NEW YORK STATE BAR ASSOCIATION

Journal

FEBRUARY 2015
VOL. 87 | NO. 2

More War Stories From the New York Courts

by Harold Lee Schwab

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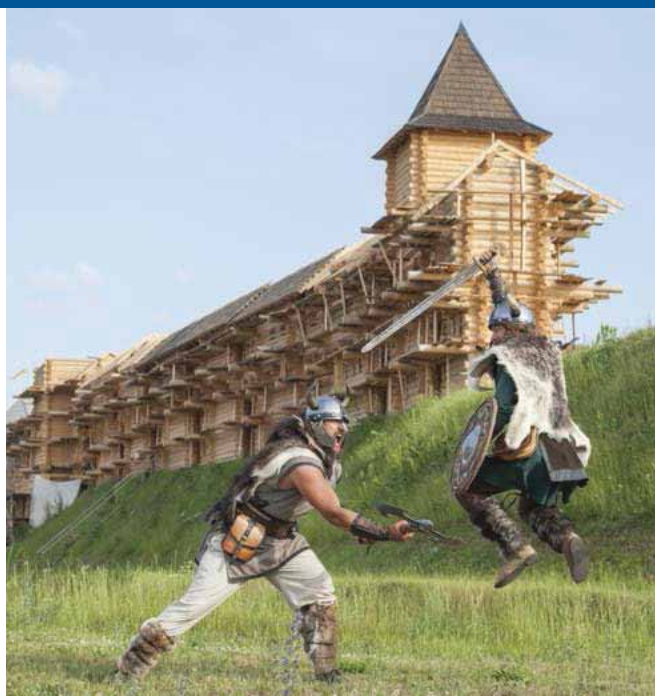
Editor-in-Chief, 1961–1998

CONTENTS

FEBRUARY 2015



MORE WAR STORIES FROM THE NEW YORK COURTS

BY HAROLD LEE SCHWAB 10

22 A Guide to New York State Commercial Landlord-Tenant Law and Procedure – Part I

BY HON. GERALD LEBOVITS AND MICHAEL B. TERK

32 Point of View

A Comparison of the New York Bar Examination and the Proposed Uniform Bar Examination

BY MARY CAMPBELL GALLAGHER, J.D., PH.D. AND PROFESSOR SUZANNE DARROW-KLEINHAUS

39 Point of View

Assessing Minimum Competence in a Changing Profession: Why the UBE Is Right for New York

BY DIANE F. BOSSE

46 The Association Position

Remarks of President-elect David P. Miranda to the Advisory Committee on the Uniform Bar Examination

BY DAVID P. MIRANDA

DEPARTMENTS

5 President's Message

8 CLE Seminar Schedule

18 Burden of Proof
BY DAVID PAUL HOROWITZ

48 Contracts
BY PETER SIVIGLIA

56 New Members Welcomed

59 Attorney Professionalism Forum

61 Classified Notices

61 Index to Advertisers

63 2014–2015 Officers

64 The Legal Writer
BY GERALD LEBOVITS

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GLENN LAU-KEE

Shared Values, Shared Strengths

Competition has long been the engine of our nation's business culture. And at the most basic level, even bar organizations often stand in competition with each other – for members and, of even greater value, members' time. Today's legal profession, however, is far from basic. Instead, the business world in which we work as attorneys is increasingly complex and global; further, the challenges and opportunities we face are increasingly interconnected. This new reality demands a new balancing of the instinct to compete with a greater emphasis on collaboration. Our Association's central mission of advocacy and service requires that we explore the ways in which we can collaborate more – with other bar associations in the state and other organizations. Instead of cutting away at individual bar associations' shares of the membership pie, collaborating can result in bar associations having more to offer members, potentially attracting more members for all of our associations by communicating the value of the organized bar. Through leveraging our strengths and partnering where we can, bar associations can create more value. These collaborations can lead to each organization expanding the breadth of opportunities it can offer, extending and deepening its sphere of influence, and creating an infrastructure to advance shared objectives.

Legislation is a prime area for collaboration among bar associations. As the only statewide bar association representing all attorneys, the Association has been a key stakeholder advocating for the legal profession and, more broadly, on behalf of the public interest. To strengthen the effectiveness of this advocacy, our leaders and government relations department consult with and work with the leadership of local, regional and specialty bars. The Association's governing structure provides fertile ground for collaboration. Representatives from the state's bar associations make up the core of the New York State Bar Association's House of Delegates, the body responsible for developing and debating policy. Of the 297 delegates, 160 represent local bar associations.

Issues raised by delegates have led to several advocacy partnerships between the State Bar and local bar associations. One recent collaboration ended with 21 state bar associations standing together to urge the state Legislature to adopt same-sex marriage. It began with the Association's Special Committee on LBGT People and the Law, which, in 2009, produced a *Report and Recommendation on Marriage Rights for Same-Sex Couples*. In that report, the Committee analyzed a host of laws and regulations and found that these accorded lesser rights to couples in a civil union than to those joined through marriage. In 2011, the State Bar Association partnered with the New York City Bar Association in organizing a press conference projecting a collective voice. Leaders from 21 bar associations – including regional and local bars, subject-area bars (including the American Academy of Matrimonial Lawyers, New York chapter), and specialty bars, among them the bar associations representing women, Muslim, Dominican, Puerto Rican, and South Asian attorneys – stood together and spoke together for the same goal: ending state discrimination against same-sex couples.

More recently, the Association joined with six other state bar associations to call on Congress to end proposed funding cuts to the federal courts. The bloc of state bar associations included Illinois, Ohio, New Jersey, and Florida, representing a combined membership of more than 286,500. The proposed funding cuts, including cuts in federal defender services and cuts that would result in slower processing of civil and

GLENN LAU-KEE can be reached at glau-kee@nysba.org.

bankruptcy cases, would have placed at risk the public and the system of justice. The Association then joined the leaders of 15 other New York bar associations in a letter to Congressional leaders that addressed the impact of the proposed cuts on state residents, particularly cuts to Legal Services Corporation (LSC) funding. Cuts to LSC funding could significantly undermine state providers' ability to serve low-income residents in the critical areas of housing, employment, and public assistance benefits. In 2013, LSC contributed $27.3 million to seven legal service providers in New York State, including several in the Hudson Valley, Western New York and on Long Island.

Addressing the widening access-to-justice gap is an important area and bars have joined together to leverage greater impact. The stakes are high. Annual civil service hearings established by Chief Judge Jonathan Lippman have demonstrated that, at best, only 20% of the critical legal service needs of the state's poor and low-income residents are met. Primarily in the Third and Fourth Judicial Districts, our Association's Pro Bono Department has worked closely with the Albany County Bar Association, Albany Law School and regional legal providers. Together, we have co-sponsored training programs for attorneys and held community outreach events to increase public knowledge of the services available to them. Since 2007, the training programs for attorneys are offered free to those who agree to take on at least two pro bono cases from the providers. This kind of ongoing and productive collaboration – sharing resources, experience and knowledge – means that more state residents in need get access to well-trained legal help faster.

When Superstorm Sandy destroyed thousands of homes and businesses in New York State, the Association reached out to county bar associations, law schools, and legal service providers and together produced a comprehensive toolbox for attorneys interested in helping the storm victims. The goal was to get the best training out to as many attorneys as possible, as quickly as possible. The Association hosted a webcast featuring attorneys with expertise in insurance, business, landlord-tenant issues (both residential and business), and related legal matters, as well as representatives from the Federal Emergency Management Agency, the Red Cross, the U.S. Coast Guard, and other relief organizations. More than 2,000 people, including attorneys from 28 states, Puerto Rico, Washington, D.C. and three countries (Canada, Finland, and Slovakia) participated in the webcast. This coordinated effort placed less of an organizational toll on any one of the involved partners, and leveraged the knowledge and strengths of each to a far wider audience.

The benefits of co-sponsoring legal education programs are not restricted to disaster relief. In producing our annual spring "Starting a Practice" continuing legal education program, our CLE department reaches out to local, ethnic and minority bar associations. This collaboration helps get the word out to the attorneys who could benefit from the training, ensures that the programs are finely tuned to the needs of different localities, and allows each partner to increase the breadth and depth of the programming it offers.

Partnerships like these build a human infrastructure of relationships and communication that can produce tremendous intangible benefits for the attorneys of our state. When issues arise that affect the legal profession as a whole, individual bar associations joining together have a stronger voice. One such issue has been mandatory pro bono for attorneys. Chief Judge Jonathan Lippman's announcement, in February 2013, of a new requirement that attorneys report the number of pro bono hours performed and the amount of monetary contributions made, elicited strong reactions among attorneys throughout the state. Soon after this announcement, then President David Schraver and I met with Judge Lippman to share our members' deep concerns. Over the next months, I heard from many leaders of bar associations throughout the state, and gained an important understanding of their viewpoints – information that helped shape our Association's position on Judge Lippman's proposal. Last year, over the course of four meetings with officials from the Office of Court Administration, President-elect David Miranda and I were able to work out a compromise that protects our members' privacy.

More recently, the Chief Judge proposed that New York adopt the Uniform Bar Exam. Like the Association, the state's local and specialty bar associations share a common interest in ensuring that newly admitted attorneys have a solid and specific foundation in New York law – a foundation that could be eroded with the adoption of a national bar exam. The human infrastructure already in place from our prior collaborations has been a vital source of productive communication on this issue.

