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Summer 2005
Vol. 10, No. 1

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Message from the Chair

By Lauren J. Wachtler

I am pleased to report that our Section membership has now increased to more than 2,320 and has been touted as one of the fastest growing Sections of the Bar. Indeed, there is hardly a week that goes by where our Section does not contribute in some significant way to the practice of commercial law in New York; whether in the form of a CLE program, a report, a commentary on a variety of issues affecting our Section and the legal community at large, or an event which has led to positive press coverage of our Section and its members. The week of January 24, 2005, during which the Annual Meeting of the New York State Bar Association and all of its Sections took place, was just such an example.

Tracee Davis, our Section Secretary, and I participated in the Diversity Reception that week, attended by, among others, our Bar President Ken Standard, past Bar President Tom Levin, and the Honorable Carmen Beauchamp Ciparick of the State Court of Appeals, along with 150 members of the State Bar. Tracee, my partner Paul Montclare, and I were able to meet with those who attended the reception and speak about our Section and the many benefits it has to offer. I was encouraged with the genuine interest sparked by the discussions I had with some of the attendees, and the number of attorneys who were eager to join our Section and work on one or more of our committees.

As a result of one such discussion, one of our Section members who practices bankruptcy litigation had the excellent suggestion of adding a Bankruptcy Litigation Committee to our 29 committees, both for those of us who practice in Bankruptcy Court, and to also address some of the issues that those of us who don't routinely practice in the Bankruptcy Courts encounter in our practice. I, for one, have had clients who have been involved in bankruptcy proceedings and it has often been necessary to reach out to other attorneys for advice, counsel, or even referrals. We welcome Douglas Tabachnik to our Executive Committee and as the Chair of our new Bankruptcy Litigation Committee. I encourage those of our members who are interested in this area of the law to join this new Committee.

There is no question that the highlight of that week was our Section's Annual Meeting and luncheon, which took place on Wednesday, January 26, 2005. The morning program was well attended and received excellent reviews from those who participated. Our luncheon this year broke all prior records, having been attended by 400 attorneys and more than 60 State and Federal judges. Attorney General Eliot Spitzer, who received our Section's Stanley H. Fuld award, asked Jay Himes, who Chairs our Antitrust Committee, to present the award to him. Jay's introductory remarks were not only elegantly delivered, but the substance of his remarks was matched only by that of Attorney General Spitzer's acceptance speech and its inspiring content. Following the meeting, the luncheon was covered on the front page of the *Law Journal* and our Section was prominently featured in the article, as well as in several other Bar publications.

A round of applause is due to Lesley Rosenthal, who Co-chaired the Presidential Summit with me on behalf of State Bar President Ken Standard. Lesley's remarkable efforts resulted in what attendees have described to me as being the most engaging and substantive program among the many which they have ever attended.

"[T]here is hardly a week that goes by where our Section does not contribute in some significant way to the practice of commercial law in New York . . ."

Not only have our Section's contributions been recognized by the State Bar, but several weeks ago, the Section received recognition again in the *New York Law Journal* regarding our contributions to the Commercial Division Rules and Guidelines, on which Section members have been working closely with Commercial Division Judges, and in particular, their principal author, the Honorable Leonard B. Austin. The article recognized the significant contributions of our Section members, many of whom are members of the Commercial Division Advisory Committee, and have provided input into the Rules and Guidelines and the important process of their implementation.

Our work with the Commercial Division has continued in other areas, and we will again be presenting a seminar for the Commercial Division judges statewide in conjunction with the Judicial Institute at Pace University School of Law. Our program this time, at the

requests of the Commercial Division judges, will focus on trade secrets, the Class Action Fairness Act, issues relating to electronic evidence, and jury instructions involving contract cases. The seminar will take place on May 11, 2005 at the Pace Law Institute. Again, I appreciate the overwhelming response by our Section members to help with this program and share their expertise with the Commercial Division judges who have shown their appreciation of these seminars by asking us to hold them both in New York and Westchester for the past three years. This continues to be a wonderful opportunity to work directly with the judges of the Commercial Division and involve as many of our Section members as possible in assisting the judiciary.

During the past several months, we have also provided the State Bar Executive Committee with our comments on the Jury Commission Report, the expanded definition of pro bono, and subsequent adoption of the expanded definition, which incorporated almost all of our Pro Bono Committee report's comments, and the State Bar Executive Committee's proposal to repeal New York law office requirements set forth in Judiciary Law § 470. To our Section's credit, our members have never been timid in expressing their views, even if they are contrary to the majority or popular position. They have always provided "food for thought" and the Executive Committee of the State Bar Association has consistently commended our Section on its fine work and the scholarship and excellence of our reports. Most recently, we presented our Class Action Committee's report, which the committee is chaired by Ira Schochet, and again the Section was commended by the State Bar Executive Committee.

We are presently in the process of preparing comments in response to the Civil Justice Program 2005: Study and Recommendations by Judge Ann Pfau, First Deputy Chief Administrative Judge. The Program and Study, which many of you may have seen in the *New York Law Journal* last month, contains many recommendations affecting aspects of our practice including complex litigation, New York City cases, civil jury selection, and the alternative dispute resolution process.

The Section is also part of a new mentoring program, chaired by former Chair Bernice K. Leber, who was also recently elected as Vice President for the First Judicial District of the New York State Bar Association. The program has been designed to attract young attorneys to join the Bar Association and our Section has agreed to become part of the program. We have been asked to study and make recommendations to keep young attorneys and new members of the State Bar engaged and involved in Bar activities. Many of our Executive Committee members have agreed to participate as mentors in this program and I am proud to say that it was based on the increase in our numbers during the past year that prompted the request of the State Bar for our Section to participate in this worthwhile endeavor.

We have also been asked to assist the Honorable Jacqueline W. Silbermann, Administrative Judge of New York County, in filling two new positions which have been created for attorneys who wish to clerk for a Commercial Division judge. A link to the flyer advertising this opportunity can be seen on the front page our website (http://www.nysba.org/comfed). I am pleased to say that it was our Section which pointed out to the Administration the difficulty many attorneys were having in obtaining expeditious results on motions and other submissions based on the increased number of matters which have come into the Commercial Division in recent years. The Administration, in response to our letters and comments made in meetings, is addressing these problems and, it is hoped that the addition of these clerkship positions, will afford some relief to the New York County Commercial Division judges in managing their caseloads, and shortening the time between motion submission and adjudication.

This past March, our Executive Committee was privileged to have as our guest speaker the Honorable Robert Smith, the newest addition to the State Court of Appeals. We also welcomed to our Executive Committee at that meeting Preeta Bansal, the immediate past Solicitor General of the State of New York, and now a member of the law firm of Skadden Arps Slate Meagher & Flom, LLP. Preeta participated in the Presidential Summit and provided us with a marvelous performance on the panel which addressed the constitutionality of New York State's lobbying law. Preeta will be joining David Tennant of the law firm of Nixon, Peabody in Rochester as the Co-chair of the Appellate Practice Committee. David presented the Executive Committee with the Appellate Practice Committee's report on the use of Google and the Internet by the judiciary entitled "Judicial Ethics and The Internet: May Judges Search The Internet In Evaluating and Deciding A Case?"

The Executive Committee also welcomes as the new Chair of the Federal Court Attorney's Committee, Erich Grosz of the law firm of Debevoise & Plimpton. Erich has some great ideas to increase that Committee's membership and involvement in Section activities.

Our Section also continues to encourage other Sections to participate in the programs which we sponsor. On June 2, 2005, Bernice Leber and I will be Chairing the third annual "Women on the Move" seminar at the New Yorker Hotel. Bernice and I have created a program entitled "Women on the Move—Successful Women in the Know" to focus on career paths available to women attorneys who are entering the job market, as

well as those who are five, ten, and fifteen or more years away from law school. The panelists on the first panel, who will discuss options for those entering the job market, include the Dean of Students at Pace University School of Law, Chief of Staff and Deputy to the President of New York University, and President of the City Bar, Betsy Plevin, Esq. The second panel will focus on women who have achieved success outside of the traditional law firm practice. Panelists include, among others, Section member Sharon Grubin, Esq., General Counsel for the Metropolitan Opera; Randi Weingarten, Esq., President of the United Federation of Teachers; and Lis Wiel, Esq. Legal Analyst, Fox News Channel and author of "Winning Every Time: How to Use the Skills of a Lawyer in the Trials of Your Life." The keynote address will be given by Dr. Ellen Ostrow, of LawyersLifeCoach, and is entitled "Are You Living the Life You Dreamed After Law School?"

The Committee on Women in the Law, the Corporate Counsel Section, the Young Lawyers Section, the Committee on Diversity and Leadership Development, and the Committee on Continuing Legal Education of the New York State Bar Association have agreed to lend their names in support of what will undoubtedly be an exciting program. I hope many of you, including the male members of our Section, will attend the program in June.

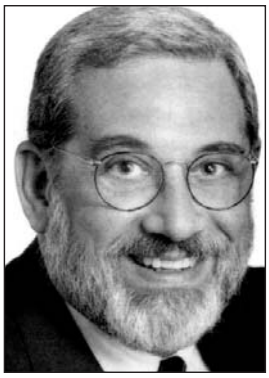
Congratulations are in order to our new officers who will commence their terms June 1, 2005: Steve Younger, Chair, Lesley Rosenthal, Chair–Elect, Carrie Cohen, Vice-Chair, and Michael D'Ambrosio, Secretary. Lew Smoley and I will continue our Section's representation in the House of Delegates. Congratulations are also in order for Tracee Davis, who has been selected to take one of the diversity seats created by our State Bar President in the House of Delegates.

As you all know, our Spring meeting takes place at the Gideon Putnam Hotel in Saratoga Springs during the weekend of May 14, 2005. The meeting is being co-sponsored by the Corporate Counsel Section. Bob Kerrey, President of the New School University in New York City, and former United States Senator from the State of Nebraska, will be accepting the Robert L. Haig award at the meeting, which promises to be a wonderful event and I look forward to seeing all of you there.

Independent Private Sector Inspectors General: Privately Funded Overseers of the Public Integrity

By Stanley N. Lupkin and Edgar J. Lewandowski

Introduction



Stanley N. Lupkin

On a clear morning on September 11, 2001 New York City's tallest buildings were reduced to 1.6 million tons of ruins.[1] The vast aggregate of twisted steel, pulverized concrete, and shattered glass left in the wake of terrorism is best fathomed as representing the equivalent of roughly one million cars, or the steel from 20 Golden Gate Bridges.[2] While natural disasters have resulted in greater quantities of debris, as in the case of Hurricane Andrew—which produced 15 million tons of rubble—they provide a feeble comparison to Ground Zero, where the destruction was centered within a 16-acre site.[3] In addition to the sheer magnitude of the disaster, the efforts of relief workers were complicated by the perils inherent in working on what amounted to a macabre Jenga game, where removing the wrong beam could result in the collapse of an entire sector of the site or inadvertently fanning the long-burning fires.[4] In addition to the physical hazards, an incalculable emotional toll confronted those laboring on what amounted to a gravesite and crime scene.[5]

"The balance of this article considers the role served by IPSIGs in combating corruption in New York City's construction industry generally, then prophylactically, in the emergency setting of Ground Zero and finally, the application of this unique concept to similar problems across the Atlantic Ocean."

Within hours of the September 11th attack, the New York City Department of Design and Construction ("DDC"), which assumed overall responsibility for coordinating the cleanup,[6] secured four construction and infrastructure management contractors to begin work at Ground Zero.[7] Tully Construction Company, which had been working on a major state construction project on lower Route 9A (West Street) for the state Department of Transportation, was the first contractor on the scene. Soon thereafter Bovis Lend Lease LMB, Inc., AMEC Construction Mgmt., Inc. and Turner Construction Co. joined Tully at the scene.[8] Each contractor was assigned to one of the roughly equivalent quadrants at the disaster site.[9] Due to the emergency circumstances, the DDC executed four identical time and materials contracts, each worth an estimated $250 million, without utilizing the competitive bidding process generally required for public contracts.[10]

Edgar J. Lewandowski

Pursuant to the emergency contracts, the contractors were paid on a "time and materials" basis, meaning that payments were based on the hours worked rather than the amount hauled.[11] Such contracts are particularly susceptible to abuse because little incentive exists to work quickly, and ample temptation persists to submit inflated invoices for phantom labor-hours and materials.[12] Nevertheless, the only significant construction-related fraud publicly reported during the course of the cleanup effort consisted of an alleged theft of 250 tons of scrap metal which were illegally transported to two sites in New Jersey and one site on Long Island.[13] Subsequent to reports of the plundered steel, the Giuliani administration took the unusual step of requiring the hiring of four Independent Private Sector Inspectors General ("IPSIGs") in early October 2001, to "serve as 'watchdogs' to make certain that all contractors and sub-contractors perform this important public service work according to the highest standards of accountability."[14] The construction compliance monitoring conducted by the IPSIGs included, among other things, background checks of all contractors and subcontractors, the tracking of personnel and equipment, surveilling and charting of all debris pick-ups and drop-offs, forensic audits of all billing requisitions submitted to New York City, surveilling worker sign-ins and sign-outs, manning a 24-hour confidential hot line to receive complaints, tips and investigative leads, etc.[15]

The balance of this article considers the role served by IPSIGs in combating corruption in New York City's construction industry generally, then prophylactically, in the emergency setting of Ground Zero and finally,

the application of this unique concept to similar problems across the Atlantic Ocean. Part I offers a brief overview of the historical backdrop of corruption and organized crime in New York's construction industry. Part II introduces the reader to a comparatively new means of preventing corruption and detecting wrongdoing: the IPSIG. We also consider the use of IPSIGs in rehabilitating corporations and other business entities tainted by scandal and those already found "non-responsible" for government contracts. Part III describes the monitoring effort at Ground Zero coordinated by the Department of Investigation, ("DOI"), and augmented by the efforts of four IPSIGs. As will become evident, the work at Ground Zero served as a test case for IPSIGs under exceptionally trying circumstances and demonstrates the potential for expanding their use. Part IV describes the current situation in Northern Ireland, post the so-called "1998 Good Friday Agreement," and the government of Northern Ireland's forward-thinking decision to borrow creative investigative techniques from its sister across the Atlantic and employ IPSIGs as a means of combating the pervasive pattern of the extortion of construction contractors by paramilitary organizations, which have re-directed their activities from bombings to shakedowns.

I. Historical Roots of Corruption in NYC's Construction Industry

A. Boss Tweed and the County Courthouse Debacle

Corruption has long plagued New York City's construction industry.[16] Perhaps the most notorious example involved the construction of the old New York County Courthouse.[17] The County Board of Supervisors allocated $250,000 for the project in 1858, four years before Tammany Hall boss William Marcy Tweed and his supervisors acquired control over the Board. In the decade between the start of construction in 1861 and the Tweed ring's ultimate exposure in 1871, the project absorbed $15 million in public funds without reaching completion.[18] The paper trail ultimately uncovered the existence of dummy corporations, phantom employees on payroll and exceptionally creative accounting. Among other things, eight different painting contractors were paid to whitewash a single room, and 122,000 square yards of carpeting was paid for but never delivered—enough to carpet a two-lane highway from Manhattan to Albany.[19]

Bursts of reform continued in the 1870s after the Tweed ring was thrown out and Tweed himself sent to prison; the reformers fought for the adoption of a competitive bidding process for public contracts.[20] Despite the fact that the new administration created the Office of Commissioner of Accounts, or OCA, the precursor to today's Department of Investigation, and redesigned the contracting system to limit the discretion of city officials in awarding contracts, graft continued as a New York City tradition.[21] Lincoln Steffens, writing in 1902, uncovered extensive corruption in the New York City Department of Buildings.[22] A generation later, in 1931, the Seabury Commission exposed similar corruption in building regulation.[23] More recently, according to the 1989 report by the New York State Organized Crime Task Force, or OCTF, official corruption persisted into the final years of the twentieth century.[24]

B. Racketeering and Organized Crime

Corruption in New York's construction industry has not been the exclusive domain of public officials and their cronies. Perhaps most pervasive is the influence of organized crime which has historically employed control over construction unions to create and maintain influence.[25] Through control of New York's construction unions—in a competitive and fragmented industry characterized by large numbers of general contractors and subcontractors[26]—organized crime has plagued the city's economy by "introducing endemic corruption, intimidation, and cynicism; by stifling healthy competition; and by imposing a hidden 'tax' on the cost of doing business that is passed on to residents and consumers."[27]

The major reasons cited by the OCTF for New York City's extremely high potential for racketeering were: (1) the enormous amounts of money involved; (2) large quantities of cash for illegal payments are easily acquired and concealed; (3) the existence of valuable non-monetary rewards, such as status, prestige and political power; (4) the cost of illegal payments can be passed on to the consumers in private construction; and (5) specific features of public construction—presenting an easier and more lucrative target for racketeers than private construction—provide special opportunities for profitable racketeering.[28] As a result, organized crime continues to profit at taxpayers' expense despite the constant threat of criminal prosecution.

While there have been rigorous criminal investigations, and numerous high-profile convictions of organized crime leaders in New York,[29] indictments alone cannot complete the job. As Manhattan District Attorney Robert Morgenthau stated in testimony before the City Council in 1996, commenting on indictments in the private waste hauling industry, "Systematic corruption must be addressed not only by the criminal law, but by the regulatory structure. Once law enforcement has done its job, there must be a regulatory structure in place with sufficient muscle behind it to ensure that systematic corruption cannot return."[30] The challenge public officials face is to strike a balance between vigilantly monitoring public contracts, lest the city be defrauded by corrupt officials and contractors, while also allowing sufficient flexibility in the contracting sys-

tem to ensure that the implementation of public works is not rendered unduly inefficient, difficult, and costly by red tape.[31]

II. Independent Private Sector Inspectors General (IPSIGs)

A. Introduction to the IPSIG Concept

Independent Private Sector Inspectors General, or IPSIGs, are privately financed but officially sanctioned "watchdogs" that monitor companies in order to ensure compliance with relevant law and regulations while deterring, preventing, uncovering, and reporting unethical conduct within and against the organization.[32] IPSIGs consist of entities or groups of individuals with demonstrated legal, investigative, audit, and loss prevention skills.[33] Due to the unique skill combinations required of effective IPSIGs, they are often staffed by former law enforcement and investigative personnel with demonstrated expertise in detecting and preventing fraud.[34] The IPSIG operates as a multi-disciplinary team that works with management and staff to monitor, investigate and analyze the business and operations of a host organization and to generate information concerning actual or potential fraud, waste and abuse. The data generated is then utilized in devising cost-effective internal controls to counteract the problems identified—while avoiding controls which would unduly impede the delivery of goods and services. Finally the data is used to design and implement codes of ethical conduct to ensure that corruption does not recur after it has been rooted out.[35]

"Litigators negotiating terms of cooperation and plea agreements with prosecutors and/or regulators are, with increasing frequency, proposing that their business entity clients agree to be monitored by a qualified IPSIG to permit the government agency to make certain that the entity remains in compliance with legal and ethical requirements and/or the terms of the settlement."

IPSIGs are a form of independent monitors utilized with great success in New York, often at the insistence of government prosecutors and regulators, to ensure that illegal and unethical activity in an industry or in a particular business entity will be placed under rigorous scrutiny for a defined period of time. Often IPSIGs have been appointed as part of a plea agreement or as a condition of a tainted company's continued eligibility to bid on public contracts. The IPSIG's fee is paid by the "host" entity but the IPSIG reports periodically to the government agency, regulator or prosecutor. It is a means by which in-depth scrutiny can be applied to a troubled business entity without the government having to deploy limited manpower and resources to ensure compliance with legal and ethical standards and with the terms and conditions of a plea or cooperation agreement.

In order to avoid capture by their host organization, it is imperative that IPSIGs remain independent, autonomous and self-sufficient.[36] Furthermore, although an IPSIG is interactive within the host organization, it must be unconstrained by organizational biases which otherwise might cause it to protect corporate reputation at the expense of exposing unethical or illegal behavior.[37] While it is true that some contractors may seek to hire the least aggressive or competent IPSIG available, and some IPSIGs, in theory, might find it in their interest to accommodate their host company, requiring the government agency, prosecutor or regulator to appoint the IPSIG of its choice, ensuring that the IPSIG reports to that authority rather than to the company, and specifying that IPSIGs be certified by the government agency (in New York City's case, DOI) encourages their continued independence.

While the use of IPSIGs has generally been imposed as a requirement for public contracts, increasing numbers of monitors have been voluntarily hired. For example, waste management companies have used IPSIGs as a marketing tool, before seeking funding from outside investors, to remove some of the stigma of operating in a traditionally corruption-riddled industry.[38] The versatility provided by the four symbiotic skill areas incorporated by IPSIGs (i.e., legal, investigative, audit and loss prevention) has resulted in their use in a wide variety of industries including construction, gambling, investment, utilities, health and real estate.[39]

Litigators negotiating terms of cooperation and plea agreements with prosecutors and/or regulators are, with increasing frequency, proposing that their business entity clients agree to be monitored by a qualified IPSIG to permit the government agency to make certain that the entity remains in compliance with legal and ethical requirements and/or the terms of the settlement. The entity agrees (1) to pay for the IPSIG's services for a defined period of time; and (2) to have the IPSIG report periodically to the government entity. Such continued oversight can sometimes provide the government with the "comfort zone" necessary to finalize the plea or cooperation agreement. The offer also operates as evidence of the entity's "good-faith" *mea culpa*.

Parties in civil litigation have occasionally proposed the hiring of an IPSIG as a mechanism for ensuring that

the terms of settlements, court orders and consent decrees are obeyed. The invocation of an IPSIG can be incorporated into the settlement document, order or decree itself and can even be "so ordered," thus providing the added authority of a court's contempt powers to the sanctions otherwise available upon default.

Unlike the temporary invasion which results from a government prosecution, an IPSIG "sits in the bowels of an infected company."[40] The IPSIG is uniquely situated to combat corporate corruption because, "you have to reduce both the incentives to cheat and the opportunities to cheat—and that can never be done externally. It has to be done from within."[41] Notably, because the IPSIGs that come into industries that are corrupt or threatened with corruption can stay long enough to root out corruption and inefficiency and prevent their recurrence, they can serve as vehicles for preserving corporate entities.[42]

B. Origins of the IPSIG Model

The IPSIG concept can be traced back to the 1989 report "Corruption and Racketeering in the New York City Construction Industry," published by the New York State Organized Crime Task Force ("OCTF").[43] The report—which catalogs the corruption and racketeering endemic to the city's construction industry—envisaged that IPSIGs (then termed Certified Investigative Auditing Firms, or CIAFs) would be compulsorily hired by prime or general contractors working on public construction projects in excess of $5 million, with a minimum of 2% of the total project cost to be utilized as funding for the CIAF.[44] The primary role of the CIAF was to scrutinize revenues and expenditures of contractors to expose the use of bribes, while also designing programs and strategies aimed at detecting and deterring corruption.[45]

The inspiration for the OCTF's CIAF concept was the federal Inspector General Act of 1978.[46] The Inspector General Act created 12 Inspector General positions, or IGs, one for each of the major federal civilian agencies. The IGs were charged with ensuring accountability within the agencies to which they were assigned by preventing and detecting fraud, waste and abuse in the operation of the agencies programs.[47] Two factors made the IG office unique in the federal government: first, the combination of audit and investigative techniques; and second, the statutory guarantee of independence for the IG coupled with a responsibility to report directly to Congress.[48] These distinctive characteristics are paralleled by private sector IPSIGs which also combine broad auditing and investigative skill sets with an obligation to report to an outside party (such as a government agency, regulator or prosecutor) information regarding wrongdoing by the company.[49] The reporting obligations of IPSIGs stand in contrast to those of typical company compliance officers who may advise a company to disclose violations, but remain under no obligation to make such disclosures themselves.[50]

Since the adoption of the corporate Federal Sentencing Guidelines in November 1991,[51] the IPSIG has become increasingly relevant as a vehicle for compliance.[52] The Guidelines, heavily aimed at the deterrence of crime, shift policing responsibility from the state to the corporation itself;[53] they provide carrot-and-stick incentives which reward companies that police themselves and punish those that do nothing to prevent, detect, or report fraud within their ranks.[54] Rather than allowing corporations to disassociate themselves from a defalcating officer, the Guidelines provide that the sentencing of the organization will primarily be determined by the following factors: (a) the steps taken by the organization prior to the offense to ensure that it has an effective program to prevent and detect violations of the law; (b) whether high level personnel participated in, condoned, or were willfully ignorant of the criminal activity; and (c) whether the organization reported the offense it detected promptly, fully cooperated in the investigation, and accepted responsibility for its criminal conduct.[55] Given the Guidelines' emphasis on the positive obligations of organizations to prevent crime within their ranks, as well as detecting and reporting it, IPSIGs provide a model for complying with the guidelines.[56]

C. Imposing IPSIGs as a Condition for Public Contracts: Monitoring Agreements

In order to afford rehabilitated contractors and vendors (i.e., those who have been found "non-responsible" for purposes of bidding on public contracts) an opportunity to demonstrate their restored integrity, DOI, in conjunction with the Law Department and individual city agencies, has negotiated and entered into monitoring agreements with individual contractors. Each monitoring agreement is designed to address the contractor's specific outstanding responsibility issues.[57] Among the generic conditions included in these agreements is the requirement that the subject company retain, at its own expense, an IPSIG to review aspects of the contractor's operations.

A standard IPSIG agreement requires the contractor to provide the IPSIG with unfettered access to its books, records, personnel, and operations. The IPSIG, in turn, maintains a 24-hour "hot line" telephone number used by employees or others to report instances of wrongdoing or corruption affecting or involving the contractor, especially with regard to the contractor's performance of the city contracts. All findings made by the IPSIG during the course of its work are reported directly to DOI, which supervises the implementation of the monitoring agreement and works with the appointed IPSIG

to develop and implement a strict code of business ethics as well as a corruption prevention program. In addition, the contractor must agree to have all personnel undergo ethics training. Should the contractor fail to comply with its obligations under the monitoring agreement, the city may declare the contractor in default of the agreement and any existing city contracts being performed.[58]

D. Tully Construction Company: A Monitoring Agreement Success Story

In 1996, for the first time, New York City agreed to do business with a company despite a "non-responsible" finding as a result of its alleged organized crime connections, failings in its VENDEX disclosures, environmental violations and tax difficulties. That company was Tully Construction, notably one of the four companies which would later work at Ground Zero. On February 13, 1996, Tully reached an agreement with the city that allowed reinstatement as a responsible bidder; central to the agreement was the condition that Tully consent to the presence of an IPSIG to oversee its operations.[59] In addition, the reinstatement agreement required Tully to adopt a Code of Business Ethics and introduce an ethics training program for its employees. The city selected the Fairfax Group[60] (later Decision Strategies and now Vance) as Tully's IPSIG at an annual cost of approximately $300,000.[61]

A Code of Business Ethics acceptable to the city attached as an exhibit to the settlement agreement, required: (1) specific standards for employees, officers and directors to follow in their business in regard to bribery, fraud, collusion and any other criminal or unethical act; (2) a policy under which the company would dismiss any employee, officer, or director who is convicted under state or criminal law for business-related activities, or, absent a conviction, to diligently investigate any charges against any employee, officer or director where they bear upon the business integrity of the company, (3) a policy barring the company from engaging any member or associate of an organized crime group as an owner, officer, director, consultant, or employee; and (4) a requirement that the company's owners, employees, officers and directors report to the IPSIG and the city any illegal or unethical conduct or other improprieties with respect to any city contracts, whether committed by an owner, employee, officer or director of the company, any subcontractor, vendor, labor official, city employee, or anyone else.[62]

In addition to specifying Tully's obligations, the monitoring agreement also sets forth the duties and mandates of the IPSIG, appointed for an initial monitoring period of three years, plus a potential two-year extension at the sole unreviewable discretion of the city.[63] The IPSIG's mandate, which Tully had no right to direct or control (although it could appeal to the city if it felt the IPSIG exceeded the scope of its duties) included: monitoring and investigating the company's compliance with the terms and conditions of the agreement and monitoring and investigating the actions, conduct, operations, or omissions of the company, or any of its officers, directors, principals, employees, or affiliated companies or entities, that, in the judgment of the IPSIG or the city, may relate to the assessment of the vendor responsibility of the company.[64] In order to aid the IPSIG's work, Tully was also required to facilitate access to all books, files, accounts, computer records and correspondence. Finally, Tully also authorized the IPSIG to immediately report "to the city and to appropriate law enforcement authorities any suspected or actual criminal activity or any suspected or actual unethical or irregular business activity on the part of the company, its employees, officers, directors, subcontractors, suppliers and vendors, or labor officials, without notice or disclosure to Tully."[65] The Tully settlement agreement expired on February 13, 2001.[66]

By entering into the monitoring agreement, the city was able to rehabilitate a substantial construction company that is traditionally very highly regarded for the quality of its work and for its low bids, and in doing so preserved another potential bidder for public construction, thereby ensuring the continued operation of a competitive bidding system. The success of IPSIGs in rehabilitating industries involved in public contracts is not limited to Tully, or even to the construction industry. Similar success stories abound in the efforts of the New York's School Construction Authority[67] and the Trade Waste Commission.[68]

III. Combating Corruption During Chaos: September 11, 2001

The work at Ground Zero was "much tempered by a real sense of patriotism," and perhaps some "reluctance by those who otherwise might have been inclined to do wrong."[69] Nevertheless, one constant accompanies every crisis: people and businesses who willingly exploit tragedy. The aftermath of the World Trade Center destruction proved no exception. According to one watchdog group, con artists seeking "donations" sent out e-mails less than two hours after the airliners impacted the towers.[70] In the days and weeks following the attacks, there were instances of price-gouging by gasoline stations,[71] identity theft,[72] insurance fraud,[73] and looting at the site itself.[74]

In the wake of reports that steel from the World Trade Center site had been stolen, the Giuliani administration took a bold and creative step when it announced on October 4, 2001 that the city had entered into monitoring agreements under which each of the four

Ground Zero construction companies were required to engage the services of an IPSIG selected and designated by DOI.[75] The monitoring effort was coordinated by DOI along with DDC, the FEMA Inspector General, local District Attorneys, and the United States Attorneys of the Southern and Eastern Districts of New York.[76]

Despite the fact that the move to hire IPSIGs came almost a month after work began, the decision to retain them was reportedly made before reports of stolen debris.[77] Hiring IPSIGs to monitor a disaster scene proved an unusual and unexpected move.[78] The determination to hire IPSIGs surprised construction industry experts, who felt the appointment of the IPSIGs, absent any indications of fraud or theft, unfairly tainted the entire industry.[79] In the words of Lou Coletti, chairman of the City Building Trades Employers' Association: "If the city's desire is to improve processes, we would all be supportive, but the whole industry is being broadbrushed because of the actions of a few small operators."[80]

The frustration voiced within the construction industry, however misplaced, was likely the result of the fact that the use of IPSIGs at Ground Zero represented a shift away from their more typical use in city construction projects. Previously, as demonstrated by Tully's 1996 Settlement Agreement, they were imposed as a condition of doing business where the construction company's "responsibility" had already been called into question. While IPSIGs had not previously been a condition of emergency no-bid contracts in the city, the size of the World Trade Center contracts dwarfed previous cases.[81] In 1999 and 2000 combined, the city signed only $77 million in emergency no-bid contracts.[82] In light of the circumstances, not only were the IPSIGs justified, but the general absence of reports of racketeering and abuse after their work began supports the conclusion that they were a vital part of a well-organized effort to actively prevent and detect fraud and other abusive practices.[83] The success of the monitoring effort belongs not only to the IPSIGs, but also to DOI, which is addressed in the following section before taking a closer look at provisions and implementation of the monitoring agreements.

