NEW YORK STATE BAR ASSOCIATION

# Journal

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# THE ONLY NEW YORK GOVERNOR EVER IMPEACHED

*By Matthew L. Lifflander*

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

# CONTENTS

JUNE 2013

## THE ONLY NEW YORK GOVERNOR EVER IMPEACHED



BY MATTHEW L. LIFFLANDER


**2012–2013 Report to the Membership**

*Special Pull-out Section*

## DEPARTMENTS



The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media.  The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $200 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

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DAVID M. SCHRAVER

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From its beginning in 1876, the New York State Bar Association has had two main objectives: to serve the profession and to serve the public.

In the words of our 1877 Enabling Act, the Association was "formed to cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to elevate the standard of integrity, honor and courtesy in the legal profession, and to cherish the spirit of brotherhood among the members thereof." These words have stood the test of time, although today we would substitute "spirit of collegiality" for "spirit of brotherhood" to mark the welcome gender diversity of our 21st-century legal profession.

The first president of the State Bar, John K. Porter, said in 1877, again in the terms of the day, "Ours is an undertaking by practical men, and it is designed to be of practical benefit to the profession and to the community at large."

Part of serving the profession is providing "practical benefit" to our members, helping them to be successful in their practices, to have the tools to serve their clients competently, and to conduct themselves professionally as lawyers. The priorities of our strategic plan are to increase the value of the Association to members and prospective members; to use technology to communicate more effectively; to deliver products and services more efficiently; and to increase the overall value of membership in the Association. In a time when we hear that everyone must do more with less, our goal is to help you do more with more – more of the best CLE through our CLE Department and our 26 sections; more up-to-date, accurate information through our publications in print form and electronic searchable formats; more networking opportunities through our sections, committees and programs; and more web-based resources for your practices.

We continue to engage in various activities to serve the public interest. The leadership of the State Bar has traveled to Albany and Washington, D.C., to advocate for adequate funding of state and federal courts and to urge our congressional delegation to resist further reductions in funding of the Legal Services Corporation. We have lobbied at the state level for reforms in the criminal justice and juvenile justice systems to avoid wrongful convictions and ensure the fair treatment of young people. We have lobbied to provide access to justice for indigent defendants and indigent parties to civil actions involving the necessities of life, and to amend the Not-for-Profit Corporation Law as recommended by our Business Law Section. We have provided training and support for local bar associations and lawyers dealing with legal problems in the wake of Superstorm Sandy and for legal services providers throughout the state. We have formed Task Forces on Gun Violence and Criminal Discovery and Special Committees on Human Trafficking, Prisoner Re-entry and Voter Participation.

The New York State Bar Association exists because more than 135 years ago New York lawyers decided that they could do more together to advance the legal profession and the interests of lawyers and to serve the public interest than they could accomplish separately. That remains true today. Together we truly can make a difference.

We invite your ideas and active participation as we continue to serve the profession and the public. Please send your comments and suggestions to me at the email address below. I look forward to working with you and serving as president of your association in the coming year. ■

DAVID M. SCHRAVER can be reached at dschraver@nysba.org.

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# THE ONLY NEW YORK GOVERNOR EVER IMPEACHED

**By Matthew L. Lifflander**

William Sulzer was elected governor of New York in November of 1912; inaugurated on January 1, 1913; impeached by the state assembly on August 13; and removed from office on October 17 – all in less than one year.

Years earlier Sulzer, an especially successful, attractive, and ambitious young lawyer in New York City, had joined the lower east side Tammany Democratic club to help develop his law practice. In 1889, the local organization backed Sulzer's first campaign for public office, and he won the formerly Republican assembly seat. Three years later, with the help of Tammany Hall, the 30-year-old Sulzer was elected Speaker of the Assembly, the youngest Speaker ever.

In 1894 Sulzer was elected to Congress. He served with distinction for 18 years, winning re-election in good times and bad – an effective representative, a Tammany stalwart, respected orator, and, eventually, Chairman of the House Committee on Foreign Affairs.

## Sulzer's Election

Tammany gave Sulzer its support in 1912 to succeed incumbent Democratic Governor John Dix, an upstate Tammany man whose first two-year term was so notoriously corrupt that the organization could not back him for re-election.

During his gubernatorial campaign, Sulzer, out of necessity, distinguished himself from Dix by repeatedly saying that he had no boss but himself. Sophisticated voters considered his rhetoric good election propaganda, but unrealistic.

In November 1912, Democrats carried the state for Woodrow Wilson as president, elected Sulzer governor, and won all the other statewide offices. Tammany won solid Democratic majorities in both houses of the Legislature. And Sulzer had won a three-way election with a plurality of 205,000 votes, then the largest in New York's history.

The 1913 Democratic-controlled Legislature was led by two of the most impressive men that the Tammany organization had to offer: Senate Majority Leader Robert Wagner (who would later become a highly respected U.S. Senator during FDR's New Deal) and Al Smith, Speaker of the

**Matthew L. Lifflander**, author of *The Impeachment of Governor Sulzer* (SUNY Press, Albany 2012), is a partner in Lifflander & Reich LLP and Counsel to Dentons US LLP.

*Photos courtesy of the Library of Congress.*

Assembly. (Smith went on to win five elections as governor of New York and, in 1928, his party's presidential nomination.)

Although highly regarded by the public, Wagner and Smith were devoted to Charles F. Murphy who had achieved legendary control of the Tammany Hall organization. And by 1912, Murphy, the Chief of Tammany Hall in New York City, had accumulated unprecedented power as the statewide leader of the Democratic Party by absorbing the local Democratic machines in the largest upstate cities.

Most, but not all, of the Democratic legislators were Tammany men, enthusiastic about the new governor's program, with one exception: the governor's proposal for a direct primary to nominate the candidates for governor, lieutenant governor, attorney general, and state comptroller, thus bypassing the influence of the party leadership in selecting statewide candidates. In the spring of 1913, Governor Sulzer led a dynamic statewide campaign for his direct primary bill but failed to get it enacted. However, his problems with Tammany Hall had started months earlier – on inauguration day.

## This Means War

On day one, Sulzer initiated unprecedented turmoil. He announced that he "belonged to no man," re-named the Executive Mansion "The People's House," abolished the traditional inaugural military parade and 21-gun salute, wore his battered campaign fedora instead of a top hat like the well-dressed dignitaries, rejected the customary ride in a horse-drawn carriage, and walked to the Capitol from the Executive Mansion and then up the long steps to the second floor. He gave his inaugural address in the overcrowded Assembly Chamber and then went outside to repeat it from the Capitol steps to those who could not get into the Chamber. Sulzer immediately began to ingratiate himself to the state's political reporters by making himself easily available, thus enhancing his own brand of populism.

In the afternoon of his second day as governor, Sulzer met with the newspaper correspondents. A reporter asked, "Have you received the O.K. of Charles F. Murphy, Tammany leader, on your plans?" Sulzer asked that they go on the record:

> I am the Democratic leader of the State of New York. The people decreed it at the polls, and I stand on their verdict. I cannot succeed in doing what I want to do as Governor unless I am the leader. If any Democrat wants to challenge that, let him come out in the open and the people will decide. . . . I am not afraid of Murphy, I am afraid of no man. No political boss can make me do anything I don't think I ought to do.

This was a declaration of war. The press was unable to get any reaction from Mr. Murphy (as he preferred to be called); he was well known for his silence and dignity. Several Tammany District Leaders who responded to calls from reporters (who guaranteed anonymity) predicted that the "Chief" would make the challenge to his leadership the fight of his life.

Then the governor rejected some of Murphy's most reliable allies for key positions regulating railroads and distributing highway construction contracts, although some Murphy-sponsored supreme court judges and local New York City nominees were approved. Murphy soon realized he was being thwarted on important cabinet positions he expected to control. A governor whom he had supported was leaving the Tammany reservation and doing it publicly. In a confrontation sometime in March, Murphy called the governor an "ingrate" and let him know that his refusal to designate James E. Gaffney, a Murphy business partner, as the State Highway Commissioner, meant "war."

A second front in Sulzer's war against "the invisible government" had opened in Sulzer's first week in office, when he announced creation of a Committee of Inquiry with broad powers to investigate all the state's departments. The committee, whose mission was to promote honesty and efficiency for the taxpayers' benefit, had the power to subpoena, take testimony, and administer oaths. The governor's committee quickly initiated investigations of state officials involved with the award of lucrative prison, highway, and canal contracts, most of which were run profitably by Tammany's close friends from the previous administration. Every few weeks the committee revealed additional shocking evidence of corruption and incompetence.

## Mr. Murphy's Revenge

On June 16, the public learned that legislators were forming a new joint legislative committee, comprising senators and assemblymen, intending to examine the governor's use of his veto power and promises of patronage to secure votes for his bill to eliminate party conventions for selecting statewide candidates. The investigation would be headed by Senator James J. Frawley, a reliable Tammany warrior, who was chairman of the powerful senate Finance Committee. Speaker Al Smith and Senator Robert Wagner expressed concern about the impact of this public battle on Tammany's prospects for the city mayoral election in the fall. They saw the value of compromise. Mr. Murphy was not interested.

The Frawley Committee promised to reveal something detrimental to Sulzer nearly every day in July. At first, the committee's revelations were all of a personal nature having little to do with Sulzer's activities in his office. They included an apparently contrived report of a breach of promise lawsuit during the governor's long bachelorhood. Another reported his alleged perjury as a lawyer in a Vermont case. And there were other stories, designed to grab headlines, demeaning the governor, including attacks on his integrity as a congressional committee chair. Sulzer called them all "rot," unworthy of response.

> A governor whom Murphy had supported was leaving the Tammany reservation and doing it publicly.

On the eve of the committee's first public meeting in July, committee staff leaked some examples of the subjects of the forthcoming hearing. The worst were that the governor had received large contributions from individuals and corporations that he failed to report as required by law, and that the governor was using campaign contributions to invest in the stock market for his personal account. Some of the Frawley Committee's testimony challenged aspects of the investigations by the governor's Committee of Inquiry; and legislators testified they had been threatened and intimidated by the governor to get their support for his direct primary bill.

The impact of the Frawley Committee's revelations was dramatic. While an ordinary man might have been forgiven, the man who had so publicly espoused his own integrity was caught red-handed violating the laws he was sworn to enforce.

The leaders of Tammany Hall had met and decided that if they did not get rid of Governor Sulzer, they might all end up in jail. The stage was set for impeachment.

## Impeachment

That August, the Frawley Committee recommended that the governor be impeached. At a Special Session called by the governor to consider his direct primary bill, the Assembly voted to impeach. The all-night session was led by Speaker Al Smith in Albany and orchestrated by Mr. Murphy by telephone from his Long Island retreat.

The resolution detailed Sulzer's offenses and called for his impeachment "for willful and corrupt conduct in office and for high crimes and misdemeanors." The resolution summarized the important charges emanating from the Frawley Committee: the fake campaign finance report Sulzer had signed under oath; his conversion of campaign contributions to "purchase of securities or other private uses"; his engagement in stock speculation, while as governor he was vigorously pressing for legislation that would affect the business and prices of the New York Stock Exchange; his use of the governor's office to "suppress the truth" and "prevent the production of evidence in relation to the investigation" while directing witnesses, including state employees, to act in contempt of the investigating committee; and his "punish[ing of] legislators who disagreed or differed with him."

After a long debate, on August 13 at 3 o'clock in the morning, the actual Articles of Impeachment were adopted by the Assembly. These articles constituted the specific charges that the governor would have to respond to at the trial before the Court of Impeachment, scheduled for noon at the Capitol on September 18, 1913. The court, created by the Constitution of the State of New York, would consist of all the senators and the judges of the Court of Appeals, the chief judge to be the presiding officer. Each member of the court would have one vote. The decision would require a two-thirds majority.

The impeachment articles were adopted by a vote of 79 to 29.

Article I accused Sulzer of "willfully, knowingly, and corruptly 'making and filing with the Secretary of State a false statement of campaign receipts and expenditures in connection with his campaign for Governor.'" (Eleven contributions, aggregating $8,500, were specified as having been omitted.)

Article II accused him of "willful and corrupt perjury" in swearing that the statement of campaign receipts he filed was correct.

Article III accused him of "bribing witnesses" and "fraudulently" inducing Louis A. Sarecky, Frederick L. Colwell, and Melville B. Fuller "to withhold true testimony" from the legislative investigating committee.

Article IV accused him of suppressing evidence by "practicing deceit and fraud and using threats and menaces" to prevent the investigating committee from procuring the attendance and testimony of those same witnesses.

Article V accused him of "preventing and dissuading" a witness, Frederick L. Colwell, from answering the subpoena of the same committee.

Article VI accused him of larceny by converting and appropriating to his own use and to stock speculation 11

checks totaling $8,500 and $32,850 in cash contributed to his campaign fund.

Article VII accused him of improperly using his Executive authority and influence "for the purpose of affecting the vote or political action" of certain members of the Legislature by promising to sign or threatening to veto bills in which they were interested Assemblymen Prime and Sweet were specified as persons to whom such promises or threats were made.

Article VIII accused Sulzer of corruptly using the influence of his office to affect the prices of securities selling on the New York Stock Exchange, in some of which he was at the time speculating.

## The Trial Lawyers

The impeachment trial involved some of the state's finest lawyers. Sulzer's team was headed by D. Cady Herrick, a 67-year-old retired justice of the New York State Supreme Court. Herrick, who had been the unsuccessful Democratic candidate for governor in 1904, was a former district attorney, as well the political boss of Albany County who, to the chagrin of some, had kept that job even after he was elected to the supreme court.

Among those assisting Judge Herrick on Governor Sulzer's team were Irving G. Vann, a former associate justice of the state Court of Appeals; Harvey D. Hinman, once an influential Republican state senator from Binghamton, N.Y., who had been associated with former Governor Charles Evans Hughes and was highly respected for his advocacy; and Louis Marshall, a well-known constitutional law expert from Syracuse who was a long-time advisor to Governor Sulzer. Marshall, who became a founder of the American Jewish Committee, had distinguished himself as an early civil rights lawyer as well.

The managers' team, that is, the prosecutors, was led by 61-year-old Alton B. Parker as chief counsel. Also an unsuccessful candidate in 1904, Parker had resigned as Chief Judge of the Court of Appeals to run as the Democratic Party candidate for president of the United States against Theodore Roosevelt. Parker had been the state's chief judge for six years, preceded by 12 years as a justice of the state supreme court.

Parker was assisted by John B. Stanchfield, a prominent corporate lawyer and litigator who had been the Democratic candidate for governor in 1900. The managers' lawyers also included Edgar Truman Brackett, a former senate Republican leader; Eugene Lamb Richards, a Tammany state committeeman who had served as the aggressive counsel to the Frawley Committee; and Isodor J. Kresel, a former assistant district attorney in Manhattan and also a veteran lawyer for the Frawley Committee.

The witness list included prominent real estate developers, industrialists and financiers, who described their contributions as personal gifts to Sulzer – for whatever purpose he wanted to use them. Some very large sums in cash proved embarrassing to the people's governor, who clearly distinguished such personal gifts from campaign contributions.

## The Arguments

### The Defense

At the inception of the trial, the defense's constitutional expert Louis Marshall asked the court to dismiss the proceedings on the ground that the Assembly's impeachment was null and void and of no effect. He argued that this impeachment resolution was adopted during an extraordinary session of the Legislature called by the governor after the Legislature had adjourned *sine die*; therefore, it could consider only the items put on the agenda by the governor's call. He argued that Sulzer was deprived of due process of law in violation of the constitution of the state and the Fourteenth Amendment to the United States Constitution. Therefore, the court of impeachment was without jurisdiction.

> Tammany lost every office in New York City, including mayor. Credit for Tammany's trouncing went to Sulzer and his people.

Marshall further introduced an appendix to his brief, a compilation of the law of every state in the union related to extraordinary sessions of state legislatures, most of which contained provisions similar to New York's about limiting the action to the specific issues for which the chief executive called the session.

The court voted 51 to 1 against Marshall's eloquent argument seeking dismissal of the proceedings.

Defense counsel D. Cady Herrick arguing another important basic legal issue, said that Articles of Impeachment I, II, and VI should be quashed because they were all entirely related to matters that had actually occurred prior to Governor Sulzer's inauguration and therefore could not be considered "willful and corrupt misconduct in office." Judge Herrick additionally argued that the court should set aside these specific articles and take no further cognizance of them.

As to the second article, charging the governor with filing a false statement under oath, Herrick additionally

argued that the law did not actually require him to file a statement under oath and, therefore, that statement could not be proper grounds for an accusation of perjury.

Herrick again noted that the impeachment charged that the governor's offenses constituted willful and corrupt misconduct "in office," and high crimes and misdemeanors, but none of the accusations contained in articles I, II, or VI actually accused the governor of any misconduct while in office, and should, therefore, be dismissed. Defense counsel included an extensive brief showing numerous examples of impeachments in New York and elsewhere, in which all of the impeachable offenses occurred while the accused was actually in office. "After reviewing every known case of impeachment in the United States[,] no case of impeachment has been found where a public official has been impeached for offenses prior to his assumption of office. All are cases of misconduct in office."

## The Prosecution

The prosecution responded, creatively, that the reporting requirements of the New York law were "in the nature of a condition precedent to his taking office as governor." Richards pointed out that the purpose of reporting campaign contributions and expenditures was to implement a progressive policy to let the people know "whether there are any strings on a candidate and who his backers are." In other words, if money is paid to a candidate to influence his future action, when that candidate takes office "his official acts can be scrutinized, weighed, and judged in the light of the interests, political or financial."

Over four days of testimony, one witness after another introduced by the managers, including Jacob Schiff and Henry Morganthau, was forced to admit on cross-examination by Marshall that he had made his contribution to candidate Sulzer for his personal use as he saw fit. Several prominent contributors made the point that they were aware of the candidate's poor financial circumstances and understood that he needed money personally. In that sense, the prosecution's parade of people whose contributions were not reported by Sulzer backfired. One way or another, most in the long line of prosecution witnesses presented over more than a two-day period testified that they knew of Sulzer's "impecunious condition" and were quite willing to have the candidate use the money at his own discretion.

Governor Sulzer's people believed they had established that no man had ever been impeached for something he had done before taking office. They also had good reason to believe that precedent would make it difficult to convict on the basis of articles I, II, or VI. Although they realized that the prosecution had made the governor look bad because of his incomplete financial report, witness Louis Sarecky, Sulzer's key campaign staff assistant, had done a good job of taking full responsibility. They also felt pretty good about their legal argument that a man could not be convicted of perjury for voluntarily filing a sworn statement when he was not required to do so by law. And, except for the evidence of the governor's attempt to suppress testimony, the prosecutors had not provided much evidentiary support for any of the other articles.

The managers' attorneys also had good reason to be optimistic about the portrait they painted of Sulzer's character and integrity through the testimony of their witnesses. The evidence of Sulzer's success at raising money for himself and his aggressive approach to it were truly damaging. Clearly the court could create new precedent and find him unfit for office based on his conduct in preparing for office. Whether there would be a two-thirds majority for removal was not crystal clear in light of the number of the members of the court who came from the judiciary or the upstate independent democracy or the Republican side of the state Senate.

## The Decision

Finally, at 3 o'clock on the afternoon of October 16, the galleries filled with spectators seeking to be witnesses to history, the court began a public vote on each of the eight impeachment articles, where one after the other, each of the judges would stand and vote.

The governor was found guilty on articles I, II, and IV by a very close two-thirds of the votes. Then, the court arrived at the moment when it had to decide if Sulzer should be removed from office. The roll call went quickly: 43 to 12 in favor of removal. The final action of the court was to vote on whether Sulzer should be barred from seeking public office. Fifty-six voted no.

## Aftermath

It required a few more days in the Executive Mansion before ex-governor Sulzer and his wife entrained to New York City. Thousands of enthusiastic supporters greeted them at Grand Central Station and took them by motorcade to his old lower east side Assembly District, where he accepted the Progressive Party's nomination for his old Assembly seat. A month later, in November 1913, after constantly enthusiastic receptions by huge crowds demanding Tammany's punishment, Sulzer was re-elected to the Assembly he had once presided over. He was elected by the biggest majority ever recorded in that district. In the same election, the statewide Democratic Assembly majority was lost to the Republicans, and several of the Tammany senators who voted to remove Sulzer lost their seats. Most important, Tammany lost every office in New York City, including mayor. Credit for Tammany's trouncing went to Sulzer and his people.

Sulzer made an ineffective independent campaign to regain the governorship in 1914 and an unsuccessful effort to gain the Prohibition Party nomination for president in 1916. He never again sought public office. ■

# BURDEN OF PROOF

BY DAVID PAUL HOROWITZ

**David Paul Horowitz** (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for over 25 years and is of counsel to Ressler & Ressler in New York City. He is the author of New York Civil Disclosure and Bender's New York Evidence (both by LexisNexis), as well as the 2008 and 2013 Supplements (to be issued June 2013) to Fisch on New York Evidence (Lond Publications). Mr. Horowitz teaches New York Practice at Columbia Law School, and Professional Responsibility and Electronic Evidence & Disclosure at Brooklyn Law School. In addition to presenting NYSBA's Annual CPLR Update Program statewide, he serves on the Office of Court Administration's CPLR Advisory Committee, as Associate Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee, and is a frequent lecturer and writer on these subjects.

# "You Gotta Have Faith"

Specifically, "good faith." In litigation, the concept of possessing a "good faith basis" for, *inter alia*, commencing an action, seeking disclosure, and posing questions to a witness, is an essential, albeit often neglected, requirement. In two recent decisions, trial court judges have reminded the particular attorneys appearing before them, as well as the bar as a whole, of this fundamental foundation requirement.

Before reviewing these and other cases, an examination of a "good faith basis" familiar to most litigators, contained in Uniform Rule 202.7, provides a useful backdrop for the requirement in other situations.

## Uniform Rule 202.7

Uniform Rule 202.7 of the Uniform Rules for the New York State Trial Courts, which has several procedural rules regarding motions, contains a good faith requirement

> with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.[1]

The First Department has held that a motion relating to disclosure must contain an affidavit of good faith, and that the failure to furnish such an affidavit requires denial of the motion.[2] The same rule, of course, applies to motions directed to bills of particulars, inasmuch as 22 N.Y.C.R.R. § 202.7(c)'s requirement of a good faith affidavit applies to motions seeking bills of particulars and to motions seeking disclosure.

The failure to confer with counsel cannot constitute good faith and requires denial of the motion:

> Furthermore, the court did not err in summarily denying the appellant's motion to strike the complaint since counsel for the appellant failed to confer with counsel for the plaintiffs in a good faith effort to resolve the issues raised by the motion.[3]

Similarly, the failure to set forth the good faith efforts requires denial of the motion:

> The affirmation submitted by the plaintiff's attorney was deficient in that it did not set forth any good faith effort to resolve the issue of the defendants' failure to appear for examinations before trial.[4]

An early trial-level decision, *Eaton v. Chahal*,[5] held "a 'good faith' effort to mean more than an exchange of computer generated letters or cursory telephone conversations."[6] *Eaton* has been cited by the First,[7] Second,[8] and Third[9] Departments. Denial of a motion for disclosure was required where the trial court improperly considered an affirmation of good faith "since it failed to discuss the notice for discovery and inspection which was the subject of the plaintiff's motion to compel."[10]

Of course, when drafting an affirmation of good faith, counsel must bear in mind one of the mandates of Rule 130-1.1(c)(3), which defines "frivolous conduct" to include asserting "material factual statements that are false."[11]

## Pleadings

In *Palmieri v. The Piano Exchange, Inc.*,[12] the plaintiff's counsel moved for a sanction pursuant to CPLR 3126, based upon the defendant's failure to appear for examination before trial. The court's decision must have come as a bit of a surprise to the plaintiff's counsel. The court first summarized the transaction at issue and the plaintiff's claims in the complaint:

> Palmieri purchased a rebuilt and refinished piano for the sum of Nine Thousand Dollars ($9,000.00).
>
> * * *
>
> In connection with this transaction of March 1996, involving Nine Thousand Dollars ($9,000.00) in exchange for a piano, on or about March 21, 2011, Plaintiff filed a Verified Complaint alleging a breach of contract seeking damages in the sum Two Hundred Fifty Thousand Dollars ($250,000.00); alleging deceit claiming damages of Five Hundred Thousand Dollars ($500,000.00); alleging breach of the covenant of good faith and fair dealing and seeking damages of Three Hundred and Fifty Thousand Dollars ($350,000.00); alleging tortious interference with a contract seeking damages of One Hundred and Fifty Thousand Dollars ($150,000.00) and lastly, alleging unjust enrichment seeking Nine Thousand Dollars ($9,000.00). In short, Plaintiff alleges One Million

> Two Hundred Fifty Nine Thousand Dollars ($1,259.000.00) as damages stemming from a contract made seventeen (17) years ago involving a used piano in exchange for Nine Thousand Dollars ($9,000.00).[13]

After citing Rule 130-1.1, the court both posed and answered two questions:

> Is it a reasonable application of the privilege to practice law to serve a complaint upon a person, in these circumstances, and stun the recipient-defendant with damage claims beyond the universe of those which logically follow the alleged breach? The Court thinks not . . .
>
> Does the administration of Justice include a responsibility to shield litigants from conduct that may cause stress, anxiety and fear of pecuniary ruination far beyond the bounds of reasonable foreseeability? The Court thinks it does.[14]

The court then made the following direction concerning the plaintiff's pleading:

> The Court is mindful of CPLR §3017(a) which includes that a complaint, "shall contain a demand for the relief to which the pleader deems himself entitled." As the above captioned matter will appear on the court's compliance calendar on March 27, 2013, the Court expects Plaintiff's counsel to articulate some good faith basis supporting prayers for relief in excess of One Million Two Hundred Fifty Nine Thousand Dollars ($1,259,000.00) (not including a prayer for relief seeking punitive damages) in an action involving the sale of a used piano some seventeen years ago at a cost of Nine Thousand Dollars ($9,000.00). *Additionally, counsel shall offer argument as to why such conduct, in the absence of good faith, is not sanctionable.*[15]

And, what about the defendant's examinations before trial? The court denied the plaintiff's motion pursuant to CPLR 3126, provided the defendant appeared for the examination on or before a date set by the court in its order.[16]

## Disclosure

In *Fawcett v. Altieri*,[17] defense counsel moved to compel the disclosure of social media matter posted by the plaintiff. After an overview of this hot-button topic, the court zeroed in on the foundation requirement for obtaining non-public social media matter protected by an individual's privacy setting:

> In order to obtain a closed or private social media account by a court order for the subscriber to execute an authorization for their release, the adversary must show with some credible facts that the adversary subscriber has posted information or photographs that are relevant to the facts of the case

at hand. The courts should not accommodate blanket searches for any kind of information or photos to impeach a person's character, which may be embarrassing, but are irrelevant to the facts of the case at hand.