Later this month I will be participating in a panel discussion on "Competition vs. Collaboration Among Bars" at the National Conference of Bar Presidents midyear meeting. I will be interested in hearing what others have to say. At NYSBA, we are looking for more ways to collaborate with other bar associations – county, diversity, and specialty – for ways to better serve our members, our profession and our communities. ■

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Legal Malpractice 2015
(9:00 a.m. – 1:00 p.m.)
March 6 Albany; New York City
March 13 Long Island; Westchester
March 20 Rochester

Boundary Line Disputes: Commercial & Residential
(9:00 a.m. – 1:00 p.m.)
March 11 Albany
March 25 New York City

Premises Liability
March 12 Long Island
March 13 New York City
March 20 Albany

11th Annual International Estate Planning Institute
March 12–13 New York City

David Paul Horowitz's 2015 CPLR Update
March 13 Albany (1:00 p.m. – 4:40 p.m.)
March 14 Syracuse (9:00 a.m. – 12:40 p.m.)
March 26 Long Island (5:30 p.m. – 9:10 p.m.)
April 18 Buffalo (9:00 a.m. – 12:40 p.m.)
May 13 New York City (5:30 p.m. – 9:10 p.m.)

Bridging the Gap – Spring 2015
March 18–19 New York City (live)
Albany; Buffalo (video conference from NYC)

Title Agent Licensing for Attorneys
(12:00 p.m. – 2:00 p.m.; live & webcast)
March 24 Albany

Human Trafficking in New York State: Legal Issues and Advocating for the Victim
(12:00 p.m. – 2:30 p.m.; live & webcast)
March 25 Albany

2015 Marketing Conference
(live & webcast)
March 27 New York City

Forming Legal Entities in Other States: The Pros and Cons
(12:00 p.m. – 2:00 p.m.; live & webcast)
April 1 Albany

Practical Skills – Family Court Practice
April 14 Westchester
April 15 Albany; Long Island
April 16 New York City; Syracuse
April 17 Buffalo

Cell Phone Forensics for Civil and Criminal Attorneys
(12:00 p.m. – 2:00 p.m.; live & webcast)
April 16 Albany

Introductory Lessons on Ethics and Civility 2015
(9:00 a.m. – 12:45 p.m.)
April 17 Rochester
April 24 Albany; Buffalo; Long Island
May 1 New York City

Divorce Anniversaries II: Valuation and Executive Compensation
(9:00 a.m. – 1:35 p.m.)
April 24 Long Island; Rochester
May 8 Westchester
May 29 Albany
June 5 New York City

Trademarks, A to Z: From Clearance Search to Litigation
(live & webcast)
April 24 New York City

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Retirement, Annuity and Life Insurance Benefit Planning

April 30	Long Island
May 6	Albany
May 14	White Plains
May 20	Buffalo
May 29	New York City
June 9	Syracuse

Practical Skills – Purchases and Sales of Homes

May 5	Albany; Long Island; Rochester
May 6	Buffalo; Westchester
May 7	New York City; Syracuse

The Freedom of Information and the Open Meetings Laws
(9:00 a.m. – 12:00 p.m.; live & webcast)

May 7	Albany

Insurance Coverage Update 2015

May 8	New York City; Syracuse
May 15	Buffalo; Long Island
May 29	Albany

DWI on Trial – Big Apple XV
(live & webcast)

May 14	New York City

Starting a Practice in New York
(live & webcast)

May 14	New York City

Social Media Ethics for Attorneys
(3:00 p.m. – 6:00 p.m.; live & webcast)

May 20	New York City

"Sweat Equity" in Startups and Early Stage Businesses
(9:00 a.m. – 1:00 p.m.; live & webcast)

June 4	New York City

Nuts and Bolts of Contract Drafting

June 16	New York City

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NYSBA's Communities are private, online professional networks designed to facilitate the sharing of knowledge and forging of connections among members. Communities are replacing NYSBA's popular listserves – they are customized and feature all the functionality of former listserves, including multiple options for format and timing of emails. Communities help you gain a competitive edge, plus you get immediate advice and tips in your area(s) of practice.

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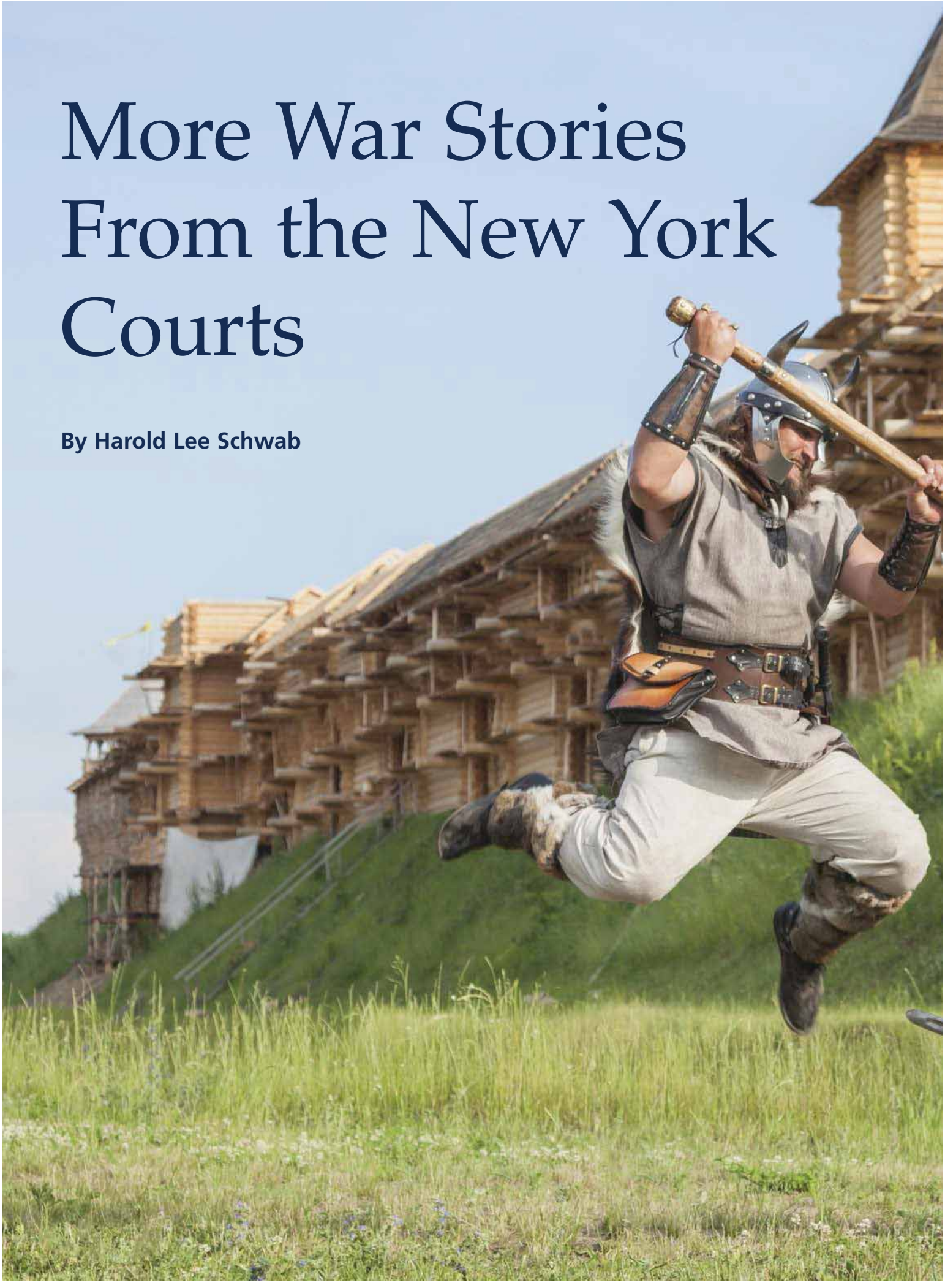
More War Stories From the New York Courts