A. The New York City Department of Investigation

Among government entities in the United States, New York City is unique in having a large executive agency whose primary undertaking is to investigate and prevent official corruption. That agency is the New York City Department of Investigation.[84] Perhaps better known for its investigations of possible cases of corruption with an emphasis on prosecution,[85] DOI played a more preventative role during the World Trade Center cleanup. According to Edward Kuriansky, then-Commissioner of DOI, the Ground Zero construction integrity initiative was intended to ensure that work at the WTC recovery met the same high integrity standards imposed on all other vendors doing business with the city.[86]

While DDC retained responsibility for the site as a whole, DOI and its law enforcement partners worked together in order to "make certain that all contractors perform their work according to the terms of their contracts by properly allocating their equipment and personnel and disposing of all materials in an authorized manner."[87] To aid this process, DOI set up an "Integrity Hot Line," which operated 24 hours a day, 7 days a week, to enable anyone with information about wrongdoing involving fraud, waste, theft, abuse, security breaches, and safety violations to confidentially report that information to the proper authorities.[88]

Throughout the cleanup process, DOI maintained a two-way stream of communication with the four IPSIGs. In addition to any regular communication necessary, DOI also more formally met with the IPSIGs at least once a week to look at any findings, to consider how problems should be approached, and to determine proper audit protocols.[89] DOI was of "immeasurable help," and "kept everyone focused."[90] In addition to lending a unifying force to the monitoring efforts of the IPSIGs, the DOI was also able to ensure that the monitors reviewed what DOI felt was necessary.[91] In turn DOI, well aware of its staffing limitations, valued the manpower and resources the IPSIGs brought to the operation.[92]

B. The Quadrant System: Four Contractors and Four IPSIGs

DDC imposed a rough order on the World Trade Center site from the outset by dividing the area into quadrants. The zones were of roughly equal size with one construction company assigned to each quadrant.[93] While the quadrants were not strictly delineated on the ground, they did serve to concentrate each company's efforts on specific portions of the debris.[94] As work on the site progressed, numerous shifting arrangements blurred the delineation between the original quadrants as one company or another took responsibility for overarching tasks.[95] For example, Bovis Lend Lease became the Construction Manager at the WTC site in January 2002, with "overall responsibility for recovery, debris removal, demolition work, and construction of temporary structures."[96]

Similarly, although each IPSIG was assigned to a specific construction company (and *de facto* to a specific quadrant), as the operation developed individual IPSIGs took on general overarching tasks. For example, Decision Strategies undertook real-time surveillance of all trucks carting away debris[97] and Thacher Associates

monitored many of the environmental aspects of the site.[98] The question arises why four IPSIGs were selected and compelled to work together rather than appointing one monitor for the entire site. Four IPSIGs were necessary, according Steven Pasichow[99] of DOI, because of the "enormity of the project, which was simply too big for any one IPSIG."[100] In addition, because each IPSIG used slightly different methodologies and protocols, they learned a great deal from each other's monitoring styles and provided a means of assuring that all of the bases had been covered.[101]

C. A Closer Look at the Trade Center Monitoring Agreements

All four monitoring agreements between the City of New York and the respective construction companies were entered into on October 4, 2001 and are substantially identical.[102] The first portion of the agreement sets forth "Contractor Integrity Standards" which include covenants that the "contractor will not engage a person to work on any aspect of the Contract who is an alleged member or associate of an Organized Crime Group," and agrees among other things, to adopt business conduct standards for employees working on any aspect of the contract.[103] Notably, unlike earlier settlement agreements which are not limited to a particular contract with the city, all references are exclusively to work on the WTC contract. This limitation in scope is likely in recognition of the fact that none of the four companies was found "non-responsible." Therefore, the emphasis was not on intrusive long-term alterations of company policy, but rather simply to protect against fraud, waste and abuse specifically in connection with this project.

Rather than attaching a lengthy model Code of Business Ethics and Standards of Conduct, as in prior settlement agreements, the WTC monitoring agreements condense these principles into a short list requiring that the contractor and/or its employees shall not: (a) file with the city or any government entity a written instrument that intentionally contains a false statement or false information; (b) intentionally falsify business records; (c) give or offer any money, gratuities, or any other benefit to a labor official; (d) give or offer any money, gratuities, or any other benefit to any city public servant; (e) attempt to make any agreement that seeks to rig bids, restrain trade by collusion or unfair trade or labor practices, or prevent the lowest responsible bidder from obtaining any subcontract related to or involved with the contract; and (f) knowingly participate in the activities of any organized crime group or permit any person allegedly associated with an organized crime group to participate in any of the business affairs of the contractor on the contract.[104]

In addition, the monitoring agreement delineated the mandate and duties of the compliance monitors (i.e., IPSIGs) in connection with the contract, and work involving the World Trade Center Complex disaster. These duties included:

- Monitoring and investigating the actions, conduct, operations, or omissions of the contractor, or any of its employees, subcontractors, consultants, suppliers, vendors, or other entities that have any connection with the contract and/or work involving the WTC disaster, that in the judgment of the compliance monitor or the city, may relate to the contractor's responsibility as a contractor.
- Conducting audits and investigations to ensure: (a) compliance with all laws; (b) compliance with the terms of the contract; (c) that payroll and payment requisitions submitted to the city are complete, accurate and truthful; (d) that no reimbursements for expenses are incurred in connection with providing anything of value to government employees or labor organizations.
- Conducting on-site review and surveillance of the contractor, its vendors, suppliers and subcontractors. Such review includes, but is not limited to, demolition, debris removal, carting and haulage firms, in the performance of the contract.
- Designing and implementing procedures—including developing questionnaires—to ensure that all vendors, suppliers and subcontractors possess the requisite integrity and qualifications to do business with the city.
- Conducting field investigations and on-site investigations as necessary.[105]

Not only were the construction company executives made aware of the monitoring process, but in a letter from Rudolph Giuliani to all Ground Zero personnel the Mayor sought "assistance in assuring that nothing whatsoever occurs to tarnish the integrity of this great undertaking."[106] The use of independent monitors was necessary, Giuliani wrote, because: "Regrettably, in these trying times, there may be some who will seek to profit unfairly by overcharging, underpaying, or cheating the government and their fellow citizens."[107]

In the following section we look at how the IPSIGs' mandates were put into practice to deter the abuses that concerned Mayor Giuliani.

D. Monitoring in Action at the World Trade Center Site

Typically, an IPSIG at the start of its work has a six-month period during which substantial resources are dedicated to analyzing how the company operates: scrutinizing business records, screening subcontractors

and establishing an ethics program.[108] Having been thrown into the breach nearly a month after work at Ground Zero had begun, the four IPSIGs faced an abbreviated ramp-up period. Fortunately, Tully Construction, AMEC and Bovis all previously worked with Decision Strategies/Fairfax; Stier, Anderson & Malone; and Thacher Associates, respectively.[109] While this prior experience provided a valuable jump-start, the enormity of the accounting effort is demonstrated by the fact that the IPSIGs were continuing, even into July 2003, to scrutinize the invoices submitted by the construction companies.[110]

The monitoring effort fell into roughly two categories: (1) monitoring the invoices and other accounting-related matters, and (2) physically monitoring the human and capital equipment used at the site. Throughout their work, the IPSIGs submitted invoices to DOI detailing every aspect of the monitoring effort. The DOI, in turn, reviewed the charges before sending summary invoices, redacted of details, to the construction companies for payment. By use of this process, DOI continually monitored the IPSIGs and guided their focus while preventing the possibility of tipping off the construction companies with regard to where monitoring resources were deployed (for example, whether the emphasis was being placed on audit work or on field surveillance).[111]

a. Monitoring Truck Movement

Although the forensic accounting examination of invoices was a lengthy and complex effort, the highest profile task of the monitoring effort was scrutinizing the debris removal process. In order to prevent material thefts, virtually every piece of debris removed from the Trade Center site was given a prescribed route and destination.[112] At first, Decision Strategies field investigators physically surveilled the routes from Ground Zero to the designated receiving sites, where law enforcement personnel sifted through the debris, and the trucks were outfitted with Global Positioning Satellite ("GPS") receivers to track their movement and to coordinate traffic patterns in and around the lower Manhattan worksite.[113] Furthermore, because a favored means of abuse in hauling contracts is to use under-size trucks, thereby forcing more trips to the landfill, every truck was observed by IPSIG investigators and weighed as it left the site to ensure that it carried a full load.[114] The trucks were also weighed upon reaching their destination to assure that no material was diverted along the way and logs were kept of what every truck hauled for every run, allowing for full documentation of the work completed.[115]

b. Field Surveillance

Detailed surveillance extended not only to movement into and out of the Trade Center site, but also to the workers and machinery within the site.[116] Among the objectives of the field investigations were to periodically inventory the equipment in the field, to literally count the number of cranes and backhoes, to check against the equipment the companies were charging the city for on a given day.[117] Sign-in sheets were prepared for the construction crews working on each shift; after the shift had begun the sheet would be photocopied and replaced so that no additional names could clandestinely be added to it.[118]

While completing field investigations, the monitors generally wore identification badges marked with a large "M," clearly identifying their purpose on the site. At other times, monitors used unmarked identification, allowing them to observe the workers covertly without advertising their purpose.[119] While neither DOI nor the IPSIGs commented on specific abuses or their discovery, there was a reported incident of an entire AMEC crew of 27 ironworkers thrown off the site for spending an entire shift doing nothing.[120] Finally, in addition to policing against payroll abuses, there was a need to maintain efficiency of operations as hundreds of pieces of heavy equipment engaged in what William Langewiesche described as a "dance of dinosaurs."[121] Ensuring that the right equipment was available, and that everything was properly maintained and utilized to its fullest extent, considerably sped up the operation.[122]

Despite the physical and emotional challenges presented to thousands of laborers, demolition specialists, ironworkers, engineers, and heavy equipment operators who toiled on the site, the WTC operation was completed ahead of schedule and well under projected cost estimates.[123] In a mere eight months, approximately four months faster than expected, the work was completed.[124] On May 30, 2002 the completion of an unprecedented recovery and cleanup effort was marked when the Trade Center's last steel beam was carried out during a wordless ceremony at 10:29 a.m., the exact time the second tower fell on September 11th.[125]

By appointing IPSIGs, the Giuliani administration took a preemptive strike against corruption.[126] The move was justified not only because the city had been forced to suspend normal bidding rules in awarding the four $250 million cleanup contracts, but also because the work at the World Trade Center was the focus of national attention, placing public confidence in government at risk. The monetary and emotional stakes at Ground Zero were extremely high, but it should be borne in mind that because city agencies enter into 40,000 contracts worth nearly $7 billion each year,[127] the stakes are always high. While there are many lessons to be learned from the World Trade Center rescue and recovery effort, perhaps the most valuable with regard to public works is that by the use of IPSIGs as a means of "opportunity blocking," we free the hands of our

public officials to grant public funds on the basis of efficiency and quality while still preventing the construction abuses that have long plagued New York City.

IV. IPSIGs and Northern Ireland

New York's positive experience with IPSIGs generally and, in the case of the Ground Zero cleanup specifically, the invocation of IPSIGs on a prophylactic basis, has inspired the forward-thinking government of Northern Ireland to apply the IPSIG concept as a template to help it deal with Northern Irish paramilitary extortionists who have plagued the construction industry there.

For better than four decades, since the mid-1960s, religious, economic and political tensions in Northern Ireland gave birth to an endless and a seemingly irresoluble cycle of violent acts of terrorism perpetrated by paramilitary organizations in both the loyalist and republican camps of the conflict. By the mid-1990s, it was estimated that more than 3,500 people had been killed and multiples of that number injured and maimed.[128] Euphemistically referred to by the deceptively benign term "The Troubles," these escalating acts of violence continued at an often torrid pace notwithstanding numerous efforts to reach a political resolution throughout the period leading up to the mid-1990s.

Shortly after Tony Blair assumed the mantle of leadership of the United Kingdom in 1997, significant progress toward a permanent cease-fire was made, with former United States Senator George Mitchell serving as the prime catalyst. This peace process culminated in April 1998 in the so-called "Good Friday Agreement," which set forth a blueprint for the re-alignment of the constitutional governance of Northern Ireland, essentially placing Northern Ireland's future in the hands of its citizenry. Since then, despite occasional "brushfire" episodes of shootings and bombings and other traditional terrorist acts, spurred by lingering, deep-rooted suspicions, The Troubles, it seems, continue to fade into the past.

With the *de facto* de-commissioning of the paramilitaries on both sides of the conflict, however, the more steadfast segments of those organizations have turned their collective attention—not surprisingly—to some of the activities associated with more traditional organized criminal enterprises. They have unabashedly plagiarized pages, indeed entire volumes, from more classic organized crime groups such as The Mafia as well as the Russian and Asian organized crime gangs of a more recent vintage. Their arsenal of illegal activities have included highjackings, drug trafficking, loan-sharking, money-laundering, counterfeiting of currency and goods and, of course, extortion. These activities continuously re-fuel the funding engines of these paramilitary organizations.[129]

So prevalent have been the activities of these Northern Irish paramilitaries-turned mobster/terrorists, that the government and its Northern Ireland Office, or NIO, has been propelled into formulating a cohesive strategy and multi-agency offensive to combat this proliferation of organized criminal activities. In September 2000, NIO, borrowing a proven successful approach from United States federal, state and local multi-agency joint organized crime task forces, created the Northern Ireland Organized Crime Task Force, or Task Force. It is currently and most visibly comprised of the NIO itself, the Police Service of Northern Ireland, Her Majesty's Customs and Excise Service, the Ireland Revenue Service, the National Criminal Intelligence Service, the Home Office and the Asset Recovery Service.

Much of the extortion activity that has emerged as a serious threat has been in the context of the otherwise burgeoning construction industry. The economic landscape has been much improved over the past few years; new construction is almost always a barometer of the economy's health. Typically, the paramilitaries-turned-extortionists have utilized the time-tested "protection racket" as their primary vehicle for compelling illegal payments. A construction company executive or project foreman would be approached and either directly or obtusely told that if the job was to proceed without "unfortunate accidents" and acts of violence targeting construction company personnel and/or their family members, substantial payments would have to be made to the extortionist. Perhaps the payment would be directed to be made to a fictitious vendor or supplier. Because charities in Northern Ireland are not currently regulated, it has been reported that the paramilitaries often demand that the extortion victims make "contributions" to an unregulated "charity" which, of course, they control.

In its most recently published annual report, issued in 2004, the Task Force reports:

> Extortion remains a cornerstone of fundraising among paramilitary organization in Northern Ireland. Much of the focus on extortion and racketeering over the past year has been to enhance existing provisions for the protection of witnesses to encourage more reporting. Victims often live in fear for their safety and livelihood and so frequently withdraw complaints before police can fully investigate the matter. The Home Office is currently reviewing the arrangement for the protection of witnesses and the OCTF will contribute to this.[130]

So serious a problem has this been that NIO and the Task Force retained the expert services of Professor Ronald Goldstock,[131] formerly Director of the New York State Organized Crime Task Force, to be its organized crime consultant. Professor Goldstock studied the emergence of organized crime in Northern Ireland for almost two years. In January 2004, he submitted a detailed report to the Secretary of State which reflected his investigative findings and recommendations for dealing with this serious problem. His excellent report is entitled *Organized Crime in Northern Ireland: A Report to the Secretary of State*.[132] The reader is urged to read the report in its entirety along with the government's response by the Security Commissioner and Chair of the Task Force, Ian Pearson.[133]

"It is nothing short of ironic, but nonetheless not surprising, that two great governments would be able to benefit by each other's experience in battling a common and pernicious enemy that speaks the same English language, but with different accents and dialects."

The cornerstone of Professor Goldstock's recommendations addressing the paramilitary extortion problem in the construction industry is ". . . continued and expanded [partnership with the private sector] including the use of Independent Private Sector Inspectors General ["IPSIGs"], particularly within the construction industry and for the regulation of charities."[134]

Conclusion

NIO and the Task Force have embraced many of Professor Goldstock's recommendations, including the use of IPSIGs on a pilot project basis on a number of designated construction projects in and around Belfast, Northern Ireland. They have solicited "requests for proposals" from established IPSIGs for this pilot program. Not surprisingly, a number of the experienced IPSIGs from the New York metropolitan area, including some of those who were assigned by the City of New York to oversee the Ground Zero clean-up, have submitted substantive responses. The first few construction projects have already been identified by the Government of Northern Ireland and are expected to commence, with IPSIGs in place, in the Spring of 2005. Many of the very same techniques and investigative protocols employed at Ground Zero in New York are expected to be utilized by the IPSIGs and the Task Force in Belfast and its environs. New York's successful prophylactic Ground Zero experiment with IPSIGs has become a dynamic template for Northern Ireland. It is nothing short of ironic, but nonetheless not surprising, that two great governments would be able to benefit by each other's experience in battling a common and pernicious enemy that speaks the same English language, but with different accents and dialects.

Endnotes

1. Jim Johnson, WTC *Cleanup Completed; 1.6 Million Tons of Debris Removed,* Waste News, June 10, 2002, at 5. The final figure of 1.6 million tons of debris removed was 25% greater than early estimates of 1.2 million tons. The earlier figure had been methodically calculated by looking at the World Trade Center's original plans and tallying up all of its ingredients. *See* James Glanz, *From Torn Steel, Cold Data of Salvage*, N.Y. Times, Oct. 9, 2001, at B13.
2. *AMEC Completes World Trade Center Recovery Work*, *available at* www.amec.com/news/news_2ndlevel.asp?pageid=71 (last visited Mar. 16, 2003).
3. Jim Johnson, *Trade Center Cleanup Moves At Snail's Pace,* Waste News, Oct. 1. 2001, at 1 (hereinafter *Cleanup Moves at Snail's Pace*); Kirk Johnson, *Challenges and Dangers in Disposing of Two Fallen Giants*, N.Y. Times, Sep. 13. 2001, at A7.
4. James Glanz & Eric Lipton, *The Excavation: Planning, Precision and Pain,* N.Y. Times, Sep. 27, 2001, at B1.
5. *Cleanup Moves At Snail's Pace*, *supra* note 3, at 1.
6. *September 11 Disaster Response*, 7 CityLaw 104 (2001). The decision to grant the DDC overall responsibility for the site was a departure from the city's official and secret emergency plans (written before September 11th) which called for the Department of Sanitation to clean up after a building collapse. William Langewiesche, *American Ground: Unbuilding the World Trade Center* 118 (North Point Press 2002).
7. "Cynics who later implied that the choice of these companies was in some way an insiders' deal were only superficially right. The four companies were simply the first that came to mind—and on the day of the collapse they responded altruistically in the face of enormous confusion, thinking at the most a few days ahead, without even the possibility of calculating gain." Langewiesche, *supra* note 6, at 89-90.
8. *Id*. All four companies had extensive construction accomplishments in New York City and elsewhere. The quadrant assignments were as follows:

   Sector NW: AMEC Construction. Other AMEC projects have included 4 Times Square as well as the International Arrivals Terminals at JFK. AMEC had approximately 300 workers at the site.

   Sector SW: Bovis Lend Lease. Bovis had been involved in the restoration of the Statue of Liberty and Ellis Island and the construction of Trump World Tower. Bovis had roughly 175 workers at the site.

   Sector NE: Turner Construction. Turner is perhaps best known for its work at Invesco Field in Denver, as well as Arthur Ashe Stadium. There were 314 Turner workers at the site.

   Sector SE: Tully Construction Company. Tully unlike the other three construction companies, which are multinational corporations, is a New York paving contractor with less structural experi-

ence but many trucks, heavy equipment and experienced workers. Among Tully's earlier projects were rebuilding the Staten Island Expressway and the West Side Highway. There were 350–400 Tully workers at the site.

Glanz & Lipton, *supra* note 4, at B1; see also Langewiesche, *supra* note 6, at 68.

9. *September 11 Disaster Response*, *supra* note 6, at 104.

10. Jennifer Steinhauer, *4 Companies are Hired to Oversee Contractors*, N.Y. Times, Oct. 5, 2001, at B11.

11. *Id*.

12. *Id*.

13. Gregg Gittrich, *Slow But Steady Progress Amid Ground Zero Rubble Precision Spurs Clean Up Efforts*, Daily News, Oct. 15, 2001, at 20. It bears noting that 250 tons of material represents a mere 0.0002% of the 1,642,698 tons of debris moved during the course of the recovery operation. While the precise value of the steel scrap removed from the Trade Center is uncertain, William Heenan, the president of the Steel Recycling Institute in Pittsburgh, estimated the steel scrap would be worth $80 to $100 per ton when sold to a steelmaker. Glanz & Lipton, *supra* note 4, at B1. Using the higher range of the estimated value of the scrap, the alleged theft represents no more than $25,000.

14. Press Release #042-2001, Department of Investigation, *DOI Announces Compliance Monitors & "Integrity Hot Line" To Help Assure Construction Integrity and WTC Recovery Site* (Oct. 4, 2001), *available at* http://www.ci.nyc.ny.us/html/doi/pdf/pr100401.pdf (last visited Mar. 6, 2005) (hereinafter DOI Press Release).

15. *Id*.

16. *See generally* New York State Organized Crime Task Force, *Corruption and Racketeering in the N.Y. City Construction Industry: Final Rep. to Gov. Mario M. Cuomo* 102 (1989) (hereinafter *Corruption and Racketeering*).

17. *Id*. For further background on Tammany Hall and Boss Tweed, *see* Gustavus Myers, *The History of Tammany Hall (1901)*: *Alexander B. Callow, Jr., The Tweed Ring* (Oxford University Press 1966).

18. Paul Grondahl, *Tweed Courthouse Tests Albany Firm's Restoration Skills*, Times Union (Alb.), Jan. 6, 2002, at G6.

19. *Id*.

20. Frank Anechiarico & James B. Jacobs, *Purging Corruption from Public Contracting: The "Solutions" are Now Part of the Problem*, 40 N.Y.L. Sch. L. Rev. 143, 145 (1995).

21. *Id. See also Corruption and Racketeering*, *supra* note 16, at 103.

22. Lincoln Steffens, *The Shame of the Cities* (New York: Hill & Wang, 1904).

23. Walter Chambers, *Samuel Seabury: A Challenge* (New York: Century, 1932).

24. *Corruption and Racketeering*, *supra* note 16, at 101. "Inspectors general have told us that they believe that there is significant fraud on every major public construction project. Nevertheless, the city has no way to quantify the extent (either in terms of frequency or magnitude) to which it has been defrauded. A DOI report states that the potential for corruption in the New York City Department of Environmental Protection is enormous, and that '[t]here is reason to believe that collusive bidding, bribery, extortion, fraud, embezzlement, labor racketeering and conflicts of interest are commonplace occurrences in the agency's capital construction program.'" *Id*. at 129.

25. *Id.* at 46. "We are not dealing with a few organized crime racketeers who are at war with the legitimate labor movement. Organized crime and other racketeers have been entrenched in the building trades for decades." *Id.* at xxv.

26. *Id.* at 57. Imbalance in New York's collective bargaining structure, typified by strong unions but weak employer associations, contributed to the hold of organized crime over the industry. Where allegiance of the workers tends to run to unions rather than to the employers, supervisors "will be less likely to blow the whistle on workers engaged in systematic theft or 'mungo' rings, sabotage or slowdowns." *Id*. at 54–57.

27. *City of New York, Reengineering Municipal Services 1994-2001: Mayor's Management Report*, Fiscal 2001 Supplement 53, *available at* http://www.nyc.gov/html/rwg/ops/pdf/2001_mmr/0901_reengineering.pdf (last visited Mar. 6, 2005) (hereinafter, Reengineering Municipal Services). One example of the hidden tax imposed by organized crime is reflected by the substantial savings that resulted in garbage disposal costs when the New York City Trade Waste Commission, or TWC, targeted the cartel that dominated commercial waste-hauling in the city for fifty years. As a result of the TWC's work in the 1990's, "[b]y 1997, the World Trade Center's annual waste hauling bill plummeted from $3 million to $600,000." James B. Jacobs & Alex Mortis, *New York City as Organized Crime Fighter*, 42 N.Y. L. Sch. L. Rev. 1069, 1070 (1998) (citations omitted).

28. *Corruption and Racketeering*, *supra* note 16, at 62–64.

29. "Lifetime incarceration of the most important bosses of the City's Cosa Nostra crime families has been achieved; criminal monopolies have been broken up; powerful labor racketeers, business executives and political leaders have been sent to jail. The resulting media coverage of these successful prosecutions has often given the impression that the organized crime groups are on the run. But the impression is illusory." Thomas D. Thacher II, *Combating Corruption in the Construction Industry Combating Corruption and Racketeering: A New Strategy for Reforming Public Contracting in New York City's Construction Industry*, 40 N.Y.L. Sch. L. Rev. 113, 114 (1995) (citations omitted).

30. *Reengineering Municipal Services*, *supra* note 27, at 53.

31. Anechiarico & Jacobs, *supra* note 20, at 145.

32. See note 15, *supra*.

33. Ronald Goldstock, *The Independent Private Sector Inspector General (IPSIG) Program*, 4 Corp. Conduct Q. 38 (1996) (hereinafter IPSIG). Ronald Goldstock is the former Director of the New York State Organized Crime Task Force, where he developed the IPSIG concept. In addition, Mr. Goldstock has been an Inspector General of the U.S. Department of Labor and is a member of the faculty of New York University School of Law. As noted in Part IV, *infra*, he was retained as an organized crime consultant by the Government of Northern Ireland.

34. *Reengineering Municipal Services*, *supra* note 27, at 59.

35. Goldstock, *supra* note 33. Michael Cherkasky, a former Chief of Investigations for the Manhattan district attorney and more recently named Chairman and CEO of the scandal-ridden insurance giant, Marsh & McLennan Companies, described the four-step real estate program which epitomizes the ideal monitoring job: (1) Auditors go over the books and billing practices of the company which are double-checked by investigators who interview employees to ensure that what the company says about its systems is true; (2) Questionnaires are sent to all of the vendors or subcontractors with which the company does work in order to disclose whether they have been barred from bidding, whether they have been under indictment and what companies they are linked to. This information is checked by investigators; (3) A code of ethics is drafted which the company's managers and vendors must agree to; (4) As part of long-term monitoring there are periodic audits and checks at construction-site jobs.

36. "[IPSIGs] must be independent and institutionally free to expose corrupt activities. At the same time, they must be useful to project managers and protective of business and trade secrets. General and prime contractors must be encouraged to use [IPSIG] services as management tools without fearing that discoveries of improper practices could be used by competitors or by potential litigants in suits against the construction company." *Corruption and Racketeering*, *supra* note 16, at 207.

37. IPSIG, *supra* note 33.

38. Wendy C. Schmidt & Jonny J. Frank, *Outside Monitors Attract Capital, Detect Abuses,* World Wastes, June 1996, at 6. One example of this phenomenon is Brooklyn-based waste management company ReSource NE Inc. which voluntarily accepted a monitor in order to calm the concerns of potential investors about operating in the New York City marketplace. *Id*.