*The party requesting the discovery of an adversary's restricted social media accounts should first demonstrate a good faith basis to make the request*.[18]

The requirement that a foundation be established in order to obtain non-public social media matter has received uniform appellate approval.[19]

## Questioning a Witness

Although no recent decision stands out for the proposition, a long line of cases make clear that counsel must have a good faith basis for posing a question to a witness. A leading Court of Appeals case, *People v. Kass*,[20] confronted the requirement where a prosecutor sought to question the defendant about a prior act of misappropriation:

> Defendant argues that the Trial Judge improperly permitted the prosecutor to ask defendant if he had "misappropriated two diamonds worth about $4,000 from a jeweler in New York City?" It is well established that a defendant who testifies may be cross-examined concerning any immoral, vicious, or criminal acts which have a bearing on his credibility as a witness. "The offenses inquired into on cross-examination to impeach credibility need not be similar to the crime charged, and questions are not rendered improper * * * *provided they have some basis in fact and are asked in good faith*." Here, the inquiry into defendant's misappropriation of the diamonds is relevant to his credibility as a witness. *The question was proper, therefore, if made by the prosecutor in good faith and had some basis in fact*.[21]

*People v. Kass* applies in civil cases. In *McNeill v. LaSalle Partners*,[22] the trial court properly permitted defense counsel to question the plaintiff in a personal injury case, where the plaintiff was the only witness to the accident, concerning the reason the plaintiff had been terminated from a prior job:

> Such dishonest conduct (assuming plaintiff engaged in it) plainly falls within the category of prior immoral, vicious or criminal acts having a direct bearing on the witness's credibility, inasmuch as "it demonstrates an untruthful bent or significantly reveals a willingness or disposition . . . voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society." Moreover, appellants sought to question plaintiff about this matter in good faith, and with a reasonable basis in fact.[23]

## Conclusion

A good faith basis is a necessary foundation requirement, and counsel must be prepared to explain the good faith basis if put to the task. So, before drafting a pleading, serving a disclosure request, or posing a question to a witness, "you gotta have faith." ■

1. 22 N.Y.C.R.R. § 202.7(a)(2).
2. *Molyneaux v. City of N.Y.*, 64 A.D.3d 406, 406–407 (1st Dep't 2009).
3. *Gonzalez v. I.B.M.*, 236 A.D.2d 363 (1st Dep't 1997) (citations omitted).
4. *Tine v. Courtview Owners Court*, 40 A.D.3d 966 (1st Dep't 2007).
5. *Eaton v. Chahal*, 146 Misc. 2d 977 (Sup. Ct., Rensselaer Co. 1990).
6. *Id.* at 983.
7. *Barber v. Ford Motor Co.*, 250 A.D.2d 552 (1st Dep't 1998).
8. *Romero v. Korn*, 236 A.D.2d 65 (2d Dep't 1997).
9. *Koelbl v. Harvey*, 176 A.D.2d 1040 (3d Dep't 1991).
10. *Barnes v. NYNEX, Inc.*, 274 A.D.2d 368 (1st Dep't 2000).
11. 22 N.Y.C.R.R. § 130-1.1(c)(3).
12. N.Y.L.J., Mar. 12, 2013 (Sup. Ct. Suffolk Co.) (Jerry Garguilo, J.S.C.).
13. *Id.*
14. *Id.*
15. *Id.* (emphasis added).
16. *Id.*
17. 38 Misc. 3d 1022 (Sup. Ct., Richmond Co. 2013) (Joseph J. Maltese, J.S.C.).
18. *Id.* at 1027–28 (emphasis added).
19. *See, e.g., Tapp v. N.Y. State Urban Dev. Corp.*, 102 A.D.3d 620 (1st Dep't 2013); *Abrams v. Pecile*, 83 A.D.3d 527 (1st Dep't 2011); *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524 (4th Dep't 2010).
20. 25 N.Y.2d 123 (1969).
21. *Id.* at 125–26 (citation omitted; emphasis added).
22. 52 A.D.3d 407 (1st Dep't 2008).
23. *Id.* (citations and parenthetical omitted).

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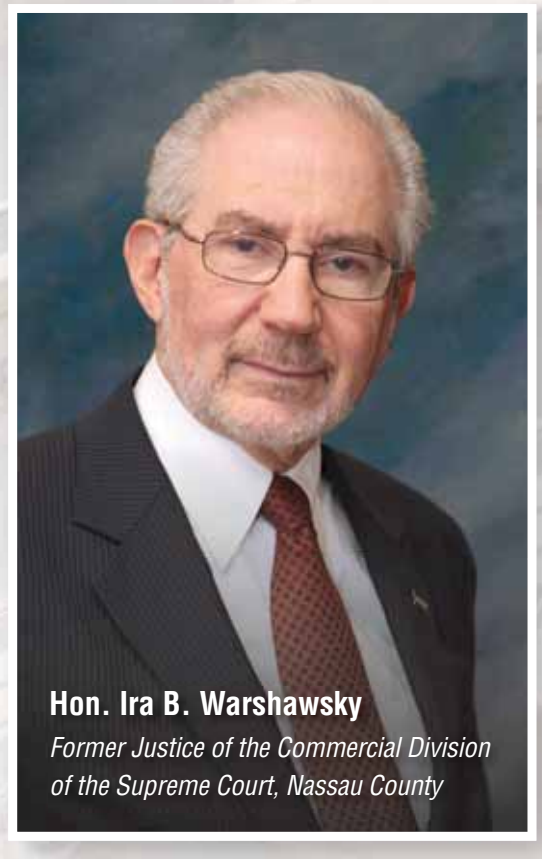

**Hon. Ira B. Warshawsky**
*Former Justice of the Commercial Division of the Supreme Court, Nassau County*

Judge Warshawsky has been a distinguished member of the New York judiciary for the past 25 years. He was a New York Supreme Court Justice in Nassau County's Commercial Division from 2002 until his retirement in 2011. He presided over all manners of business claims and disputes, including business valuation proceedings, corporate and partnership disputes, class actions and complex commercial cases. Immediately prior to this appointment, Judge Warshawsky handled general litigation, including products liability, from 1998 to 2002. Prior to that, he sat in the Nassau County District Court for ten years, from 1987 to 1997, presiding over a wide variety of matters.

According to the 2009/2010 New York Judge Reviews, Judge Warshawsky has been praised for keeping a "calm" demeanor, even during highly charged, high-profile cases. Lawyers interviewed described him as "one of the hardest working, intelligent, even-handed judges, who has a very good sense of justice." He has been described as a "top-notch judge" who is known for encouraging settlement negotiations without being overly aggressive. One attorney stated, "Judge Warshawsky is one of the best judges I have ever appeared before in the nation."

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# The DSM-V and the Law: When Hard Science Meets Soft Science in Psychology

**By Dr. Gordon Cochrane**

The Diagnostic and Statistical Manual of Mental Disorders V (DSM-V) is the latest edition of the diagnostic manual of mental disorders. As such, it outlines the symptom criteria for the diagnosis of the disorders included in the manual, which provide the framework for most psychological assessments and for most forms of psychotherapy. The DSM-V is actually a meld of science, theory and opinion. Rather than just identifying the law-related changes in the DSM-V, we begin by presenting the research principles and the subjective realities that underlie this manual. This contextual approach will allow you to understand – and to legitimately question – the research behind the various diagnostic symptom criteria rather than just looking at the symptoms lists themselves.

The DSM-V can be compared to the hub of a wheel. The spokes emanating from the hub include items such as research design, the validity of psychological assessments, construct validity, treatment efficacy, correlation versus causation, human memory, truth assessment, meaning attribution, selective attending, and their roles in the courts. The rim of the wheel represents the subjective human beings who give meaning and purpose to the hub and spokes of the wheel. The DSM-V is best understood when viewed as part of the whole.

Judges, as gatekeepers, must evaluate the scientific status of the prospective evidence proposed by attorneys to determine if it is admissible in court. The *Daubert*[1] case of 1993, the National Research Council (NAS) report of 2009 on Strengthening Forensic Science in the United States,

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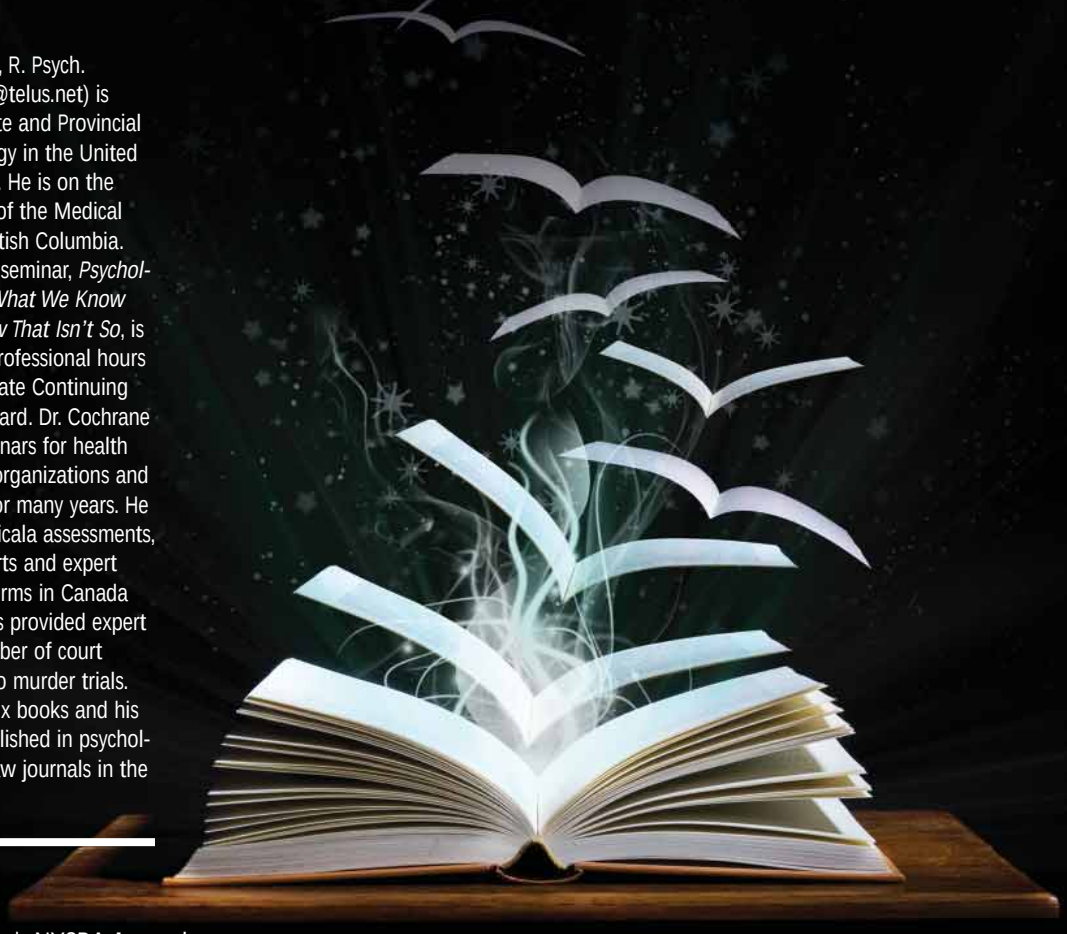

the Canadian Goudge report of 2008 and the UK Law Commission report of 2009 have all contributed to changes in the guidelines that regulate scientific admissibility. Whereas admissibility guidelines have been strengthened in forensics generally, the field of psychology / psychiatry remains comparatively clouded by misinformation, oversimplification and ambiguity. However, as judges gain increasing knowledge of the DSM-V and of key concepts in the psychology / psychiatry field, attorneys too will need to become better informed about what will and will not meet the evolving admissibility criteria in this field.

Because attorneys and psychologists have human beings as clients, the practice of law, like that of psychology, is usually conducted in shades of gray rather than black and white. Psychology often involves the application of hard science principles to soft science phenomena. This unavoidable situation creates fertile ground for biological oversimplification and the attribution of factual information to that which is really psychological metaphor. Much of this meaning attribution and misinformation goes unchallenged because most people, including attorneys, witnesses, judges and jury members, do not have the information necessary to easily recognize and effectively challenge the aspects of law-related psychology that fall into the category of "what we know that isn't so."

When attorneys are clear about how the science of psychology differs from other forms of science, they will gain a new perspective on the law-related changes in the DSM-V. This informed perspective will enable them to more effectively represent their clients in cases where a psychological assessment, a DSM-V diagnosis, a psychotherapy recommendation, a prognosis and / or opposing expert testimony could have significant impact on the lives of their clients.

Psychology is a science, but it is unlike other sciences in that the subjects studied and assessed are not objective entities. The subjects are human beings, and we human beings are subjective in many ways. We creatively construct our sense of self and we give meaning to the world around us. We imagine; we assume; we generalize; we attribute meaning to ambiguities; we remember creatively; we formulate our values and our beliefs through the screen of our culture; we selectively attend to that which confirms our biases and attitudes; we mind-read with excessive confidence; we project our perceived realities onto other people and situations; we are sometimes honest and sometimes deceptive; we are rational and sometimes irrational; we are consciously motivated and sometimes unconsciously motivated and, yet, we believe that our perceptions are reality.[2]

## Everyday English

Judges and juries are charged with finding truth and reality from within this labyrinth of human complexity. This search for truth can be made a little less daunting when judges and attorneys have the information needed to distinguish research from theory and theory from opinion in law-related psychology. The first piece of information is simple, reliable and powerful: When assessing reports, conducting cross-examinations or when interacting with opposing counsel, insist on the use of everyday English.

Like other professions, psychology and psychiatry have a vocabulary of their own, and if you attempt to communicate in the specialized language of these professions, you place yourself at a significant and unnecessary disadvantage. Be comfortable requesting that verbal and written statements, which will initially be expressed in the terms of the profession, be restated in everyday English. Listen carefully and be comfortable requesting further clarification if you are uncertain about ambiguous aspects of the translation. If a disorder or psychological concept cannot be clearly expressed in everyday English, you can justifiably question its validity and, consequently, its scientific status.

You may feel that the use of this simple strategy will be viewed as disrespectful, unnecessarily antagonistic and potentially counterproductive. This is certainly possible but, as indicated, psychology and psychiatry are not hard sciences because the subjects are themselves subjective. At present, we simply do not have sufficient knowledge of how the human mind works for our professions to qualify as hard sciences. This is not a fault or an inadequacy. There is no hard scientific solution to this situation; it is simply the nature of the beast.

Out of necessity then, much of the professional vocabulary in psychology and psychiatry is metaphor, and in these professions the metaphor is often an implied comparison between that which is soft science and that which is hard science. A metaphor is a metaphor; it is not alchemy. Therefore, when you ask that a professional term or concept be expressed in everyday English, you are often asking for clarification of a metaphor. And if a psychology or psychiatry concept cannot be expressed in everyday English, you may want to question its validity.

## Research Limitations and the DSM-V

To help you understand the law-related aspects of the DSM-V we will discuss the research designs used in psychology and psychiatry. One might assume that, because human beings are the subjects of psychology research, the designs used are quite different from those used in other sciences. This is not the case. The research designs used in psychology are unavoidably imperfect adaptations of the designs used in other sciences such as chemistry, physics and agriculture where the subjects are constants. People, however, are not constants, and they are not passive.

Do not be intimidated by the irrefutability that is implied by the term "scientific research." The research designs used in psychology must accommodate human subjectivity and, therefore, the conclusions derived from this research are usually qualified in some important

way. The results are expressed as probabilities rather than certainties.

Sometimes, too, the media, when reporting on studies such as brain imaging or the search for a genetic explanation for disorders such as obesity and depression, misrepresent correlation as causation, oversimplify the research and speculate about what the studies might be showing. For example, Dr. Michael Gazzaniga at the University of California, Santa Barbara, and a primary researcher in human brain functioning, warned in the *New York Times*[3] that brain images are snapshots that vary widely among people and trying to define social constructs like good judgment, free will and response to stress in terms of biological processes is a fool's game. Additionally, a recent study on the human genome,[4] derived from an immense decade-long project involving 440 researchers from 32 universities, concludes that the human genome with its millions of newly identified gene switches definitely holds great potential for the enhancement of our understanding and treatment of many diseases and disorders. At the present time, however, these new discoveries have moved an already incredibly complex field of research into the realm of the stunningly complex; practical conclusions about causes and treatments are clearly premature.

Therefore, when assessing a report, conducting a cross-examination or interacting with opposing counsel, remember that research in psychology generates probabilities rather than certainties; correlation is not causation. Genetic explanations for psychological disorders such as depression are oversimplified and are primarily theory-based rather than research-based. Heritability, which is consistently found to be well below 50%, refers to the underlying risk of depression and not to depression itself. Multiple variables, including the uniqueness of the individual, are involved in the causation of depression.[5] Indignant bluster and adamantly expressed hard science terminology do not convert complexity and probability into certainty.

Like its predecessors, the DSM-V is a manual of symptoms – it does not offer psychotherapy guidelines for the disorders it lists. There is, however, a relationship between the symptom descriptions in the DSM-V, the research conducted to develop assessment instruments and the psychotherapies intended to address the various symptom clusters.

## DSM-V – Related Outcome Research

Much of psychology research is devoted to treatment effectiveness. That is, can it be shown that a particular treatment model for a particular psychological problem actually results in positive change? This type of research is necessary, but it is far from perfect. Outcome research requires a design that includes one or more clearly described treatment models, therapists who are trained in the treatment being studied, randomly selected treatment groups, a control group for each treatment group, and statistical control for selected variables such as gender, age, education, socio-economic status, religion, rural-urban location and any other variables that could influence the outcome. In addition, it is necessary to have a means of establishing a valid benchmark measure of the DSM disorder of the groups studied and a valid means of assessing any change that occurred following treatment.

The analysis of variance (ANOVA) is then applied to the outcome data to determine if, following treatment, there was an average positive change and, if so, whether it was greater than chance. If the design included valid measures of individual differences, some of the characteristics common to those who made positive changes can also be identified.

In these studies it is very difficult to maintain treatment consistency across therapists and across groups. Therapists and the group members are not absolutes. Nor is the disorder being studied an absolute. The nature and severity of depression, for example, are not the same for each person who suffers from depression. The Global Assessment of Functioning Scale (GAF) in the DSM-IV is used to estimate an individual's overall level of functioning following an assessment. The scores range from zero to 100 but they are not absolute; they are, as the name states, assessments of functioning made by the assessing psychologist or psychiatrist. Again, this does not suggest a flaw or inadequacy in the measures or their creators. There simply is no valid and reliable way to objectively assess perceived severity the way a thermometer assesses temperature or a ruler assesses dimensions. The authors of the DSM-V have also developed scales in an effort to address the important variable of disorder severity. Their scales too are "soft science" assessments.

Employing random selection of the treatment and control groups that best represent the population being studied is ideal from a statistical perspective but is simply not possible in the real world. Approximate randomness is as good as it gets. Larger samples are best. People drop out in every study, further diluting the theoretical randomness of the sample.

A key variable that is rarely included in psychology research is the self-efficacy of the individuals being studied. Research design for treatment effectiveness is based on the unspoken premise that each person in the study has the same ability to utilize the cognitive, behavioral and emotional tools provided in the treatment model. This fallacy can be illustrated thus: An experienced jockey who is well versed in the efficacy-based handbook of competitive riding should be able to achieve positive results on any horse. However, it is obvious that the horse matters. A 2012 study by A.A. Goldsmith, et al.,[6] found that the client's self-efficacy was a significant predictor of outcome. The authors noted that self-efficacy is an understudied variable in addiction treatment research.

Treatment effectiveness is determined by comparing the average score of the treatment group to the average score of the control group, whose members, as far as the researchers can determine, received no treatment. If a treatment is found to be effective, its effectiveness can range from very beneficial to simply better than no treatment.

The validity of treatment effectiveness is also influenced by the validity and reliability of the instruments used to measure change. Self-reports, which are often used in outcome research, are the least reliable measures. Change is usually measured immediately following treatment and sometimes again, with those subjects who make themselves available, six months or more after treatment. For example, recent research[7] shows that the benefits of cognitive behavioral therapy (CBT) for depression are much greater initially than they are at a two-year follow-up.

In addition to the research limitations discussed, the medical or disease model often influences expectations of treatment effectiveness and recovery rates in psychology research: for example, the medical model consists of a client-reported problem followed by a diagnosis followed by a prescribed treatment and an expected recovery time. Even the term treatment, which is now part of the psychology lexicon, is derived from the medical model. The medical model can also complicate some aspects of the DSM-V, and it invites direct-to-consumer advertising of pharmaceuticals for problems of living.

The medical model leads many physicians to endorse CBT as the treatment of choice for most psychological problems. Cognitive behavioral therapy sounds like hard science – solid, specific, reliable and even unique. Emotional Focused couple therapy sounds like soft science while CBT couple therapy sounds "hard," yet both models are research-validated, though neither model helps all couples and neither has been found to be superior to the other. In reality, the term cognitive refers to the client's problematic thinking patterns, beliefs and biases. Behavior refers to the client's decisions and the actions that follow his or her cognitions. Therapy refers to appropriate changes in the client's cognitions, behavior and, consequently, his or her emotional well-being.

CBT is an important feature in all research-validated therapy models but it is not medicine to be taken for a specific period of time to treat a disease. CBT plus controlled exposure has repeatedly been shown to be effective for treating PTSD,[8] but the outcome literature also shows that recovery times vary greatly and close to 30% of PTSD sufferers never fully recover.[9]

The committees in charge of creating the DSM-V have, without doubt, been as thorough and professional as possible with such a daunting endeavor. If you go to DSM-V online, you will see a link titled "Research Development," which includes the field trials conducted on DSM-V symptom criteria and 223 peer-reviewed publications arising from the work conducted on the DSM-V. This is truly a wealth of information, yet, as with all psychology research, the subjectivity of human beings and the subsequent research limitations also apply to this body of work.

**Sometimes the media, when reporting on studies, misrepresent correlation as causation, oversimplify the research and speculate about what the studies might be showing.**

This brief summary of research design in psychology illustrates that because people are subjective beings, we do not fit well in the research designs traditionally used in scientific research. Consequently, there is no certainty in psychology research; there is only probability.

The DSM-V is a manual of human disorders, resting on a foundation of research, theory and opinion. It certainly warrants our respect but not our blind respect. When aspects of the DSM-V factor into your cases, request clarifications in everyday English and request evidence to show whether the case-relevant DSM-V disorders and their symptom clusters are research-based, theory-based or opinion-based.

## Law-Related Changes in the DSM

### The Personality Disorders

Major changes have taken place in the category of the Personality Disorders (PDs). The DSM-IV lists 10 specific personality disorders whereas the DSM-V lists six. These changes, as thoroughly considered as they have been, will further complicate an already complex situation when the diagnosis of a Personality Disorder intersects with the legal process. Existing case law involving Personality Disorders is based on the DSM-IV model. Therefore, until a new body of case law has been established, opinion evidence and often, conflicting opinion evidence, will be the norm.

Widiger[10] points out in *Personality Disorders: Theory, Research and Treatment* (a journal of the American Psychological Association), that there is insufficient research to legitimize the new condensed version of the Personality Disorders. A theory is a theory because there is insufficient research evidence to make it factual. The DSM-V Personality Disorders must, as was the case for their DSM-IV predecessors, be viewed as theory. PD assess-

ments and expert testimony then, will involve a great deal of individual interpretation and professional opinion.

Construct validity is an agreed-upon meaning of the constructs being assessed. Without construct validity, the content validity of an assessment instrument or procedure is of little significance and the establishment of a meaningful standardized base is equally difficult. The malleability that exists in the constructs defining Personality Disorders will, for a few years at least, elevate the roles of theory interpretation and differing expert opinions in the cases involving Personality Disorders.[11]

From a psychology / psychiatry perspective, the DSM-V changes to the Personality Disorders are interesting and debatable. From a legal perspective, only time will tell how these changes will affect the proceedings in cases where one or more of the new Personality Disorders plays a role.

The decision to make changes to the DSM-IV Personality Disorders arose from an experiential recognition that severity differs from individual to individual, that normality and pathology reside on a continuum where one slowly fades into the other, making assessment, diagnosis or a reliable prognosis quite difficult. The complexity of these disorders, the possibility of overlapping disorders, the functioning of the individual when in crisis versus when not in crisis, the questionable reliability of self-reports, the frequent uncooperativeness of the individual being assessed and the considerable amount of time and money required to conduct a thorough assessment, made this a challenging task. This task was further complicated by professional disagreements concerning the nature of the Personality Disorders themselves, disagreements about the appropriate assessment tools and disagreements about interview strategies. Unfortunately, this situation may not change much with the DSM-V changes.

The Minnesota Multiphasic Personality Inventory-2 (MMPI-2) or the Personality Assessment Inventory (PAI) has been used in conjunction with structured interviews designed to assess the DSM-IV-TR, Axis II PD criteria. The Millon Clinical Multiaxial Inventory (MCMI), which was developed exclusively for the assessment of Personality Disorders, was frequently used but its sample base pales in comparison to the MMPI-2. No single instrument or interview session was sufficient for a reliable assessment of the DSM-IV Personality Disorders and that will be equally true, at least initially, for assessments of the DSM-V Personality Disorders. Professional disagreement was and will remain common.

When engaging an expert in this realm, you will want the person doing the evaluation and report to be a psychologist or psychiatrist who is trained in psychological assessment procedures, knows the current literature on the Personality Disorders, appreciates the subjective limitations in this realm and respects the fact that legal precedent does not yet exist for assessments of the DSM-V Personality Disorders.

## The DSM-V Personality Disorders

To qualify as a Personality Disorder, the criteria described below must be relatively stable over time, not be normative culturally or developmentally, and not be solely caused by drug use or a general medical condition.

### Antisocial PD

The person's self-esteem is derived from power, personal gain or pleasure. He or she fails to conform to lawful or culturally normative ethical behavior; he or she lacks empathy and remorse, and lacks the capacity for intimacy. The person's relationships are based on exploitation, deceit and domination. The person is antagonistic, manipulative and angers easily. He or she is irresponsible, impulsive and takes excessive risks.

> Personality Disordered people tend to practice the same strategies repeatedly with only minor variations – they are adaptively inflexible.