By Harold Lee Schwab



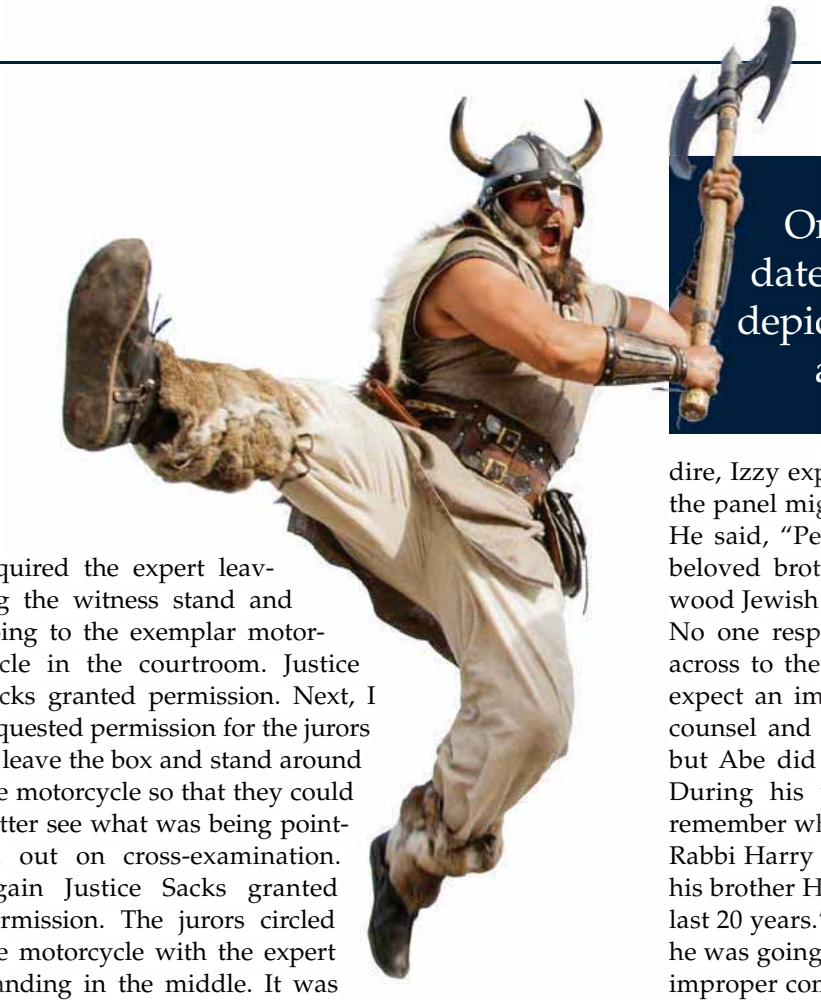
The Expert Stinks

Brian Hudson was a serious biker who reveled in the freedom of the open road. His numerous speeding violations proved the point. On one fateful afternoon Hudson lost control of his motorcycle while rounding the curve at Lilly Pond Avenue on Staten Island. He claimed that his brakes failed due to a manufacturing defect. Honda had issued a recall notice that warned of a possible brake failure if the brakes were exposed to water. Indeed, it had been raining that day, and there was a significant accumulation of water due to the gradient of the roadway. Hudson sued, and the trial, *Hudson v. Honda Motor Co. Ltd.*, took place before Hon. Lester Sacks in Supreme Court, Richmond County from January through March, 1982. Hudson, now a paraplegic, was represented by Fredrick Grae, a trial lawyer who then maintained a significant law practice in Staten Island. Although the recall notice appeared at the outset to be decisive, Grae called as an expert witness an engineer who had actually worked for a competitor manufacturer. The expert, who had arrived from France just the day before, opined, because of weather conditions, a causal nexus between the manufacturing defect and the brake failure. However, cross-examination raised some doubts since the expert had never done any wet brake testing either in the laboratory or in the field on either the subject motorcycle or an exemplar. Worse still, the expert had co-authored an article advocating a motorcycle design where the gasoline tank would eject in an accident and hurtle down the road like napalm, endangering innocent pedestrians. Objection to this line of cross-examination was sustained, but it certainly called into question the expert's opinions.

John Kerns, a product investigator for Honda, was assisting at the trial. At the lunch recess he said, "That expert stinks." I told him, "I know John, I am kicking the s_ _ _ out of him." John replied, "No, no, you don't understand, he *really* stinks." I said, "I have a deviated septum and can't smell anything. Is it that bad?" "Yes," he answered.

What to do? Although cross-examination really was completed, when the trial resumed I advised the court that I had a few more questions, but they

Harold Lee Schwab is a founding partner of Lester Schwab Katz & Dwyer, LLP and has lectured extensively, written on subjects relating to trial practice, and tried to a verdict more than 125 major cases. He is a Fellow of the International Association of Trial Lawyers and has been continuously listed in *Best Lawyers in America* since inception of that publication in 1983.



required the expert leaving the witness stand and going to the exemplar motorcycle in the courtroom. Justice Sacks granted permission. Next, I requested permission for the jurors to leave the box and stand around the motorcycle so that they could better see what was being pointed out on cross-examination. Again Justice Sacks granted permission. The jurors circled the motorcycle with the expert standing in the middle. It was now time for the grand finale. The expert was asked to put his one hand on the allegedly defective brake at the front wheel and raise his other arm to show the jury how the braking mechanism worked on one of the handlebars. His scent was clearly unmistakable. Jurors were sniffing the smell, and some even turned their faces away.

At the conclusion of the day's proceedings, I asked plaintiff's counsel, "Freddie, do you know why I violated the cardinal rule by getting your expert down in front of the jury?" "Yes, you (*blank*)," he replied. "Why?" I asked. With that Grae put his head up in the air and pinched his nostrils with his fingers, explaining, "He came in from Paris, and I told him to change his underwear and shirt, but he didn't listen to me."[1]

Jury Selection in Brooklyn – Anything Goes

Abe Shackton was an aggressive and dangerous "no holds barred" defense attorney. His cross-examination on credibility issues was often masterful. Isadore Halpern was a highly successful plaintiff's attorney in Brooklyn. His almost grandfatherly appearance belied his trial ability, and Izzy (as he was known to all) used his multilingual skills when it suited his purposes. At a time when there was a fairly high percentage of prospective Jewish jurors in Brooklyn he would often lapse into Yiddish.[2]

There came a time in a personal injury case when Izzy represented the plaintiff and Abe Shackton appeared for the defense. In our earlier collection of courtroom war stories, we mentioned this case because, during voir dire, Izzy expressed the thought that some members of the panel might have known his dear departed brother. He said, "Perhaps some of you may have known my beloved brother Rabbi Harry Halpern from the Midwood Jewish Community Center, may he rest in peace." No one responded, but Izzy had gotten the message across to the jurors. Today, every trial attorney would expect an immediate objection from seasoned defense counsel and in particular someone like Abe Shackton, but Abe did not object. He patiently waited his turn. During his voir dire, he addressed the jury: "You remember what Mr. Halpern told you about his brother, Rabbi Harry Halpern? What he didn't tell you was that his brother Harry Halpern and he hadn't spoken for the last 20 years." Izzy immediately objected, told Shackton he was going to make a motion to disband the panel for improper comment, and asked to see the Justice presiding in then Trial Term Part I, Assignment Part. The two of them went before Hon. Frank Samanski, and Izzy pleaded his case for a mistrial. Justice Samanski denied the motion: "You know, Izzy, what Abe said was true. Harry didn't speak to you for the last 20 years of his life." The motion to disband the panel was denied. The case never went to a trial. For sure Izzy settled the case but for much less than he had planned.

> On the court-appointed date, the surveillance video depicted the plaintiff running across Centre Street.

The Greatest Surveillance of Them All

Plaintiff Steve Bershad was crossing a street in Manhattan, walking west to east on the southern side of 37th Street when he was struck by a left-turning bus. He had the green light. The Greyhound bus had been going westbound on 37th Street and turned on the same green light to head south. Unfortunately for the defense, the bus driver testified at his examination before trial that he first saw the plaintiff when he observed Bershad's raised hand on the front window of the bus. Fortunately for Bershad, the bus had been proceeding very slowly and the plaintiff only received emergency treatment. Nevertheless, the plaintiff testified that he sustained multiple physical and psychological injuries, which resulted in permanent confinement to home at all times except to see his various doctors and medical providers, including an orthopedist, psychologist, and psychiatrist.

The case of *Bershad v. Greyhound Lines, Inc.* was brought in Supreme Court, Kings County. The plaintiff was represented by Steven Beldock, a competent and

personable trial attorney who understandably viewed the case as a big verdict winner. However, the claim of permanent confinement to home appeared questionable, and surveillance, albeit on the eve of trial, appeared to be needed. Here's what the videos showed:

Surveillance No. 1
The plaintiff is seen leaving his home in Staten Island with his wife and children and driving to New Jersey to attend what turned out to be a Bat Mitzvah reception for a young relative. The investigator, armed with his camcorder, boldly joined the gathering and videotaped Bershad when he was called up to light one of the ceremonial candles.

Surveillance No. 2
The plaintiff is seen traveling to Sheepshead Bay in Brooklyn and interfacing with two young men approximately one-half his age. They were obviously not doctors.

Surveillance No. 3
A call came in from the investigator that the plaintiff had been arrested in Manhattan with some other individuals for running a numbers game. The question was, What to do next? The answer was obvious. Perform a surveillance at the Criminal Court building, 100 Centre Street, Manhattan, on the return date of the criminal complaint.

Surveillance No. 4
On the court-appointed date, the surveillance video depicted the plaintiff running across Centre Street, oblivious to the automobile traffic, notwithstanding his alleged PTSD fear of automobiles. He gets in his automobile but does not drive home to Staten Island. Instead, he takes a northbound route onto the Major Deegan, then the New York State Thruway, and across the Tappan Zee Bridge. He is next seen stopping in Nyack, going into a delicatessen and coming out with a bag, presumably with food, and then purchasing a bouquet of flowers. Fortified with these necessaries, the plaintiff is next seen driving to a motel where he stops in front of one of the doors and makes a phone call. Within less than 10 minutes, an SUV pulls up driven by a woman. The plaintiff gets out of his car and is next seen going over to the adjacent automobile and engaging in activities which would appear to be contraindicated for someone with orthopedic problems. After that, Bershad and his female companion entered the motel room without needing to register at the front desk.

Bershad v. Greyhound Lines, Inc. was tried before Justice Joseph Levine in July 2000. Steve Beldock, who had no knowledge of the extracurricular activities of his client, had by that time received copies of the surveillance videos. Mrs. Bershad was in court on her loss-of-services claim but allegedly had already commenced divorce proceedings against her philandering husband.[3]

The Erroneous Expert Exemplar

Czaczkes v. Anthony DeLalla, Inc. was tried before Justice Samuel I. Silverman in Supreme Court, New York County, in 1974. The plaintiff, Serafine Czaczkes, was represented by Robert Conason, the dean of the New York trial bar and a man highly regarded by all attorneys.

The elderly Mrs. Czaczkes, only 5′ 2″ tall, was crossing West 184th Street in Manhattan. She had to pass in front of a private garbage truck owned and operated by DeLalla and manufactured by co-defendant Diamond Reo. When the light changed, the truck proceeded forward, and Mrs. Czaczkes was run over by the wheels of the truck. The allegation against Diamond Reo was that the top of the hood of the radiator was improperly designed. It was six feet above the ground, which prevented any driver from seeing a 5′ 2″ pedestrian passing in front of the vehicle. The allegation against the co-defendant was driver negligence.

