manipulated, there is a danger of judges substituting their own views of what the Equal Protection Clause protects.[206] This probably led to Justice Stevens' novel approach in *Lane.* In addition, this also explains the three different interpretations of *Lane* which have emerged among the circuits: *Boerne* is an easily manipulated test.[207]

Perhaps most problematic is the Court's refusal to be persuaded by a legislative record unless it has expressly held that certain conduct violates the Constitution.[208] There must be some middle ground between giving Congress full power to find constitutional violations and giving it none.[209] If Congress can find Equal Protection violations, then the Court loses the power to "say what the law is."[210] However, if Congress can only legislate

when the Court finds discrimination, the current Court will never find discrimination on which Congress may legislate.[211] I contend the latter danger is far more damaging than the former.

First, Congress has both the power and the duty to enforce the guarantees of the Fourteenth Amendment.[212] Second, the Supreme Court has by no means created a complete Equal Protection doctrine, so Congress may "plug the holes" by interpreting what the Constitution's guarantees are.[213] Third, and related to the first two points, while the Court does not want to upset *Marbury*'s command that it is the Court alone who can "say what the law is," the Fourteenth Amendment, which was enacted after *Marbury* was written, does alter the *Marbury* command.[214] Congress has the power to interpret the Constitution, and it is time that the Court created a test that reflected that.[215] If Congress may not interpret the Constitution, hundreds of Equal Protection Clause violations will go unpunished at the hands of a Court which stubbornly and steadfastly holds on to a power it believes is reserved only for them.[216]

V. Conclusion

Lane appears at first glance to be a step in the right direction in vindicating the rights of disabled plaintiffs. In fact, the majority in *Lane* left open the question as to whether the Title II in its entirety is constitutional. It appears that Congress has identified a history of unconstitutional behavior by the states in each public service or accommodation mentioned in Title II. Therefore, for another provision of Title II to be a valid exercise of Congress' power, it need only pass *Boerne*'s tailoring requirement.

However, *Lane* ignores the larger problem of the Court's reading of Section 5, and brings other problems to light, such as the unique reading of Title II in its entirety to satisfy the congruence element, but analyzing Title II "as applied" in finding the remedy to be proportional. This has left the circuits scrambling to find meaning in the Court's opinion, because it certainly does leave much open to interpretation. A test that better takes into account Congress' enumerated power under Section 5 would alleviate much of this confusion, and instead of the Court merely recognizing Congress' power to interpret the Constitution, it will adopt a test that will actually allow Congress to do so.

Endnotes

1. The tension began with *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), which held that Congress can abrogate a state's sovereign immunity power when it does so pursuant to a valid exercise of its power under section 5 of the Fourteenth Amendment to enforce the substantive guarantees of the amendment.
2. U.S. CONST amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); U.S. CONST. amend. XIV, § 1 "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").
3. U.S. CONST amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").
4. 5 U.S. 137 (1803). The power spoken about in *Marbury* is that of the Supreme Court to "say what the law is." *Id.* at 177.
5. *See Seminole Tribe v. Fla.*, 517 U.S. 44 (1996) (holding that Congress' Indian Gaming Regulatory Act was unconstitutional because it abrogated a state's Eleventh Amendment immunity); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress may not abrogate state sovereign immunity by authorizing private actions for money damages against nonconsenting states in their own courts).
6. 521 U.S. 507 (1997).
7. *Id.* at 519.
8. *Id.*
9. *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (holding that Congress' amendment of the patent laws was unconstitutional because Congress exceeded its authority under section 5 of the Fourteenth Amendment*); Tennessee v. Lane*, 541 U.S. 509 (2004) (holding that Title II of the American with Disabilities Act was a valid exercise of Congress' section 5 authority to enforce the guarantees of the Fourteenth Amendment).
10. *Flores*, 521 U.S at 520. In order to show a congruence, there must be a history and pattern of constitutional violations. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001).
11. *See United States v. Morrison*, 529 U.S. 598, 620 (2000) (holding the Violence Against Women Act invalid because there was not enough evidence of sufficient investigation and prosecution of gender motivated crime); *Garrett*, 531 U.S. 356 (holding that Title I of the Americans with Disabilities Act does not afford private litigants a suit against a state for money damages).
12. 538 U.S. 721 (2003).
13. The Court found the Family and Medical Leave Act, which granted a mandatory twelve-week leave for maternity or paternity, to be constitutional. *Id.* at 740. *Contra Kimel v. Fla. Bd. of Regents*, 528 U.S. 86 (2000) (holding that Congress' intent to abrogate the States' immunity in enacting the Age Discrimination in Employment Act exceeded Congress' authority under section 5 of the Fourteenth Amendment).
14. *Id.* at 734.
15. *Id.* at 729–30.
16. *Id.* at 734.
17. 541 U.S. 509 (2004).
18. *Id.* at 522-23 (stating that Title II, like Title I, "seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review").
19. The two fundamental interests are voting and access to the courts. For voting *see Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966) (invalidating a state poll tax and stating, "[w]here fundamental rights and liberties are asserted under equal protection, classifications which might invade or restrain them must be closely scrutinized and carefully confined"); *see also Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (annulling a school district rule that to vote in district elections, a person must either own or lease property or be a parent of a child who attends school in the district); *see also Reynolds v. Sims*, 377 U.S. 533 (1964) (forcing Alabama to redistrict to represent the "one person, one vote" principle). For access to the courts *see Griffin v. Illinois*, 351 U.S. 12 (1956) (Black, J. plurality) (holding a state court must provide a trial transcript to an indigent defendant on appeal: "Due process and equal protection both call for procedures in criminal trials which allow no invidious discrimination."); *Douglas v. California*, 372 U.S. 353 (1963) (finding that the state must appoint counsel to indigent defendant on appeals as of right); *Boddie v. Connecticut*, 401 U.S. 371

(1971) (nullifying fee requirements for indigent litigants in initiating divorce); *Little v. Streater*, 452 U.S. 1 (1981) (determining that due process entitles indigent defendant to a state-subsidized blood test to defend a paternity suit); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1966) (cancelling fee requirement for indigent challengers to a parental rights termination decree).

20. 42 U.S.C. § 12132 (2005) (noting that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity").
21. *Id.* (protecting individuals with disabilities against all discrimination, not just discrimination having to do with fundamental rights).
22. *Lane*, 541 U.S. at 530-31 ("[n]othing in our case law requires us to consider Title II, with its variety of applications, as an undifferentiated whole; [w]hatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts.").
23. *See id.* at 553 (Rehnquist, C.J., dissenting) (hypothesizing that because of the majority's decision the states will be subject to a hoard of piecemeal litigation, and stating that this decision does not square with recent precedent).
24. 42 U.S.C. § 12132 (2005).
25. *Lane*, 541 U.S. 509, 514 (2004).
26. *Id.* at 513–14.
27. *Id.* at 514.
28. *Id.*
29. *Lane,* 541 U.S. at 522.
30. *Id.* at 512.
31. *Id.* at 516.
32. *Id.*
33. *Boerne*, 521 U.S. at 507 (holding that RFRA was unconstitutional because it allowed congressional intrusion into states' authority to regulate for the health and welfare of their citizens).
34. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000); *Garrett*, 531 U.S. at 365.
35. 42 U.S.C. § 12202 (providing that "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").
36. *Lane,* 541 U.S. at 518.
37. *Id.* at 519. Justice Stevens gave, as an example, *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721 (2003). There the Court held that a male plaintiff could recover money damages against the state for violating the family-care leave provision of the Family and Medical Leave Act of 1993. This abrogation was held to be valid because under section 5, Congress can combat sexual discrimination.
38. *Lane*, 541 U.S. at 520.
39. *Id.* (quoting *Boerne,* 521 U.S. at 519).
40. *Id.* at 520–21.
41. *Id.* at 522.
42. *Id.* The only discrimination against the disabled which can be regulated by Congress is irrational discrimination. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985) (stating that "to withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.").
43. The right of access to the courts has been found to be fundamental by the Court. *Boddie v. Connecticut*, 401 U.S. 371 (1971). Access to the courts includes: (1) a "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings," *Faretta v. California* 422 U.S. 806, 819, n. 15 (1975); a "meaningful opportunity to be heard," *Boddie,* 401 U.S. at 379; the right of the criminal defendant to a trial by jury composed of a fair cross-section of the community, *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); and the public right of access to criminal proceedings, *Press-Enter. Co. v. Super. Ct. of Cal., County of Riverside*, 478 U.S. 1, 8–15 (1986).
44. *Lane*, 541 U.S. at 523.
45. *Id.* at 528.
46. *Id*. The Court here compared the legislative record to that in *Hibbs*, which upheld the abrogation in the Family and Medical Leave Act. Because *Hibbs* involved sex-based classifications, "it was easier for Congress to show a pattern of state constitutional violations." 538 U.S. at 735–37. Here, Justice Stevens said the record was far more extensive than that in *Hibbs*, and because access to the courts is subject to strict judicial scrutiny, it was very easy to conclude that Congress was justified in its finding of a history of constitutional violations by the state. In addition, the ADA also states that discrimination against persons with disabilities is present in access to public services. 42 U.S.C. § 12101(a)(3).
47. *Lane,* 541 U.S. at 524–25 (considering decisions of other courts finding a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities).
48. *Lane*, 541 U.S. at 530-31. ("[N]othing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole. . . . Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.") (citing *United States v. Raines*, 362 U.S. 17, 26, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960)).
49. *See id.* (pointing out that although the petitioner argues that Title II applies not only "to public education and voting-booth access but also to seating at state-owned hockey rinks[,] . . . Title II is not properly tailored to serve its objectives. . . . It is unclear what, if anything, examining Title II's application to hockey rinks or voting booths can tell us about whether Title II substantively redefines the right of access to the courts").
50. *See id*. at 531 ("The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination.").
51. *Id.* ("Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable proble[m]' warrants 'added prophylactic measures in response.'") (*citing Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 737 (2003)).
52. *Id*. at 532 ("It requires only 'reasonable modifications' that would not fundamentally alter the nature of the services provided, and only when the individual seeking modification is otherwise eligible for the service." According to the Court, such reasonable modifications could be satisfied in several different ways: newer buildings had to comport with architectural guidelines, but those buildings built before 1992 could comply with Title II by adopting less costly measures. Only if these measures were ineffective did an older building have to undergo reasonable structural changes. And these buildings needed not to undergo these changes if the cost was unduly prohibitive, if historic preservation would be threatened, or a fundamental alteration in the service would be made.) (citing 28 C.F.R. §35.150(a)(2), (a)(3) (2003)).
53. *Lane*, 541 U.S. at 533 (citing several cases where, in order to facilitate uninhibited access to the courts, record fees and filing fees were waived and counsel was appointed by the court to defendants: (1) *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that divorce filing fees could be waived, contrary to the state's interests, if requiring such fees impeded plaintiff-appellants access to the courts); (2) *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that conditioning appeal on pre-payment of record fees in parental rights termination violates due process); (3) *Smith v. Bennett*, 365 U.S. 252 (1959) (holding that requiring payment of filing fees before the

state processes an application for habeas corpus or direct appeal in criminal cases "den[ies] that prisoner the equal protection of the laws"); (4) *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that the state had an obligation to provide a transcript, or other comparable means to indigent criminal defendants seeking appellate review of their convictions if they were unable to pay the filing fees); (5) *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that states have a duty to provide criminal defense counsel where the defendant cannot afford one); and (6) *Douglas v. California*, 372 U.S. 353 (1963) (holding that a defendant has a right to counsel for first appeals).

54. *See id*. ("Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.' It is, rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end.") (quoting *Boerne*, 521 U.S. at 532; *Kimel*, 528 U.S. at 86).

55. *See id.* at 534-35 (Souter, J., concurring) (pointing out such cases as *Buck v. Bell*, 274 U.S. 2000 (1927), where the Court sustained the constitutionality of involuntary sterilization for the mentally disabled; and *State ex. rel. Beattie v. Bd. of Ed. of Antigo*, 169 Wis. 231, 172 N.W. 153 (1919), where the Court upheld an administrative exclusion of children with cerebral palsy from public schools because the sight of them was both nauseating and depressing to others).

56. *Id.* at 535 ("In sustaining the application of Title II today, the Court takes a welcome step away from the judiciary's prior endorsement of blunt instruments imposing legal handicaps.").

57. *Lane*, 541 U.S. at 535 (Ginsburg, J., concurring).

58. *See id.* at 537 ("Legislation calling upon all government actors to respect the dignity of individuals with disabilities is entirely compatible with our Constitution's commitment to federalism, properly conceived.").

59. *See id.* ("It seems to me not conducive to a harmonious federal system to require Congress, before it exercises authority under *§ 5 of the Fourteenth Amendment*, essentially to indict each State for disregarding the equal-citizenship stature of persons with disabilities. . . . Members of Congress are understandably reluctant to condemn their own States as constitutional violators, complicit in maintaining the isolated and unequal status of persons with disabilities.").

60. *See supra* text accompanying note 51.

61. *Id*. at 538 ("Congress considered a body of evidence showing that in diverse parts of our Nation, and at various levels of government, persons with disabilities encounter access barriers to public facilities and services. That record, the Court rightly holds, at least as it bears on access to courts, suffices to warrant the barrier-lowering, dignity-respecting national solution the People's representatives in Congress elected to order.").

62. *Lane*, 541 U.S. at 538 (Rehnquist, C.J., dissenting) ("While the Court correctly [held] that Congress" unequivocally expressed its intent to abrogate state's immunity, "I disagree with [the Court's] conclusion that Title II is valid § 5 enforcement legislation.").

63. *See id.* (arguing that the Court's "decision is irreconcilable with *Garrett* and the well-established principles it embodies").

64. *Id*. ("In *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001), we held that Congress did not validly abrogate States' *Eleventh Amendment* immunity when it enacted Title I of the American with Disabilities Act of 1990.").

65. *See id*. at 539 (quoting *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 728 (2003)); *see also id.* at 549 (noting that "[l]ike Title I, Title II may be laudable public policy," but also arguing that it is "an attempt to redefine legislatively the States' legal obligations under the Fourteenth Amendment").

66. *See id*. at 540-41.

67. *Lane*, 541 U.S. at 540 (noting that Title II purports to protect numerous constitutional rights of disabled persons, including not only the equal protection rights "against irrational discrimination," but also rights under the Due Process Clause of the Fourteenth Amendment).

68. *See id*. at 540-41 (stating that "because the Court ultimately upholds Title II 'as it applies to the class of cases implicating the fundamental rights of access to the courts,' the proper inquiry focuses on the scope of those due process rights." The Chief Justice also lists four access-to-the-courts rights mentioned by the majority: (1) the right of the criminal defendant to be present at all critical stages of the trial (citing F*aretta v. California*, 422 U.S. 806, 819 (1975)); (2) the right of litigants to have a "meaningful opportunity to be heard" in judicial proceedings (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)); (3) the right of the criminal defendant to trial by a jury composed of a fair cross-section of the community (citing *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)); and (4) the public right of access to criminal proceedings (citing *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 U.S. 1, 8-15 (1986)).

69. *See id.* at 541 (noting that this part of the inquiry is crucial in determining whether Title II was enacted to prevent or remedy actual constitutional violations, or whether it was an illegitimate attempt to substantively redefine the constitutional rights that it purports to enforce).

70. *See id*. (noting that the majority identified nothing in the legislative record to indicate a history of widespread violations of due process rights of disabled persons).

71. *See id*. (arguing that the majority digresses into a broad discussion of societal discrimination, addressing discrimination in the fields of marriage, voting, public education, conditions in mental hospitals, and other forms of discrimination in the administration of public services and programs, which is irrelevant when it comes to the narrow "as applied" type of inquiry).

72. *Lane*, 541 U.S. at 542 ("Even if it were proper to consider this broader category of evidence, much of it does not concern *unconstitutional* action by the *States*. The bulk of the Court's evidence concerns discrimination by nonstate governments, rather than the States themselves.").

73. *Id*. (noting that evidence regarding discrimination by nonstate governments is irrelevant to the inquiry of whether Congress has validly abrogated Eleventh Amendment immunity, which is a privilege enjoyed exclusively by the sovereign states). *But see id.* at 527, n.16 (addressing Chief Justice's contention that evidence pertaining to nonstate actors is irrelevant, Justice Stevens, in his plurality opinion, stated that in judicial services, local governments are considered "arms of the state" for the Eleventh Amendment purposes (citing *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977)); *but cf. id.* (pointing out several cases, such as *South Carolina v. Katzenbach*, 383 U.S. 301, 312-15 (1966) and *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), in which most of the evidence was of not of state discrimination, but rather of either local, private-sector, or federal government discrimination. In both *Katzenbach* and *Hibbs*, the Chief Justice was in favor of the majority opinion and actually wrote the opinion in *Hibbs*).

74. *See id.* at 542 (stating that "[m]ost of the brief anecdotes do not involve States at all, and those that do are not sufficiently detailed to determine whether the instances of 'unequal treatment' were irrational, and thus unconstitutional under our decision in *Cleburne*") (citing *Garrett*, 531 U.S. at 370).

75. *See id.* at 543 ("With respect to the due process 'access to the courts' rights on which the Court ultimately relies, Congress' failure to identify a pattern of actual constitutional violations by the States is even more striking. Indeed, there is *nothing* in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials.").

76. *See supra* text accompanying note 65.

77. *Lane*, 541 U.S. at 544 (criticizing the majority for identifying only two reported cases where a disabled person's federal constitutional rights were violated: (1) *Ferrell v. Estelle*, 568 F.2d 1128 (5th

Cir. 1978) and (2) *People v. Rivera*, 125 Misc. 2d 516, 480 N.Y.S. 426 (1984)).

78. *See id.* at 544-45 (stating that the majority relied upon three items to justify its decision: (1) a 1983 U.S. Civil Rights Commission Report, "showing that 76% of 'public services and programs housed in state-owned buildings were inaccessible' to persons with disabilities"; (2) testimony before a House subcommittee regarding the "'physical inaccessibility'" of local courthouses; and (3) evidence submitted to Congress' designated ADA task force that allegedly contained numerous examples of discrimination against persons with disabilities in state judicial services and programs. According to the Chief Justice, the last "sound[ed] promising" based on the majority's opinion.).

79. *Id.* at 546-47 ("We have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance. Indeed, the fact that State may need to assist an individual to attend a hearing has no bearing on whether the individual successfully exercises his due process right to be present at the proceeding.").

80. *See supra* text accompanying notes 70, 76, and 79.

81. *Lane*, 541 U.S. at 548 (Rehnquist, C.J., dissenting) (stating that "[t]he third step of our congruence-and-proportionality inquiry removes any doubt as to whether Title II is valid § 5 legislation").

82. *See id.* ("The ADA's findings make clear that Congress believed it was attacking 'discrimination' in all areas of public services, as well as the 'discriminatory effect' of 'architectural, transportation, and communication barriers'. In sum, Title II requires, on pain of money damages, special accommodations for disabled persons in virtually every interaction they have with the State.") (quoting 42 U.S.C. § 12101(a)(3), (a)(5) (1990)).

83. *See id.* at 549 ("'Despite subjecting the States to this expansive liability,' the broad terms of Title II 'd[o] nothing to limit the coverage of the Act to cases involving arguable constitutional violations.' By requiring special accommodation and the elimination of programs that have a disparate impact on the disabled, Title II prohibits far more state conduct than does the equal protection ban on irrational discrimination.") (quoting *Florida Prepaid Postsecondary Education Expense Board. v. College Savings Bank and United States*, 527 U.S. 627, 646 (1999)).

84. *See id.* (rejecting the majority's claim "that Title II also vindicates fundamental rights protected by the Due Process Clause—in addition to access to the courts—that are subject to heightened Fourteenth Amendment scrutiny." "Title II is not tailored to provide prophylactic protection of these rights; instead, it applies to any service, program, or activity provided by any entity. Its provisions affect transportation, health, education, and recreation programs, among many others, all of which are accorded only rational-basis scrutiny under the Equal Protection Clause.").

85. *Id.* at 551 (expressing doubts about "importing an 'as applied' approach into the § 5 context. . . . In applying the congruence-and proportionality test, we ask whether Congress has attempted to statutorily redefine the constitutional rights protected by the Fourteenth Amendment. This question can only be answered by measuring the breadth of a statute's coverage against the scope of the constitutional rights it purports to enforce and the record of violations it purports to remedy.") *But see id.* at 531, n.18 (responding to Chief Justice Rehnquist's point in question, Justice Stevens stated that "neither *Garrett* nor *Florida Prepaid* lends [*sic*] support to the proposition that the *Boerne* test requires courts in all cases to 'measur[e] the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce.' In fact, the decision in *Garrett*, which severed Title I of the ADA from Title II for purposes of the § 5 inquiry, demonstrates that courts need to examine 'the full breadth of the statute' all at once.").

86. *Lane*, 541 U.S. at 551 (expressing discontent with the majority's approach as not being "an assessment of whether Title II is 'appropriate *legislation*' at all" under the Fourteenth Amendment of the Constitution, "but a test of whether the Court can conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation").

87. *See id.* at 554 ("Congress has authorized private damages suits against a State for merely maintaining a courthouse that is not readily accessible to the disabled, without regard to whether a disabled person's due process rights are ever violated.").

88. *Id.* (stating that "'Congress did nothing to limit' the Act's coverage 'to cases involving arguable [Due Process] violations,' such as when the infringement was nonnegligent [*sic*] or uncompensated"). *But see id.* at 533, n.24. (arguing against Chief Justice Rehnquist's point in question, Justice Stevens stated in his plurality opinion that "Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' and may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text'") (quoting *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81(2000)).

89. *Lane*, 541 U.S. at 554 (Scalia, J., dissenting).

90. *See id.* at 557-58 ("I yield to the lessons of experience. The 'congruence and proportionality' standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress's taskmaster.").

91. *See id.* (finding that the congruence and proportionality standard forces the Court to "check Congress' homework to make sure that it has identified constitutional violations to make its remedy congruent and proportional." The problem with a test like this, in Justice Scalia's eyes, is that it has no basis in the text of the Constitution, and there is no objective way to conclude that it has been passed or failed).

92. *See id.* at 558-59 ("I would replace 'congruence and proportionality' with another test—one that provides a clear, enforceable limitation supported by the text of § 5. Section 5 grants Congress the power 'to *enforce*, by appropriate legislation,' the other provisions of the Fourteenth Amendment. . . . Nothing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or 'remedy' conduct that does not *itself* violate any provisions of the Fourteenth Amendment. So-called 'prophylactic legislation' is reinforcement rather than enforcement." Justice Scalia's definition of *enforcement* is "[t]o put in execution; to cause to take effect; as, to *enforce* the laws.") (quoting NOAH WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE at 396 (1860)).

93. *Id.* at 559-60 ("One of the first pieces of legislation passed under Congress's § 5 power was the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, entitled "*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes.*" Section 1 of that Act, later codified as Rev. Stat. § 1979, 42 U.S.C. § 1983, authorized a cause of action against 'any person who, under color of the law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States.' 17 State. 13.").

94. *Lane*, 541 U.S. at 560 (stating that "[s]ection 5 . . .also authorize[s] measures that do not restrict the States' substantive scope of action but impose requirements directly related to the *facilitation* of 'enforcement'—for example, reporting requirements that would enable violations of the Fourteenth Amendment to be identified." However, Justice Scalia stated that section 5 does not authorize so-called "prophylactic" measures which prohibit primary conduct that is itself not forbidden by the Fourteenth Amendment.).

95. *See id.* at 561-63 (quoting *Slaughter House Cases*, 83 U.S. 36 (1873), which stated that the purpose of the Fourteenth Amendment was to protect the newly freed slaves. This was before the emergence of the substantive due process doctrine, protecting unenumerated [*sic*] liberties, the extension of equal protection to sex, age, and disability, and the incorporation doctrines, which held that the Fourteenth Amendment incorporates and applies against the States the Bill of Rights. Therefore, before these doctrines were announced by the Court, it was permissible to allow Congress to interpret section 5 broadly in the context of race.).

96. *See id*. at 564 (upholding congressional prophylactic section 5 legislation on the States where (1) "there has been an identified history of relevant constitutional violations"; (2) "the prophylactic remedy . . . must be directed against the States or state actors rather than the public at large"; and (3) congressional measures do not violate other provisions of the Constitution).

97. *Id*. (arguing that when the requirements of the prophylactic section 5 legislation have been met, he would leave it to Congress, "under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States").

98. *See id.* at 565 ("I shall also not subject to 'congruence and proportionality' analysis congressional action under § 5 that is *not* directed to racial discrimination. Rather, I shall give full effect to that action when it consists of 'enforcement' of the provisions of the Fourteenth Amendment, within the broad but not unlimited meaning of that term I have described above. When it goes beyond enforcement to prophylaxis, however, I shall consider it ultra vires.").