### Avoidant PD

The person has low self-worth and excessive feelings of shame or inadequacy. He or she is reluctant to pursue goals, take personal risks or engage in new interpersonal activities. He or she is extremely sensitive to perceived and anticipated criticism or rejection and is therefore reluctant to trust others. Withdrawal, intimacy-avoidance and anxiety about interpersonal situations are hallmarks of this disorder.

### Borderline PD

The person is excessively self-critical, feels empty and can experience dissociative states under stress. He or she has difficulty maintaining personal goals, values or career plans. The person is prone to feeling slighted or insulted and has a diminished capacity for empathy. His or her relationships are intense, unstable and conflicted, and are marked by mistrust, neediness and fear of abandonment. The person's emotions are easily aroused and are out of proportion to the situation. He or she is frequently angry in response to minor real or perceived slights and insults and can react impulsively without regard for the consequences. The person is usually anxious about interpersonal situations and fears both closeness and abandonment. These states can lead to depression, pessimism

and even thoughts of suicide. As the case has been for all Personality Disorders, no reliable evidence demonstrates that Borderline PD symptoms significantly change into middle age and beyond.

### Narcissistic PD

The individual excessively makes reference to esteemed others implying grandiose self-association. The person feels entitled, better than others and is condescending. He or she constantly seeks the admiration of others yet has impaired empathy, because his or her interest in others is limited to whether they are relevant to self. The person's relationships are generally superficial and exist primarily to serve his or her sense of worth. His or her exaggerated sense of self is easily deflated, leading to indignation, anger and severe distress.

### Obsessive-Compulsive PD

The individual gains a sense of self from work or productivity but has difficulty completing tasks because of rigid and excessively high standards. He or she is overly conscientious and moralistic with a limited capacity for empathy. His or her relationships are secondary to work or productivity, causing ongoing relationship problems. The person displays a rigid perfectionism and believes that there is only one way to do things. Consequently, the person is preoccupied with details, organization and order. He or she often persists with tasks long after the efforts show results.

### Schizotypal PD

The individual has a distorted sense of self with confused boundaries between self and others and emotional expression that is not congruent with the context. He or she has unrealistic or incoherent goals and a limited capacity for empathy, frequently misinterpreting others' motivations and behaviors. The person is prone to mistrust and suspiciousness about the loyalty of others; the consequent related anxiety makes it very difficult to develop close relationships. The person often behaves bizarrely, saying unusual or inappropriate things, putting forth views that others consider unusual or strange. He or she has little emotional reaction and appears indifferent, with the result that socialization is minimal.

### Personality Disorder Trait Specified (PDTS)

A diagnosis of PDTS is defined by significant impairment as measured by the Levels of Personality Functioning Scale and one or more of five pathological personality trait domains or facets.

### The Levels of Personality Functioning Scale

This scale replaces the DSM-IV category Personality Disorder Not Otherwise Specified. On the PDTS, the levels of functioning are based on the assessed severity of disturbances in one's identity or sense of self and in the interpersonal capacity for empathy and intimacy. Five theoretical personality traits are used to determine where an individual falls on the PDTS continuum. These broad traits are negative affectivity, detachment, antagonism, disinhibition versus compulsivity, and psychoticism.

The level of severity derived from this new and non-standardized scale will be used to make clinical recommendations, and it will serve as a basis for expert opinion in legal proceedings. It should be noted that those whose severity is greatest are also the ones least likely to benefit even minimally from treatment.[12]

Whereas it is important, from a construct validity perspective, to define as accurately as possible, the constructs that constitute each Personality Disorder, it is at least as important to have the tools to accurately assess the severity of a disorder. As you can see from the description of the PDTS and the Levels of Personality Functioning Scale, much remains subjective. This scale is influenced by the perceptions of the person administering the scale; hence, there will be professional disagreements and arguments about expertise. As an attorney, keep your eye on the ball. The ball, in this case, is the subjectivity and malleable construct validity that is woven into the definition and assessment of the Personality Disorders.

The coping strategies of most individuals are diverse and flexible. When one strategy or behavior isn't working, normal persons shift to something else. Personality Disordered people tend to practice the same strategies repeatedly with only minor variations – they are adaptively inflexible. Consequently, their stress level keeps rising, creating crisis situations. Because they cannot be flexible, other people and situations must become ever more adaptive. However, there are limits to how adaptive people can be. When the situation is not arranged to suit the Personality Disordered person, a crisis ensues. In effect, a Personality Disordered person's life is like a bad one-act play that repeats over and over again.[13]

When reviewing summaries of the disorders described above, most people, including attorneys, self-consciously notice traits that seem more personally familiar than they would like. Relax – there is a very real difference between a periodic display of a particular personality trait and actually qualifying for a diagnosis of a longstanding Personality Disorder.

## Addiction Therapy Models

The new Substance Use and Addictive Disorders segment of the DSM-V makes some changes from the DSM-IV. It should be noted that Gambling Disorder, which in the DSM-IV was listed under Impulse Control Disorders Not Otherwise Specified, is now included in the Substance Use and Addictive Disorders section of the DSM-V. The disorders have been organized as the following Substance Induced Disorders: SI Psychotic Disorder; SI Bipolar Disorder; SI Depressive Disorder; SI Anxiety Disorder; SI OC Disorder; SI Sleep-Wake Disorder; SI Sexual Dysfunction;

SI Delirium; SI Neurocognitive Disorder and according to each addictive substance such as alcohol, caffeine and opiates.

The diagnostic criteria for these disorders are described in terms of failure to fulfill obligations at work, school or home and in situations involving driving or operating equipment while intoxicated. Additional criteria include continued use of a substance in spite of pressures not to; the intake of ever-increasing amounts of the substance to obtain the desired result; a struggle between an expressed desire to cut down intake and continued excessive consumption; increasing time spent on acquiring, using and recovering from intake of the substance; continuing intake despite obvious physical and psychological harm; distinct symptoms of distress when intake is suspended for a period of time; and cravings for the substance.

The DSM-V does not distinguish, as did the DSM-IV, between the concepts of abuse and dependence. Abuse was seen as hazardous behavior and dependence as psychobiological in nature. The DSM-V committee concluded that current research[14] supports the decision to combine abuse and dependence into a single disorder with a grading scale for severity. A rating of 2-3 on this scale suggests a moderate problem, whereas a rating of 4 and above suggests a severe problem. However, these severity measures are not reliable for short assessment periods such as days, weeks or even a few months. Also, the designated placement on the severity scale is derived from consumption self-reports; co-worker, family and friend reports; and from urine, blood or saliva tests. Only the latter measures have acceptable validity and reliability.

It is important to remember that change to the diagnostic criteria for a disorder does not mean there are consequent changes in the treatment outcomes. Diagnosis is about the description of a disorder, whereas treatment is about the degree of measurable and lasting change achieved by an individual following treatment for the specified disorder.

According to Marica Ferri and her colleagues,[15] in their review of outcome literature involving eight addiction treatment models, with 3,417 men and women, a number of addiction therapy models, primarily Alcoholics Anonymous, Narcotics Anonymous and variations of the CBT model, have been shown to have efficacy, but no addiction therapy model has been shown to be more effective than any other model. Additionally, recent research[16] identifies a significant role of self-efficacy in a successful outcome, and this role is independent of the treatment model.

Numerous lawsuits have been launched in the past few years against tobacco companies[17] and by tobacco companies,[18] against gambling organizations[19] and against alcohol outlets.[20] The most common issue in these cases is that of the disease model of addiction. The case for the plaintiff rests on the premise that addiction is a disease, and this disease is such that the addicted individual is unable to break his or her addiction. Consequently, the argument is that he, she or they, if it's a class action suit, cannot be held responsible for the negative consequences arising from their powerlessness in the face of their addiction disease. These consequences can include cancer, heart disease, liver disease, indebtedness from out-of-control gambling, DUI charges and loss of employment. If you are defending clients in this realm, it is important to remember that the disease model is a theoretical and, in some circles, an opinion model, rather than a research-validated model.

The research evidence does not definitively confirm the popular disease model of addiction.

Harvard psychologist Gene Heyman[21] found in his work that 60% to 80% of young problem drinkers are no longer problem drinkers by the age of 30, leaving the hard-core users to enter the treatment programs. This core group with a DSM-V severity score of 4 or above also has, according to Heyman, a high incidence of DSM disorders with damaged self-worth, anxiety and depression being the most common.

The research evidence does not definitively confirm the popular disease model of addiction and it does not support the related hypothesis that, as a disease, addiction afflicts all people equally. Sullum[22] found that young people who develop addiction problems are not like those who never develop them and, as Heyman[23] reported, adults whose problems persist for decades manifest different traits from those who break their pattern of problem substance abuse.

The only generally agreed-upon position about the genetics of drug addiction is that genetics and environmental factors both play significant roles. The arguments center on the degree of influence each has and the estimates of these influences are wide-ranging. It seems obvious that when ingested, a substance such as alcohol, nicotine or cocaine has a chemical effect on the human brain. What is neither obvious nor confirmed by research is that used long-term these substances alter the decision-making abilities of the users. Again, correlation is not causation.

There is no best therapy model for addictions, and the success rates across models are not great – but many individuals do in fact succeed in their quest for freedom from their addictions. Therapy however, is an interactive undertaking. The therapy model must be efficacy-based,

CONTINUED ON PAGE 28

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Continued from Page 26

but the input of the persons who participate in the therapy is at least as important as the therapy model.

## Posttraumatic Stress Disorder

The changes to the section on Posttraumatic Stress Disorder are moderate but still significant. Years ago PTSD, or shell shock, was perceived to be an extreme anxiety reaction in an often stigmatized minority of active-duty military personnel. The DSM-IV diagnostic criteria broadened this narrow focus to some degree and the DSM-V further broadens the circumstances wherein a person may suffer identifiable PTSD symptoms. The DSM-V also expands and clarifies the nature of some of the key PTSD symptoms.

For these reasons, personal injury attorneys are no longer the only members of the legal profession who have a professional interest in PTSD. The nature of the diagnostic changes is supplemented by the recognition that the diminished functioning of people suffering from PTSD affects their personal, family and professional lives as well as their ability to participate fully in life generally.

> The diagnosis and treatment of PTSD is an issue that often comes up during the process of determining damages in personal injury law.

Therefore, the DSM-V changes to PTSD will also be of interest to attorneys in specialties such as employment law, family law, health law and criminal law.

The first noticeable change from the DSM-IV categorization of PTSD is the creation of a new DSM-V category for PTSD and related disorders such as Acute Stress Disorder and Adjustment Disorders. In the DSM-IV, PTSD was listed as one of the Anxiety Disorders. Based on the considerable research on PTSD that has been published over the past decade, it was determined by the committee responsible for this section of the DSM-V that PTSD and other types of traumas warranted a separate category. The designations for this section range from G-00 to G-08 with the designation for PTSD going from 309.81 in the DSM-IV-TR to G-03 in the DSM-V.

The aftermaths of 9/11 and Hurricane Katrina generated a significant portion of this new research. Consequently, in the DSM-V, PTSD is now found in the category of Trauma and Stressor-Related Disorders. *The American Psychologist*, the flagship journal of the American Psychological Association, devoted the September 2011 edition[24] exclusively to the lessons learned about PTSD since the 9/11 disaster.

In case law involving the DSM-IV-TR criteria for PTSD, Criterion A was the source of debate and argument in courts and tribunals because it was difficult to make a clear distinction between traumatic events and events that are distressing but do not exceed the traumatic threshold.[25]

The DSM-V Criterion A, upon which many future legal decisions will be made, is as follows:

The person was exposed to one or more of the following events: death or threatened death, actual or threatened serious injury, or actual or threatened sexual violation, in one or more of the following ways:

1. Experiencing the event or events himself or herself.
2. Witnessing, in person, the event or events as they occurred to others.
3. Learning that the event or events occurred to a close relative or friend; in such cases, the actual or threatened death must have been violent or accidental.
4. Experiencing repeated or extreme exposure to aversive details of the event or events, such as in the case of first responders collecting body parts; police officers repeatedly exposed to details of sexual abuse. Such exposure does not include exposure through electronic media, television, movies, or pictures, unless this exposure is work related.

It is evident that, in spite of the considerable efforts that have been made to establish a more valid and reliable distinction between that which is traumatic and that which is merely distressing, the perceptions of the person directly involved can neither be ignored nor underestimated.

The terms that best illustrate the unavoidable subjective aspect of Criterion A are threatened and serious. A threat combines circumstances with anticipation. Sometimes the perception of a threat of death or serious injury is objective, leaving little room for argument about its validity. On other occasions, however, the threat level of a potentially traumatizing situation is much more difficult to ascertain.

When a person perceives a threat, he or she does so in terms of the anticipated outcome rather than in terms of the actual outcome. It can be difficult for a court to reliably determine, in hindsight, whether an individual's perception that he or she faced a serious threat was a misperception of the circumstances, was influenced by pre-existing situations or a pre-existing condition or was a purposeful attempt to deceive.

It might seem easier to base a PTSD assessment on the actual and identifiable outcome of the event itself, but that hard science approach requires us to ignore the human capacity for anticipatory creative thought. And, if

the event were to be the determining factor in the assessment of PTSD, to be a valid approach, all the people involved would have to have perceived the event in the same way.

In its general statement and third item, Criterion A states that the "actual or threatened death" must have been violent or accidental, with the exception of a sexual violation. If you have clients with children or other loved ones who have faced death from clearly life-threatening situations such as a heart attack, untreatable cancer or a potentially deadly anaphylactic reaction, you may want to explore the boundaries of the term accidental and you may want to cite the exception made for sexual violations. Marshall and colleagues in their 2010 papers,[26] as well as Robinson and Larson in their 2010 paper,[27] point to a number of PTSD definition and diagnostic challenges similar to those identified here.

Item four of Criterion A represents a significant change from the DSM-IV-TR, because it recognizes that first responders such as police, firefighters and ambulance attendants are at risk from the cumulative effects of exposure to very distressing situations. Item four contains the caveat that exposure that is not work-related, that comes via television, movies or other electronic means, is not sufficient to cause PTSD. But, as clarified in item four of Criterion A, if a person is already suffering from PTSD, electronic exposure can create cues that can significantly amplify a person's PTSD symptoms.

Though change is increasingly evident, acknowledgement of and seeking treatment for PTSD still carries a whiff of alleged malingering for the military and first responders. Such clients will still face resistance from third parties; but instead of the often-denied appeal to reason when the DSM-IV was in use, their case is supported by the DSM-V, Criterion A, item four.

The majority of PTSD-related cases involve workers' compensation claims and personal injury claims that involve insurance companies. There can be little doubt that insurance companies have a vested interest in the establishment of a limited criterion for PTSD. It must be noted, however, that the PTSD symptoms identified and described in the DSM-V are symptoms actually experienced and expressed by large samples of real people who, as their symptom clusters confirm, suffer from PTSD. The causes of PTSD, however, are deemed. These causes certainly rest on theoretical and practical grounds but as is the case with third-party coverage for addiction treatments, they also rest on economic grounds.

## The PTSD Context

The diagnosis and treatment of PTSD is an issue that often comes up during the process of determining damages in personal injury law. However, PTSD is also an issue in criminal cases such as assault, home invasion and other violent events. Increasingly it is being suggested that PTSD can arise from life-threatening health situations. It can be a factor in employment law when the issue of short- and long-term disability is in question; it can also be a factor in family law as a contributor to family breakdown.

We are often more familiar with the diagnosis and treatment of the physical injuries suffered by our clients in motor vehicle accidents, personal assaults or other injury-causing events than we are with the diagnosis and treatment of PTSD. The primary difficulty in PTSD assessment and prognosis resides in the fear-laden, subjective images that flood the individual's mind during and after a potentially traumatizing event. The victim does not know the outcome before the event is complete. He or she anticipates the nature of the potential harm to self or others during the event and then, following the event, the victim often imagines the worst that could have happened.

The symptoms of PTSD are well documented; but the severity and duration of these symptoms vary from person to person because of their subjective reactions; therefore, each case must be carefully assessed. Lawyers, psychologists and family physicians are familiar with the symptom cluster that constitutes PTSD and we understand that an accurate determination of whether a client suffers from PTSD cannot be made on the basis of the event alone. People react differently to potentially traumatizing events. In fact, many individuals who are exposed to trauma do not develop PTSD. In a meta-study of 77 studies on PTSD,[28] Brewin found that the probability of an individual developing PTSD was increased slightly by a previous psychiatric history and by various forms of prior adverse experience. The most influential predictive variables that Brewin identified were concurrent life stresses, the degree of family and social support and the nature of the trauma. As might be expected, combat was the most likely situation to result in PTSD for some, but not all, participants.

Individual circumstances clearly play a role in PTSD onset. In their 2009 paper,[29] Andrews and colleagues found that immediate-onset and delayed-onset PTSD were similar in the number and type of symptoms reported at onset, but the delayed-onset group differed in showing a gradual accumulation of symptoms that were quite persistent. Those with delayed onset had greater stress sensitivity and were less able to adapt to continued exposure to stress than immediate-onset subjects. Exposure to continuous stress may well be part of the individual's type of work. People in the military, police force or fire department are more likely than most to be exposed to continuous stress. In other careers, such as the practice of litigation law, there isn't a comparable threat of physical harm but there certainly is a continuous exposure to stress. In a related study,[30] Olatunji and Wolitzky-Taylor reported in their meta-analysis that elevated anxiety sensitivity was associated with panic disorder and with PTSD. In the same vein, Pineles and colleagues[31] reported

in 2011 that people who are highly reliant on avoidance as a coping tool are also highly reactive to trauma reminders, and therefore, are at the greatest risk for prolonging or even elevating their PTSD symptoms.

The victim's subjectivity is the floating variable that complicates the diagnosis and treatment of PTSD. Insurance companies want to avoid excessive payouts for overly zealous PTSD assessments and pessimistic treatment prognosis. Consequently, lawyers often need to warn their clients against an understandable but unwise self-declaration of a full recovery. Accident and assault victims sometimes minimize their symptoms because they want to get back to normal life as quickly as possible. They often find, however, that denial simply prolongs the problem and a year or two later they are no longer able to function effectively. Recent research shows that approximately 20% of PTSD sufferers never fully recover from their symptoms.[32]

## PTSD Symptom Criteria: DSM-V

The conditions that must be present for a DSM-V diagnosis of PTSD are as follows. Criterion A was discussed previously, but it bears repeating so the PTSD Symptom Criteria are listed in one place.

Criterion A. The person was exposed to one or more of the following events: death or threatened death, actual or threatened serious injury, or actual or threatened sexual violation, in one or more of the following ways:

1. Experiencing the event or events himself or herself.
2. Witnessing, in person, the event or events as they occurred to others.
3. Learning that the event or events occurred to a close relative or friend; in such cases, the actual or threatened death must have been violent or accidental.
4. Experiencing repeated or extreme exposure to aversive details of the event or events, such as in the case of first responders collecting body parts; police officers repeatedly exposed to details of sexual abuse. Such exposure does not include exposure through electronic media, television, movies, or pictures, unless this exposure is work related.

As was pointed out earlier, this deemed causal criterion does not acknowledge the potential for PTSD when the exposure to death or threatened death was health related. *The New York Times* reported on a Columbia University Medical Center study showing that 2,383 of their patients reported PTSD symptoms after suffering a heart attack.[33] The patients reported that subjective fear of death rather than the severity of the attack was the primary contributor to their symptoms. If you have a client with a health problem that was life-threatening to self or a loved one, and your client meets the symptom criterion for PTSD but not the causal criterion, you may want to point out that Criterion A consists of deemed items whereas the symptom criteria consists of experienced items.

Criterion B. Intrusion symptoms that are associated with the traumatic event(s) and that began after the traumatic event(s) that are evidenced by one or more of the following:

1. Spontaneous or cued recurrent, involuntary and intrusive distressing memories of the traumatic event(s). In children the traumatic themes may be expressed in repetitive play.
2. Recurrent distressing dreams in which the content and / or the affect of the dream is related to the event(s). In children there may be frightening dreams without recognizable content.
3. Dissociative reactions or flashbacks in which the individual feels or acts as if the traumatic event(s) were recurring.
4. Intense or prolonged psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).
5. Marked physiological reactions to reminders of the traumatic event(s).

You may notice that the descriptions of Criterion B generally narrow the range of reactive symptoms to the specific traumatic event(s). This is understandable and could be seen as insurance company friendly as it selectively minimizes the human capacity for metaphoric creative thought.

When you are representing a client who sincerely claims to suffer from PTSD, you may want to explore the Criterion B terms: associated, affect, related, psychological distress and internal cues. These terms suggest potential ambiguity and flexibility. This is not a flaw in the DSM-V; quite the contrary, it is a controlled nod to the subjectivity of the persons being assessed.

Criterion C. Persistent avoidance of stimuli associated with the traumatic event(s), evidenced by efforts to avoid one or more of the following:

1. Avoids internal reminders (thoughts, feelings, physical sensations) that arouse recollections of the traumatic event(s).
2. Avoids external reminders (people, places, conversations, activities, objects, situations) that arouse recollections of the traumatic event(s).

It is evident that the avoidance identified in Criterion C is based on anticipation and perception. As you will learn from your clients, some of their reminders will be objective and easily identified while others will be unique to the individual.

Criterion D. Negative alterations in cognitions and mood that are associated with the traumatic event(s) that began or worsened after the event(s), as evidenced by three or more of the following:

1. Inability to remember an important aspect of the traumatic event(s) not due to head injury, alcohol or drugs.
2. Persistent and exaggerated negative expectations of the future for one's self, others or the world.

3. Persistent distorted blame of self or others about the cause or consequences of the traumatic event(s).
4. Pervasive negative and helpless emotional state.
5. Markedly diminished interest or participation in significant activities.
6. Feelings of detachment or estrangement from others.
7. Persistent inability to experience positive emotions.

Anything that is negative and chronic can become depressing.[34] Criterion D outlines the pessimism and the feelings of being at risk in the world described by the author in his earlier papers on PTSD.[35] We all want to feel safe in the world and to do so we maintain a healthy myth that we can always take care of ourselves and our loved ones. Then an event occurs that irrefutably demonstrates that our safety is a myth.

Victims of a motor vehicle accident, an assault and other trauma-inducing situations often comment on their realization of how quickly life can change. Healthy denial makes it possible for most people to live with a sense of general safety, personal control and an expectation of a predictable future. When this imagined reality is shaken by a serious accident, an assault, or life-threatening health issue, victims are faced with a new reality that makes it difficult for them to sustain their day-to-day faith that all is well. They often feel vulnerable to real and imagined threats that seem much more evident following their traumatizing experience than prior to that experience. When they are told by well-meaning professionals, caring friends and concerned family members that there is a low statistical probability that they will suffer additional harm, they are not convinced. Experience trumps statistics.

These individuals feel that they have looked into the abyss, and they now appreciate the precariousness of our existence. Some seek security by avoiding situations they perceive to be threatening. Their quest for security diminishes their quality of life and, for some, results in a near reclusive lifestyle. In cases where PTSD co-exists with chronic pain or mobility-limiting physical injuries, the pain and/or injuries are a constant reminder of the trauma-inducing event and can make recovery from the PTSD more daunting. The combination of physical and emotional injuries can reinforce the victim's uncertainty about the nature of his or her future.

When considering damages for your PTSD clients, keep in mind that it can often take considerable time and effort for your client to restore a sense of safety in the world. Because of the traumatizing event or events, your client knows that safety is a myth, and it can be very difficult, with or without professional help, to set that knowledge aside and return to a healthy level of comfort. Also, your client's symptoms, as described in Criterion D, will quite probably include depression, which will require treatment. If so, the efficacy of treatment for depression, including cognitive behavioral treatment, either in short-term or long-term effectiveness, will not be the same for each person with depression.

Additionally, recent research[36] has shown that drugs that have been widely used to treat severe PTSD symptoms in veterans are no more effective than placebos and, in many cases, have serious side effects. On the other hand, a study by de Roon-Cassini and colleagues[37] shows that most of their 330 PTSD subjects showed considerable resilience. Effective coping skills, healthy self-efficacy, higher education and severity of the PTSD and related depression were the key predictors of recovery.

Recent research has shown that drugs that have been widely used to treat severe PTSD symptoms in veterans are no more effective than placebos.

The point is, no one can tell ahead of time whether your PTSD clients will recover quickly, eventually or not at all. Therefore, when seeking damages, consider the extent of assistance that your clients may need rather than accepting an arbitrary number.

Criterion E. Alterations in arousal and reactivity associated with the traumatic event(s) as evidenced by three or more in adults, or two or more in children, of the following:

1. Irritable or aggressive behavior.
2. Reckless or self-destructive behavior.
3. Hyper vigilance.
4. Exaggerated startle response.
5. Problems with concentration.
6. Sleep disturbances.

The concentration difficulties experienced by some PTSD sufferers can be quite severe and unsettling. The avoidance and emotional distancing identified in Criterion C reduces capacity for absorption of details, which contributes to the person's difficulty concentrating. Too much stimuli, such as in business meetings, home dynamics, social events or other multifaceted situations can overload the person's diminished capacity to concentrate and can bring on a panic attack.

Criterion F states that a person's PTSD symptoms must persist for more than one month, while Criterion G states that they must cause impairment in social or occupational functioning. If the symptoms remain evident for fewer than four weeks, a diagnosis of Acute Stress Disorder (G-04) is likely appropriate. If the stressor is not sufficiently extreme to warrant a PTSD diagnosis, an

initial diagnosis of Adjustment Disorder (G-06) may be appropriate.

As mentioned in Criterion D, some of those who suffer from PTSD also experience survivor guilt or guilt arising from their belief that other people have more worthy reasons for suffering from PTSD than they do. Many of these individuals have a long-standing sense of personal initiative coupled with a strong work ethic, and they are prone to a counterproductive insistence that they can return to work when, in fact, they are not yet ready to do so. Their inability to carry out their responsibilities soon becomes evident; and, in some work situations, it also is evident that these individuals create a safety risk to themselves and others.

Another factor, most prevalent among male victims, is the denial of psychological symptoms. These individuals declare that they are emotionally fine and then attempt to function as if their declaration of wellness actually makes them well. They subsequently grow more emotionally distant from their family and friends, have difficulty sleeping, become irritable and are prone to aggressive outbursts. They may also begin to abuse alcohol or other chemicals. They often report, when they do seek help, that they did not want to appear weak and vulnerable; some acknowledge that they were ashamed of having PTSD symptoms.[38]

People with PTSD often suffer from other, comorbid disorders.