Under New York law, in order to make out a prima facie case in product liability, the plaintiff has to prove the feasibility of an alternative design. That was no problem in this case since the plaintiff's expert had taken detailed measurements under the hood of an exemplar truck. Utilizing the carburetor as a reference point, he advised the jury on direct examination of the number of inches of space from the carburetor to the top of the hood, the distance from the carburetor to the front of the radiator and the measurements from the carburetor to either side of the hood. It appeared clear from this testimony that Diamond Reo could have lowered and shortened the hood by a foot or more in each direction.

What the expert knew, but the jury did not, was that the accident vehicle was a diesel. The expert failed to inform the jury that the two vehicles were different under the hood. Worse still, the expert failed to inform Conason of the difference. Photographs in evidence of the accident truck demonstrated the configuration of a diesel exhaust going up the side of the cab. Diesel engine trucks do not have components under the hood as referred to by the witness, such as a carburetor, air cleaner and air filter. It required only three questions on cross-examination for the witness to realize that the defense was aware that the measurements about which the expert testified were not of a proper exemplar truck. It also required only three answers for the jury to appreciate the expert's lack of credibility and for Justice Silverman to strike his testimony.

Q. I just have a few more questions, sir. You mentioned these dimensions you took under the hood, if you will, of this Diamond Reo truck back in 1971. Do you recall that, sir?
A. Yes, sir.
Q. And you spoke about a dimension involving the carburetor, as I recall, is that correct?
A. Yes, sir.

Q. And you spoke about a dimension inside there involving the air cleaner, air filter, as I recall, is that correct?
A. Sir, I did not take those measurements on that vehicle, but on a later date, I saw on that vehicle the capacity up there, as I recall, that's not even a carburetor job. The average similar vehicle —
The Court: When the measurement was 13 inches from the carburetor, you mean that it does have a carburetor?
The Witness: I am not certain, but I believe that is a non-carburetor vehicle.
The Court: What does 13 inches from the carburetor mean?
The Witness: This is on a similar cab configuration.
The Court: I strike the testimony as to the distance from the carburetor to the top of the hood. Go ahead.
Q. As a matter of fact, this is a diesel engine in that vehicle. That doesn't have a carburetor and doesn't have an air filter and air cleaner inside under the hood, isn't that correct?
A. I said I think that is correct, sir. The measurements were from an identical vehicle with a gasoline engine.

Plaintiff's counsel destroyed the value of Severy's testimony by getting him to admit the extraordinary amount of money that he had earned on cases testifying for VW.

Q. No further questions.

The jury returned a substantial verdict in favor of the plaintiff but only against the driver, defendant DeLalla.

A Hairpiece Won the Case

Derwyn Severy was a lean long-distance runner. Some wondered how his second-rate toupee stayed on and why he didn't get a better one. I concededly was one of those. He was also a brilliant and eccentric engineer from Los Angeles who specialized in the defense of automotive product liability cases on behalf of various manufacturers. He had participated in some of the first vehicle crash tests in the 1950s and 1960s and had authored scientific articles on the subject. Severy regularly traveled the country testifying and often appeared in New York courts.

He had been retained in a case on behalf of Volkswagen for whom he had often testified. On cross-examination, plaintiff's counsel destroyed the value of Severy's testimony by getting him to admit the extraordinary amount of money that he had earned on cases testifying for VW. Severy admitted to a figure close to a million dollars, and the inference to the jury of his being a kept witness appeared inescapable. However, plaintiff's counsel decided as a grand finale to push the blade into where it really hurt. He said, "If you made all that money and are really so smart, why do you wear a hairpiece like that?" An outrageous and politically incorrect question, but Severy was unfazed as usual:

> I am glad you asked me that. I didn't want to be in the Navy during the war but I enlisted there because I thought it was better than being a dog face. And I didn't want to be a fighter pilot but it seemed that that was better than just being aboard ship. And I didn't want to lead a squadron off of the carrier but my squadron commander had been killed and ---.

Plaintiff's counsel objected and withdrew his question. However, the court overruled the objection saying that "you had asked the question and I will permit the witness to complete his answer."

> . . . And I didn't want to have to land back on the carrier because it was burning but there was no place else to go except to ditch my plane.
>
> And I didn't want to have to jump off the deck into the boiling oil but the ship was listing and going to capsize – I remember being pulled into a boat when someone said, "He is almost dead, his skull is broken open." And I didn't want to have them put a plate in my head and keep me in the hospital for more that six months but that's why I am here today.
>
> And when they sent me home, they gave me this toupee, and I figured if it's good enough for the government, it's good enough for me.

Severy won the day, and VW won the case.[4]

Chicken, Noodle, Shy Shelly, Alligator and Mouse

Levine v. Kent was a medical malpractice case tried before Justice Martin Schoenfeld in New York County in February 2002. The twin girls, Avery and Betsy, had been born prematurely at about 26 weeks. They were in neonatal care for an extended period, and both underwent heart surgery and one had laser eye surgery. It was claimed that they had cerebral palsy as well as physical and developmental problems. The defense maintained that they had made a spectacular recovery and that, although diminutive in height, they were actually attending a mainstream public school. At the age of six, the girls were presented in court and gave brief testimony on direct examination. Peter Kopf of Nardelli & Kopf, a leading defense medical malpractice trial attorney, had a problem, and in fact more than one. Do you cross-examine six-year-old chil-

dren, and if so, how do you do it so as not to alienate the jury but instead to demonstrate the extent of recovery? Kopf was a churchgoer, who in the past had used puppets to teach young children in Sunday school. In court, he took off his jacket, sat on the floor, opened up his black briefcase, and introduced each child to his hand puppets, Chicken, Noodle, Shy Shelly, Alligator and Mouse. Without objection from plaintiff's counsel and with the help of the puppets, he put the girls in a conversational mood to speak about their brothers, wearing knapsacks, going to restaurants, music, and books. The girls were articulate and, while playing with the puppets, demonstrated good hand-eye coordination. The session for each child lasted 20 to 30 minutes. With the aid of the puppets, the claim of ongoing developmental problems was effectively destroyed. Seeing the short-sleeved defense lawyer sitting on the floor and conversing with the children through puppets additionally established a unique rapport with the jury, although the extent to which Chicken, Noodle, Shy Shelly, Alligator and Mouse contributed to the malpractice defense verdict remains uncertain.

A Bagel for Breakfast

DuLuca and Allen v. Spider Staging Sales Co., et al. was tried in the Supreme Court, Kings County before Justice Anthony Jordan in 1978. The plaintiffs were construction workers who were injured when the exterior scaffold on which they were working failed. They brought a product liability case against Spider Staging, the manufacturer of the hoisting equipment, and a labor law case against various other contractors. The plaintiffs were represented by two leading members of the trial bar, Joseph Kelner and Jerome Edelman. The construction defendants, with cross-claims against Spider Staging, were represented by leading members of the defense bar, including Frank Mangiatordi, Vinny DeBlasi, and Bob White. To say that there was no camaraderie between the construction defendants and Spider Staging, which I represented, is to understate the situation. However, in short order, things got worse.

As one of his first witnesses, Kelner called an engineer from MIT who had arrived that morning from Boston. The examination was interrupted by an off-the-record conversation conducted sotto voce by the judge with the witness. The judge then handed the witness a piece of paper. The engineer wrote something on it and handed the paper back to the judge. With that, His Honor summoned his clerk and gave him the piece of paper. The clerk left the courtroom.

Approximately 20 minutes later, the clerk returned, carrying a brown paper bag. The judge then declared a recess and motioned the witness to take the brown bag and go in the back to the robing room. Completely perplexed by what was taking place, I asked my paralegal, who was assisting at the trial, to keep a record of how much time the expert was in the robing room.

Word reached His Honor that I was keeping time on him. While the jury was still out, Justice Jordan ascended the bench and explained what was taking place, paraphrased as follows:

> You're clocking me? You wanna know what's going on? I'll tell you! I asked this man whether he was hungry since he had just come in from Boston. He said he was. So I asked him what he wanted for breakfast. He wrote down a bagel and coffee. So I told my clerk to get him a bagel and coffee. He came back with it and I took a recess so this man could have breakfast. It was the right thing to do!

I tried to explain to His Honor that, although his motivation was admirable, it was an obvious appearance of judicial impropriety. My protestation fell on deaf ears, and my motion for mistrial was denied. The two cases were settled shortly thereafter for substantial sums of money.[5]

How to Settle a Negligence Case

Lester Schwab Katz & Dwyer was defending a negligence case that had to be settled. The plaintiff had fallen through an unguarded sidewalk opening, and liability appeared absolute. Worse still, the plaintiff was represented by Fuchsberg & Fuchsberg, a premier plaintiffs' law firm. The senior partner, Jacob (Jack) Fuchsberg, had won the first New York million-dollar personal injury verdict in 1964 and in 1974 was elected an associate judge on the New York Court of Appeals. Although he was no longer at Fuchsberg & Fuchsberg, the firm had an outstanding array of younger trial attorneys, including Ed Weidman,

Robert Ginsberg and Donald Miller. My job was to go to the Bronx, make an appearance and settle the case.

Phase I

Controlled chaos existed in the hallway outside of the courtroom of Hon. Louis I. Fusco. The swell of lawyer humanity was akin to the LIRR at rush hour. However, in the crowd I was able to identify the Fuchsberg attorney on the case, then young Marshall Schmeizer. He agreed with my suggestion that we should discuss the case in a more appropriate setting. Since this was before lunch, a coffee and donut seemed a good idea.