39. IPSIG, *supra* note 33.

40. Interview by co-author Edgar J. Lewandowski of co-author Stanley N. Lupkin, who was then serving as Senior Vice President—Office of the President, Decision Strategies LLC, a prequalified IPSIG provider, in New York, N.Y. (Jan. 7, 2003).

41. Diana B. Henriques, *New York City Builds a Better Watchdog: Agency May Be a Model for Business,* N.Y. Times, Mar. 14, 1996, at D1 (quoting Thomas D. Thacher II).

42. Alison Frankel, *Fighting Corruption for Fun & Profit: Former Mob-Buster Michael Cherkasky Has Started up a New Monitoring Business at Kroll Associates. Can He do Good and do Well?,* Am. L., Apr. 1995, at 75.

43. *Corruption and Racketeering in the New York City Construction Industry*, New York State Organized Crime Task Force, December 1989. The report was republished in 1990 by the New York University Press.

44. *Id.* at 139; *Report, International Association of Independent Private Sector Inspectors General* (hereinafter IAIPSIG Report) (on file with authors).

45. IAIPSIG Report, *supra* note 44 at ¶ 4: Frankel, *supra* note 42. The deterrence-oriented objectives envisioned for the CIAFs parallels the OCTF's overall strategy which, "flowed from its philosophy of organized crime control. Investigations and prosecutions are means and not ends. The ultimate goal is not to send corrupt persons to prison but to reduce industry opportunities for and susceptibility to corruption and racketeering." Corruption and Racketeering, *supra* note 16, at 2.

46. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978); *see* Ronald Goldstock, *On the Origins of the Independent Private Sector General Program* (prepared for a panel discussion on IPSIGs at the Association of the Bar of the City of New York) (on file with authors) (hereinafter *Origins of the Independent Private Sector General Program*).

47. Margaret J. Gates & Marjorie Fine Knowles, The Inspector General Act in the Federal Government: A New Approach to Accountability, 36 Ala. L. Rev. 473 (1985).

48. *Id.* at 475.

49. Independent Private Sector Inspectors General, Compliance Programs & Corp. Sent. Gdlns. § 8:15 (2002).

50. *Id.*

51. See 56 Fed. Reg. 22,762 (1991).

52. IAIPSIG Report, *supra* note 44, at ¶ 5.

53. IAIPSIG Report, *supra* note 44 n.4; Ilene H. Nagel & Winthrop M. Swenson, The Federal Sentencing Guidelines For Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future, 71 Wash. U.L.Q. 205 (1993).

54. IAIPSIG Report, *supra* note 44, at n.4; Nagel & Swenson, *supra* note 53.

55. United States Sentencing Commission Guidelines Manual, Chapter 8: Sentencing of Organizations 28 U.S.C. § 996; Neil V. Getnick & Lesley A. Skillen, *Combating Industry-Wide Corruption*. N.Y.L.J., Jul. 15, 1994, at 1.

56. Origins of the Independent Private Sector General Program, *supra* note 46; Getnick & Skillen, *supra* note 55.

57. *Reengineering Municipal Services*, *supra* note 27, at 59.

58. *Id.*

59. Agreement dated February 13, 1996 between Tully Construction Co., Inc. and the City of New York. Amended July 3, 1996. (hereinafter Tully Settlement Agreement); *Non-Responsibility Determinations*. 2 CityLaw 73 (1996); *Currently Appointed IPSIGs Listed,* 7 CityLaw 54 (2001).

60. The Fairfax Group later merged with Decision Strategies. In February 2001, Decision Strategies was acquired by the SPX Corporation. In January 2005, the name was again changed to Vance.

61. *Non-Responsibility Determinations*, *supra* note 59.

62. Tully Settlement Agreement, *supra* note 59, at 5–6.

63. The Tully IPSIG agreement was in fact extended; it expired on February 13, 2001. *Currently Appointed IPSIGs Listed*, *supra* note 59.

64. Tully Settlement Agreement, *supra* note 59, at 7.

65. *Id*. at 8.

66. *Currently Appointed IPSIGs Listed, supra* note 59.

67. *See* Thacher, *supra* note 29: Henriques, *supra* note 41.

68. *See* Jacobs & Mortis, *supra* note 27.

69. Lupkin interview, *supra* note 40; According to William Langewiesche: "The mob shied away from the job. There was little featherbedding, and no strong-arming of the New York kind. With the exception of the firefighters' action, which was a special case, there were no threatened walkouts or strikes." Langewiesche, *supra* note 6, at 181.

70. Associated Press, *Tragedy a Magnet for People Intent on Mischief and Deceit*, Guelph Mercury, Sep. 17, 2001, at A7; Melody Petersen, *Reports of Scams Preying on Donors are on the Rise*, N.Y. Times, Sep. 28, 2001, at A18.

71. Manimoli Dinesh, *Feds, States Slap Stations for Profiteering*, Oil Daily, Sep. 18, 2001.

72. Ed Vulliamy, *Tolls may be 1,000 Less than Feared*, Observer, Sep. 23, 2001, at 7.

73. Greg Wilson, *Insurers are on Alert for Phony Claims*, Daily News, Dec. 3, 2001, at 31; *Coalition Release Top 13 Insurance Schemes of 2002: Coalition Against Insurance Fraud Adds 13 to its Insurance Hall of Shame*, Best's Review, Feb. 1, 2003, at 11. Included in the list of insurance crooks dishonored by the Coalition were Charles and Cynthia Gavett of Georgia. The Gavetts had falsely reported that Cynthia died in the September 11th attacks and tried to claim $628,000 in life insurance payouts. *Id*.

74. Pete Donohue & Corky Siemaszko, *City Will Give Victims' Kin Soil from WTC Site: Vendors, Looters Ripped by Rudy*, Daily News, Oct. 3, 2001, at 18. Among the most brazen looting attempts involved unsuccessful efforts by intruders to pry open or cut in from above the Bank of Nova Scotia's bank vault which held a quarter of a billion dollars in precious metals. It is presumed that the intruders were construction workers, but "it never became clear who exactly they were, where they had come from, or how they had proposed to get through these ruins with more than just a few ingots." Langewiesche, *supra* note 6 at 36.

75. IPSIGs were alternatively dubbed "Independent Project Integrity Compliance Monitors" and "Construction Compliance Monitors" in the agreements and press releases. Steinhauer, *supra* note 10, at B11; DOI Press Release, *supra* note 14. The IPSIG assignments were as follows: (1) Stier, Anderson & Malone was assigned to AMEC Construction Mgmt.; (2) Thacher Associates was assigned to Bovis Lend Lease; (3) PriceWaterhouseCoopers was assigned to Turner Construction; and (4) Decision Strategies/Fairfax Int'l was assigned to Tully Construction. *September 11th Disaster Response*, *supra* note 6.

76. DOI Press Release, *supra* note 14.

77. Katia Hetter, *Monitors for WTC Cleanup: Decision was Made Before Reports of Stolen Debris*, Newsday, Oct. 10, 2001, at A37.

78. Steinhauer, *supra* note 10, at B11; According to Louis Coletti, Chairman of the Building Trades Employers Association: "This is not normal on emergency sites. There are other cities that have procedures and guidelines for projects that come through a normal process, but I don't know what any of this means. I have never heard of it under the kind of conditions that we have now." *Id*.

79. *Cleanup Firms Face New Scrutiny*, Engineering News-Record, Oct. 15, 2001, at 12.

80. Quoted in, *Cleanup Firms Face New Scrutiny,* Engineering News-Record, Oct. 15, 2001, at 12.

81. This prophylactic use of IPSIGs by New York City at Ground Zero may well have been a factor in the decision by Northern Ireland to go forward with its IPSIG Pilot Project.

82. David Barstow, *Officials Are on the Lookout for Relief Effort's Dark Side*, N.Y. Times, Sep. 22, 2001, at B11.

83. A 2003 news report alleged that the Genovese and Colombo crime families used their control of two powerful construction unions in order to demand cushy jobs for their cronies, such as stringing lights and tending generators. Nevertheless, it appears that the mob-connected employees had to do work for their money; and they actually completed 12-hour shifts. Investigators have not yet found substantiation for allegations of no-show pay. *See* Al Guart, *How the Mob Muscled in at Ground Zero*, N.Y. Post, Mar, 2, 2003, at 16. Even if these alleged abuses are true, they are likely far smaller than the abuses still generally riddling New York City's construction industry. The same article reported that AMEC, one of the four Ground Zero construction companies, was recently named in an indictment that charged members of two prominent unions with setting up no-show jobs at other construction sites. The same unions (Locals 14 and 15 of the International Union of Operators and Engineers) worked at Ground Zero and according to the federal indictment, have been under mob control since 1997. The indictment charged 25 alleged gangsters, including Colombo boss Joel "Joe Waverly" Cacace, and 17 union members in pocketing more than $4 million. *Id.* If anything, this recent report only serves to underscore the need for the expanded use of IPSIGs throughout the New York City construction industry.

84. Frank Anechiarico & James B. Jacobs, *Pursuit of Absolute Integrity* 75 (University of Chicago Press 1996).

85. *Id*. at 81.

86. DOI Press Release, *supra* note 14.

87. *Id*.

88. New York City Department of Investigation, *Significant Cases 2001, at* http://www.nyc.gov/html/doi/html/sig-cases-2001.html (last visited Mar. 29, 2003).

89. Lupkin interview, *supra* note 40.

90. *Id.*

91. Interview with Steven A. Pasichow, then-Assistant Commissioner, New York City Department of Investigation, in New York, NY (Feb. 10, 2003).

92. *Id.*

93. See *supra* note 6.

94. Langewiesche, *supra* note 6, at 68.

95. *Id.* at 179.

96. *Role of Bovis Lend Lease at World Trade Center Ground Zero Site in New York*, *available at* http://www.bovislendlease.com/llweb/bll/main.nsf/all/news_20020104 (last visited Mar. 6, 2005).

97. Lupkin interview, *supra* note 40.

98. Pasichow interview, *supra* note 91.

99. Steven A. Pasichow was, at the time the Assistant Commissioner of the New York City Department of Investigation. Mr. Pasichow, who was also an Inspector General in the New York Cite Housing Authority (NYCHA), had extensive experience in combating corruption in New York City's construction industry. He currently serves as the Deputy Inspector General of Port Authority of New York and New Jersey. Among many achievements, other than work related to the World Trade Center cleanup, was Mr. Pasichow's involvement in uncovering abuses related to the alleged theft of over $245,000 from the NYCHA by a former construction company owner and his corporation. *See* Press Release, Office of New York State Attorney General Eliot Spitzer, *Construction Contractor Indicted for Stealing More Than $200,000 from the New York City Housing Authority* (Aug. 8, 2002), *available at* http://www.oag.state.ny.us/press/2002/aug/aug08a_02.html (last visited Mar. 6, 2005).

100. *Id*.

101. Lupkin interview, *supra* note 40.

102. Agreement dated October 4, 2001 between AMEC Construction Mgmt., Inc. and the City of New York; Agreement dated October 4, 2001 between Bovis Lend Lease LMB, Inc. and the City of New York; Agreement dated October 4, 2001 between Tully Construction Co., Inc. and the City of New York; Agreement dated October 4, 2001 between Turner Construction Co., Inc. and the City of New York (hereinafter WTC Monitoring Agreements).

103. WTC Monitoring Agreements, *supra* note 102, at 2.

104. *Id.*

105. *Id.* at 3–5.

106. Letter from Rudolph W. Giuliani, Mayor of the City of New York, to All Ground Zero Construction Site Personnel (Nov 2, 2001) (on file with authors).

107. *Id*.

108. Lupkin interview, *supra* note 40.

109. Pasichow interview, *supra* note 91.

110. Guart, *supra* note 83, at 16.

111. Lupkin interview, *supra* note 40; Pasichow interview, *supra* note 91.

112. Glanz & Lipton, *supra* note 8.

113. Joseph McCann, *Global Positioning System Speeds Up Scrap Removal; Scrap; After Islamic Terrorist Attacks on World Trade Center,* American Metal Market, March 12, 2002, at 10.

114. Barstow, *supra* note 82.

115. Lupkin interview, *supra* note 40.

116. Contrary to what one might expect, having numerous workers on the site, who were not affiliated with any of the construction

companies, being monitored did not complicate the tasks of the monitors. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Langewiesche, *supra* note 6, at 181.

121. *Id.* at 175.

122. *Id.*

123. Jim Johnson, *Nightmare Cleanup Winding Down; Project is Months Ahead of Schedule and Well Under Budget, Officials Say*, Waste News, May 13, 2002, at 1. Preliminary calculations for the cost of the cleanup were as high as $7 billion. Becky Orfinger, *Cleanup Crews Ahead of Schedule at WTC*, at http://www.disasterrelief.org/Disasters/020124wtccleanup/ (last visited Mar. 6, 2005). Later estimates had pegged the cleanup at around $2 billion, but one city official has said that the final price tag could be closer to $600 million. Joseph McCann, *supra* note 113, at 10.

124. Johnson, *supra* note 3, at 5. Furthermore, it bears noting that: "[n]o one invoked in the WTC recovery was seriously injured, even though they were working around the clock in what was arguably the most dangerous construction site in history." *AMEC Completes World Trade Center Recovery Work*, *supra* note 2.

125. *Id.*

126. Although the city prudently appointed IPSIGs to work at Ground Zero, there are still no requirements *mandating* the use of IPSIGs for all large emergency contracts or other special case exceptions to competitive bidding. There is arguably less cause for alarm with respect to emergency contracts, because they are triggered only by exigent circumstances and are generally limited in price and scope. By contrast, the special case exception, which allows for potentially expansive discretion on the part of city agencies, is somewhat more troubling, despite the fact that it does allow for the selection of contractors for valid reasons other than the price of their bid.

127. Anechiarico & Jacobs, *supra* note 20, at 143.

128. See Marie-Therese Fay, Mike Morrisey and Marie Smyth, *Northern Ireland's Troubles: The Human Costs* (London: Pluto Press, 1999).

129. For succinct, yet highly informative further insight into the history of "The Troubles" and the political, religious, economic and social backdrop of the internecine warfare and the fragile accords reached in the late 1990s, see Landon Hancock, *Northern Ireland: Troubles Brewing available at* http://cain.ulst.ac.uk/othelem/landon.htm (last visited Mar. 6, 2005); Seamus Dunn, editor, *Facets of the Conflict in Northern Ireland* (Landon: Macmillan Press Ltd. 1995) *available at*: http://cain.ulst.ac.uk/othelem/facets.htm (last visited Mar. 6, 2005); John Darby, *Northern Ireland: The Background to the Peace Process available at* http://cain.ulst.ac.uk/events/peace/darby03.htm (last visited Mar. 6, 2005).

130. See *Threat Assessment 2004—Serious and Organized Crime in Northern Ireland, Northern Ireland Organized Crime Task Force, available at* http://www.octf.gov.uk/extort.cfm (last visited Mar. 6, 2005).

131. See note 33, *supra*, for Professor Goldstock's professional credentials.

132. Goldstock, Ronald, *Organized Crime in Northern Ireland: A Report for the Secretary of State*, *available at*: http://www.nio.gov.uk/press/040722 a.htm (July 22, 2004).

133. *Id.*

134. *Id.*, at pp. 22–27.

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Committee Report—Should Deposition Witnesses Be Allowed to Confer With Their Counsel During a Deposition?

Summary

The question of whether a witness, during a deposition, should be allowed to confer with counsel, during a deposition, and, if so, under what circumstances and for what reasons, has been controversial for many years. In 1990, it split a Federal Bar Council committee on the conduct of depositions, chaired by now Southern District of New York Judge Sidney H. Stein, for which "[n]o subject . . . generated more controversy . . . than the question of the extent to which a witness should be permitted to discuss matters with his or her attorney during the conduct of the deposition."[1] The majority of that committee found that attorney-initiated conferences should be presumptively improper for any purpose other than to determine whether a privilege should be asserted.[2] The minority found the proposal a sort of gag order that could prevent a client from requesting legal advice during a deposition and, therefore, an improper interference with the attorney/client relationship.[3]

There is still no consensus as to when it is appropriate for a deponent to consult with counsel, and, if consultation occurs, whether the content of that consultation should be subject to examination by the interrogator. There is contradictory case law,[4] and there are a range of local rules.[5] Nonetheless, the Section agrees on two principles, the first of which is incorporated in Local Rule 30.6 of the United States District Court for the Eastern District of New York:

(1) There should never be a consultation while a question is pending, except for the purpose of ascertaining whether a privilege or other protection from discovery should be asserted.

(2) There may be unfettered consultation during overnight breaks in a deposition.

Beyond these principles, no agreement can be found. Some would not prohibit any consultation between a deponent and deponent's counsel. Of this group, however, some would permit the interrogator to explore what was said during the consultation, if the consultation is during a break initiated by the witness or the witness' counsel, although without otherwise waiving the attorney-client privilege. Others would prohibit any consultation between the deponent and the deponent's attorney, except for the purpose of discussing whether to halt the deposition due to the bad faith of the interrogator or unreasonable annoyance, embarrassment or oppression under Rule 30(d)(4), after a record of objections to such questioning has been made.

This report will examine the considerations that lead to the divergent views on whether and when consultation between a deponent and the deponent's counsel should occur.

Discussion

Whether or when counsel should be allowed to confer with witnesses during depositions requires a balancing of the reasons why conferences should be prohibited and why they might occur. It is also affected by a need to draw workable lines that can be recognized in the absence of a jurist, but enforced if required.

There are two reasons why witnesses should not be allowed to confer with counsel during a deposition—coaching and interference in the examination of the witness.

Coaching occurs when counsel, directly or indirectly, tells the witness what to say.[6] This may lead to untruthful testimony (possibly a criminal violation[7]) and may be an ethical, if not criminal, violation by the witness' attorney.[8] The interrogator does not receive a truthful recollection from the witness, but only what counsel views as good for her or his case.[9] Coaching during a deposition frustrates the major purposes of depositions, which are to discover the facts and preserve truthful testimony.[10]

Coaching should be distinguished from preparation. During preparation, counsel and the witness review the witness' recollection of relevant events, relevant documents, issues in the case and deposition procedure.[11] Preparation does not seek to alter a witness' recollection, but to improve it. However, the line between permissible preparation and improper coaching is fuzzy.

A second reason for prohibiting conferences between counsel and witnesses during a deposition is that conferences will interfere with the interrogator's examination. Cross-examination is the best mechanism for ascertaining the truth of testimony.[12] Successful cross-examination sometimes depends on raising the witness' level of discomfort high enough for the witness

to disclose the truth in response to *questioning*. Interruptions for conferences may interfere with the interrogator's questioning and prevent the deposition from reaching the objectives of discovering the facts and preserving truthful testimony.

On the other hand, there are reasons for allowing witnesses to confer with counsel during a deposition. The deponent may need to seek legal advice about asserting a privilege or protection or about harassing questions, and, reciprocally, counsel may need to determine whether to assert a privilege, invoke protection from discovery or seek a ruling from the court. There may be a need to correct an error on the record. Counsel may need to advise a witness about the process to make the witness more comfortable answering questions. There may also be a need for the witness and counsel to discuss issues relating to the case, but not necessarily relating to the subject of the examination. We examine each of these reasons.

Asserting a Privilege or Protection

If a privilege is not asserted prior to answering a question, the privilege is usually considered to have been waived.[13] Equally, if an assertion is not made that a prospective answer is protected from discovery for some reason other than privilege (perhaps a protective order), waiver of the protection may be inferred from the fact of answering.[14] Therefore, to determine whether it is appropriate to assert a privilege or protection from discovery in response to a question, any consultation between a witness and the witness' attorney must occur prior to the answer to the question. Although such a consultation interferes with the examination of the witness, the consequences of prohibiting consultation are grave enough to overcome the interference.[15]

Harassing Questions

Normally there is no third party presiding over the conduct of a deposition. This can lead to abuse by interrogators. Interrogators may pursue irrelevant lines of inquiry calculated more to embarrass a deponent than to obtain facts relevant to the subject matter of the case. Interrogators may also phrase questions, make comments and act in a manner designed to intimidate or harass a witness. If such tactics become sufficiently abusive, it may be appropriate to suspend the deposition and seek court intervention.[16] However, such a suspension might result under Rule 37(a)(4)(A) in the imposition on the witness of reasonable expenses, including attorneys' fees, if the court determines the suspension was unjustified. A consultation between counsel and the deponent might well be appropriate to discuss the costs and benefits of the available courses of action before taking the step of suspending the deposition.

While the possibility of harassment and the risks of suspending a deposition can be discussed during preparation before a deposition, an assessment of the appropriate course of action may not realistically be able to be made until the event occurs. Moreover, because of the risk of sanctions if a suspension is unjustifiably invoked, it may be that the attorney has an ethical obligation to explain the courses of action to the witness before such an action occurs.[17] These considerations justify a consultation between counsel and the witness when no question is pending and after the witness' attorney has made a record under Rule 30(c) justifying the consultation.[18]

Correct Errors

It has been argued by David H. Taylor that "consultation to correct inadvertent false statements amounts to little more than the allowed post-deposition correction of the record provided for in Rule 30(e). By accelerating the correction to a point in time that allows for immediate follow-up based on the corrected information, interests of economy in discovery are served."[19] Taylor further argues that an attorney's obligation of candor toward the tribunal under Rule 3.3 of the Model Rules of Professional Conduct (1994), which requires an attorney to take reasonable remedial measures if evidence is offered that the attorney knows to be false, obligates counsel to initiate a conference to correct an error in testimony during a deposition.[20]

Correcting errors, however, looks very much like coaching the witness. Correcting a transcript after a deposition is not the same as interrupting a deposition for a consultation between attorney and witness and then producing changed testimony. Moreover, after the questioning by the interrogator, under Rule 30(c), the witness' attorney may ask questions to clarify any previous statements by the witness.[21] The goal of a deposition is not economy or efficiency, but discovery of facts through truthful testimony. Drawing workable lines for depositions conducted outside the presence of a judicial officer might suggest that consultations to correct errors be prohibited.

On the other hand, if there is a material error that will lead to a series of questions based on an incorrect premise, then it is a waste of the time of everyone at the deposition for there not to be an immediate correction. A witness' attorney can ask for a break to warn the interrogating attorney that an error has been made that requires correction, but interrogators have been known to disregard such suggestions.

Thus, correcting errors is one reason for interrupting a deposition for consultation with a witness that does not obviously tilt either toward prohibition or toward complete acceptability.

Witness' Comfort

It has been suggested that providing reassurance during a deposition to an inexperienced witness, who may be intimidated by the process, might aid the fact-finding process.[22] However, such an interruption mitigates the stress of undergoing cross-examination, which stress is part of the basis for the belief that cross-examination leads to more truthful testimony.[23] Further, there is a risk that reassurances may shade into coaching, especially with more experienced witnesses.

Reassurance should be provided during preparation, whether before a deposition or at appropriate breaks. It may be appropriate during overnight breaks in a deposition,[24] although, under Rule 30(d)(2), most depositions should now not include an overnight break. Courts disagree as to whether reassurance is appropriate during normal breaks, such as for a meal.[25]

This is an area where workable rules that do not infringe on direct examination by the interrogator could be devised. One line that could be drawn would be to distinguish between breaks called by the witness or the witness' attorney and all other breaks. To avoid improper coaching or interruption of direct examination, breaks requested by the deponent or the deponent's attorney would not result in consultation. On the other hand, because the interrogator controls the pace of examination, if the interrogator asks for a break or allows a scheduled break, it is less likely that the break will greatly interfere with the examination of the witness. Unfettered consultation could therefore be allowed during breaks not initiated by the deponent or the deponent's attorney.

Another line that could be drawn would be to permit breaks initiated by a deponent or the deponent's counsel, but to make the content of any such consultation subject to examination during the deposition beyond the limited inquiry permitted in any event, which would not infringe the attorney-client privilege. If the break were truly for the purpose of reassuring the witness, then the disclosure of what was said will not infringe on the attorney-client privilege nor will it provide ammunition for later use at trial. If the break were truly for the purpose of coaching, then the discussion of the change in testimony during the break and its disclosure on the record to the detriment of the witness' credibility will deter future abuse. Further, by having a rule to this effect known to all deposition participants in advance, impermissible coaching may be significantly deterred. Moreover, with such a rule, the deponent and the deponent's counsel will know that communications during breaks they initiate will not be subject to the attorney-client privilege and can act accordingly. This should minimize any impact on attorney-client communications, especially if the rule provides that any examination on the topic of discussions during such breaks will not be considered a waiver of the attorney-client privilege for any other purpose.

In any event, a need for reassurance should not be used as an excuse to interrupt cross-examination while a question is pending.[26]

Issues Relating to the Case

A deposition provides an excellent opportunity for counsel and a witness, especially a party witness, to discuss issues relating to the case. Both are focused on the facts of the matter and may obtain insights during the deposition process that affect matters outside of the areas of examination. Such consultation should be allowed, except to the extent it interferes with the examination during the deposition.[27] This is a further item weighing in the balance for "workable" rules discussed in the previous section.

Court Rules

Because of concerns over costs and delays in civil litigation[28] and discovery,[29] courts and judges have promulgated local or individual rules or guidelines concerning consultation with witnesses during depositions. The text of many of these rules is set out in Appendix A.

Consistent with the lack of consensus as a result of the different factors bearing on consultations between deponents and their counsel, these rules present a variety of approaches to the question of when a deponent may consult with counsel. The United States District Court for the District of Oregon has one of the more limited rules, which only governs when a recess may be taken: "[i]f a question is pending, it must be answered before a recess is taken unless the question involves a matter of privacy right; privilege; or an area protected by the constitution, statute, or work product."[30] By contrast, the United States District Court for the District of South Carolina is one of the more restrictive jurisdictions, basing its rule on the language of the order of Judge Gawthrop in *Hall v. Clifton Precision*.[31] South Carolina's rule prohibits conferences between counsel and deponents during breaks or recesses, except to determine whether to assert a privilege, make an objection or move for a protective order; requires counsel engaging in any conference with a deponent to report the results of the conference on the record; and permits the interrogating counsel to inquire of the deponent about the conference.[32]

Conclusion

In deciding when counsel and a deposition witness should be allowed to confer, there should be a balancing between the reasons for prohibiting consultation—

coaching and interference with the interrogator's examination—and the reasons why a consultation could occur—correction of errors, reassurance of the witness, or legal advice about assertion of a privilege or protection, harassing questions, or issues relating to the case. This balance should prohibit consultation during a deposition while a question is pending, except for the purpose of ascertaining whether a privilege or other protection from discovery should be asserted, and permit consultation during overnight breaks. Beyond that, each court may weigh the considerations. No further consensus seems possible.

Endnotes

1. Federal Bar Council Committee on Second Circuit Courts, "A Report on the Conduct of Depositions," 131 F.R.D. 613, 618 (1990).
2. *Id.*
3. *Id.* at 627.
4. Compare *Hall v. Clifton Precision*, 150 F.R.D. 525, 529 (E.D. Pa. 1993) (Gawthrop, J.), with *In re Stratosphere Corp. Securities Litig.*, 182 F.R.D. 614 (D. Nev. 1998) (Hunt, M.J.).
5. *See* Appendix A.
6. *In re Stratosphere Corp. Securities Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998).
7. 18 U.S.C. § 1621.
8. New York State Bar Association, *The Lawyer's Code of Professional Responsibility* EC 7-26; DR 7-102(A)(6), 22 N.Y.C.R.R. § 1200.33(a)(6); ABA Model Rules of Professional Conduct 3.3(a)(4); 18 U.S.C. § 1622.
9. "There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers." *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993).
10. *Id.; Henkel v. XIM Products, Inc.*, 133 F.R.D. 556, 557 (D. Minn. 1991).
11. *See Christy v. Pennsylvania Turnpike Comm'n*, 160 F.R.D. 51, 53 (E.D. Pa. 1995) ("a lawyer has an ethical duty to prepare a witness" before a deposition and no restriction on pre-deposition communications should be imposed).
12. "[C]ross-examination [is] the 'greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935 (1970) (*quoting* 5 J. Wigmore, *Evidence* § 1367 (3d ed. 1940)).

    "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110 (1974).

    "[C]ross-examination, a '"vital feature" of the Anglo-American system,' "'sheds light on the witness' perception, memory and narration,"' and 'can expose inconsistencies, incompletenesses, and inaccuracies in his testimony.'" *Perry v. Leeke*, 488 U.S. 272, 283 n.7, 109 S. Ct. 594, 601 n.7 (1989) (*quoting* 4 J. Weinstein, *Evidence* ¶ 800[01] (1988)).

    "[T]he truth-seeking function of the trial can be impeded in ways other than unethical 'coaching.' Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. Permitting a witness . . . to consult with counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess. This is true even if we assume no deceit on the part of the witness; it is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney." *Perry v. Leeke,* 488 U.S. 272, 282, 109 S. Ct. 594, 601 (1989).