It is extremely difficult to predict individual vulnerability to PTSD. A study by Breslau and Anthony[39] found that women who have been assaulted are sensitized to the PTSD effects of subsequent traumatic events of lesser magnitude. Bonanno and colleagues[40] reported that predicting who will and who won't suffer PTSD following a potentially traumatizing event is very difficult because a number of factors, including the creative imaginations of the persons involved, come into play. Bryant and Guthrie[41] added that an individual's pre-trauma self-appraisal and self-efficacy are significant predictors of PTSD onset, severity and recovery.

## Comorbidity

People with PTSD often suffer from other, comorbid disorders. Kessler and colleagues,[42] in their study of 5,877 individuals with PTSD, found that nearly 50% had additional diagnoses, most commonly depression and substance abuse. The task, then, is to determine the primacy of diagnosis. Comorbid disorders often develop subsequent to PTSD but some individuals were diagnosed with a psychological disorder prior to the traumatizing event. Cause and effect can be difficult to determine.

Brewin[43] and colleagues found in their meta-analysis of 77 studies of PTSD that the likelihood of developing PTSD was somewhat increased by a previous psychiatric history and other adverse experiences. Perkonigg[44] found that panic disorder, depression and substance abuse are most likely to emerge after the onset of PTSD.

People with PTSD often report a sense that their life is divided between life before the event and life after the event. Some feel depressed when they compare the quality of life that they had before the event with the diminished quality of life that they now have and the quality of life they imagine for themselves in the foreseeable future.

PTSD victims often have the sense that they are no longer in control of their own life. Some feel unfairly accused of malingering and many feel distressed at the impersonal, policy-bound, plodding pace of the bureaucracies that now control so much of their lives. Their time is governed by appointments with health professionals, lawyers and rehabilitation providers. They feel that they are expected to wait by the phone for the next directive. They cannot plan ahead with confidence because they have very little control over their schedule. This loss of control would be difficult for most people but it is particularly difficult for someone with a diminished ability to concentrate, high anxiety, chronic irritability, sleep-deprived fatigue and other PTSD symptoms.

## Diagnostic Methods

The presence or absence of PTSD and the severity of the disorder, if it is present, are derived by gathering information about an individual's symptoms, family history, social context, beliefs, strengths, vulnerabilities, immediate support system and his or her coping tools. The experienced interviewer invites situation and symptom descriptions from the client rather than providing a checklist of PTSD symptoms from the DSM-V for the client to consider. If there is evidence that the client lost consciousness at the time of the accident or assault, a physician, rather than a psychologist, should check for Mild Traumatic Brain Injury (MTBI).

The National Stressful Events Survey PTSD Short Scale (NSESSS) has been developed to help assess the severity of an individual's stress following a potentially traumatizing experience. Nine questions, based on DSM-V criterion, are asked. In answer to the questions, the individual is asked to mark one of five categories that best describes his or her thoughts, feelings and post-event experiences: not at all; a little bit; moderately; quite a bit; extremely.

Whereas the words used in this survey do avoid obvious DSM-V terminology, the NSESSS, like similar surveys, is still a self-report document with no reliable means of assessing inadvertent or purposefully misleading responses.

A diagnosis based on a review of the available medical and police reports, plus a detailed interview by a psychologist or psychiatrist, is the most common format used to assess potential psychological damage to an individual following a motor vehicle accident or an assault. However, clinical assessments of this type are sometimes challenged because, with or without the NSESSS, they rely heavily on self-reports and the interpretive expertise of the person doing the assessment. Most people provide honest, though subjective, self-reports of their post-event symptoms, but some provide descriptions that are intentionally inaccurate. Psychologists and psychiatrists, like all other people, perform no better than chance when it comes to assessing the intent and truthfulness of self-reports.[45] Therefore, the reliability of these assessments can be greatly enhanced by adding the MMPI-2 to the assessment process. This is the most valid and reliable measure of the mental disorders, and the F scale on the MMPI-2 is a very reliable measure of exaggerated or feigned responses.

## PTSD Treatments

Considerable research has been conducted in recent years on the most effective treatment models for PTSD. It clearly shows that quick fixes for PTSD have failed to gain support from the evidence. Variations of cognitive behavioral therapy have repeatedly been found to be the most effective treatments for PTSD. In their 2009 meta-analysis, Stewart and Chambles[46] found that CBT, which includes identification and alteration of problematic thought processes, including selective attending, meaning attribution, negative future expectations and the related emotions and behaviors, is effective for treating anxieties in the real world clinical setting.

The CBT model for treatment of PTSD consists of exposure, reframing of problematic conclusions and anxiety containment. When a trusting client-therapist relationship has been established, the client is invited, at a pace he or she can tolerate, to talk about the details of the trauma. Research such as that by Moore and Krakow[47] has confirmed that a positive outcome is related to the client's absorption in these details, and the client's absorption can be enhanced through the use of focused imagery. This exposure to the details of the trauma initially amplifies the client's anxiety but, subsequently, the therapy becomes a shifting but focused activity wherein the therapist gently pushes the client into the details, listens for problematic trauma-induced conclusions and backs off when the client's anxiety becomes too intense. The therapist teaches the client to use anxiety-containment skills. The goal is to help the client regain the ability to confidently function in life. As Criterion C in the DSM-V implies, the pace of the therapy is primarily determined by the severity of a client's PTSD and his or her psychological resilience.

The September 2011 special issue of the *American Psychologist* reports on the lessons learned about treating PTSD since the 9/11 attacks. The lesson is to focus on the needs of the person with PTSD and less on the enthusiasm and theoretical perspectives of the providers. Individuals progress at the rate that their resources and anxiety will permit. People are unique beings, and therapy models need to be adapted to the individuals rather than the other way around.

## Prognosis

The prognosis for recovery is of concern, for different reasons, to the person suffering from PTSD, to his or her insurance company, to the person's employer, to the individual's family, and to the lawyers representing the PTSD sufferer. Understandably, everyone wants to know if this person will fully recover and, if so, when.

A prognosis for recovery from PTSD is a statement of probability. When all of the diagnostic variables and the literature on outcome patterns have been considered, the attending psychologist or psychiatrist can provide a probable date of recovery with a clearly stated provision that, as that date approaches, the actual rate of recovery will be assessed. If it is determined, in consultation with the recovering individual, that he or she is ready to return to work, arrangements can be made to facilitate the return in the manner that best meets the needs of the employee and the employer. If, however, it is evident to the attending psychologist or psychiatrist that the PTSD sufferer has not recovered sufficiently, a second probability-based prognosis is necessary. If this occurs and second opinions are sought, the standardized measure provided by the MMPI-2 in the original assessment will become invaluable.

PTSD is discussed extensively in this article because it is now more fully recognized that PTSD is not a rare disorder and it is not a disorder that exclusively impacts the life of the immediate victim. The victim's irritable or aggressive behavior can erode the quality and nature of his or her work and family relationships which, in turn, can often involve family, employment and criminal attorneys. Untreated or undertreated PTSD can also contribute, through a reduced capacity for concentration and/or greater recklessness, to an increase in risk factors and consequent liability issues in a variety of settings.

## The Somatic Symptom Disorders

No section of the DSM-V better illustrates that psychology is a soft science than does Somatic Symptom Disorders (SSDs). This newly named section melds the DSM-IV categories Somatoform Disorders, Hypochondriasis, Undifferentiated Somatoform Disorder and Pain Disorder into the single SSD category. Fundamentally, SSD concerns the body-mind issues of psychological factors influencing medical conditions.

The somatoform disorders are described in the DSM-V as follows:

1. Somatic Symptom Disorder – J 00: The person has, typically for six months or more, one or more somatic symptoms that are distressing and create a significant disruption in daily living. The person has time-consuming excessive thoughts, feelings and behaviors related to these health concerns; he or she is persistently concerned about the perceived seriousness of these symptoms. The severity of the disorder is subjectively determined by the treating physician.
2. Illness Anxiety Disorder – J 01: The person has, for at least six months, no symptoms but has high and easily activated anxiety arising from his or her preoccupation with having or getting a serious illness. One type seeks continuous checkups while the other avoids medical care because it is anxiety evoking. The preoccupations are not better accounted for by another DSM Disorder.
3. Conversion Disorder (Functional Neurological Disorder) – J 02: The individual has one or more neurological symptoms such as altered motor, sensory, cognitive or seizure-like experiences with or without impairment of consciousness. After an assessment it is determined that these symptoms are not due to a medical condition and they are not congruent with a recognized neurological disorder. The person experiences anxiety and impairment of his or her social and occupational life.
4. Psychological Factors Affecting a Medical Condition – J 03: The person does have a medical condition but his or her psychological and behavioral factors adversely affect the course of the medical condition. Generally, these psychological factors worsen the medical condition and interfere with its treatment.
5. Factitious Disorder – J 04: The person falsifies physical or psychological symptoms and presents himself or herself as ill, impaired or injured. The deception is maintained even in the absence of obvious reward; is not better explained by another DSM-V Disorder.
6. Somatic Symptom Disorder Not Elsewhere Classified – J 05: The person struggles with Pseudocyesis or what is commonly known as false pregnancy.

What has not significantly changed in this DSM-V realignment is the unreliability of assessments, the determination of disorder severity and the difficulty in differentiating honest responses from malingering or downright deception.

Because SSDs are fundamentally distresses and anxieties about real, imagined or anticipated medical conditions, it is the frontline physician who often makes the initial diagnosis and a subjective assessment of the severity of the disorder. Even when a formal MMPI-2 psychological assessment is conducted, there is a very real possibility that the person undergoing the assessment will answer the questions honestly, but his or her anxiety-fuelled responses will suggest malingering, which of course, can sometimes be viewed as a euphemism for purposeful deception.

Again, nobody, expert or novice, in spite of confidence in his or her detection skills, performs significantly better than chance when it comes to determining if a person is telling the truth.[48] The most common error involved in our efforts to assess truth is the principle of meaning attribution. Human beings fill in gaps of uncertainty with attributed meaning and do so with surprising confidence. We have all met people who say, "I read people really well" or "I'm really intuitive" or "I'm a really good judge of character," and they seem to have complete faith in these self-appraisals. Kahneman and Klein[49] found that people who make decisions based on their self-determined elevated intuitiveness are wrong more often than chance because they make two fundamental errors: (1) their assumption that they are extraordinarily intuitive and (2) their tendency to prematurely trust their bias rather than considering all the available evidence.

> Psychology and psychiatry are more soft science than hard science, so there are few if any absolutes.

Attorneys are aware of the realities of deception detection, while many members of the general public, from which comes our juries, are not. Keep in mind that, when representing clients, it may be helpful bring this research to the jury's awareness.

Personal injury lawyers and insurance carriers are concerned about the possibility of malingering in claims that include PTSD. In cases involving SSD, employment lawyers, health lawyers and to a lesser degree personal injury lawyers and insurance carriers in the health benefits field are most concerned.

The most common issues are how the honesty or dishonesty of your client is to be determined and whether your client's health problem is primarily one of anxiety and secondarily one of physical illness or the other way around. From the insurance companies' perspective this issue could be expressed as: "Does this person have a medical problem that we are contractually obligated to

cover or, does this person have SSD which we may or may not be contractually obligated to cover?"

The somatic disorders are difficult to reliably assess and, because of their chronic nature, many insurance companies employ special investigators. Sometimes, however, claims assessors function from the bias that anyone who has been diagnosed with one of the somatic disorders is probably malingering. The book *Clinical Assessment of Malingering and Deception* by Richard Rogers, now in its third edition, has often been given greater credibility than is warranted. With the exception of standardized measures such as the MMPI-2, most of the assessment techniques do not have validity derived from a standardized base.

One or more of your clients may have been caught up in this net of alleged malingering. Unless direct and verifiable evidence of malingering on the part of your client is brought to light, you should stand and fight on behalf of your client. This is a subjective realm but its subjective nature does not mean that your client is faking his or her symptoms.[50]

## Conclusions

Other changes have been made in a number of DSM-V Disorders. For example, the Major Depressive Disorders have undergone some minor changes including the exclusion of normal bereavement from the symptom list; Mixed Anxiety / Depression has, as it was in the DSM-IV, been relegated to the Appendix (Section 111) for further study; and the Neurodevelopmental Disorders, formerly listed in the DSM-IV as Disorders Usually Diagnosed in Infancy, Childhood or Adolescence, have undergone reorganization. Whereas all the changes in the DSM-V could at some time play a role in the legal context, the scope of this article limits coverage to those changes that tend to be relevant to the legal system.

The primary intent of this article, however, has been to point out the human element in the psychology research supporting the changes in the DSM-V. The fact that human beings are creative, active, information-processing beings and, as such, we often confuse perception with verified or verifiable reality, is a pervasive variable that greatly influences research in psychology. Consequently, attorneys will best serve their clients when they view the DSM-V disorders and their symptom clusters through a lens of respectful skepticism. Psychology and psychiatry are more soft science than hard science, so there are few if any absolutes. Whereas much in psychology and psychiatry is acceptably validated by research, much is theory based and much is opinion based. Therefore, insist on the use of everyday English to explain psychological terminology that may not rest on the solid research-validated foundation that the specialized terms imply. It is appropriate, and usually beneficial to your client, that, when reviewing a medical-legal report, in interacting with opposing counsel or during cross-examination, you ask for clarification of the type of evidence that supports the psychology or psychiatry evidence being proposed.

The DSM-V is a valuable and necessary document but when its contents become a potentially influential factor in your cases, its limitations need to be identified and, when necessary, respectfully but rigorously challenged. ■

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# The "Governmental Function Immunity" Defense in Personal Injury Cases in the Post-*McLean* World

**By Michael G. Bersani**

The Court of Appeals has, within the last few years, published a series of cases, starting with *McLean v. New York City*, which have troubled the waters of the "Governmental Function Immunity" defense.[1] This article is intended to help attorneys navigate the post-*McLean* seas.

## What Is the Governmental Function Immunity Defense?

Despite the state's general waiver of *sovereign immunity* (Court of Claims Act § 8), our courts have applied the court-made doctrine of *governmental function immunity* to most policy-imbued governmental actions.[2] Generally, the government, and its various agencies and employees, benefit from immunity (either qualified or absolute) when they are legislating, adjudging, and making governmental or quasi-governmental discretionary decisions. The rationale for the survival of this vestige of sovereign immunity in personal injury actions is the courts' reluctance to second-guess governmental decisions of a quasi-judicial nature that implicate, at least to some extent, discretionary decisions on how to best allocate limited public resources for the provision of public services owed to the public at large, and that, if disallowed, may hamstring decision making for fear of lawsuits.[3]

## The Pre-*McLean* World

Before *McLean*, most practitioners and judges were comfortable believing that the governmental function immunity defense, though somewhat muddled in the case law, could be described generally as follows: If a government's agent (e.g., police officer, clerk, housing inspector) negligently caused harm to a plaintiff, and the agent's harm-causing action or inaction was deemed *ministerial*, then the government employer could be held liable even absent a "special duty" to the individual plaintiff. On the other hand, if the harm-producing action or inaction was deemed *discretionary*, the government could be held liable only if the plaintiff proved the agent had a "special duty"

to the plaintiff, beyond the general duty the government has to the public at large.

The "special duty" could be formed in three ways: (1) by a statute that was enacted for the benefit of a particular class of persons of which the plaintiff is a member;[4] (2) by the government official's voluntary assumption of a duty toward a private party who then justifiably relies on proper performance of that duty;[5] or (3) by a government official assuming positive direction and control in the face of a known, blatant and dangerous safety violation.[6]

The second method – of establishing a "special relationship" with a governmental actor – is the most commonly litigated. To succeed, the plaintiff must meet all of four requirements: (1) an assumption by the public entity through promises or action of an affirmative duty to act on behalf of the injured or deceased party; (2) knowledge by the public entity's agents that inaction could lead to harm; (3) some form of direct contact between the public entity's agents and the injured or deceased party; and (4) the injured or deceased party's justifiable reliance on the public entity's affirmative promise.[7]

Several Appellate Division cases and two Court of Appeals cases, *Pelaez v. Seide*[8] and *Kovit v. Estate of Hallums*,[9] lent support to this general understanding that *ministerial* governmental actions could create liability even when no special duty was established, while a prerequisite for liability for *discretionary* governmental actions was a special duty toward the plaintiff. The rule as enunciated in *Kovit*, for example, was "municipalities generally enjoy immunity from liability for discretionary activities they undertake through their agents, *except* when plaintiffs establish a special relationship with the municipality."[10] In *Pelaez*, the Court said, "[M]unicipalities generally enjoy immunity from liability for discretionary activities they undertake through their agents, except when plaintiffs establish a 'special relationship' with the municipality."[11]

### *McLean v. City of New York*

The post-*McLean* world starts, obviously, with *McLean v. City of New York*.[12] In that case, the mother of a child who was injured at a city-registered home daycare center brought a negligence action against the city. Before sending her child to that daycare center, the mother had called the city agency responsible for "registering" privately owned home daycare centers. The agent on the telephone sent her a list of registered home daycare centers, and the mother picked a daycare from that list, assuming that registration indicated some kind of city supervision or inspection. As it turned out, the daycare center had a history of negligence-related child injuries, and the city agency had improperly, in *contra* of its own regulations, renewed the center's registration. In other words, if the agency had done what it should have done – that is, keep track of offending daycares and deny registration to them – the mother would never have selected that particular daycare.[13]

One of the main defenses to the case was that, although the agency may have acted negligently in failing to do what it should have done, the plaintiff could not establish a "special relationship" with the offending agency. Thus, the case should fail for lack of "duty." The plaintiff's lawyer, however, was no fool; he tried to circumvent the special relationship requirement by arguing that the agency's negligence in renewing the daycare's registration in contradiction of its own rules was a "ministerial" not a "discretionary" act. Under the governmental immunity doctrine, as the plaintiff then understood it, she was not required to show that the agency owed her a "special duty" or that she had established a "special relationship" with the city agency if the negligent act complained of was "ministerial" rather than "discretionary." The plaintiff was able to rely on precedent, including dictum from the Court of Appeals cases of *Kovit*[14] and *Pelaez*,[15] to support this argument.

But, to the disappointment of the plaintiff, and the surprise of the bar, the *McLean* court disavowed this understanding of the governmental function immunity defense.[16] The Court distilled the rule to a simple sentence: "Discretionary municipal acts may never be a basis for liability; whereas, ministerial municipal acts may support liability only if a special duty is found to exist."[17]

This newly enunciated rule caused the *McLean* plaintiff to lose her case. The Court found that, even if the city agency's negligence in wrongfully renewing the daycare's registration in violation of its own rules could be qualified as "ministerial," *the plaintiff failed to show a duty*. The government's daycare registration requirements and rules for renewing them were intended to protect the public at large, not just the plaintiff, and she had failed to show that the agency had made some special commitment to her, in that casual telephone call, or else had otherwise established a *special duty* to her in at least one of the three permissible ways.[18]

*McLean* imparts two lessons to the bar: (1) governmental functions that are discretionary can *never* be the basis of liability; and (2) even if the act is ministerial, the plaintiff must still show a special duty. This second principle, though harsh for plaintiffs, is not, in fact, surprising. Every first-year law student knows that, in order for a negligence claim to prevail, a plaintiff must first establish that the defendant owed the plaintiff a duty of care. Since our courts determine "duty" based on public policy concerns, often with an eye toward hemming in boundless liability, it is not surprising that Court of Appeals jurisprudence determined long ago that a plaintiff must show a "special" duty was owed to the individual plaintiff, beyond the general duty owed to the public at large.

### *Dinardo v. City of New York*

Duty is paramount. It trumps everything else. The Court of Appeals made this perfectly clear in its first post-*McLean* case, *Dinardo v. City of New York*.[19]

In *Dinardo*, a special education teacher was injured when she tried to restrain one student from attacking another. She alleged the school administrators had promised her, sometime beforehand, that "something" was going to be done about the assailant student, whose behavior had made the teacher fear for her safety. The Court rejected her claim, because the teacher-plaintiff could not show that she "justifiably relied" on the vague promises made by the school to "do something" about the troublesome student. Without justifiable reliance, there could be no "special duty" under the four-prong *Cuffy* test.[20] Because there was no duty, the Court refused to decide the issue of governmental immunity, that is, whether the school's failure to remove the student was relationship, specifically the *justifiable* part. The Court reasoned that she should have called to confirm that the ex-boyfriend had been arrested, and she was not *justified* in relying solely on the verbal promise. In conducting its analysis, the Court articulated the principle that duty should be analyzed separately from the governmental immunity defense itself. The "duty" requirement and the "governmental function immunity" defense are two separate creatures. The Court recognized that the two issues had been conflated in the case law, including Court of Appeals case law, over the years.[23]

Having determined that the duty element was lacking in *Valdez* (i.e., no special relationship), the Court noted that it had "no occasion to address whether . . . [the city]

**Duty is paramount. It trumps everything else. The Court of Appeals made this perfectly clear in its first post-*McLean* case.**

"discretionary" or "ministerial." The distinction-drawing between ministerial and discretionary actions was of no matter because, post-*McLean*, a "duty" is always required.

In Justice Lippman's *Dinardo* dissent, he summarizes the *McLean* rule (with which he disagrees) as follows: "According to *McLean*, the special relationship exception only applies where the challenged municipal action is ministerial." A more accurate restatement of the *McLean* rule, as clarified in *Dinardo*, is that the special relationship exception – the special duty – becomes relevant *only* if the action is ministerial. Even if there is a special duty, the plaintiff cannot prevail if the act was discretionary. Governmental discretionary actions are *always* insulated from liability, even when there is a duty.

### *Valdez v. City of New York*

The next Court of Appeals pronouncement on the governmental immunity defense was *Valdez v. City of New York*.[21] In *Valdez*, a city police officer promised a frightened woman by telephone that the police would arrest her estranged boyfriend who had threatened to do her harm. The officer told her she could go home because the ex-boyfriend was going to be arrested. She returned to her apartment, feeling safe with the knowledge that her ex-boyfriend would not be there to stalk her. But the police failed to arrest the ex-boyfriend, and a few days later, when she opened her door to take out some trash, she was met with bullets.[22]

The Court of Appeals decided that the plaintiff could not prevail because she could not show that a special relationship had been formed, which would have created a special duty toward her. Specifically, she could not show the "justifiable reliance" element of a special could have avoided liability under such a [governmental immunity] defense on the rationale that the alleged negligence involved the exercise of discretionary authority."[24] In other words, a plaintiff must first show "duty" before a court will engage in the governmental immunity defense analysis.[25]

Because "lack of duty" and "governmental immunity" are in fact two separate defenses, the *McLean* rule ("*discretionary* municipal acts may *never* be a basis for liability; whereas, *ministerial* municipal acts may support liability only if a *special duty* is found to exist"[26]) can be viewed as a shorthand manner of describing, in one breath, the tandem effect of both defenses. The "discretionary" and "ministerial" language pertains to the governmental immunity defense, while the "special duty" language pertains to the "lack of duty" defense. Since there must always be "duty" for liability to attach, and since discretionary actions are always immune under the governmental immunity doctrine whether or not there is a duty, it follows that "duty" becomes a relevant inquiry only if the action is deemed "ministerial." Stated otherwise, the issue of duty is moot when the action is *discretionary* because the government immunity doctrine has already annihilated any liability. Nevertheless, as the Court indicated in *Valdez v. City of New York*[27] and later in *Metz v. State of New York*,[28] discussed below, the Court prefers to first dispose of the "duty" issue and, only if it finds a duty, to then proceed to the governmental immunity defense analysis.

### *Metz v. State of New York*

*Metz v. State of New York* concerned a boating accident on Lake George.[29] A privately owned tourist vessel, the *Ethan Allen*, was certified for many years, by the state

agency charged with conducting tour boat safety inspections, to hold a maximum of 48 passengers. The owner modified the vessel, equipping it with a new, heavier "canopy," which made it somewhat top heavy. Meanwhile, the average American's weight was climbing. The state agency nevertheless continued year after year to "rubber stamp" the 48-passenger capacity rating without re-testing the vessel. On a beautiful day, a small wave struck the vessel, and it capsized, killing and injuring many of its 48 elderly passengers. After-the-fact studies showed that the actual capacity rating of the top-heavy ship should have been only 18. The plaintiff claimed that the state's failure to conduct stability tests to determine safe maximum passenger limits in light of the ship's top-heavy remodeling, and the supersizing of Americans, amounted to negligence.[30]

At deposition, the state's employees readily admitted that they had *discretion* to conduct, or not to conduct, fresh stability tests to determine the vessel's correct passenger capacity. This might have seemed to them an unassailable defense, since *McLean* had declared that "*discretionary* municipal acts may never be a basis for liability."[31] The defendant here, however, learned the hard way that the rule as articulated in *McLean* was incomplete. The Third Department granted summary judgment to the plaintiff, dismissing the governmental immunity defense because, although the state had discretion to test the passenger capacity of the vessel, *it failed to exercise this discretion*. It engaged in no decision-making process as to whether to keep the old passenger capacity rating of 48 or conduct new testing. Rather, it simply rubber stamped the old rating with no thought whatsoever of changed circumstances.[32]

At the Third Department level, this was fatal to the state's governmental immunity defense because the court said that the state had not "exercised" the discretion it clearly had. Long before *McLean*, it was well settled that, where a government actor is entrusted with discretionary authority, but *fails to exercise any discretion* in carrying out that authority, the governmental defendant will not be entitled to governmental immunity from liability.[33] This makes sense, because the sole purpose of the governmental function immunity defense is to allow the government to exercise its governmental, policy and quasi-judicial *discretion* without fear of lawsuits. If the government actor fails to exercise any discretion at all, there is no policy reason to enforce the governmental immunity defense. In simple terms, we might call this the "don't-use-it-you-lose-it" rule.

The *Metz* plaintiff won the battle but however, lost the war. When *Metz* reached the Court of Appeals, the Court refused to address the governmental immunity defense analysis until it had first disposed of the issue of duty. The Court noted that the duty the state agency had to inspect passenger vessels, and ensure that the passenger capacity was safe, was to the public at large, and not to the particular plaintiffs in the lawsuit. No "special duty" had been established.[34]

The complete rule can be stated like this: For liability to attach, a duty is first in all instances required.

The Court cautioned that the plaintiffs must *first* establish duty *before* the Court would tackle the governmental immunity defense proper. The Court stated: "As we recently made clear in *Valdez v. City of New York* . . . claimants must first establish the existence of a special duty owed to them by the State before it becomes necessary to address whether the State can rely upon the defense of governmental immunity."[35]

## The Complete Post-*McLean* Governmental Immunity Defense Rule

The rule as pronounced in *McLean* ("*discretionary* municipal acts may *never* be a basis for liability; whereas, *ministerial* municipal acts may support liability only if a *special duty* is found to exist"[36]) falls short of enunciating the complete rule encompassing the tandem workings of the "duty" requirement and the "government immunity" defense. The Court of Appeals cases that followed in the wake of *McLean* (*Dinardo, Valdez* and *Metz*) exposed the complete rule.