99. *Lane*, 541 U.S. at 565 ("The considerations of long accepted practice and of policy that sanctioned such distortion of language where state racial discrimination is at issue do not apply in this field of social policy far removed from the principal object of the Civil War Amendment. . . . It is past time to draw a line limiting the uncontrolled spread of well-intentioned textual distortion.").

100. *Lane*, 541 U.S. at 565-66 (Thomas, J., dissenting) (stating that he continues to believe that *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003) was wrongly decided and disavowing any reliance on *Hibbs* in reaching the conclusion in the present case).

101. *Roe v. Johnson*, 334 F. Supp. 2d 415, 416 (S.D.N.Y. 2004); *Simmang v. Tex. Bd. of Law Exam'rs*, 346 F. Supp. 2d 874, 879 (W.D. Tex. 2004).

102. *Roe*, 334 F. Supp. 2d 415 (dismissing a suit by a woman seeking admission to New York State Bar after she was asked about her psychiatric history by the Committee on Character and Fitness and failed to disclose her mental disabilities that would impair her capacity to practice law on her questionnaire).

103. *Id*. at 422.

104. *Simmang*, 346 F. Supp. 2d at 882 (W.D. Tex. 2004) (dismissing claim by a person with a learning disability who repeatedly requested double time for his bar examination, but was only given time and a half, and subsequently failed three bar examinations).

105. *Id*. at 882.

106. *Roe*, 334 F. Supp. 2d at 422 (*citing Lane*, 541 U.S. 509, 531-32 (2004)), *Simmang*, 346 F. Supp 2d at 882.

107. *Miller v. King*, 384 F.3d 1248, 1275-76 (11th Cir. 2004) (dismissing a claim by a paraplegic prisoner in a disciplinary isolation section of a prison who alleged that the cells were too small, the prison staff neglected to remove the bed for more mobility, the showers and toilets were not wheelchair-accessible, and that the prison staff had ignored his medical complaints); *Parker v. Mich. Dep't of Corr.*, No. 4:01-CV-11, 2001 U.S. Dist. LEXIS 18931 at *14 (D. Mich. Nov. 9, 2001) (dismissing a claim by a diabetic who was not allowed to participate in the prison substance abuse treatment program, which caused further incarceration).

108. *Id*. at 1272.

109. *Id*. at 1269.

110. *Id*. at 1272.

111. *Miller,* 384 F.3d at 1272.

112. *Id*. at 1274.

113. *Id* at 1274.

114. *Id.* at 1275-76.

115. *Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005).

116. *Id*. at 190.

117. *Id*. at 191 (explaining that "[t]he second step of the *Boerne* analysis requires [the court] to decide whether Title II was enacted in response to a history and pattern of constitutional violations by the states").

118. *Id*. at 191 (holding that Title II was "enacted in response to a history and pattern of States' constitutional violation," thus satisfying the second prong of the *Boerne* analysis).

119. *Id*. at 191 (distinguishing this court's analysis from *Miller* by explaining that "[while] Miller . . . analyzed the congruence and proportionality of Title II's remedies to claims rooted in the Eighth Amendment . . . [this court] analyze[s] the congruence and proportionality of Title II's remedies to claims rooted in the Equal Protection Clause of the Fourteenth Amendment").

120. *Id*. at 191 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987), and noting that the Court in *Turner* held that "when a regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests").

121. *Cochran v. Pinchak*, 401 F.3d at 192 (adopting a rational basis test because "[t]he DOC's classification does not involve race, alienage, or national origin" and does not affect one of Cochran's fundamental rights. Therefore, the classification is constitutional if it is "rationally related to a legitimate state interest.").

122. *Id*. at 193 (stating that "Title II's affirmative duty to accommodate Cochran's asserted disability needs is not congruent and proportional to New Jersey's wide latitude in making classifications among prisoners that are rationally related to a legitimate governmental interest").

123. *Id*. at 193.

124. *Id*. at 194 (Sciria, C.J., dissenting) (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000)).

125. *Cochran*, 401 F.3d at 196 (Sciria, C.J., dissenting), fn. 92(a); *id*. at 198 (Sciria, C.J., dissenting) (explaining that "Title II only requires reasonable modifications, taking into account considerations of cost and other burdens, which a prison can satisfy in a number of ways, and which would not fundamentally alter the nature of the service provided.").

126. *Id*. at 193.

127. *Id.* at 198 (Sciria, C.J., dissenting).

128. *Id*. at 198 (Sciria, C.J., dissenting).

129. *Id*. at 199 (Sciria, C.J., dissenting).

130. *Carrasquillo v. City of New York*, 324 F. Supp. 2d 428 (S.D.N.Y. 2004) (ruling on a case in which a prisoner who had trouble walking alleged that he was placed in housing which was far away from prison service, which forced him to walk long distances, causing him great pain).

131. *Id*. at 440-41 (explaining that qualified immunity would not attach to the defendant's alleged actions because the plaintiff is alleging that the defendants were "deliberately indifferent to [his] urgent medical needs and . . . failed to remedy [the] ongoing violations." The Eighth Amendment right to receive adequate medical treatment is "both clearly established and well-settled," so the alleged actions would never be "objectively reasonable.").

132. *Id*. at 442 (explaining the Prison Litigation Reform Act, which "provides that 'no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted'"). 42 U.S.C. § 1997e(a) (2005).

133. *Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791 (9th Cir. 2004).

134. *Id*. at 792-93.

135. *Dare v. California*, 191 F.3d 1167, 1176 (9th Cir. 1999) (holding that the defendant state's biennial fee for disability parking placards violated the ADA, "[b]ecause the ADA constitutes an appropriate exercise of Congress' enforcement powers under Section Five of the Fourteenth Amendment.").

136. *Phiffer*, 384 F.3d at 793 (O'Scannlain, J., concurring).

137. *Dare*, 191 F.3d at 1174.

138. *Id*. at 1175.

139. *Johnson v. S. Conn. State Univ.*, No. 3:02-CV-2065, 2004 U.S. Dist. LEXIS 21084, at *13 (D. Conn. Sept. 30, 2004) ("Thus, in the wake of *Lane*, it appears that a private suit for money damages under Title II of other ADA may be maintained against a state only if the plaintiff can establish that the Title II violation involved a fundamental right."). *See also McNulty v. Bd. of Educ.*, No. 2003-2520, 2004 U.S. Dist. LEXIS 12680, at *10-11 (D. Md. July 8, 2004) (stating that education is not a fundamental right that would give rise to abrogation under Title II of the ADA).

140. *McNulty v. Bd. of Educ.*, No. 2003-2520, 2004 U.S. Dist. LEXIS 12680, at *11-12 (D. Md. July 8, 2004) ("[T]his court finds that *Eleventh Amendment* immunity remains intact for educational claims under Title II of the ADA.").

141. *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 287 (5th Cir. 2005) (stating that it was not necessary to determine, in the educational context, whether Congress validly abrogated under Title II, because Louisiana waived its sovereign immunity by receiving federal funds, but stating that the Supreme Court has never held the right to education or freedom from disability discrimination to be fundamental).

142. *Haas v. Quest Recovery Servs.*, 338 F. Supp. 2d 797, 801 (N.D. Ohio 2004) (following the reasoning in *Popovich v. Cuyahoga County Court,* 276 F.3d 808 (6th Cir. 2002). In *Popovich,* the plaintiff argued that he was unable to be fully involved in a child custody hearing due to lack of accommodations for his hearing disability. The court found that Title II can validly abrogate immunity for due process violations, but that Title II exceeds Congress's authority with respect to equal protection claims).

143. *Id*. at 799.

144. *Id*.

145. *Id.* at 803 (finding, however, that Ohio waived its immunity by receiving federal funds under the Rehabilitation Act).

146. *See Roe v. Johnson*, 334 F. Supp. 2d 415 (S.D.N.Y. 2004); *Simmang v. Texas Bd. of Law Examiners*, 346 F. Supp. 2d 874 (W.D. Tex. 2004); *Johnson v. S. Conn. State Univ.*, No. 3:02-CV-2065, 2004 U.S. Dist. LEXIS 21084, at *13 (D. Conn. Sept. 30, 2004); *McNulty v. Bd. of Educ.*, No. 2003-2520, 2004 U.S. Dist. LEXIS 12680, *1 (D. Md. July 8, 2004); *Haas,* 338 F. Supp. 2dat 801.

147. *See Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005); *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004); *Carrasquillo v. City of New York*, 324 F. Supp. 2d 428 (S.D.N.Y. 2004).

148. The Ninth Circuit makes up this last camp. *See Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791 (9th Cir. 2004); *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999).

149. See *Americans with Disabilities Act of 1989: Hearings on S.933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 10718 (1989) (testimony of Justin Dart, Chairman of Task Force on Rights and Empowerment of Americans with Disabilities). Justin Dart testified that having conducted 63 public forums in every state he had found overwhelming evidence that people with disabilities are assumed to be less "than fully human," resulting in nationwide discrimination. *Id. See also* Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 TEMP L. REV. 393, 408-09 (1991) (noting that during the congressional hearings Congress had documented instances of exclusion of disabled people from hospitals, theaters, bookstores, and auction houses).

150. *Tennessee v. Lane*, 541 U.S. 509, 524-25 (2004) (noting examples of allegedly discriminatory state laws including D.C. CODE ANN. § 46-403 (2001) (declaring illegal and void the marriage of "an idiot or of a person adjudged to be a lunatic"); KY REV. STAT. ANN. § 402.990(2) (1992) (criminalizing the marriage of persons with mental disabilities); and TENN. CODE ANN. §36-3-109 (1996) (forbidding the issuance of a marriage license to "imbecile[s]")).

151. *See id*. at 529 (citing The Americans with Disabilities Act, 42 U.S.C. § 12101(a)(3) (2005)).

152. *See id.*

153. *See id*. at 564 (Scalia, J., dissenting) ("Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations."). *See also Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 742 (2003) (Scalia, J., dissenting) (declaring that "the Court does not even attempt to demonstrate that each one of the 50 states . . . was in violation of the Fourteenth Amendment."); *United States v. Morrison*, 529 U.S. 598, 626 (2000) ("Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States.").

154. *Lane,* 541 U.S. at 541 (Rehnquist, J., dissenting) ("'Congress' § 5 power is appropriately exercised only in response to state transgressions.' But the majority identifies nothing in the legislative record that shows Congress was responding to widespread violations of the due process rights of disabled persons.").

155. *See id.* at 533.

156. *See id*. at 524 & n.9 (citing MICH. COMP. LAWS ANN. § 729.204 (2002) (persons selected for inclusion on jury list may not be "infirm or decrepit"); TENN. CODE ANN § 22-2-304(d)(1) (2005) (authorizing judges to excuse "mentally and physically disabled" persons from jury service)).

157. *See id.* at 524-25, 527 (citing *Ferrell v. Estelle*, 573 F.2d 867 (5th Cir. 1978), opinion withdrawn as moot). *See also Chisolm v. McManimon*, 275 F.3d 315, 320-21 (3rd Cir. 2001) (charging county court with failure to provide interpretive services).

158. *Lane,* 541 U.S. at 524–25 & n.14 (noting a pattern of unequal treatment of disabled persons by state agencies in a variety of settings). *See also Layton v. Elder*, 143 F.3d 469, 472–73 (8th Cir. 1998) (ordering county court to make services more accessible after mobile-impaired defendants were excluded from a court session because of their inability to reach the second floor).

159. *Lane,* 541 U.S. at n.14 (citing *Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1289 (9th Cir. 1982)) (noting that blind persons have unconstitutionally been excluded from jury service).

160. *Id*. (*citing DeLong v. Brumbaugh*, 703 F. Supp. 399, 402 (W.D. Pa. 1989) (referring to instances in which the deaf were excluded from jury services).

161. *See id*. at 527 (referring to *Oversight Hearing on H.R. 4468 before the House Subcomm. on Select Education of the Comm. on Education and Labor*, 100th Cong. 40-41, 48 (1988)).

162. *See id*. (relying on *Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment* (Oct. 12, 1990)).

163. *Id*. at 530.

164. *See Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 443 (1985) ("Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation."); *Artway v. Attorney Gen.*, 81 F.3d 1235, 1267 (3d Cir. 1996) ("The level of scrutiny applied to ensure that classifications comply with this guarantee differs depending on the nature of the classification. Classifications involving suspect or quasi-suspect class, or impacting certain fundamental constitutional rights, are subject to heightened scrutiny. Other classifications, however, need only be rationally related to a legitimate government goal.").

165. *See, e.g., Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 491 (1955) ("We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds."). *But see Stevens v. Illinois DOT*, 210 F.3d 732, 738 (1999) ("the ADA . . . raises the level of judicial scrutiny from rationality review to a heightened level of scrutiny. **. . .** In sum, the ADA replaces the Fourteenth Amendment's constitutional protections with a higher set of legislative standards.").

166. *See, e.g., Cleburne,* 473 U.S at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."); *Steffan v. Aspen*, 8 F.3d 57, 63 (1993) ("Any governmental action that burdens individuals unequally but does not burden a 'suspect class' need only survive 'rationality,' or 'rational-basis' review.").

167. *See U.S Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). *See also Steffan*, 8 F.3d at 63 (1993) ("When individuals are deprived of the equal protection of the laws by a governmental actor for entirely arbitrary reasons, or for reasons that rest solely upon irrational and invidious prejudices against a class of people (whether or not a 'suspect class'), a court should declare the government action unconstitutional.").

168. 473 U.S. 432 (1985).

169. *Id*. at 436–37.

170. *See id*. at 448–50.

171. *See id.* at 447.

172. 541 U.S. at 524-25 ("The historical experience that Title II reflects is also document[ed] in this Court's cases, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of settings.").

173. *See* Sharmila Roy, *Suits Against States: What to Know About the 11th Amendment*, 41 AZ Attorney 18, 25 (2004) (*citing Garcia v. SUNY Health Sci. Ctr. of Brooklyn*, 280 F.3d 98, 110-12 (2d Cir. 2001); *Wessel v. Glendening*, 306 F.3d 203, 215 (4th Cir. 2002); *Reickenbacker v. Foster*, 274 F.3d 974, 981-83 (5th Cir. 2001); *Popovich v. Cuyahoga Cty. Ct. of Common Pleas*, 276 F.3d 808, 812 (6th Cir. 2002) (*en banc*); *Walker v. Snyder*, 213 F.3d 344, 346-47 (7th Cir. 2000); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1007 (8th Cir. 1999); *Thompson v. Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001) (stating that, according to these courts, "a history and pattern of unconstitutional discrimination by the states against the disabled" was lacking); *see also Garrett* 531 U.S. at 372 (holding that "Congress' failure to mention states in its legislative findings addressing discrimination in employment reflect[ed] that body's judgment that no pattern of unconstitutional state action had been documented).

174. *Cochran v. Pinchak,* 401 F.3d 184, 194 (3d Cir. 2005). (Sciria, C.J., dissenting) ("Title II may prohibit some conduct that would otherwise pass muster under the Equal Protection Clause. But this fact alone does not mean that Title II is an unconstitutional abrogation of States' sovereign immunity").

175. *See generally Lane,* 541 U.S. at 522 (citing *Garrett,* 531 U.S. at 365) ("The first step of the *Boerne* requires us to identify the constituional right or rights that Congress sought to enforce when it enacted Title II."); *see also Cochran,* 401 F.3d at 188 (*citing Garrett,* 531 U.S. at 365) ("The first step in the Boerne analysis is to 'identify with some precision the scope of the constitutional right at issue'").

176. *See Garrett*, 531 U.S. at 368 ("The legistlative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled"); *see also Wessel,* 306 F.3d at 220 (finding that "Congress did not have an adequate record of unconstitutional discrimination by states against the disabled to support abrogation").

177. *See generally Lane,* 541 U.S. at 530 (examining the last step in the *Boerne* analysis, which forces the court to ask whether Title II is an appropriate response to the history and pattern of unequal treatment alleged by the plaintiff); *see also Boerne,* 521 U.S. at 519-24, *reprinted in Garrett*, 531 U.S. at 365 (stating that "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" is a required step in the *Boerne* analysis).

178. *See generally Cochran*, 401 F.3d at 198 (Sciria, C.J., dissenting) (arguing that, in *Lane,* there was a "limited scope of Title II's remedy as applied to accessibility of judicial services").

179. 541 U.S. at 531-32 (holding that Title II did not require states to employ any and all means necessary to make judicial services accessible to the disabled and did not require states to compromise their essential eligibility criteria for public programs).

180. If this argument holds, then there could be some problems with finding the statute void for vagueness, as it does not state what kind of modifications would be reasonable.

181. *See generally Cleburne,* 473 U.S. at 452-54 (Stevens, J., concurring) (suggesting that in the equal protection context, all groups of people should be subjected to rational basis, because, for example, it is less rational to discriminate against blacks because they are black, and more rational to treat people of different ages differently).

182. *Lane*, 541 U.S. at 556 (Scalia, J., dissenting). *See, e.g., Cochran v. Pinchak*, 401 F.3d 184 (9th Cir. 2005) (holding that Title II of the ADA does not abrogate state immunity from suits by disabled prisoners and applying the third prong of the *Boerne* test in the context of the 14th Amendment) (J. Sciria, dissenting, disagreed with the majority's application of the third prong of the *Boerne* test); *see also Miller v. King*, 384 F.3d 1248 (11th Cir. 2004) (analyzing the third prong of the *Boerne* test against the 8th Amendment rather than the 14th, in a disabled prisoner's suit).

183. *Id*. at 524-31 (majority opinion).

184. *Id*. at 530.

185. *See* discussion *supra* Section II.

186. U.S. CONST. amend. XIV, § 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

187. Timothy Zick, *Marbury Ascendant: The Rehnquist Court and the Power to "Say What the Law Is,"* 59 WASH. & LEE L. REV. 839, 909 (2002) (discussing the ramifications of Section 5). *Ex parte Virginia,* 100 U.S. 339, 345 (1880) ("It is the power of Congress which has been enlarged").

188. Zick, *supra* note 187, at 846.

189. Zick, *supra* note 187, at 909 (positing that *Marbury* does not empower the Court to preclude legislative interpretations of the Fourteenth Amendment). *See also Boerne*, 521 U.S. at 536 (1997) (explaining that when the Court has already interpreted the Constitution in a particular area, a congressional interpretation to the contrary will be struck down).

190. *Garrett*, 531 U.S. at 366-367.

191. 473 U.S. at 442.

192. Zick, *supra* note 187, at 910. *See Garrett*, 531 U.S. at 366-67 (applying rational basis review to a claim made under Title I of the ADA).

193. *Brown v. Bd. of Educ*., 347 U.S. 483 (1954).

194. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 516-517 (2000). *See also* Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94 (1966) (arguing that *Brown* became "more firmly law" after the Civil Rights Act of 1964).

195. *Grutter v. Bollinger,* 539 U.S. 306, 326-27 (2003) (stating that a strict scrutiny test must be applied to Equal Protection claims on the basis of race); *cf. Vill. of Arlington Heights v. Metro. Hous. Dev*., 429 U.S. 252, 265 (1977) (stating that the plaintiff must prove a discriminatory intent in Equal Protection claims on the basis of race).

196. *Grutter*, 539 U.S. at 343.

197. *See id.* at 326-27 (stating that a strict scrutiny test must be applied to Equal Protection claims on the basis of race). *Cf. Vill. of Arlington Heights*, *supra* note 195, at 265 (stating that the plaintiff must prove a discriminatory intent in Equal Protection claims on the basis of race); Post, *supra* note 194, at 514.

198. *See generally Dillon v. Gloss*, 256 U.S. 368 (stating that the dynamic will of the people is enacted through Congress); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (holding that determining intent is a "legislative duty and not a judicial one").

199. 514 U.S. 549, 614 (1995) (J. Souter, dissenting). *See also* A. Christopher Bryant & Timothy J. Simone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 373 (2001).

200. U.S. CONST. art. I, § 5, cl. 3 (stating that "[e]ach House shall keep a journal of its proceedings, and from time to time publish the same,

excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal").; Bryant, *supra* note 199, at 376.

201. *See generally id*. at 376; *see also* David A. Curie, *The Constitution in Congress: 1789-1801*, at 10 (1997) (stating that "the Senate chose to operate behind closed doors for several years. . . [N]either chamber interpreted the journal provision to require a verbal transcript of its proceedings"). *Cf*. U.S. CONST. art I § 5, cl.3.

202. *Field v. Clark,* 143 U.S. 649, 670 (1892) (rejecting the argument that the congressional record is "the best, if not conclusive, evidence); Bryant, *supra* note 199, at 383-384.

203. *See id*. at 384-385. *See also* Herbert Wechsler, *The Political Safegaurds of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546-47 (1954) (arguing that Congress reflects political sensitivity).

204. *See Field,* 143 U.S. at 670 (stating that the the Congressional Record is imperfect evidence of legislative action); *cf. Harwood v. Wentworth*, 162 U.S. 547, 562 (1986) (stating that legislative journals "show everything done in both branches of the legislature while engaged in consideration of bills presented for their action").

205. *See* Bryant, *supra* note 199, at 391. *See also* Peggy Davis, *"There Is a Book Out. . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1602-1603 (1987) (arguing that the judicial branch should have statutory authority to review disputed legislative facts); *e.g. Lopez, supra* (reviewing the legislative process *de novo*).

206. *See* Bryant, *supra* note 199, at 392. *See also* Anne Woolhander, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 123-24 (1988) (arguing that the use of judges or administrative agencies to perform reviews of legislative intent would be prohibitively subjective).

207. *See generally Adkins v. Kaspar*, 393 F.3d 559, 566 (5th Cir. 2004) (distinguishing *Boerne* on Fourteenth Amendment bases). *Cf. Abdul-Alazim v. Superintendent, Mass. Corr. Inst., Cedar Junction*, 778 N.E.2d 946, 950, n.8 (2002) (using *Boerne* as justification for applying the reasonable relationship standard).

208. *See generally* Zick, *supra* n. 187, at 839, 901(concluding that "[r]ecord review . . . is not a means of examining legislative predicates at all, but rather a tool the Court utilizes only after the outcome has been preordained by the application of judicial stare decisis to legislative interpretations of the Constitution"). *See also United States v. Morrison*, 529 U.S. 598, 614 (2000) (holding that congressional findings, standing alone, are insufficient to sustain the constitutionality of Commerce Clause legislation as this can ultimately be decided only by the Supreme Court (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring))).

209. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (suggesting congressional power under Section 5 of the Fourteenth Amendment is limited to enforcement and does not encompass the power to determine which violations offend the Constitution), *and Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966) (commenting that an interpretation of Section 5 mandating a judicial determination that a particular state law violates the Amendment as a prerequisite for sustaining congressional legislation precluding such a law would interfere with Congress's responsibility to implement the Amendment).

210. *See City of Boerne*, 521 U.S. at 516, 520–21 (discussing that congressional power to enforce the provisions of the Fourteenth Amendment is of a remedial, rather than substantive nature and that these categorical distinctions must be observed lest they interfere with judicial authority to determine the constitutionality of laws which, in turn, "is based on the premise that the 'powers of the legislature are defined and limited'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)). *See generally id*. at 177 (stating "[i]t is emphatically the province and duty of the judicial department to say what the law is").

211. *See* Zick, *supra* note 187, at 914 (demanding that the Court explain why it has limited condemnation under the Equal Protection Clause to instances of discrimination that violate, or could be found to violate, judicial interpretations of constitutional guarantees); *Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 (2001) (holding that Congress failed to establish a pattern of discrimination by the States in violation of the Fourteenth Amendment and that, absent such a finding, upholding the disputed legislation would contradict judicial precedent and misconstrue the scope of congressional authority under Section 5).

212. Zick, *supra* note 187, at 901 (acknowledging that Congress, per Section 5, is the principal enforcer of the Fourteenth Amendment's Section 1 guarantees). *See also Ex Parte Virginia*, 100 U.S. 339, 345–46 (1879) (describing the post-Civil War Amendments' aggrandizing effect on congressional power, in the form of the authorization to enforce all prohibitions through legislation and the responsibility to secure the "enjoyment of perfect equality of civil rights and the equal protection of the laws").

213. Zick, *supra* note 187, at 910 (arguing that while the Court has chosen not to practice "judicial minimalism" when deciding Section 5 cases, there are gaps in the developing constitutional doctrine which can be adequately filled by "legislative interpretation[s] of governing law" given congressional experience and access to broader investigation and information unavailable to the courts). *See also* David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 59–60 (1997) (noting that the Supreme Court and Congress share the task of enforcing the Fourteenth Amendmendment, which requires them to engage in acts of constitutional interpretation that, due to institutional differences, may have different substantive meanings and lead to equally valid but distinct levels of enforcement).