I asked Marshall, "Who is going to pay for the coffee and donut?" He replied, "I am." I said, "No Marshall, you're not going to pay and I'm not going to pay. Abe will pay for it." Marshall replied, "That will never happen." Abraham Fuchsberg was the managing partner at Fuchsberg & Fuchsberg. Although the law firm was well-known for its generosity to various charitable causes, including the UJA and Federation of Jewish Philanthropies, Abe Fuchsberg was reputed to be miserly in his professional affairs.

I asked Marshall to accompany me to the nearby phone booth, dropped a dime in the slot, and dialed Worth 2-2800. The phone call which Marshall heard went as follows:

> I'd like to speak to Abe Fuchsberg. This is Harold Schwab. Hello, Abe. I'm with Marshall here in the Bronx and we want to talk about settling the case. We're going go out for coffee and a donut, but you have to pay for it. How many? One donut and one coffee apiece, Abe. Okay.

Phase II

Marshall thought this was a phony call but it wasn't. I had accomplished the impossible. Abe Fuchsberg had agreed to pay for two coffees and two donuts. Marshall and I got the case passed in Judge Fusco's courtroom and then went out to the local coffee shop. We discussed the case but got nowhere. I asked Marshall what was his "maximum irreducible minimum demand" (an ingenious negotiation phrase devised by Abe Shackton). Marshall told me that Abe's rock bottom figure was X dollars, and I told him the carrier would not pay that kind of money. (I, of course, got a receipted bill for the two coffees and two donuts, subsequently sent the bill to Abe Fuchsberg, and he wrote me a check enclosing with it a poem, which was his particular specialty.)

Phase III

The planned-in-advance settlement scenario was not yet complete. I asked Marshall whether he wanted a ride downtown to 250 Broadway since my office was at 120 Broadway. As expected, he answered in the affirmative. We walked across the Grand Concourse to where my car was parked in what was then known as the "pit." When in the car, I told Marshall, "I have something for you to hear." With that, I turned on the car's cassette player. From the speaker we heard: "You will next hear from Abraham Fuchsberg on how to settle a negligence case!" The lecture by Abe Fuchsberg was part of a series of taped lectures offered by the State Bar and other professional associations.[6]

Abe's lecture went on for approximately 20 minutes. He explained how as a young attorney, he had been told to present his rock bottom figure for settlement purposes and that cost him, since, in the end, he had to settle the case for much less than he had planned. The thesis of his entire lecture was that you never, never, never tell anyone what your rock bottom figure is. I asked Marshall, "Did Abe ever tell you that he would not tell anyone what his rock bottom figure was?" Of course, Marshall answered, "No." When I dropped Marshall off at 250 Broadway I asked him to tell Abe that he had heard the lecture and that we both knew that Abe did not tell either of us what his maximum irreducible minimum demand was.

The case was subsequently settled, for a realistic amount, in a phone call with Abe Fuchsberg. ■

1. By way of postscript, the jury returned a defense verdict. The defense called two expert witnesses. One drove an exemplar motorcycle multiple times through a trough of water in California without brake failure. The other sprayed water on the brakes and on an early Sunday morning flooded Lily Pond Avenue and drove through the water without incident. The courtroom cross-examination of the expert may not have made the difference but it surely did not hurt the defense.

2. You may recall Izzy's turning the tables on A. Harold Frost, when Frost tried to use Izzy's Rolls-Royce against him. *See* Harold Lee Schwab, *War Stories From the New York Courts*, N.Y. St. B.J. (Oct. 2014), p. 33.

3. Index No. 18306/97 (Sup. Ct., Kings Co.). The case was tried on the issue of liability only and the jury never saw the surveillance videos. Undeniably, however, they played a major role in the settlement of the case. Also helpful was the jury's finding that the plaintiff was 60% contributorily negligent for crossing four feet outside of the crosswalk.

4. This was told to me by an attorney who had personal knowledge of these events and confirmed their accuracy. Although not a New York case, it appeared worthy of inclusion because of the uniqueness of what took place and as an extraordinary example of how an overzealous attorney may get carried away on cross-examination with one question too many.

5. Robert Kelner, then a fledgling attorney working for his father, well remembers the case for various reasons.

6. Before the advent of mandatory CLE, many law-oriented associations recorded trial practice lectures by leading members of the bar and offered them for sale on cassette tapes.

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for more than 25 years and is "of counsel" to Ressler & Ressler in New York City. He is the author of *Bender's New York Evidence* and *New York Civil Disclosure* (LexisNexis), as well as the 2008 and forthcoming 2014 Supplements to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches *inter alia*, New York Practice at Columbia Law School and Brooklyn Law School. He serves on the Office of Court Administration's Civil Practice Advisory Committee, as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee, and is a frequent lecturer and writer on these subjects.

"A Tale of Two Cases"

Introduction

It is not often that a New York Appellate Division decision generates the multiple opinions all too familiar to students of the United States Supreme Court. Such was the case in *Cheeks v. City of New York*,[1] an action seeking recovery for false arrest and malicious prosecution against the City of New York. By a two-one-two vote, generating two concurring and one dissenting opinion, the trial court's judgment awarding plaintiff damages after a jury verdict was reversed, on the law and facts and in the exercise of discretion, and the matter remanded for a new trial.

It is also unusual to read multiple opinions in the same case where judges marshall the facts in a manner more often associated with the fervent advocate. Recalling *Rashomon*, the classic Japanese 1950 noir film describing a single event through the eyes of different participants to the events, *Cheeks* offers two starkly different versions of the underlying facts, one in one of the concurring decisions and the other in the dissenting opinion.

Cheeks v. City of New York[2]

This tort action was brought by plaintiff Tatiana Cheeks and was set in motion by the death, on March 27, 1998, of her 5½-week-old daughter Cha-Nell. The concurring opinion of Justice Friedman, joined by Justice Sweeny, presented the underlying facts this way:

> Plaintiff Tatiana Cheeks was the sole custodian and caregiver of her daughter Cha-Nell, who was born in healthy condition on February 16, 1998. Early in the morning of March 27, 1998, plaintiff found 5½-week-old Cha-Nell unresponsive and not breathing; the infant was taken to the hospital and pronounced dead on arrival. The cause of the little girl's death was not immediately clear – although the emergency room doctor remarked at the time that the "child presents as malnourished" – and an autopsy was performed. Two months later, on May 26, 1998, the New York City medical examiner's office issued its determination – based on extensive physical and chemical observation, measurement and analysis recorded in the 48-page autopsy report – that the infant had, indeed, died of malnutrition, and that the malnutrition was not due to any detectable defect in her digestive system. This conclusion has never been questioned, not even by plaintiff or the medical expert who testified on her behalf in this action.
>
> Based on the medical examiner's determinations, Detective Donald Faust of the New York City Police Department reopened the investigation of Cha-Nell's death, took plaintiff into custody and arrested her on suspicion of having caused her daughter's death through neglect of the infant's feeding. On May 29, 1998, plaintiff was arraigned on charges of criminally negligent homicide and reckless manslaughter. On July 1, 1998, however, the charges against plaintiff were dropped. The reason for the district attorney's voluntary dismissal of the case does not appear in the record. Plaintiff subsequently commenced this action against the City of New York for false arrest and malicious prosecution.[3]

Justice Acosta, joined by Justice Manzanet-Daniels, dissenting, presented the underlying facts this way:

> Plaintiff Tatiana Cheeks, a young, poor, single mother living in the Bronx, and her infant daughter Cha-Nell, were so tragically neglected and ignored by the local medical establishment that baby Cha-Nell died, despite the best efforts of her attentive mother to nourish and care for her.
>
> The mother's tragedy was then compounded by the rush to judgment by the New York City Police Department, which arrested her on a flimsy record and charged her with the depraved murder of her baby.
>
> Once it was determined that these criminal charges were bogus, the charges were dropped. To obtain a measure of justice, Tatiana brought a civil action for malicious prosecution against the City of New York, the employer of the detective who ignored all the signs that pointed to a noncriminal cause of the infant's death, and instead treated this grieving mother as unworthy of belief. An expert later testified that Cha-Nell most probably died

as a result of what is medically known as a failure to thrive.

* * *

Plaintiff Tatiana Cheek's daughter, Cha-Nell, was born on February 16, 1998, weighing six pounds, five ounces. Plaintiff, who also had a 15-month-old son, was a 21-year-old single mother. She lived with her grandmother and two younger siblings. Plaintiff was encouraged at the hospital to breast feed her daughter, which she did when she returned home. She was given an appointment to have the child seen at the clinic one week later. When she went to the clinic, she was told that the doctor would not see her because plaintiff did not have a Medicaid Card for her child or the $25 to pay the fee in the absence of a card. Instead, a nurse lifted the baby's shirt, gave her a cursory examination, and said nothing about her weight.

Plaintiff followed up with her public assistance worker, who told her it would take some time and additional documents to get a card. She was advised to contact the Department of Health regarding the child's vaccination shots because she did not think she would have the Medicaid card in time. She did so and was told to bring her child in for vaccination shots at six weeks.

Plaintiff testified that she continued to breast feed the child as often as she seemed hungry, approximately every 2½ hours. She stated, "I thought I was feeding her like you feed a normal baby," meaning the "[b]aby cries and you feed the baby." Plaintiff testified that she did not realize the baby had not gained weight at three weeks old, or lost weight prior to her death. Her grandmother, who had spoken to the police just prior to plaintiff's arrest but was deceased by the time of trial, had commented that the baby was "puny," "a little thing just like [plaintiff]," "and her father [wa]s not bigger than a minute." Plaintiff did not take these comments as an indication that her grandmother thought the child was "unhealthy." Thus, it comes as no surprise that she never took Cha-Nell to an emergency room at a local hospital, but instead sought medical follow-up at a clinic. Cha-Nell died approximately 5½ weeks after she was born.[4]

With such strong disagreement about the underlying facts, it is no wonder a split decision ensued.