The complete rule can be stated like this: For liability to attach, a duty is first in all instances required. Since the government's duty to the public at large will not do, a special duty toward the particular plaintiff is generally required. Only if such a duty is found will the actions or omissions of the government officer then be examined. If those actions or omissions are deemed *discretionary*, and that discretion was actually *exercised*, then the government is always immune. But if the action is *discretionary* and no discretion was *exercised*, or if the action was *ministerial*, the governmental immunity defense will fail.

Even this might not be complete statement of the rule, however, as the following discussion will show.

## Does the Nonfeasance/Misfeasance Distinction Survive *McLean*?

A pre-*McLean* line of cases, including Court of Appeals cases, drew a distinction between governmental *misfeasance* and *nonfeasance*. If a government's agent (e.g., police officer, clerk, housing inspector) caused harm to

a plaintiff through his or her *misfeasance* (such as, for example, a police officer shooting his gun into a crowd), the government could be held liable for the officer's negligence regardless of whether a "special" duty was established. If, on the other hand, the alleged negligent act amounted to *nonfeasance*, in the sense of negligently failing to provide governmental services or to enforce a statute or regulation (for example, failing to provide police protection or firefighting services or to enforce housing regulations), then the plaintiff must show a *special* duty. In other words, if the negligence complained of amounted to active *misfeasance* rather than passive *nonfeasance*, the duty followed the act. Put another way, where the government official *actively* caused harm, rather than simply, passively permitted harm from some other quarter to befall the plaintiff by failing to provide governmental services or by negligently providing them, the act of causing the harm itself was sometimes deemed to create the duty.[37]

One post-*McLean* court has questioned whether the *misfeasance* exception to the general requirement that a "special duty" must be shown survives *McLean*.[38] In *Applewhite v. Accuhealth, Inc.*,[39] in a footnote, the First Department noted that "in *McLean*, the Court of Appeals did not discuss the doctrine of a special duty or relationship in terms of misfeasance and nonfeasance, but clearly intended to apply the special relationship doctrine to all acts that constitute a government function." The court thus refused to "evaluate this case using a distinction between nonfeasance and misfeasance."[40]

Nevertheless, an argument might be made that the *misfeasance/nonfeasance* distinction survives *McLean*. The only post-*McLean* Court of Appeals case that addressed an unambiguous case of *misfeasance* (the line between misfeasance and nonfeasance is often nebulous) was *Johnson v. City of New York*.[41] In that case, a police officer's decision to shoot at armed robbers (thus causing injury to a bystander) was deemed "discretionary," and thus the governmental immunity defense prevailed. Recall that the post-*McLean* Court of Appeals has announced it will not reach the issue of the governmental immunity defense until it first finds a duty. Since the *Johnson* court found the officer's actions were discretionary, we must assume the court first found the officer had a duty toward the injured plaintiff. This duty could not be a special duty because the facts of the case do not lend themselves to establishing a special duty in any of the three ways permitted by Court of Appeals case law.[42] The duty had to be there by virtue of the misfeasance itself. Thus, *Johnson* lends support to the argument that the misfeasance / nonfeasance distinction survives *McLean*.

If so, the full post-*McLean* rule encompassing the tandem workings of the duty requirement and the government immunity defense must be restated yet again as follows: For liability to attach, a duty is first in all instances required. Since the government's duty to the public at large will not do, a special duty toward the particular plaintiff is required in cases of nonfeasance. In some cases of misfeasance, however, the misfeasance may create the duty. If any duty is found, then the actions of the government officer will be examined. If those actions are deemed discretionary, and that discretion was actually exercised, then the government is always immune. If the action is discretionary but no discretion was exercised, or if the action was ministerial, the governmental immunity defense must fail. ■

1. *McLean v. City of N.Y.*, 12 N.Y.3d 194 (2009).
2. *In re World Trade Ctr. Bombing Litig.*, 17 N.Y.3d 428 (2011).
3. *Riss v. City of N.Y.*, 22 N.Y.2d 579 (1968); *Cuffy v. City of N.Y.*, 69 N.Y.2d 255, 260 (1987).
4. In *Pelaez v. Seide*, 2 N.Y.3d 186, 202 (2002), the Court of Appeals enunciated a three-prong test to determine whether the Legislature, in passing the law in question, intended to create a private right of action for a plaintiff. The plaintiff must show that he or she is (1) one of a class of persons for whose particular benefit that statute was created; (2) that recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) that to do so would be consistent with the legislative scheme.
5. *Id.* at 195.
6. The third way of establishing a "special duty" between the public corporation and the injured person or class of persons is exceedingly rare. Examples of instances where it was established are: where a town knew of blatant, dangerous violations on a motel's premises, but the town affirmatively certified the premises as safe by issuing a certificate of occupancy, upon which representation plaintiffs justifiably relied in their dealings with the premises, then a proper basis for imposing liability on the town may well have been demonstrated. *See Garrett v. Holiday Inns, Inc.*, 58 N.Y.2d 253 (1983). And where a city sewer inspector observed that private sewer system trench violated rules and code since it had been excavated to a depth of over 11 feet without bracing or shoring and inspector stated to decedent, before he descended therein, that the walls looked pretty solid and that the inspector did not think they needed bracing, city was liable for death of decedent killed in cave-in of trench, by reason of the inspector's positive action in assuming direction and control at jobsite in absence of decedent's supervisor. *See Smullen v. City of N.Y.*, 28 N.Y.2d 66 (1971).
7. *Cuffy*, 69 N.Y.2d 255.
8. 2 N.Y.3d at 195.
9. 4 N.Y.3d 499, 505 (2005).
10. *Id.*
11. *Pelaez*, 2 N.Y.3d at 195.
12. *McLean v. City of N.Y.*, 12 N.Y.3d 194 (2009).
13. *Id.*
14. *Kovit*, 4 N.Y.3d at 505.
15. *Pelaez*, 2 N.Y.3d at 195.
16. *See McLean*, 12 N.Y.3d 194.
17. *Id.*
18. As discussed above, Court of Appeals case law allows a *special duty* to be formed in three ways: (1) by a statute that was enacted for the benefit of a particular class of persons of which plaintiff is a member; (2) by the government official's voluntary assumption of a duty toward a private party who then justifiably relies on proper performance of that duty; or (3) by a government official assuming positive direction and control in the face of a known, blatant and dangerous safety violation.
19. 13 N.Y.3d 872 (2009).
20. *Cuffy v. City of N.Y.*, 69 N.Y.2d 255 (1987).
21. 18 N.Y.3d 69 (2011).
22. *Id.*
23. *Id.*

24. *Id.*

25. *Id.*

26. *McLean*, 12 N.Y.3d 194.

27. *Valdez*, 18 N.Y.3d at 80.

28. *Metz v. State*, 20 N.Y.3d 175 (2012).

29. *Id.*

30. *Id.*

31. *McLean*, 12 N.Y.3d 194.

32. *Metz v. State of N.Y.*, 86 A.D.3d 748 (3d Dep't 2011), *rev'd*, 20 N.Y.3d 175 (2012).

33. *Mon v. City of N.Y.*, 78 N.Y.2d 309, 313 (1991); *Haddock v. City of N.Y.*, 75 N.Y.2d 478, 485 (1990).

34. *Metz*, 20 N.Y.3d 175.

35. *Id.* (citing *Valdez*, 18 N.Y.3d 69).

36. *McLean*, 12 N.Y.3d 194.

37. *See Perez v. City of N.Y.*, 298 A.D.2d 265 (1st Dep't 2002) (police could be held liable for accidental shooting of a bystander); *Wilkes v. City of N.Y.*, 308 N.Y. 726 (1954) (same); *Flamer v. City of Yonkers*, 309 N.Y. 114 (1955) (same); *Rodriguez v. City of N.Y.*, 189 A.D. 2d 166 (1st Dep't 1993) (same, and Court explained that "the special duty rule is limited to cases involving nonfeasance, where the municipality is alleged to have failed to take action in breach of some general duty imposed by law or voluntarily assumed for the benefit of the public as a whole" . . . and "the rule has no application to plaintiff's theory of negligence in the officer firing across the crowded street and hitting plaintiff"). The rationale for finding a duty where *misfeasance* is involved is that "even when no original duty is owed to the plaintiff to undertake affirmative action, once it is voluntarily undertaken, it must be performed with due care." *Parvi v. City of Kingston*, 41 N.Y.2d 553 (1977) (police officers' taking intoxicated men into custody created a duty on the part of the police officers to exercise reasonable care to secure their safety and police could be held liable for leaving the intoxicated men near the Thruway where they were later hit by a passing car); *Walsh v. Town of Cheektowaga*, 237 A.D.2d 947 (4th Dep't 1997) (police officers who affirmatively prevented a drunk driver from driving his car, and then let him go on foot across a railroad track, could be held liable for his being hit by a train, despite absence of a "special duty"). *See also Schuster v. City of N.Y.*, 5 N.Y.2d 75, 81–82 (1958).

38. *McLean v. City of N.Y.*, 12 N.Y.3d 194 (2009).

39. 90 A.D.3d 501 (1st Dep't 2011).

40. *Id.*

41. 15 N.Y.3d 676 (2010).

42. As discussed above, Court of Appeals case law allows a *special duty* to be formed in three ways: (1) by a statute that was enacted for the benefit of a particular class of persons of which plaintiff is a member; (2) by the government official's voluntary assumption of a duty toward a private party who then justifiably relies on proper performance of that duty; or (3) by a government official assuming positive direction and control in the face of a known, blatant and dangerous safety violation.

# Ademption in New York: Legislative and Judicial Recaps and Recommendations

**By Jim D. Sarlis**

Your uncle leaves you his house in his will. Unfortunately, between the time he signs his will and the time of his death, he suffers a severe stroke and needs extensive care. The house is sold and the money resulting from the sale is used to pay for his care and living expenses at an assisted living facility. Shortly thereafter, your uncle dies. What happens now? Do you get what remains of the proceeds of the sale of the house? Or does the bequest lapse and you get nothing? Does it matter whether it was your uncle's agent under a power of attorney or a court-appointed property guardian who sold the house?

The relevant legal doctrine is called *ademption*. The question is whether your uncle's bequest of the house to you *adeems* – or lapses – under these circumstances.

Unlike some states, New York lacks comprehensive ademption legislation. This needlessly creates uncertainty and gaps in many relatively common situations. This article reviews the current status of the law and recommends legislative and judicial action, including enactment of a comprehensive anti-ademption statute.[1]

## A Brief Review of Dispositive Will Provisions

The generic term for a will provision that leaves something to a person is called a *bequest*. If the property bequeathed is personalty, it is called a *legacy* and the person receiving it is a *legatee*. If the property is real estate, it is called a *devise* and the person receiving it is a *devisee*.

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If a will provision leaves a specific item of property that can readily be identified and distinguished from the other property in the decedent's estate, it is called a *specific* bequest.[2] Examples would be, "I leave my Jaguar automobile to X" or "I leave 123 Main Street to Y."

By contrast, a will provision that can be paid out of the general assets of the estate is called a *general* bequest. An example of such a provision would be "I leave $100 to X."[3]

If the will says that a bequest must be paid out of a specific fund, it is called a *demonstrative* bequest. An example of such a provision would be "I give $100 to X, to be paid from my account at Queens Federal Savings."

If the will provision at issue says, "I leave the rest, residue, and remainder of my estate to X," it is called a *residuary* bequest.

Here's where it can get tricky: If the will says, "I leave 100 shares of ABC Corp. stock to X," it is considered a general bequest and the beneficiary would receive the date of death value of 100 shares of that particular stock. However, if the possessive "my" is added and the will says, "I leave *my* 100 shares of ABC Corp. stock," it is considered a specific bequest, and the beneficiary would receive the testator's 100 shares of that particular stock if the testator owned it at the time of death.

## Ademption Defined

Ademption occurs when the property that the will leaves to someone is not in the testator's estate when the testator dies.[4] By its nature, therefore, ademption applies only to specific bequests (i.e., specific legacies of personal property or specific devises of real property) where identifying the specific asset intended is important (i.e., not general, residuary or demonstrative bequests).[5] This makes sense because an ademption would be relevant if "the 1964 red Corvette I inherited from my grandfather," or "123 Main Street," is no longer owned by the testator at the time of his death, while ademption would not be relevant to a bequest of $1,000 or "the residue of my estate."

There are two kinds of ademption. The first, "ademption by extinction," means the property is not in the testator's estate at the time of death because it was sold, transferred, substantially changed, or destroyed before the testator's death.[6] Let's say your father leaves you his comic book collection in this will, but after he signs his will he sells the collection and invests the proceeds in an emu ranch. Upon his death, you get neither the comic book collection nor the emu ranch nor the value of these assets. The bequest would adeem by extinction. The second, "ademption by satisfaction" means that the property is not in the testator's estate because it was already intentionally transferred by the testator to the beneficiary.[7] In our example, if your father gifted you his comic book collection during his life, that bequest would adeem by satisfaction. Ademption need not totally eliminate the bequest – there can even be *partial* ademption under certain circumstances.[8]

The test for ademption depends upon the physical existence of the property in the estate, not upon the testator's intent.[9] The testator's intent would, however, be considered relevant in a will construction proceeding to determine whether an alternate gift was intended or whether a bequest was meant to be a general disposition rather than a specific or a demonstrative bequest.

Ademption occurs when the property that the will leaves to someone is not in the testator's estate when the testator dies.

## Traditional Common Law Ademption

Under traditional common law ademption, a specific bequest lapses if the property is not part of the estate at the testator's death. Thus, if real property that is specifically devised is sold before death by a testator with capacity, the specific devise would lapse. Moreover, the specific devisee would not be entitled to the proceeds of sale either, even if the proceeds could be traced or otherwise ended up being part of the estate. Such situations involve a straightforward application of ademption. Ademption would occur even if the sale were incomplete at the death of the testator, because a valid executory contract or other transaction to transfer property is sufficient to remove it from the estate and extinguish any bequest of the property.

Of course, in many cases testators have lost capacity, and the sale is conducted by someone other than the testator. In those cases, the testators themselves may not have, strictly speaking, consented to, or even be aware of, the sale. According to the traditional view of ademption this would not matter; the testator's knowledge or intention would be irrelevant. The only relevant question would be whether the property was part of the estate when the testator died. Under traditional common law ademption, therefore, a sale of the specifically bequeathed property by a conservator, committee, guardian, or an agent under a power of attorney would cause the specific bequest to adeem.

## Anti-Ademption Statutes

Some states have enacted anti-ademption statutes which prevent a bequest from adeeming.[10] In New York, a handful of Estates, Powers and Trusts Law (EPTL) statutes

influence the analysis of a possible ademption situation. Section 3-4.2 provides that, in those situations where the testator has agreed to a sale or disposition of specifically bequeathed property, the bequest does not adeem but the beneficiary takes "subject to whatever rights were created by such agreement."[11] Section 3-4.3 provides for partial ademption, meaning that whatever is left of a bequeathed asset may pass to the intended beneficiary.[12] Section 3-4.4 provides that a conveyance of property made by a committee or conservator during the lifetime of the incompetent or conservatee,[13] which property had been specifically bequeathed in that individual's will, does not cause the bequest to adeem, and the specific beneficiaries may claim what exists of the traceable proceeds.[14] EPTL 3-4.5 provides that insurance proceeds paid after the testator's death on property that had been specifically bequeathed are to pass to the intended beneficiary of the property – note that this applies solely to proceeds paid after the testator's death.[15]

## Uncertainty When It Comes to Powers of Attorney

While EPTL 3-4.4 may answer the question of what happens if a court-appointed guardian sells the property, it is not so clear what happens if the person selling the property is the testator's agent under a power of attorney.[16]

In *LaBella v. Goodman*,[17] the Appellate Division, Second Department, made short work of dismissing the specific beneficiaries' claim to proceeds of property sold under a power of attorney before the testator's death, holding that

> [t]he Surrogate's Court properly determined that the doctrine of ademption extinguished any claim the plaintiffs may have had regarding the devised property . . . once the devise is found to be adeemed, the court is not permitted to substitute something else for it . . . . This includes tracing the proceeds from the sale of real property.[18]

This classic view was presented by the Niagara County Surrogate's Court in *In re Kramp*.[19] There, the agent under a power of attorney sold the specifically bequeathed real property before the testatrix's death, and the devisee sought to recover the proceeds of the sale. The court held that the conveyance did not fall within the exception of EPTL 3-4.4, and thus the bequest adeemed, emphasizing:

> It is clear that this case does not fall within the express terms of EPTL 3-4.4. There was no adjudication of incompetency as to this testatrix, she was never "judicially declared to be incapable" in any respect, and no committee was ever appointed for her . . . .
>
> The language of EPTL 3-4.4 evinces to this court the clear legislative intent to restrict its application to cases in which incompetency has been judicially determined and established under the restraints and safeguards of due process . . . . That limitation is not only sound in principle but is set forth in unambiguous terms . . . .
>
> Accordingly, the court holds that this case is not within the purview of EPTL 3-4.4 and that the [specific devisee] is not entitled [to use EPTL 3-4.4 to claim the proceeds of the asset's sale].[20]

Because of this detailed and specific reasoning, the question arises whether a court would be willing to extend the statute's reach to those situations involving a testator who either had been declared incapacitated or was obviously so, whose property was sold by an attorney-in-fact.

A nuanced analysis was, in fact, provided by the Kings County Surrogate's Court in *Estate of Crowell*.[21] There, the attorney-in-fact sold shares of the testator's stock. Upon the testator's death, the specific legatees of the stock sought the proceeds of the sale. The parties entered into a settlement agreement, thus preventing the court from determining the ultimate ademption issue; however, the court did note two interesting points: first, that some courts are able to implement the testator's intent by manipulating the classification of bequests as specific or general, thus bypassing EPTL 3-4.4 and, second, that durable powers of attorney have become a popular substitute for the Article 81 guardianship proceedings that are a condition precedent to the applicability of EPTL 3-4.4. One can view these statements as favoring expansion of the statute to provide an exception where "the sale is made by the attorney-in-fact of a now-incapacitated testator, and the other criteria of the statute are met."[22]

## Analysis of Our Hypothetical Scenario

Returning to the scenario postulated in the opening paragraph: If your uncle left you his house in his will and, after his stroke, it was sold before his death, the outcome could depend on a few factors.[23]

If the house was sold by a property guardian[24] appointed for your uncle, then EPTL 3-4.4 would be triggered. Based on that, the bequest to you would not adeem, and you would be entitled to the balance of the proceeds after your uncle's death.

If the house was sold by your uncle's agent under a power of attorney, the result would be less certain. It could even depend on which court had jurisdiction (for example, where the real property was situated and/or where your uncle was domiciled). The Second Department has as its primary precedent *LaBella v. Goodman*, which adheres to the traditional ademption analysis and would not apply EPTL 3-4.4's anti-ademption provisions. Niagara County has *Kramp* as its local precedent. While that court determined that the bequest at issue adeemed, determinative to its analysis was the fact that the testatrix in that case was never found incompetent. Therefore, the outcome of our hypothetical scenario could depend on whether your uncle was adjudicated incompetent or was obviously so. Meanwhile, if

jurisdiction were in Brooklyn, Kings County has *Estate of Crowell* as its local precedent. Because the parties in that case settled, the actual issue of ademption was not reached by the court, but its dicta and analysis create a hopeful foundation allowing for extension of EPTL 3-4.4 – or at least its anti-ademption concepts – to your uncle's power of attorney situation, assuming he had become incapacitated.

Determination of the hypothetical scenario's outcome could ultimately depend on future legislation directly addressing this issue, or a decision being rendered by the New York Court of Appeals putting this uncertainty to rest. Obviously, there is a need for legislative or judicial clarification of this issue. At the very least, our hypothetical underscores the need to align the outcomes for attorneys-in-fact and guardians.

## Legislative or Judicial Action Needed to Clarify the Issues and Fill the Gaps

Research of the law on the subject has uncovered neither a Court of Appeals decision nor a statute that provides comprehensive guidance regarding the issue of ademption. In addition, as of this writing, no bills on the subject are pending, either.[25] As explained above, legislative or judicial clarification is needed regarding whether sale or disposition of specifically bequeathed property by an agent under a power of attorney adeems. One approach would be to clarify whether this falls under an anti-ademption statute (either by expansion of EPTL 3-4.4 or enactment of another statute). Another approach would be for the Court of Appeals to expressly address this issue and, for example, hold that EPTL 3-4.4 extends to power of attorney situations. In addition, currently there are no statutes addressing ademption from the loss of specific property due to fire, theft, or act of a third party.

By contrast, other states have extensive and comprehensive anti-ademption laws – often addressing various permutations of sales, transfers, condemnation, changes in form, and other common situations – and these could serve as templates for New York to follow.[26] By enacting such legislation, New York could codify much of its rich body of case law on the subject, fill the existing voids, and improve the areas of uncertainty.

## Avoiding Ambiguity and Uncertainty With Proper Planning

Needless to say, the possibility of ademption can be anticipated when a will is drafted and appropriate wording is used to avoid ambiguities. Consider these examples:

- "I bequeath my blue 2010 Chevrolet Corvette to X if it is owned by me at the time of my death; if not, this bequest will adeem."
- ". . . this bequest shall be deemed to include any proceeds of its sale or other disposition."
- ". . . this bequest includes the proceeds of its sale, and any mortgage, bond, deposit, surety, interest or license that accrues by reason of the sale and investment of the proceeds of the property."

The language could even expressly state what happens in the event of fire, theft, act of a third party, and whether the bequest extends to insurance on the property.

Expressing the intent of the testator in detail would provide clear guidelines to the executor and any court called upon to interpret the will, and would avoid ambiguity regarding whether ademption would occur under a variety of circumstances.

## Conclusion

Appropriate action by the legislature or judiciary could greatly reduce the uncertainty we have. There is no need for New York to have gaps and ambiguity when completeness and certainty are possible. Comprehensive anti-ademption legislation could provide explicit guidelines. As always, however, while legislative and judicial frameworks and default provisions can help – or even save the day – nothing beats well-planned and carefully crafted document drafting to achieve our clients' goals. ■

1. The New York State Bar Association has not adopted a position on the issues discussed within this article and does not have a position on any of the regulations or legislation discussed. The views expressed in this article are those of the author only.

Author's Disclaimer: The foregoing is meant as a starting point to foster discussion. The key is that the ability to have most common scenarios summarized in one statute would undoubtedly be valuable.

2. *In re Flynn*, 36 Misc. 2d 97 (Sur. Ct., Cattaraugus Co. 1962); *see also Crawford v. McCarthy*, 159 N.Y. 514 (1899).

3. Typically, a general bequest is for a stated sum of money; however, a bequest of stock or securities may also be classified as a general bequest. *See, e.g., In re Malone*, 143 Misc. 657 (Sur. Ct., Queens Co. 1931).

4. Considered legally tantamount to a revocation of the bequest. *In re Dittrich*, 53 Misc. 2d 782 (Sur. Ct., Queens Co. 1967).

5. *In re Wallace*, 86 Misc. 2d 175 (Sur. Ct., Cattaraugus Co. 1976) (citing *In re Roth*, 183 Misc. 834, 839, *modified on other grounds*, 271 A.D. 972, *aff'd*, 297 N.Y. 757 (1944)).

6. *See In re Brann*, 219 N.Y. 263 (1916); *In re Wright*, 7 N.Y.2d 365 (1960).

7. This can also include delivery of proceeds, money, or property in satisfaction of the bequest. *See* 39 N.Y. Jur. Decedent's Estates § 934 (2009).

8. *See* discussion at note 12, below.

9. *In re Wright*, 7 N.Y.2d at 367–69:

> Although, in the early days . . . , ademption was based on the intention of the testator, today in New York, as well as in many other jurisdictions, intention has nothing to do with the matter; the bequest fails and the legatee takes nothing if the article specifically bequeathed has been given away, lost or destroyed during the testator's lifetime . . . . [I]t matters not whether this came to pass because of an intentional and voluntary act on the part of the testator, such as abandonment, sale or gift, or because of an occurrence, involuntary and unintended, such as condemnation, fire or theft. (citations omitted).

This is the so-called "identity" theory as opposed to the "intent" theory of ademption. *See also In re Brann*, 219 N.Y. 263; *In re Baker*, 106 Misc. 2d 649, 652 (Sur. Ct., Westchester Co. 1980); *Estate of Spanos*, N.Y.L.J., May 3, 1994, p. 29, col. 6 (Sur. Ct., Nassau Co.). *Cf. In re Ellsworth*, 189 A.D.2d 977 (3d Dep't 1993).

10. *E.g.*, Wisconsin Statutes §§ 854.08 *et seq.* (which is the template for the statutory language that this article proposes for New York, below at note 26,

and which addresses situations involving a guardian or attorney-in-fact); *see also* Alabama Code §§ 43-8-225 *et seq.* (recently interpreted in *Bolte v. Robertson*, 941 So. 2d 920 (Ala. 2006) to give the specific devisee of real property the outstanding balance on the mortgage after sale); California Probate Code §§ 21133–21134; Tennessee Code Annotated § 32-3-111 (expanded by *Stewart v. Sewell*, 215 S.W.3d 815 (Tenn. 2007)); Utah Uniform Probate Code § 75-2-606.

11. EPTL 3-4.2 provides:

> An agreement made by a testator to convey any property does not revoke a prior testamentary disposition of such property; but such property passes under the will to the beneficiaries, subject to whatever rights were created by such agreement.

12. EPTL 3-4.3 provides:

> A conveyance, settlement or other act of a testator by which an estate in his property, previously disposed of by will, is altered but not wholly divested does not revoke such disposition, but the estate in the property that remains in the testator passes to the beneficiaries pursuant to the disposition. However, any such conveyance, settlement or other act of the testator which is wholly inconsistent with such previous testamentary disposition revokes it.

In the oft-cited case that illustrates this concept, the testatrix made a specific bequest of her mink coat, but prior to her death had it cut down to a mink stole. The court reasoned that, because the stole was not "wholly inconsistent" with the bequest of the coat, the legatee would receive the stole, as what remained of the bequeathed coat. *In re Winfield*, 11 Misc. 2d 149 (Sur. Ct., N.Y. Co. 1958).