214. *See* Susan Herman, *Splitting the Atom of Marshall's Wisdom*, 16 ST. JOHN'S J. LEGAL COMMENT. 371, 373–74 (2002) (commenting on the relationship between the modern Court's invocation of its mandate to interpret the Constitution, as derived from *Marbury*, to "decide how far the powers of Congress extend" and the increased rate at which it has invalidated congressional acts); Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 182–83 (1997) (criticizing the Court's claim in *Boerne* that the framers of the Fourteenth Amendment intended to maintain judicial supremacy in the realm of constitutional interpretation as dubious given historical evidence that Section 5 of the Amendment "was born of the conviction that Congress—no less than the courts—has the duty and the authority to interpret the Constitution").

215. *See* McConnell, *supra* note 214, at 171 (finding congressional interpretive authority through both the existence of a general principle authorizing each of the branches of government to independently interpret the Constitution "within the scope of [their] own powers" and a reading of *Marbury* that, as a consequence of the preeminence of the Constitution as the national source of law, vests the duty to enforce the Constitution on all officials, as opposed to only judges); *City of Boerne*, 521 U.S. at 535 (accepting that "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution").

216. *See* Zick, *supra* note 187, at 917 (claiming the Court's refusal to share its interpretive power by binding Congress to judicial precedents under the Equal Protection Clause precludes any dialogue with Congress on topics such as gender and disability discrimination); McConnell, *supra* note 214, at 191 (explaining that when Congress engages in constitutional interpretation under the enforcement power, it is free from some of the considerations informing judicial restraint, which translates into a broader, more robust, and egalitarian protection of civil rights).

Craig Rokuson is a real estate finance associate at Thacher Proffitt & Wood.

Do ADR Mediators Have an Ethical Duty to Ensure an Agreement's Substantive Fairness?

By Zachary Dubey

The use of Alternative Dispute Resolution (ADR) in settling disputes has grown tremendously in the past several years.[1] In particular, many people are turning to mediation as their preferred form of ADR. The reasons for this focus on mediation as a substitute for litigation are numerous. Some of the benefits include cost savings, time savings, the confidential nature of mediation, and the diminishment of potential evidentiary obstacles to one's case.[2] Additionally, direct contact between the parties often "uncovers the parties' true underlying interests and allows them to reach for an optimal solution."[3] On the other hand, ADR is not beneficial if one or more parties involved are not truly committed to agreeing to a voluntary settlement[4] or where a party wants to set a legal precedent, call public attention to a cause, or exploit to its benefit an existing economic disparity, strong legal position, or other power imbalance.[5]

"[D]o mediators have an ethical duty to ensure the substantive fairness of agreements reached in mediation?"

As ADR, and particularly mediation, becomes more widespread, these benefits and drawbacks raise the question of what types of agreements are being produced through mediation. Are most agreements more or less fair to both sides, or do some agreements leave one side with a patently unfair result? It also raises the question whether, as an ethical matter, mediators should be held responsible for the content of any agreement reached between the parties to mediation. That is, do mediators have an ethical duty to ensure the substantive fairness of agreements reached in mediation?

This article explores this question and seeks to provide an answer through a detailed analysis of the recent standards and theories being offered to the ADR community. Part I gives a brief background of the mediation process. Parts II and III explain the current ethical guidelines that apply to mediators, explore the moral obligation of mediators, and set forth arguments both supporting and opposing a mediator's duty to ensure the substantive fairness of an agreement reached through mediation. Finally, Part IV offers a brief conclusion on this topic.

I. Background

Mediation is defined as "an informal process in which an impartial third party helps others resolve a dispute or plan a transaction but does not (and ordinarily does not have the power to) impose a solution."[6] The main distinction between mediation and other forms of dispute resolution is that the third party neutral in a mediation does not make a binding decision as to the parties' dispute.[7] In this way, mediation is different from litigation or arbitration in that it is designed to help facilitate the parties to reach their *own* settlement of the case, rather than put their respective futures in the hands of a non-party or stranger.[8] Any agreement the parties come to is expressed in a contract rather than a decision or order.[9] Additionally, mediation is typically a voluntary process in which the parties choose freely to participate.[10]

Most of a mediator's ethical duties are well-settled.[11] These duties include: (1) maintaining confidentiality during and after the mediation process (whether successful or not); (2) advising the parties of their strengths and weaknesses as an incentive to settle; (3) explaining the possible outcomes that could result from litigation; (4) being competent and understanding the dispute and issues relating thereto; (5) exerting a high degree of civility to everyone involved; (6) ensuring parties understand the ramifications of the agreement; and (7) maintaining impartiality.[12] Other prominent duties required of a mediator include: (1) avoiding a conflict of interest (or the appearance thereof); (2) being truthful and not misleading;[13] (3) protecting the voluntary participation of the parties; and (4) refraining from providing legal advice to the parties.[14] Included in this list, some believe, should be an ethical duty to ensure the substantive fairness of an agreement reached through mediation.[15]

Several institutions have published ethical guidelines for mediators. Three of the largest ADR providers, the American Arbitration Association (AAA), the American Bar Association (ABA), and the Association for Conflict Resolution (formerly known as The Society for Professionals in Dispute Resolution or SPIDR),[16] have jointly produced the Model Standards of Conduct for Mediators.[17] Judicial Arbitration and Mediation Services (JAMS), another large ADR provider, has also published ethical guidelines for mediators.[18]

Noticeably, however, certain important institutions have not directly addressed the ethical obligations of mediators.[19] Although the ABA adopted the Model Standards of Conduct for Mediators,[20] a lawyer-mediator in need of ethical guidance would likely look to the ABA Model Rules of Professional Conduct,[21] which do not directly address the ethical obligation of a mediator

to ensure the substantive fairness of parties' agreements. Model Rule 2.4, which requires that a lawyer serving as a third party neutral inform the parties that the lawyer is not representing them,[22] is "stated in a comment not to apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties."[23] The Model Rules are silent on the issue of substantive fairness and merely state that lawyer-representatives participating in mediation are governed by the rule.

The rule governing alternative dispute resolution for the Southern District of New York (Local Civil Rule 83.12, Alternative Dispute Resolution) is also silent on the issue of a mediator's responsibility for the fairness of an agreement, although it does provide a short list of a mediator's duties.[24]

In the discussion below, these guidelines and rules will be analyzed in the context of whether or not they support the view that mediators have an ethical duty to ensure the substantive fairness of parties' agreements.

II. The Argument For: Mediators Have a Moral Obligation to Ensure Fairness of Mediation Agreements

Arguments for requiring an ethical duty to ensure the fairness of a mediation agreement rely on three main sources of support: (1) the duty to ensure the parties' informed consent of the consequences of settlement; (2) the duty to promote the integrity of mediation as a process for dispute resolution; and (3) the view that a mediator should do what is morally right.

1. Ensuring Informed Consent and Promoting Integrity

Three sections of the Model Standards of Conduct for Mediators can be plausibly interpreted as requiring mediators to assume ethical responsibility for the justness of any result reached through mediation.[25] The first of these sections is entitled "Standard VI. Quality of the Process, Part A, § 4," and provides that "[a] mediator should promote honesty and candor between and among all participants."[26] This appears to give the mediator license to work to ensure that any resulting agreement is substantively fair.

In addition, Part B of this section provides that "[i]f a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps, including, if necessary, postponing, withdrawing from or terminating the mediation."[27] And Part C of this Section provides that "[i]f a mediator believes that participant conduct . . . jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation."[28] Both Part B and C seem to be directed at ensuring the integrity of the mediation process. In fact, the Preamble to these rules sets forth its goal to "promote public confidence in mediation as a process for resolving disputes."[29] In light of that purpose, it appears that the objective of promoting public confidence in mediation would not be served if the mediation process had no regard for the substantive fairness of an agreement reached through mediation.

The Mediator Ethics Guidelines issued by JAMS provides additional support for the proposition that a mediator has a duty to ensure an agreement's fairness.[30] Section VII of those guidelines lists the circumstances under which a mediator should withdraw from the mediation.[31] It provides, *inter alia*, that "a mediator should be aware of the potential need to withdraw from the case if procedural or *substantive unfairness* have undermined the integrity of the mediation process."[32] While there is no discussion or reasoning of the inclusion of substantive unfairness in these guidelines, it is clear that the integrity of the mediation process is of paramount importance. Allowing a substantively unfair agreement to be produced would be a threat to that integrity.

A leading ADR commentator, John W. Cooley, believes that, at least under the Model Standards of Conduct for Mediators, the mediator has a duty with respect to ensuring the fairness of an agreement reached through mediation.[33] In analyzing the Model Standards of Conduct for Mediators, Cooley finds that mediators should "help them [the parties] make informed decisions."[34] Cooley finds further support under the Model Standards in that,

> Included in the mediator's duties under Standards I and VI is the responsibility to see that checks are performed to guarantee that the settlement is fair and equitable within the perceptions of the parties.[35] Under those standards, a mediator is also expected to deal appropriately with power imbalances causing advantages to one or more parties resulting from wealth, social position, access to legal expertise, access to facts, negotiating ability, physical intimidation, or an opponent's avoidance of conflict. Methods by which mediators deal with power imbalances include, (1) enlisting the aid of the parties' counsel, (2) convincing parties to stop the intimidating tactics or other abusive behavior, (3) encouraging parties to obtain legal representation if they are unrepresented, (4) educating the parties in effective negotiation techniques, and (5) advising the parties of the mediator's obligation to withdraw if the adverse effects of the imbalance cannot be resolved.[36]

Cooley also notices that mediators have a duty to protect the integrity of the mediation process.[37]

In a different forum, Cooley addressed more directly the topic of this article: whether a mediator has an ethical obligation to ensure the fairness of an agreement reached through mediation when there is a power imbalance among the parties.[38] Cooley stated, "In mediation, a problem can arise when the less powerful party does not understand or fully appreciate that, because of the power disparity, the solution to which that party is about to agree is unfair in the sense that it will either result in a great disadvantage to him or her and/or that it is being coercively foisted upon him or her."[39] Additionally, "[t]he mediator's duty to properly handle power imbalances arises from the mediator's broader duty to the parties to ensure the parties' informed consent[40] and to facilitate their understanding of the consequences of a settlement."[41] Therefore, one could argue, under Cooley's analysis of the Model Standards, a mediator has a duty to ensure the fairness of a resulting agreement not only because of the requirement of informed consent, but also because ensuring the fairness of the agreement furthers the integrity of the mediation process.

"One leading ADR professor strongly believes that the mediator must be concerned with the fairness of any outcome arrived at through mediation."

2. Morality

Linda R. Singer[42] makes several interesting observations relevant to the subject of morality in mediation in her book *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System*. Singer notes that the ethical standards governing mediators are in a state of flux.[43] Even the American Bar Association's Model Rules of Professional Conduct, which governs the ethical conduct of lawyers, does not directly address the ethical obligations of a lawyer-mediator who does not represent either party to the mediation.[44] Additionally, Singer notices, "[t]he most debated ethical questions about ADR concern mediation," including the issue of whether a mediator is responsible for the fairness of an agreement resulting from mediation.[45]

Singer bases her answer to this question on the SPIDR standards of ethical responsibility which state that "the mediator must inform the parties of any concern he or she may have about the possible consequences of a proposed agreement, and providing that the mediator then has the option of educating the parties, referring one or more for outside advice, or withdrawing from the case in extreme circumstances (while maintaining confidentiality)."[46] Finally, Singer concludes, mediators in most contexts "would agree that it is inappropriate to assist parties in entering an agreement that is patently unfair or based on misleading or inaccurate information."[47]

Singer bases her argument for imposing a duty on the fact that it is morally right for mediators to be fair and that mediators should make sure parties understand the consequences of their settlement.[48] However, that is not enough support for imposing an ethical duty on a mediator. First, what if the mediator did express his concern over the possible consequences of the agreement and the parties agreed to it anyway? In that situation the agreement would still be unfair, and the mediator would have breached his duty to ensure the substantive fairness.[49] Second, while most mediators might think it inappropriate to oversee a mediation resulting in a patently unfair agreement,[50] it is the parties who have voluntarily chosen to mediate, who are (likely to be) represented by counsel, and who freely sign the agreement at the end of the day.[51] In short, while Singer's argument warms the heart in the sense that it might make the mediator feel a sense of righteousness, Singer does not offer any objective, affirmative support for her position.

One leading ADR professor strongly believes that the mediator must be concerned with the fairness of any outcome arrived at through mediation.[52] Professor Gunning[53] argues that in the pursuit of both procedural and substantive fairness, mediators must engage in "activist mediation," whereby the mediator uses "intervention techniques" to equalize power imbalances.[54] This would be done, of course, in an endeavor to achieve a fair result.[55]

Gunning explains that an "activist mediator is probably not as 'active' as the name might suggest."[56] Gunning indicates "that the mediator will openly discuss issues of 'equality' and 'justice' with the parties and encourage them to define and abide by these principles in creating any agreement that might result. If a mediator does this, does that violate her impartiality or neutrality?"[57]

The real issue, Gunning states, is how the "mediator's concern for justice in the outcome interacts and intersects with the mediator's concern for the parties' self-determination."[58] She answers by explaining, "[w]hen a mediator considers intervening to prevent bullying, stop lying or provide information in order to increase the chances of a just outcome, it is not at all clear that such interventions violate party self-determination."[59] This is so, Gunning reasons, because, "[i]f self-determination is divorced from informed decision-making or voluntary consent, it cannot claim to constitute authentic self-determination."[60]

Gunning puts it this way: "It would be surprising to find a party who would openly state that they do not want a fair or just outcome."[61] She then proposes a way

to create that ethical duty to ensure substantive fairness of an agreement without necessarily violating any other ethical obligation a mediator might have:

> If later in the mediation, the mediator senses a power imbalance, she need not announce it as such or hope for one of the parties to make an explicit complaint.
>
> One method of managing this would be to explore the possibility of imbalance and any negative implications through a "check-in" with the parties on the agreed-upon process and outcome values. As proposals are placed on the table, the mediator makes it a practice to remind the parties of their earlier promises and to encourage the parties to further explain their views on fairness or justness as they relate to any particular proposal[62]

In the end, however, Gunning offers no concrete support for imposing a duty on mediators. Instead, her arguments are more an effort to explain the detrimental effects that imposing a duty would have on self-determination of the parties, one of the main principles upon which mediation is based.[63]

III. The Argument Against: Mediators Do Not Have a Moral Obligation to Ensure Fairness of the Agreement

Arguments made against requiring an ethical duty to ensure the fairness of an agreement find four main sources of support.

1. What Is Fair?

Two sections of the Model Standards of Conduct for Mediators can be interpreted as relieving the mediator of any ethical responsibility for the justness of any result reached through mediation.[64] The first section, "Standard I. Self-Determination, Part A, § 2," states, "[A] mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices."[65] Reading the plain language of the first clause here, it appears that the standards recognize the limitations of mediators in particular, and on persons in general.[66] Since the mediator simply "cannot" ensure the freedom or voluntary nature of a party's choices, how can it ensure the fairness of the agreement which is based primarily upon those considerations?

This leads to the broader argument against requiring a duty.[67] That is, by what objective standard is a mediator supposed to determine that an agreement is substantively unfair? The answer, of course, is that no such standard exists.[68] It appears that the only way a mediator could determine this question, then, would be based on his own subjective standard of what is fair. This cannot be a sound basis for making a decision as to what is fair.[69] Practically speaking, to impose an ethical duty calling for a mediator to use his subjective standard of fairness as to a result made between the parties themselves would liken the mediator to a judge in some respects (who, incidentally, is not the person the parties chose to decide their dispute).

Professor Jonathan M. Hyman[70] pointed to another obstacle standing in the way of any potential ethical duty of a mediator to ensure substantive fairness: "The issue of justice in mediation raises the potential conflict between what the parties think is a fair and reasonable resolution, and what the mediator thinks is fair and just . . . Should mediators' ideas of justice trump some decision that parties want to make?"[71] If we consider imposing this ethical obligation, then "we run the risk of having the mediator trump the concern of the parties . . . [as] there is no trustworthy substantive standard of justice on which mediators can rely."[72]

2. Ethical Guidelines Call for Procedural, Not Substantive, Fairness

The Model Standards of Conduct for Mediators, "Standard VI. Quality of the Process," states, "A mediator shall conduct a mediation . . . in a manner that promotes . . . procedural fairness."[73] This section clearly shows that the Model Standards and, more generally, the ADR community behind those standards believe that procedural fairness should be a paramount consideration for a mediator.[74] It also shows that, for whatever the reasons, the ADR community chose *not* to impose a requirement upon mediators to ensure substantive fairness.[75] And while critics of this interpretation may argue that the mention of procedural fairness implicates a desire to impose substantive fairness as well (on the theory that ensuring procedural fairness will necessarily lead to a fair result), that argument does not hold up to the simple fact that had the ADR community thought such a requirement was appropriate, it certainly had the opportunity to so provide.[76]

Professor Joseph Stulberg[77] presents an interesting distinction between what is "fair" on the one hand and what is "moral" on the other.[78] At the Association for Conflict Resolution's 2003 Annual Conference, Stulberg presented this distinction by way of a colorful example that can be summarized as follows: An elderly lady in poor health was traveling on an overnight train in a closed cabin.[79] A fellow passenger wants to smoke, but if he does the woman might die.[80] Also, this woman is in the situation where she led her relatives to believe that she will leave them a large inheritance when she passes away.[81] However, the woman is broke.[82] Now the fellow passenger offers the woman ten million dollars if

she will let him smoke.[83] That money would enable the woman to leave her relatives the large inheritance she promised.[84] "Perhaps," Stulberg offers, "what we might say of this situation is that the agreed-upon outcome is a fair outcome but not the morally right outcome."[85] In light of this distinction, can the agreement truly be said to be fair substantively?[86] That is, can an agreement be fair substantively if one party is essentially contracting to allow herself to be killed in return for a particular sum of money?[87] The answer is no, of course.[88] But Stulberg's point is that as long as the parties understand what they are agreeing to, it is not the mediator's role to prevent them from so agreeing.[89]

3. Power Imbalances Are Overrated

In "Power Imbalances in Mediation: Questioning Some Common Assumptions,"[90] Jordi Agusti-Panareda makes an interesting argument premised on the fact that mediation can deal fairly with its parties even if there is a significant power imbalance among them.[91] She begins by stating the common argument that mediation preserves the already-existing power imbalance among the parties and provides a ripe forum for exploitation.[92] She then states that "Critics argue that mediation 'works best when equals are bargaining with one another' and proves 'ineffective in cases of severe power imbalances between the parties.'"[93] She then attacks that position, arguing that mediations do not necessarily work better when parties have equal power.[94] As support for this theory, the author states, "The existence of power does not entail its exercise."[95] This is because when the weaker party recognizes the potential for a power-play by the stronger party, the weaker party will often times not agree to that outcome due to such a heightened level of suspicion of the other side's intentions.[96] This may happen even if the proposal would be viewed as reasonable by an outside observer.[97]

The author also points out that "the adversarial structure of legal adjudication encourages confrontation and could be said to convert disputes into power struggles."[98] The obvious implication of this point is that while power imbalances may result in an unfair agreement through mediation, it is still much less likely to occur when compared to power imbalances being played out in the courts.[99]

This article leads to the conclusion that there is no essential need for an ethical duty of mediators to ensure the substantive fairness of their agreements because the presumed cause of any unfair agreement (i.e., the difference in some aspect of power between the parties) can and should be virtually diminished.[100]

Additional support for not placing an ethical requirement on mediators is found in an article published in the *New York Law Journal*,[101] in which the authors responded to a series of articles asserting that divorce mediation is unrealistic. This article strives to negate the importance of power imbalances between parties to a divorce mediation.[102] As the authors stated:

> The concept of a power imbalance between the spouses is often overrated. Anyone who has seen the impact of passive power knows that a spouse who "can't make a decision," or who "needs more time," has a great deal of power. In cases where a spouse is truly overwhelmed, the mediator has a responsibility to make sure the spouse obtains the necessary resources (time, information, legal or financial advice, etc.) to participate fully in the mediation or needs to refer the couple to a different venue for working out the terms of their agreement.[103]

Taking this reasoning further, if the very basis upon which a substantively unfair agreement was premised is eliminated, then what reason is there for imposing a duty to ensure the agreement's fairness?

It has also been argued that requiring a duty of substantive fairness might conflict with the all-too-important duty of confidentiality. One professional mediator, Michael D. Young,[104] provides a clear illustration of this inherent conflict:

> For example, plaintiff is represented in an employment discrimination action by an attorney who is not very experienced in the field. Based on a misconception of the law, plaintiff's counsel has materially under-estimated the value of the case. This fact has become apparent to the mediator only as the result of a conversation he has had with defense counsel, but the latter has prohibited the mediator from disclosing the information to plaintiff's counsel. Plaintiff is about to settle for a relatively low amount based on this misconception of the law.
>
> The mediator is under an absolute obligation not to disclose defendant's counsel's understanding of the law since counsel has prohibited the mediator from doing so. . . .
>
> . . .
>
> . . . [Therefore, the mediator] cannot take any steps that would even implicitly violate the confidentiality obligation. Nor can it be said that, given the presence of otherwise adequate counsel, the media-

> tor has failed in his or her obligation to ensure a "fair" process.

However, Young goes on to distinguish between a situation in which

> [T]he mediator does not learn of the misconception of the law from the defendant's counsel, but is aware of it from his or her own knowledge. . . .
>
> . . .
>
> Under such circumstances, the mediator may be under an ethical obligation to at least suggest to plaintiff's counsel that she review the issue again. (As a matter of good practice, the mediator will likely have that discussion with counsel outside the presence of the plaintiff.) Otherwise, there may be a non-knowing consent to a settlement. On the other hand, *the mediator is not the guarantor of a "fair or just" result*, and the mediator owes ethical obligations of fairness and impartiality to the defendant.[105]

Young provides a forceful argument against imposing an ethical duty on mediators to ensure substantive fairness. In light of this argument, it appears that, not only would it be impractical to impose a potentially conflicting duty on mediators, but, when weighing the concept of confidentiality against the concept of fairness, the fairness factor seems to have protections already built-in (in the form of legal representation), while the confidentiality factor does not. In fact, the confidentiality aspect would be left unprotected if the mediator could violate the ethical guideline to keep all information obtained by one side confidential unless authorized by that party to disclose.

Harvey Besunder's view on this issue is quite different from that just stated. In fact, Mr. Besunder defines the issue here not as one of violating the mediator's duty of confidentiality, but rather that of whether the parties themselves made the right choice in deciding to mediate rather than litigate.[106] "If the parties choose mediation, they must be aware that they will not, unless otherwise agreed to, have the benefit of liberal discovery as they would in a litigation."[107] Instead, Besunder argues that the system should place the burden on the parties' counsel, to learn and know the appropriate facts and be accurately aware of the law.[108] "The proper remedy in that situation [where the attorney misunderstood the law] is for the client to sue his attorney for legal malpractice; not for the mediator to help one side make up for the inadequacy of his counsel."[109]

4. The Purpose of Mediation Is to Provide a Quick, Efficient, and Informal Method of Dispute Resolution

Finally, it has been argued that a major objective of ADR is the quick and efficient resolution of disputes.[110] The informal manner in which mediation takes place is essential to reaching solutions quickly,[111] and any hard and fast rules attached thereto will slow down the time in which it takes to reach those solutions. Of course, this is not to say that the mediator should be void of any ethical duties. However, it seems that the ethical duties already imposed on mediators strike a fair balance between maintaining the integrity of the mediation process and the quick and efficient resolution of disputes.

"[T]he ultimate responsibility for the fairness of an agreement rests with the people who created the dispute to begin with: the parties themselves."

IV. Conclusion

At present, a mediator cannot be held responsible for the substantive fairness of an agreement reached through mediation. This article does not seek to deny that a mediator does in fact have a duty to promote the integrity of the mediation process, and to ensure the informed consent of the parties as to any possible consequences resulting from the final agreement. Nor does it seek to negate the importance of the parties' self-determination in mediation. However, numerous factors (including: the lack of any subjective standard for determining what is substantively fair, the absence of this ethical duty in existing ethical guidelines promoted by the major ADR providers and courts, the differing views on the effect of power imbalances between parties, the potential conflict between a mediator's existing duty of confidentiality and a duty to ensure substantive fairness, and the overall objective of the ADR process) underlie the practical difficulties in imposing such a standard. Therefore, the ultimate responsibility for the fairness of an agreement rests with the people who created the dispute to begin with: the parties themselves.