Notwithstanding the fact that a reader might reasonably believe an editor had accidentally conjoined portions of opinions from two different cases into one, these lengthy, dueling opinions contain an abundance of useful case law, and guidance on the application of that law to the claims in the action.

Fortunately, a third opinion nestles between the opinions authored by Justices Friedman and Acosta, and offers a succinct analysis of the exclusion of certain portions of the autopsy report, while adopting the dissenters' conclusion on the sufficiency of the evidence.

The Deciding Vote

Justice Kapnick completed the First Department panel, and her vote both compelled a new trial and, at that new trial, the admission of excluded portions of the autopsy report:

> While I agree with Justices Acosta and Manzanet-Daniels that the issue of whether or not there was probable cause to arrest plaintiff was properly submitted to the jury because there was "conflicting evidence, from which reasonable persons might draw different inferences . . . ," I believe that the trial court's denial of defendant's application to admit the unredacted medical examiner's report into evidence was reversible error.[5]

Sufficiency of the Evidence

Justice Kapnick agreed with the sufficiency of the evidence holding of Justices Acosta and Manzanet-Daniels:

> Contrary to the view of Justices Friedman and Sweeny, the court properly denied defendant's motion for judgment notwithstanding the verdict as a matter of law. Viewing the evidence in the light most favorable to plaintiff, there was a permissible inference that could lead a rational jury, as it did here, to conclude that there was no probable cause to arrest plaintiff, citing *Veras v. Truth Verification Corp.* "Where there is conflicting evidence, from which reasonable persons might draw different inferences . . . the question [is] for the jury.'" Thus, in the absence of a defense to either claim as a matter of law, the claims of false arrest and malicious prosecution were properly submitted to the jury.
>
> The evidence demonstrated that notwithstanding the conclusion in the autopsy report that the child died of malnutrition, the detective testified that two medical professionals who viewed the child's body saw no apparent signs of neglect or abuse, found food in the child's stomach, and concluded that she appeared to be well fed. Thus, there was no indication that plaintiff had either intentionally, recklessly or negligently starved

It is unusual to read multiple opinions in the same case where judges marshall the facts in a manner more often associated with the fervent advocate.

the infant. The jury reasonably could have found that, at the time of arrest, there was no basis for a prudent person to believe that an offense had been committed. That is, that the mother did not act recklessly or negligently in feeding the child and/or not realizing that the child was malnourished, or did not in fact commit any offense whatsoever. The jury also reasonably could have rejected the detective's testimony that the grandmother told him that plaintiff had refused the grandmother's request that she take the child to the hospital because she appeared too thin. He kept no record of that statement, made 13 years before trial, and the City failed to introduce the audiotape purportedly containing that statement. Although Justice Friedman accuses me of raising a "red herring" by citing to plaintiff's failed attempt to have Cha-Nell seen by a doctor at a clinic, I believe that her efforts to have Cha-Nell seen by a doctor are relevant to the issue of probable cause. Indeed, Detective Faust admitted he would not have arrested plaintiff based on the "singular fact of the child dying from malnutrition," and, after extensive questioning, he admitted that plaintiff explained her failed attempt to have Cha-Nell seen by a doctor prior to her arrest. Thus, it is not my position that the detective should have "intuited" failure to thrive as the cause of death, but rather, that the contents of the report along with the other evidence did not provide probable cause to believe that a crime had been committed. Moreover, under the circumstances of this case, it cannot be said that "it was reasonable, as a matter of law," for the detective to discredit plaintiff's account.

> As the jury could have reasonably concluded there was no probable cause, it also could have inferred malice from these same facts, particularly the detective's reliance on the grandmother's statements and his disregard of evidence that the child was being fed and was not otherwise neglected or abused.[6]

Exclusion of Portions of the Autopsy Report

Justice Kapnick wrote to explain her holding that the exclusion of certain redacted portions of the autopsy was error:

> The redacted portion of the report contained the medical examiner's conclusion that the manner of death was "homicide (parental neglect)." While this evidence was properly redacted in the first instance, in light of defendant's failure to oppose plaintiff's motion in limine, it was error to keep it

out when defendant subsequently moved for its admission after plaintiff "opened the door" and elicited testimony from Detective Faust suggesting that the baby's death resulted from malnutrition caused by defective digestion or some other underlying medical condition of the infant, when the autopsy report contained no such conclusions. To the extent that the trial court sustained the redaction because defendant did not call an expert medical witness to testify as to the manner of death, this too was error since the redacted conclusion was not being offered for its truth, i.e., that the infant's manner of death was in fact "homicide (parental neglect)," but rather, for the effect it had on the mind of the detective who made the arrest. Therefore, an expert medical witness was not necessary and the trial court certainly could have given a limiting instruction to the jury on how to treat this evidence during deliberations. Moreover, the dissent's conclusion that this statement was properly excluded because it states an inadmissible opinion as to the manner of death is supported by cases where the manner of death was the ultimate issue in the case, unlike here, where probable cause is the ultimate issue, as Justice Friedman aptly discusses in footnote 28 of his opinion.

I respectfully disagree with the conclusion that even if the excluded statement was admissible to show the detective's state of mind at the time of the arrest, it was still properly excluded because it was more prejudicial than probative. While a trial court certainly may exercise its discretion to exclude otherwise technically admissible evidence when it finds that evidence to be more prejudicial than probative, that analysis was not undertaken here. Rather, the trial court merely ruled that the autopsy report would remain redacted because "[t]here was no expert to testify that there was, in fact, poor parental neglect, and so, as a conclusion of law, not as a conclusion of medicine, I'm not permitting that portion of the medical examiner's report, the autopsy to be presented to this jury."

> Nor can it be said that the words "homicide (parental neglect)" are so incendiary that their probative value on the issue of probable cause is "substantially outweighed by the danger that it will unfairly prejudice [plaintiff] or mislead the jury." This is especially true here, where the fact that plaintiff was charged with homicide was not a secret to the jury, and in fact, the trial court charged the jury on the law of homicide. Moreover, the proposition for which the dissent cites (citations omitted) is inapposite here, where the evidence in question is not hearsay by definition because it would not be entered into evidence for its truth.[7]

The opinion concluded by casting her vote to order a new trial:

> Finally, it cannot be said that the exclusion of this evidence was harmless error or that the excluded evidence would not have had a substantial influence in producing a different result. Therefore, although conscious of the burdens a new trial will place upon plaintiff, I would nonetheless direct a new trial.[8]

Conclusion

Cheeks is a wonderful case for students of hearsay. It provides a rare window into a court's decision-making, and the impact the facts of a case can have on outwardly staid appellate judges. There are even rare flashes of rancor evident in the decision.[9]

When the next edition of the *Journal* lands in your mail, or inbox, Spring will have arrived. Until then, when the umpteenth snowstorm blankets New York from Brooklyn to Buffalo, and you find yourself snowbound at home with unexpected downtime, *Cheeks* makes a good read. ■

1. 123 A.D.3d 532 (1st Dep't 2014).
2. *Id.*
3. *Id.* at 533 (citations and footnotes omitted).
4. *Id.* at 559–61 (footnotes omitted).
5. *Id.* at 557 (citations omitted).
6. *Id.* at 565–55 (citations and parenthetical omitted).
7. *Id.* at 557–59 (citations and footnote omitted).
8. *Id.* at 559 (citations omitted).
9. Upon reflection, it might have been better to turn the other *Cheek*[s].

A Guide to New York State Commercial Landlord-Tenant Law and Procedure – Part I

By Hon. Gerald Lebovits and Michael B. Terk

I. Introduction

Contrary to popular belief among some practitioners, New York landlord-tenant law is complex and specialized. Many intricate aspects, such as rent regulation and compliance with the New York City Housing Maintenance Code, arise only in the residential context. But commercial landlord-tenant litigation is often as complicated and confusing as residential landlord-tenant litigation, if not more so, especially considering the many types of complex lease provisions common to commercial leases that rarely appear in residential leases. New York commercial landlord-tenant law and procedure is full of land mines that can quickly consume the inexperienced advocate. This two-part article is designed to make the maze of New York commercial landlord-tenant litigation easier to navigate.

II. Summary Proceedings to Recover Possession

A. Procedure and Pleadings

1. General Procedure

A tenant or other occupant with possessory rights may ordinarily be evicted from real property in New York pursuant only to a warrant of eviction issued by a court of competent jurisdiction. Although there is a near-absolute prohibition on self-help evictions of residential tenants, a limited common-law right to evict commercial tenants by extra-judicial self help allows landlords to do so if doing so is expressly authorized by the lease and can be effectuated without force or violence.[1] Even when this common-law self-help option is available, landlords will rarely exercise it in commercial cases. A finding that the eviction was unlawful will subject the landlord to treble damages under Real Property and Proceedings Law (RPAPL) 853.