13. The statute still uses the older terms, but is deemed to include guardians and incapacitated persons since April 1, 1993, when Mental Hygiene Law Article 81 superseded Articles 77 and 78. *See In re Buckner*, N.Y.L.J., Feb. 26, 1993, p. 26, col. 2 (Sur. Ct., N.Y. Co.); *Estate of Oppenheim*, N.Y.L.J., Jan. 29, 2007, p. 39, col. 3 (Sur. Ct., Suffolk Co.); *In re P.V.*, N.Y.L.J., June 5, 2009, p. 27, n. 3, col. 1 (Sup. Ct., N.Y. Co.). Furthermore, the implementing legislation of Article 81 provides that when a statute uses the terms conservator or committee, "such statute shall be construed to include the term guardian . . . unless the context otherwise requires." N.Y. Session Laws: 1992 N.Y. Laws ch. 698, § 4.

14. EPTL 3-4.4 provides:

> In the case of a sale or other transfer by a committee or conservator, during the lifetime of its incompetent or conservatee, of any property which such incompetent or conservatee had previously disposed of specifically by will when he was competent or able to manage his own affairs, and no order had been entered setting aside the adjudication of incompetency at the time of such incompetent's death, or the conservatorship continued through the date of the conservatee's death, the beneficiary of such specific disposition becomes entitled to receive any remaining money or other property into which the proceeds from such sale or transfer may be traced.

15. EPTL 3-4.5 provides:

> Where insurance proceeds from property which was the subject of a specific disposition are paid after the testator's death, such proceeds, to the extent received by the personal representative, are payable by him to the beneficiary of such disposition . . . .

*See also In re Baker*, 106 Misc. 2d 649, 652 (Sur. Ct., Westchester Co. 1980).

16. Courts have treated differently those situations where agents under a power of attorney have transferred the principal's property to themselves. They generally deem such an *inter vivos* transfer a breach of the agent's fiduciary duty, reverse the transfer, and return the property to the principal's estate. *See, e.g.*, *Musacchio v. Romagnoli*, N.Y.L.J., June 16, 2006, p. 25, col. 3 (Sur. Ct., Westchester Co.); *Estate of Berry*, N.Y.L.J., Apr. 2, 1997, p. 31, col. 1 (Sur. Ct., Suffolk Co.).

17. 198 A.D.2d 332 (2d Dep't 1993).

18. *Id.* at 333.

19. 100 Misc. 2d 724 (Sur. Ct., Niagara Co. 1979).

20. *Id.* at 726.

21. N.Y.L.J., Dec. 3, 2002, p. 27, col. 3 (Sur. Ct., Kings Co.).

22. *Id.*

23. This discussion is based on New York law.

24. As explained above at note 13, this analysis extends to a conservator or committee as well.

25. As of February 15, 2013.

26. A suitable template for New York to follow would be along the lines of Wisconsin Statutes §§ 854.08 *et seq.*: It should include provisions like § 854.08 covering ademption by extinction, as well as § 854.08(5) encompassing sales, mortgages, insurance, and condemnation, in situations involving guardians and agents under a power of attorney. That portion should include wording to the effect that "[t]he term guardian shall be deemed to include a conservator or committee." It should include provisions like § 854.11 regarding bequests of securities, to cover stock splits and dividends, and changes in corporate name or form. It should also include provisions like § 854.09 covering ademption by satisfaction. There should be wording akin to the following, based on § 854.08(6)(c): "To the extent that a pecuniary amount is substituted for the asset bequeathed, the total is reduced by any expenses of the sale, by the expenses of collection of the proceeds of insurance, sale, or condemnation award and by any amount by which the income tax of the decedent or the decedent's estate is increased because of items covered by this section. Expenses include legal fees paid or incurred."

# MEET YOUR NEW OFFICERS

## President
## David M. Schraver

David M. Schraver of Rochester, New York, took office June 1 as the 116th president of the 77,000-member New York State Bar Association.

The House of Delegates, the Association's decision and policy-making body, elected Schraver at the organization's 136th annual meeting, held this past January in Manhattan.

Schraver is a partner of Nixon Peabody LLP, where he practices business and commercial litigation, with a particular expertise in Indian law.

A member of the State Bar for more than 40 years, Schraver has served on the Finance Committee since 2003 and as its chairman since 2007. He also served on the Executive Committee for seven years, including as vice president for the Seventh Judicial District and a member-at-large; and has served for 14 years on House of Delegates. He is a member of the Committee on Standards for Attorney Conduct and the Commercial and Federal Litigation Section.

At Nixon Peabody, Schraver's work encompasses complex business and commercial litigation in state and federal courts. He is a founding member of the firm's Indian law and gaming team. His practice also focuses on energy / utility litigation, contract litigation, and fiduciary and professional liability. He has served as managing partner of the firm's Rochester office.

He is member of the ABA House of Delegates and member of its Litigation Section. He also is a past president of the Monroe County Bar Association and the Metropolitan Bar Caucus of the National Conference of Bar Presidents. He has served on the boards of a number of community organizations in the Rochester area.

A native of Albany, Schraver graduated *cum laude* from Harvard University and *magna cum laude* from the University of Michigan Law School, where he was note and comment editor for the *Michigan Law Review*. After law school, Schraver was on active duty in the United States Navy Judge Advocate General's Corps (JAG).

Schraver will serve a one-year term as State Bar president.

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## Secretary
## David P. Miranda

David P. Miranda, a partner of the Albany intellectual property law firm Heslin Rothenberg Farley & Mesiti P.C., has been re-elected to a fourth term as secretary of the New York State Bar Association.

Miranda is an experienced trial attorney whose intellectual property law practice includes trademark, copyright, trade secret, false advertising, patent infringement and Internet-related issues. He is an arbitrator of Intellectual Property disputes for the National Arbitration Forum and the American Arbitration Association.

Heslin Rothenberg Farley & Mesiti P.C. is the largest law firm in upstate New York dedicated exclusively to the protection and commercialization of intellectual property.

A 23-year member of the State Bar Association, Miranda chairs the Committee on Resolutions. He also served as chair of the Electronic Communications Committee and the Young Lawyers Section. He co-chaired the Special Committee on Strategic Planning.

Miranda is a member of the Commercial and Federal Litigation Section, Committee on Annual Award, Committee on Continuing Legal Education and Membership Committee. He is a past member of the Task Force on E-Filing and the Special Committee on Cyberspace Law.

Miranda is a past president of the Albany County Bar Association and has served on the Independent Judicial Election Qualification Commission for the Third Judicial District.

A resident of Voorheesville, Miranda graduated from the State University of New York at Buffalo and Albany Law School.

## President-elect Glenn Lau-Kee

Glenn Lau-Kee, of New York City, took office June 1 as president-elect of the 77,000-member New York State Bar Association.

The House of Delegates, the Association's decision and policy-making body, elected Lau-Kee at the organization's 136th annual meeting, held this past January in Manhattan. In accordance with NYSBA bylaws, Lau-Kee will become the Bar Association's 117th president on June 1, 2014.

Lau-Kee is a partner of Kee & Lau-Kee, where he concentrates his practice in real estate and business law.

A 13-year member of the State Bar Association, Lau-Kee is co-chair of the President's Committee on Access to Justice. He has served as a member-at-large of the Executive Committee and co-chair of the Membership Committee. Lau-Kee is a member of the Business Law, Health Law and Real Property Law Sections; in 2010 he received the Commercial and Federal Litigation Section's George Bundy Smith Pioneer Award.

In addition, Lau-Kee has served as a member of the Task Force on the State of Our Courthouses and the Special Committees on Legal Specialization, Multijurisdictional Practice and Sarbanes-Oxley Issues.

He is a vice-chair of the board of the Greater New York City YMCA and a board member of the Fund for Modern Courts, The New York Bar Foundation and US-Asia Institute. He served as president of the Asian American Bar Association of New York from 1997–1999 and was appointed by former Chief Judge Judith S. Kaye to serve on the Commission to Examine Solo and Small Firm Practice, and the Committee to Promote Public Trust and Confidence in the Legal System.

A resident of Westport, Connecticut, Lau-Kee graduated from Yale College and Boston University School of Law.

## Treasurer Sharon Stern Gerstman

Sharon Stern Gerstman of Buffalo has been elected treasurer of the New York State Bar Association.

Gerstman is of counsel to Magavern Magavern Grimm in Buffalo, where she concentrates her practice in the areas of mediation and arbitration, and appellate practice.

A 32-year member of the State Bar, Gerstman has served on the Executive Committee as an Eighth Judicial District vice-president. She is a member of the House of Delegates, Finance Committee, Dispute Resolution Section, and Torts, Insurance and Compensation Law Section's Executive Committee.

She was chair of the Committee on Civil Practice Law and Rules and the Special Committee on Lawyer Advertising and Lawyer Referral Services. She previously co-chaired the Task Force on E-Filing and the Special Committees on Lawyer Advertising and Strategic Planning. She also served on the American Bar Association's Board of Governors for three years and is a member of the ABA's House of Delegates.

A resident of Amherst, Gerstman graduated from Brown University and earned her law degree from the University of Pittsburgh School of Law. She received a master's degree from Yale Law School.

# ATTORNEY PROFESSIONALISM FORUM

**To the Forum:**

I have found that accessing various forms of social media has become a highly useful tool in my practice. However, I want to know if there are limits as to how Facebook, Twitter, LinkedIn and the like can be used in connection with handling my various client matters. For example, what are the recommended methods for conducting research on adverse witnesses or potential jurors through the use of social media? What other electronic means can be utilized to conduct such research? Most important, what ethical obligations come into play when one uses social media in these contexts?

Sincerely,

I. Tweet

**Dear I. Tweet:**

In recent years, the social media explosion in the legal profession has raised numerous ethical considerations. Although the New York Rules of Professional Conduct (RPC) provide some guidance for attorneys when using social media (and we will review the applicable provisions of the RPC here), the reality is that we all practice law in a rapidly evolving environment in which the rules have yet to be fully articulated. That said, lawyers need to be fully competent in social media usage and the ethical provisions arising from such usage.

As noted in the May *Forum* (which discussed the use of mobile technology in 21st century legal practice), Rule 1.1 of the RPC states our ethical obligation to provide competent representation. Like it or not, this means that we must understand how technologies are utilized and become familiar with them. The use of social media by attorneys falls within this obligation. It is imperative that attorneys utilizing social media educate themselves as to the functionality of the social media sites which they wish to access, whether for research or other purposes.

Multiple ethics opinions of the New York State Bar Association (NYSBA) and other bar associations provide guidance to our profession. In N.Y. State Bar Op. 843 (2010), NYSBA's Committee on Professional Ethics (the Committee) found that "[a] lawyer representing a client in a pending litigation may access the public pages of another party's social networking website for the purpose of obtaining possible impeachment material for use in the litigation." The Committee additionally found that "accessing the social network pages of the [opposing] party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by non-lawyers acting at their direction)" so long as the attorney does not friend the other party or direct another person to do so. *Id.* The Committee was careful to distinguish between public social networking pages and private pages where attempts to access such private information would ordinarily be impermissible. In the view of the Committee, accessing publicly available social media data "is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service." *Id.* Therefore, publicly available social media information would be very useful for conducting research on adverse witnesses or even potential jurors.

In the same month that the NYSBA Committee released Opinion 843, the Committee on Professional Ethics for the New York City Bar Association (NYCBA), in Formal Opinion 2010-2, addressed the question whether a lawyer, acting either alone or through an agent such as a private investigator, may "resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds." *Id.* NYCBA found that an attorney who seeks to obtain information maintained on a social networking site should utilize "informal discovery" practices, which may include "truthful 'friending' of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page." *Id.* Furthermore, NYCBA suggested that "an attorney or her agent may use her real name and profile to send a friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request. *Id.* In concluding its opinion, NYCBA stated that "a lawyer may not use deception to access information from a social networking page" since such acts violate both Rule 4.1 ("a lawyer shall not knowingly make a false statement or fact or law to a third person") and Rule 8.4(c) ("a lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation"). *Id.* So for example, if an attorney or another person acting at the attorney's direction sets up a Facebook page or Twitter feed as a ruse for

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

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

the purpose of drawing in the opposing party in an attempt to access that party's private information, such conduct (often called "pretexting") would almost certainly run afoul of Rules 8.4, 4.1 and 5.3(b).

In May 2011, the New York County Lawyers' Association (NYCLA) Committee on Professional Ethics published Opinion 743, which focused on the use of social media for juror research and the application of Rule 3.5.

Rule 3.5(a)(4) states that a lawyer shall not

> communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order.

Furthermore, Rule 3.5(a)(5) states that a lawyer shall not

> communicate with a juror or prospective juror after discharge of the jury if: (i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service.

As stated in the NYCLA opinion, lawyers do not escape the reach of Rule 8.4(a) by using third parties; lawyers are prohibited from doing indirectly what they cannot do themselves. *Id.* This should come as no surprise as most of us know that a lawyer may not direct a nonattorney employee of his or her firm or a retained private investigator to make contact in any way with prospective jurors to learn more about them.

The NYCLA opinion concluded that the passive monitoring of jurors (which would include viewing publicly available social media pages) may be permissible. *Id.* However, the NYCLA opinion cautioned that the lawyer (or agent) conducting online searches of social media pages is precluded from having "contact or communication with the prospective juror and the lawyer does not seek to 'friend' jurors, subscribe to their Twitter accounts, send juror tweets or otherwise contact them." *Id.* Those familiar with Internet research understand that getting information about a particular person is often as simple as plugging the name of a person into an Internet search engine (such as Google). Often, the search may yield the various social media accounts associated with that person, and the information posted to such accounts could be easily accessible. Depending on security settings, this may include biographical information, status updates on Facebook or LinkedIn, as well as tweets on Twitter. As with all things relating to social media usage, attorney professionalism – not to mention common sense – suggests that the prudent practitioner exercise both caution and discretion when conducting such searches in order to avoid a potential ethical minefield. Last, the NYCLA opinion reminded us that, under Rule 3.5(d), if the lawyer learns of improper conduct by a juror, or by another toward a juror or a member of the juror's family, the lawyer then has an obligation to reveal the misconduct to the court.

The use of social media for juror research was also addressed by NYCBA in Formal Opinion 2012-2. Although the opinion states that a lawyer can use social media websites for juror research, it stressed that there must be no communication occurring between lawyer and juror as a result of the research. Unlike others who have weighed in on this subject, NYCBA may have slightly pushed the proverbial envelope by suggesting that there is possibly another side of this coin. Notwithstanding the prohibitions prescribed by Rule 3.5(a)(4) and (5), "standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on the case." *Id.* In other words, NYCBA suggested that the attorney seeking to learn about potential jurors should use all reasonable means to conduct his or her research but should always use caution when conducting such research.

NYCBA Formal Opinion 2012-2 also dealt with the question of what constitutes a "communication" for purposes of Rule 3.5, noting that attorneys may not research jurors if the result of the research is that the juror will receive the communication. For example, a communication which may be prohibited will depend on the mechanics and privacy settings of each service. Some services (such as LinkedIn) will notify a party if his or her profile has been viewed, while others provide notification only if another user initiates an interaction (which is one of the integral parts of the experience of using social media sites such as Facebook and Twitter). Such communications may be prohibited even when inadvertent or unintended. *Id.* What this means is that attorneys who use social media *must* become fully familiar with the functionality of various social media sites (as per the requirements of Rule 1.1) before utilizing them for research purposes. One click of the mouse on the wrong part of a social media page can mean a world of trouble. Saying that you "*accidentally*" clicked on the part of a social media page that seeks access to a potential juror's private site may not get you off the hook.

Although the ethics opinions discussed here explore issues which may arise from usage of the more popular social media sites (i.e., Facebook, Twitter, YouTube and LinkedIn), social media sites primarily geared towards sharing visual content (such as Instagram, Vine and Pinterest, respectively) also should be noted. The publicly available information on these sites may contain a treasure trove of information since users oftentimes post everything they do on a given day. These sites also carry with them the same cautions applicable when accessing the more popular social media sites. Like Twitter, Instagram and Vine allow you to "follow" users so that you can both observe and comment

on various user postings. Both sites also contain privacy control features which prevent public viewing. User postings which have not been made private can be readily accessible by way of an Internet search engine (such as Google). However, as the opinions discussed here demonstrate, attorneys (or someone acting at their direction) should not attempt to contact a party or adverse witness who has engaged privacy settings in order to gain access to that user's privately posted content, unless they clearly state the purpose for making such contact.

Social media is a rapidly evolving area of technology which provides countless benefits for all those who use it. Attorneys are strongly advised to be knowledgeable of how these sites operate and the ethical concerns which arise from the usage of social media in their practices. We believe that common sense usage of social media will help you avoid many ethical pitfalls both known and unknown.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq., and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am always conscious about running up unnecessary legal fees in litigation matters and I am acutely aware that, in this current economic climate, clients scrutinize legal bills more carefully than ever. I recently succeeded in winning summary judgment on liability for my client in a breach of contract matter and the trial court subsequently directed a hearing on damages in which my adversary, David Delayer (Delayer), moved for a stay in the appellate court. The stay was granted, however, on the condition that Delayer's client post an undertaking. The day after the stay was granted, I emailed Delayer asking if his client would be posting the undertaking directed by the appellate court. His response was, "We have not made that determination as of yet." A few days later, at a conference before the trial court, Delayer said that his clients "were not seeking to obtain an undertaking." Since Delayer represented that he was not going to seek an undertaking, the trial court scheduled a damages hearing at the conference to occur in 30 days. The day after the conference and in preparation for the hearing, I served a document subpoena upon Delayer, which he moved to quash. That motion was argued a few days before the damages hearing and was granted in part by the trial court. The following morning, I was informed by Delayer that his client had posted the undertaking directed by the appellate court which it had required in order to stay the damages hearing. That afternoon, counsel for the insurance company (which issued the undertaking) informed me that Delayer had applied for the bond "weeks earlier." This is the first I had heard about the timing of the application for the bond, and from past experience I know that a bond is usually issued in a matter of days (if not the same day). Had I known that Delayer had applied for the bond weeks ago (and assuming it was issued shortly after he applied for it), then I would not have been forced to spend unnecessary time opposing his motion to quash since he likely knew weeks prior that the bond was issued, thereby staying the damages hearing.

I believe that Delayer's actions are unprofessional. At a minimum, Delayer's behavior is a clear example of uncivil (perhaps unethical) conduct motivated solely for the purpose of increasing my client's litigation expenses.

My questions for the Forum: Did my adversary act unprofessionally? Is Delayer's conduct sanctionable?

Sincerely,

A. Barrister

# NEW MEMBERS WELCOMED

**FIRST DISTRICT**
John Russell Ablan
Elisheva Ackerman
Sky Christopher Adams
Melissa Susan Ader
Lee Adlerstein
Michael Matthew Agosta
Medora Mayne Akers
Deepa Alagesan
Stephen Paul Alicanti
Nathaniel Allard
Ahmed Almudallal
Brendan James Alt
Audra Florence Amarosa
Kenji Amma
Amma Afum Anaman
Ifenna Dominic Anamdi
Paul G. Anderson
Brent Lloyd Andrus
Allison Noel Angel
Steven Roderick Aquino
Jacquelyn Nicole Arcati
Myla Gounder Arumugam
Sarah Ruby Babka
Salvatore Charles Badala
Jae Joon Bang
Jacqueline Barbera
Laura Paulino Barker
Francesca Lynne Bartolomey
Amy Jane Beaux
William David Becker
Kevin Christopher Begley
Jessica Lindsay Benach
Jennifer Ashley Bender
Eric Steven Berelovich
Markus Bergauer
Tobias Charles Berkman
Branden Carl Berns
Laura Bertilotti
Christopher Michael Bezeg
Daniel Latham Biller
Kelsey Marie Bilodeau
Jennifer Lane Bleys
Marie A. Bober
Lisa Marie Bonanni
Jacob Morris Boyars
Cory Ruth Brader
Frederick Andrew Braunstein
Alexander Martin Bregman
Nathalie Braha Bressler
Victor Joseph Brienza
Ryan Kenneth Brissette
Daniel Richard Bromwich
Mariel Rebecca Bronen
Alesha Shanta Brown
Angelica Elizabeth Campanaro
Jeremy Daniel Campbell
Robin Jeanne Campbell-Urban
Jennifer Carmen
Brooke Mackenzie Cartwright
Ekaterina A. Casali
Ashleigh Stuart Casey
Mark William Catanese
Andrew Chang
Alice Zao Chen
Jeff Chen
Lu Chen
Ping-chun Chen
Candice Chi Yeun Cho
Hannah Carol Choate
Moon Choi
Ashley Aeri Chung
Yang-kun Chung
Shawn Matthew Clark
Samuel Scherer Coe
Adam Paul Cohen
Justin Andrew Cohen
Tess Margaret Cohen
Victoria Anne Cole
Sarah Meade Colombo
Chelsea Jean Corey
Sarah Whitton Corstange
Abigail Marie Coyle
Elizabeth Ungrich Cukor
Richard W. Cutler
Theresa Jeanine D'Andrea
Danielle A. D'Aquila
Juliana Gisela Dalotto
Brett David Davenport
Bejide Analeah Davis
Anna De La Cruz
Claudia De Palma
Tavish C. DeAtley
Wyatt James Delfino
Jennifer Tembeck Demetriou
Michael Matthew Denci
Geoffrey James Derrick
Joseph C. Devine
Jessica Anne Diab
Brett Mary Dignam
Jennifer Lauren Dinicola
Dominick Paul Disabatino
Amanda Sue Disanto
Kimberly Ann Donnelly
Katherine Moira Dubyak
Nemanja Dundjerovic
Rebecca Rakatansky Dunnan
Jaclyn Kim Elfland
Matthew Gregory Ellias
Andrew Maxwell Endicott
John Frederic Escherich
Michael S. Fabiani
Aryeh Ethan Falk
Perry Steven Fallick
Brian David Farber
Lauren Adele Fasano
Priscilla A. Fasoro
Leah Wood Feinman
Rebecca Keiko Felsenthal
Laurel Sage Fensterstock
Emily Jane Feuerman
Brian Patrick Fitzgerald
Edward William Ford
Scott I. Forman
Michael Jon Frantel
Brittany Kaye Frassetto
Jennifer Margaret Freeman
Amanda Helena Freyre
Bari N. Friedman
Jonathan Noah Frodella
Fentress Jamal Fulton
Toby Edward Futter
Matthew Thomas Gabbard
Salvatore Anthony Gambino
Stephanie K. Gamiz
Narciso Garcia
Mark Steven Geiger
Samara Lauren Geller
Blake Hugh Gilson
Allyn Marie Ginns
Maya Ginsburg
Samuel Evan Goldberg
Benjamin Aryeh Goldburd
Jessica Lauren Goldenberg
David Lichtenstein Goldin
Andrew Mark Goldsmith
Adam Goldstein
Jason Zachary Goldstein
Ryan Mitchell Goldstein
Stella Goldstein
Sarah Gruber Gordon
Russell Todd Gorkin
David Averil Gottfried
Michael Walter Gramer
Jaclyn Diana Granet
Ashley Grant
Harold Michael Greenberg
Olivia J. Greer
Yana Victorovna Grishkan
Joshua Maxwell Grossman
Scott B. Group
Andrew Michael Grous
Alexander Emerson Grout
Heather Elaine Groves
Micah A. Gruber
Danielle Alexandra Grunwald
Xizhou Gu
Steven Andrew Guerrero
Andrea Danit Guttin
Victoria Yin-wai Ha
Joseph Daniel Hadacek
Gael Yannick Hagan
Tanya Hajjar
Tara E. Halsch
Daniel Hanan
Eric Mark Hansen
Stephen Gregory Harper
Patrick Shane Harrington
Elizabeth Marie Caroline Harris
Tessa Brianne Harvey
Athar Haseebullah
Kirsten Rowena Heenan
Elena Heim
Alex David Heller
Julia Fyrwald Heming
Peter Hering
Taylor Katherine Herman
Vanessa Marie Hernandez
Kristian M. Herrmann
Amy H. Herskowitz
Rodney Harrison Hill
Sean Allan Hill
Christina Georgia Hioureas
Christopher Michael Hirsch
Jessica Lindsay Ho
Erin Kathleen Hoben
Caitlin Patricia Hogan
Margaret Barringer Hoppin
Satoshi Hosokawa
Nabilah Akhtar Hossain
Rebecca Elizabeth Houck
Gregory Dennis Howling
Ju Huang
Leonie Wei Shi Huang
Christian Edward Hudson
Lauren Elizabeth Hume
Jeremy Edward Hutcher
Brian James Igoe
Ataru Iizuka
Steven Mark Israel
Brittany Christa Jackson
Steven Benjamin Jacobs
Andrew Shahon Jacobson
Brandon Jang
Karin Scholz Jenson
Laura Jereski
Sigrid Ursula Jernudd
Jacob Keith Johnson
Maria Lianos Johnson
Andrew Scott Joseph
Hina A. Joshi
Lina Jun
Steven Juskowicz
Samantha Maxwell Kagan
Shilpa Kalra
Jennifer Yince Kan
Jee-eun Kang
Daniel B. Kaplan
Olga Albertovna Kariyawasam
Ryan Thomas Kearney
Andrew Rosenthal Keats
Sarah Thorndike Kelly
Aileen J. Kim
Elizabeth Jun Kim
Jonathan Michael King
Spencer Kartchner Kirton
Musisi Eddin Kiwanuka
Ryan Samuel Klarberg
Mark Klaver
Tori Alexandra Koenig
Theodoros Konstantakopoulos
Eric J. Koplowitz
Alexia Dorothea Koritz
Lawrence W. Kornreich
Yoshinobu Koyama
Evan Ross Kreiner
Matthew Patrick Kremer
Jason Reid Krochak
Stacia Christine Kroetz
Siew Kai Kwok
Monica Kwong
Rachel Elizabeth Labes
Rachel Elizabeth Landy
Kaylan Elizabeth Lasky
Blaise J. Latella
Kelly April Latta
Tyler Nathaniel Layne
Jennifer Lynn Lee
Lauren Teresa Lee
Soeun Lee
Cory Robert Lefkowitz
Alexander Browning Lemann
Elizabeth Ann Lentini
Joseph Isidore Leone
Joshua Noah Lerner
Alina Levina
Julianne Gabrielle Levine
Megan Theresa Levine
Renee Melinda Levine
Patrick James Lewis
Man Wai Li
Oliver C. Liao
Frederick Wei Xin Lien
Willa Wei Lin
Marissa Baine Litwin
Erchan Liu
Tianren Liu
Stuart Roth Lombardi
Ashley Ann Lostritto
Seth B. Lubin
Matthew M. Lucas
Dane Alexander Lund
Tal Rachel Machnes
Sharon Elizabeth Mack
Anil R. Makhijani
Caitlin McGill Rochford Mandel
Robert Andrew Mantel
Jessica Lee Marczyszak
Dimitrios Theofanis Markos
Andrew Peter Marks
Susannah Rose Marsh
Christen Marie Martosella
Jeffrey Andrew Mason
Joslyn Ann Massengale
Keisuke Masuda
Scott Aaron Mathias
Sarah Michal Matz
Katherine Eliza Mayall
Janet Sadler McCrae
Andrew Lawrence McElroy
Matthew Bensen McFeely
Joseph David McGeehin
David Grey McGuiness
Gina F. McGuire
Patrick Donovan McKegney
Timothy Patrick McKernan
Michelle A. McLeod
Margaret Davenport McPherson
John Joseph Meehan
Laura Katherine Mehalko
Aylana Meisel
Andrew Patrick Meiser
Doha Gamal Mekki
Laura Elizabeth Mergenthal
Andrew Patrick Merten
Elisabeth Milan
Benjamin Lyn Miller
David Robert Miller
Jessica Lynne Miller
Lindsey Elizabeth Brandon Miller
Marc Andrew Miller
Michael Robert Miller
Lindsey Ann Mills
Joelle Anne Milov
Jennifer Freda Mindlin
Lauren A. Mintz
Hayley Beth Miskiewicz
Katherine Leigh Mitchell
Shira A. Mizrahi
Tenley Mochizuki
Alison Gainfort Moe
Jeffrey Chuang-wei Mok
William Jin Moon
Rosemary Cobb Morgan
Candace Lynne Moss
Kevin Douglas Moss
Ryan Michael Mott
Leo Muchnik
Daragh John Murphy
Matthew Albert Musano
Lauren E. Myers
Sophie Irene Myers
Rosemari Y. Nam
Adam S. Namoury
Suno Naniwa
Sanjay Narayan
George Alfonso Naya
Jaclyn Nayar
Marie Ndiaye
Joshua Arthur Nemser
Evan Wolfe Neu
Jack Lee Newhouse
Alanna B. Newman
Joyce Yan Yan Ng
Aileen Ann Nielsen
Anthony Michael Niescier
Jean Pierre Nogues
Ryan Evan Norman
Victor Noskov
Molly Anne Novero
Megan Rebecca O'Flynn
Rashidat M. Ogbara
Stephen Timothy Olson
Erica Welch Onsager
Natalie Kay Orpett
Chelsea Leigh Osborne
Katharine Lee Ostrow
Milton Eugene Otto
Enes Ovcina
Jessica Jenning Pai
Laura Rose Paliani
Samantha Jillian Palmer
Amy Michelle Palumbo
Elena Panagiotou
Jennifer Elyse Paone
Francisco Alejandro Pardo
Brendan Sidney Parent
Brian Anthony Park
Alison Ley Parker
Leslie Ann Pasqualone
Deena J. Patel