    "For two centuries, common law judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony, and they have insisted that the opportunity is a right and not a mere privilege." McCormick on *Evidence* at 47 (3rd ed. 1984).
13. 8 Wright, Miller & Marcus, *Federal Practice and Procedure* § 2016.1 at 229 (2d ed. 1994); *Nguyen v. Excel Corp.*, 197 F.3d 200, 206-07 (5th Cir. 1999); *Thomas v. F. F. Financial, Inc.*, 128 F.R.D. 192, 194 (S.D.N.Y. 1989); *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 459 (N.D. Cal. 1978).
14. *Cf. Littlejohn v. BIC Corp.*, 851 F.2d 673, 680 (3d Cir. 1988) (failure to object to release at trial of information subject to a protective order waives any rights to confidentiality).
15. *Hall v. Clifton Precision,* 150 F.R.D. 525, 529 (E.D. Pa. 1993); *American Fun & Toy Creators, Inc. v. Gemmy Indus., Inc.*, 96 Civ. 0799 (AGS) (JCF), 1997 WL 482518 at *9 (S.D.N.Y. Aug. 21, 1997) (Francis, M.J.).
16. Rule 30(d)(4).
17. Model Rules of Professional Conduct Rule 1.4(b) (1994) ("[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").
18. *See Refco, Inc. v. Troika Investment Ltd.*, 87 C 9272, 1989 WL 94326 at *11 (N.D. Ill. Aug. 4, 1989) (Shadur, J.) ("counsel are ordered not to instruct or advise deponents that they are free to decline to answer any questions, but may advise them not to answer only . . . if a question touches sensitive areas or goes beyond reasonable limits"); *Heller v. Consolidated Rail Corp.*, Civ. A. No. 95-3935, 1995 WL 476244 at *3 n.2 (E.D. Pa. Aug. 7, 1995) (Gawthrop, J.) ("[c]ounsel not only has a right to be there [at a deposition], but the right – and duty – to interrupt to protect his client from overreaching and abuse by an opponent, provided it is done within the rules").
19. David H. Taylor, "Rambo as Potted Plant: Local Rulemaking's Preemptive Strike Against Witness-Coaching During Depositions," 40 *Vill. L. Rev.* 1057, 1076 (1995).
20. *Id.* at 1075; *see In re Stratosphere Corp. Securities Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998) ("[t]his Court will not preclude an attorney, during a recess that he or she did not request, from making sure that his or her client did not misunderstand or misinterpret questions or documents, or attempt to help rehabilitate the client by fulfilling an attorney's ethical duty to prepare a witness").
21. At least one court has held that it is appropriate for a witness' attorney to consult with the deponent after the interrogator's examination is completed, but before any examination by the witness' attorney. *See Odone v. Croda Int'l PLC*, 170 F.R.D. 66, 68-69 (D.D.C. 1997) (rehabilitation of client on cross-examination, after consultation during a five-minute recess not requested by client or client's attorney and after interrogator's line of questioning concluded, held not sanctionable).
22. Taylor, *supra* n. 19, at 1070–71.
23. *Perry v. Leeke,* 488 U.S. 272, 282, 109 S. Ct. 594, 601 (1989).
24. *Cf. Geders v. United States*, 425 U.S. 80, 91, 96 S. Ct. 1330, 1337 (1976) (trial court's order directing a criminal defendant while

on the stand not to consult his attorney during an overnight recess violated the witness' Sixth Amendment right to counsel); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) (judge's prohibition of consultations between a party and his attorney during breaks and recesses in the party's trial testimony violated the party's Fifth Amendment right to counsel in a civil case).

25. *See Perry v. Leeke*, 488 U.S. 272, 284, 109 S. Ct. 594, 602 (1989) ("in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying [criminal] defendant does not have a constitutional right to advice . . . [but] [o]ur conclusion does not mean that trial judges must forbid consultation between a defendant and his counsel during such brief recesses"); *Hall v. Clifton Precision*, 150 F.R.D. 525, 529 (E.D. Pa. 1993) (Gawthrop, J.) ("Once the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness's counsel. Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules."); *In re PSE&G Shareholder Litig.*, 726 A.2d 994, 997 (N.J. Superior Ct. Essex County 1998) ("[O]nce the deposition commences there should be no discussions between counsel and the witness, even during recesses, including lunch recess, until the deposition concludes that day. However, at the conclusion of the daily deposition, counsel and the witness should be permitted to confer and to prepare for the next day's deposition"); *Refco, Inc. v. Troika Investment Ltd.*, 87 C 9272, 1989 WL 94326 at *11 (N.D. Ill. Aug. 4, 1989) ("counsel are ordered not to consult with witnesses during the course of their depositions except during mutually-agreed-upon breaks"); *McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648, 650 (D. Col. 2001) ("the truth finding function is adequately protected if deponents are prohibited from conferring with their counsel while a question is pending; other consultations, during periodic deposition breaks, luncheon and overnight recesses, and more prolonged recesses ordinarily are appropriate").

26. *See In re Norplant Contraceptive Prods. Liability Litig.*, MDL Docket No. 1038, 1996 WL 42053 at *4 (E.D. Tex. Jan. 19, 1996); *Refco, Inc. v. Troika Investment Ltd.*, No. 87 C 9272, 1989 WL 94326 at *10 (N.D. Ill. Aug. 4, 1989) (Shadur, J.).

27. *See Reynolds v. Alabama Dep't of Transp.*, 4 F. Supp. 2d 1055, 1064 (M.D. Ala. 1998) (court in a civil case allowed defendants' counsel to consult with any witness about non-testimonial matters during both brief and extended recesses); *cf. Geders v. United States*, 425 U.S. 80, 88, 96 S. Ct. 1330, 1335 (1976) (criminal defendant, unlike a testifying witness, has a constitutional right during an overnight recess in his testimony to discuss matters with his counsel that go beyond the content of his testimony, such as trial tactics).

28. *See* Section 102 of the Civil Justice Reform Act of 1990, Pub. L. 101-650 § 102, 104 Stat. 5088 (1990).

29. *See* Advisory Committee Notes to Subdivision (b)(1) of Rule 26 of the Federal Rules of Civil Procedure (2000 Amendment).

30. D. Ore. LR 30.5.

31. 150 F.R.D. 525, 531–32 (E.D. Pa. 1993).

32. D.S.C. Local Civil Rule 30.04(E), (F), (G).

December 12, 2002

New York State Bar Association
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Committee on Federal Procedure

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***Co-authors of this report.**

****Messrs. Jossen and Lowenthal dissent from the conclusion in part. Apart from the circumstances when a question is pending, they do not believe that there is an appropriate basis or concern to suggest that there should be any limit on consultations between a deponent and the deponent's counsel. In the absence of any court-made or ethics rule, they do not believe that lawyers are under, or should be under, any proscription from such consultation. Stanley N. Futterman of the Section's Executive Committee joins this dissent.**

APPENDIX A

M.D. Ala. Guideline II.G.; S.D. Ala. Guideline II.G.: "Except during normal breaks and for purposes of determining the existence of privilege or the like, normally at the request of the client, a deponent and his attorney should not normally confer during a deposition. The fact and duration of the conference may be pointed out on the record and, in the event of abuse, an appropriate protective order may be sought."

D. Col. LR 30.1C. A.: "The following abusive deposition conduct is prohibited: . . . 2. Interrupting examination for an off-the-record conference between counsel and the witness, except for the purpose of determining whether to assert a privilege. Any off-the-record conference during a recess may be a subject for inquiry by opposing counsel, to the extent it is not privileged."

S.D. Fla. Local Rule 30.1.A.: "The following abusive deposition conduct is prohibited: . . . 2. Interrupting examination for an off-the-record conference between counsel and the witness, except for the purpose of determining whether to assert a privilege."

S.D. Fla. Local Rule App. A. Discovery Practices Handbook . . . II. Depositions . . . B. Objections. . . . (3) Other Restrictions on Deposition Conduct. . . ."off-the-record conferences between counsel and witness are inappropriate."

S.D. Ind. L.R. 30.1(b): "An attorney for a deponent shall not initiate a private conference with the deponent regarding a pending question except for the purpose of determining whether a claim of privilege should be asserted."

D. Md. Rules App. A. Discovery Guideline 5.g.: "During breaks in the taking of a deposition, no one should discuss with the deponent the substance of the prior testimony given by the deponent during the deposition. Counsel for the deponent may discuss with the deponent at such time whether a privilege should be asserted or otherwise engage in discussion not regarding the substance of the witness's prior testimony."

M.D.N.C. LR26.1(b)(iii): "Counsel and their witness-clients shall not engage in private, off-the-record conferences while the deposition is proceeding in session, except for the purpose of deciding whether to assert a privilege."

E.D.N.Y. Rule 30.6: "An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted."

Guidelines for Discovery Depositions of Magistrate Judge Foschio (W.D.N.Y.): "(5) Counsel and their witness/clients shall not initiate or engage in private off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege. (6) Any conferences which occur pursuant to, or in violation of, guideline (5) are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what. (7) Any conferences which occur pursuant to, or in violation of, guideline (5) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record."

D. Ore. LR 30.5: "If a question is pending, it must be answered before a recess is taken unless the question involves a matter of privacy right; privilege; or an area protected by the constitution, statute, or work product."

D.S.C. Local Civil Rule 30.04: "(E) Counsel and witnesses shall not engage in private, 'off the record' conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order. (F) Any conferences which occur pursuant to, or in violation of, Local Civil Rule 30.04(E) are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature. (G) Any conferences which occur pursuant to, or in violation of, guideline Local Civil Rule 30.04(E) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall be noted on the record."

W.D. Tex. Rule CV-30(b): "An attorney for a deponent shall not initiate a private conference with the deponent regarding a pending question, except for the purpose of determining whether a claim of privilege should be asserted."

D. Wy. Rule 30.1(f): "An attorney defending at a deposition of a non-party deponent shall not engage in a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted."

Alaska Rules of Civil Procedure 30(d)(1): "Continual and unwarranted off the record conferences between the deponent and counsel following the propounding of questions and prior to the answer or at any time during the deposition are prohibited."

Del. Court of Chancery Rule 30(d); Del. Rule of Civil Proc. for the Super. Ct. 30(d): "(1) From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given, except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order, or (B) suggest to the deponent the manner in which any questions should be answered."

Md. Discovery Guideline 8(e): "An attorney for a deponent should not initiate a private conference with a deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted. To do so, otherwise, is presumptively improper."

Mass. Civil Procedure Rule 30(c): "Any objection to testimony during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. . . . Counsel for a witness or a party may not instruct a deponent not to answer except where necessary to assert or preserve a privilege or protection against disclosure." Reporter's Notes – 2001: "It has been suggested that some attorneys, cognizant of the prohibition against suggestive comments or hints during the deposition, may accomplish the same result by seeking to confer with the client in private prior to the client answering the question. It appears that the rule does not permit such conferences except where appropriate to preserve a privilege or protection against disclosure. . . . Just as a lawyer may not interrupt the questioning of a witness in order to confer in private and develop strategy with the witness, nor should the lawyer be allowed to interrupt the flow of questions at a deposition. Nor may the deponent stop the deposition in order to seek the advice of counsel (except in the case of a privilege or protection against disclosure)."

S. Car. Rules of Civil Procedure 30(j): "(5) Counsel and a witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order. (6) Any conferences which occur pursuant to, or in violation of, section (5) of this rule are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature. (7) Any conferences which occur pursuant to, or in violation of, section (5) of this rule shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall be noted on the record."

Tex. Rules of Civil Procedure 199.5(d): "Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony."

Wash. Superior Court Rule 30(h)(5): "Except where agreed to, attorneys shall not privately confer with deponents during the deposition between a question and an answer except for the purpose of determining the existence of privilege. Conferences with attorneys during normal recesses and at adjournment are permissible unless prohibited by the court."

Uniform Rules for the District Courts of the State of Wyoming Rule 601(c): "An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted."

Differences in Discovery in State and Federal Courts—Electronic Discovery and Other Miscellany

What follows is a panel discussion among two New York State attorneys, a Southern District Court judge and a New York State Supreme Court justice held at the Annual 2005 Meeting of the Commercial and Federal Litigation Law Section. The discussion revolved around the effect of electronic discovery in state and federal courts and the differences in discovery and evidentiary rules in those courts with respect to electronic documents. The panelists included: Adam Cohen from Weil Gotshal & Manges; Gerald Paul from Flemming Zulack & Williamson; Judge Harold Baer from the Southern District; and Justice Barbara Kapnick from New York State Supreme Court, New York County.

MS. FRIEDMAN ROSENTHAL: This morning's program focuses on the general topic of the differences, relevant to commercial litigators, between state courts and federal courts with respect to discovery and evidence procedures and rules. More specifically, we will examine the variations between the two types of courts in the context of electronic discovery.

Adam Cohen is uniquely qualified to discuss these differences with regard to electronic discovery. He cowrote the bible on electronic discovery called *Electronic Discovery Law and Practice*.

I thank our panelists in advance for their presentation and I turn the floor over to Adam Cohen.

MR. COHEN: In terms of discussing what is going on in the federal court system and rule-wise in electronic discovery, there are two items everybody needs to know about. The main issue is the spoliation of electronic data. You are continuing to see cases where very large companies, represented by sophisticated law firms, are being severely sanctioned for destruction of electronic information.

This leads us to ask: Why does this keep happening? Is there really still a problem in terms of the awareness of preservation obligations when it comes to electronic information? I would suggest that complying with the duty to preserve electronic information may not be all that easy.

We have seen sanctions imposed against a UPS worker as well as Philip Morris. Most recently, we saw a situation where a magistrate recommended a default judgment against PriceWaterhouseCoopers for reasons relating to their failure to produce certain electronic information.

What is the problem here? On one level, a tension exists. While in some ways it is harder to destroy electronic information because forensic experts can reconstruct everything, it is also easier to destroy in the sense that preservation requires affirmative action. For example, the failure to take the affirmative action of calling for the halt of recycling backup tapes has resulted in spoliation sanctions.

The other issues have to do with how fuzzy, both in scope and timing, the duty to preserve is. This fuzziness leads to disagreements in making judgments about when litigation is reasonably anticipated as well as what subject matter is covered. For example, before you are served with a complaint, it's not always easy to figure out exactly what subject matter is going to be covered by the potential lawsuit.

Additionally, communication breakdowns lead to spoliation. Much of this has to do with the fact that technical people and lawyers just don't speak the same language. You see these kinds of communication breakdowns in the failure of IT people to appreciate the legal obligations leading to spoliation.

When you add the most important characteristic of electronic information which is volume, you have a very potent, combustible mixture. Any slip-up can result in the destruction of a large amount of information.

Moreover, the sanctions can be very severe. They can be dispositive. They can lead to adverse inferences. We've also seen cases involving personal monetary sanctions against corporate officers. In Sarbanes-Oxley, we have criminal penalties as well.

It is important to keep in mind that here in New York State, in the Second Circuit, you don't have to show any kind of evil intent to get severe sanctions like an adverse inference. With respect to spoliation of evidence, it's enough that the destruction was negligent. And that can be a big problem where we don't have established standards for conduct in terms of preserving electronic information.

Zubulake V, the latest decision in Judge Scheindlin's *Zubulake v. Warburg* case, is still the hottest case right now, in electronic discovery. It came out in July, and it's clearly the most talked about case still. This opinion wrapped up a lot of what was going on and talked about the literature and case law in a comprehensive way. It also attempted to lay out some guidelines that counsel should be following in complying with the duty to preserve electronic information. If you are a litigator in federal courts, you must read this opinion, especially because of the influence that Judge Sheindlin has in this area. Courts all around the country are fol-

lowing her electronic discovery opinions, whether they are on cost shifting or the duty to preserve.

Zubalake V is a case that resembles a law school question on electronic discovery. The fact pattern includes a number of debatable issues. There was information that was retained that wasn't asked for; there were preservation instructions that weren't given to key witnesses; there was the kind of communication breakdown that I talked about, misunderstanding, technical issues, and a failure to safeguard backup tapes. While preservation instructions were given in this case, but they were found not to be adequate.

What was the spoliation that occurred in *Zubulake*? It was found after redepositions, ordered in the wake of *Zubulake IV*, that key witnesses in the case had actively deleted e-mails. It was demonstrated that these witnesses had deleted e-mails after receiving instructions, and these e-mails were later found on the backup tapes. The judge found that it was clear that there had been this kind of active deletion after the instruction had been given when later, after the instructions had been given, somehow the e-mails weren't on the active servers.

The case included late production response of documents, and there was also a showing that the lost documents were very significant documents to the case. There were also issues with documents that weren't deleted or lost but somehow they just weren't collected. Collection is a part of the process that's just as important as preservation, but not often given as much attention as the preservation issues. And here we get to the really important part of the decision for litigators where there is some practical guidance given.

We all know generally you have to transmit some kind of initial "litigation" old communication, letting people know that we are involved in this lawsuit, and have to preserve relevant information. But then there are some things here that may require some of us to learn about technology, even if we don't practice in the technology area because it really permeates all kinds of litigation. For example, how many of you are prepared to get familiar with your clients' data retention architecture? We're all going to have to roll up our sleeves a little bit, sit down with some of these IT people that speak different languages, and try to understand what's going on here because we are the ones that are going to be there in front of the judge having to explain this stuff.

We also need, in the wake of *Zubulake*, to take affirmative steps to monitor compliance. Thus, you cannot send out the initial litigation hold message, and then say I've done my duty, I can go away now and expect everyone to preserve. Judge Sheindlin talks about this as an ongoing duty, similar to the ongoing duty to supplement production. There is a wonderful probe here recognizing that a lawyer cannot be obliged to monitor her clients like a parent watching a child. Nevertheless, these are all the steps that you need to do. You need to communicate with the key players, you need to collect the stuff that's been retained, you need to make sure that what was preserved is identified and kept safely.

Finding all these sanctions, I think the important point here is on the consequences of failing to follow the practical guidance in *Zubulake*. Though the adverse inference instruction given in *Zubulake* was fairly mild, I note the use of the word "reasonable." The use of the word "reasonable" is a kind of artifact of Second Circuit law in that the question is not whether they acted in bad faith or recklessly or intentionally, but did they act reasonably?

With respect to the issue of spoliation, the Philip Morris case provides an example of the importance of suspending routine destruction policies. Philip Morris had a very common-day practice of a rolling purge of the e-mail servers. The problem was that they did not suspend that purge when the case started. Specifically, they did not suspend the purge with respect to key individuals whose depositions had been noticed. The e-mails were lost. Ironically, one of those individuals was a director of corporate responsibility. Furthermore, they compounded the problem by not telling the court about this discovery until four months after they learned about it.

Clearly, judges don't like that kind of thing. There were very severe sanction issues, totaling almost a million dollars. While this amount might not be a lot of money to a company like Philip Morris, there were evidentiary preclusions in terms of testimony that they could offer. As we all know, that can really cripple a case.

Besides spoliation, the other big issue involves proposals to codify the Federal Rules of Civil Procedure to deal with electronic discovery issues and, interestingly, privilege waiver issues even beyond the electronic discovery context. While this is something that is looked into because of the unique problems associated with electronic discovery, it applies outside of that context as well.

MR. PAUL: As you all know, electronic discovery is a growth industry for litigators. A week doesn't go by in which we're not bombarded with snail mail, e-mails about CLE programs, and e-mails about services that can keep us up-to-date on e-discovery decisions and even on various companies who specialize in the technology of e-discovery. There is a good reason for all of this. Essentially, it is really impossible today to prosecute or defend a commercial case without at least addressing e-discovery issues.

Some of the issues that have been spawned by this really dramatic event of the last few years include: What's discoverable? What's accessible? What can be restored? Who should pay for it? What is needed to

prove spoliation? What are the consequences of spoliation? What can I do to protect my client from spoliation allegations? What can I do to prevent the adverse party from destroying critical electronic evidence? What are the implications of a document retention policy?

And of course, I'm sure you realize that a document retention policy is really a document destruction policy. Now, there are rules on e-discovery. With respect to the federal courts, there is pending a series of amendments to the Federal Rules of Civil Procedure dealing with electronic discovery that is being commented on. By contrast, in New York, neither the CPLR nor the Commercial Division rules have really dealt yet with electronic discovery issues.

However, I think that's about to change. The CPLR is not silent on electronic discovery. In CPLR 4518(a), there is a reference to the admissibility of electronic records. And interestingly, CPLR 4518 incorporates, by reference, the definition of an electronic record that is contained in a volume of McKinney's called the Technology Law, Section 102 of the Technology Law. An electronic record is defined as: "information, evidencing any act, transaction, occurrence, event or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities." Don't ask.

It seems that the absence of rules on the state court level is going to change. Currently, there is a series of proposals that would amend the Commercial Division rules in various respects, including electronic discovery issues and issues that the parties need to confer about prior to and during the preliminary conference. I think it's reasonable to expect in the months ahead these rules are going to be promulgated.

With respect to differences between federal and New York State case law, for the last 20 years or so, with a handful of exceptions, the New York State courts have really not addressed electronic discovery except in the most rudimentary way. However, with the e-mail phenomenon now a part of our lives and with the Commercial Division now an established alternative to the federal courts, we can expect an exponential increase in e-discovery issues in New York State courts. For those reasons, it's essential that any state court practitioner carefully monitor what the federal courts are doing in this area.

Judge Scheindlin in the *Zubulake* decisions has written a primer for all of us on e-discovery. Of course, issues on procedural law in federal courts are certainly going to differ in certain respects from counterpart issues in the state courts, particularly with respect to matters like spoliation and shifting of costs. The fact of the matter is, however, that with respect to the pure technology issues, there is really no reason why the New York State courts don't, if not simply apply, at least adapt the learning available in *Zubulake* and many other carefully analyzed federal court decisions. While the case law may differ as to the standard for spoliation or whether and under what circumstances the shifting of costs should be permitted, the technology issues are not going to be different. In other words, federal decisions are at least persuasive authority on many of the e-discovery issues that come before the state courts.

Some recent New York State court decisions are instructive. In a 2004 case, *Samide v. Roman Catholic Diocese of Brooklyn*, the Appellate Division ordered the production of printouts of all the e-mail messages that were found on the defendant's computer for in-camera inspection. The court also ordered that the hard drive be produced to a qualified expert, one appointed by the court-appointed referee. That expert was to determine whether or not the deleted e-mails could be recovered. The court also made it clear that recovery of e-mails by a qualified expert was an appropriate exercise. With respect to the question of cost, it is worth noting that at the oral argument, counsel for the party seeking discovery acknowledged that his client was willing to pay the cost of the exercise.

As far as I am aware, no New York State cases have yet addressed whether discovery under the CPLR requires the production of electronic records in a particular format. For example, is it adequate to simply print out hard copies of e-mails and produce those? We've learned from the *Zubulake* decisions that there's something called metadata. Metadata is information that you never see on the hardcopy of a printout of an e-mail. Metadata, which is electronic data that can be recovered, can indicate the entire history of an e-mail, who was blind copied on it, whether drafts existed, and who got copied on the drafts. You can imagine all the privilege issues that can be spawned if metadata is permitted to be produced.

On spoliation, there is another case, *House of Dreams v. Lord & Taylor*, by Justice Kornreich in New York County Supreme Court 2004. This case involved a contract dispute, and one of the things that was interesting is that there were very serious allegations of spoliation. The plaintiffs asserted that the defendants deliberately destroyed evidence of a key agreement by allowing their normal document destruction policies to continue despite the fact that they were aware of this claim. Under *Zubulake*, this claim would have been a source of serious sanctions.

In *House of Dreams*, the defendant's document destruction policy was a quick one. The tapes were either destroyed or written over in a seven-to-twenty-one-day period. The court analyzed the claim and determined that not only was there no evidence of willful violation of either a discovery demand or a court order, but, in fact, the spoliation claim itself was

brought in bad faith. Nonetheless, the court ordered the plaintiff to have access to the defendants' disaster recovery tapes, provided the plaintiff was willing to incur any cost associated with reviewing those tapes.

In another 2004 case, *Lipco*, a decision by Justice Austin in the Commercial Division in Nassau County, various types of electronic discovery were being sought, including specific files, identification of software necessary to read certain files, backup tapes, and a sorting of electronic data in accordance with certain instructions. Justice Austin, not surprisingly, couldn't find any New York cases dealing with the issues that he had to confront. He distinguished federal law on the matter of cost shifting, and he made it clear that under New York law, the party seeking the discovery is responsible for the cost associated with that discovery. While he rejected cost shifting initially, he did, in fact, ask the parties to provide detailed analyses of the costs that might be entailed for certain types of electronic discovery.

In one other case, *Blue Tree Hotels*, by Justice Ramos in the Commercial Division in New York County in 2003, electronic discovery was sought from a nonparty. Justice Ramos ruled that when electronic discovery is sought from a nonparty, cost shifting, that is, making the party seeking the discovery pay the cost of that discovery, is appropriate.

It remains to be seen to what extent the New York courts are going to follow the patterns that we're starting to see emerge on the federal side.

MS. FRIEDMAN ROSENTHAL: To move us away from the technology-specific sector for a moment now, Judge Baer and Justice Kapnick are going to discuss the differences in the federal and state courts.

JUDGE BAER: In reflecting on the kinds of concerns that I see sitting now in the federal court as compared to what it used to be in state courts, the discovery practice is not a bad place to start. In state courts, many lawyers would come to pretrial conferences having failed to comply with the preliminary conference order. It was their view that court orders in state court on discovery were really nothing more than an expression of hope from a judge.

The second problem, again these are all in discovery, occurred when there were adjournments in depositions at the very last moment which would frequently disrupt any discovery schedule that the judge and the lawyers had sort of labored over and tried to put together. And then what would happen in the state court is that people would come by a year later after everything was supposedly ready to go and would then implead some new party and simply start in a large measure all over again. To avoid starting over, I would make sure that they used all the transcripts of any of the earlier depositions. Either way, however, it would be a really significant delay for obvious reasons.

Compliance with the rules, and the rules are there, regarding the note of issue and certificate of readiness did not always occur during my tenure on the State bench. On the one hand, it is possible that the deadlines now set out in Rule 202.19 have been reviewed also as, in effect, productivity standards, by which justices are evaluated. The standards may then become incentives that could contribute to the filing of notes of issue even when disclosure is not complete. That, of course, can be troublesome if there is not a follow-up by the court since much time may pass without discovery being completed.

These things may still happen. Clearly, things aren't like they were when I left. Regardless, let me just tell you a little bit about the distinctions. In the federal court, I have a pretrial scheduling order which every judge has and they're quite similar. In fact, in the very near future, pretrial schedule orders are going to include the issue of electronic discovery as a required discussion between the parties. Electronic discovery, including preservation of electronic information, the form of disclosure, and the cost of preserving, locating and producing electronic information will be a part of everybody's pretrial scheduling order.

In any event, in my part I have a pretrial scheduling order that sort of takes the lawyers from the very beginning up until the trial months. And while some of this creates a little concern, I have found that all lawyers are anxious to have as much certainty as they can have. This kind of pretrial scheduling order provides that certainty. I should say that this is unlike State Court, in that rarely does a lawyer come to pretrial conferences not knowing what their case is about.

JUSTICE KAPNICK: With respect to concerns of state court litigators not following the preliminary conference orders and there being such delays in the discovery, these are big issues. I don't know all the answers, but I'm going to throw out at least some of the problems. Our courts may only be across the plaza, but I say it's so near yet so far.

When lawyers come in to me for a compliance conference and we hold up the order and say there are 12 things you're supposed to do on this compliance order, have you done any of them? They say, Judge, we did numbers 1 and 2, isn't that great? And I said what about 3 to 12? They didn't get to that, but they thought it was good that they did 1 and 2. And my response, if you were going to go the federal court, you'd be on your hands and knees begging for an excuse to please give us some time. In New York County, they just come and it doesn't seem to be an important thing. Why does this happen? There's a lot of reasons that it happens.

The blame may be partially on the lawyers and partially on the judges, and maybe with the whole system. What really creates these cultural differences? One of

the problems, I don't sit in a commercial part, but we regular judges do get trickle-down cases that the Commercial Division isn't interested in having, or that some lawyers, for some reason, don't know about or chose not to be in the Commercial Division.

But we also have a lot of other general cases. And one of the problems is that the personal injuries and some of the real estate case lawyers just have a much, much greater caseload, and are just running around like chickens without their heads and trying to put band-aids wherever they can. It's very hard to follow through.

This leads to another problem. Because there are so many parts and so many people who have so many different requirements on their time, attorneys often use per diem appearances. I frequently have lawyers that come into my part that know less about the case than I do from the few little notes that I have written on the card from the last time. It's really outrageous that they come in without proper authority to even bind their clients or law firms, and that's a big problem that we're all aware of. It's happening less, but it's still a problem.

I think lawyers are a lot more afraid of the federal judges than of the state judges. They seem to be able to sanction a little bit more, and wield their power a little bit more. Part of it is that they're appointed for life and we're not. We're elected. Many of the judges that sit in Supreme Court in New York County at least are sitting as acting Supreme Court judges; they're not elected yet. I sat there in that position for a long time. We have to go before all kinds of screening panels, and the lawyers that come before us are often on these screening panels, and it puts the judges in a very difficult position. And I don't think that the federal judges have that to contend with as much. And all these issues are problems.

Also, the lack of funds in the state court is really very significant. We are not allowed to have overtime. If my witness is going to go 15 minutes past lunch, I have to call up my administrative judge. As she says, "I'll never say no, but don't call me unless you really need it." They just can't afford the overtime for the officers and the other people.

So we have a limitation on what we can do there. And also I think the fact that there are magistrate judges in the federal court and we don't have that kind of a system in the state court is a big problem. Do we have referees who are taxed with all kinds of other obligations? We do have law department people that can help us, but I mean in the middle of a busy day we'll get calls to do rulings at a deposition. My law secretary usually handles it, not that he hasn't a million things to do, but these are all problems as to why the discovery is so different on the federal side than on the civil side.