In New York, summary proceedings are the primary method for a landlord, owner, or sublessor of real

Gerald Lebovits, an acting Supreme Court justice in Manhattan, is the president of the New York City Civil Court's Board of Judges and a former president of the New York City Association of Housing Court Judges. **Michael B. Terk** is an associate with David Rozenholc & Associates in Manhattan. This article is a substantially revised version of a three-part piece the authors published in the February, March, and June 2014 issues of the *Brooklyn Barrister*.

property to evict a tenant, subtenant, or other occupant. Summary proceedings are special proceedings to recover possession of real property under RPAPL Article 7. These proceedings are commenced in New York City Civil Court, District Court in Nassau and most of Suffolk counties, and the governing City Court or Justice Court elsewhere in the state. The ancient common-law ejectment action is occasionally brought in Supreme Court, and the question whether a landlord may recover possession or a tenant has continued possessory rights may also be litigated as an action for a declaratory judgment or injunctive relief in Supreme Court. But absent an issue requiring Supreme Court's general jurisdiction, there is a strong preference, to which Supreme Court will typically defer, that landlord-tenant disputes over possessory rights to real property be litigated in the context of summary proceedings in the lower courts.[2]

The party commencing the summary proceeding is styled the "petitioner," the equivalent of a plaintiff in a plenary action. The initiatory pleading a petitioner files is called a "petition," the equivalent of the complaint in a plenary action. The party sought to be evicted and against whom or which the summary proceeding is lodged is the "respondent," the equivalent to the defendant in a plenary action. The document accompanying the petition that summons the respondent to court is the notice of petition, the equivalent of a summons in a plenary action.

The two main categories of summary proceedings are (i) holdover proceedings, which are based on the expiration or termination of a right to possess the real property of the tenant[3] or nontenant occupant with possessory rights or claiming those rights,[4] and (ii) nonpayment proceedings, which are based on a tenant's alleged default in paying rent.[5]

The courts that hear summary proceedings have the jurisdiction to do so only if the respondent — a tenant or an occupant — possesses the property when the proceeding commences.[6] If a tenant vacates owing outstanding rent before the proceeding begins, the landlord's remedy is a plenary action for money. If the tenant or occupant vacates and surrenders possession while the proceeding is pending, the court may permit the proceeding to continue to final adjudication.

A petitioner's holdover claim is often only against the tenant; a nonpayment claim, by definition, can only be against a tenant. But as a practical matter, a landlord wishing to recover possession of real property in a summary proceeding needs to name as a respondent and serve any subtenant or other occupant in possession or with possessory rights. Even when a landlord prevails and thus obtains a possessory judgment and a warrant of eviction, a subtenant or legal occupant not named as a respondent may not be evicted pursuant to the warrant.[7] If the identity of an occupant other than the tenant is unknown to the landlord but the occupant is in possession or might be in possession, the petitioner may name the occupant as a respondent by a fictitious name. The fictitious names normally used are "John Doe" and "Jane Doe" for individual persons or "XYZ Corp." for corporations, companies, or other business entities.

A summary proceeding is usually commenced by filing a notice of petition and petition. Courts also have the power to issue an order to show cause in lieu of a notice of petition, although landlords' attorneys rarely commence summary proceedings that way. In contrast to plenary actions, in which a request for judicial intervention must be filed before a case is placed on the court's calendar, a summary proceeding is placed on the calendar on the petitioner filing the notice of petition and petition, except for New York City nonpayment proceedings, which are placed on the calendar when the respondent files an answer.

Summary proceedings dispense with many other procedural aspects of plenary actions, such as disclosure conferences (disclosure in a summary proceeding may be obtained only with leave of court[8]), separate calendar types (such as trial calendars, pretrial calendars, and motion calendars), and notes of issue or notices of trial to get the case onto a trial calendar.

Every summary-proceedings calendar is a trial calendar for Civil Practice Law and Rules (CPLR) purposes. The court may hold a trial whenever the proceeding is on the calendar, although, in parts of New York City, Manhattan in particular, the matter will often be transferred to a different part for trial. In practice, adjournments are common and easy to obtain if it is the first court appearance in the matter.

The current filing fee in the courts that adjudicate summary proceedings in New York City and Long Island (Civil Court and District Court, respectively) is $45.00. Other than that filing fee, which the petitioner must pay, the only other court filing fees in a summary proceeding are for a jury demand ($70.00) or a notice of appeal ($30.00). There is no fee to file a motion. The notice of petition and petition are filed with the clerk. Upon this filing, the petition is kept in the court file. The clerk then returns the notice of petition to the petitioner, which must timely re-file it along with the affidavit of service of the notice of petition and petition.

In a holdover proceeding, as well as in a nonpayment proceeding outside New York City, the notice of petition designates the petition's return date,[9] which the court clerk selects and inserts into the notice of petition upon filing.

In a New York City nonpayment proceeding, the notice of petition is returnable before the clerk, and the respondent must serve and file with the clerk an answer within five days after being served with the notice of petition and petition.[10] Upon the respondent's filing an answer, the clerk fixes a court date.[11] If the respondent fails to answer, the petitioner may apply for a default judgment. Default-judgment applications are submitted

to the clerk, who processes and forwards them to a judge. The judge then reviews the papers. If the papers are free of defects, including improper proof of service, the judge will issue a default judgment of possession and a warrant of eviction.

2. Requirements for Petitions in Summary Proceedings

Summary proceedings under RPAPL Article 7 are purely statutory in nature. A petitioner's strict compliance with the statute is required to give a court the jurisdiction to hear the proceeding.[12] The principles of liberalized-pleading requirements apply with more limited force to petitions in summary proceedings than to complaints in plenary actions. Despite the modern trend favoring a liberal construction of pleadings, procedural irregularities remain common, and often successful, defenses in summary proceedings.

RPAPL 741 enumerates the required contents of a summary-proceeding petition. An extensive body of case law interprets these requirements. A failure to comply with any requirement can result in dismissing the petition. Some irregularities or errors in a notice of petition and petition are amendable. Those deemed jurisdictional are not.

The petition must contain a description of the premises to be recovered.[13] The description in the petition must be sufficient to allow a marshal to execute a warrant based on the description without any additional information.[14] Even if the description of the premises in the petition reflects the precise wording in the lease, the description will be inadequate if it leaves the exact location of the premises unclear.[15]

The petition must accurately state the petitioner's interest in the real property sought to be recovered,[16] the respondent's interest in the real property, and the respondent's relationship to the petitioner regarding the real property.[17]

The petition must also set out the facts on which the summary proceeding is based.[18] These facts include:

(a) In the case of a holdover proceeding, when and how the tenancy terminated or expired (e.g., natural expiration of the lease term, service of a termination notice, service of a 30-day termination notice on a month-to-month tenant with no written lease) and that the respondent remained in possession after the termination or lease expiration date. If the holdover alleges a ground other than the natural expiration of a lease term and if the termination was effectuated by giving the respondent a termination notice, the petition also should have annexed to it a copy of the termination notice served on the respondent and proof of its service. If the termination notice is predicated on a cure notice and failure to cure, the petition should also annex a copy of the cure notice and proof of its service.

(b) In the case of a nonpayment proceeding, the amount of rent demanded from the respondent.

(c) How, or under what agreement, the tenant entered into possession and, in the case of a nonpayment proceeding, that the lease or agreement obligates the tenant to pay the rent sought in the petition.

The facts on which the proceeding is based include details less obvious to inexperienced practitioners. Even when the property sought to be recovered is commercial, special additional allegations must appear in a petition if the property sought to be recovered is in New York City or another jurisdiction that has rent regulation or more stringent regulation of multiple dwellings.

One requirement for petitions in New York City summary proceedings is that they state the regulatory status of the premises to be recovered.[19] It will normally suffice in a summary proceeding to recover exclusively commercial property to allege that the premises are not subject to rent stabilization or rent control on the basis that they are used solely for non-residential purposes.[20]

In New York City, any building containing three or more residential units is a multiple dwelling. If the commercial premises to be recovered are in a building with three or more residential units, then, to maintain a summary proceeding, the building in which the premises are located must have a current multiple dwelling registration (MDR) on file with the New York City Department of Housing Preservation and Development (HPD).[21]

This rule applies even if the specific premises to be recovered in the building are commercial. The summary-proceeding petition must plead either that (i) the premises are contained in a multiple dwelling that has a current MDR on file with HPD and provide the MDR number and the name and address of the registered managing agent or that (ii) the premises are not contained in a multiple dwelling building.[22] A petitioner that lacks a required MDR when the proceeding begins will normally be allowed to cure by obtaining one before trial. Failing to prove as part of the petitioner's prima facie case at trial that a current MDR is on file will be fatal.

The petition must additionally set forth the relief sought.[23] The relief must always include a prayer for a judgment of possession and warrant of eviction. That is the primary relief to be awarded in a summary proceeding: A commercial petition that does not seek possession is without jurisdictional effect. The petition will further almost always include a prayer for a money judgment for the rent arrears in a nonpayment proceeding. The petition may also seek other, incidental monetary relief, such as a money judgment for use and occupancy based on the fair-market rental value for the period after termination or expiration during which the respondent remains in possession (if notice is given in the notice of petition that this relief will be sought) and for legal fees and costs, if the parties' lease authorizes that recovery.

Courts will typically allow petitioners to seek a money judgment for rent arrears in a holdover proceeding for a short period of time before termination or expiration. If

many months of pre-termination rent arrears are sought as ancillary relief in a holdover proceeding, courts are less likely to award those arrears. The better practice for a landlord seeking to recover rent is to bring a nonpayment proceeding before the expiration or termination of the tenancy, especially because a holdover proceeding commenced after the lease expiration will not be fatal to a nonpayment proceeding commenced before.

A petition in a summary proceeding may be verified by the petitioner or by the petitioner's counsel, even if counsel's office is located in the same county as the petitioner.[24] This differs from the normal CPLR verification requirement.