Daniel Pearlstein
Michael Jacob Pemstein
David Louis Perechocky
Antonia Freire Pereira
Michael Jordan Pergler
Theresa Angelica Perkins
Yuliya Perlina
Valerie Isabelle Petein
Michelle Pham
Gary Chung-yu Pong
Lee Maia Popkin
Madison Porzio
Ilona Celia Potiha
Samuel Walker Powers
Derrick Mark Preston
Marie Louise Priolo
Simon Nicholas Pulman
Mingran Qu
Phong Quan
Sabrina Schaffer Rabinowitz
Nicole Alyse Rang
Benjamin John Rankin
Patrick Kelly Reisinger
Aaron D. Resetarits
Evan Edward Richards
Laura Ann Richenderfer
Spencer Barlow Ricks
Sheena Michelle Rinkle
Herbert Joshua Rivera
Kamil Robakiewicz
Rafael Andre Roberti
Stephanie Mae Roberts
Andrew Patrick Rocks
Nicholas Ferreira Rodriguez
Kristen Tessa Rohr
Alissa Marie Roland
Nadia Raquel Rollins
Victoria Melissa Rosales
Alexander Robert Rosegren
Matthew Jacob Rosenbaum
Jeffrey Benjamin Rosenbrough
Peter Simpson Ross
Ariel Gail Roth
Daniel Todd Rothberg
Andrew John Rowe
Zachary Lance Rowen
Lana Marie Rowenko
Elon Rubin
Michelle Mora Rueda-Roberti
Linsey Alaine Ruhl
Amelia Jane Russell
Gina V. Santino
Dahlia Sattar
Nawreen Sattar
Dylan Grace Savage
Rana Sawaya
David M. Sborz
Kara Michelle Scheiden
Joseph Michael Scherban
Keri Elizabeth Schick
Whitney Grace Schlimbach
Lee Daniel Schneider
Jonathan Barry Schreier
Suzanne Elizabeth Sciarra
Erica M. Segal
Katherine Stacey Seid
Talia Seidel
Kahini Camille Selmouni
Amanda Sue Sen
Stephen R. Severo
Matthew Richard Shapiro
Steven Daniel Shapiro
Kai David Nicholas Sheffield
Peter Andrew Sheppard
Brian K. Sheridan
Hiroko Shibuya
Genavieve Casey Shingle
Andrew Gregory Shoals
Adam Laurence Shpeen
Brian Anthony Shue
Elina Shulman
Samuel Aaron Shusterhoff
Ashley Elizabeth Siegel
Jonathan Eric Siegelaub
David Sienko
Graham Marc Lawrance Silnicki
Lee Silver
Ashley Margaret Simonsen
Cindy Arlana Singh
Joseph John Skrokov
Liesse-Marie Slemon
Bradley David Small
Dana Leigh Smith
Natalie Ellen Smith
Valerie E. Smith
Eugene Alexis Sokoloff
James Sottile
Christin Margaret Spradley
Kristina Nicole Violet Srica
Noam C. Srolovitz
Rebecca Stanger
Ryan Vincent Stearns
Alexander Joseph Steinberg
Sara Elizabeth Stinson
Alison Juliana Stoffregen
Molly Elizabeth Storey
Robert Lowell Stratford
Brendan James Stuart
Katherine Maureen Sullivan
Catherine Ella Sum
Bradford Jay Sussman
Abe S. Sutton
Kaitlyn E. Suydam
Erini Rose Svokos
Emily L. Sy
Eric Lewis Taffet
Alice Tam
Xiyi Tang
Xiyin Tang
Chandler Hinkins Tanner
Sanjiv Jayant Tata
Justin Paul Tatham
Samara Renee Thomas
Patrick Ryan Tierney
Brent Reed Tomlinson
Amanda Grace Tomney
Daniel Tracer
Benjamin Fox Tracy
Leonid Traps
Christopher Michael Trueax
Joanna C. Tsoumpas
Brent Michael Tunis
Jennifer Kimberly Tytel
Sarah Margaret Vacchiano
Rachele Michele Van Arsdale
Andrew Lawrence Van Houter
William Russell Vanderveer
Molly Caitlin Vaughan
Victoria Lorraine Velasquez
Shara Christine Venezia-Walerstein
Laura Verlangieri
Ana Angelica Viciana
Andrew Villacastin
Gerard Virga
Mary Grace Vitale
Gregory Stephen Volkmar
Kimberly Alexis Wade
Jessica Leslie Wald
Benjamin Jesse Arnold Walker
Xin Wang
Michael Christopher Ward
Cody Matthew Warner
Joanna Karolina Wasik
Eric Michael Wasserstrum
Kunihiro Watanabe
Kevin James Weber
Thomas Lawrence Wechsler
Marc Joshua Wegh
Wei Wei
Jessica Anne Weidmann
Cheryl Lynn Weinheim
Vincent Shane Weisband
Sean Brandon Weisberg
Craig Allen Wenner
Kathryn Werner
Ellen R. Werther
John Bierce Wetmore
Stephanie Wiegand
Justin P.d. Wilcox
Kahlil Charles Williams
Jane Elizabeth Wilson
Jennette Elizabeth Wiser
Matthew Robert Wisnieff
Amy Ilana Wolf
Owen Richard Wolfe
Benjamin Joseph Wolfert
Alex Jeremy Yastrow
Aparna Venkata Yenamandra
Michael Y. Yiin
Brittani Nicole Yriarte
Daina Amaryllis Zhang
Wenqi Zhao
Minyu Zhou
Yi Parker Zhou
Shenggang Zhu
Joanna Zieba
Marc Andrew Zimmerman
Nico G. Zimmerman
Aaron Louis Zises
Jonathan S. Zucker
Mitchell G. Zuckerman
Peter Brian Zuckerman

**SECOND DISTRICT**
Nikki Adame Winningham
Marybeth Catherine Allen
Amanda Renee Barrera
Daniel Berman
Whitney Zuckerman Bernstein
Kimberly Bolte
John Michael Boulos
Mehtab Kaur Brar
Marina Braverman
Chaim E. Bryski
Barbara Burke
Iskuhi Chakarian
Bayti Chen
Christina Marie Corcoran
Daniel Vincent Derby
Jennifer Helen Feeley
Max Kinsler Fidler
Nicholas Martin Ford
James Monroe French
Nicholas John Fribourg
Romy Colleen Ganschow
Margaret Louise Garrett
Sara M. Gronningsater
Jaime Dara Hecht-Cosloy
Javier O. Hidalgo
Jonathan Jeremy Hill
James F. Horton
Sarah Alexandra Kaufmann
Deborah Ruth Kerzhner
Elizabeth Ann Kowell
Amy Caroline Kurtich
Olga Kuzmina
Magda Laszlo
Rebecca Lebowitz
Jenny Lee
Yevgeniy Lerner
Michael Libuser
Eitan Zwi Magendzo
Joseph I. Mancino
Ian Andrew Massar
Hannah Eryl McCrea
Mani Mostofi
Sarah Nadeau
Lauren Midori Nakamura
Renee Lynn Neier
Erik Max Nilsson
Kathryn Victoria Ramey
Susan Marie Reilly
Owain Huw Robertson
Nicole Rossini
Jean-Baptiste Rudatsikira
Emma Solangel Salas
Genna Kinsler Saltzman
Avraham Reuven Schachter
Maria Elizabeth Schiavone
Alison Angela Schill
Karen Schnur
Chase Scolnick
Jessica B. Smith
Andrew M. Stengel
Owen A. Sucoff
Ruth Sharon Talansky
Dimitri Teresh
Anna Tse
Imoh S. Udofia
Sierra Katherine Van Borst
Thomas W. Vanasse
Joanna Denise Wine
Lauren J. Zimmerman

**THIRD DISTRICT**
Rosa Cohen-Cruz
Joy A. David
Dennis F. DiBari
Adam C. Eggleston
James Michael McGahan
Ryan D. Smith

**FOURTH DISTRICT**
Justin M. Grassi
Swarnapradha Shreenivas

**FIFTH DISTRICT**
Kyle W. Crandall
Ariel Ling Lin
Derek T. Shepard

**SIXTH DISTRICT**
Randa Adra
Jeffrey Paul Catalano
Amy Hsu
Jian Hu
Robert Andrew Jerry
Christopher Francis Nenno
James Christopher Paci
Edmond R. Parhami
Jason Matthew Pierce
Amanda Rios
Boris Ryvkin
Edan Shertzer
Alexander J. Stone-Tharp
Benjamin J. Warach

**SEVENTH DISTRICT**
Mollie A. Dapolito
Kelly Ochs

**EIGHTH DISTRICT**
Joel Peter Feroleto
Kerry McGrath
Peter McGrath
Oriana Robin Montani
Sara Ashley Myers

**NINTH DISTRICT**
Elizabeth J. Ambron
Nathan T. Assel
Danielle Marie Baran
Rufina Beem
Eliot Berger
Andrew David Bochner
Benjamin Oberon Brown
Keith Joseph Clarke
Ashley T. DeVito
Siobhainin S. Funchion
Faziah Gafur
Jessica Blair Goldstein
Sean Andrew Gradowitz
Reynaldo Guzman
Jared Arden Hand
Courtney Renee Hogue
Afshan Jabeen Khan
Daniel Latella
Ashley Megan Lebow
Troy David Lipp
Rachel Amy Malina
Brooke Ann Mendelson
Brandon Mohr
John William Osborne
Taylor M. Palmer
Melissa Ann Peace
Kathleen M. Prystowsky
Jaclyn Reilly
Michael Andrew Rubin
Eli Russell Shindelman
Christopher Richard Skrypack
Kaylan Sobel
Kevin Eugene Staudt
Anna L. Susarina
Kunal Tewani
Stephen A. Veneruso
John Joseph Ventosa
Kadeen Lissandra Wong
Kristen L. Woodford
Krista Elizabeth Yacovone

**TENTH DISTRICT**
David Joseph Alamia
Eric R. Amidon
Stephanie Aris
Samantha Robyn Aster
Sheila Marie Ballato
Paraskevas Binakis
Daniel Michael Brown
Matthew Todd Burrows
Andrew Joseph Cabasso
Natalie Marie Campo
Joseph B. Caraccio
Hilary Faye Casper
Ritesh Chatterjee
Conrad Aloysius Chayes
Brian Douglas Conboy
Melissa Anne Danowski
Michael Philip DeRosa
Bernadette Theresa Diprisco
Patrick Andrew Dolan
Nicholas John Fink
Josh Mathew Friedman
Sean Robert Gajewski
Michael John Ganci
Samantha Rose Gellman
Christopher Craig Haner
Jeremy Scott Hankin
Elana Tori Jacobs
Albina Kataeva
Tara Kellner
Terence John Kemp
Nina Khaimova
Megan Marie Landy
Jared Ross Levy
Cooper J. Macco
Brittany Caitlin Mangan
Kaitlyn Rose McKenna

Brian Patrick McLaughlin
Michael George Melchione
Yasmine G. Meyer
Jared David Newman
Michael Sean Newman
Katharine Emily O'Dette
Richard A. Paladino
Thomas Theodore Papain
Sabiha Parvin
Jennifer Prusiecki
Karen Simone Rawlins
Robert Luigi Renda
Rebecca Richards
Daniel Paul Richford
Kenneth Rosenblum
Jon H. Ruiss
Nicole Caren Rynston
Shawn Nunzio Sandler
Matthew Schlesinger
David L. Schwed
Jason Stephen Selmont
Rajat Shankar
Henry Scott Shapiro
Jason Mark Simensky
Ilyssa M. Spergel
Alexandra B. Stevens
Dennis Christopher Valet
Mario Andrea Veneroso
Jeremy M. Weg
Gregory Edward Wenz
Hilary Madeline Wissemann
Justin Zaroovabeli
Kenneth Thomas Zawistowski

**ELEVENTH DISTRICT**

David Akerman
James Asquith
Rimma Ayzen
Lili Alexandre Biesemeyer
Lawrence Brown
Hera Javed Chand
Anna Demidchik
Justin David Dickinson
Mandy F. Estinville
Ye Feng
Adam Justin Heckler
Elizabeth Marie Kenney
Laura Marie Kitchen
Scott Adam Kutcher
Sujeon Lee
Margaret M. Lin
Maria Elena Malvar
Theodore Mavromihalis
Michele McGuinness
Kenny Minaya
Tiffany Moseley
Jessica Ann O'Grady
Alexander B. Rubin
Thais Maria Pascho Saad
Rory Edward Sheridan
Mordecai Simha
Alexander B. Turbin
Kaliopi Vasiliou
Aiysha Wasi
Andre Williams
Damias A. Wilson

**TWELFTH DISTRICT**

Ufuoma Barbara Akpotaire
Leeor S. Baskin
Patrick Thomas Clark
Cassidy Hope Crough
Shannon Cumberbatch
Adam Fischman
Sylvia Frenkel
Conor Gleason
Katherine Anne Gregory
Latoya Dee Herring
Kari Alexandra Heyison
Allison M. Holubis
Maeve Eileen Huggins
Sabrina Nilofar Jiwani
Alexander Lawrence Judka
Kathryn Lynn Kliff
Courtney Faith Mose Libon
Patrick Joseph McCadden
Jonathan Max McCann
Katherine Loraine Moore
Mary Alissa Schindler
Amy Marie Schneider
Amalea Christina Smirniotopoulos
Melissa Robyn Weiner
Kyla Jade Wells
Edmund R. Witter

**THIRTEENTH DISTRICT**

Artem Djukic
Alexander James Fumelli
Regina G. Gennari
Vartges William Saroyan
Catherine F. Schiavone
Sarah L. Stoudemire

**OUT OF STATE**

Jasmine Lilly Abraham
Jennifer Marie Adams
Ryan John Adams
Nicolas V. Aeschlimann
Zarina Ajwani
Machaille Hassan Al-naimi
Hannah Kennedy Albertson
Mark Eldridge Anderson
David Nelson Apfelbaum
Vikram Singh Arneja
Ian S. Augarten
Seong Ryeol Bae
Lindsay Ann Barovick
Adam Morgan Beasley
John Richard Berkley
Gary Charles Berkson
Douglas Jerome Blacker
Melissa Ann Blue Sky
Clare E. Bogdanowicz
William Nicolas Bonnin
Sarah Jane Braasch
Sarah Laine Brodie
Klaus Markus Buhlmann
Jessica Ann Burt
Daniella Casseres
Sitong Chen
Xia Chen
George Constantinov Chipev
Sonali Priyamvada Chitre
Doo Young Choi
Rizwan Afzal Chowdhry
Celia Ruth Choy
Lindita Valentina Ciko
Keith Joseph Clarke
Giovanni Colantuono
James Peter Conlan
Laura Faye Corbin
Sean Warren Coughlin
Jacqueline Danielle Crowley
Lisa Lyne Cunningham
Gabriela Da Cunha Lima Britto
Laura Domenica Damiano
Vanessa De Aguiar Danley
Meetu Dhar
Nicholas Salvatore Dilorenzo
Sheng Dong
Cathleen Michele Doyel
Patrick Ryan Featherston
Ilya Feldsherov
Troy Benjamin Felver
Celina Kitzie Fletcher
Kimberly Ann Franko
Wenqiong Fu
Ilyssa S. Fuchs
Kazuyo Fujimura
Toshiya Furusho
Melissa Ann Gardner
Allison W. Gaul
Michael Wallace Gibaldi
James Gifford
Brandon Marqui Gillard
Benjamin Burnett Glerum
Alexandra Goldstein
Trudy Anne Golobic
Adriana Gomez Buritica
Laurie-anne Eliane Marie Grelier
Eugene Michael Grossman
Nikki Ann Galutira Guevarra
Brian R. Gutman
Daniel George Habib
Michael R. Herman
Craig Herskowitz
Henrik Humrich
Kathleen Theresa Hunker
Allison N. Johns
Carolina Taunay Joop
David Michael Kaden
James Byron Kelly
Fawad Khan
Hankyu Kim
Hyungsoo Kim
Kara L. Kohlenberg
Anastasia Kovalevskaya
Andrew Ryan Kravis
Adam J. Levitt
Marc Abraham Levitt
Philip Joseph Levitz
Miaoran Li
Melina Lito
Vivian Y. Liu
Wei Liu
Yueling Liu
Rui Luo
Mark Leo Mahan
Jennifer Brooke Maisel
Lauren Brooke Major
George Justin Mallone
Andrea Lynn Manafort
Anna Mandel
Rajvinder Kaur Mann
Da Mao
Lauren Jill Marcus
Renata Ribeiro Marques
Leon Matthias Martin
Vicki Martin-Odette
Andrea Louisa Martinez
Molly Egan McBurney
Bryana Theresa McGillycuddy
Monika Bipin Mehta
Alexander Scott Meiseles
Susan Verda Metcalfe
Angela Meyster
Mark Elsas Miller
Meredith Kelly Mommers
Gerard Francis Mooney
Gemma Mootoo Rajah
Ellen Louise Mossman
Carey Patricia Mulherin Parker
Martin Musinguzi
Katheryn Noelle Nadbielny
Togo Nakamura
Sumito Nakano
Tomoyasu Nakata
Tatsuya Nakayama
Richard Phillip Nedlin
Mika Brooks Nelson
Brian Nguyen
Rachael Elizabeth Nole
Margaux Nollet
Lawrence Howard Norton
Niall Michael O'Sullivan
Anna Crindell Offit
Oleksandr Olshanskyy
Sin Yee Ong
Diane Elisabeth Pallez
Yian Pan
Oleksandr Pankiv
Alexandra Chloe Papalia
Brendan Ross Parets
Joshua M. Parker
Matthew Kenneth John Parker
Andrew Henry Pastwick
Kimberly Leehaug Patwardhan
Scott Topiel Paul
Sheena Paul
Eric Mark Pelz
Martha Perez
Breanna Leigh Peterson
Andrew John Petrie
Stefanie Andrea Pfisterer
Andreas Johannes Piepers
Danielle Pistola
Laure Pistre
Frank B. Poe
Margot Julia Pollans
Ashley Nicole Prather
Greta Aileen Proctor
Amanda Beth Protess
Alexandra Jennifer Pryor
Bridget Earley Psarianos
Roger Gregorio Pujols Rodriguez
Stephen Joseph Putnoki-Higgins
Wenxiong Qiu
Corilee Kahealani As Racela
Nadia Rahman
Paul Joseph Ray
Jaime S. Reichardt
Courtney Retter
Brian Thomas Rice
Nathaniel Mark Richman
Gabriel L. Riggle
Paul James Rinefierd
Fabrice Robert-tissot
Grace Elizabeth Rodden
Fernando Rodriguez-Cortina
Mieun Roh
Barry Rona
Kaihli Micole Ross
Nicholas Andrew Rowe
Steven Andrew Rowings
Todd Wayne Rubin
Taketo Sakurai
Daniel Joseph Saposnik
Steven Anthony Sciancalepore
Benjamin Elliot Sedrish
Jake Harris Seligman
Debodhonyaa Sengupta
Amy Jean Sennett
Randal Scott Seriguchi
Daniel Henry Serlin
Mira Rose Serrill-Robins
Gregory Theodus Shannon
David Aaron Shapiro
James Timothy Shearin
Sirine Shebaya
Youngho Shim
Daniel Shlomi
Nicholas Henry Sikon
Jacob Louis Silberberg
Ethan Tsvi Siller
Ezra Isaac Siller
Sharen Sher Ling Sim
William Joseph Simmons
Michael David Sinai
Pavini Emiko Singh
Michael Alan Sisitzky
Mary Christine Slavik
Aisling Slevin
Kaylan Erin Sliney
Ryan David Smith
Jose Alberto Socorro
Whitney J. Stein
Jessica Jane Stringer
Erica Lynne Swainson
Edward B.M. Terchunian
Danielle-Ann Thomas
Michael John Von Klemperer
David Weinstein
Dennis Ira Wilenchik
Zachary Alexander Withers
David Carl Wohlstadter
Sidney Bing Wong
Yun Wu
Ayako Yamada
Masayuki Yamada
Chiharu Yamamoto
Hai-ching Yang
Liu Yang
Xiaohong Yao
Nathnael Tesfamichael Yohannes
Jiayi Yu
Keju Zheng
Le Zhou
Michael Charles Zogby

# *In Memoriam*

Michael J. Brown
*Kennebunkport, ME*

Benjamin Franklin
*Ithaca, NY*

Jacob W. Heller
*New York, NY*

Donald E. Deegan
*Garden City, NY*

Joseph W. Kiefer
*Orlando, FL*

you may move for sanctions for your adversary's unreasonable denials in a notice to admit.

No prohibition exists to using both an EBT and a notice to admit in pending litigation. Use an EBT to discover facts, and use a notice to admit to "establish that certain facts are not in dispute and to eliminate the need for proof of that fact at trial."[19]

## The Earliest and the Latest

You may serve a notice to admit after the defendant has served its answer or after 20 days from receiving the plaintiff's summons, whichever is sooner.[20]

A party may serve a notice to admit, unlike true disclosure devices, up to 20 days before trial.[21] Thus, as long as your notice to admit isn't a subterfuge to get disclosure, you may serve a notice to admit after filing a note of issue (or notice of trial in the lower courts) certifying that you're ready for trial.[22] Your note of issue (or notice of trial) informs the court that pretrial proceedings and disclosure is complete. Even though disclosure is complete, you may still serve your adversary with a notice to admit. The reason is that a "notice [to admit] is not truly a disclosure device but just a procedure designed to 'crystallize issues.'"[23]

## Format and Style

Like other legal documents, your notice to admit should have a caption. Include the name of the court, the county, the title of the action, the index number, the names of the parties, and the title of the document.[24] The title of the document, for example, might be "Plaintiff's First Notice to Admit" or "Defendant's First Notice to Admit." If you send a second notice to admit, label it "Plaintiff's Second Notice to Admit" or "Defendant's Second Notice to Admit." Nothing but motions prohibiting harassment limits the number of notices to admit you may serve your adversary.

Include an introductory paragraph stating who's seeking admissions from whom and the date that responses are due.[25] *Example:* "Plaintiff requests that defendant admit by [date 20 days after service] the following facts."[26] If your lawsuit has multiple plaintiffs or multiple defendants, specify clearly which party is seeking the admissions and which party must respond to the notice to admit. If you're serving a notice to admit on more than one party, tailor the notice to admit to each respective party. CPLR 2103(e) provides that you serve copies of the notice to admit on all other parties who have appeared in the litigation.

If you need to define special terms in your notice to admit, include a definition section. But don't over-define or use boilerplate definitions.[27]

Number each request in the notice to admit in numerical order. *Example:* "Request No. 1," "Request No. 2," "Request No. 3." Nothing limits the number of requests in your notice to admit;[28] just don't impose an undue burden on your adversary.[29]

If you send more than one notice to admit, keep your requests sequential. If you ended your first notice to admit with request number 20, start your second notice to admit with request number 21.[30]

Request one fact at a time. Avoid compound requests.[31] Create clear and simple requests. *Example of compound request:*

> Request No. 1
>
> On May 12, 2008, Annette Barnes was president of Memorable Photographs Company and, as president, had the authority to purchase the camera lenses from plaintiff, Lens For You, Inc., and sign plaintiff's invoice acknowledging receipt of the camera lenses.

Break down the compound request one fact at a time. *Example:*

> Request No. 1
>
> On May 12, 2008, Annette Barnes was president of Memorable Photographs Company.
>
> Request No. 2
>
> On May 12, 2008, Barnes had the authority to purchase the camera lenses from plaintiff, Lens For You, Inc.

**If you don't respond to a notice to admit, all the items in the notice will automatically be deemed admitted.**

> Request No. 3
>
> On May 12, 2008, Barnes had the authority to sign plaintiff's invoice acknowledging receipt of the camera lenses.

Create each request so that your adversary can respond with a clear answer. Avoid requests that have subparts.