I think that we're going to talk a little bit about interlocutory appeals and other issues that affect the proceeding of cases in the Commercial Division or regular division and the federal court.

JUDGE BAER: One of the major problems that bear significantly on the discovery process is the interlocutory appeal. The need for interlocutory appeals in the state court has never been very clear to me, but I must tell you that I have always had, and perhaps it is my own paranoia, the feeling to a degree at least that it represents a failure of trust in the judges and justices of the lower courts.

JUSTICE KAPNICK: I don't think that there is really a possibility that the law is going to change on the interlocutory appeals. Lawyers would oppose that very significantly. And getting anything changed in the CPLR takes years and years, even if it's one or two simple statements. I think it does delay the progress of the case, but there really isn't too much we can do about it.

Often people take an appeal on something that I've done, such as a summary judgment motion where I grant part, deny part, and I schedule the trial date. The lawyers will ask me to please stay the trial because they are appealing my decision. My answer is, I really thought my decision was right, which is why I wrote it that way, and I don't see any reason to stay the trial. If the Appellate Division tells me I have to stay the trial, that's fine, and I will do so. But I do think most of my colleagues do the same.

The last thing I'm going to bring up is that CPLR 3214 provides that a motion pursuant to CPLR 3211, 3212, and 3213, summary judgment or motions to dismiss, will automatically stay discovery. The Commercial Division has issued rules that say it doesn't stay discovery unless the judge rules otherwise. I'm not sure that they have the right to issue rules that are in contradiction to the CPLR, but they're done, and basically they're followed. In the noncommercial parts, we don't have that rule.

Another committee that I'm on has recommended that the CPLR be changed to say that discovery should not be stayed unless the judge directs it to be stayed. Some cases involve a summary judgment motion, made between a third-party defendant and the fourth-party defendant, which has nothing to do with the main case. Furthermore, I wouldn't even know that the motion was made because it was made in a motion part. Then, six weeks later, I get a motion submitted and find out that all the discovery directed to go on during that six weeks didn't occur because there was a summary judgment motion stayed it. This type of delay is an important thing to look at.

JUDGE BAER: The individual assignment system is another area that works out better in the federal system than the state. The fact is that the cases when you get them from the get-go move along and discovery is just part of that moving along concept.

Electronic Evidence and its Admissibility Under Exceptions to the Hearsay Rule in State and Federal Courts

What follows is a panel discussion among a New York State Supreme Court justice, a New York State law professor, and two New York State practicing attorneys, held at the Annual 2005 Meeting of the Commercial and Federal Litigation Law Section. The discussion revolved around the process of authenticating, introducing and handling electronic evidence in both federal and state courts, particularly in the context of the business records rule. The panelists included: Hon. Helen Freedman of the New York Supreme Court Commercial Division; Professor Richard Farrell of Brooklyn Law School; Lauren Wachtler from Montclare & Wachtler; and Bernice Leber from Arent Fox. The fact pattern referred to in this discussion is annexed to this discussion as Appendix A.

PROFESSOR FARRELL: In discussing evidence, we must look at the hearsay rule. I'm going to tell you in great detail, and with great precision the entire corpus of the hearsay rule. This is the hearsay rule in exquisite detail—"No." Did you get that? "No." That's the hearsay rule. "No."

Even a law school professor can't get a lot of mileage out of a rule that is summed up in a two-letter word. A law school professor would say, "what do you really mean about 'no?'" A psychology professor would say, "how do you feel about 'no?'"

That's the hearsay rule. "No."

When we talk about hearsay, we do not talk about the hearsay rule. We talk about the exceptions to the hearsay rule. Now, I'm not going to get into a dispute with the Chief Judge of the State of New York, but in a case called *People v. Kennedy*, the Chief Judge said that in her opinion, the most important exception to the hearsay rule in the modern era is the business records exception.

The business records exception came about rather recently, as these things go, meaning in the 1920s. The statutory exceptions, for both New York and the federal courts, are in CPLR 4518 subdivision a, and the Federal Rules of Evidence, Rule 803(b), respectively. If you put them side by side, they sound almost identical. And they should sound almost identical because they were all generated by a proposal way back in the 1920s. The similarity is not exclusive to New York. The business record exceptions for the hearsay rule are pretty much identical as you move from state to state to state.

Against this backdrop, we are addressing the applicability in a more modern context of the exception of the hearsay rule created back in the 1920s for regularly maintained writings and regularly conducted activity.

People v. Kennedy lists four predicate facts that have to be established for permission of a business record. First, the record must be made in the regular course of business. Essentially, the record must reflect a routine, regularly conducted business activity and that record must be needed and relied on in the performance of functions of the business.

Second, it must be the regular course of such business to make the record. There is a double requirement of regularity. Basically, the record must be made pursuant to established procedures for the routine, habitual, systematic making of such record.

Third, the record must be made at or about the time when the event is being recorded. Essentially, the recollection must be fairly accurate so that the habit or routine of making the entries is assured. That's *People v. Kennedy*. The *Kennedy* case has a lot of interesting aspects to it, not the least of which is an Irish defendant being charged with conducting a loansharking operation. I didn't know my ancestors were smart enough to do something like that. I need an abacus just to figure out two times two.

And then there's a fourth requirement. If a business record is made up, as most business records are, of the amalgamation of information flowing into the central recordkeeping node, then there is a double requirement of business responsibility. In this case, the source of the information, the one who supplies the information to the recorder, must be in the same business as, and under the same duty to the same business, as the recorder. As long as you have that identity of obligation to the same business, whose record is being amalgamated out of observations, made by somebody charged, with responsibility of observing, to someone charged with responsibility of recording, you have a business record. This is *Matter of Leon*, and, to go even further back, this is *Johnson v. Lutz*.

The statute itself deserves a couple of moments of mention. "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of that act, transaction, occurrence or event if the judge finds it was made in the regular course of any business, that it was the regular course of such business to make it, and that the act, transaction, occurrence or event occurred at the time or within a reasonable time thereafter.

And then we get from the old to the new. Added fairly recently is the admissibility of the electronic record, as defined in section 102 of the State Technology Law: "such a memorandum shall be admissible in a tangible exhibit that is a true and accurate representation of the electronic record." Under section 102, an electronic record shall mean "information evidencing any act, transaction, occurrence or event or other activity produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities." I think that means that you can read it.

That means that the E-ZPass report that you get, where no human is involved, is a "record." The first time I saw the E-ZPass record, I fell in love with it. Here all the philandering spouses, all the cheap SOBs who won't pay cash to avoid detection, are going to get nailed. And about every three or four weeks you find some guys caught in *flagrante delicto*. That's what the electronic record refers to.

The court may consider the method or manner in which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record.

Here's where there is a big difference between the way the feds come at this and the way New York does. "All other circumstances of making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but shall not affect its admissibility." Here, under the CPLR, the term "business" includes a business, profession, occupation and calling of every kind.

There is a case in New York Third Department, written by then-Justice, later Chief Judge Cooke, God rest his soul. The business record offered by the defendant was the accident report made by the snowplow operator who hit the automobile on the New York State Thruway. Objection was made. What kind of ploy is this? How can you let this in as evidence as what exactly happened? Talk about a guy who has reason to misrepresent. Judge Cooke looked at the statutes, the circumstances and method of preparation, all of which go to weight, not to admissibility.

JUSTICE FREEDMAN: Just to add one little note to *Toll v. State*, the record was prepared 15 days later, and Judge Cooke also found that that was okay because we're not wedded into a particular time. We're talking at or around, about the time of the incident. Fifteen days is not a big deal. So aside from its other infirmities, it may have been at the time that litigation was more than contemplated. But we don't go into that.

As Professor Farrell did point out to you, the biggest or most obvious distinction between Rule 803(6) and CPLR 4518(a) is the line, unless the source of information or the method or circumstances or preparation indicate a lack of trustworthiness. So the federal judges have a way out in a way that the state judges don't have.

I would argue that in the *Kennedy* case, Judge Kaye found a way out. She didn't say it wasn't trustworthy; she just said it wasn't habitual or routine. So there is always a way of keeping it out. However, what is interesting is that it was a nefarious activity. It was a loansharking activity in *Kennedy*, and she said nefarious or loansharking activity is still a business. Whether it's a good business or a bad business, it's still a business. And so that didn't keep it out. It would have been admissible if the expert who testified really could have testified that it was made in the regular course of business. Now, in this case, fortunately, the expert wasn't the party who made the entries. It was an expert who was an expert on loansharking activities, and he, looking at the records of the malefactors, decided that somehow the law or the court looking at it said that this didn't quite make it because each loansharker has a different way of entering things. Therefore, we can't determine what the method is.

I think the federal courts have had it a little easier. They can just simply say that it wasn't trustworthy. Now they have no problem with letting in records of bad people. We've got a number of cases. For example, in *U.S. v. Moore*, there were bank tellers working together to create a little loan to each other, a fictitious payee, and they all divided up the money. These were recorded in the loan transaction department, and some collection attorney sometime later discovered it. The fact that they were a part of a scheme that was not appropriate, but crooked, didn't keep it out.

But, on the other hand, in *Potamkin v. BRI*, the court simply said that the records were not trustworthy. This was a case where Potamkin was suing the broker. The broker counterclaimed against Potamkin asserting that there were some unreimbursed expenses that it had. The court found that the broker's records were just not trustworthy. They may have been kept in the regular course of business; they may have been properly compiled; but they just were not trustworthy. The federal courts have that option.

Interestingly, Rule 1006, the compilation provision of the federal rule, is often quoted in state cases, if not by number, in *haec verba*, as they say. Summaries are permitted, charts are permitted. That's *Guth v. Gold*. There, the court simply cited the federal rule. It said 803, sub 6. State courts have no hesitation in citing the federal rules when they think that they are appropriate.

When we get into electronic records, we know that the statutes recognize them. CPLR 4518(a) was amended in 2002 to included them. I think that 1006 already

included them, and the various advisory committee reports in the federal court already include them.

We also know that electronically kept records are okay even if they've never been printed out on paper, as long as you can print them out. If they were entered into the computer and they're there, you can admit them sometime later. They don't have to be printed out first.

Addressing learned treatises, this is one area that the federal and state rules are somewhat different. Federal Rule 803, sub. 18, says "to the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in public treatises, *et cetera*, established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice," may be read into evidence, but may not be received into evidence. That means that as long as somebody with some expertise authenticates the treatise during the course of the trial, any other expert can be cross-examined on that treatise. It can't be admitted into evidence, but cross-examination is open. That's the federal law.

There is no equivalent in state law. The law is much stricter in New York on treatises. For example, the particular expert who is testifying must say that it is an authoritative treatise for that person to be cross-examined using it. You can't rely on some other expert to cross-examine the expert on the stand about a treatise. As many of us who have done either medical practice or products liability or even valuation cases, treatises cannot be introduced or language of treatises cannot be introduced unless the person on the stand actually authenticates it or says it's authoritative.

In looking at a few state cases, in *Spensieri v. Lasky*, which is a 1999 case, the Court of Appeals held that the PDR, the *Physician's Desk Reference*, is not a treatise that can come in or be read in to show the standard of care that a physician should take in prescribing medicines unless, of course, the doctor who is on the stand says that it's authoritative. By contrast, by the way, in many states the PDR is accepted virtually under the judicial notice concept. I can assure you that no doctor is going to say the PDR is authoritative, particularly the doctor being sued for medical malpractice. There is a little wiggle room in the Court of Appeals' decision. The lower court simply said it's hearsay and it can't come in. The PDR is what the drug companies say about their particular medication or drug. But it can, of course, come in against the drug companies under the next exception, the old admission. But it can't come in against a doctor. It's not authoritative as to the standard of care, at least not in New York. If some other doctor said this is how it should have been done, it says so in the PDR, that may be okay. But you still can't cross-examine the other doctor on it. That doctor can, to some extent, say he will rely upon the PDR to come up with his opinion, along with other things. So, under *Spencieri,* there may be a little bit of wiggle room in getting the language of a treatise in, but very little.

Most recently in *Watkins v. Lasiack*, a 2004 case, the Second Department reaffirmed the learned treatise rule. It's not so in the federal court. For example, in *Constantino v. Herzog*, a videotape on shoulder dystocia in birth and how shoulder dystocia, that's palsy, occurs in a birth, was admissible as prima facie evidence of the lack of departure or malpractice, and it was admitted under the learned treatise rule.

In other words, "learned treatise" now includes videotapes because it was put out by the American College of Obstetrics and Gynecology, which is the guiding guru in the obstetrical industry. And interestingly, I think it may have come in under another, possibly demonstrative evidence exception. But specifically in the federal court, Judge Gleason held, and was affirmed, that it came in under the treatise exception.

In *Carroll v. Morgan*, which is a Fifth Circuit case, it was permissible to cross-examine a cardiologist on a treatise that he did not recognize as authoritative because another cardiologist who had testified in the case had. You would not have a situation like this in the state court.

Turning to a fact pattern, let me just start off by saying that Ralph is the key here. The fact pattern involves a case where Jerry Built Construction Company was the GC for The Very Big Building Incorporated headquarters, built in Brooklyn. In other words, Jerry Built was a GC for The Very Big Building. The building was supposed to be constructed of reinforced concrete, and a protocol was established. They needed to have certification of the quality of the concrete that was poured each day. And before the next level could be built, certification through a concrete lab had to be made. Concrete was supplied by Best Stressed Concrete Company, and each day a sample of concrete from each mixture was supposed to be taken to a testing lab. A concrete testing lab would then certify it if it met the specs.

Terry, an employee of Jerry Built, was supposed to collect the samples, deliver them to the lab, and then advise Max, who was the construction supervisor on the site, of the test results. And then Max would say, if they met the specs, go to the next floor. Terry would give Max the report. Max also put the information into his Palm Pilot since he was on the site. He had a Palm Pilot that said "reported specs by next floor, go ahead." Terry, however, decided that he could do things a little faster and save himself a lot of trouble, so he made a deal with Sid, who was an employee of Best Stressed Concrete Company. The deal was: get me some really

good samples, we'll get those over to the lab quickly, perfect samples, doesn't have to be from the mixtures that are being delivered to the site, and we'll get them certified, and everything will go more quickly and we'll all become heroes on this project.

That's what happened. They had a runner named Ralph who was one of the laborers and who facilitated the rapid back and forth. At that point, Terry was able to tell Max that the concrete lab reported everything was fine.

When they got to the seventh floor on Friday, November 5, 2004, an interesting date, the building collapsed. It was over the weekend, and we know why it happened. They weren't giving the right samples of concrete.

The lab, of course, had its reports showing that all of the concrete was just perfect, and met specs. Finger-pointing started. We also learned that Ralph, who got some money, a gratuity so as to assure his silence, had entered various items on his Palm Pilot. He had made little notes on scraps of paper, on napkins, on matchbook covers, as he did everything else. And he put all this in his Palm Pilot because he was running a number of other unsavory businesses as well. Once the building collapsed, the finger-pointing went every which way, and some lawsuits started.

The Very Big Building starts suing everybody. After discovery, investigation and electronic discovery, I'm sure from the Palm Pilot, we have Ralph who decides in order to get immunity on all of his other transactions, he would like to be helpful and testify.

At this point, in terms of issues, we're going to focus on Ralph's notes. We can also talk a little bit about whether Max's notes can get in. We know that the concrete lab notes can get in because there is no question there. In terms of whether Ralph's notes can get in, we know that certainly the concrete lab wants to get Ralph's notes in and the plaintiff wants to get Ralph's notes in, because the plaintiff is being sued or being counterclaimed against because of the architect.

MS. WACHTLER: Let's assume that I'm the person trying to get these reports in or get Ralph's notes in. The good thing about Ralph's notes is that I notice that they have lots of other stuff besides his nefarious goings on there. He's got loans in addition to bills paid, received, and I'm going to argue to Judge Freedman that this is a business record.

Bearing in mind that Professor Farrell has already said "no" regarding hearsay, what I'm going to do first is lay a foundation for these. The most helpful thing to do is to go right to the statute and just ask the questions right out of the statute. You go through the three criteria which are set forth in Rule 4518. If you take the statute and you read it, you will see one, it must be made in the regular course of any business; that two, it was the regular course of such business to make it; and three, that it was made at the time of the transaction, occurrence or events. You just establish your foundation by running through those questions.

Now, my adversary is going to tell you that this was not a business. How can you say this scheme or all of these terrible things that Ralph was doing wasn't a business? And I'm going to argue that under state law it doesn't matter, because that will go to the weight and not admissibility of whether or not this is a business record.

JUSTICE FREEDMAN: What about the fact that all of his notes and the underlying data, the matchbooks and the napkins, have been thrown out? How about a spoliation of evidence claim here?

MS. WACHTLER: I have a feeling that would be the second thing that my adversary would argue. How can you say these are reliable because we don't know what the notes said? The notes could have said something completely different.

I'm going to say, we don't need to do that, that will still go to whether or not it's reliable and the jury or the judge, the finder of fact, can determine whether or not the weight of that should be considered, but not to admissibility.

I'm still going to argue, and I may lose on this one, that not only is this an admission, of the concrete company, it is also an admission against their interest. Even if I lose on the admission, I still have the business record argument which I'm pretty sure under state law I would be safe on.

JUSTICE FREEDMAN: Since he was a faithless employee, to say the least, and he's long been fired, you still think it would be an admission on the part of the concrete company?

MS. WACHTLER: That's why I would much rather rely on the business records exception because I have a feeling that if he doesn't have "speaking authority," as Judge Freedman says in her book, he would not be considered an agent of the corporation in which I can hold him responsible or the company responsible for whatever acts he committed, *ultra vires* or not in the course of his business. However, if I felt I was on a roll that day, I might go to the admission route just to shake up my adversary.

JUSTICE FREEDMAN: Under New York law, I would probably say it's not an admission because he doesn't have speaking authority, but maybe it's time to change the law on that too. What do you think? Under federal law, Bernice, would it come in?

MS. LEBER: As the plaintiff or the lab trying to either implicate the general contractor or exonerate the lab from its responsibility and point the finger at the concrete company, Ralph's notes are arguably a business record. Taken as a whole, Ralph made them at or near the time of conducting a regular business activity. He was a person with knowledge and he was seeking to make these reports of the payoffs that he was getting. It is also a business record because Ralph, don't forget, was acting as an agent of Sid. And Sid, as the field representative of the concrete company, I would argue, was much more of an authoritative person with knowledge who also was involved in nefarious doings.

In the federal courts, in *U.S. v. Headman*, 630 F.2d 1184, a personal diary kept by an inspector who was getting payoffs by an owner of a building seeking to get permits in Chicago was admitted. The court reasoned that making these payoffs was a business and it was regularly conducted. The court said that when you look for indicia of trustworthiness you look at four criteria: the source of the information, the method, the circumstance of preparing the entries, and whether a person who had made the entries was available to testify.

In this case, we know all the bad guys are here and they can be subject to cross-examination. For that reason I would argue they are business records.

JUSTICE FREEDMAN: Professor Farrell, you disagree?

PROFESSOR FARRELL: Oh, no. God, no. Because the thing you have to focus on, I think, is sort of the last sentence both of 4518(a) and 803(6) of the Federal Rules of Evidence.

Both say essentially the same thing, that the term "business," as used in the paragraph, includes business, institution, association, profession, occupation and calling of every kind whether or not conducted for profit. I tell my students that when I reach this point in the course, look down in front of you. There are business records right in front of you. They're notes. They are in the student business, the regularly conducted activity of being a student. They have been in school most of their lives and these records are an ordinary part of the regularly conducted activity. It's not just business business. It can be monkey business like old Ralphie. It can be shylocking. It can be illegally conducted activities. That's why I think Ralph's record would be admissible.

JUSTICE FREEDMAN: What about Max's records? Suppose somebody wants to put Max's records in and, just briefly, he's made records based on what Terry told him. Do they come in?

JUSTICE FREEDMAN: What's wrong with those records?

MS. LEBER: In federal court you would have a little difficulty. The contractor's position would be that while Max's Palm Pilot itself would be admissible, the entries are based on hearsay which presents a double hearsay question.

JUSTICE FREEDMAN: If there is somebody who had the duty to report to him, you don't have *Johnson v. Lutz* exactly.

MS. LEBER: In federal court, you have to prove both layers of hearsay are somehow admissible. In that context, in *Potamkin*, which is a federal court case, the plaintiff, the insurance company, was not able to introduce its own records to show these business expenses because the underlying data, which was in a computer record, could not be found. Similarly here, you could argue that because these records are simply oral and nowhere to be found, it is unreliable and inherently untrustworthy.

MS. WACHTLER: Just one further remark on Max's notes. If you need to object on a business record exception, the best thing to do, because of the more relaxed standard or application of the rules in state court, is argue that the business records don't fall into those three definite criteria that you must show in order for you to even reach the threshold of reliability or unreliability. I try to stick to those, try to get around those, and say those three criteria were not met, as the *Kennedy* court did.

MS. LEBER: We commented on the possible attempts to limit the admission of evidence solely to show that Max had a reasonable basis for acting the way he did and permitting the concrete company and the building to go up. But we also wanted to mention that it could qualify as a party admission.

MS. FRIEDMAN ROSENTHAL: We have the problem here that Terry was an employee. Certainly if Max was individually sued, there is no question. I think that it would come in to exonerate him.

APPENDIX A

Jerry Built Construction Company was the general contractor for the Very Big Building Inc. headquarters building in Brooklyn. The building was to be constructed of reinforced concrete, and daily certification of the quality of the concrete poured that day was necessary before work on the next level could begin.

The concrete was supplied by Best Stressed Concrete Co. A sample of each mixer full of concrete was supposed to be taken and sent to Concrete Testing Labs. Terry, an employee of Jerry Built was responsible for collecting the samples, delivering them to the lab and advising Max, the construction supervisor, of the test results. Based on Terry's report, the construction supervisor would determine when and whether the work could proceed to the next level.

Terry decided on a scheme to save himself a lot of trouble and insure that concrete samples would meet the specified composition and quality. Terry arranged to have special samples delivered directly to him by Sid, the Best Stressed field representative. This arrangement saved Terry and Sid a good deal of time and effort, savings that Sid paid Terry for being so cooperative. Ralph, a Best Stressed laborer, brought the cash payments to Terry. Ralph received a gratuity to assure his silence.

The Very Big Building building reached the seventh floor on Friday, November 5, 2004. Over the weekend the building collapsed. Building engineers quickly discerned the cause—the concrete used to make the fourth floor and the columns supporting the fifth floor was well below the quality specified for the job.

The finger-pointing began immediately. Jerry Built relied on the lab reports to show its freedom from fault. The lab relied on its records showing that all samples delivered by Terry had passed inspection. Best Stressed relied on Max's report that recited how Terry took samples from each and every truckload of concrete delivered for the work on the fourth floor and columns (Max has identified Terry as the source of that information).

Ralph has come forward with his tale of the arrangement between Terry and Sid, and, to stave off indictment for other crimes, has agreed to cooperate.

Very Big Building has sued Best Stressed, Concrete Testing Labs, and Jerry Built for breach of contract and negligence. All defendants have raised comparative fault as a defense, and each defendant has cross-claimed against the others.

According to his own testimony in pretrial depositions, Ralph supplemented his wages as a laborer in several ways, all questionable, most unlawful. His efforts on behalf of Sid and Terry were recorded by Ralph, who showed unanticipated meticulousness in keeping track of his nefarious doings. Ralph told how he would write down each event on whatever medium was available—old envelopes, napkins, scraps of paper, matchbook covers, etc. At the end of each day Ralph would enter on his Palm Pilot each usurious loan made, favor done, bet taken, debt collected, and bill paid or received (including the payer or payee as with Sid and Terry). Once the entries had been made, Ralph destroyed the "original" note. (No spoliation sanction was granted.) The information on the Palm Pilot is available.

Committee Report—What Should Be the Precedential Effect of "Unpublished" Decisions?

Summary

"Unpublished" opinions by the United States Courts of Appeals continue to proliferate. For the year ending September 30, 2000, almost 80% of U.S. Courts of Appeals' decisions on the merits were "unpublished." Because of various local Court of Appeals rules, "unpublished" decisions of most of those Courts cannot be relied upon as precedent or even cited by advocates or other judges, except in very limited circumstances. Those decisions are, in effect, virtually a nullity except for the parties to the case.

The Section opposes the local rules of the federal Courts of Appeals to the extent they prohibit citation to unpublished opinions. The Section recommends that the local rules of the Courts of Appeals, at a minimum, permit unpublished opinions to be given whatever weight the court to which they are cited chooses to give them. *See* 11th Circuit Local Rule 36-2 (unpublished decisions "may be cited as persuasive authority"). The Section does not object to the local rules containing prohibitions, such as those existing today, against unpublished decisions being treated as binding precedent.

1. Local Federal Court of Appeals Rules Concerning Unpublished Decisions

Each of the United States Courts of Appeals has a local rule authorizing "unpublished" decisions and restricting in one or more ways the use that can be made of such decisions.[1] Many of these local rules expressly declare that unpublished decisions of the court are not precedent.[2] Most of them also limit the circumstances in which such decisions may be cited at all. Generally, unpublished decisions may be cited only to support a claim of res judicata, collateral estoppel or law of the case, may be cited only in a related case, or, as in the 10th Circuit, may be cited only if the decision relates to a material issue not addressed in a published decision.[3]

Section 0.23 of the Local Rules of the Second Circuit provides that in those cases in which the panel decision is unanimous "and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order." If the disposition is by summary order, the court is permitted to attach a brief written statement to the order. "Since these statements [oral dispositions in open court and written statements attached to summary orders] do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court."

It is often not clear whether a local rule purports to apply to the citation of the Court's "unpublished" decisions only in papers submitted in that appellate court and in district courts within that circuit or also purports to apply to the citation of the Court's "unpublished" decisions in other courts, as well. *Compare* 11th Circuit Local Rule 36-2, 10th Circuit Local Rule 36.3 and 7th Circuit Local Rule 53(b)(2)(iv) with 9th Circuit Local Rule 36-3, 4th Circuit Local Rule 36(c), 2nd Circuit Local Rule ' 0.23 and 1st Circuit Local Rule 36(b)(2)(F).

To the extent that some of the local rules prescribe objective criteria as to when a decision should or must be published, they generally require that one or more of the following situations exist: the decision (1) establishes, alters, modifies or explains a rule of law; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; (4) contains an historical review of the legal rule that is not duplicative; (5) resolves a conflict between panels of the Court or creates a conflict with a decision in another Circuit; (6) contains a dissent or a concurrence; or (7) reverses the decision appealed from or affirms it on different grounds. *See*, *e.g.*, 4th Circuit Local Rule 36(a); 5th Circuit Local Rule 47.5.1; 7th Circuit Local Rule 53(c)(1); 9th Circuit Local Rule 36-2.

2. The Pervasive Use of "Unpublished" Decisions

The use of "unpublished" decisions by the U.S. Courts of Appeals is pervasive. In the years ending September 30, 2000 and September 30, 1999, 79.8% and 78.1%, respectively, of the U.S. Courts of Appeals' dispositions of cases on the merits consisted of "unpublished" decisions, excluding decisions by the Federal Circuit. *See*, Administrative Office of the U.S. Courts, *2000 Judicial Business of the United States Courts*, Table S-3 (2001); Administrative Office of the U.S. Courts, *1999 Judicial Business of the United States Courts*, Table S-3 (2000). The extent to which "unpublished" decisions are utilized varies markedly among the Circuits. *Id.* For the year ending September 30, 2000, the usage ranged from a low of 56.5% in the Seventh Circuit to a high of 90.5% in the Fourth Circuit, with 77.5% of the Second Circuit's decisions on the merits being "unpublished."

3. The Rules Have Been the Subject of Considerable Debate

The subject of "unpublished" decisions and the concomitant restrictions on their use as precedent or their citation has been the subject of considerable written debate, including books and articles by judges of the U.S. Courts of Appeals. *See*, *e.g.*, D. Boggs & B. Brooks, *Unpublished Opinions and The Nature of Precedent*, 4 Green Bag 2d 17 (Autumn 2000) ("*Boggs & Brooks*")

(Judge Danny J. Boggs sits on the 6th Circuit); R. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999) (Judge Arnold sits on the 8th Circuit); R. Posner, *The Federal Courts: Challenge and Reform* (1996) (Judge Posner sits on the 7th Circuit); A. Kozinski & S. Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, 20 California Lawyer 43 (June 2000) (the authors sit on the 9th Circuit); and B. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L. J. 177 (1999) ("*Martin*") (Judge Martin sits on the 6th Circuit).

There have also been two recent Court of Appeals decisions addressing both the constitutionality and the wisdom of such rules. *Compare Anastasoff v. United States*, 223 F.3d 898 (8th Cir.) (Arnold, J.) (holding the 8th Circuit's Local Rule unconstitutional), *vacated on rehearing en banc as moot*, 235 F. 3d 1054 (8th Cir. 2000), *with Hart v. Massanari*, 266 F.3d 1155 (9th Cir. Sept. 2001) (Kozinski, J.) (upholding the constitutionality of the 9th Circuit's Local Rule and criticizing *Anastasoff*); *see also National Classification Comm. v. United States*, 765 F.2d 164, 172 (D.C. Cir. 1985) (separate statement by Judge Wald criticizing the overuse of unpublished opinions).