Endnotes

1. JOHN W. COOLEY, MEDIATION ADVOCACY 1 (National Institute for Trial Advocacy 1996); William K. Slate II, *Court-Annexed ADR Systems*, N.Y.L.J., Jan. 5, 1995, p. 3, col. 1 (discussing the development and future of court-annexed ADR programs).
2. Scott E. Mollen, Esq., Lecture at St. John's University School of Law (Oct. 2005); interview with Harvey B. Besunder, Esq., Partner, Prusansky & Besunder, LLP, in Islandia, N.Y. (Nov. 30, 2005). Mr. Besunder has served as a mediator and court referee, represented parties participating in mediation, and judged the Mediation Competition at Touro Law School. In addition, Mr. Besunder has served as President of the Suffolk County Bar Association, 1993-1994, and

on the Suffolk County Bar Association's Grievance Committee and Judiciary Committee. He was Chair of the New York State Bar Association's Committee on Lawyer Discipline from 1996 to1999. From 1988 to 1996, he served as a member of the Grievance Committee for the Tenth Judicial District. Additionally, Mr. Besunder has lectured extensively on behalf of the Suffolk Academy of Law, on such topics as ethics and the disciplinary process.

3. LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS: ABRIDGED 210 (2d ed. 1998) (1988). *See also* Eric P. Tuchmann, *Sources of Confidentiality in Mediation*, N.Y.L.J., July 3, 1997, p. 3, col. 1 (discussing the value of confidentiality in mediation).

4. Besunder interview, *supra* note 2. *See also* Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575 (1997) (considering the importance of good faith and the potential need for a good faith requirement).

5. Mollen lecture, *supra* note 2. *See also* Kovach, *supra* note 4, at 594 (providing an example of negotiating in bad faith).

6. RISKIN AND WESTBROOK, *supra* note 3 (labeling the desired result as an agreement tailored to the needs of the parties). For a slightly different definition specific to the Federal Courts of the Southern District of New York, *see* MCKINNEY'S N.Y. RULES OF CT., LOCAL RULES OF THE U.S. DIST. CTS. FOR THE S. AND E. DISTS. OF N.Y., Civ. Rule, 83.12 303 (2005) (applying the definition that "[m]ediation is a confidential ADR process in which a disinterested third party directs settlement discussions but does not evaluate the merits of either side's position or render any judgments"). *See also* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitration Ass'n et al., 2005), *available at* <http://www.acrnet.org/pdfs/ModelStandardsofConductforMediatorsfinal05.pdf> (last accessed March 18, 2006) (defining mediation as "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute").

7. COOLEY, *supra* note 1, at 4 (describing the differences between mediation and arbitration in terms of the judicial process by analogizing mediation to a judicial settlement conference and arbitration to a trial). *See also* MEDIATION THEORY, POLICY AND PRACTICE xiv (Carrie Menkel-Meadow ed., 2001) (attributing mediation's authority to the voluntary commitments made by the parties rather than to coercion from third parties or the state).

8. *See* Gail M. Valentine-Rutledge, *Mediation as a Trial Alternative: Effective Use of the ADR Rules*, 57 AM. JUR. TRIALS 555 (2006) (stating that mediation allows parties to play an active role in resolving their cases by providing them with a greater degree flexibility and control over the development of potential resolutions); MEDIATION THEORY, POLICY AND PRACTICE, *supra* note 7, at xiv (claiming that mediation "challenges the Anglo-American ideal of adversarial dispute resolution" by permitting a third party with no decision-making or regulatory authority to facilitate a solution crafted by the disputing parties).

9. RISKIN & WESTBROOK, *supra* note 3, at 4 (commenting that usually such agreements will be enforceable according to the rules of contract law). *See also* MEDIATION THEORY, POLICY AND PRACTICE, *supra* note 7, at xiv (positing that as a process and a substantive legal matter, mediation is closer to negotiation and contracting than to "more formal and legalistic institutions").

10. RISKIN & WESTBROOK, *supra* note 3, at 4 (noting that the parties usually select the mediator). However, non-voluntary mediation also exists, such as court-ordered mediation. *Id*. *See also* James T. Peters, Note & Comment, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83 (1997) (introducing mediation as a "non-binding, voluntary (dispute) settlement process" that, as such, strengthens the opportunity for dispute resolution through a mutually acceptable agreement).

11. *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitration Ass'n et al., 2005), *available at* <http://www.acrnet.org/pdfs/ModelStandardsofConductforMediatorsfinal05.pdf> (last accessed March 18, 2006) (informing that these standards were jointly produced and separately approved by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution (formerly SPIDR)); JAMS MEDIATORS ETHICS GUIDELINES (2003), *available at* <http://www.jams-endispute.com/mediation/ethics.asp> (last accessed March 17, 2006) [hereinafter JAMS GUIDELINES] (conceding the general nature of the ethical duties but asserting their national scope).

12. Besunder interview, *supra* note 2 (explaining that some mediators do not give the appearance of impartiality and that the practical effect thereof can be the lack of a successful resolution of the case). With respect to a mediator's duties, Besunder believes that mediators who have been found guilty of serious transgressions in the past should either (1) be prohibited from mediating disputes, or (2) at the very least, should have an ethical duty to disclose those transgressions to the parties up front. *Id*. He notes that such disclosures would be appropriate where the mediators are disbarred attorneys or convicted felons. *Id.* The purpose of this ethical duty, Besunder explains, is to promote among the parties a sense of confidence and integrity in the mediation process. *Id*. *See also* COOLEY, *supra* note 1, at 147--48 (adding that the ethical duties of a mediator are defined in relation to the parties, the process, nonparties, and other professionals).

13. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitration Ass'n et al., 2005), *available at* <http://www.acrnet.org/pdfs/ModelStandardsofConductforMediatorsfinal05.pdf> (last accessed March 18, 2006) (detailing the need to investigate and disclose whether there are any actual or potential conflicts of interest but permitting the mediator to continue in his role after securing the agreement of all parties unless the conflict is perceived as undermining the integrity of the mediation). *See* JAMS GUIDELINES (2003), *available at* <http://www.jams-endispute.com/mediation/ethics.asp> (last accessed March 17, 2006) (extending the duty of being truthful and not misleading to any advertising or marketing conducted in the mediator's behalf and responses given to questions regarding the mediator's impartiality).

14. JAMS GUIDELINES (2003), *available at* <http://www.jams-endispute.com/mediation/ethics.asp> (last accessed March 17, 2006) (emphasizing the centrality of "[t]he right of the parties to reach a voluntary agreement" to the mediation process and the threats to the mediator's impartiality (or appearance thereof) if he or she begins to act as a representative of or advocate for any a party). *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitration Ass'n et al., 2005), *available at* <http://www.acrnet.org/pdfs/ModelStandardsofConductforMediatorsfinal05.pdf> (last accessed March 18, 2006) (urging the mediator to conduct the process according to the principle of "party self-determination," which allows the parties to make voluntary, uncoerced decisions on whether to participate or withdraw from the process and outcomes).

15. *See* COOLEY, *supra* note 1, at 148 (suggesting that the current standards already include the responsibility to perform a series of checks to guarantee the fairness of an agreement "within the perceptions of the parties"). *But see* Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997) (warning that the functions and duties of mediators such as the promotion of self-determination and impartiality are undermined if they undertake evaluative duties).

16. SPIDR has since merged with the Academy of Family Mediators and the Conflict Resolution Education Network to form the Association for Conflict Resolution (ACR). For purposes of discussion in this article, SPIDR and ACR may be used interchangeably.

17. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitration Ass'n et al., 2005), *available at* <http://www.acrnet.org/pdfs/ModelStandardsofConductforMediatorsfinal05.pdf> (last accessed March 18, 2006).

18. JAMS GUIDELINES (2003), *available at* <http://www.jams-endispute.com/mediation/ethics.asp> (last accessed March 17, 2006).

19. Linda R. Singer, Settling Disputes: Conflict Resolution in Business, Families, and the Legal System 175-180 (Westview Press, Inc. 1994) (1990).

20. Model Standards of Conduct for Mediators (Am. Arbitration Ass'n et al., 2005), *available at* <http://www.acrnet.org/pdfs/ModelStandardsofConductforMediatorsfinal05.pdf> (last accessed March 18, 2006). The American Bar Association adopted the Model Standards of Conduct for Mediators on August 9, 2005.

21. Model Rules of Prof'l Conduct (2004).

22. Model Rules of Prof'l Conduct R. 2.4 cmt. 5 (2004).

23. 4 Am. Jur. 2d *Alternative Dispute Resolution* § 6 (2005).

24. *Local Rules of the United States District Courts for the Southern and Eastern Districts of New York,* Local Civil, R. 83.12 (2005), *available at* <http://www.nysd.uscourts.gov/rules/rules.htm> (last accessed March 6, 2006) ("By holding meetings, defining issues, diffusing emotions and suggesting possibilities of resolution, the mediator assists the parties in reaching their own negotiated settlement."). One explanation offered for the refusal of certain institutions to place in their rules an ethical obligation of mediators to ensure the substantive fairness of agreements is that the purpose of mediation is to settle disputes quickly and informally. "Setting hard and fast rules would not further the basic purpose of mediation as it would slow down the mediation process." Besunder interview, *supra* note 2.

25. Model Standards of Conduct for Mediators, Standard VI (Am. Arbitration Ass'n et al., 2005), *available at* <http://www.acrnet.org/pdfs/ModelStandardsofConductforMediatorsfinal05.pdf> (last accessed March 18, 2006) ("Standard VI. Quality of the Process").

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* (In addition to this goal, the Standards also serve "to guide the conduct of mediators" and "to inform the mediating parties").

30. *Id.*

31. *Id*. In addition to this section, the guidelines state that "All JAMS mediators should be aware of applicable state statutes or court rules that may apply to the mediations they are conducting" as the guidelines listed are not intended to trump state or local laws. *Id*.

32. *Id*. (emphasis added). This section also states that a mediator should withdraw from the process if the mediation if the mediation "is being used to further illegal conduct, or for any of the reasons set forth above: lack of informed consent, a conflict of interest that has not or cannot be waived, a mediator's inability to remain impartial, or a mediator's physical or mental disability." *Id.*

33. Cooley, *supra* note 1, at 147-49. *See also* John W. Cooley, *Mediator & Advocates Ethics*, 55 Disp. Resol. J. 73, 74 (2000) ("Included in the mediator's duties under Standards I and VI is the responsibility to see that checks are performed to guarantee that the settlement is fair and equitable within the perceptions of the parties.").

34. Cooley, Mediation, *supra* note 1, at 147-49. *See also* Cooley, *Advocates*, *supra* note 33, at 73 ("A mediator can educate the parties about the mediation process and help them make informed decisions.").

35. *Id*. at 74 (reiterating mediator's duty to guarantee a fair settlement). *But see id*. at 78. It is unclear from Cooley's statements here whether he is advocating "checks" that inquire as to the substantive fairness of the agreement, or whether he is referring to procedural checks instead. The decision of whether a settlement is fair rests upon the perception of the parties. This implies that the resolution need not be substantively fair. "Dispute resolution in mediation . . . focuses on person-oriented or party-perceived norms or notions of fairness." *Id*.

36. Cooley, Mediation, *supra* note 1, at 147-49.

37. *Id*. at 148-49. *See also* Cooley, *Advocates*, *supra* note 33, at 74.

38. *Id*. at 78.

39. *Id.* at 78.

40. Besunder makes a most-important distinction in this area, however. "There is a difference between ensuring that the parties understand the *ramifications* of the agreement and ensuring the parties understand the *nature* of the agreement. I believe that the mediator's duty goes so far as to require him to ensure the parties know the consequences of what they are agreeing to without, though, requiring him to ensure the parties understand the nature of the agreement itself—and more particularly whether that agreement is fair by one party's subjective standard." Besunder interview, *supra* note 2.

41. Cooley, *Advocates*, *supra* note 33, at 78.

42. Linda R. Singer, *supra* note 19, at 175-79. Linda R. Singer is a lawyer who has directed the Center for Dispute Settlement since 1971. She also handles an active mediation and arbitration practice as a principal in ADR Associates in Washington, D.C.

43. *See id*. at 175.

44. *Id*.

45. *Id*. at 176 (noting other debated ethical questions about ADR mediation including whether the mediator has a duty to ensure that everyone with an interest in the outcome of a dispute is represented at the bargaining table; and whether it is appropriate to mediate at all when the parties have significantly different knowledge, resources, or power).

46. *See id.*

47. *Id.* at 176.

48. *See id*. Singer also notes that the Society of Professionals in Dispute Resolution has adopted ethical standards that emphasize the need for impartiality and the parties' informed consent.

49. *Id*. (admitting that "[d]eciding where to draw the line between the mediator's duty to be impartial and his or her accountability for an obviously unfair or unworkable agreement can be extremely difficult").

50. *Id.*

51. *See id*. at 177. Singer concedes that the difficulty with power imbalance situations is that often mediation may be better suited to resolve the conflict than the alternative methods available.

52. Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 Cardozo J. Conflict Resol. 87 (2004).

53. Professor Gunning teaches law at Southwestern School of Law. In addition, she serves as a pro bono mediator through the Los Angeles County Bar Association's Dispute Resolution Services Project and Gay and Lesbian Mediation Project as well as the Southern Christian Leadership Conference's Martin Luther King Jr. Dispute Resolution Center. She has also co-chaired the Asian Pacific American Dispute Resolution Center.

54. Gunning, *supra* note 52, at 89.

55. *See id.*

56. *See id.* at 91.

57. *Id.*

58. *Id.* at 93.

59. *Id.*

60. *Id.*

61. *See id.* at 94.

62. *See id.* at 94–95.

63. *Id.* at 89. Gunning is far less comfortable watching stronger parties bully weaker parties than are others who purely focus on the self-determination of parties.

64. Thomas J. Stipanowich, *Model Mediators Standards Are Revised, but Commercial Applications Are Questioned,* 23 ALTERNATIVES TO THE HIGH COST OF LITIG. 154, 156 (2005) (providing examples of criticism of the model rules).

65. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, STANDARD VI (Am. Arbitration Ass'n et al., 2005), *available at* <http://www.acrnet.org/pdfs/ModelStandardsofConductforMediatorsfinal05.pdf> (last accessed March 18, 2006).

66. *See* Joseph B. Stulberg, REPORTER'S NOTES, JOINT COMMITTEE ON THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS, pp. 9-10 (2005) (explaining the meaning of the "self-determination" in the Model Standards of Conduct for Mediators); *see also* Craig McEwen, *Giving Meaning to Mediator Professionalism*, 11 NO. 3 DISP. RESOL. MAG. n. 3, 4 (2005) (discussing how an individual mediator may need support from other mediators to make ethical decisions that are sufficiently informed).

67. *See generally* Nancy A. Welsh, *Eyes on the Prize: The Struggle for Professionalism*, 11 NO. 3 DISP. RESOL MAG. 13, 15 (2005) (pointing out that there are many examples of mediators behaving inconsistently with party self-determination principles). *See also* McEwen, supra note 66, at 3, 4 (2005) (discussing the difficulties of clarifying the obligations of the mediator and implementing them).

68. *See* Anna Eberlin, *Lawyers Serving as Third-Party Neutrals: No Clear Ethical Guidelines*, 48-Sep ADVOC. 21 (2005) (describing the lack of clear uniform guidelines for mediators). *See generally* McEwen, *supra* note 66, at 3, 4 (discussing the subjectivity of mediators' determinations made absent clear guidelines).

69. *Id*. (suggesting that it is important for the mediator to remove subjectivity from mediation).

70. Professor Hyman is a professor at Rutgers Law School. He has served as an arbitrator and mediator, as well as serving as the Associate Director of the Rutgers Certificate Program in Conflict Management.

71. Symposium, *Association for Conflict Resolution Annual Conference 2003. The World of Conflict Resolution: A Mosaic of Possibilities Session on Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 187, 200 (2004).

72. *Id.* at 201. *See* Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 19, 32-37 (2004) (discussing the reasons why mediators should not talk about fairness, i.e., it opens the door for the mediator to impose on the parties his or her own ideas of substantive fairness, which are purely personal and subjective).

73. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, STANDARD VI (Am. Arbitration Ass'n et al., 2005), *available at* <http://www.acrnet.org/pdfs/ModelStandardsofConductforMediatorsfinal05.pdf> (last accessed March 18, 2006). These Model Standards were revised from their original 1994 version, and, as of September 2005, have been approved by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution.

74. *See id.* The Model Standards devote an entire section, Section VI "Quality of the Process," to the overall quality of the mediation process (not necessarily the results thereof), specifically including procedural fairness; no such section exists discussing substantive fairness. Instead, the Model Standards focus on the autonomy of the parties (Standard I "Self Determination"), the impartiality of the mediator (Standard II "Impartiality"), and generally on how the outcome of the mediation should be solely the result of the individual parties' voluntary agreements.

75. *See id.* The Preamble to the Model Standards clearly states that the goals of these Standards are to serve as guidelines for mediator conduct, to inform the mediating parties and to "promote confidence in mediation as a process." In order to best assist the parties in coming to a voluntary agreement, it is the procedure of the mediation, as opposed to the substance, that is focused upon with respect to the rules imposed upon mediator conduct.

76. *See id.* The drafting history and revisions from the original 1994 Model Standards provided ample opportunity for the preparers to address in these Standards the most significant issues regarding the conduct requirements and duties of the mediator. The total absence of the mention of a mediator's possible duty to ensure anything substantive (the issue of substantive fairness does not even come up as a "should" standard, which, as opposed to a "shall" standard, indicates a highly desired but not required practice) shows that the preparers consciously focused on the fairness of the mediation as a process and did not intend to impose a duty on mediators as to the substantive fairness of the mediation result.

77. Professor Joseph Stulberg teaches primarily in the area of alternative dispute resolution at Moritz College of Law at Ohio State University and serves as coordinator of the college's Program on Dispute Resolution. He also serves as a member of the Ohio Supreme Court Committee on Dispute Resolution, Vice Chair of the Mediation Committee of the Section on Dispute Resolution of the ABA, and Reporter for the Joint Committee on the Model Standards of Conduct for Mediators.

78. Symposium, *supra* note 71, at 187. Professor Stulberg's thoughts were given in response to questions posed by the symposium mediator, Professor Love.

79. *Id*. at 197.

80. *Id. See also* Amy Guttman, *Lecture: How Not to Resolve Moral Conflicts in Politics*, 15 OHIO ST. J. ON DISP. RESOL. 1, 3-5 (1999) (using a similar hypothetical to apply the theory of majority rules to the resolution of moral conflicts).

81. Symposium, *supra* note 71, at 197.

82. *Id.*

83. *Id.*

84. *Id.* (presenting the question of whether this is a fair outcome and further, if a mediator had been involved, would he have voiced a problem with this agreed upon result).

85. *Id.* at 198-99. *See also* Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 912 (1998) (discussing "the idea that a concept of fairness must include a substantive distributional dimension that trumps utility considerations appears persuasive and central").

86. *See id.* at 911 ("[w]e would criticize the mediation process as being 'unfair' if outcomes achieved through it left some parties much worse off from their starting position"). *See also* Ellen A. Walderman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L. J. 703, 710 (1997) (stating that "the ethical guidelines formulated by professional organizations inconsistently adjure mediators both to respect disputant autonomy and to override disputant agreements that contravene societal norms of fairness and equity").

87. *See* Stulberg, *supra* note 85, at 912 ("Broadly speaking, principles of fairness must govern the manner in which one conducts mediated conversations."). *See also* Walderman, *supra* note 86, at 767 n.281 (quoting a study in which mediators were asked to identify scenarios they had been confronted with that they found to be ethically problematic).

88. *See* Symposium, *supra* note 71, at 198.

89. *Id.* (stating that "[i]t is their life and it is their freedom to choose"). *See also* Jonathan M. Hyman and Lela P. Love, *Papers Presented at the UCLA/IALS Conference on "Problem Solving in Clinical Education": If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 165 (2002) (explaining that "a mediator need not agree with a party's views about what is more fair or more

just, but should be able to articulate the meaning of justice as the party sees it and help the party think through his ideas in ways that might lead to a resolution").

90. Jordi Agusti-Panareda, *Power Imbalances in Mediation: Questioning Some Common Assumptions*, 59 DISP. RESOL. J. 24 (2004).

91. *Id.* at 24. *See also* Michael Coyle, *Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?* 36 OSGOODE HALL L. J. 625, 650 (1998) ("the existence of a significant power imbalance between the parties would seem to be an important, but in the end, only a contextual factor to which the mediator should be sensitive when assessing the need to respond to fairness concerns").

92. Agusti-Panareda, *supra* note 90, at 24-26. *See also* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L. J. 1073, 1076-78 (1984) (arguing that dispute resolution involves considerable risk of exploitation of parties not able to bargain as equals).

93. Agusti-Panareda, *supra* note 90, at 26. *See also* Coyle, *Defending the Weak and Fighting Unfairness, supra* note 91, at 647 (discussing the criticism that "power imbalance between parties in ADR processes can lead to a failure of 'justice within the system'").

94. Agusti-Panareda, *supra* note 90, at 26. *See also* Joan Kelly, *Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention*, 13 MEDIATION Q. 87 (1995) ("having greater power in a relationship does not automatically lead to an exercise of that power to the other party's disadvantage").

95. Agusti-Panareda, *supra* note 90, at 27. *See also* Jeffrey Rubin & William Zartman, *Asymmetrical Negotiations: Some Survey Results That May Surprise*, 11 NEGOTIATION J. 362 (1995) (claiming that "equal power does not lead to a more effective negotiation").

96. Agusti-Panareda, *supra* note 90, at 27. *See also Symposium, supra* note 71, at 198 (concluding that "[t]he alleged imbalance of power deriving from unequal economic positions does not undermine party capacity to decide").

97. Agusti-Panareda, *supra* note 90, at 27. *See also* Coyle, *Defending the Weak and Fighting Unfairness, supra* note 91, at 647 ("Proponents of mediation have argued that one of mediation's virtues lies in its potential both for empowering the parties and assisting them in recognizing the authenticity of the interests of other disputants.").

98. Agusti-Panareda, *supra* note 90, at 28.

99. *See id*.

100. *See id*. at 30–31.

101. Emily M. Brown and Peter R. Maida, Letter to the Editor, *Mediation Works*, N.Y.L.J., Sept. 10, 1996, p. 2, col. 6.

102. *Id*.

103. *Id*.

104. Michael D. Young, *Know a Mediator's Ethical Obligations*, N.Y.L.J., Aug. 21, 2000, p. 6, col. 3 (footnotes omitted). Michael D. Young, Esq., is a full-time mediator and arbitrator in the New York office of JAMS and serves as co-chairperson of the JAMS Committee on Professional Standards and Public Policy. He has conducted over 950 complex or multi-party mediations in over thirty states and abroad. Michael D. Young—JAMS Profile, http://www.jamsadr.com/Neutrals/Bio.asp?NeutralID=1794.

105. *Id.* (emphasis added). Interestingly, Young states at the beginning of his article that no generally accepted or enforceable set of ethics standards exists.

106. Besunder interview, *supra* note 2.

107. *Id*.

108. *Id*.

109. *Id*.

110. *Id*. *See also Sobel v. Hertz, Warner & Co*., 469 F.2d 1211, 1214 (2d Cir. 1972) (holding that although requiring arbitrators to explain their reasoning in every case would help to uncover egregious failures to apply the law to an arbitrated dispute, such a rule would undermine *the very purpose of arbitration, which is to provide a relatively quick, efficient and informal means of private dispute settlement* (emphasis added)).

111. *Geisel v. Odulio*, 807 F. Supp. 500, 504 (W.D. Wis. 1992) (stating that "the mediation system is intended to provide an informal, inexpensive and expedient means for resolving disputes without litigation").

Zachary Dubey is an associate at Harvey B. Besunder, P.C. in Suffolk County. His practice focuses on commercial litigation.

Report on the Revised Uniform Arbitration Act

This report is a report of the following entities only and not their parent organizations:

Commercial and Federal Litigation Section of the New York State Bar Association

New York City Bar Committee on Arbitration

New York State Bar Association Committee on ADR

New York State Bar Association Committee on The CPLR

New York County Lawyers Association Arbitration & ADR Committee

I. Executive Summary

This Report recommends the enactment by New York State of the Revised Uniform Arbitration Act (RUAA). [A copy of the RUAA is annexed as Appendix 1.] The Report is submitted by a broad array of Bar Organizations of the State: the Commercial and Federal Litigation Section (C&FLS), the Standing Committee on ADR (ADR Committee) and the Standing Committee on the CPLR (CPLR Committee) of the New York State Bar Association (NYSBA), the Committee on Arbitration (Arbitration Committee) of the Association of the Bar of the City of New York (ABCNY) and the ADR & Arbitration Committee (County Lawyers Committee) of the New York County Lawyers Association (NYCLA).

"The State should continue in its near-century-long leadership role in arbitration and adopt the Consensus Draft RUAA as the law of the State."