Attach as an exhibit any document or photograph you refer to in your notice to admit.[32] Plaintiffs should mark their exhibit tabs using numbers, from 1 onward. Defendants should mark their exhibit tabs using letters, from A onward. CPLR 3123(a) provides that you need not serve a copy of a document or photograph with your notice to admit if you've previously furnished a copy to your adversary. The better practice is to include the document or photograph as an exhibit in your notice to admit.[33] You'll avoid confusion and save time that way.

No need to file your notice to admit with the court.

Notices to admit must comply with CPLR 2101(d). The notice to admit must have the attorney's name, signature, address, and telephone num-

ber. Pro ses must include their names, signatures, addresses, and telephone numbers.

## Improper Ways to Use a Notice to Admit

If you use a notice to admit improperly — and even if your adversary never responds to your notice to admit — the admissions won't automatically be deemed admitted.[34] Make sure you properly use a notice to admit and for the right reasons.

You can't seek in a notice to admit a fact that's the "very dispute" of the action.[35] Notices to admit are "intended only to eliminate from the issues in litigation matters which will not really be in dispute at the trial. Thus . . . requests for admissions are not intended to cover ultimate conclusions which can only be made after a full and complete trial."[36] In a negligence case, the defendant's negligence is the "gravamen of the dispute."[37] Therefore, you can't ask the defendant to admit that the defendant was negligent, because you can't ask the defendant to admit facts that prove the defendant's negligence. Assume you've sued Pierson Sewage Company for negligence because your client, Sophia Andrews, fell on a pipe left on the street after workers fixed a sewage pipe. *Examples:*

> Request No. 4
>
> Pierson Sewage Company was negligent when it failed to remove a pipe from the intersection of Canal and Lafayette Streets.
>
> Request No. 5
>
> Pierson Sewage Company's negligence caused Sophia Andrew's injuries.

Likewise, you can't seek in a notice to admit an admission that goes to the "heart of the matter at issue."[38] Assume you're suing the City of New York for damages your client sustained in a slip and fall on a sidewalk. *Example:*

> Request No. 6
>
> The City of New York had constructive notice of the defective sidewalk located in front of 321 White Street.

You can't use a notice to admit to seek interpretations of the law[39] or legal conclusions.[40] *Example:*

> Request No. 7
>
> Plaintiff's notice of claim against the City of New York was proper under the General Municipal Law.

You can't use a notice to admit to seek technical or scientific information as would "ordinarily [be] elicited from an expert."[41] Assume that your client performed a brain MRI on Anderson Pitt. Also assume that your client in a no-fault action is suing Pitt's insurance company, seeking reimbursement for the unpaid MRI bill. *Example:*

> Request No. 8
>
> Anderson Pitt's MRI of the brain was medically necessary.

You can't use a notice to admit to seek admissions that your adversary has already admitted in responsive pleadings.[42] If your adversary has already admitted a fact in its answer, for example, no reason would exist to send a notice to admit for your adversary to admit the same fact.[43] Your adversary doesn't need to admit the same fact twice. If your adversary's response at an EBT or in a bill of particular, however, was ambiguous or equivocal — and thus not an admission — it's appropriate to send a notice to admit that fact.[44]

You can't use a notice to admit to obtain information if other disclosure devices are available[45] and relevant to what you're seeking. Notices to admit aren't substitutes for EBTs or bills of particulars.[46]

You can't use a notice to admit to "uncover, define, or narrow [the] responder's contentions."[47] If that's what you're seeking to do, use a bill of particulars instead of a notice to admit.[48]

You can't use a notice to admit to seek admissions from a party that only another party knows about.[49] If you're the plaintiff and you've sued multiple defendants, for each notice to admit write one for each defendant. Assume you're suing a manufacturer of freezers, Really Cold Freezer Company, and the delivery company, Large Appliance Delivery Company. You can't send a notice to admit to Really Cold Freezer Company seeking information about Large Appliance Delivery Company. *Example:*

> Request No. 9
>
> Large Appliance Delivery Company failed properly to secure the freezer in its delivery truck before transporting it to plaintiff.

**You can't seek in a notice to admit a fact that's the very dispute of the action.**

You can't use a notice to admit to seek answers to "clearly irrelevant questions."[50] Assume you're suing defendant Austin Stark for breach of contract. *Example:*

> Request No. 10
>
> On May 5, 2009, Austin Stark was wearing brown cowboy boots when he signed the contract.

You can't use a notice to admit to obtain additional disclosure right before trial.[51] You can't, for example, send the defendant a 50-page notice to admit seeking what you should have sought during disclosure.[52] It's improper to do so, and it creates an unreasonable burden on your adversary.[53]

## Proper Ways to Use a Notice to Admit

Use a notice to admit to get your adversary to admit that a specific document is authentic. *Example:*

> Request No. 11
>
> The original document, a copy of which is attached as Exhibit 1, is a genuine and authentic Priceless Antiques bill, dated November 12, 2009.

CONTINUED ON PAGE 58

Use a notice to admit to get your adversary to admit the accuracy of a photocopy. *Example:*

Request No. 12

The document, attached as Exhibit A, is an accurate copy of Zoe Matthew's Bags Inc.'s commercial lease with the landlord for premises 111 Pope Street, store #2.

Use a notice to admit to establish facts that aren't in dispute. *Example:*

Request No. 13

On February 21, 2011, defendant Lee Markowitz drove a 1990 black convertible Corvette.

Use a notice to admit to authenticate signatures on documents. *Example:*

Request No. 14

The signature appearing on the last page of the 25-page contract, attached as Exhibit 1, is defendant's signature.

Even though you can't use a notice to admit to seek legal conclusions or to interpret the law, you may use a notice to admit to seek the "responder's subjective understanding of its own legal duty."[54] Assume you've sued Hope Avenue LLC, defendant-landlord, after your client's child was injured when the child fell out of an unsecured building window. *Example:*

Request No. 15

Hope Avenue LLC was aware of its duty to install window safety guards on the building.

Use a notice to admit to get your adversary to admit that a specific photograph is accurate, "correct or fair."[55] Assume you're suing Paula Ohms for damages your client sustained in a car accident. *Examples:*

Request No. 16

The photograph, attached as Exhibit 1, fairly and accurately represents the intersection of Broadway and Franklin Street as it appeared on the day of the incident, June 21, 2011.

Request No. 17

On June 21, 2011, Paula Ohms owned the car depicted in the photograph, attached as Exhibit 2.

In the upcoming issue of the *Journal*, the *Legal Writer* will continue with techniques on writing and responding to a notice to admit. ■

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

1. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 30:05, at 30-5 (2006; Dec. 2009 Supp.) (citing *Falkowitz v. Kings Highway Hosp.*, 43 A.D.2d 696, 696, 349 N.Y.S.2d 790, 791-92 (2d Dep't 1973)).

2. 1 Byer's Civil Motions § 24:47 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.).

3. 6 Jack Weinstein, Harold Korn & Arthur Miller, N.Y. Civ. Prac.: CPLR ¶ 3123.01, at 31-534 (2d ed. 2012; Mar. 2013 Supp.); Barr et al., *supra* note 1, § 30:01, at 30-5 (citing CPLR 3102(a), 3123(a)).

4. David D. Siegel, New York Practice § 364, at 624 (5th ed. 2011).

5. Byer's Civil Motions, *supra* note 2, at § 24:47 (citing *Lewis v. Hertz Corp.*, 193 A.D.2d 470, 470, 597 N.Y.S.2d 368, 368 (1st Dep't 1993)).

6. Siegel, *supra* note 4, at § 364, at 623 (quoting CPLR 3123(a)).

7. Barr et al., *supra* note 1, § 30:10, at 30-6.

8. *Id.* § 30:03, at 30-5.

9. Weinstein et al., *supra* note 3, ¶ 3123.02, at 31-534.

10. CPLR 3123(a); Byer's Civil Motions, *supra* note 2, at § 24:47.

11. Barr et al., *supra* note 1, § 30:32, at 30-8.

12. *Id.* § 30:32, at 30-8 (citing *Great Am. Ins. Co. v. Matzen Constr., Inc.*, 114 A.D.2d 625, 626, 494 N.Y.S.2d 464, 465–66 (3d Dep't 1985); *Cent. Nassau Diagnostic Imaging, P.C. v. GEICO*, 28 Misc. 3d 34, 37, 905 N.Y.S.2d 431, 433 (App. Term 1st Dep't 2010) ("[P]laintiff's requests for admissions were appropriate and defendant, by failing to respond to the notice to admit or seek other appropriate relief, is deemed to have admitted the facts on which plaintiff sought admissions. Because defendant admitted that the two bills attached to the notice were 'true and accurate' copies of the bills received by defendant and that defendant has not paid those bills, plaintiff established its entitlement to recover the overdue assigned first-party no-fault benefits."); *but see Bajaj v. Gen. Assurance*, 18 Misc. 3d 25, 28, 852 N.Y.S.2d 576, 578 (App. Term 2d Dep't 2nd & 11th Jud. Dists. 2007) ("[T]he admissions sought by plaintiff in the notice to admit were proper and, in the absence of a response, the court below correctly deemed the genuineness of the claim denial form to have been admitted. However, . . . defendant . . . did not . . . concede the admissibility of the provider's claim form as a business record . . . .")).

13. Siegel, *supra* note 4, at § 364, at 623.

14. Barr et al., *supra* note 1, § 30:02, at 30-5.

15. *Id.*

16. *Id.* § 30:30, at 30-7.

17. *Id.* § 30:05, at 30-5.

18. *Id.* § 30:202, at 30-20.

19. Byer's Civil Motions, *supra* note 2, at § 24:47 (quoting *Groeger v. Col-Es Orthopedic Assocs. PC*, 136 A.D.2d 952, 952, 524 N.Y.S.2d 950, 951 (4th Dep't 1988) and citing *Johantgen v. Hobart Mfg. Co.*, 64 A.D.2d 858, 859–60, 407 N.Y.S.2d 355, 357 (4th Dep't 1978)).

20. CPLR 3123(a).

21. CPLR 3123(a); Siegel, *supra* note 4, at § 364, at 624.

22. Siegel, *supra* note 4, at § 364, at 624 (citing *Hodes v. City of N.Y.*, 165 A.D.2d 168, 171, 566 N.Y.S.2d 611, 612 (1st Dep't 1991) ("An examination of plaintiff's fifty page purported notice to admit demonstrates that it scarcely constitutes a request for admission of the sort of narrow, limited matters contemplated by the statute but, instead, appears to be merely a subterfuge for obtaining further discovery.")).

23. *Id.* (quoting *Hodes*, 165 A.D.2d at 170, 566 N.Y.S.2d at 612).

24. Barr et al., *supra* note 1, § 30:61, at 30-10.

25. *Id.* § 30:62, at 30-10.

26. *Id.*

27. *Id.* § 30:63, at 30-10.

28. CPLR 3123.

29. Barr et al., *supra* note 1, § 30:68, at 30-11 (citing *Nader v. Gen. Motors Corp.*, 53 Misc. 2d 515, 515–16, 279 N.Y.S.2d 111, 112 (Sup. Ct. N.Y. County) ("The subject notice consists of more than three hundred (300) separate items, subdivided in forty-four paragraphs of a twenty-nine page, single-spaced typewritten document. Even a cursory examination of these papers establishes that, as a whole, the notice in question is patently burdensome, unnecessarily prolix, and unduly protracted."), *aff'd*, 29 A.D.2d 632, 286 N.Y.S.2d 209 (1st Dep't 1967)).

30. *Id.* § 30:67, at 30-11.

31. *Id.* § 30:64, at 30-11.

32. CPLR 3123(a); Siegel, *supra* note 4, at § 364, at 623.

33. Barr et al., *supra* note 1, § 30:69, at 30-11.

34. *Id.* § 30:13, at 30-6.

35. Byer's Civil Motions, *supra* note 2, at § 24:47; Siegel, *supra* note 4, at § 364, at 623 (quoting *Spawton v. James E. Strates Shows, Inc.*, 75 Misc. 2d 813, 814, 349 N.Y.S.2d 295, 297 (Sup. Ct. Erie County 1973)); Barr et al., *supra* note 1, § 30:13, at 30-6 (citing *DeSilva v. Rosenberg*, 236 A.D.2d 508, 508, 654 N.Y.S.2d 30, 31 (2d Dep't 1997)).

36. Byer's Civil Motions, *supra* note 2, at § 24:47 (quoting *Servidori v. Mahoney*, 129 A.D.2d 944, 945-46, 515 N.Y.S.2d 328, 330 (3d Dep't 1987); *Falkowitz*, 43 A.D.2d at 696, 349 N.Y.S.2d at 792; *Nader*, 52 Misc. 2d at 516, 279 N.Y.S.2d at 113.

37. *Id.* (citing *Spawton*, 75 Misc. 2d at 814, 349 N.Y.S.2d at 297).

38. Weinstein et al., *supra* note 3, ¶ 3123.06, at 31-539 (citing *Glasser v. City of N.Y.*, 265 A.D.2d 526, 526, 697 N.Y.S.2d 167, 168 (2d Dep't 1999)).

39. Byer's Civil Motions, *supra* note 2, at § 24:47.

40. *Id.* (citing *Gomez v. Long Island R.R.*, 201 A.D.2d 455, 456, 607 N.Y.S.2d 388, 389 (2d Dep't 1994) (noting that defendant improperly sought plaintiff's status in this country under immigration laws and whether plaintiff was trespassing at time of accident)); Barr et al., *supra* note 1, § 30:15, at 30-7 (citing *Villa v. N.Y. City Hous. Auth.*, 107 A.D.2d 619, 620-21, 484 N.Y.S.2d 4, 5 (1st Dep't 1985) (finding plaintiff's notice to admit improper because it sought defendant to admit that plaintiff's notice of claim was proper under General Municipal Law)); Oscar G. Chase & Robert A. Barker, Civil Litigation in New York § 15.04, at 707–08 (5th ed. 2007).

41. Siegel, *supra* note 4, at § 364, at 623 (citing *Falkowitz*, 43 A.D.2d at 696, 349 N.Y.S.2d at 792); Barr et al., *supra* note 1, § 30:14, at 30-7 (citing *Haroche v. Haroche*, 38 A.D.2d 957, 957, 331 N.Y.S.2d 466, 467 (2d Dep't 1972) (finding improper wife's notice to admit seeking husband's admission that dental treatment for child was necessary and reasonable)).

42. Byer's Civil Motions, *supra* note 2, at § 24:47.

43. The *Legal Writer* explained in Parts VI-IX of this series the techniques to drafting an answer. *See Drafting New York Civil-Litigation Documents: Part VI — The Answer*, 83 N.Y. St. B.J. 64 (Mar. / Apr. 2011); *Drafting New York Civil-Litigation Documents: Part VII — The Answer*, 83 N.Y. St. B.J. 64 (June 2011); *Drafting New York Civil-Litigation Documents: Part VIII — The Answer*, 83 N.Y. St. B.J. 96 (July / Aug. 2011); *Drafting New York Civil-Litigation Documents: Part IX — The Answer*, 83 N.Y. St. B.J. 64 (Sept. 2011).

44. Barr et al., *supra* note 1, § 30:52, at 30-10; *Groeger*, 136 A.D.2d at 952, 524 N.Y.S.2d at 951 ("[A]n admission made during a deposition is not conclusive and may be explained away, but an admission in response to a notice to admit, unless amended or withdrawn by court order, is conclusive.").

45. Byer's Civil Motions, *supra* note 2, at § 24:47 (citing *Nader*, 53 Misc. 2d at 516, 279 N.Y.S.2d at 113 ("[I]n the instant matter, the number, the detailed complexity, the minutia and, in many instances, the repetitiousness of the substance of the requests made by plaintiff clearly demonstrate that, in reality, he seeks information which may be properly obtained, if at all, by way of deposition rather than by requested admissions. The practice of employing the notice to admit in connection with detailed and disputed items of evidence has frequently been the subject of serious judicial criticism, which is particularly applicable here.")).

46. Barr et al., *supra* note 1, § 30:51, at 30-9; § 30:16 at 30-7 (citing *DeSilva*, 236 A.D.2d at 509, 654 N.Y.S.2d at 31; *Berg v. Flower Fifth Ave. Hosp.*, 102 A.D.2d 760, 760–61, 476 N.Y.S.2d 895, 897 (1st Dep't 1984)); *Falkowitz*, 43 A.D.2d at 696, 349 N.Y.S.2d at 792 ("The notice in this case concerns a great deal of highly technical, detailed and scientific information, which is itself a subject for examination by an expert witness or witnesses familiar with the sales, marketing, manufacturing and chemobiological backgrounds of the product in question. Information such as that is not the proper subject of a notice to admit.").

47. Barr et al., *supra* note 1, § 30:17, at 30-7 (citing *Rosario v. Gen. Motors Corp.*, 148 A.D.2d 108, 114, 543 N.Y.S.2d 974, 977 (1st Dep't 1989)).

48. *Id.* § 30:17, at 30-7.

49. Siegel, *supra* note 4, at § 364, at 623 (citing *Taylor v. Blair*, 116 A.D.2d 204, 207, 500 N.Y.S.2d 133, 134 (1st Dep't 1986) ("Many items [improperly] seek admissions either as to facts within the unique knowledge of other parties to the action . . .")).

50. Byer's Civil Motions, *supra* note 2, at § 24:47.

51. *Id.*

52. Siegel, *supra* note 4, at § 364, at 624 (citing *Hodes*, 165 A.D.2d at 171, 566 N.Y.S.2d at 612) (finding that plaintiff's 50-page notice to admit was mere subterfuge to obtain more disclosure by trying to circumvent the readiness requirement).

53. Byer's Civil Motions, *supra* note 2, at § 24:47; Chase et al., *supra* note 40, §15.04 [e], at 707.

54. Barr et al., *supra* note 1, § 30:15, at 30-7 (citing *Villa*, 107 A.D.2d at 620, 484 N.Y.S.2d at 5 (finding proper plaintiff's notice to admit that defendant was aware of its legal duty to install window safety guards on a building)).

55. *Id.* § 30:44, at 30-9.

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## INDEX TO ADVERTISERS



## JOURNAL BOARD MEMBERS EMERITI

# LANGUAGE TIPS

BY GERTRUDE BLOCK

**Question:** Please write a column on the frequent misuse of the words *alternate* and *alternative*, and explain that they are not synonyms. Each word is not the "alternative" and certainly not "the alternate" of the other.

**Answer:** This email from a Pennsylvania correspondent makes a pertinent request, but the distinction in meaning that he believes exists between *alternate* and *alternative* is not quite as pronounced as he thinks. Both *alternate* and *alternative* are widely used as nouns, and they rarely cause any confusion. See, for example, *The American Heritage Dictionary*, 1986: A person acting in place of another is an alternate.

If the nouns compared are not persons, *alternative* is usually chosen, as in, "There is no alternative." In a comparison of non-person adjectives, "alternative" is also widely used, as in: "Tuesday is the alternative choice for the meeting."

However, usage is mixed when adjectives are involved. Although some Americans insist (like the correspondent) that only the adjective is correct ("an alternative route"), a substantial minority of Americans consider *alternate* also acceptable. Thus, phrases like "alternate routes" or "alternate ideas" are proper. So it is probably better to avoid the word "correct" or "incorrect" to characterize that usage.

Two reliable sources on usage, *The Oxford English Dictionary* and the legal *Words and Phrases* (Volume 3, 2007), agree on that point. The correspondent will probably eventually become correct in his opinion, but the decision is currently in flux.

**Question:** The time might be ripe for a discussion of the difference between *less* and *fewer*. On TV, speakers talk about "less opportunities," politicians talk about "less taxes." But I believe correct usage requires "fewer" taxes and "fewer" opportunities.

**Answer:** You are right! My thanks to Rochester, New York attorney Philip L. Burke for his suggestion that we discuss this question again, for it always seems timely. For example, the governor of Florida recently announced: "Less than 300,000 private sector jobs have been created since December 2010." (The word *less* should be *fewer*.)

The reason is that English nouns are of two kinds: "count nouns" like "marbles, apples, programs, and jobs"; and "non-count nouns" like "information, wealth, happiness, and laziness." Modern English contains many more count nouns than non-count nouns, and the number of count nouns grows as the number of non-count nouns shrinks.

Count nouns are divisible; thus they have a plural form. You can have one marble or two marbles, one job or several jobs. Non-count nouns have no plural forms, for they are non-divisible: you cannot pluralize "information," by saying "two informations." Nor can you speak of "two lazinesses."

Non-count nouns can occur in the singular without either a definite or indefinite article – "the" or "a/an." You can say, "Information is necessary." But you must add either "the" or "a/an" to singular count nouns. Thus you must say, "An apple is good for you," not "Apple is good for you." You can talk about half an apple, but not half a sadness, a non-count noun.

But a complicating problem is that some nouns can be either count or non-count nouns. Both *air* and *honor* are in this category. In the statement, "In industry honor is important," *honor* is a non-count noun. In "He received many honors at graduation," *honor* is a count noun. To make the situation even more complicated, different nations make different decisions about which nouns are count and which nouns are non-count. In British English, for example, you enter university (non-count). In the U.S. you attend a university (count noun). The British go to *hospital*; Americans go to *a hospital*. Even more confusing, some words are non-count nouns in certain contexts and count nouns in others. You can buy sugar and coffee by the pound (as non-count nouns) or order "a coffee" (in a cup) or "a sugar" in an individual packet.

Non-count nouns are rapidly disappearing in both England and the United States. Not too long ago, the word *conscience* was a non-count noun, as in "People's conscience guides their behavior." Now it has become a count noun: *consciences*. Recently we used *behavior* as a non-count noun, but since psychologists refer to patients' *behaviors* that noun has moved into the count category.

"Humidity" was formerly a non-count noun, but weather forecasters now talk about "humidities." A recent law review article describes "emotional intelligences," and journalists discuss the "insights" of diplomats – all formerly non-count nouns. Mental health professionals have come to use *depression* (a former non-count noun) as a count noun.

This long explanation may clarify Attorney Burke's question. Use *fewer* with count nouns, *less* with non-count nouns. Talk about *much* happiness, or *fewer joys; much* help, but *many* helpers, *less* company, but *fewer* visitors; *little* difficulty, but *fewer* problems (or *few* difficulties, for *difficulty* can be either a non-count or a count noun). Correspondent Burke mentioned that his father used to talk about "fewer opportunities" and "fewer taxes"; his father was right!

From this long answer, it is also apparent why readers regularly have difficulty deciding which category a certain noun belongs in. Their dilemma is increasing because the categories may change as they ponder.

## Potpourri

A Massachusetts reader notes that there is now a third category to answer the question, Married or single? It is "in a relationship," which indicates neither married nor single, but "committed."■

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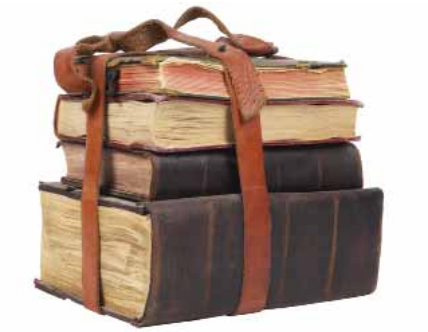

# Drafting New York Civil-Litigation Documents: Part XXV — Notices to Admit

In the last issue, the *Legal Writer* concluded its overview of summary-judgment motions.

In this issue and upcoming issues of the *Journal*, we continue our series on civil-litigation documents with notices to admit.

CPLR 3123 explains notices to admit. Although notices to admit are discussed in Article 31 — the disclosure article — of the CPLR, notices to admit aren't true disclosure devices.[1] Practitioners don't use notices to admit to obtain and disclose facts. Practitioners use notices to admit to get their adversary to admit matters not in dispute: "the genuineness of writings, or correctness or fairness of any photographs or of the truth of any matters of fact."[2] For this column, "adversary" is used to distinguish the party seeking a notice to admit (the seeking party) from the party responding to a notice to admit (the responding party).

Notices to admit are also known as "requests for admission."[3] But practitioners rarely use notices to admit to get admissions from adversaries. Some admissions are made during the pleadings, examinations before trial (EBTs), or conferences with the court. Often, practitioners will easily prove at trial many of the items they could have sought in a notice to admit. Notices to admit are underutilized.[4]

Notices to admit are useful litigation devices. Think of a notice to admit as a stipulation between you and your adversary about facts that neither of you will contest at trial. Use a notice to admit to elicit an admission from your adversary on something about which you and your adversary agree.[5] The seeking party should use a notice to admit when it "'reasonably believes there can be no substantial dispute' about the matter and when it is within the knowledge of the other party or ascertainable by [the party] 'upon reasonable inquiry.'"[6]

CPLR 3101 governs the scope of notices to admit: The information sought must be "material and necessary."[7]

Any party may serve a notice to admit on any other party. Co-parties may serve notices to admit on each other.[8]

Use a notice to admit in any action or proceeding, including a special proceeding.[9]

## Advantages and Disadvantages to Notices to Admit

If you don't respond to a notice to admit, all the items in the notice will automatically be deemed admitted.[10] No court involvement is needed.

The admissions you get from a notice to admit might foreclose the possibility of trial. Use the admissions against your adversary to "set the stage for a motion for summary judgment."[11] If you succeed at the summary-judgment phase, you won't need a trial. Also, use the admissions to move for partial summary judgment if your adversary admits part of a claim or defense. If a court determines that your notice to admit is proper, you might also win your summary-judgment motion using your adversary's deemed admissions.[12]

Save yourself and your client "the trouble and expense of proving a readily admittable fact" at trial.[13] Using a notice to admit will decrease the number of facts you'll have to prove at trial. The trial will be faster and cheaper.[14] It will alleviate your burden of producing a witness or securing evidence to prove a fact if you use, at trial, admissions from a notice to admit.[15]

> Notices to admit aren't true disclosure devices.

Use a notice to admit to get your adversary to admit substantive facts. Also, use a notice to admit to get your adversary to admit to foundational facts, including establishing chain of custody for physical evidence,[16] authenticating a document, and establishing that a document is a business record.

Although notices to admit aren't true disclosure devices, "all of the procedural devices relating to disclosure are applicable"[17] if any disputes arise, including serving and responding to a notice to admit. You may move for a protective order; the court may strike or modify an item, condition a response, or correct an improper request.[18] You may move to compel your adversary to respond to the notice to admit. You may also move to challenge your adversary's responses to a notice to admit and have the court determine whether the responses are sufficient. You may move to extend your time to respond to a notice to admit. You may move to amend or withdraw an admission. After trial,

CONTINUED ON PAGE 56

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