Judges Kozinski, Reinhardt and Martin favor the use of "unpublished" decisions and, in appropriate circumstances, limitations on their use. In *Hart*, Circuit Judges Kozinski and Richard C. Tallman also found such rules to be constitutional. Judge Arnold opposes such limitations as a matter of policy and in *Anastasoff* also held them to be unconstitutional (Circuit Judge Gerald W. Heaney was on the panel in *Anastasoff*). *Anastasoff* and *Hart* are discussed below. Judge Boggs supports the use of "unpublished" decisions, in appropriate circumstances, but seems to oppose prohibitions on their citation. Instead, Judge Boggs favors allowing litigants to cite an "unpublished" decision for whatever persuasive value it may have.

Academicians and district court judges have tended to be critical of the restrictions on citing "unpublished" decisions. *See*, *e.g.*, W. Reynolds & W. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167 (1978) ("*Reynolds & Richman*"); M. Dragich, *Will the Federal Courts of Appeal Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 Am. U. L. Rev. 757 (1995) ("*Dragich*"); K. Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeal*, 85 Calif. L. Rev. 541 (1997). In *Lloyd v. United States*, 2000 WL 804632, at *4 (E.D.N.Y. May 18, 2000), Judge Glasser tersely stated with regard to the Second Circuit's rule, "I will not discuss the debatable premise of the Summary Order rule. Suffice it to say that I find the views of its critics unassailable (citations omitted)." *Accord*, *Gomez v. Kaplan*, 2000 WL 1458804, *9 (S.D.N.Y. Sept. 29, 2000) (Haight, J).

At its August 2001 meeting, the House of Delegates of the American Bar Association passed a resolution opposing on policy grounds the federal Courts of Appeals' rules prohibiting the citation of unpublished opinions and recommending that the Courts permit citation to relevant unpublished opinions.[4]

4. The Genesis of the Rules

The genesis of the various local rules concerning "unpublished" decisions was a resolution adopted by the Judicial Conference in 1964 "[t]hat judges of the courts of appeal and the district courts authorize publication of only those opinions which are of general precedential value . . . ." *See Reynolds & Richman*, 78 Colum. L. Rev. at 1169 n.17. In 1971, the Federal Judicial Center suggested that publication of opinions be curtailed, and that non-published opinions not be cited. *Reynolds & Richman*, 78 Colum. L. Rev. at 1169–70. In 1972, this report was circulated by the Judicial Conference, which requested that each circuit court devise an opinion publication plan. *Id.* at 1170. Thereafter, the Federal Judicial Center published a Model Rule on publication of judicial opinions. *Id.* at 1171 & n.27. The foregoing resulted in the various local rules in effect today.

5. Arguments In Favor of the Rules

The argument in favor of the rules limiting the citation, or use as precedent, of "unpublished" opinions is inexorably intertwined with the justification for "unpublished" opinions. The principal justification for both is judicial economy and productivity, particularly in light of the increasingly heavy case load of the U.S. Courts of Appeals. *See Martin*, 60 Ohio St. L.J. 177; *Boggs & Brooks*, 4 Green Bag 2d at 19; *National Classification Comm. v. United States*, 765 F.2d at 172 (separate statement by Judge Wald).

Proponents of the rules contend that the case loads of the Courts of Appeals are, and have been for quite some time, much too heavy to permit fully explained written decisions in every case and every decision does not warrant fulsome treatment because of a lack of importance. Judges writing opinions will not expend the same amount of time and effort on decisions that, with limited exceptions, cannot be cited or used as precedent as they will spend on decisions they know can be cited by parties in other cases and relied upon as precedent. However, if citation to unpublished decisions were permitted, those judges might not be satisfied with such limited exposition and the timesaving would thus be lost.

The judicial economy justification was explained by Judge Kozinski in *Hart* as follows:

> "[T]he judicial time and effort essential for the development of an opinion published for posterity and widely distrib-

> uted is necessarily greater than that sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision." Federal Judicial Center, *Standards for Publication of Judicial Opinions* 3 (1973). An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision. Deciding a large portion of our cases in this fashion frees us to spend the requisite time drafting precedential opinions in the remaining cases.

266 F.3d at 1178, *see also*, *id*., at 1180.

Proponents say that the development of the law, and the doctrines of *stare decisis* and binding precedent, are not impeded when redundant, straightforward or unimportant decisions are not "published" and cannot be cited as precedent or even as persuasive authority. *See Hart*, 266 F.3d at 1180. (For a summary discussion of *stare decisis* and binding precedent, *see Dragich*, 44 Am. U. L. Rev. at 768–74.) The proponents do not take issue with the notion that published opinions are the "heart of the common law system," the authoritative sources of law, and essential to the functioning of the doctrine of *stare decisis*. *See Dragich*, 44 Am. U. L. Rev. at 758, 765–75. Rather, they say that many appellate court decisions do not serve that function because of their lack of significance.

There seems to be little debate that the use of "unpublished" opinions, at least as long as there are limitations on the use that can be made of such decisions, results in a more rapid output of decisions by the federal appellate courts than would otherwise be the case. Whether judicial efficiency is alone a sufficient justification for the limitations on the use of such decisions is a matter of debate. Generally, the proponents argue that "unpublished" opinions promote judicial efficiency while not having any adverse effect on the principles of *stare decisis* and precedent, and do not constitute a hidden body of case law. *See Martin*, 60 Ohio St. L. J. 177.

The argument that there are types of decisions that do not call for full publication and need not be freely citable is based on the belief that court decisions fall into two distinct categories. The first category comprises decisions whose function is limited to seeing that the appealed case is decided correctly—dispose of the litigation, correct district court and administrative agency errors, and explain the result to the parties and the decision maker below. The second category comprises decisions that also serve to establish or clarify the law itself. These latter decisions, in addition to seeing that the appealed case is correctly decided, also establish new law, explain changes in and interpretations of existing law, criticize existing legal principles, or add to existing precedent on a principle that is not yet well-established or a subject of disagreement. *See* Leflar, *Sources of Judge-Made Law*, 24 Okla. L. Rev. 319 (1971).

Those who favor "unpublished" opinions and no-citation/no-precedent rules argue that opinions falling within the first category have value only to the parties in the case and the decision maker below, but have no value to the legal community or the public in general. Because such opinions do not serve a general purpose, there is no need for full publication and unlimited use. *See Martin*, 60 Ohio St. L. J. 177. In addition, the goal of achieving enhanced judicial economy through the use of "unpublished" decisions would be frustrated if citation of "unpublished" decisions were permitted because judges would feel compelled to expend more time and effort in writing decisions that are supposedly of no value other than to the parties and the decision maker in the case. *See Hart*, 266 F.3d at 1178.

A second principal argument in favor of the rules is that citation of "unpublished" opinions would unfairly advantage certain litigants over others because such decisions would not be generally available. The unfairness argument is based on the belief that litigants will have different degrees of access to "unpublished" opinions, giving litigants who have greater access to "unpublished" decisions an advantage over litigants whose access is more limited. Such an argument now appears quite dubious at best given the ready availability of "unpublished" decisions on-line.

A third principal argument is articulated by Judge Kozinski in *Hart* as follows:

> Adding endlessly to the body of precedent—especially binding precedent—can lead to confusion and unnecessary conflict. Judges have a responsibility to keep the body of law "cohesive and understandable, and not muddy the waters with a needless torrent of published opinions." Martin, note 36 *supra* [Ohio St. L. J.] 192 . . . [P]ublishing redundant opinions will multiply significantly the number of inadvertent and unnecessary conflicts, because different opinion writers may use slightly different language to express the same idea.

266 F.3d at 1179. Allowing "unpublished" opinions to be cited would, so the argument goes, create the same risk of confusion and conflict as mandating that all decisions be published.

6. Arguments Against the Rules

Opponents of the rules limiting the use of "unpublished" decisions challenge the notion that decisions readily fall into one of two categories discussed above. Opponents contend that, even if there are decisions that principally serve to settle disputes between the parties, that does not mean they have absolutely no value to the legal community at large. For example, the extent to which a legal principle is well-settled as the result of a multitude of decisions establishing that principle makes it much more difficult to overturn the principle. At the same time, for better or worse, it helps to eliminate doubt as to the continuing validity of a particular legal principle. In addition, the varying fact patterns to which a legal principle is or is not applicable in itself may be of significance. Professor Dragich also argues that fully reasoned decisions lend legitimacy to the judicial process and promote public confidence in the judicial system. *Dragich*, 44 Am. U. L. Rev. at 775–76.

Further, "unpublished" decisions have by no means been limited to what could be considered run-of-the-mill, insignificant decisions. *See* S. Katsh & A. Chachkes, *Outside Counsel: Examining the Constitutionality of No-Citation Rules*, New York Law Journal, April 2, 2001, p. 1, col. 1 (hereafter "*Katsch & Chachkes"*). "Unpublished" opinions have included cases of first impression, cases with concurrences and dissents, and cases reversing the decision being reviewed. *Id*. That conclusion is supported by a statistical study carried out by Professors Merritt and Brudney. *See* D. Merritt and J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71 (2001) (*"Merritt & Brudney")*. Professors Merritt and Brudney compiled a database encompassing all appellate cases decided between October 1986 and November 1993 which resolved unfair labor practice claims under the NLRA. 54 Vand. L. Rev. at 75. They found that 7.15% of "unpublished" Courts of Appeals opinions reversed the NLRB, while 2.04% included a concurrence or dissent. *Id.* at 113. They also found that the Circuits vary widely in the percentage of opinions they publish. *Id.* at 119. Perhaps most telling is that unpublished decisions have been accepted for review and been reversed by the United States Supreme Court. *See, e.g.*, *Johnson v. United States*, 529 U.S. 694 (2000), *reversing* 181 F.3d 105 (6th Cir. 1999); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), *reversing* 993 F.2d 883 (9th Cir. 1993); and the other cases cited in *Boggs & Brooks*, 4 Green Bag 2d at 20–21 n.17.

In order for the use of "unpublished" decisions to effect significant cost savings in terms of expenditure of judicial time and effort, it is necessary for the panel rendering the decision to decide before the decision is written whether that decision will be published. Obviously, if that decision is not made in advance, the argument that judges expend greater time and effort on decisions that will be published than on decisions that will not be published does not hold up. However, those in favor of "unpublished" opinions and limitations on their use assume that judges can accurately predict early on in the process whether a decision will merit publication. Whether that is a valid assumption in many cases is certainly problematic.

Further, it appears that the adoption of a rule allowing citation to "unpublished" opinions for what they are worth will not necessarily adversely affect judicial efficiency. The 11th Circuit already allows citation to "unpublished" decisions as persuasive authority. 11th Circuit Local Rule 36-2. Yet, the 11th Circuit's percentage of unpublished decisions is among the highest—86.3% in 1999 and 88.2% in 2000—indicating that the possibility of citation does not necessarily diminish the use of unpublished decisions. And almost 88% of the Eleventh Circuit's unpublished decisions in 2000 and about 84% in 1999 contained a discussion of the judicial reasons for the decision, thus indicating that such a rule will not inevitably lead to a vast increase in summary affirmances. *See*, Administrative Office of the U.S. Courts, *2000 Judicial Business of the United States Courts*, Table S-3 (2001); Administrative Office of the U.S. Courts, *1999 Judicial Business of the United States Courts*, Table S-3 (2000). The Section, nonetheless, recognizes that if its position is adopted, the Courts of Appeals may increase their use of summary affirmances, with no opinion at all.[5]

Nor has the citability of Eleventh Circuit unpublished opinions seemingly impaired judicial economy in that Circuit. In the twelve months ending September 30, 2000, the median time in the Eleventh Circuit between hearing an appeal and final disposition was 1.9 months compared to the national average median time of 2.0 months. And seven Circuits had longer disposition times, ranging from 2.3 to 3.0 months. *See* Administrative Office of the U.S. Courts, *2000 Judicial Business of the United States Courts*, Table B-4 (2001).

As to the argument that certain litigants have greater access to "unpublished" decisions than others, that should be accorded no weight given the ready availability of "unpublished" decisions on WESTLAW, LEXIS, Court of Appeals and law school Web sites, and the like. In *Gomez v. Kaplan*, 2000 WL 1458804, at * 9 (S.D.N.Y. Sept. 29, 2000), Judge Haight addressed this argument when he criticized, but felt bound to follow, the Second Circuit's local rule on "unpublished" opinions:

> The concept of an unpublished opinion or disposition has in today's world of electronic libraries and databases become nearly obsolete. The reason, according to the rule, that dispositions in open courts by summary order are

> not to be cited or granted any precedential authority is because "these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties." (Emphasis added.) However, these *soidisant* informal, unreported and unavailable rulings are in fact readily available to anyone with access to WESTLAW or LEXIS-NEXIS, which have become necessary complements to, if not replacements for, the traditional Federal Reporters library . . . Given our technological advances, this rule would appear to have outlived its stated purpose. While I understand the potential problem caused by allowing parties or courts to cite unpublished opinions, it is difficult to understand why opinions, frequently of considerable substance, should be characterized as "unpublished" or "unreported" merely because they are not included in the printed reporters.

Id.

7. The Constitutional Implications of Such Rules

In *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *vacated on rehearing en banc as moot*, 235 F.3d 1054 (8th Cir. 2000), the panel decision of the Eighth Circuit held unconstitutional that portion of Eighth Circuit Local Rule 28A which declared that "unpublished" opinions are not precedent and parties generally should not cite them."[6] The panel decision, authored by Judge Arnold, held that this portion of Local Rule 28A violated Article III of the Constitution "because it purports to confer on the Federal Courts a power that goes beyond the judicial." 223 F.3d at 899. The crux of Judge Arnold's decision, which details his view of the history and significance of the doctrine of precedent, was that "[t]he Framers of the Constitution considered these principles [forming the doctrine of precedent] to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution. Accordingly, we conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional." 223 F.3d at 900.

According to Judge Arnold,

> The doctrine of precedent was well-established by the time the Framers gathered in Philadelphia . . . . To the jurists of the late eighteenth century (and thus by and large to the Framers), the doctrine seemed not just well-established but an immemorial custom, the way judging had always been carried out, part of the course of the law.
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> * * *
>
> In sum, the doctrine of precedent was not merely well-established; it was the historic method of judicial decision-making.

223 F.rd at 900; *see also id*. at 901. In reaching that conclusion, Judge Arnold relied upon Blackstone, Kent and Coke and the writings of Hamilton and Madison, among other sources. *Id*. at 902.

While acknowledging that there was limited publication of judicial decisions at the time the Constitution was adopted, *id*. at 903, Judge Arnold relied upon his analysis of the Framers' understanding of precedent to conclude that "the Framers did not regard this absence of a reporting system as an impediment to the precedential authority of a judicial decision. . . . [J]udges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum." *Id*. at 903.

Thus, Judge Arnold concluded:

> To summarize, in the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself . . . . The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III.

Id. at 903–04.

Judge Arnold only briefly addressed the purported rationale for the Local Rule. According to Judge Arnold, "[t]he question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not." 223 F.3d at 904. He did note, however, that as far as the court was aware, "every opinion and every order of any court in this country, at least of any Appellate Court, is available to the public. You may have to walk into a clerk's office and pay a per-page fee, but you can get the opin-

ion if you want it." *Id.* Of course, unless you know the "unpublished opinion" exists, you cannot just go and get it. On the other hand, there is always the ready availability of "unpublished" opinions on WESTLAW and LEXIS and a variety of Web sites.

Judge Arnold gave short shrift to the argument that the rule served a salient purpose because the court's case load was so high that it was unrealistic to ascribe precedential value to every decision. "We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case." 223 F.3d at 904.

The panel decision in *Anastasoff* was subsequently vacated as moot in an *en banc* decision, also written by Judge Arnold. The *en banc* decision held that the underlying dispute between the taxpayer and the Government was moot and therefore the panel decision, including the portion holding Local Rule 28(A)(i) unconstitutional, was vacated. As a result, the "constitutionality of that portion of Rule 28(A)(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit." 235 F.3d 1054, 1056 (8th Cir. 2000). Presumably, given another opportunity, Judge Arnold will again find the Eighth Circuit's Local Rule unconstitutional.

The portion of the panel decision in *Anastasoff* holding Local Rule 28(A)(i) unconstitutional was criticized in a case note in the *Harvard Law Review*: "[t]he Eighth Circuit's conclusion regarding the bounds of Article III finds little support in either history or practice." Recent Cases, *Constitutional Law—Article III Judicial Power—Eighth Circuit Holds That Unpublished Opinions Must Be Accorded Precedential Effect*, 114 Harv. L. Rev. 940, 943 (Jan. 2001). According to the article, there is little evidence that the drafters of the Constitution relied on the theory of precedent in drafting Article III and it is unclear that the Framers would have opposed "a departure from precedent in the manner authorized by Rule 28(A)(i)." *Id*. In addition, it is claimed that the "Eighth Circuit's conception of the proper role of precedent does not comport with judicial practice." *Id*. at 944. The case note, however, concludes that "policy considerations as a whole, weigh against the Circuit rules." *Id*. at 946.

More recently, the Ninth Circuit Court of Appeals, in an opinion authored by Judge Kozinski, held in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) that the Ninth Circuit's local rule generally prohibiting citation to unpublished decisions did not violate Article III of the Constitution. The Ninth Circuit expressly disagreed with the conclusion and reasoning of Judge Arnold in *Anastasoff*. According to Judge Kozinski, "*Anastasoff* may be the first case in the history of the Republic to hold that the phrase 'judicial Power' [in Article III, § l.1 of the U.S. Constitution] encompasses a specific command that limits the power of the federal courts." *Id.* at 1160. "[W]e question whether the 'judicial Power' clause contains any limitation at all, separate from the specific limitations of Article III and other parts of the Constitution"; "the term 'judicial Power' in Article III is more likely descriptive than prescriptive." *Id.* at 1161. In addition, the "Constitution does not contain an express prohibition against issuing nonprecedential opinions because the Framers would have seen nothing wrong with the practice." *Id.* at 1163.

Citing extensively to historical and secondary sources, including Blackstone and Coke, Judge Kozinski explained that prior to the Constitution, common law judges in England did not "make" law, but instead "found" the law with the help of earlier cases that had considered similar matters. "An opinion was evidence of what the law is, but it was not an independent source of law" *id.* at *4; "neither judges nor lawyers understood precedent to be binding in *Anastasoff*'s strict sense." *Id.* at 1163–64. "Common law judges looked to earlier cases only as examples of policy or practice, and a single case was generally not binding authority." *Id.* at 1165.

Judge Kozinski explained that there were two impediments to establishing a system of strict binding precedent: the absence of a distinct hierarchy of courts, which did not emerge in England or in the United States until the 19th century, and the absence of reliable reports of cases, which also did not emerge in England or the United States until the 19th century. *Id.* at 1164.[7] "The modern concept of binding precedent . . . came about only gradually over the nineteenth and early twentieth centuries." *Id.* at 2268.

Judge Kozinski concluded that although he agreed with *Anastasoff* that "the principle of precedent was well established in the common law courts by the time Article III of the Constitution was written," he did not agree that such a principle was "known and applied in the strict sense in which we apply binding authority today." *Id*. at 1174. Then, "a single case was not sufficient to establish a particular rule of law . . . [and] the concept of binding case precedent . . . was used exceedingly sparingly. For the most part, common law courts felt free to depart from precedent where they considered the earlier-adopted rule to be no longer workable or appropriate." *Id.* at 1174–75. "Case precedent at common law thus resembled much more what we call persuasive authority than the binding authority which is

the backbone of much of the federal judicial system today." *Id.* at 1175.

The Ninth Circuit concluded that "the principle of strict binding authority is itself not constitutional, but rather a matter of judicial policy." *Id.* at 1175.[8]

Judge Kozinski also made several points regarding the policy justification for the rule. First, that few, if any, appellate courts have the resources to write precedential opinions in every case that they decide. *Id*. at 1177; *but cf*. 11th Circuit Local Rule 36-2 permitting unpublished opinions to be cited as persuasive authority. Second, the fact that a case is decided without an opinion that can be cited does not mean that the case has not been fully considered and analyzed. Rather, it means that "the disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases." *Id*. at 1178. Unpublished decisions are not, however, as unintelligible to non-parties as Judge Kozinski suggests, nor do they state applicable legal principles in ways that invariably make the case unsuitable for future citation. In any event, these appear to be matters that the court in a later case can weigh in deciding how much weight, if any, to give to an unpublished decision.

Third, if parties are permitted to cite to "unpublished" decisions, much, if not all, of the judicial timesaving would be lost because judges would feel compelled to spend considerably more time writing more detailed decisions. *Id*. at 1178. Judge Kozinski posits that the quality of published opinions would, at the same time, diminish because judges would be able to devote less time to each opinion. *Id*. at 1178. Finally, Judge Kozinski postulates that because "nonprecedential disposition generally involve[s] facts that are materially indistinguishable from those of prior published opinions," writing yet another opinion involving the same legal principles, based on materially indistinguishable facts, "will, at best, clutter up the law books and databases with redundant and thus unhelpful authority," or even worse, lead to confusion and unnecessary conflict. *Id*. at 1179.

The Recommendation of the Section

Assuming that the local Courts of Appeals rules declaring that unpublished opinions are not precedent and may not be cited do not run afoul of Article III of the Constitution, and the Section believes with the Ninth Circuit that such rules do not violate Article III, the issue remains whether such rules are sound as a matter of policy. The Section believes and recommends that as a matter of policy, the local rules of the Courts of Appeals should permit decisions designated as "unpublished" to be cited for whatever they are worth, leaving it to the decision maker to determine the weight to be given to such decisions, given their "unpublished" or similar designation, just as such courts decide now whether cited cases are binding, persuasive, distinguishable or irrelevant. This accords with the Local Rule of the Eleventh Circuit, which provides that unpublished decisions "may be cited as persuasive authority." 11th Circuit Local Rule 36-2.

The Section is not unmindful of the workload of Courts of Appeals judges and accepts that the rules in question result in a more rapid output of decisions. However, the Section finds the policy arguments against the rules to be more persuasive than those in favor of the rules.

First, regardless of the situation when such rules were first adopted, there is today no such thing as an "unpublished" decision because of widespread availability via LEXIS, WESTLAW, court and law school Web sites and various other online services. As a result, "unpublished" decisions are available for citation outside the Circuit where the decision was rendered, unless the local rules are construed or changed to preclude citation in any court in the United States, federal or state. In addition, the easy availability of such decisions negates any claim of unfairness based on the notion that some attorneys will have greater access to unpublished decisions than others.

More important, the fundamental premise underlying the rules, that unpublished decisions are limited to mundane, run-of-the-mill cases, has proven to be untrue. It is also not clear that prior to writing a decision, a panel can be certain that the decision will be of so little value, other than to the parties to the case, that it should be designated as "unpublished." Yet, unless that is done before the opinion is written, the benefit of judicial economy will be lost. Indeed, it is questionable that an opinion of a federal Court of Appeals will necessarily be so devoid of any significance that citation to it should be prohibited. In addition, the use of an uncitable opinion may well result, at least in certain cases, in the court giving less careful and thorough consideration and analysis to the issues in the case, regardless of a contrary intention, than if the decision were freely citable by jurists and lawyers in other cases. Moreover, subsequent courts are being deprived of the use of relevant, well-reasoned "unpublished" decisions.

The Section believes that designating a decision as "unpublished" will signal a court in another case to be particularly circumspect in deciding what weight to accord the "unpublished" decision and that this strikes the proper balance. Thus, the rule proposed by the Section would eliminate, to some extent, the anomalous situation that exists now where there are two opposite panel decisions in the same Circuit on the same issue, the first unpublished and uncitable and the second published. Not only is the second panel not to be told of the

existence of the first panel's decision, but it is also free to ignore the first panel's decision if it learns of it (if the first decision had been published, the second panel would be obliged to follow it). Moreover, it is the second panel's decision that becomes the rule in the Circuit and the first panel's decision is a nullity as far as other cases in the Circuit are concerned.

Finally, the experience of the Eleventh Circuit, where unpublished opinions can be cited as persuasive authority (11th Circuit Local Rule 36-2), shows that permitting unpublished opinions to be cited for what they are worth will not necessarily have an adverse impact on judicial efficiency or lead to a significant increase in summary affirmances. *See* above.

Endnotes

1. *See* 1st Circuit Local Rule 36; 2nd Circuit Local Rule § 0.23 (summary dispositions in open court and summary orders); 3rd Circuit Internal Operating Procedures IOP 5.1-5.4 & 5.8; 4th Circuit Local Rule 36; 5th Circuit Local Rule 47.5; 6th Circuit Local Rule 206 and IOP 206; 7th Circuit Local Rule 53; 8th Circuit Local Rule 28A(i); 9th Circuit Local Rule 36-3; 10th Circuit Local Rule 36.3; 11th Circuit Local Rule 36-2; D.C. Circuit Handbook of Practices & Internal Procedures, Part XII.A ("D.C. Cir. Practices & Procedures"); and Federal Circuit IOP 9 & 10. A copy of each of these rules is in the Appendix. An examination of statutes or rules regarding unpublished decisions in state courts is beyond the scope of this report.
2. *See* 3rd Circuit IOP 5.3; 7th Circuit Local Rule 53; 8th Cir. Local Rule 28A(i); 9th Circuit Local Rule 36-3, except as to res judicata, collateral estoppel and law of the case; 10th Circuit Local Rule 36.3; 11th Circuit Local Rule 36-2; and D.C. Cir. Practices & Procedures, Part XII.A. The Federal Circuit provides for "nonprecedential" decisions, which may not be cited as precedent. IOP 9.9. In the Fifth Circuit, unpublished opinions issued before January 1, 1996 are precedent; those issued on or after that date are not, except as to res judicata, collateral estoppel, law of the case and in certain other limited circumstances. 5th Cir. Local Rules 47.5.3 & 47.5.4.
3. *See* 1st Circuit Local Rule 36(b)(2)(F) (unpublished opinions may only be cited in related cases); 2nd Circuit Local Rule § 0.23 (summary dispositions from the bench and summary orders, including any written statement accompanying the summary order, shall not be cited in unrelated cases); 4th Circuit Local Rule 36(c) (citation of unpublished dispositions of the court to the court or district courts within the Circuit is disfavored, except to establish res judicata, estoppel or law of the case). In the Fifth Circuit, unpublished opinions issued before January 1, 1996 "should normally be cited only when the doctrine of res judicata, estoppel or law of the case is applicable, and under certain other limited exceptions. Unpublished opinions issued on or after that date are not precedent except as to res judicata, collateral estopped, law of the case, double jeopardy, sanctionable conduct and certain other limited circumstances, but may be cited if considered persuasive." 5th Cir. Local Rules 47.5.3 & 47.5.4. In the Seventh and Ninth Circuits, unpublished opinions shall not be cited except to support a claim of res judicata, estoppel or law of the case. 7th Cir. Local Rule 53 (b)(2)(iv); 9th Cir. Local Rule 36-3(1)&(2). In the Eighth Circuit unpublished opinions are not precedent and parties generally should not cite them except as to res judicata, collateral estoppel or law of the case. They may, however, be cited if persuasive on a material issue as to which no published opinion would serve as well. 8th Cir. Local Rule 28A(i). The rule in the Ninth Circuit is similar to that in the Seventh Circuit. In the Tenth Circuit, citation to unpublished opinions is disfavored (except for res judicata, estoppel or law of the case), but they may be cited if persuasive on a material issue not addressed in a published opinion. 10th Cir. Local Rule 36.3. The Eleventh Circuit permits unpublished opinions to be cited as persuasive authority. Local Rule 36.2. In the D.C. Circuit, an unpublished decision may be invoked for its preclusive effect. D.C. Cir. Practices & Procedures, Part XII.A. In the Federal Circuit, nonprecedential opinions and orders shall not be cited as precedent except in relation to res judicata, estoppel or law of the case. IOP 9.9.
4. The resolution was recommended by the ABA's Section of Litigation, Criminal Justice Section, Tort and Insurance Practice Section and Senior Lawyers Division.
5. As to the precedential value of summary dispositions, the courts themselves apparently do not agree. *See Dragich*, 44 Am. U. L. Rev. at 792–93.
6. Local Rule 28A(i) provides, in pertinent part:

   > Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well . . . .

7. "For centuries, the most important sources of law were not judicial opinions themselves, but treatises that restated the law, such as the commentaries of Coke and Blackstone. Because published opinions were relatively few, lawyers and judges relied on commentators' syntheses of decisions rather than the verbatim text of opinions." *Id.* at 1165–66.
8. In *Schmier v. United States Court of Appeals for the Ninth Circuit*, 136 F.Supp.2d 1048 (N.D. Cal. 2001), *aff'd*, 279 F.3d 817 (9th Cir. 2002), plaintiff challenged the validity under Article III of the Ninth Circuit Rules governing unpublished opinions, Local Rules 36-3 and 36-4. The suit was dismissed by the district court for lack of standing because the plaintiff failed to allege a cognizable injury. *Katsh & Chachkes*, N.Y.L.J., April 2, 2001, take the position that no-citation rules violate a litigants First Amendment rights of free speech and freedom to petition the Government, including the right of access to the courts.