The original Uniform Arbitration Act (UAA), which the RUAA revises, was adopted in 1955 by the National Conference of Commissioners on Uniform State Laws (NCCUSL). It is one of the most successful of the Uniform Laws, having been adopted in 49 states, either intact or with amendments. Although New York is the one state that did not formally adopt the UAA, the State's arbitration law, embodied in Article 75 of the CPLR (CPLR Article 75) has some language and much of substance in common with the UAA, and the 1920 New York arbitration statute was the basis for the 1925 United States Arbitration Act (FAA), which, in turn, was the basis for the UAA.

The RUAA is a comprehensive statute, designed to bring clarity to modern arbitration by fleshing out and, largely, codifying the arbitration law that has been developed by the courts over the years under the skeletal framework of the existing statutes. It has been adopted in twelve states, and, hopefully, it will be as successful as the UAA, especially if it is adopted by New York, which has been the leading state to date in developing arbitration law and practice.

As this report points out, the RUAA has a number of provisions that codify what is already the arbitral law of New York. Where the RUAA is different from existing New York law, the RUAA brings improvement. Most importantly, where New York law has been different from the norm, especially as compared with the FAA, the RUAA brings it into conformity, eliminating what has been the source of costly and time-consuming litigation for parties in New York.

The form of RUAA—the Consensus Draft RUAA—that is being urged for adoption in New York is not entirely the pristine form of RUAA adopted by NCCUSL in 2000. It is the product of years of hard work by New York lawyers, experienced with arbitration, who have brought differing perspectives to the process. They have worked through differences, noted below. And they have crafted modifications discussed in this Report that are improvements to the RUAA and are for the most part existing aspects of New York law and practice deserving of, and susceptible to, preservation without disruption of the overall uniformity of the RUAA.

While the work on the RUAA was ongoing the ABCNY's Arbitration Committee and its International Commercial Dispute Committee proposed a change to CPLR Section 7502(c) that was enacted into New York law in 2005. The change brings New York law into conformity with that of virtually all other jurisdictions in permitting the courts of the state to provide for preliminary relief in aid of arbitrations outside the State, as well as, those within the State. With one change, the revised Section 7502(c) has been incorporated into the Consensus Draft RUAA as Section 8(a). The change eliminates language that might be asserted as a spurious ground for avoiding or delaying needed interim relief.

As is outlined in this Report, the Consensus Draft RUAA will be a significant improvement to the arbitral law of New York. The State should continue in its near-century-long leadership role in arbitration and adopt the Consensus Draft RUAA as the law of the State.

II. Background of This Report

As noted above, the RUAA is a comprehensive statute for the regulation of the arbitration process. It was adopted by NCCUSL five years ago. The twelve states that have already adopted it, sometimes with modifications, are: Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah and Washington. In the process of drafting the RUAA, NCCUSL received input from bar associations, arbitration-provider organizations, practitioners and academics throughout the United States. Its work drew on decades of experience under the 1955 UAA, the 1925 FAA, and the pioneering New York State arbitration statute, adopted in 1920.

New York established its leadership role in arbitration early on. Its 1920 arbitration statute was the first in the United States, to put agreements to arbitrate on an equal footing with other contracts and to combat a then-prevailing judicial antipathy to arbitration. As noted above, New York's statute was the model for the FAA, which was the model for the UAA, and New York's arbitration law in CPLR Article 75 contains much substance in common with federal law and the law of other states.

The UAA, the FAA and CPLR Article 75 are all bare-bones statutes. In sharp contrast, the RUAA fleshes out state arbitration law, based on the wealth of experience with arbitration, and with litigation in the courts about arbitration. Unlike the existing statutes, the RUAA provides to private parties, the bar, and arbitrators a far greater degree of articulation, specificity and clarity about the law that governs their proceedings.

The RUAA does not constitute a radical departure from existing New York arbitral law. As a general matter, the RUAA codifies what is already the law, often the law of New York. Furthermore, the changes that the RUAA does make to existing law are improvements that advance the underlying objectives of arbitration, helping to create a fair and efficient means of alternative dispute resolution.

For example, current New York arbitration law imposes certain limitations on the arbitration process that are unwarranted and are not to be found in the FAA or the RUAA. One such limitation derives from 1976 when the Court of Appeals ruled that arbitrators do not have the power to award punitive damages, even if the parties agree that they do. *See Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831 (1976). Another is a pair of provisions (CPLR 7502-03) that permit a party to avoid arbitration for disputes over statute of limitations issues. A third (CPLR 7513) forbids the award of attorneys' fees in arbitration, absent party agreement. These limitations place New York arbitration law in conflict with federal arbitration policy which, as expressed in the FAA, (1) holds that all such issues may be decided by an arbitrator, and (2) preempts such limitations of state arbitration law in all cases having even a slight link to interstate or foreign commerce. *See Citizens Bank v. Alafabco*, 539 U.S. 52 (2003). These conflicts between New York law and the FAA have spawned extensive litigation at all levels of the state and federal judiciary, as courts have tried to determine whether the parties should be deemed to have agreed to arbitrate under the restrictive rules of New York State or the broader rule of the FAA. The RUAA would eliminate these anomalies of New York law, ensuring that, if the parties have agreed to arbitrate "all disputes," all disputes will indeed be subject to arbitration, even if the parties have stated elsewhere in their agreement that arbitration will be "under New York law."

"The RUAA does not constitute a radical departure from existing New York arbitral law. "

Adoption of the RUAA will also place New York in line with other jurisdictions that have adopted, or will adopt, the uniform act as their state arbitration law.

As noted, the Consensus Draft RUAA, as recommended by committees of state and local New York bar organizations for adoption in the state, is not entirely in the form of the RUAA as adopted by NCCUSL. For the most part, the modifications retain valuable features of New York practice and are intended to maintain procedural consistency with other provisions of the CPLR. For example, the Consensus Draft RUAA, as modified for New York, applies New York's liberal rules governing appeal of court orders in general to those relating to arbitration. The proposed form of statute also preserves an important pro-arbitration provision contained in CPLR 7503(c) that streamlines the commencement of arbitration and allows arbitrability issues to be decided early, a goal of the RUAA. It does so by authorizing a party to give notice of its intent to arbitrate, thereby imposing on a respondent a choice between allowing arbitration to proceed or commencing within 20 days (extended to 30 days in the Consensus Draft RUAA) an action in court to stay the arbitration. These amendments are of a kind not likely to interfere with the goal of uniformity of the RUAA.

III. Contributions by New York Bar Committees: Development of Consensus Draft

The process of revision of the UAA began with the appointment by NCCUSL of a Study Commission to look at areas in which the UAA might usefully be revised. After its report was issued in 1995, a Drafting Committee was appointed in 1997 to explore the issues raised in the report and draft a revised statute to propose to the full Commission. The NCCUSL Drafting Committee met eight times over three years. It produced a draft that was given

a first reading by the full Commission in July 1999, and a revised draft that received a second, and final, reading at the Commission's annual meeting in July 2000, when the RUAA was adopted by NCCUSL.

The ABCNY Arbitration Committee monitored the drafting process from its inception, discussed a succession of drafts at committee meetings and conveyed comments to the Drafting Committee from time to time. In the spring of 2000 the Arbitration Committee issued a report urging NCCUSL to adopt the final draft of the RUAA.

After adoption of the RUAA by NCCUSL, in the fall of 2000, the NYSBA ADR Committee undertook a study of the RUAA that lasted over two years. Starting in September, 2001, members of the ADR Committee met regularly with representatives of the ABCNY Arbitration Committee to analyze the RUAA with a view toward its adoption by New York. The NYCLA Committee was also represented at those meetings.

"The Consensus Draft has been endorsed by the Arbitration Committee, the ADR Committee, the CPLR Committee, and the C&FLS, which all recommend support for its enactment in New York."

Working together, the representatives of the several organizations (the Joint Committee) drafted several proposed amendments to the RUAA for enactment in New York (the 2003 Draft RUAA). In a report issued in June 2003, the ADR Committee urged adoption of the 2003 Draft RUAA and, at the same time, provided a critical analysis of several sections of the RUAA (the ADR Committee Report). When it reviewed the 2003 Draft RUAA the ABCNY Arbitration Committee raised questions about several of the modifications that were being proposed by the Joint Committee and had been accepted by the ADR Committee.

The ADR Committee Report was circulated broadly within the NYSBA, and, in January 2004, the NYSBA CPLR Committee issued its own report on the RUAA (the CPLR Committee Report). The CPLR Committee Report noted that the RUAA improved on the CPLR in a number of respects, but the report was critical of other RUAA provisions. The CPLR Committee's concerns were largely directed to aspects of arbitration law and practice in CPLR Article 75, but not in the RUAA, that were believed to be valuable and worthy of preservation.

With this background of general support for the RUAA but remaining specific substantive and drafting issues of concern, a new Joint Committee was created, with members from the ABCNY Arbitration Committee, the NYCLA Committee and the NYSBA ADR and CPLR Committees and its C&FLS. The new Joint Committee set about resolving the differences between the respective modifications to the RUAA that the ADR Committee and the Arbitration Committee had endorsed, and addressing the remaining concerns of the ADR Committee and those of the CPLR Committee—as well as any remaining issues that may be perceived by any member of the Joint Committee.

The work of the new Joint Committee spanned seven months. It included several meetings, the exchange of numerous e-mails, and the consideration of a number of drafts. One focal point of discussion was on pre-arbitration procedures. As a result of those discussions the Joint Committee decided to retain the provision of CPLR 7503(c), referred to above, that provides for a Notice of Intention to Arbitrate, which enables a party to precipitate early decision of arbitrability issues. On the other hand, the Joint Committee decided not to adopt the mechanism of CPLR 7502-03 that permits a party to have a judicial decision of statute of limitations issues in advance of arbitration even if its agreement purports to require arbitration of such issues. In addition to preemption problems, such a provision was thought to be inconsistent with the prevailing majority view and the philosophy of the RUAA to have all decisions, other than those concerning the existence of an enforceable agreement to arbitrate, made by the arbitrator in the absence of party agreement to the contrary.

The work of the new Joint Committee resulted in a Consensus Draft RUAA that is discussed in this Report and is being recommended for enactment in New York. In the Consensus Draft the Joint Committee succeeded in resolving the differences between the ADR Committee and the Arbitration Committee, addressed the concerns of the CPLR and ADR Committees and made additional improvements in the RUAA. The Consensus Draft also incorporates the provision in CPLR 7502(c), as amended in 2005, that brings New York law into conformity with the law elsewhere and permits courts of the state to provide interim relief in aid of arbitrations outside the state, as well as within. The Consensus Draft has been endorsed by the Arbitration Committee, the ADR Committee, the CPLR Committee, and the C&FLS, which all recommend support for its enactment in New York.

IV. Benefit from Increased Clarity through Codification

Lawyers and parties to civil litigation in court benefit from the fact that in New York and other states the rules of civil procedure are spelled out in a thoroughly articulated code. Such a code reduces uncertainty, facilitates the adjudicative process, and helps assure fair and evenhanded application of the law.

The same considerations apply in arbitration. Parties have an interest in knowing what the arbitration law of a state is and how it will shape their arbitration. Indeed, having a detailed code is of particular benefit in arbitration, where the parties are not limited to applying the immutable rules that govern litigation in court but instead can shape the procedure to be used to resolve their specific disputes. Thus, the clarity that comes through codification facilitates the parties' determination of whether to choose arbitration as the means to resolve their disputes and what, if anything, they may wish to add to their contract to customize their proceedings rather than relying on the default provisions provided by state law. The benefits of the clarity derived from well-executed codification are particularly compelling in an arbitration context, which, because of the limitations on judicial review, does not generate a high volume of court decisions.

The RUAA provides an appropriate amount of structure without unduly constraining arbitration proceedings and without infringing unnecessarily on the rights of the parties to waive or change provisions that do not suit their purposes. Specifically, the RUAA brings the clarity of codification to a number of principles that are already tenets of New York case law. These include:

- **The power of New York arbitrators to grant provisional remedies (RUAA Section 8(b)).** We believe parties who agree to arbitrate future disputes should be able to obtain from the arbitration process at least the same remedies and protections that they could otherwise obtain from a court, including provisional remedies such as attachment for security and preliminary injunction. Existing New York case law suggests that arbitrators already have such power. *See Park City Assoc. v. Total Energy Leasing Corp.*, 58 A.D.2d 786, 396 N.Y.S.2d 377 (1st Dep't 1977). Although not unanimous, the strong consensus of the Joint Committee membership is that provisional remedies in arbitration have become widely accepted in the law and are an important feature of modem arbitration practice. The RUAA will explicitly recognize and codify the arbitrator's power to order interim relief and confirms the arbitrator's authority to alter or adjust a court order granting or rejecting an application for a provisional remedy once the arbitrator has undertaken his or her functions.

- **The authority of the courts to consolidate related arbitrations in appropriate circumstances (RUAA Section 10).** Such consolidation is permitted under New York case law, *County of Sullivan v. Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 397 N.Y.S.2d 371 (1977), and the RUAA will also codify this point, making consolidation possible in appropriate cases where the parties have agreed to arbitrate under New York law (or the law of another state that has adopted the RUAA).

- **Arbitrator and arbitration organization immunity from civil liability (RUAA Section 14).** Such immunity is widely accepted as appropriate and necessary to the process and is codified in the RUAA. *See Richardson v. American Arbitration Assoc.*, 888 F. Supp. 604 (S.D.N.Y. 1995); *Austern v. Chicago Board Options Exchange, Inc.*, 716 F. Supp. 121 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 882, 886 (2d Cir.), *cert. denied*, 498 U.S. 850 (1990); *Seligman v. Allstate Ins. Co.*, 2003 WL 1092995 (N.Y. Sup.); *Wally v. General Arbitration Council*, 165 Misc. 2d 896, 898, 630 N.Y.S.2d 627 (S. Ct., N.Y. County 1995), *appeal dismissed*, 241 A.D.2d 983, 660 N.Y.S.2d 978 (1st Dep't 1997); *Candor Central School Dist. v. American Arbitration Ass'n*, 97 Misc. 2d 267, 411 N.Y.S.2d 162 (S. Ct., Tioga County 1978); *Rubenstein v. Otterbourg, Steindler, Houston & Rosen*, 78 Misc. 2d 376, 357 N.Y.S.2d 62 (Civ. Ct., N.Y. County 1973).

"The RUAA provides an appropriate amount of structure without unduly constraining arbitration proceedings and without infringing unnecessarily on the rights of the parties to waive or change provisions that do not suit their purposes."

- **Arbitrator freedom from compelled testimony (RUAA Section 14).** The RUAA confirms arbitrator immunity from being compelled to testify about the substance of an award or in the absence of a showing of arbitrator wrongdoing. *See Martin Weiner Co. v. Fred Freund Co.*, 2 A.D.2d 341, 155 N.Y.S.2d 802 (1st Dep't 1956), *aff'd*, 3 N.Y.2d 806, 144 N.E.2d 647, 166 N.Y.S.2d 7 (1957) (may not question arbitrator about process of arriving at decision or whether award reflects arbitrator's intention); *Cavallaro v. Allstate Ins. Co.*, 124 A.D.2d 625, 507 N.Y.S.2d 886 (2d Dep't 1986) (consideration of statements of arbitrator about intention or interpretation of award disapproved); *Dahlke v. X-L-O Automotive Accessories, Inc.*, 40 A.D.2d 666, 337 N.Y.S.2d 86 (1st Dep't 1972) (not encourage post-award arbitrator affidavits); *Temporary Commission of Investigation v. French*, 68 A.D.2d 681, 418 N.Y.S.2d 774 (1st Dep't 1979) (arbitrator may not be questioned about factual or legal basis for decision, decision-making process or communications among arbitrators before or related to decision, and not about misconduct, illegality, fraud, corruption, bribery or other criminality without a minimal showing of evidence of same);

Davis v. Esikoff, 105 Misc. 2d 955, 430 N.Y.S.2d 208 (S. Ct., N.Y. County 1980) (upholds questioning of arbitrator, limited to alleged arbitrator impropriety after preliminary showing of same).

- **Arbitrator power to grant summary dispositions in appropriate circumstances (RUAA Section 15).** Present law recognizes that some arbitration cases can be decided without an extended hearing, as where the facts are undisputed and only a question of law is presented, or where a "mini-hearing" may be sufficient to resolve a few disputed points. The RUAA would codify this authority. *Goldman, Sachs & Co. v. Patel*, N.Y.L.J., August 18, 1999 (S. Ct., N.Y. County) (claim for wrongful termination of at-will employee); *see also, e.g., Sheldon v. Vermonty*, 269 F. 3d 1202 (10th Cir. 2001) (motion to dismiss under NASD rules); *Max Marx Color & Chemical Co. Employees' Profit Sharing Plan v. Barnes, Kemper Securities Group, Inc.*, 37 F. Supp. 2d 248 (S.D.N.Y. 1999) (same).

  There was considerable discussion within the Joint Committee about whether a specific standard for summary disposition should be adopted, such as that in FRCP 56. It was ultimately concluded, however, that setting a specific standard was incompatible with the broad arbitrator power to conduct an arbitration "in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding" (RUAA Section 15(a)), and that an arbitrator's freedom to dispose of issues without hearing is very much constrained by the opportunity for an aggrieved party to get an award vacated (1) on the basis of an arbitrator's refusal "to consider evidence pertinent and material to the controversy" (Section 23(a)(3)), or (2) on the basis of an arbitrator's "manifest disregard" of a party's right to present evidence if there is a genuine issue of fact. *See Neary v. Prudential Ins. Co.*, 63 F. Supp. 2d 208 (D. Conn. 1999).

- **Arbitrator power to impose sanctions RUAA (Section 17(d)).** Such power is recognized under existing case law. *Credit Suisse First Boston Corp. V. Patel*, N.Y.L.J., August 18, 1999 (S. Ct., N.Y. County); *see also Asia 2000 PTE Ltd. v. Oceana Petrochemicals AG*, 373 F. Supp. 2d 370 (S.D.N.Y. 2005) (under FAA and AAA rules upholding sanction against party but not against attorney).

V. Positive Changes to New York Law in RUAA

Despite some differences in format, the RUAA has relatively few provisions that would substantively alter New York law. In some instances the existing provisions of New York law are already preempted by federal arbitration law. In any case, where the RUAA *would* effect changes in New York law, the changes would be positive developments. They include:

- **Waiveability (RUAA Section 4).** The RUAA pulls together, in one section, in a comprehensive, systematic way, information about which of its provisions can be waived or modified by the parties. While some joint Committee members would have preferred such information to be contained in individual substantive provisions, generally it was felt that the RUAA approach was sound, having the advantage for arbitration-clause drafters of having all waiver information in one place. It was also felt that Section 4 properly preserves party autonomy in most cases and departs from it only where necessary, and that Section 4 is a distinct improvement over the sketchy treatment of waiver in CPLR Article 75.

- **Arbitrator Decision of Limitations Issues (RUAA Section 6).** Consistent with the majority rule in the United States, the RUAA changes the law of New York and assigns to the arbitrator the task of deciding the question of whether a claim is barred by a statute of limitations. It thus removes the license that Article 75 gives to a party to have that decision made by a court, even in the face of an agreement to the contrary. Finally, the RUAA does not contain the license in the CPLR for an arbitrator to disregard the statute of limitations entirely in those instances in which it is left the arbitrator to decide whether a proceeding is time-barred.

- **Arbitrator disclosures (Section 12).** The RUAA requires disclosures of interests and relationships by both neutral and non-neutral arbitrators, whether or not party-appointed.

- **Discovery (Section 17).** The RUAA creates a statutory scheme for limited discovery in arbitration, and streamlines the procedures for obtaining discovery from out-of-state nonparties.

- **Punitive damages with safeguards (Sections 21(a), (e)).** The RUAA allows punitive damages but imposes important procedural safeguards for such awards. Currently under New York case law, arbitrators do not have the power to award punitive damages, regardless of the parities' wishes. *See Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831 (1976). Pursuant to federal law, however, for transactions touching on commerce (defined broadly), arbitrators do have the power to award punitive damages, under the rules typically adopted by the parties (e.g., AAA, JAMS, NASD). *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

Thus, for the limited number of cases in which New York law applies, the narrow New York rule raises the

problem of arbitrators in the state who are unable to provide as full relief as would be available in court in the same circumstances. On the other hand, for the great majority of cases in which federal law applies, the permissive federal rule raises a concern about the prudence of permitting such extensive power to be wielded in arbitration, where judicial review of an award is much more limited than that received by a jury verdict or a trial-judge decision.

The RUAA strikes a balance between these competing concerns. It provides arbitrators with the power to award punitive damages but includes safeguards regarding the use of that power to avoid misuse. Thus, Section 21(a) of the RUAA requires that any award of punitive damages be authorized by the law that would control such damages if awarded in court, and that it be supported by the factual and legal bases required in court. Section 21(e) requires an award of punitive damages to contain a written specification of the factual and legal bases for the award.

RUAA Section 4(a) permits waiver of the remedy of punitive damages "to the extent permitted by law." A concern has been expressed about the fairness of permitting such a waiver in circumstances of unequal bargaining power and contracts of adhesion. However, under current federal law, parties have the power to waive such damages. It is believed that interference with the parties' right to deal with punitive damages as they wish—where there is no corresponding limitation imposed as to proceedings in court—would violate the FAA and be preempted. *See Mastrobuono*, 514 U.S. at 59.

- **Attorney's fees without party agreement (Section 21(b)).** The RUAA allows award of attorneys' fees in arbitration wherever they are permitted in court, which includes where they are provided for by statute. Current New York law (CPLR 7513) permits attorneys' fees to be awarded only where there is agreement of the parties that they may be awarded.

VI. Preserving Valuable New York Practices

A number of changes to the RUAA are proposed by the Joint Committee in its Consensus Draft. Most of them are designed to preserve the best aspects of New York's existing arbitration law. The changes include:

- **Attorney representation (RUAA Section 4; CPLR 7506(d)).** The CPLR prohibition of post-dispute agreement to waive the right to representation by an attorney is added to the prohibition contained in RUAA Section 4 of pre-dispute agreement to waive representation. Of course, the proposed statutory provision in the Consensus Draft, like the current one in the CPLR, merely bars an *agreement* to waive representation. It does not require a party to engage counsel and does not preclude a party from self-representation.
- **Notice of Intention to Arbitrate (RUAA Section 5; CPLR 7503(c)).** As noted above, it has been decided to retain the Notice-of-Intention-to-Arbitrate mechanism that permits a party to have arbitrability issues decided early in a proceeding, but with a longer, 30-day, response time.
- **Court Provision of Preliminary Relief in Aid of Arbitration (RUAA Section 8(a); CPLR 7502(c)).** The Consensus Draft RUAA adopts most of the language of CPLR 7502(c), which deals with the power of the courts of the State to provide interim relief in aid of arbitration. The provision includes a 2005 amendment that brought New York law into conformity with the law elsewhere. The amendment permits the courts to provide interim relief in aid of arbitrations outside, as well as those within, the State. In one respect, however, RUAA Section 8(a) changes—and improves on—the amended CPLR 7502(c) by eliminating the phrase "arbitrable controversy." The change is intended to foreclose reliance on the phrase to try to block or delay a meritorious application for interim relief that would be needed whether a case were ultimately to be heard on the merits in court or in arbitration. As drafted, RUAA Section 8(a) is also intended to be consistent with cases interpreting the prior language of CPLR 7502(c), such as *S.G. Cowen Corp. v. Messih*, 224 F.3d 79 (2d Cir. 2000), and *Cullman Ventures v. Conk*, 252 A.D.2d 222 (1st Dep't 1998), which have held that a party in arbitration who seeks provisional relief from a court must show both that it is entitled to that relief under the ordinary legal principles applicable in a civil action and that an eventual arbitration award might be rendered ineffectual if the court failed to grant the relief.
- **Hearing notice (RUAA Section 15(c); CPLR 7506(b)).** The traditional New York 8-day notice of hearing has been preserved in lieu of the shorter notice originally provided in the RUAA.
- **Attorney subpoenas (RUAA Section 17(a); CPLR 7505).** The right of attorneys to issue subpoenas in arbitration is preserved.
- **Confirmation time limit (RUAA Section 22(a); CPLR 7510).** The traditional 1-year time limit for seeking confirmation of an arbitral award is preserved.
- **Venue (RUAA Section 27; CPLR 7502(a)).** The venue provision, with which New York practitioners are already familiar, is preserved.
- **Appeal of court orders related to arbitration (RUAA Section 28(a); CPLR Art. 57).** The right to

appeal all judicial decisions, including those related to arbitration, is preserved.

VII. Other Positive Changes in Modifications for New York

The Consensus Draft contains additional beneficial changes to the original RUAA that do not involve existing New York practices. They include:

- **Clarification of the limit on parties' right to modify grounds for vacatur (Section 4).** The Consensus Draft removes an inconsistency between the text of the RUAA and the related Official Comment. The result is to clarify that parties may modify the grounds for vacatur only by enlargement of them, not by narrowing them.
- **Assignment of decision-making in absence of party agreement (Sections 6, 7).** The Consensus Draft clarifies the matter of which issues are to be decided by the court, and which by the arbitrator, absent party agreement.
- **Avoidance of duplication of proof where fair (Section 15).** Provision is made for use of the existing record where fair, in case of the death or indisposition of an arbitrator.
- **Judicial review of interim decisions (Section 18(a)).** The right to judicial review of an order by an arbitrator, denying a provisional remedy, is provided for in addition to the right already contained in the RUAA for review of an order granting such relief.
- **Judicial Review of punitive damages (Section 23(a)(7)).** The Consensus Draft contains a separate provision for review of an award of punitive damages. The provision requires that a reviewing court vacate an award of punitive damages that does not fulfill the requirements of Section 21(a) and (e). The addition of this provision to Section 23 prompted a strong dissent within the Arbitration Committee (attached to the Arbitration Committee version of this Report) on the ground that it imposes an unwarranted inhibition on the award of punitive damages. The prevailing view, however, was that a difference in treatment of punitive damages on review was required to meet expectations arising from the different language for the requirements for punitive-damage awards used in Section 21.

VIII. Limitation Imposed by Preemption on Special Protection for Consumers

The proponents of the Consensus Draft RUAA believe that the proposed statute does not favor any class of parties in arbitration and that it provides clear, fair arbitration rules for all users of arbitration in New York. However, some have expressed a concern that the RUAA does not provide special protections for consumers against fine-print arbitration clauses that might attempt to tilt the process in favor of powerful commercial organizations.

The Joint Committee believes that such issues cannot be effectively addressed in a state arbitration statute, such as the RUAA, because federal arbitration policy, as expressed in the FAA, preempts state law that would discriminate against agreements to arbitrate or impose any limitations on such agreements that are not applicable to commercial agreements generally. Thus the United States Supreme Court has struck down state arbitration statutes that sought (1) to protect employees and franchisees by excusing them from carrying out their agreements to arbitrate, or (2) to impose requirements on arbitration clauses not required for other contracts. *See Perry v. Thomas,* 482 U.S. 483 (1987) (employee arbitration); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (franchise arbitration); *Doctors Associates v. Casarotto,* U.S. 681 (1996) (large print requirement).

"The Consensus Draft contains additional beneficial changes to the original RUAA that do not involve existing New York practices."

New York State has already enacted two statutes that purport to protect certain types of parties from so-called "binding" or "mandatory" arbitration. One is Section 55-c(7)(b) of the New York Alcoholic Beverage Law which states in pertinent part that "No brewer or beer wholesaler may impose binding arbitration of any issue as an [sic] term or condition of an agreement." This provision was recently found to have been preempted by the FAA. *See Ryan v. Molson*, 2005 WL 2977767 (E.D.N.Y.).

In the other statute the New York Legislature has addressed the question of protection of consumers in arbitration. Enacted in 1984, Section 399-c of the General Business Law prohibits contracts for the sale or purchase of consumer goods from requiring submission of future controversies to arbitration in which a decision applicable to a consumer would not be subject to court review. Thus, if consumers in New York need statutory protection from arbitration, and the state has the power to provide it, the protection has been provided in Section 399-c.

Section 399-c has been the subject of litigation, but it has not been the target of an argument urging preemption. *See, e.g., Ragucci v. Professional Construction Services,* 803 N.Y.S. 2d 139 (2d Dep't 2005) (contract to provide architectural services held to be contract for sale or purchase of consumer goods). If tested in the courts under the FAA, Section 399-c would probably be subject to pre-

emption, like Section 55-c(7)(b) of the Alcoholic Beverage Laws. The same fate would likely befall the RUAA if it were to have added to it special limitations for consumer arbitration agreements not applicable to contracts in general. At the least, such a provision would be likely to subject users of the RUAA to litigation over its validity.

In any case, consumers can be protected from unfairness in arbitration without violation of the FAA. There is a proper way to provide such protection. The FAA does not prohibit a state from protecting consumers in arbitration with laws derived from general principles of unconscionability applicable to all commercial agreements, not just to arbitration agreements. *See, e.g, Hooters of America, Inc. v. Phillips,* 173 F.3d 933 (4th Cir. 1999); *Ingle v. Circuit City Stores,* 328 F.3d 1165 (9th Cir. 2003). The FAA would not preempt a statutory enactment that does not treat arbitration as an evil unto itself, but rather addresses unfairness in dispute resolution in general and is applicable both to arbitration and to litigation in court. However, the place for such a provision is not a state arbitration statute like the RUAA.

IX. Other Arbitration Issues

The ADR Committee's support of the Consensus Draft RUAA is not conditioned on study of other issues related to arbitration. However, at the time of the June 2003 Report a majority of members of the ADR Committee held the view that, if New York were to adopt the RUAA, it should appoint a task force to look into several additional arbitration issues, such as the licensing of arbitrators and arbitrator ethics. Although a majority of ADR Committee members still believe that other arbitration issues warrant study, most members now believe that the RUAA merits passage on its own. It should also be noted (1) that the arbitration process has functioned effectively for a very long time without licensing of arbitrators, and (2) that the matter of arbitrator ethics has been recently and extensively studied, and the 1977 Code of Arbitrator Ethics has been recently updated.

X. Conclusion and Recommendations

The NCCUSL Drafting Committee was an able, experienced group, which understood the need to make arbitration a simpler, more uniform process throughout the United States, to fulfill the promise of speedy and efficient resolution of disputes, without need for endless litigation over conflicts between arbitration laws of different states or between federal and state arbitration law. They created a carefully considered, quality product that has been further improved by the work of a knowledgeable group of New York lawyers who have been sensitive to New York's historic contribution to the arbitration process.

New York assumed a leadership role in arbitration at least by 1920 when it led the U.S. in throwing off the mistrust of arbitration that it had inherited from England, where the courts had rendered pre-dispute arbitration agreements unenforceable. New York has continued as the focal point of arbitration practice ever since. The State has, once again, the opportunity to make an important difference in the development of arbitration in the U.S.

"New York assumed a leadership role in arbitration at least by 1920 when it led the U.S. in throwing off the mistrust of arbitration that it had inherited from England, where the courts had rendered pre-dispute arbitration agreements unenforceable"

New York should be commended for its recent passage of an amendment to CPLR 7502(c) to bring it into conformity with virtually all other jurisdictions as to the authority of its courts to order interim relief in aid of international, as well as, domestic arbitrations. Now the State can again further the cause of uniformity—and at the same time the upgrading of arbitration procedures across the country—by leading the way and swiftly passing the RUAA Consensus Draft.

A united New York Bar should now move forward to support enactment of the Consensus Draft RUAA in the State of New York.

Appendix 1

Consensus Version of Working Group of New York State, City and County Bar Associations

Revised Uniform Arbitration Act With New York Amendments

August 30, 2005 (Revised 1/31/06)

§ 1. DEFINITIONS. In this [Act]:

(1) "Arbitration organization" means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

(2) "Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

(3) "Court" means [a court of competent jurisdiction].

(4) "Knowledge" means actual knowledge.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(6) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

§ 2. NOTICE.

(a) Except as otherwise provided in this [Act], a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications.

§ 3. WHEN [ACT] APPLIES.

(a) This [Act] governs an agreement to arbitrate made on or after [the effective date of this [Act]].

(b) This [Act] governs an agreement to arbitrate made before [the effective date of this [Act]] if all the parties to the agreement or to the arbitration proceeding so agree in a record.

(c) On or after, January 1 of the third year following the year in which the effective date occurs this [Act] governs an agreement to arbitrate whenever made.

§ 4. EFFECT OF AGREEMENT TO ARBITRATE; NONWAIVABLE PROVISIONS.

(a) Except as otherwise provided in subsections (b), (c), (d), (e) and (f), a party to an agreement to arbitrate or to an arbitration proceeding may waive or, the parties may vary the effect of, the requirements of this [Act] to the extent permitted by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) waive or agree to vary the effect of the requirements of Section 5(a), 6(a), 8, 17(a), 17(b), 26, or 28;

(2) agree to unreasonably restrict the right under Section 9 to notice of the initiation of an arbitration proceeding;

(3) agree to unreasonably restrict the right under Section 12 to disclosure of any facts by a neutral arbitrator; or

(c) A party to an agreement to arbitrate or arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of this section or Section 3(a) or (c), 7, 14, 18, 20(d) or (e), 22, 24, 25(a) or (b), 29, 30, 31, or 32.

(d) A party to an agreement to arbitrate or arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of Section 16 as to the right of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this [Act], except that an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(e) A party to an agreement to arbitrate or arbitration proceeding may not narrow the grounds for vacatur set forth in Section 23.

(f) Waiver or variation as contemplated hereby may be effected by written agreement or conduct.

§ 5. [APPLICATION] FOR JUDICIAL RELIEF; NOTICE OF INTENTION TO ARBITRATE.

(a) Except as otherwise provided in Section 28, an [application] for judicial relief under this [Act] must be made by [motion] to the court and heard in the manner provided by law or rule of court for making and hearing [motions].

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial [motion] to the court under this [Act] must be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion must be given in the manner provided by law or rule of court for serving [motions] in pending cases.

(c) A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within thirty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with. Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within thirty days after service upon him of the notice or demand, or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. Service of the application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate. Service of the application by mail shall be timely if such application is posted within the prescribed period.

§ 6. VALIDITY OF AGREEMENT TO ARBITRATE.

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for finding a contract invalid, unenforceable or revocable.

(b) The court shall decide whether an agreement to arbitrate exists or **is** invalid, unenforceable or revocable or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is invalid, unenforceable or revocable.

§ 7. [MOTION] TO COMPEL OR STAY ARBITRATION.

(a) On [motion] of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) if the refusing party does not appear or does not oppose the [motion], the court shall order the parties to arbitrate; and

(2) if the refusing party opposes the [motion], the court shall proceed summarily to decide whether the issue is for decision by the court and, if so, whether the grounds asserted preclude arbitration. If the grounds asserted do not preclude arbitration, the court shall order the parties to arbitrate.

(b) On [motion] of a person alleging that an arbitration proceeding has been initiated or threatened and that grounds exist to avoid arbitration, the court shall proceed summarily to decide whether the issue is for decision by the court and, if so,

whether the grounds asserted preclude arbitration. If the grounds asserted do not preclude arbitration, the court shall order the parties to arbitrate.

(c) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

(d) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a [motion] under this section must be made in that court. Otherwise a [motion] under this section may be made in any court as provided in Section 27.

(e) If a party makes a [motion] to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(f) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

(g) If a party makes a motion to stay arbitration, and unless the court otherwise orders, the arbitration proceeding may continue pending (1) final resolution of the issue by the court or (2) decision by the court that the issue is to be resolved by the arbitrator.

(h) A party who fails to make a motion to stay arbitration prior to the earliest of (1) a time limit imposed by Section 5(c), (2) a decision in the arbitration on a motion for summary disposition under Section 15(b) or (3) the commencement of the arbitration hearing under Section 15(c) shall be precluded from asserting that an arbitration agreement does not exist or is invalid, unenforceable or revocable.

§ 8. PROVISIONAL REMEDIES.

(a) The supreme court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in Section 27 may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose), except that the court shall grant the remedy only upon a showing as to the ground as stated above. If an arbitration is not commenced within thirty days of the granting of the provisional relief, the order granting such relief shall expire and be null and void and costs, including reasonable attorney's fees, awarded to the respondent. The court may reduce or expand this period of time for good cause shown. The form of the application shall be as provided in Section 27.

(b) After an arbitrator is appointed and is authorized and able to act the arbitrator may issue orders for provisional remedies, including interim awards and modifications of prior orders.

(c) A party does not waive a right of arbitration by making an application under subsection (a).

§ 9. INITIATION OF ARBITRATION.

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under Section 15(c) not later than the beginning of the arbitration hearing, the person by appearing at the hearing waives any objection to lack of or insufficiency of notice.

§ 10. CONSOLIDATION OF SEPARATE ARBITRATION PROCEEDINGS.

(a) Except as otherwise provided in subsection (c), upon [motion] of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) there are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;

(2) the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

§ 11. APPOINTMENT OF ARBITRATOR; SERVICE AS A NEUTRAL ARBITRATOR.

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on [motion] of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

§ 12. DISCLOSURE BY ARBITRATOR.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) a financial or personal interest in the outcome of the arbitration proceeding; and

(2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrators:

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under Section 23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b), upon timely objection by a party, the court under Section 23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Section 23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a [motion] to vacate an award on that ground under Section 23(a)(2).

§ 13 ACTION BY MAJORITY. If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under Section 15(c).

§ 14 IMMUNITY OF ARBITRATOR; COMPETENCE TO TESTIFY; ATTORNEY'S FEES AND COSTS.

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by Section 12 does not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection does not apply:

(1) to the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) to a hearing on a [motion] to vacate an award under Section 23(a)(1) or (2) if the [movant] establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d), and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees and other reasonable expenses of litigation.

§ 15. ARBITRATION PROCESS.

(a) An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim of particular issue:

(1) if all interested parties agree; or

(2) upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding, and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than eight days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c), a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with Section 11 to continue the proceeding and to resolve the controversy, and in such case the arbitration proceedings shall be repeated to the extent necessary to insure full and just disposition.

§ 16. REPRESENTATION BY LAWYER. A party to an arbitration proceeding may be represented by a lawyer.

§ 17. WITNESSES; SUBPOENAS; DEPOSITIONS; DISCOVERY.

(a) An arbitrator or an attorney of record for a party to an arbitration may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing. An arbitrator may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing,

including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.

(d) If an arbitrator permits discovery under subsection (c), the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State or in a foreign country upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective. A subpoena or discovery-related order issued by an arbitrator in another State or in a foreign country must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

§ 18. JUDICIAL ENFORCEMENT OF PREAWARD ORDER OR RULING BY ARBITRATOR.

(a) If an arbitrator makes a preaward order as to a provisional remedy under Section 8, the arbitrator shall incorporate the ruling into an award under Section 19 at the request of any party to the arbitration proceeding whose interests are affected by the ruling. Any such party may make a [motion] to the court for an expedited order to confirm, vacate or modify the award under Section 22, 23 or 24, in which case the court shall summarily decide the [motion].

(b) If an arbitrator makes any other preaward ruling, the party to the arbitration proceeding in whose favor the ruling was made may request the arbitrator to incorporate the ruling into an award under Section 19. A prevailing party may make a [motion] to the court for an expedited order to confirm the award under Section 22, in which case the court shall summarily decide the [motion]. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under Section 23 or 24.

§ 19. AWARD.

(a) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.

§ 20. CHANGE OF AWARD BY ARBITRATOR.

(a) On [motion] to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) upon a ground stated in Section 24(a)(1) or (3);

(2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) to clarify the award.

(b) A [motion] under subsection (a) must be made and notice given to all parties within 20 days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to the [motion] within 10 days after receipt of the notice.

(d) If a [motion] to the court is pending under Section 22, 23, or 24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) upon a ground stated in Section 24(a)(1) or (3);

(2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) to clarify the award.

(e) An award modified or corrected pursuant to this section is subject to Sections 19(a), 22, 23, and 24.

§ 21. REMEDIES; FEES AND EXPENSES OF ARBITRATION PROCEEDING.

(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(c) As to all remedies other than those authorized by subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under Section 22 or for vacating an award under Section 23.

(d) An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a), the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

§ 22. CONFIRMATION OF AWARD.

(a) Within one year after a party to an arbitration proceeding receives notice of an award, the party may make a [motion] to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 20 or 24 or is vacated pursuant to Section 23.

(b) A judgment shall be entered upon the confirmation of an award.

§ 23. VACATING AWARD.

(a) Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) the award was procured by corruption, fraud, or other undue means;

(2) there was:

(A) evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) corruption by an arbitrator; or

(C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) an arbitration agreement did not exist or was invalid, unenforceable or revocable, unless the person participated in the arbitration proceeding and failed to make a motion to stay arbitration pursuant to Section 5(c) or 7; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(7) If the arbitrators included punitive damages or other exemplary relief in an award under Section 21(a), and the court determines that such an award is not authorized by law in a civil action involving the same claim or that the evidence produced at the hearing does not justify the award under the legal standards applicable to the claim, then the court shall vacate that portion of the award that provides for punitive damages or other exemplary relief.

(b) A [motion] under this section must be filed within 90 days after the [movant] receives notice of the award pursuant to Section 19 or within 90 days after the [movant] receives notice of a modified or corrected award pursuant to Section 20, unless the [movant] alleges that the award was procured by corruption, fraud, or other undue means, in which case the [motion] must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the [movant].

(c) If the court vacates an award on a ground other than that set forth in subsection (a)(5), it may order a rehearing. If the award is vacated on a ground stated in subsection (a)(1) or (2), the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in subsection (a)(3), (4), (6), or (7), the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in Section 19(b) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a [motion] to modify or correct the award is pending.

§ 24. MODIFICATION OR CORRECTION OF AWARD.

(a) Upon [motion] made within 90 days after the [movant] receives notice of the award pursuant to Section 19 or within 90 days after the [movant] receives notice of a modified or corrected award pursuant to Section 20, the court shall modify or correct the award if:

(1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) the arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

(3) the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a [motion] made under subsection (a) is granted, the court shall modify, or correct and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

(c) A [motion] to modify or correct an award pursuant to this section may be joined with a [motion] to vacate the award.

§ 25. JUDGMENT ON AWARD; ATTORNEY'S FEES AND LITIGATION EXPENSES.

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity therewith. The judgment-roll shall consist of the award and the judgment confirming, vacating, modifying or correcting it, together with each paper submitted to the court in connection with the application for confirmation, vacation, modification or correction, and judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the [motion] and subsequent judicial proceedings.

(c) On [application] of a prevailing party to a contested judicial proceeding under Section 22, 23, or 24, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

§ 26. JURISDICTION.

(a) A court in this State having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers jurisdiction over the parties to the agreement to arbitrate and jurisdiction on the court to enter judgment on an award under this [Act].

§ 27. APPLICATIONS TO THE COURT; VENUE. A special proceeding shall be used to bring before a court the first application in connection with an arbitration which is pending or to be commenced and which is not made by motion in a pending action.

(a) The proceeding shall be brought in the court and county specified in the agreement. If the name of the county is not specified, proceedings to stay or bar arbitration shall be brought in the county where the party seeking arbitration resides or is doing business, and other proceedings affecting arbitration are to be brought in the county where at least one of the parties resides or is doing business or where the arbitration was held or is pending.

(b) If there is no county in which the proceeding may be brought under paragraph (a) of this subdivision, the proceeding may be brought in any county.

(c) Notwithstanding the entry of judgment, all subsequent applications shall be made by motion in the special proceeding or action in which the first application was made.

§ 28. APPEALS.

(a) Appeals may be taken from court orders or judgments under this Chapter in accordance with Article 57 hereof.

(b) An appeal under this section must be taken as from an order or a judgment in a civil action.

§ 29. AWARD BY CONFESSION.

(a) An award by confession may be made for money due or to become due at any time before an award is otherwise made. The award shall be based upon a statement, verified by each party, containing an authorization to make the award, the sum of the award or the method of ascertaining it, and the facts constituting the liability.

(b) The award may be made at any time within three months after the statement is verified.

(c) The award may be made by an arbitrator or by the agency or person named by the parties to designate the arbitrator.

§ 30. DEATH OR INCOMPETENCE OF A PARTY. Where a party dies after making a written agreement to submit a controversy to arbitration, the proceedings may be begun or continued upon the application of, or upon notice to, his executor or administrator or, where it relates to real property, his distributee or devisee who has succeeded to his interest in the real property. Where a committee of the property or of the person of a party to such an agreement is appointed, the proceedings may be continued upon the application of, or notice to, the committee. Upon the death or incompetence of a party, the court may extend the time within which an application to confirm, vacate or modify the award or to stay arbitration must be made. Where a party has died since an award was delivered, the proceedings thereupon are the same as where a party dies after a verdict.

§ 31 UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

§ 32 RELATIONSHIP TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. The provisions of this Act governing the legal effect, validity, and enforceability of electronic records or electronic signatures, and of contracts performed with the use of such records or signatures conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act.

§ 33 EFFECTIVE DATE. This [Act] takes effect on January 1 of the year following the year in which it is enacted (the "effective date").

§ 34 REPEAL. Effective on [delayed date should be the same as that in Section 3(c)], the [Uniform Arbitration Act] is repealed.

§ 35 SAVINGS CLAUSE. This [Act] does not affect an action or proceeding commenced or right accrued before this [Act] takes effect. Subject to Section 3 of this [Act], an arbitration agreement made before the effective date of this [Act] is governed by the [Uniform Arbitration Act].

Report of the Commercial and Federal Litigation Section in Support of the Proposed Revisions to the Lawyer's Code of Professional Conduct on Lawyer Advertising

The proposed amendments to the sections of the Disciplinary Rules of the Code of Professional Responsibility governing advertising and solicitation by attorneys contain welcomed (and in some cases long-overdue) changes to our existing Code. The proposed changes are thoughtful and carefully take into account the realities of modern-day law practice. Most importantly, the proposed changes appear, in large part, to achieve the goal of protecting the client's interests and expectations

The Commercial and Federal Litigation Section has reviewed the proposed revisions and, with the exceptions noted below, endorses the changes. The Section would respectfully request that the Office of Court Administration take into account the following comments as to several of the proposed changes:

"As long as the lawyer or law firm is in compliance with all other applicable advertisement or solicitation rules, then the distinction between "current client" and one that is not should not matter."

(1) ***Section 1200.6(d)(1)***: The proposed change prohibits "an endorsement of, or testimonial about, a lawyer or law firm from a current client." This raises some concern that such a prohibition, while understandable in its goal, could be unnecessarily broad in application. Specifically, application of the rule would have the effect of treating lawyers in different practice areas differently. There are some practice areas where clients typically hire a lawyer for one particular transaction or event (e.g., real estate closing, wills, estate planning, etc.), while there are other areas where long-standing and institutional clients form the basis of the practice (e.g., corporate, intellectual property, banking, etc.). Under the proposed rules in the former practice areas, one could have a testimonial or endorsement of a lawyer or law firm from a former client. In the latter practice areas, one could not have a testimonial or endorsement from that lawyer's long-standing existing clients. As such, we recommend that the Section oppose the proposed rule that prohibits an endorsement of, or testimonial about, a lawyer or law firm from a *current* client. As long as the lawyer or law firm is in compliance with all other applicable advertisement or solicitation rules, then the distinction between "current client" and one that is not should not matter. The proposed rule also raises a question about law firms that list "current clients" on their websites and marketing materials, including responses to RFPs. Would such lists be considered an "endorsement" of the lawyer or law firm? Is a lawyer prohibited from obtaining a letter of recommendation or reference from an existing client even if requested by a prospective client?

(2) ***Section 1200.6(t)(1)***: The proposed rule requiring that all advertisements or solicitations should include a disclosure that the client will remain liable for any costs, disbursements and other expenses incurred, regardless of the outcome of the matter, should be reconsidered. While the proposed rule is consistent with DR5-103(B), which requires clients to remain "ultimately liable" for litigation costs and expenses, the Committee on Standards of Attorney Conduct ("COSAC") has recommended a comprehensive revision of New York's disciplinary rules, including adoption of Model Rule 1.8(e). The latter rule allows a lawyer to advance court costs and other expenses of litigation, "the repayment of which may be contingent on the outcome of the matter." By report of the Class Action Committee, the Commercial and Federal Litigation Section has endorsed that change. The reasons advanced in that report, echoing those articulated by the great majority of states that have adopted Model Rule 1.8(e), demonstrate that, unlike most of the other proposed amendments to the rules governing advertising of legal services, adoption of Section 1200.6(t)(1) would be inconsistent with the goal of protecting the client's interests and expectations.

First, while under the current rule clients must assume the theoretical liability for costs regardless of the outcome of the case, there is no disciplinary requirement that counsel sue their clients to collect this sum in the event the case is lost. Indeed, many states recognize a "universal practice" by contingent litigation firms of not doing so. *See Dinter v. Sears, Roebuck & Co.*, 278 N.J. Super. 521, 531, 651 A.2d 1033, 1038 n. 9 (Sup. Ct., N.J. 1995) ("The change was apparently motivated by the universal practice by which an attorney, who represents a client on a contingent-fee basis, declines to sue his client for reimbursement of advanced expenses."); *In re Oracle Sec. Litig.*, 136 F.R.D. 639, 642-43 (N.D. Cal. 1991) (noting that prior to the Model Rules, "most contingent fee lawyers had long since given up pressing clients for repayment of expenses if no recovery was obtained"). Thus, requiring that an advertisement for legal services warn about liability that, in practical terms, will never be incurred is misleading in terms of client expectations. The misimpression that would be created would have material, adverse consequences, related to another reason states have adopted the Model Rule on this matter, discussed below.