November 14, 2001

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Appendix

1st Circuit Rule 36. Opinions

(a) Opinions Generally. The volume of filings is such that the court cannot dispose of each case by opinion. Rather it makes a choice, reasonably accommodated to the particular case, whether to use an order, memorandum and order, or opinion. An opinion is used when the decision calls for more than summary explanation. However, in the interests both of expedition in the particular case, and of saving time and effort in research on the part of future litigants, some opinions are rendered in unpublished form; that is, the opinions are directed to the parties but are not otherwise published in the official West reporter, and may not be cited in unrelated cases. As indicated in Local Rule 36(b), the court's policy, when opinions are used, is to prefer that they be published; but in limited situations, described in Local Rule 36(b), where opinions are likely not to break new legal ground or contribute otherwise to legal development, they are issued in unpublished form.

(b) Publication of Opinions. The Judicial Council of the First Circuit, pursuant to resolution of the Judicial Conference of the United States, hereby adopts the following plan for the publication of opinions of the United States Court of Appeal for the First Circuit.

(1) Statement of Policy. In general, the court thinks it desirable that opinions be published and thus be available for citation. The policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants. (Most opinions dealing with claims for benefits under the Social Security Act, 42 U.S.C. § 205(g), will clearly fall within the exception.)

(2) Manner of Implementation.

(A) As members of a panel prepare for argument, they shall give thought to the appropriate mode of disposition (order, memorandum and order, unpublished opinion, published opinion). At conference the mode of disposition shall be discussed and, if feasible, agreed upon. Any agreement reached may be altered in the light of further research and reflection.

(B) With respect to cases decided by a unanimous panel with a single opinion, if the writer recommends that the opinion not be published, the writer shall so state in the cover letter or memorandum accompanying the draft. After an exchange of views, should any judge remain of the view that the opinion should be published, it must be.

(C) When a panel decides a case with a dissent, or with more than one opinion, the opinion or opinions shall be published unless all the participating judges decide against publication. In any case decided by the court en banc the opinion or opinions shall be published.

(D) Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.

(E) If a District Court opinion in a case has been published, the order of court upon review shall be published even when the court does not publish an opinion.

(F) Unpublished opinions may be cited only in related cases. Only published opinions may be cited otherwise. Unpublished means the opinion is not published in the printed West reporter.

(G) Periodically the court shall conduct a review in an effort to improve its publication policy and implementation.

(c) Copies of Opinions. Unless subject to a standing order which might apply to classes of subscribers, such as law schools, the charge for a copy of each opinion, after one free copy to counsel for each party, is $5.00.

2nd Circuit Rule § 0.23. Dispositions in Open Court or By Summary Order

The demands of an expanding case load require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may

append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

3rd Circuit Internal Operating Procedures Chapter 5. Opinions

IOP 5.1. Forms of Opinions.

There are three forms of opinions: for-publication; not-for-publication; and memorandum opinions. A majority of the panel determines whether the opinion is for-publication or not-for-publication, unless a majority of the active judges of the court decides otherwise.

IOP 5.2. For-publication Opinions.

An opinion, whether signed or per curiam, is published when it has precedential or institutional value.

IOP 5.3. Non-precedential Opinions.

Opinions which appear to have value only to the trial court or the parties are designated by the court as unreported and are not sent by the court for publication. These may include, at the option of the majority of the panel, divided panel opinions affirming the judgment of the trial court, granting or denying a petition for review or enforcement of the order of an administrative agency, divided or unanimous opinions reversing or vacating the judgment of the trial court or remanding to the trial court, and per curiam opinions. Per curiam opinions may be utilized for affirming, reversing, vacating, modifying, setting aside, or remanding the judgment, decree, or order appealed from; for dismissing an appeal; for granting or denying a petition for review; and for granting or refusing enforcement of the order of an administrative agency. An opinion that is designated by the court as unreported shall state "unreported, not precedential" on the face of the opinion.

IOP 5.4. Memorandum Opinions. (formerly 5.1.2)

When the panel unanimously determines to affirm the judgment, order, or decision of the court under review, to dismiss an appeal, or to enforce or deny review of the order or decision of an administrative agency, and determines that a written opinion will have no precedential or institutional value, the author may choose to write a memorandum opinion briefly setting forth the reasons supporting the court's decision as an alternative to preparation of a judgment order. In that circumstance, the authoring judge will also prepare the judgment. Memorandum opinions are not used when the disposition of the court is to reverse or remand to the trial court or to grant review or deny enforcement of an order of an administrative agency or to remand to such an agency.

IOP 5.8. Citations. (formerly 5.6)

Because the court historically has not regarded unreported opinions as precedents that bind the court, as such opinions do not circulate to the full court before filing, the court by tradition does not cite to its unreported opinions as authority.

4th Circuit

Rule 36(a). Publication of Decisions.

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticizes existing law; or

iv. It contains a historical review of a legal rule that is not duplicative; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

The Court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication, and all members of the Court have acknowledged in writing their receipt of the proposed opinion. A judge may file a published opinion without obtaining all acknowledgments only if the opinion has been in circulation for ten days.

Rule 36(b). Unpublished Dispositions.

Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Any individual or institution may receive copies of all published and certain unpublished opinions of the Court by paying an annual subscription fee for this service. In addition, copies of such opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrate judges, clerks of district courts, United States Attorneys, and Federal Public Defenders upon request. All opinions are available on ABBS, the Appellate Bulletin Board System, for a minimum of six months after issuance. The Federal Reporter periodically lists the result in all cases involving unpublished opinions. Copies of any unpublished opinion are retained in the file of the case in the Clerk's Office and a copy may be obtained from the Clerk's Office for $2.00.

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.

Rule 36(c). Citation of Unpublished Dispositions.

In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28(b).

5th Circuit Local Rule 47.5. Publication of Opinions

47.5.1 Criteria for Publication. The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion is published if it:

(a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

(b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;

(c) Explains, criticizes, or reviews the history of existing decisional or enacted law;

(d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another;

(e) Concerns or discusses a factual or legal issue of significant public interest; or

(f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it:

Is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.

47.5.2 Publication Decision. An opinion shall be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication. If any judge of the court or any party so requests the panel shall reconsider its decision not to publish an opinion. The opinion will be published if, upon reconsideration, each member of the panel determines that it meets one or more of the criteria for publication or should be published for any other good reason, and the panel issues an order to publish the opinion.

47.5.3 Unpublished Opinions Issued Before January 1, 1996. Unpublished opinions issued before January 1, 1996, are precedent. However, because every opinion believed to have precedential value is published, such an unpublished

opinion should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). A copy of any unpublished opinion cited in any document being submitted to the court, must be attached to each copy of the document.

47.5.4 Unpublished Opinions Issued On or After January 1, 1996. Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, but if cited in any document being submitted to the court, a copy of the unpublished opinion must be attached to each document. The first page of each unpublished opinion bears the following legend:

> Pursuant to Loc. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Loc. R. 47.5.4.

47.5.5 Definition of "Published." An opinion is considered as "published" for purposes of this rule when the panel deciding the case determines, in accordance with Loc. R. 47.5.2, that the opinion shall be published and the opinion is issued.

6th Circuit

Rule 206. Publication of Decisions

(a) Criteria for Publication.

The following criteria shall be considered by panels in determining whether a decision will be designated for publication in the Federal Reporter:

(1) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;

(2) whether it creates or resolves a conflict or authority either within the circuit or between this circuit and another;

(3) whether it discusses a legal or factual issue of continuing public interest;

(4) whether it is accompanied by a concurring or dissenting opinion;

(5) whether it reverses the decision below, unless:

(A) the reversal is caused by an intervening change in law or fact, or

(B) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;

(6) whether it addresses a lower court or administrative agency decision that has been published; or,

(7) whether it is a decision that has been reviewed by the United States Supreme Court.

(b) Designation for Publication. An opinion or order shall be designated for publication upon the request of any member of the panel.

(c) Published Opinions Binding. Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.

IOP 206. Publication of Decisions—Opinions

(a) Case Conferences and Designation of Writing Judge. At the conclusion of each day's arguments, the panel usually holds a conference concerning the cases submitted that day. A tentative decision is discussed, and opinion writing is assigned by the presiding judge of the panel. A conference report detailing the issues before the panel and giving the tentative views of the panel members is prepared in certain cases and circulated to all judges, for their information.

(b) Processing of Opinions. After the draft opinion has been prepared, the opinion writing judge circulates the proposed opinion to each of the other two judges on the panel for the purpose of obtaining their concurrence, dissent or special concurrence. Under the Court's policy, the review of a judge's proposed opinion is given high priority by the other members of the panel.

(c) Circulation to Non-panel Members. All judges receive copies of any proposed published opinions.

(d) Decisions Not Published. All decisions which are not designated for full-text publication according to the provisions of 6 Cir. R. 206 are listed in table form in the Federal Reporter.

(e) Release of Decisions. All decisions are filed in and released by the clerk's office. The clerk's office is not given advance notice of when a decision will be rendered and, therefore, cannot make this information available to counsel. Copies are sent to all counsel and made available to the public on the date of filing.

(f) Subscriptions to Decisions. Subscriptions for published decisions are available to the general public for an annual fee. Subscribers receive copies of all published decisions issued on a weekly basis. Information on subscription rates can be obtained by contacting the clerk's office.

7th Circuit Rule 53. Plan for Publication of Opinions of the Seventh Circuit Promulgated Pursuant to Resolution of the Judicial Conference of the United States

(a) Policy. It is the policy of the circuit to reduce the proliferation of published opinions.

(b) Publication. The court may dispose of an appeal by an order or by an opinion, which may be signed or *per curiam*. Orders shall not be published and opinions shall be published.

(1) "Published" or "publication" means:

(i) Printing the opinion as a slip opinion;

(ii) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media; and

(iii) Unlimited citation as precedent.

(2) Unpublished orders:

(i) Shall be typewritten and reproduced by copying machine;

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

(iii) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported), and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;

(iv) Except to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent

(a) in any federal court within the circuit in any written document or in oral argument; or

(b) by an such court for any purpose.

(c) Guidelines for Method of Disposition.

(1) Published Opinions. A published opinion will be filed when the decision

(i) establishes a new, or changes an existing rule of law;

(ii) involves an issue of continuing public interest;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of law,

(B) by describing legislative history, or

(C) by resolving or creating a conflict in the law;

(v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or

(vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.

(2) Unpublished Orders. When the decision does not satisfy the criteria for publication, as stated above, it will be filed as an unpublished order. The order will ordinarily contain reasons for the judgment, but may not do so if the court has announced its decision and reasons from the bench. A statement of facts may be omitted from the order or may not be complete or detailed.

(d) Determination of Whether Disposition is to Be By Order or Opinion.

(1) The determination to dispose of an appeal by unpublished order shall be made by a majority of the panel rendering the decision.

(2) The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

(3) Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for method of disposition set forth in this rule.

(e) Except to the purposes set forth in Circuit Rule 53(b)(2)(iv), no unpublished opinion or order of any court may be cited in the Seventh Circuit if citation is prohibited in the rendering court.

8th Circuit

Rule 28A. Briefs

. . .

(i) Citation of Unpublished Opinion. Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party who cites an unpublished opinion in a document must attach a copy of the unpublished opinion to the document. A party who cites an unpublished opinion for the first time at oral argument must attach a copy of the unpublished opinion to the supplemental authority letter required by FRAP 28(j). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

9th Circuit Rule 36–3. Citation of Unpublished Dispositions or Orders

(a) Not Precedent. Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrines of law of the case, res judicata, and collateral estoppel.

(b) Citation. Unpublished dispositions and orders of this court may not be cited to or by the courts of this circuit except in the following circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.

(ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

(c) Attach Copy. A copy of any cited unpublished disposition or order must be attached to the document in which it is cited, as an appendix.

10th Circuit Rule 36.3. Citation of Unpublished Opinions/Orders and Judgments

(a) Not Precedent. Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel.

(b) Reference. Citation of an unpublished decision is disfavored. But an unpublished decision may be cited if:

(1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and

(2) it would assist the court in its disposition.

(c) Attach Copy. A copy of an unpublished decision must be attached to any document that cites it. If an unpublished decision is cited at oral argument, the citing party must provide a copy to the court and the other parties.

11th Circuit Rule 36–2. Unpublished Opinions

An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made.

D.C. Circuit Handbook of Practice and Internal Procedures

PART XII. MAKING THE DECISION

A. Forms of Decision

(*See* Fed. R. App. P. 36; D.C. Cir. Rule 36.)

Four possible forms for disposing of cases that have been considered by a merits panel are currently used: a published signed opinion, a published *per curiam* opinion, an unpublished judgment or order with memorandum, and a judgment or order without memorandum. The first two forms are familiar to all attorneys. An unpublished judgment or order with memorandum is addressed primarily to those immediately concerned with the case and is not duplicated for subscribers. The memorandum usually is fairly brief, stating only the facts and law necessary for an understanding of the Court's decision. A judgment or order without memorandum indicates affirmance or reversal, or grant or denial of a petition for review, with a brief explanation, such as citation of a governing precedent or adoption of the reasoning of the district court or agency.

Circuit Rule 36(a)(2) sets out the criteria the Court employs in determining whether to publish an opinion. The Court's policy is to publish an opinion or memorandum, meeting one or more of the following criteria: (1) the opinion resolves a substantial issue of first impression generally or an issue presented for the first time in this Court; (2) the opinion alters, modifies, or significantly clarifies a rule of law previously announced by the Court; (3) the opinion calls attention to an existing rule of law that appears to have been generally overlooked; (4) the opinion criticizes or questions existing law; (5) the opinion resolves a conflict in decisions within the Circuit or creates a conflict with another Circuit; (6) the opinion reverses a published district court or agency decision, or affirms it on grounds different from those in a published opinion of the district court; or (7) the opinion warrants publication in light of other factors that give it general public interest.

While an unpublished decision may not be cited as precedent in this Circuit, it may, of course, be invoked for its preclusive effects. *See* D.C. Cir. Rule 28(c).

Federal Circuit

IOP 9. Disposition of Cases—Opinions and Order—Vacate, Reverse, Remand—Costs

Date: April 9, 1998

1. The court employs only these means in disposing of matters before it for decision: precedential opinions; nonprecedential opinions; precedential orders; non-precedential orders; and Rule 36 judgments of affirmance without opinion.
2. The court's decisions on the merits of all cases submitted after oral argument or on the briefs, other than those disposed of under Rule 36, shall be explained in an accompanying precedential or nonprecedential opinion.
3. The court's decisions on motions, petitions and applications will be by precedential or nonprecedential orders.

4. The court's policy is that all opinions and orders shall be as short and as limited to the dispositive issue as the nature of the cases or motions will allow.

5. At the election of the authoring judge, a unanimous or majority opinion, precedential or nonprecedential, may be headed "PER CURIAM." Rule 36 judgments shall be "PER CURIAM."

6. Copies of all issued opinions and precedential orders shall be provided when issued to all judges of the court, to other participating judges, to the parties involved, and to the tribunal from which the appeal was taken, or which is affected by the order. Copies of Rule 36 judgments signed by the clerk will be provided by the clerk to the parties, the trial tribunal, and the members of the panel.

7. All dispositions made in the preceding week will be entered by the clerk on the weekly disposition sheet issued each Monday. When appropriate, the clerk may accumulate nonprecedential orders (disposing of petitions for rehearing and similar items) for periodic issuance and entry on a disposition sheet. All opinions and orders, precedential and nonprecedential, are public records of the court and shall be accessible to the public.

8. Publishers will be requested to publish periodically in tables the results in cases in which the decision was accompanied by a nonprecedential opinion or order or was a Rule 36 judgment.

9. Nonprecedential opinions and orders and Rule 36 judgments shall not be employed as precedent by this court, nor be cited as precedent by counsel, except in relation to a claim of res judicata, collateral estoppel, or law of the case, and shall carry notice to that effect.

10. The court will VACATE all or part of a judgment, order, or agency decision when it is being eliminated but not replaced with a contrary judgment or order of this court.

The court will REVERSE all or part of a judgment, order, or agency decision when it is being replaced with a contrary judgment or order of this court.

The court will REMAND only when there is something more for the trial court or agency to do, and will supply such guidance as the case may warrant.

11. Adoption of opinions of trial tribunals.

(a) Because a *precedential* opinion stating that this court affirms "on the basis of" an opinion of a trial tribunal might cause confusion as to what constitutes *precedent* in this court, that format will no longer be used in precedential opinions. It is not objectionable in nonprecedential opinions which are not citable as precedent. Except for the provisions (b) and(c) below, a precedential opinion should say enough to supply, in itself without reference to another opinion, the basis of this court's decision.

(b) If a trial tribunal's opinion has been published, and a panel can accept all or a separate part thereof *as its own* opinion, the panel may state that it adopts the trial tribunal's opinion or separable part as its own. If this has been done, the panel's opinion, when circulated to the court for seven-day review, shall be accompanied by a copy of what has been adopted. The panel's precedential opinion and what has been adopted then constitutes precedent in this court.

(c) If a trial tribunal's opinion has not been published, and a panel accepts all or a separate part thereof as its own opinion in its precedential opinion, the panel will circulate for seven-day review and will publish the adopted opinion or separable part, as an appendix to or in the body of the panel's opinion, with suitable attribution.

12. Costs.

(a) When a panel affirms or reverses a judgment or order in its entirety, or dismisses an appeal, it need say nothing respecting costs, which will be assessed by the clerk automatically against the losing party. A panel that does not wish assessment of costs against the losing party will instruct that costs be assessed as the panel may deem just.

(b) When a panel's decision is other than a total affirmance or reversal (e.g., affirm-in-part, reverse-in-part, vacate, remand) the panel will include in its opinion or order a direction on the award of costs.

(c) A panel's direction respecting costs will appear as the last paragraph in this court's opinion or order and will be headed "COSTS."

(d) The foregoing does not apply to appeals from decisions of the Boards of the Patent and Trademark Office. The clerk will not send forms for designation of costs to parties in such cases.

IOP 10. Precedential/Nonprecedential Opinions and Orders

Date: April 9, 1998

1. The current workload of the appellate courts precludes preparation of precedential opinions in all cases. Unnecessary precedential dispositions, with concomitant full opinions, only impede the rendering of decisions and the preparation of precedential opinions in cases which merit that effort.

2. The purpose of a precedential disposition is to inform the bar and interested persons *other* than the parties. The parties can be sufficiently informed of the court's reasoning in a nonprecedential opinion.

3. Disposition by nonprecedential opinion or order does not mean the case is considered unimportant, but only that a precedential opinion would not add significantly to the body of law or would otherwise fail to meet a criterion in paragraph 4. Nonprecedential dispositions should not unnecessarily state the facts nor tell the parties what they argued, or what they otherwise already know. It is sufficient to tell the losing party why its arguments were not persuasive. Nonprecedential opinions are supplied to the parties and made available to the public. The results reached in cases disposed of by nonprecedential opinions or Rule 36 judgments are reported periodically in tables in West Federal Reporter.

4. The court's policy is to limit precedent to dispositions meeting one or more of these criteria:

   (a) The case is a test case.

   (b) An issue of first impression is treated.

   (c) A new rule of law is established.

   (d) An existing rule of law is criticized, clarified, altered, or modified.

   (e) An existing rule of law is applied to facts significantly different from those to which that rule has previously been applied.

   (f) An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued.

   (g) A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved.

   (h) A significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case, is set forth.

   (i) A new interpretation of a Supreme Court decision, or of a statute, is set forth.

   (j) A new constitutional or statutory issue is treated.

   (k) A previously overlooked rule of law is treated.

   (l) Procedural errors, or errors in the conduct of the judicial process, are corrected, whether by remand with instructions or otherwise.

   (m) The case has been returned by the U.S. Supreme Court for disposition by action of this court other than ministerial obedience to directions of the Court.

   (n) A panel desires to adopt as precedent in this Court an opinion of a lower tribunal, in whole or in part.

5. The election to employ a nonprecedential opinion or a Rule 36 judgment shall be unanimous among the judges of the panel. Nothing herein shall impede the right of any judge to require disposition to be precedential in any case before a panel opinion has been issued, even in a case previously designated nonprecedential. In that event the judge to whom the authoring role is assigned shall supply an appropriate majority opinion.

6. A request of a panel member or a motion seeking reissuance of an issued opinion or order as a precedential disposition shall only be granted by a unanimous vote of the judges on the merits or motions panel that decided the case or matter. If such request or motion be granted, the author of the opinion shall revise it appropriately.

7. Nothing herein shall be interpreted as impeding the right of any judge to write a separate opinion.

New York Attorney General Eliot Spitzer's Acceptance of Section's Stanley Fuld Award

The following is the acceptance speech of New York Attorney General Eliot Spitzer, who was presented with the Commercial and Federal Litigation Law Section's Fuld Award for contributions to the field of commercial law in New York at the Section's Annual 2005 Meeting. The Award, named after former Chief Judge of the New York Court of Appeals Stanley Fuld, is given annually to an individual who has made outstanding contributions to commercial law and litigation.

ATTORNEY GENERAL SPITZER: Thank you so much. I became aware of the fact that I was the 63rd Attorney General of New York shortly after I was sworn in for the first time. In learning that, I felt it incumbent upon myself to find out who my predecessors were just because I thought I should be familiar with that history of the office. I was shocked to find out that Aaron Burr was the Attorney General of New York. And there are those who think we play hard ball . . .

It's really an honor to be here. Thank you so much. When I looked at Judge Fuld's resume, and realized what a spectacular jurist he had been, I also saw that he and I shared several features in our resume. Certainly not a judicial one, but he had been Assistant DA under Thomas Dewey, and I view Robert Morgenthau as the heir to that great history. I feel honored to have shared that.

Judge Fuld also served as a special cases attorney general and we also have that in common. It's an honor to receive this award, particularly and more importantly, because of Judge Fuld's dedication to the notion of the law as evolving. I have always believed that concept is what makes the practice of law so exciting, so challenging and so important to all of us—that the law is not static. If the law were merely the application of static principles of changing facts, most of us in this room would probably have found another profession. It is the opportunity to participate in the evolution of the law that makes it so challenging, so exciting, and permits us to see our society evolving over time.

I always feel compelled to ask, would any one of us in this room be comfortable if the law today looked the way it looked 200 years ago or 100 years ago, or even 25 years ago? Even though we fight and fight vigorously over the incremental shifts in individual cases, the reality is that as the law has evolved, it has mirrored a society that increasingly reflects the values that we share and the beliefs that we have of how our society should be structured.

I would like to raise a matter that has been at the center of what we have tried to do over the last year in the office. For the past few months, there has been a significant push-back from the leaders in the business communities against what they viewed to be overreaching, overbearing efforts by government officials to change the discourse in the nature of corporate governments. It has taken many forms. The business community is now calling for repeal of certain of the statutes and changes that were imposed upon the business community legislatively down in Washington. The SEC is being sued by the Chamber of Commerce with respect to its statutory authority to enact certain regulatory structure regarding mutual funds. The president of the Chamber of Commerce said that while my office and I had not overstepped, we were acting in ways that were injurious to the business communities.

There have been a series of efforts to preempt the jurisdiction of state law enforcement entities to a certain extent because we had the temerity to move forward into areas that traditionally had been within the federal domain.

What this is all really about is a fundamental debate as to the proper role of government in our time. There is no question in my mind that the voices in opposition to what we are doing are the voices of a status quo that inures the benefits of many. This group is upset when they see the changes being implemented, changes that I deeply believe reflect an economy of transparency, integrity and fair dealing.

The irony that presents itself to us is that 100 years ago, when Teddy Roosevelt was running for the presidency, he at the time was subjected to an unbelievable array of assaults by the business community. He, at the time, was viewed as the antithesis of leadership that was good for business. He was attacking the cartels, he was protecting labor, he was protecting the environment. One hundred years ago, Teddy Roosevelt defined what I think we now believe the appropriate role for government should be.

The irony is that the hero evoked by the other side of the debate, those who disagree with what I and others try to do, also evokes Teddy Roosevelt. They evoke Teddy Roosevelt. But I think they fundamentally misunderstand who he was and what he stood for.

Thus, the irony of this debate is that we often evoke the same hero. These days, as Ron Chernow's brilliant book describes, it is to evoke both Hamilton and Teddy

Roosevelt, and for good reason. These men really are two of the most important figures in our history in terms of creating our nation's economy. Each one of them played a vital role in establishing the important and fundamental role that government can and must play in defining the boundaries, the rules, and the way the business is transacted.

What I want to do very quickly is run through a few of the cases. I want to go through quickly to explain what we saw; what the resolution was in brief; and perhaps, most importantly, what the response has been from the other side of this debate that does not believe that we should be intervening in the national economy the way we have been.

I will begin with the analyst cases. In a sense, I think most of us in the room would accept the proposition that the analyst product that was being generated by the major investment banks had been debased. The product had lost its fundamental integrity because the investment houses happened upon a business model that subjugated analytical works to the need to generate underwriting revenues. Consequently, analysts were told to tailor their work such that underwriting revenues would continue to come in and drive the economic well-being of the major investment houses. That was a reality that I think most of us understood.

Now, there were a myriad conflicts of interest investigations. I merely observe in that regard that Jack Grubman, who is not an individual I ordinarily quote, and who was a leading telecom analyst on the street for many years, did say one thing several years back that was brilliant. With respect to the conflicts of interest that were clearly gripping Wall Street, he said, what used to be viewed as a conflict of interest is now viewed as a synergy. And indeed, that was the epic that had overtaken the major investment houses. It was a brilliant synthesis of what the problem was. When we addressed this problem and began the lengthy process of investigation, negotiations and ultimately settlement, we filed a case along the way.

Soon after we filed the case against the first investment house, the lawyers for that investment house came into my office, and they did not make what one would imagine would be the traditional argument in defense of what happened. Namely, you don't understand the industry, you're taking e-mails out of context. We all know the litany of often frivolous but well articulated arguments that are made.

They didn't do that. They came into my office and they sat down and they said, Eliot, you're right. And I was astonished. You're right, but we're not as bad as our competitors, honest. And I listened to this in amazement. And I picked up a pad and a pencil and I said, keep talking, we're making progress here.

First of all, they were right. They were right that I was right about the facts. And more importantly, they weren't as bad as their competitors.

But the more subtle point that they were making was that everybody on the street knew that everybody was doing this and nobody had stood up to say we should stop. Instead of recognizing that there had been this descent to the lowest common denominator, each decided to compete against the other investment house by emulating their improper behavior.

That comment has stuck in my mind because of what it says about the way the business was being done. What was the response of the federal government when we went to them with this problem? And I don't mean to pick on Harvey Pitt, although I tend to do that every now and again. Mr. Pitt was aware of this problem. We know he was aware of this problem because he had sent a memo to the CEOs of the major investment houses to convene a meeting of the CEOs on Wall Street. He convened that meeting based upon a memo in which he said to them there is a major problem with the quality of analytical work. And what did the federal government do about it? In the same memo he said, I don't think this is my problem, you deal with it.

You deal with it.

Of course, nobody did. The SEC fundamentally abdicated its responsibility to deal with the quality of research upon which millions of American investors were basing their decisions. The SEC said we will do nothing about it.

What did the firms do about it? Absolutely nothing. What did the SEC then do? They went to Capitol Hill and supported an amendment that was drafted by an investment house to preempt state Attorney Generals from intervening in these contexts. That was the sequence of the behavior.

Let me switch gears to another situation which unfortunately tells the same story. The mutual fund investigations. The mutual fund cases evidence a situation where an even broader base of investors was being taken to the cleaners. We now have $70 billion a year in fees that are being paid to mutual funds—fees that are not set competitively, and fees that are not set based upon board efforts to get competitive bidding for quality or based upon the value of the services provided. Seventy billion dollars.

Yet after we revealed fundamental underlying fraud with respect to the way the mutual funds were being operated, when we tried to raise the issue of the propriety of the fees, the SEC not only went to the Hill to support a preemption once again, but publicly said this was not a matter to be addressed by government officials. Even though at the heart of this was a funda-

mental violation of fiduciary duty by the board members of those who sat on the boards of the mutual funds, the SEC said, not our issue.

Another area is the insurance cases. Again, there are now six, I believe, criminal pleas, fee rigging, fundamental violation of duty, that have been entered into the record without any possible doubt. There has been a cancer within the insurance sector of a magnitude that is difficult to calculate.

This is a sector with $1.1 trillion in premiums paid every year, and the essence of that marketplace has been corrupted by a conspiracy among brokers and carriers designed to drive premiums up.

Yet when we said, quite properly in my view, that we would not settle with a company whose CEO or general counsel had been involved in fundamental deception, what was the response? It is not your job to determine who the CEO of a company should be. That's correct. It is not my job. It is not any regulator's job to determine who the CEO of a company should be.

Having said that, any company that wishes to settle with my office or, I would hope, with any governmental office, has to demonstrate that its leadership complies with the rudiments of ethics of fair play, dedication to fiduciary duty and fair dealing.

We saw just the opposite from the leadership of a particular insurance company. Consequently, in my view, it was obligatory for us to say we cannot settle with existing leadership, because that sends absolutely the wrong message about accountability and holding individuals to the standard that we expect them to live by.

In the *Paxil* case, a company called GlaxoSmithKline suppressed information about the side effects of drugs that it was marketing to teenagers. It suppressed evidence that four out of five clinical tests had demonstrated that suicidal tendencies for adolescents increased if they took the drug.

In that context, when we went to the company and said, we think this is improper marketing and we had to sue them, was that an appropriate action on our part? And when we settled and forced them to reveal the negative data, as well as the positive data, so that the marketplace could make sound determinations, was that an appropriate action? Certainly, I believe so.