Second, the proposed warning will likely act as a disincentive for individuals and institutions to undertake litigation to recover losses that others wrongfully caused them to incur, thus improperly limiting access to the courts. *See County of Suffolk v. Long Island Lighting Co.,* 710 F. Supp. 1407, 1414 (E.D.N.Y. 1989) ("We cannot condone a policy which would effectively limit class action plaintiffs to corporations, municipalities, or the rich."). Thus, such a warning hardly serves the interests of clients. When considering together the universal practice of contingent litigation law firms of not suing their clients for advanced costs incurred in lost cases, and the harmful disincentives of giving potential clients the opposite impression, the proposed amendment to the rules on advertising is not warranted.

Third, the disciplinary rule is inconsistent with the purposes underlying class action litigation in federal court. Rule 23 of the Federal Rules of Civil Procedure exists in part to allow individuals to bring an action on behalf of a class of plaintiffs when those individuals would not have the funds to pay for the costs of pursuing complex litigation individually. Recognizing this, the United States District Court for the Southern District of New York held in *In re WorldCom Sec. Litig*., 219 F.R.D. 267 (S.D.N.Y. 2003), that "strong federal interests" require that New York's rule on reimbursement of costs "be disregarded" because "[w]here the litigation is vast, even a *pro rata* share of the costs may discourage potential class representatives, and encourage selective filing in districts located in states with less restrictive local rules." New York should not adopt an advertising rule that is inconsistent with the rules that federal courts in New York apply to the reimbursement of costs in class action litigation.

While DR5-103(B) remains, for the time being, a binding rule, that fact, by itself, is not a sufficient reason to build on that provision with another disciplinary rule relating to advertising. This is particularly so given that the COSAC has recommended the repeal of DR5-103(B) and adoption of Model Rule 1.8(e). To the extent that there may exist any contingent litigation firm that deviates from the "universal practice" of not seeking return of advanced costs to clients in cases that are lost, the interests and expectations of clients can best be protected by rules governing the content and form of retainer agreements. A new limitation on advertising inconsistent with actual practice, however, would be harmful and inconsistent with the goals of the disciplinary rules.

(3) ***Section 1200.41-a***: The proposed prohibition on contacting potential plaintiffs in wrongful death and personal injury cases for at least thirty (30) days after the date of the incident is troublesome for several reasons. This rule, if adopted, would appear to leave an unsophisticated victim little time in which to receive and evaluate proposals from attorneys, and could be viewed as an impediment to the search for counsel. The effect of the proposed rule is likely to have an unintended consequence as well. That is, for a thirty-day period, victims who may not have personal lawyers remain unrepresented and could very well be approached by the "defense" during that window in an attempt to compromise any potential claims. Finally, the proposed rule also may not adequately protect victims with potential claims where shortened notice provisions apply, such as against municipalities that might have to give notice within sixty (60) or ninety (90) days, or to insurance carriers.

One member of the Executive Committee dissented from this recommendation. The dissent noted that the Mass Disaster Committee had recommended the moratorium to prevent the flood of attorney advertising and the rampant direct attorney solicitation that typically follows mass disasters such as plane, train and ferry crashes. The dissent states that this brief time-out is consistent with the 45-day window specifically provided by federal law for air disasters (which expressly prohibits any lawyer contact—plaintiff or defense), and can be shortened to account for prompt filing requirements in the case of suits against municipalities (with 90-day notice requirements). We also note that the State Bar of Florida enacted a similar restriction following the ValuJet crash in the Everglades, and has not reported any problems in its implementation.

(4) ***Section 1200.1(k)***: The proposed definition of "advertisement" would arguably include any comments made by an attorney not only in a brochure or website, but also in a news article or on television in which the attorney makes a statement about himself or herself. As attorneys are quoted in many news articles, sometimes about cases that they handle at other times about cases they are not handling, the proposed rule would seem to be implicated. As far as feature articles, attorneys often times write about past cases, motions, etc., which could arguably be prohibited as well. If such statements are within the meaning of "advertisement" under Section 1200.1(k), then the articles or stories would have to include the language prescribed in Section 1200.6(g) or (h), and also then be filed with the Attorney Disciplinary Committee as the rules contemplate.

Conclusion

With the exception of the limited comments set forth above, the Commercial and Federal Litigation Section endorses adoption of the Office of Court Administration's proposed revisions to the Code of Professional Responsibility. The Section applauds the effort of the Task Force in attempting to formulate these rules.

Editor's Note: This report was originally prepared by the Ethics and Professionalism Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, and was approved and adopted by the Section in September 2006. The Ethics and Professionalism Committee is co-chaired by James M. Wicks and Anthony J. Harwood.

Response of the Commercial and Federal Litigation Section to the American Bar Association Recommendation for Proposed Amendments to Federal Rules of Bankruptcy Procedure

In advance of the forthcoming House of Delegates Meeting of the ABA, the Commercial and Federal Litigation Section of the New York State Bar Association (the "Section") submits this response to the report issued by the American Bar Association, Section of Business Law, General Practice, Solo and Small Firm Division to the House of Delegates, concerning a proposed amendment to the Federal Rules of Bankruptcy Procedure.

The Section generally agrees that attorneys practicing before the bankruptcy courts should be familiar with the provisions of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. However, it is unusual to single out a particular subset of counsel for the implementation of specialized disciplinary rules. Therefore, the Section recommends that there be included in the proposal a preamble that the purpose of the proposed rule changes is to ensure that attorneys coming before the bankruptcy court are aware that their practice before that court constitutes a certification that such attorneys are familiar with the Bankruptcy Code and Rules of Bankruptcy Procedure.

The Section also has a few suggested line items with respect to remedies provided for in the proposed rules. Specifically, the Section is concerned that the disbarment remedies as drafted would overreach the jurisdictional prerogatives of the bankruptcy court, and would appear to test the bounds of due process. Attorneys are admitted to practice before the bankruptcy courts in their respective jurisdictions by reason of their admission to practice before the United States District Courts in the respective districts in which the bankruptcy courts sit. There is no specific admission to the bar of the bankruptcy court, and accordingly it seems that the language pertaining to "disbarment" in the proposed amendment is misplaced.

The bankruptcy court may exercise a range of remedies available to it with respect to the practice of the attorneys before the bankruptcy court, as is well demonstrated by the extensive legal analysis contained in the report. See also the recent cases of *In re Bost*, No. 4:05-bk-28537E (Bankr. E.D. Ark. 4/26/06) (attorney with inadequate experience and who inadequately represented clients' interests, ordered to forfeit all fees paid to him as retainers and referred to the state's Supreme Court for further disciplinary proceedings); *In re Petition for Disciplinary Action Against Knutson*, No. A05-808 (Minn. 04/06/06) (attorney suspended from the practice before the bankruptcy court for a minimum of 18 months due to misconduct).

However, issues related to the disbarment of the attorney should be referred to either the District Court for appropriate disposition and/or the appropriate state authorities if disbarment is sought from either the federal or state jurisdictions. Indeed, the holding of the case of *In re Sheridan*, 362 F.3d 96 (1st Cir. 2004), and the extensive discussion of jurisdictional limitations upon the bankruptcy court's ability to enter any order sanctioning an attorney should be instructive on this point. The panel there noted the distinction between bankruptcy courts as courts created under Article I of the U.S. Constitution, and federal district courts, which are constituted under Article III of the Constitution. Because of that distinction, it was noted by the *Sheridan* panel that bankruptcy courts could not render a final judgment on those matters that are determined to be outside of their core jurisdiction. The determination of whether or not a judgment or order imposing sanctions against an attorney that go beyond the attorney's practice in the bankruptcy court raise all of the jurisdictional and constitutional concerns that occupied the *Sheridan* panel. Indeed, given the constitutional and jurisdictional issues raised by *Sheridan*, it seems uncertain that the same might be cured by the mere promulgation of an amendment to the Federal Rules of Bankruptcy Procedure.

Furthermore, and by reason of the foregoing, the Section objects to the language that requires, as a condition of appealablity of any order imposing disciplinary sanctions, a requirement that the attorney consent to the entry of a final order on the issuance of sanctions. It should be the counsel's rights to have such sanctions reviewable de novo on appeal, since, as it appears from the language of the proposed rule, the standard for the imposition of sanctions requires a showing by clear and convincing evidence. It is well settled that where a sanction that is imposed is punitive in nature, as opposed to coercive in nature, the appeal of the imposition of such a sanction is allowable as an appeal of a final judgment, order, and decree, as that language is used in section 28 U.S.C. § 158(a). *See, e.g.*, *Oliner v. Kontrabecki* (9th Cir. 2005) (noting the distinction between civil and criminal contempt as stating that if it is civil in nature, or to coerce compliance with an order or rule, it is an interlocutory order and not appealable as matter of right; but if it is intended as punishment for past conduct, then it is an appealable order as a matter of right).

In conclusion, the Section approves of the recommendations contained in the American Bar Association

report, in principle, subject, however, to the reservations expressed above. The Section respectfully submits the attached redlined version of the proposed changes reflecting its comments above.

Editor's Note: This report was prepared by the Bankruptcy Litigation Committee of the Commercial and Federal Litigation Section of the New York State Bar Association and was approved and adopted by the Section on July 19, 2006. The Bankruptcy Litigation Committee is chaired by Douglas T. Tabachnik.

APPENDIX A

Proposed Attorney Discipline Amendments to the Federal Rules of Bankruptcy Procedure

1. Proposed Amendments to Rule 5003 (Records Kept by Clerk)

ADD new subdivision (f); renumber existing (f) as (g):

(f) **Records of Attorney Disciplinary Proceedings.** The clerk shall keep, in the form and manner as the Director of the Administrative Office of the Courts may prescribe, files and records of all attorney disciplinary proceedings conducted by the bankruptcy court, including the disposition of such proceedings. Such files and records shall be available to the public after a determination that probable cause exists to believe that misconduct occurred, provided, however, specific testimony, documents or records may be kept confidential for cause shown, and further provided that the deliberations of the disciplinary panel shall remain confidential.

2. Proposed Amendments to Rule 9011 (c) (Signing of Papers; Representations to the Court)

(1)(B) *On the Court's Initiative with Respect to a Specific Filing:* On its own initiative or at the request of a person aggrieved, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

[NEW] (C) *On the Court's Initiative with Respect to a Pattern of Attorney Misconduct:* Upon a determination that probable cause exists to believe misconduct occurred, the court may enter an order describing the specific conduct by an attorney that appears to be part of a pattern of misconduct in multiple bankruptcy cases in the district or that appears to have caused potential or actual injury to clients, the public, the legal system, or the legal profession in violation of subdivision (b) and directing that attorney to show cause why that attorney should not be suspended from practice before the bankruptcy court or otherwise disciplined with respect thereto. The court may also refer the matter to the appropriate state disciplinary authorities and/or the appropriate federal district court for further disposition. Orders to show cause issued pursuant to this subdivision shall be subject to the disciplinary process set forth in Rule 9029 (a)(3).

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A), ~~and~~ (B), and (C), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

3. Proposed Amendments to Rule 9029

ADD new subdivision (a)(3):

(3) A local bankruptcy rule shall be adopted to provide procedures for the disciplining of attorneys appearing before the court.

(A) *Initiation of Disciplinary Proceedings:* On the court's own initiative or at the request of a person aggrieved, the court may commence disciplinary proceedings (i) by issuing an order to show cause pursuant to Rule 9011(a)(3), or (ii) by preparing and filing with the clerk a written statement of cause setting forth the basis for recommending discipline of an attorney. Such cause may include diversion of or failure to account for client or estate property; failure to avoid conflicts of interest; lack of diligence; lack of competence; lack of candor; false statements, fraud or misrepresentation; abuse of the

legal process; discipline by other courts; incapacity; unauthorized practice; or other violations of the Rules of Professional Conduct adopted by the highest court of the state in which the court sits. Multiple referrals for the same attorney may be consolidated.

(B) *Investigation; Selection of a Disciplinary Panel:* The court shall refer orders to show cause pursuant to Rule 9011(a)(3) and statements of cause pursuant to subsection (3)(a) to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate. The court shall appoint as counsel a member of the bar of the court. Upon counsel's recommendation that a formal disciplinary hearing should be conducted, the court shall designate up to three bankruptcy judges in that district (excluding the referring judge) to serve on a disciplinary panel.

(C) *Conduct of Disciplinary Hearing:* At any hearing, the attorney may present evidence, subpoena and cross-examine witnesses, and be represented by counsel. The United States Trustee may appear and participate in the presentation of evidence as a party to any disciplinary proceeding. Discipline shall only be imposed upon clear and convincing evidence.

(D) *Determination of Discipline:* After notice and hearing, the disciplinary panel shall submit to the district court its proposed findings of fact, conclusions of law, and recommendations for imposition of such private or public discipline as may be appropriate under the circumstances after due consideration of the professional duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors. Discipline may include suspension from practice before the bankruptcy court, reprimand, admonition, probation, monetary sanctions or restitution, limitation upon practice, required completion of professional responsibility or other professional education training, or other sanction deemed appropriate, subject to the jurisdictional limitations of the bankruptcy court. Such order shall be treated as an appealable order pursuant to Rule 8001(a). The court may also refer the matter to the appropriate state disciplinary authorities and/or the appropriate federal district court for further disposition.

(E) *Reinstatement* of Privileges: An attorney whose privileges have been revoked, modified, or suspended pursuant to an order of a disciplinary panel may apply for reinstatement of privileges upon a showing of good cause. Such applications shall be heard by a disciplinary panel.

Report of the Commercial and Federal Litigation Section Opposing the Recommendation of the American Bar Association Section of Litigation That Draft Expert Reports and Communications Between Experts and Attorneys Not Be Discoverable Insofar as It Applies to New York State Practice

The Section of Litigation of the American Bar Association (the "ABA") intends to propose to the ABA House of Delegates a recommendation (the "Recommendation") that would shield draft expert reports and communications between an attorney and a testifying expert from virtually all disclosure.[1]

Although the ABA Section of Litigation suggests that the Recommendation be incorporated in federal and state discovery procedures, the Recommendation has no relationship to current procedures for expert discovery under the CPLR, and its adoption would amount to an unwarranted intrusion into an existing discovery scheme that already provides ample protection for attorneys' interactions with testifying experts.

"Even a cursory review of the procedures for expert discovery under the CPLR shows that the Recommendation has no bearing on current state practice."

As is clear from the report prepared by the ABA Section of Litigation, the Recommendation was conceived in relation to the procedures for expert discovery set forth in Rule 26(a)(2) of the Federal Rules of Civil Procedure. That rule requires parties to produce, for each testifying expert, a written report prepared and signed by the expert, containing a "complete statement of all opinions to be expressed and the basis and reasons therefore." The rule further requires that the report contain "the data or other information considered by the witness" in forming his or her opinions. Moreover, under federal practice, testifying experts are subject to deposition, and inquiry into any information considered by the expert is generally permitted and encouraged. The Recommendation seeks to curb what it perceives as overly aggressive interpretations of the federal discovery rules to permit discovery of both drafts of expert reports and attorney communications with the testifying expert.

Even a cursory review of the procedures for expert discovery under the CPLR shows that the Recommendation has no bearing on current state practice. Unlike federal practice, under the CPLR a party offering a testifying expert is generally only required to "disclose in reasonable detail" the subject matter and substance of facts and opinions on which the expert will testify, and a "summary of the grounds" for the expert's opinion. There is no requirement that this disclosure statement be prepared or signed by the expert; to the contrary, it is common practice for the statement to be prepared by counsel. If the expert does in fact prepare a written report, nothing in the CPLR expressly requires that the report be disclosed to the adverse party, and the case law suggests that it is *not* discoverable—at least not without a showing sufficient to overcome the presumption against discovery of materials prepared in anticipation of litigation. *In re Love Canal Actions*, 161 A.D.2d 1169, 555 N.Y.S.2d 519 (4th Dep't 1990); *Bailey v. Owens*, 2004 WL 895972 (Sup. Ct., N.Y. Co. 2004); *see also* CPLR 3101, cmt. C3101:29(H) (McKinney 2005). Nor, *a fortiori*, are *drafts* of an expert's report routinely discoverable under the CPLR. Thus, from the standpoint of New York state practice, the Recommendation's first prong—protection of an expert's draft reports from discovery—has no application to the expert disclosures that are required under the CPLR, and is superfluous with respect to New York's treatment of expert reports themselves.

Similarly, whereas prevailing federal practice may well require the disclosure of attorney communications with a testifying expert as part of the disclosure of "the data or other information considered by the witness," there is no comparable requirement in state practice; to the contrary, all that is required to be produced is a "summary of the grounds" of the expert's testimony. CPLR 3101(d)(1)(i). Nor is there any significant risk that attorney communications might be discoverable at a deposition of the expert, because the CPLR does not generally require that testifying experts are subject to deposition. Even in those instances where expert depositions are required or agreed to, there is no established tradition in the New York cases whereby such depositions become a vehicle for discovering the attorney's core work product. Indeed, the CPLR imposes a heavy burden on parties seeking to discover such information, and particularly so where the information would reveal an attorney's "mental impressions, conclusions, opinions or legal theories." CPLR

3101(d)(2). Moreover, to the extent that an adverse party can make the heavy showing required under New York law to obtain discovery of such information, there is no readily apparent reason to set up a special rule—as the Recommendation requests—that would bar such disclosures in all cases.

To summarize: the Recommendation, as presented, has no bearing on New York expert discovery practice. The barriers against discovery that it seeks to impose on federal practice would, in most instances, be obviated by the limitations imposed on expert discovery under the CPLR, and while current state practice does not impose an absolute barrier against disclosure of attorney communications with experts, there is already sufficient protection for such communications under New York law, thereby eliminating the need for a special rule in this case.

For the reasons stated above, the ABA Section of Litigation's Proposal Regarding Expert Discovery is disapproved insofar as it seeks to apply to New York state practice.

Endnotes

1. The ABA Section of Litigation's proposal reads as follows:

   RESOLVED, That the American Bar Association recommends that applicable federal, state and territorial rules and statutes governing civil procedure be amended or adopted to protect from discovery draft expert reports and communications between an attorney and a testifying expert relating to an expert's report, as follows:

   (i) an expert's draft reports should not be required to be produced to an opposing party;

   (ii) communications, including notes reflecting communications, between an expert and the attorney who has retained the expert should not be discoverable except on a showing of exceptional circumstances;

   (iii) nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinions.

Editor's Note: This report of the Commercial and Federal Litigation Section of the New York State Bar Association was approved and adopted by the Section on July 19, 2006.

Book Review

Business and Commercial Litigation in Federal Courts (Second Edition)

Robert L. Haig, editor-in-chief
Thomson West Publishing, 2005, with CD-Rom

Reviewed by Jack C. Auspitz

In today's world, when most lawyers do their research on the computer rather than in the library (pronounced Lib-ra-ree, for those unfamiliar with the concept), litigators tend to zero in on trying to find This Exact Case immediately. Accordingly, they are less likely to turn to the major treatises, even when the treatises are also available on-line. Huge mistake! A good treatise not only can help you find T.E.C., it can give you the necessary context and critical understanding to fully answer the immediate question you have.

No treatise does this better or more comprehensively than *Business and Commercial Litigation in Federal Courts* (2d Edition, 2005). The editor is, of course, Robert L. Haig. Even if Bob was not the founder of the Commercial and Federal Litigation Section and even if I was not one of the swarm of lawyers who have authored chapters of Bob's companion treatise, *Commercial Litigation in New York State Courts*, his new eight-volume edition of this now classic treatise on commercial litigation in the federal courts would get a stellar review.

Business and Commercial Litigation in Federal Courts is a step-by-step manual to commercial litigation, from the earliest stages even prior to litigation, through pleadings, discovery, motion practice, trial and appeals. The academic integrity of the subject matter is maintained by having each chapter written by nationally recognized experts, including federal judges and practitioners. Haig continues this successful formula in the second edition while adding 16 new chapters which address recent developments in commercial litigation, including discovery of electronic information, civility (much needed and well addressed here with both "informal" and formal tactics to deal with incivility), directors' and officers' liability, mergers and broker-dealer arbitrations. Also, this recent edition includes new substantive topics, such as partnerships, e-commerce, and commercial defamation, which have become increasingly prominent in commercial litigation.

Indeed, the second edition includes almost an entire new volume specifically discussing general litigation practices. The new chapters in this volume include: litigation avoidance and prevention, techniques for expediting and streamlining litigation, litigation technology, and litigation management. In addition to informing attorneys about recent developments in litigation, these chapters provide multiple ways to reduce effectively the skyrocketing costs of litigation.

To take but one example of the new work in this edition, Chapter 22, "Discovery of Electronic Information," is typically authoritative and helpful. Written by our Section's former Chair Hon. Shira A. Scheindlin and Jonathan M. Redgrave, it provides a practical approach for any litigator in dealing with clients who maintain large computer networks. The chapter begins with the steps you should make sure your clients take even prior to litigation: maintaining clear records and information management policies that encompass electronic data, establishing a litigation hold procedure within the company and many others. Following that path (which I expect will have more potholes than anticipated) should help both lawyers and clients, and, perhaps more importantly, avoid irritating the court. In keeping with the spirit of the rest of the treatise, this chapter not only provides practical knowledge, but also a more theoretical discussion on the interplay of electronic discovery and the Federal Rules of Civil Procedure. By the end, the reader will be talking of the differences between PDF files and tiff files like a Silicon Valley geek—but a geek who can conduct a 30(b)(6) document deposition.

As with the first edition, each chapter of the second edition contains a practice or procedural checklist to guide attorneys when dealing with the subject matter. The second edition, however, has the extra bonus of a CD-ROM with hundreds of pages of essential litigation forms and jury charges. Even with all of these additions, the second edition still maintains its accessibility. Written in a clear and concise manner and covering every aspect of commercial litigation, *Business and Commercial Litigation in Federal Courts* should be the first resource of any litigator.

Jack C. Auspitz is a commercial litigation partner at Morrison Foerster. He has litigated numerous private and class action securities and banking cases and complex commercial matters. Mr. Auspitz has been Chair of the Commercial and Federal Litigation Section of the New York State Bar Association and a member of the House of Delegates of the New York State Bar Association.

Book Review:

New York Contract Law

Glen Banks
West's New York Practice Series Volume 28, 2006, 1,574 pages

Reviewed by Michael S. Oberman

New York Contract Law ("*NYCL*"), by Glen Banks, is a brand new title (and Volume 28) in West's New York Practice Series—the series that includes (as Volumes 2-4B) Bob Haig's *Commercial Litigation in New York State Courts*. The mailer announcing the publication of *NYCL* immediately raised two questions that I felt warranted discussion in this publication. First, does *NYCL* merit a spot on our bookshelves next to the indispensable Haig treatise?[1] Second, is *NYCL* a resource which colleagues should be urged to use routinely when you make them understand that computerized legal research alone is insufficient? The answer to both questions is "yes"—this is an excellent book, although I do have some modest suggestions for the updates and for the second edition of the work.

NYCL has no preface, so we are not given Banks' full vision of his book. Chapter 1, titled "Introduction," does state (at p. 3) that the "purpose of this book is to provide the practitioner, whether he or she is located in New York or elsewhere, with an understanding of New York contract law as it is presently applied by New York state courts and federal courts sitting in New York." The chapter concludes (at p. 22) by reiterating that the "focus" of *NYCL* is on "the law currently being articulated by judges sitting in New York" and by adding that it focuses on "principles of contract law that are generally applicable" (as opposed to special areas of contract law, such as insurance law). The mailer promises that *NYCL* "is an ideal starting point for any contract issue you encounter."

We are not told whether the work was designed as a reference treatise alone or whether it was also intended to serve as a "how-to" manual (in the way that the Haig treatise is rich with practical advice and forms). An examination of *NYCL* reveals that it is a comprehensive treatise that sets out the principles of New York contract law without much advice for working with these principles drawn from the author's own experience. The book contains no biography of Banks, except that the Acknowledgment includes thanks to the author's partners and staff at the New York office of Fulbright and Jaworski L.L.P. No forms are provided in the book (except when a "Practice Tip" suggests possible contract language (see, e.g., p. 770) (offering a choice of law clause)), and there is no companion CD-Rom disk containing forms (a major difference between *NYCL* and the Haig treatise).

I "test drove" *NYCL* while I worked on a number of cases with contract law issues (the kind of cases that keep Commercial and Federal Litigation Section members busy), and I found much to like. As promised in the Introduction, *NYCL* supports the huge majority of its sentences with very current case citations. Time and again, I saw citations to the most recent cases appearing in briefs I was then drafting or reviewing. There are not many string cites or parenthetical discussions within the cites, but the careful selection of current cases gives the reader a good starting point for further research (as advertised).[2] The currency of case law discussion is especially helpful where the law is evolving (see, e.g., § 7:23 "Restrictive Covenants—A New Standard Emerges"). Banks' writing is exceptionally clear and concise, and I was pleasantly surprised with the vast array of topics that are covered. For example, along with the anticipated chapters on contract principles, *NYCL* has a useful chapter on "Related Tort Claims" (Chapter 21). There is also extended and helpful discussion of arbitration clauses (§§ 27:2-27:16) and settlement agreements (26:2-26:7). The bulk of the Introduction consists of a very neat feature: "a brief summary of the general principles that have been articulated by the Court of Appeals." (p. 4). What follows is an overview of the very basics of contract law, annotated with citations to Court of Appeals cases (§§ 1:3-1:13).

Overall, the depth of discussion is quite appropriate for a one-volume treatise having 1,269 pages of text. Only at a few points did I feel some frustration at being taken right to the object of my research yet then left at the precipice of learning. Thus, Section 24:6, "Exclusion of Consequential Damages," states (at pp. 1038-39): "The precise demarcation between direct and consequential damages is a question of fact usually left for resolution at trial." There are two case citations, but no other amplification of the "demarcation" between these categories of damages.

On receiving the book, I immediately looked to see if it discussed a little known rule of New York contract law upon which I won a case (when I found that rule in a contract law treatise after computerized legal research done for me failed to discover this rule.) Because I knew the leading case (*Meinrath v. Singer Co.*, 87 F.R.D. 422 (S.D.N.Y. 1980)), I was able to find the rule quickly from the table of cases. *NYCL* states (at 929): "As a general rule, when a contract calls for payment of money on a certain date and

payment is not made, the measure of damages is interest at the rate specified by law" (citing *Meinrath* and a later case). This rule is a tremendous limitation on a claim for consequential damages, where a plaintiff alleges that the failure to make a contract installment payment put it out of business.[3]

The quoted rule appears in Part VII of *NYCL* titled "Damages," within Chapter 22 ("General Principles") and Section 22:26 ("Money Withheld"). I then asked myself whether a reader unaware of *Meinrath* and of its holding would be able to uncover this rule easily while using *NYCL* to defend a claim for consequential damages. The answer to this question exposed my most serious concern about *NYCL*. The book is not well indexed, and it lacks sufficient internal cross-references. The heading for "Consequential Damages" at Index-10 has only two entries ("Generally" and "Limitations on liability, exclusion of consequential damages"). The book has many more topics related to consequential damages than these two, and neither reference (or the text or footnotes of the two referenced sections) would take the reader to Section 22:26. It is necessary to carefully review and reflect on the table of contents (which is amply detailed) or to read all relevant chapters (a good idea in any event) to get to this important rule of law.[4]

This is not the only omission I discovered in the index. One of my pending cases had a clause excluding "incidental damages." The index has no listing for this subject by itself or under "Damages" at Index-12—even though the text discusses the basic principles of incidental damages in Section 24:6 ("Exclusion of Consequential Damages"). In this instance, a review of the Table of Contents would not get the reader to the learning on incidental damages. Much the same, when I looked for a description of the "finder's fee" provision of the Statute of Frauds (N.Y. Gen. Oblig. Law § 5-701(c)(10)), I found nothing in the Index or Table of Contents and came upon a brief mention of this topic only by paging through the Statute of Frauds part (§§ 3:9-3:18). I initially thought *NYCL* lacked adequate discussion of when a purported fraud claim fails as a mere duplicative contract claim, because Section 21:4 ("Effect of Contract") appearing in the chapter on "Related Tort Claims," "Part I. Introduction" did not elaborate on the law limiting contract claims re-pleaded as fraud claims or cross-reference such discussion. Yet the case law is very nicely presented in Sections 21:7 and 21:8 ("Relation to Claim for Breach" and "Relation to Claim for Breach—Intention Not to Perform") coming later in the same chapter, under "Part II. Fraud." The listing for "Fraud" at Index-20 does not refer to either section, although the Table of Contents naturally does. I found myself sorely missing a searchable disk, which would permit me easily to locate valuable case law discussion despite an anemic index.

On the other hand, when a client called to ask whether parties to a contract may disclaim liability for "gross negligence," I found "Gross Negligence" as an index heading, and under it the sub-heading "Limitations on Liability." This took me to the relevant section (§ 24:16), which states and then expands upon the rule that "[a] party may not limit liability for damages caused by its own grossly negligent conduct" (p. 1055). Similarly, when I wanted to refresh myself on the current state of the law on when "preliminary agreements" might be enforceable, the Index had a heading for "Preliminary Agreements" and a sub-heading for "Binding Preliminary Agreements." The referenced section (§ 3:24) turned out to be in the middle of "Part IV. Preliminary Agreements" in "Chapter 3—Other Contract Formation Issues." The reader, accordingly, could quickly come to this topic by skimming the Table of Contents. This part discusses both oral and written preliminary agreements. The issue is one on which I have litigated and counseled repeatedly, and I thought Banks offered a detailed, cogent and up-to-date treatment of the governing law.

As implied above, *NYCL* could offer more practical guidance. Scattered throughout the text are some set-off paragraphs of practical advice labeled "Comment" or "Practice Tip," but they appear only infrequently and unpredictably. Section 24.21, "Arbitration," in Chapter 24, "Limitations on Liability" provides—for example—an important caveat on how damages principles might play out in an arbitration and ends with this comment:

> •**Comment**: If the parties' agreement containxs an arbitration clause, a party wishing to limit its liability should craft the language to ensure that the limitation applies to any claim whatsoever arising from or relating to the contract or the performance thereof and such limitation survives any breach or termination, including but not limited to any wrongful termination, of the contract.

This is sound advice, but the "Comments" and "Practice Tips" seem to have been dropped in as an afterthought and as an incomplete feature. Here, too, the index will not take you to the point (the heading "Arbitration" at Index-2 not having a reference to Section 24:21 and there being no compilation in the Index of "Comments" or "Practice Tips"). The regular text, from time to time, observes whether an argument might prevail on a motion to dismiss or on summary judgment. See, e.g., p. 1056 ("While the question of whether defendant acted with gross negligence often presents an issue of fact, courts have sustained limitations of liability provisions in the context of a summary judgment motion when the surrounding facts compel such a result"); p. 1145 ("Whether the language set forth in a release unambiguously bars a particular

claim is a question of law appropriately determined on a motion for summary judgment without reference to extrinsic evidence"). This type of guidance is quite useful for litigators and for other practitioners attempting to measure the force of a rule, but—here too—such guidance is a bit too sporadic. And one might expect that a book put into a "Practice Series" would have forms.

NYCL comes in the same trade dress as the Haig treatise, and it looks great sitting in my bookcase next to the second edition of the Haig treatise and my copy of another research staple—Baker and Alexander's *Evidence in New York State and Federal Courts* (Volume 5 of West's New York Practice Series). I predict that giving *NYCL* this prominent spot will prove to be a wise decision for now and even more when it is updated and ultimately revised.

Endnotes

1. *See* Lauren J. Wachtler's review of the second edition of the Haig treatise in *NYLitigator*, Spring 2006 at p. 60.
2. The editors also have added to each section references to West's Key Numbers, *Williston on Contracts* (4th ed.) and *N.Y. Jur. 2d.*
3. *See Scavenger, Inc. v. GT Interactive Software Corp.*, 289 A.D. 2d 58, 734 N.Y.S. 2d 141, 142 (1st Dep't 2001).
4. *NYCL* is available on Westlaw. As a test, I searched the text for "consequential damages" and was referred to 31 sections (including § 22:26 discussed above)—far more than the Index would suggest.

Michael S. Oberman is a partner in the Litigation and Intellectual Property Departments of Kramer Levin Naftalis & Frankel LLP. He has litigated a wide variety of complex civil and copyright cases at the trial and appellate levels and in arbitration and has also served as an arbitrator and a mediator. Mr. Oberman has been a member of the Executive Committee of the Commercial and Federal Litigation Section of the New York State Bar Association since the Section's formation and was the Section's Delegate to the House of Delegates from 1989-91. He has served as a member of Chief Judge Kaye's Commercial Courts Task Force, which created the Commercial Division of the New York Supreme Court, and has also served as a member of the Second Circuit's Committee on Rules and Operating Procedures. This is Mr. Oberman's ninth review for *NYLitigator*.

Book Reviews:

Electronic Discovery

Brent Kidwell, Matthew Neumeier, and Brian Hansen
Law Journal Press, 2005, 219 pages (loose leaf)

eDiscovery & Digital Evidence

Jay E. Grenig and William C. Gleisner III
Thomson West, 2005, 1,416 pages (2 vols. including appendices) with CD-Rom of Forms

Reviewed by Norman C. Simon

The words "electronic discovery" inspire fear in the hearts of many litigators today. The law in this area is evolving quickly and new advances in technology seem to happen every day and at a rate that threatens to outpace lawyers' ability to understand and master them. Even worse, the threat of sanctions hangs in the air for spoliation of electronic data—even if data is lost accidentally or through no affirmative human action, but rather due to routine and automatic recycling. It is unsurprising then, that promotional material for books about electronic discovery are filling attorneys' inboxes at a rapid pace.

Two recent treatises on electronic discovery provide useful resources for practioners in this area. Each offers a unique slant on the subject. *Electronic Discovery* by Brent Kidwell, Matthew Neumeier, and Brian Hansen (Law Journal Press, 2005) presents a comprehensive view of the technical aspects of electronic discovery, providing attorneys with a primer on the myriad data systems that exist and how they work. *eDiscovery & Digital Evidence* by Jay E. Grenig and William C. Gleisner III (Thomson West, 2005) is less focused on making technology understandable and more concerned with surveying the state of the law of electronic discovery with a focus on how practitioners can best meet their electronic discovery obligations.

Electronic Discovery is divided into chapters that are organized by legal subject matter—for example, "Preserving Electronic Documents Before and After Litigation Ensues," "Drafting Discovery Requests for Electronic Information," and "Deposing the Records Custodian or Information Technology Manager." However, the actual discussion of law in these chapters tends to be overshadowed by a much more elaborate presentation of technology. The focus on technology in *Electronic Discovery* is not entirely surprising since the principal author, Brent Kidwell, is Chief Knowledge Counsel for Jenner & Block with responsibility for the firm's strategic technology and knowledge management initiatives. According to the Jenner website, "Mr. Kidwell focuses on developing and implementing various 'applied technology' programs in the Firm, including deployment of robust client extranets as well as automated litigation and practice support technologies . . . [and] also oversees the Firm's aggressive use of state-of-the-art technology in complex litigation."

To be sure, *Electronic Discovery* does include a discussion of legal concepts; however, its discussion of the law tends to be lean. The book also includes many practice points. Some, however, seem too sweeping. For example, the authors write that "[a]n attorney should ask for inspection of the opponent's hardware. He should serve a request for an inspection of the opposing party's corporate network system in order to get a better idea of what the opponent has (or does not have) and where the opponent stores it" (at § 3.01[2]). While this may be appropriate in certain instances, it is hardly the rule in litigation and is not necessary in many cases; it is a method that should selectively be employed only when there is a good reason for the inspection (i.e., there is a suspicion that an adversary has been less than forthcoming in discovery or that produced data has been altered from its original state). Indeed the authors offer the following seemingly contradictory advice in the very same paragraph: "The attorney should be prepared for considerable opposition—the opponent will not like a stranger snooping through its computer databases." Similar directives for attorneys to "obtain copies of network configurations and architecture" and "litigation databases and imaged documents" (at § 5.03) are likewise sweeping and not necessarily practical in many cases.

The strength of the *Electronic Discovery* treatise lies in its detailed discussion of technology. In a chapter entitled "Email and Messaging," for example, an elaborate discussion of the technological framework of electronic mail is included, complete with schematics of the internal email path in a typical Exchange environment. The authors begin this analysis by observing (at § 7.04), "Sitting at the computer and sending and receiving an email, few people truly comprehend the complex technical process required to transmit the text they have just typed, an attached word processing document, or a child's picture to the office next door, or to a far away continent, both with near instantaneous delivery." Should the reader desire to know such details, this treatise is good at providing it in

a fairly comprehensible manner. Similarly, the discussion of "where to search for stored email" (at § 7.06) provides a technological overview of personal digital assistants (PDAs), laptops, servers and document management systems. Attention to technical detail is also evident in the specifics included in the "definition section" of the "Sample Document Request" (at § 5.03[2]), which includes such concepts as "imaged copy," "magnetic storage media," and "optical storage media," as well as the Form "Sample Request for Production of Documents"(at § 5.03[3]), which calls for all policies and procedures related to computers, including "backup tape rotation schedules," "file naming conventions and standards," "password, encryption and other security protocols," and "software and hardware upgrades." A "List of Deposition Topics" (§ 6.03[3]) for depositions of a corporate representative and Form Sample Outline for Taking the Deposition of an Information Technology Witness (§ 6.04) are similarly laden with very technology-specific subject matter.

In contrast to the approach in *Electronic Discovery*, Grenig and Gleisner set out in the introduction to *eDiscovery and Digital Evidence* that treatise's objective of avoiding an overly technical discussion in favor of a more practical approach (at 3):

> A number of articles and treatises have been written for lawyers and judges concerning the electronic, or more appropriately, the digital revolution. The problem is that most read like technical journals. They attempt too much, while failing to explain in practical terms how and why the digital revolution affects all lawyers and judges. . . . This book takes a different approach, focusing on how lawyers and judges do their business and only discussing technology in terms of the realities of the day-to-day legal world.

eDiscovery accomplishes its objective. It pulls into one place a good amount of authority in the area, including the Sedona Principles regarding electronic discovery, the American Bar Association's e-discovery standards, excerpts from the Manual for Complex Litigation concerning digital information, and even some approaches espoused by particular courts such as the District Court of Delaware's default standards on electronic discovery. The treatise is peppered with good practice tips. For example, the treatise provides good guidance on steps that a discovering party's lawyer should consider early on in a case (at § 7.6), as well as a comprehensive road map for lawyers who are involved in producing their client's digital records (at § 8.2); the authors rightly note that "[w]hat lawyers need, and what is often lacking in presentations or discussions on digital evidence, is a simple, yet comprehensive, road map." The treatise also includes a thorough discussion of spoliation and a lawyer's duty of preservation as it relates to electronic data. The book does a good job of tying technical discussion to the substantive and legal analysis. The forms that are included are quite useful as well as convenient—they are provided in electronic form on a CD-Rom.

An example of the contrast in the two treatises approach to technology is best seen in the sample forms that are included in both. A Sample Preservation of Evidence Letter in *Electronic Discovery* by Kidwell et al. (§ 4.08) provides a lengthy list of particular types of electronic information that must be included, which are spelled out in four pages of exacting detail. The list includes, among many other technical items: files and file fragments created by applications that process financial, accounting and billing information; files and file fragments containing information from electronic calendars and scheduling programs; online data storage on mainframes and minicomputers; offline data storage; backups and archives (including zip drives, zip files, magneto-optical disks, floppy diskettes and mainframes); fixed drives on standalone personal computers and network workstations; and application programs and utilities. While impressive in scope, the authors overlook that by making a preservation demand with such exacting specificity—as opposed to a more generalized request to preserve all electronic information in whatever form it exists—it could allow some data that is not explicitly included to fall through the cracks. A letter as technical as this form also assumes a level of understanding by the recipient, which may not necessarily exist.

In contrast, the *eDiscovery* treatise by Grenig et al. offers a three-paragraph form (Form 12) that accomplishes the same objective of preservation but in a more streamlined manner that relies less on technical know-how:

> Your assistance and cooperation are required with respect to preserving corporate information this case. Electronically stored data is an important and irreplaceable source of discovery and evidence.
>
> This lawsuit requires that all employees preserve all information from [organization's] computer systems, removable electronic media, and other locations relating to [describe]. This includes, but is not limited to, email and other electronic communication, word processing documents, spreadsheets, databases, calendars, telephone logs, contact manager information, Internet usage files, and network access information.
>
> You must take every reasonable step to preserve this information until further notice from [name 2]. Failure to do so

could result in extreme penalties against [organization].

In the final analysis, both of these treatises are good entries into the ever expanding universe of electronic discovery guides. For those practitioners who are techies at heart, *Electronic Discovery* might be the better choice. For those looking for a practical guidance and to more fully understand the most current legal developments in the area of electronic discovery, *eDiscovery* is the better choice.

Norman C. Simon is a litigation partner with Kramer Levin Naftalis & Frankel LLP. Mr. Simon has significant experience in the area of electronic discovery. He litigated a number of pretrial electronic discovery disputes in the high-profile case *Zubulake v. UBS Warburg*. He regularly advises clients on matters of electronic discovery and has conducted internal investigations for clients concerning data loss. Mr. Simon also has presented at several programs on electronic discovery, including Kroll Ontrack's "E-Discovery: Ask the Experts," the Securities Industry Association's "Managing the HR Risks of Email," and numerous in-house seminars.

Section Committees and Chairs

Antitrust
Jay L. Himes
Office of Attorney General
(212) 416-8282
jay.himes@oag.state.ny.us

Appellate Practice
Preeta D. Bansal
Skadden Arps Slate Meagher & Flom LLP
(212) 735-2198
pbansal@skadden.com

David H. Tennant
Nixon Peabody LLP
(585) 263-1000
dtennant@nixonpeabody.com

Arbitration and Alternative Dispute Resolution
Deborah Masucci
AIG Domestic Brokerage Group
(212) 770-1288
deborah.masucci@aig.com

Carroll E. Neesemann
Morrison & Foerster, LLP
(212) 468-8138
cneesemann@mofo.net

Bankruptcy Litigation
Douglas T. Tabachnik
Law Offices of Douglas T. Tabachnik
(732) 792-2760
dttlaw@aol.com

Civil Practice Law and Rules
James Michael Bergin
Morrison & Foerster, LLP
(212) 468-8033
jbergin@mofo.com

Thomas C. Bivona
Milbank Tweed et al.
(212) 530-5124
tbivona@milbank.com

Civil Prosecutions
Neil V. Getnick
Getnick & Getnick
(212) 376-5666
ngetnick@getnicklaw.com

Class Action
Ira A. Schochet
Labaton Sucharow & Rudoff LLP
(212) 907-0864
ischochet@glrslaw.com

Commercial Division
Vincent J. Syracuse
Tannenbaum Helpern Syracuse & Hirschtritt LLP
(212) 508-6722
syracuse@thshlaw.com

Commercial Division Law Report
Jonathan D. Lupkin
Flemming Zulack Williamson Zauderer LLP
(212) 412-9579
jlupkin@fzw.com

Paul D. Sarkozi
Hogan & Hartson LLP
(212) 476-8284
pdsarkozi@hhlaw.com

Complex Civil Litigation
Michael C. Keats
O'Melveny & Myers LLP
(212) 326-4475
mkeats@omm.com

Edward A. White
Hartman & Craven LLP
(212) 753-7500
ewhite@hartmancraven.com

Construction Litigation
J. Scott Greer
Lewis & Greer, P.C.
(845) 454-1200
jsgreer@lewisgreer.com

Edward J. Henderson
Torys LLP
(212) 880-6026
ehenderson@haythecurly.com

Corporate Litigation Counsel
Richard B. Friedman
Dreier LLP
(212) 328-6113
rfriedman@dreierllp.com

Carla M. Miller
Universal Music Group
(212) 331-2564
carla.miller@umusic.com

Creditors' Rights and Banking Litigation
Peter J. Craig
Peter Craig & Associates P.C.
(585) 586-1060
pjcraig@aol.com

Michael Luskin
Luskin Stern & Eisler, LLP
(212) 293-2700
mluskin@lse-law.com

S. Robert Schrager
Hodgson Russ, LLP
(212) 751-4300
rschrager@hodgsonruss.com

Electronic Discovery
Constance M. Boland
Nixon Peabody LLP
(212) 940-3000
cboland@nixonpeabody.com

Adam I. Cohen
FTI Consulting, Inc.
(212) 841-9393
adam.cohen@fticonsulting.com

Employment and Labor Relations
Gerald T. Hathaway
Littler Mendelson, P.C.
(212) 583-2684
ghathaway@littler.com

Evidence
Lauren J. Wachtler
Montclare & Wachtler
(212) 509-3900
ljwachtler@montclarewachtler.com

Ethics and Professionalism
Anthony J. Harwood
Labaton Sucharow & Rudoff LLP
(212) 907-0700
aharwood@labaton.com

James M. Wicks
Farrell Fritz P.C.
(516) 227-0617
jwicks@farrellfritz.com

Federal Judiciary
Jay G. Safer
Lord, Bissell & Brook LLP
(212) 812-8305
jsafer@lordbissell.com

John D. Winter
Patterson Belknap Webb & Tyler
(212) 336-2000
jwinter@pbwt.com

Federal Procedure
Gregory K. Arenson
Kaplan Fox & Kilsheimer LLP
(212) 687-1980
garenson@kaplanfox.com

Intellectual Property
Peter Brown
Thelen Reid Brown et al.
(212) 895-2480
pbrown@brownraysman.com

Stephen Joseph Elliott
Kaye Scholer LLP
(212) 836-7829
selliott@kayescholer.com

International Litigation
Ted G. Semaya
Eaton & Van Winkle LLP
(212) 561-3615
tsemaya@evw.com

Internet and Litigation
Peter J. Pizzi
Connell Foley LLP
(973) 533-4221
ppizzi@connellfoley.com

Membership
Edwin M. Baum
Proskauer Rose LLP
(212) 969-3175
ebaum@proskauer.com

Peter Andrew Mahler
Farrell Fritz, P.C.
(212) 687-1230
pmahler@farrellfritz.com

Nominating
Melanie L. Cyganowski
U.S. Bankruptcy Court
(631) 712-5688
Melanie_Cyganowski@nyeb.uscourts.gov

Pro Bono and Public Interest
Robert L. Becker
Raff & Becker, LLP
(212) 732-5400
beckerr@raffbecker.com

Michael David Sant'Ambrogio
Patterson Belknap Webb and Tyler, LLP
(212) 336-2436
mdsantambrogio@pbwt.com

Publications
Carrie H. Cohen
Office of Attorney General
Public Integrity Unit
(212) 416-8242
carrie.cohen@oag.state.ny.us

Real Estate Litigation
David Rosenberg
Marcus Rosenberg & Diamond, LLP
(212) 755-7500
dr@realtylaw.org

Securities Litigation
Douglas C. Conroy
Paul Hastings Janofsky and Walker, LLP
(203) 961-7400
douglasconroy@paulhastings.com

State Court Counsel
Kathy M. Kass
NYS Supreme Court
(646) 386-3655
kkass@courts.state.ny.us

Jodie B. Sopher
NYS Unified Court System
(646) 386-3208
jsopher@courts.state.ny.us

Technology
Daniel P. Levitt
(212) 286-0099, ext 2
levittdan@aol.com

White Collar Criminal Litigation
Evan T. Barr
Steptoe & Johnson
(212) 506-3918
ebarr@steptoe.com

Joanna Caine Hendon
Merrill Lynch
(212) 670-4507
joanna_hendon@ml.com

At-Large Members of the Executive Committee

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Keane & Beane P.C.
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(212) 398-8310

David B. Eizenman
Loeb & Loeb, LLP
(212) 407-4847

Vanessa R. Elliott
Beattie Padovano, LLC
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NYS Supreme Court

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(212) 468-8203

Jonathan D. Lupkin
Flemming Zulack Williamson Zauderer LLP
(212) 412-9579

Jonathan D. Lupkin
Flemming Zulack Williamson Zauderer LLP
(212) 412-9579

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U.S. Courthouse
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(212) 412-9520

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(718) 797-7380

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Hon. Karla Moskowitz
NYS Supreme Court
(212) 386-3220

Michael S. Oberman
Kramer Levin et al.
(212) 715-9294

Kenneth A. Payment
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(585) 232-6500

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(718) 325-5000

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U.S. District Court, SDNY
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United States District Court
(212) 805-0262

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Gerald G. Paul
Flemming Zulack Williamson Zauderer LLP
(212) 412-9540

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Flemming Zulack Williamson Zauderer LLP
(212) 412-9562

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Arent Fox PLLC
(212) 484-3930

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Lippes Mathias Wexler Friedman LLP
(716) 853-5100

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(212) 812-8305

Cathi A. Hession
Flemming Zulack Williamson Zauderer LLP
(212) 412-9506

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(212) 557-7200

Lauren J. Wachtler
Montclare and Wachtler
(212) 509-3900

Stephen P. Younger
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NEW YORK STATE BAR ASSOCIATION
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