And yet what were we met with? We were met with opposition by the FDA, that to this day has done absolutely nothing with respect to disclosing clinical testing data that disagrees with the affirmative marketing information for off-label use. We were also met with an editorial in *The Wall Street Journal* that said the system was working exactly as it should. Exactly as it should? How could that be when a company withheld critical data that any doctor or any patient certainly would have wanted to have available to him or her in order to make an independent, fair judgment about the wisdom of using this drug?

Likewise, the last case I will mention involves predatory lending, an issue of importance. We all understand how critical access to capital is. And yet when we went into court to stop predatory lending, which leaves the borrower in a worse-off condition than he or she would have been prior to borrowing, we were met recently by arguments from nationally chartered banks that the OCC has given them carte blanche to ignore state and municipal laws with respect to predatory lending.

Quick story. An individual just southeast of Albany called our office one day, and he said, thirty years ago I entered a 25-year mortgage. I took out a 25-year mortgage and automatic deductions were being made from my checking account on a monthly basis to service the mortgage. Just recently, I woke up and realized that this mortgage should have been paid off by now. So, I called the bank, and sought to have them stop deducting money from my checking account. I was told, no, they wouldn't do so.

So his lawyer called the bank. The bank refused. His lawyer called my office, and in a very kind and gentlemanly way we called the bank and asked why it was still deducting money from this poor fellow's bank account. But we said to the bank, don't you think that maybe this is something you should address? (And we really did this in a very gentlemanly way.)

The bank sent us an audio tape, which had one of the lawyers for the bank calling back saying as a nationally chartered bank, the OCC says we don't need to pay attention to state Attorneys General anymore, go away.

That's what they said. And indeed, the OCC has been promulgating efforts to eliminate state jurisdiction in its entirety with respect to nationally chartered banks, never mind the merits of the case.

What we've been met with across the board is this effort to stifle our jurisdiction, to stop our capacity to intervene to elevate the standards of conduct, and it is all because what is on the other side is this notion of the free market.

What I would say to those who invoke the free market, and those on the other side who evoke Alexander Hamilton and Teddy Roosevelt, is that they fundamentally misunderstand how that market survives and what it takes to maintain the market. I am as dedicated to the free market as any of them, but I think, on our side, we understand it better.

What these cases prove and what the comment, "we're not as bad as our competitors," proves is that the behavior of competitors in the free market must be guided by a government that defines boundaries of ethics, fair dealing and disclosure. Only government can do it.

Unfortunately, the free market alone will drive certain businesses to a lowest common denominator that is unacceptable. What we understand is our obligation to define that boundary line in order to preserve the free market.

Certain other corollaries have emerged from this rule. The first one is that self-regulation has not worked. We all know that spasm of deregulation that we've gone through over the past 20 years, a spasm that in many respects was important and right. The mantra was, we don't need government to be doing this self-regulation, we will fill the role the government used to fill. In every sector we have looked at, in every context we've examined, self-regulation has failed. It isn't just the cases I looked at. It's also lawyers, it's doctors, it's every profession.

Self-regulation has failed because of the difficulty of standing up and pointing the finger at one of your colleagues. It simply hasn't happened. Those self-regulatory entities that should have stood up and said we have a problem simply failed to do so.

I will tell you a revealing story about me that perhaps is not terribly flattering. My wife and I have three daughters, and one of them is a teenager. They are 10, 12, and 15. A couple of weeks ago at dinner one night, in order to spark conversation, I turned to my 15-year-old and I said, "Melissa, what's your favorite word?"

And you know how teenagers will roll their eyes at the father's foolish question. She did just that and said, "Daddy, I don't have a favorite word, but I know what yours is." And I perked up. I said, "What is it?" She said, "Fiduciary duty." And as I said, this was very humbling. I said, "Oh, my goodness, am I really that boring?" Again, I did not get the desired answer.

But so much of what we are talking about comes down to the fact that allegiance to fiduciary duty has not been what it should have been over the last 10 or 15 years. In so many contexts, the willingness of people to make hard choices, to remain loyal to that fiduciary duty has not been there. In that way, I would merely ask the following questions:

How much value have CEOs given to themselves in the past decade in options that were triggered by fraudulent financial statements? What is the total value of those shares and how much of that has been returned to shareholders? How many CEOs have voluntarily returned the value they received in spinning allocations in the context of IPOs, value that should have gone to the shareholders, not to them individually? How many CEOs have participated or benefited from change of control provisions, based upon what I think is the highly suspect theory that CEOs can only remain loyal to their duty to shareholders in the context of acquisitions, or prospective acquisitions, if they have some benefit that is triggered when the company changes control?

Think about when change of control benefits are justified by the argument that only if this extra added benefit is given to the CEO or other senior executives, only then can these executives remain loyal to their duty to shareholders. And yet that is the world we have lived in. Parenthetically, I don't see this as necessarily wrong, but how many, for example, in this room know that the ratio of CEO compensation to average worker compensation between 1980 and the present went from 41 to 1? The ratio was twice what it was in the rest of the world even in 1981, but perhaps justifiable. It went from 41 to 1, to 530 to 1. If that does not suggest that there is a fundamental breakdown in the duty of loyalty, duty of care and allegiance to fiduciary duty, then I don't know what does. We have been working at this against significant pushback, and I think we have been right.

It is an honor to be here. Thank you so much.

Committee Report—Providing Offers of Judgment With "Teeth": A Proposal for the Amendment of *Federal Rule of Civil Procedure* 68

Summary

The concept of an "offer of judgment" under Rule 68 has been practically a dead letter since its adoption as one of the original *Federal Rules of Civil Procedure* in 1938. The intent of the Rule has been to encourage settlements by shifting taxable costs to a claimant (usually the plaintiff) who rejects a written settlement offer on the claim and later fails to obtain a judgment more favorable than the rejected offer. The Section believes that the Rule's lack of utility as a settlement-promoting device stems from the fact that it does not apply to a broad enough range of situations, and that its limited financial consequences do not provide a sufficient economic incentive for offerees to settle by accepting offers of judgment.

Accordingly, the Section recommends that Rule 68 be modified **(i)** to make it applicable to both claimants and defendants on a claim; **(ii)** to make it applicable when a claimant-offeror obtains a result that is more favorable than the offer; **(iii)** to make it applicable when the claimant-offeree loses at trial or on a dispositive motion; and **(iv)** to strengthen the potential economic consequences to the party rejecting the offer by shifting, in addition to taxable costs, the offeror's reasonable post-offer expenses (but not attorneys' fees) to the offeree, in the discretion of the court, if the offeree fails to obtain a result more favorable than the rejected offer.

1. The Current State of the Federal Rule on Offers of Judgment

As a matter of course, Fed. R. Civ. P. 54(d)[1] provides that a party who loses at trial or on a dispositive motion, *i.e.*, the non-prevailing party, will be taxed the costs of suit defined in 28 U.S.C. 1920,[2] unless the court otherwise directs. *See Kohus v. Toys "R" Us, Inc.*, 282 F.3d 1355, 1359 (Fed. Cir. 2002) ("Section 1920 'embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party,'" citing *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987)).

Rule 68 of the *Federal Rules of Civil Procedure*[3] shifts the risk of being saddled with taxable costs to a prevailing claimant under the circumstances spelled out in the Rule, which reads as follows:

> **Rule 68. Offer of Judgment**
>
> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Rule 68 introduced a new concept in federal jurisprudence[4] by allowing a party defending against a claim to serve upon the claimant more than 10 days prior to trial an offer "to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued." If the claimant-offeree refuses the offer but does not obtain a better result at trial, then "costs [under 28 U.S.C. § 1920] incurred after the making of the offer" are taxed to the offeree in accordance with Rule 54(d). Rule 68 operates only when the offeree refuses the offer and subsequently wins on the merits of the claim but obtains the same or less than the amount offered.[5] A plaintiff may make an offer of judgment under Rule 68 only as to a counterclaim or cross-claim against it. In short, "Rule 68 bites only when the plain-

tiff wins but wins less than the defendant's offer of judgment." *Amati v. City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999).

The long-recognized purpose of Rule 68 has been "to relieve overburdened courts from litigation by encouraging early settlement." Martha A. Mills et al., *Report on Proposed Rule 68: Offer of Settlement*, "The New and Proposed Rules of Civil Procedure" 501, 506 (PLI 1984). In theory at least, parties are more likely to settle early in the case when prolonging the litigation carries with it the prospect that the prevailing party (i.e., the claimant-offeree) will have to pay the losing party's costs taxable under 28 U.S.C. § 1920 which were incurred after the offer of judgment was served. The Supreme Court in *Delta Air Lines, supra*, explained the rationale of Rule 68—which has no purpose other than to promote settlement—as follows:

> The purpose of Rule 68 is to encourage the settlement of litigation. In all litigation, the adverse consequences of potential defeat provide both parties with an incentive to settle in advance of trial. Rule 68 provides an additional inducement to settle in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain. Because prevailing plaintiffs presumptively will obtain costs under Rule 54(d), Rule 68 imposes a special burden on the plaintiff to whom a formal settlement offer is made. If a plaintiff rejects a Rule 68 settlement offer, he will lose some of the benefits of victory if his recovery is less than the offer.

450 U.S. at 352 101 S. Ct. at 1150.

In his concurring opinion, Justice Powell commented further on the Rule's purpose as follows:

> The Rule particularly facilitates the early resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature.

Id. at 363, 101 S. Ct. at 1156.

2. Why Has Rule 68 Not Fulfilled Its Purpose?

In reality, Rule 68 is used infrequently by litigants,[6] and has come to be generally regarded as ineffective as a means of inducing settlements, especially in protracted cases where the purpose of the rule would, in principle, be best served.[7] *See*, Association of the Bar of the City of New York, *Report of the Committee on the Federal Courts*, March 1, 1984 at 11.

There are several reasons why parties forgo making offers of judgment under Rule 68. For instance, the Rule refers to "costs," which presumptively entail only *taxable costs* specified in 28 U.S.C. § 1920, incurred after the offer of judgment was made. Such costs (*see*, fn. 2, *supra*) are usually relatively small—especially if the offer is made close to the 10-day pre-trial deadline—compared to the offeree's actual expenses (even without taking into account its attorneys' fees), such as document imaging, travel and lodging, and interpreters and testifying experts. Therefore, the risk of having to pay the costs prescribed in 28 U.S.C. § 1920 provides little financial incentive for defending parties to make, and claimant-offerees to accept, Rule 68 offers of judgment even at an early stage of a case. Also, only a party defending against a claim may invoke the rule. While a plaintiff defending against a counterclaim or a cross-claim may make an offer of judgment, it may not make an offer of judgment in order to settle its affirmative claim, 12 *Wright, Miller & Marcus, supra*, § 3000 at fn. 7.

Recognizing the shortcomings of Rule 68, proposals to amend it were made in 1983[8] and 1984,[9] but were never enacted.

3. Opposing Views Regarding Possible Changes to Rule 68

Notwithstanding—or perhaps because of—its desuetude, there has been considerable debate over how Rule 68 can be made more effective as a settlement tool in litigation.

It has been suggested that Rule 68 be amended to include an award of the offeror's attorneys' fees.[10] The Association of the Bar of the City of New York has criticized such a change, reasoning that amending the rule to allow an award requiring "losing" claimants to pay defendants' litigation expenses beyond the usual taxable costs—especially attorneys' fees—would be a "radical departure from traditional American litigation philosophy." *See* Association of the Bar of the City of New York, *Report of the Committee on the Federal Courts*, *supra* at 10. Amending Rule 68 to include attorneys' fees, the Association later stated, would be tantamount to forgoing the traditional "American Rule" (requiring each party to bear its own legal expenses, regardless of the outcome) in favor of the "English Rule" (requiring the loser to pay the winner's attorneys' fees).[11] *See,* Association of the Bar of the City of New York, *Report of the Committee on Federal Legislation*, "Attorney Fee-Shifting and the Settlement Process," *The Record*, Vol. 51, No. 4, 391 at 393–94 (1996).

The United States Supreme Court has repeatedly reaffirmed its commitment to the American Rule. *See*, *e.g.*, *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 87 S. Ct. 1404, (1967) (citing several rationales for continued support of the American Rule); *Alyeska Pipeline Service v. Wilderness Society*, 421 U.S. 240 95 S.

Ct. 1612, (1975) (rejecting a general theory in support of attorney fee-shifting). *But compare* 35 U.S.C. § 285, a statutory partial abrogation of the American Rule, whereby courts in patent infringement cases of an "exceptional" nature "may award reasonable attorney fees to the prevailing party."

In short, plaintiffs generally contend that amending Rule 68 to allow for an award of attorneys' fees[12] would dramatically shift the risks of litigation in favor of well-financed defendants, thereby forcing many small or individual claimants to forgo pursuing litigation claims. They argue that this would be especially true in "test cases," such as those involving civil rights or toxic torts, where there is a strong societal interest in allowing them to come to a final resolution on the merits rather than by settlement. *See* Mills et al., *supra,* at 509. On the other hand, defendants generally would obviously favor an award of attorneys' fees against plaintiffs who refuse to settle. Clearly, there is a need and consensus for changing Rule 68 to make it more vigorous in achieving its purpose,[13] but which would accommodate the concerns regarding attorneys' fees.

The Recommendation of the Section

(1) The Section recommends that Rule 68 be amended to state that the offeror can be either the claimant or a party defending against a claim. This was suggested by the Advisory Committee on the Federal Rules of Civil Procedure and favored by the Committee on Second Circuit Courts of the Federal Bar Council in 1984. *See* "Bar Panel Opposes Change in Civil-Procedure Rule," *New York Law Journal*, Mar. 1, 1984. The Federal Bar Council Committee stated that a revised Rule 68 applicable equally to claimants and parties defending against claims would best serve the interests of all parties and eliminate concerns regarding parties on opposite sides of a litigation with unequal resources and levels of sophistication. *Id*. The Section submits that there is ample reason to allow claimants to make offers of judgment in view of the Section's proposal to allow the offeror to recover certain post-offer expenses from the offeree, subject to court approval. Counterpart rules in several states permit plaintiffs to make offers of judgment.[14]

(2) In view of the Section's proposal to allow the offeror to recover certain post-offer expenses (see below), the Section recommends that the Rule be amended to make it applicable also to cases where a claimant-offeree loses on the merits at trial or on a dispositive motion.

(3) The Section further recommends that Rule 68 be amended so that the trial court has discretion as to whether and to what extent an award of post-offer expenses, exclusive of attorneys' fees, should be made beyond the costs that may be taxed under 28 U.S.C. § 1920. Such post-offer expenses could include discovery expenses such as photocopying, deposition transcripts, travel and lodging for attorneys, witnesses, and other personnel, fees of testifying experts and other expert expenses recoverable under Fed. R. Civ. P. 26(b)(4)(c),[15] and office services such as electronic imaging and storage. Since the offeror could be the claimant or the party defending against the claim, giving courts such discretion would "up the ante" without embracing the "English Rule" as to attorneys' fees (and thereby avoid the possibility of running afoul of the Rules Enabling Act).[16]

There is also a procedural correction to Rule 68 which the Section recommends. Since its enactment in 1938, Rule 54(a) has defined "judgment" to include "a decree and any order from which an appeal lies." In the interim, Rules 54(b)[17] and 62(h)[18] were amended to make clear that a judgment on less than all the claims or involving less than all the parties is not appealable as of right as a final judgment. Yet the provision in Rule 68 allowing the clerk of the court to enter judgment upon acceptance of an offer of settlement, which could be for less than all claims or involve less than all parties, was not so amended. This creates the potential for an anomalous situation of there being an offer and acceptance of judgment on less than all the claims or involving fewer than all the parties which cannot be entered by the clerk. The Section recommends that this be corrected by providing that, if a judgment is entered under Rule 68 on fewer than all claims or involving fewer than all parties, then, to establish its finality, the judgment be considered an appealable final judgment.

Thus, the Section recommends that Rule 68 be amended as follows, where changes are indicated in boldface (additions italicized and deletions bracketed):

> ***(a)*** At any time more than 10 days before the trial begins, a party **[defending against a claim]** may serve upon **[the]** ***an*** adverse party an offer to **[allow judgment to be taken against the defending party]** ***resolve a claim*** for the money or property or to the effect specified in the offer**[, with costs then accrued]**. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment ***which, if with respect to fewer than all claims or all parties, shall nonetheless be considered an appealable final judgment***. An offer not accepted shall be deemed withdrawn

and evidence thereof is not admissible except in a proceeding to determine costs. If the **[judgment finally obtained by the]** offeree **[is]** ***does*** not ***obtain a*** more favorable ***judgment on the merits of the claim*** than the offer, the offeree must pay ***to the offeror*** the costs incurred after the making of the offer ***and, upon motion by the offeror, in the court's discretion, reasonable expenses, excluding attorneys' fees, incurred by the offeror after the making of the offer.*** The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, **[the party adjudged liable may make an offer of judgment,]** ***either party may make an offer to resolve the amount or extent of the liability,*** which shall have the same effect as an offer made before trial if it is served **[within a reasonable time]** not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

(c) In exercising its discretion whether and to what extent to award reasonable expenses, exclusive of attorneys' fees, a court may consider, among other things, (1) the relation of the claim to any other claim in the action, (2) the relation of the expenses to the claim, (3) the reasonableness of the offer, (4) the burden on the offeree in paying the expenses, (5) the resources of the offeror, (6) the importance of the claim, and (7) the reasonableness of the rejection of the offer.

How Rule 68 would read, as amended, is shown in Appendix A.

The Section believes that this amendment effects a workable compromise in several respects.

First, it does not adopt the English Rule of awarding attorneys' fees to the winning party, because such fees are not normally awarded under the proposal. *See, Marek v. Chesny*, 473 U.S. 1, 9, 12, 105 S. Ct. 3012, 3016, 3018, (1985) (where a statute provides for attorneys' fees to be awarded to the prevailing party as part of costs, a claimant who rejects a Rule 68 offer and recovers less than the offer may not recover attorneys' fees incurred after the offer); *Crossman v. Marcoccio*, 806 F.2d 329, 3333–4 (1st Cir. 1986). Any award of the offeror's expenses is likely to be far less than the amount of its attorneys' fees incurred after a rejected offer.

Second, any expenses and costs that are shifted are only those incurred after an offer is rejected. It does not include what may be substantial expenses and costs incurred prior to the offer. It might be anticipated that offers would be made after substantial discovery occurs, thereby reducing the amounts that would be subject to shifting.

Third, under the proposal, judges may exercise their discretion to reduce the amount of costs and expenses to be shifted. Judges may explicitly consider the relative resources of the parties (items (4) and (5)), which is meant to alleviate concerns that shifting costs and expenses after rejection of an offer might have a chilling effect on civil actions which society has an interest in fostering, such as class actions in which class representatives reject an offer, environmental claims, etc. Further, judges should consider the importance of the claim or claims offered to be settled and their relationship to the other claims in the action and to the post-offer expenses (items (1), (2) and (6)) in apportioning additional costs and expenses incurred after the offer. Moreover, judges may examine any gamesmanship in making or rejecting the offer (items (3) and (7)).

The proposal retains the applicability of Rule 68 to non-monetary claims. 13 *Moore's Federal Practice 3d*, *supra*, at § 68.04[5]. Under the Section's proposed amendment of Rule 68, offers of judgment would remain in the form of "money or property or to the effect specified in the offer." The Section agrees that the term "to the extent specified in the offer" includes equitable claims, which appears to be consistent with Fed. R. Civ. P. 1 making the rules applicable to "all suits of a civil nature" unless exempted by Fed. R. Civ. P. 81, and that allowing a party to make an offer to settle equitable claims, such as injunctive relief, would "create much greater incentives to use the Rule." *Mills et al., supra* at 506.

Finally, there may be some concern that proposed Rule 68 would lead to further litigation. To be sure, there would be an increase in collateral proceedings after some judgments on the merits. However, the Section believes that shortening of litigation times and reduction in case loads due to increased pretrial settlements would result in greater cost savings than any increase in collateral post-trial litigation costs in consequence of an amended Rule 68.

Conclusion

The Section believes that its present recommendation will add more "teeth" to Rule 68 by modifying it

(i) to make it applicable to both a claimant and a party defending against a claim, (ii) to make it applicable when a claimant-offeror obtains a result that is more favorable than the offer, (iii) to make it applicable when a claimant-offeree loses on the merits at trial or on a dispositive motion, and (iv) to strengthen its financial "bite" upon the party rejecting the offer by creating the risk that the offeror's reasonable post-offer expenses—exclusive of attorneys' fees—will be shifted to the offeree, in addition to taxable court costs. Most importantly, the Section believes that in the long run, the proposed amendment would make Rule 68 effective in achieving its intended purpose of encouraging settlement of litigation.

Endnotes

1. **Rule 54. Judgments; Costs**

   * * *

   (d) Costs; Attorneys' Fees.

   (1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within five days thereafter, the action of the clerk may be reviewed by the court.

2. **§ 1920. Taxation of costs.**

   A judge or clerk of any court of the United States may tax as costs the following:

   (1) Fees of the clerk and marshal;

   (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

   (3) Fees and disbursements for printing and witnesses;

   (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

   (5) Docket fees under § 1923 of this title;

   (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under § 1828 of this title.

   A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

3. For comprehensive discussions of Rule 68, *see* 12 *Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d* §§ 3001-3007 (1997); and 13 *Moore's Federal Practice* 3d §§ 68.01-68.10 and 68 App. 01-68, App. 101 (3d 2001). An extensive and scholarly analysis of Rule 68, its history, shortcomings, and proposals for amending it, can be found in Roy D. Simon, "*The Riddle Of Rule 68*," 54 Geo. Wash. L. Rev. 1 (1985).

4. State court antecedents can be found in Minnesota, Montana and New York. *See* 2 *Minn. Stat.* (Mason, 1927) § 9323; 4 *Mont. Rev. Codes Ann.* (1935) § 9770; and *N.Y.C.P.A.* (1937) § 177.

5. Rule 68 does not apply if the claimant-offeree refuses the offer of judgment and subsequently loses on the merits, because the claimant-offeree did not "obtain" a judgment within the meaning of the Rule. In almost all such cases, Rule 68 would be superfluous because "costs" under 28 U.S.C. § 1920 are taxed against the losing claimant-offeree under Rule 54(d). *Delta Air Lines, Inc. v. August*, 450 U.S. 346 101 S. Ct. 1146 (1981).

6. *See* Simon, *supra* note 3 at 8.

7. "[T]he rule 'has rarely been invoked and has been considered largely ineffective in achieving its goals.' " 12 *Wright, Miller & Marcus, supra*, at § 3001 at 67-68 (*quoting* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 337, 363 (1983)). In a Court of Appeals decision, the Rule was described as being "among the most enigmatic of the Federal Rules of Civil Procedure because it offers imprecise guidelines regarding which post-offer costs become the responsibility of the plaintiff," *Crossman v. Marcoccio*, 806 F.2d 329, 331 (1st Cir. 1986).

8. Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings in the United States District Courts, reprinted in* 98 F.R.D. 337, 361-67 (1983).

9. Committee on Rules of Practice & Procedure of the Judicial Conferences of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, reprinted in* 102 F.R.D. 407, 432-37 (1984).

10. *See* 28 U.S.C. § 1927 (counsel's liability for excessive costs). The rule (R. 4:58) governing offers of judgment in New Jersey state courts provides for the shifting of attorneys' fees. *See, New Jersey Law Journal*, January 14, 2002, p. 1.

11. The "English Rule" on attorneys' fees in litigation under the Civil Procedure Rules of England is that the unsuccessful party will be ordered to pay the "costs" (see below) of the successful party (Rule 44.3(2)(a)), although the court may order otherwise if it considers it appropriate (Rule 44.3(2)(b)). In assessing costs, the court will only allow those costs that were reasonably incurred, are reasonable in amount (Rule 44.4(1)) and are proportionate to the matters at issue in the case, which generally is about 65–75% of a party's actual legal bills.

    "Costs" are defined in the Civil Procedure Rules to include fees, charges, disbursements and expenses. There is no definition of either "disbursements" or "expenses" but, in addition to the time charges of its solicitors, a winning party may be entitled to claim:

    1. The costs of being represented by a barrister;

    2. Court fees;

    3. The fees and expenses of expert witnesses;

    4. The expenses of witnesses of fact; and

    5. Disbursements such as travel expenses and translation fees.

    Solicitors' internal expenses (photocopying, postage, couriers, outgoing telephone calls and faxes etc.) are assumed to be covered by the solicitors' time charges and are not normally recoverable separately (exceptions can be made where the expenses are heavy, for example photocopying voluminous discovery documents for trial bundles).

    It is not possible to recover internal costs of a corporate client (e.g., time spent by in-house counsel in supervising the case) save in the rare situation where it can be shown that in-house counsel has performed a role normally carried out by the outside legal team.

12. Some statutes provide for the award of attorneys' fees to the prevailing party as part of "taxable costs" under 28 U.S.C. § 1920. *See,* for example, 42 U.S.C. § 1988 (Civil Rights Act), 42 U.S.C. § 7413(b) (Clean Air Act), and 17 U.S.C. § 505 (Copyright Act). Fed. R. Civ. P. 54(d)(2) applies to applications for attorneys' fees in such cases, and the shifting of taxable costs under Rule 68 carries with it the denial of an attorney's fee to the prevailing plaintiff-offeree who fails to win a judgment for more than the

offer. *See Marek v. Chesny*, 3017 473 U.S. 1, 11 105 S. Ct. 3012 (1985). Parties litigating under such statutes would not be treated any differently by the Section's recommendation.

13. *See* Simon, *supra* note 3 at 53. ("Nearly everyone agrees that the existing procedures under Rule 68 should be changed.")

14. *See* 12 *Wright, Miller & Marcus, supra* note 3 at § 3001.2, fn. 2. For a detailed discussion of the applicability in federal cases of offers of judgment by plaintiffs under state rules, see 12 *Wright, Miller & Marcus, supra* note 3 at § 3001.2.

    For example, in Connecticut there are separate statutes for plaintiffs and defendants governing offers of judgment. The plaintiff's statute, *Conn. Gen. Statute* § 52-192a, provides that a plaintiff in an action on a contract or for the recovery of money (whether or not other relief is sought) can make a written pretrial offer of judgment to the defendant offering to settle the claim underlying the action and to stipulate to a judgment as upon a default, for a sum certain. The offer is filed with the clerk of the court and notice thereof is served on the defendant. If the defendant rejects the offer by failing to file a written acceptance thereof with the clerk of the court within the earlier of 30 days or the rendering of the verdict or court award, and judgment is ultimately entered in the case, the court then determines whether the plaintiff has recovered an amount equal to or greater than the amount the plaintiff offered to settle for in the offer of judgment. If the amount recovered is equal to or greater than the sum certain stated in the offer of judgment, then the court adds 12% annual interest to the amount recovered, running either from the date on which the complaint was filed (if the offer of judgment was filed in the first 18 months of the case), or the date on which the offer of judgment was filed (if the offer was filed after the first 18 months of the case). The court may also award up to $350 in reasonable attorney's fees to the plaintiff.

    The defendant's statutes, *Conn. Gen. Statute* § 52-193 through § 52-195 provide, in essence, that the defendant in the same types of actions may offer judgment and file the offer with the clerk of the court. If the plaintiff fails to accept the offer of judgment within 10 days prior to the commencement of the trial and obtains a judgment for an amount not greater than the amount of the defendant's offer, with interest included, then plaintiff shall recover no costs that accrued after he received notice of the filing of the offer of judgment and must pay defendant's costs accruing after plaintiff's receipt of such notice. Defendant's costs may include defendant's reasonable attorneys' fees up to $350.

    Because the Connecticut plaintiff's statute, *supra*, created a substantive right under state law (*see Erie)*, it is not preempted in federal diversity actions by Fed. R. Civ. P. 68 which in its current form only allows offers of judgment by claim defendants. *See Murphy v. Marmon Group, Inc.*, 562 F. Supp. 856 (D. Conn. 1983).

15. **Rule 26(b) Discovery Scope and Limits**

    * * *

    (4) Trial Preparation: Experts.

    * * *

    (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

16. **28 U.S.C. § 2072. Rules of Procedure and Evidence; Power to Prescribe**

    (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

    (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

    (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under § 1291 of this title.

17. **Rule 54. Judgment; Costs**

    * * *

    (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

18. **Rule 62. Stay of Proceedings to Enforce a Judgment**

    * * *

    (h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

April 17, 2002

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APPENDIX A

Rule 68. Offer of Judgment

(a) At any time more than 10 days before the trial begins, a party may serve upon an adverse party an offer to resolve a claim for the money or property or to the effect specified in the offer. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment which, if with respect to fewer than all claims or all parties, shall nonetheless be considered an appealable final judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the offeree does not obtain a more favorable judgment on the merits of the claim than the offer, the offeree must pay to the offeror the costs incurred after the making of the offer and, upon motion by the offeror, in the court's discretion, reasonable expenses, excluding attorneys fees, incurred by the offeror after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, either party may make an offer to resolve the amount or extent of the liability, which shall have the same effect as an offer made before trial if it is served not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

(c) In exercising its discretion whether and to what extent to award reasonable expenses, exclusive of attorneys' fees, a court may consider, among other things, (1) the relation of the claim to any other claim in the action, (2) the relation of the expenses to the claim, (3) the reasonableness of the offer, (4) the burden on the offeree in paying the expense, (5) the resources of the offeror, (6) the importance of the claim, and (7) the reasonableness of the rejection of the offer.

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