3. Answers in Summary Proceedings

In a New York City nonpayment proceeding, the tenant must serve its answer within five days after service of the notice of petition and petition and file it with the clerk.[25] A pre-answer motion to dismiss a nonpayment proceeding within the time to answer does not automatically toll the time to answer. Although particularly draconian (the benefit of CPLR 3211(f) is inapplicable to respondents in New York City nonpayment proceedings), a default judgment may be entered if an answer is not filed within the prescribed statutory time frame to answer, notwithstanding the pendency of a pre-answer motion to dismiss, even if the respondent has appeared by moving to dismiss.[26]

To preserve the right to answer and avoid a default judgment while a pre-answer motion to dismiss is pending, a respondent may move pre-answer by order to show cause to dismiss a New York City nonpayment proceeding and include in the show-cause order a temporary restraining order tolling the respondent's time to answer until after the court resolves the motion to dismiss.

In all other summary proceedings besides New York City nonpayment proceedings, the answer is due when the petition is noticed to be heard, unless the notice of petition is served at least eight days before the petition is noticed to be heard and demands that the answer be made at least three days before the petition is noticed to be heard.[27] Respondents in holdover proceedings or in nonpayment proceedings outside New York City will not be in default for failing to interpose a written answer if they appear in court on the return date.

A respondent may answer in a summary proceeding orally or in writing.[28] Attorneys representing respondents will almost always submit written answers. Pro se respondents will frequently appear before the clerk to answer orally.

An answer in a summary proceeding may contain any legal or equitable defense or counterclaim.[29]

Commercial landlord-tenant litigation is often as complicated and confusing as residential landlord-tenant litigation, considering the many types of complex lease provisions common to commercial leases that rarely appear in residential leases.

Notwithstanding the limited statutory jurisdiction of the courts adjudicating summary proceedings, they retain the jurisdiction to adjudicate equitable defenses a respondent might raise.[30]

Lease provisions barring tenants from raising counterclaims in summary proceedings will be enforced, but a counterclaim inextricably intertwined with the petitioner's claim will be allowed notwithstanding a "no-counterclaims" lease provision.[31]

The ordinary statutory limits on monetary jurisdiction of the courts of limited jurisdiction that adjudicate summary proceedings are dispensed with in the context of summary proceedings, both for the petitioners' claims and for the respondents' counterclaims.[32] There is no monetary limit to a petitioner's rent claims in a nonpayment proceeding, to a petitioner's ancillary claim for legal fees or use and occupancy, or to a respondent's counterclaims.

4. Motions in Summary Proceedings

Motions in summary proceedings may be made in substantially the same manner as any proceeding, including pre-answer motions to dismiss, summary-judgment motions, or motions to strike answers, bills of particular demands, or jury demands. A motion in a summary proceeding may be made returnable when the proceeding is scheduled to be heard. The minimum eight-day notice requirement for petitions set forth in CPLR 2214 is inapplicable in summary proceedings.[33]

B. Holdover Proceedings

1. Common Grounds for Holdover Proceedings

The three most common grounds for holdover proceedings against commercial tenants are:

a. So-called "no-defense" holdover proceedings (also called "no-grounds" holdovers, because the petitioner need not allege grounds to terminate a tenancy), which are based on the natural expiration of the full term of a written lease or the termination of a month-to-month tenancy by serving a 30-day termination notice (or a one-month termination notice

outside New York City). If the lease has expired but the landlord has accepted rent after the expiration, the landlord will be deemed to have created a month-to-month tenancy on the same terms as the expired lease (except for the term of the tenancy and the monthly rent), and a 30-day notice of termination must be given to terminate the tenancy.

b. Holdover proceedings based on the tenant's alleged breach of a covenant of the lease.

c. Holdover proceedings based on the landlord's exercising an early termination option that allows the landlord to effectuate an early cancellation of the lease under certain circumstances, such as a demolition, renovation, or selling the building.

2. Predicate Notices in Holdover Proceedings

Unless the full term of a written lease has expired and the landlord has not subsequently accepted rent, a termination notice is required to terminate the tenancy before a holdover proceeding may be maintained. The termination notice must issue when the termination is based, for example, on a tenant's breach of covenant of the lease, on the landlord's exercising an early termination-for-demolition option, or when a landlord terminates a month-to-month tenancy if there is no written lease or the tenant has remained in possession paying monthly rent after a written lease expires.

In the case of a lease breach, a commercial lease will typically require the landlord to serve a cure notice, offering the tenant a prescribed time period to correct a lease breach before a termination notice may issue if the tenant fails to cure.

A cure notice must set forth the tenant's claimed defaults under the lease and that the landlord will terminate the tenancy if the tenant does not cure the default by a specified date.[34] A cure notice must specify the lease provision allegedly violated[35] and tell the tenant what remedial action will effectuate a cure and avoid termination.[36]

When a landlord claims to have exercised an early termination option under a lease provision allowing cancellation of the lease, the cancellation provisions are strictly construed in the tenant's favor.[37] This furthers a policy disfavoring forfeiting tenancies.[38]

If the tenancy is a month-to-month tenancy with no written lease, a petitioner must give the tenant a 30-day notice (or one-month's notice outside New York City).[39] If the tenancy is a month-to-month tenancy, the termination notice, in addition to giving at least 30-days' notice (or one-month's notice outside New York City), must set the last day of the month as the termination date.[40] Unless served on the first day of a 31-day month, a 30-day notice to terminate a month-to-month tenancy must expire on the last day of the following month. The practical result is that although it is denominated a 30-day notice, 60-days' notice may be required depending on when in the month the notice is served. A 30-day notice of termination of a month-to-month New York City tenancy must be served in the same manner as a notice of petition and petition, the service of which is governed by RPAPL 735.[41]

A one-month notice to terminate a month-to-month tenancy outside New York City has no prescribed method of service, may be served by mail, and need not be in writing, although written notice with proof of service, annexed to the petition, avoids a "he said/she said" dispute at trial about what notice was given and when.[42]

To terminate a tenancy, a termination notice must terminate a tenancy clearly, definitely, unequivocally, and unambiguously.[43] An equivocal or ambiguous notice will form a basis to dismiss the petition.

Only "rent" may be recovered in a nonpayment proceeding. Sums a tenant owes to the landlord that do not constitute rent under a lease or rental agreement may not be demanded or recovered in a nonpayment proceeding.

A petitioner must sign a termination or other notice required by a lease provision or statute. The notice must contain the signature of an individual whose authority to act on the petitioner's behalf is readily apparent and clear on its face, specifically identified in the lease, known to the tenant from earlier dealings, or established by proof of authority furnished with the notice. A termination notice signed by a petitioner's attorney or agent who is unknown to the tenant and not named in the lease is ineffective. The respondent is entitled to disregard it as not emanating from the petitioner.[44] An unsigned termination notice is similarly ineffective.[45]

If the notice is signed by an attorney or agent with whom the tenant is familiar and the tenant knows or should know of the attorney or agent's authority to act on the landlord's behalf, the attorney's or agent's signature is sufficient.[46] A typewritten name does not constitute a signature, but a handwritten signature, whether signed by the petitioner or a signature stamp, suffices.

Accepting rent after service of the termination notice but before filing the petition and notice of petition will vitiate the termination and reinstate the tenancy if the rent accepted is for any month after the termination date set forth in the notice.[47] In the case of a notice to

terminate a lease, the effect will be to reinstate the lease. For a 30-day notice to terminate a month-to-month tenancy, the effect will be to reinstate the month-to-month tenancy. When the petitioner's acceptance of the rent was clearly inadvertent, such as acceptance through a bank lockbox, and the rent is promptly returned when the petitioner discovers the inadvertent acceptance, the termination notice will stand despite the acceptance of rent.[48]

Commencing a nonpayment proceeding after the expiration date of the termination notice will vitiate the termination notice; commencing a nonpayment proceeding seeks to enforce the tenant's obligations under the lease and is inconsistent with asserting that the tenancy was terminated.[49] A nonpayment proceeding commenced after service of the termination notice but before the termination date will not affect the termination notice. If a landlord commences a nonpayment proceeding before the tenancy terminates and then commences a holdover proceeding, both proceedings may be maintained simultaneously.[50]

Service of a later termination notice will also vitiate an earlier termination notice.[51] To be terminated, a tenancy must still be in effect in the first place, and setting a termination date necessarily means that the tenancy remains in effect until that date.

If a holdover proceeding is dismissed or discontinued, the same predicate notice may not be re-used in a later holdover proceeding. A new termination notice must issue.[52] A limited exception allowing a termination notice to be re-used in a later proceeding arises if the second proceeding is begun before the first is terminated.[53] For this exception to apply, the second proceeding must be brought promptly after the first, and no discernable prejudice to the respondent may result from re-using the notice.[54]

Some laws protecting residential tenants in holdover proceedings do not exist for commercial tenants: (i) the Real Property Law § 223-b prohibition against retaliatorily evicting residential tenants does not protect commercial tenants; (ii) conditional limitations, which permit a landlord, for a tenant's default in the payment of rent, to terminate the lease and prosecute a holdover proceeding instead of maintaining a nonpayment proceeding; and (iii) commercial-lease provisions in fine print are enforceable, despite the unenforceability under CPLR 4544 of fine-print residential leases.[55]

C. Nonpayment Proceedings

1. Grounds and Parties

A landlord may maintain a nonpayment proceeding against a tenant when (i) the respondent is a tenant (not a subtenant or other occupant that has no landlord-tenant relationship with the landlord), (ii) the tenant agreed to pay rent under a lease or rental agreement, (iii) the tenant has defaulted in paying rent required under the lease or rental agreement, and (iv) the landlord has demanded the rent.[56]

Only "rent" may be recovered in a nonpayment proceeding. Sums a tenant owes to the landlord that do not constitute rent under a lease or rental agreement may not be demanded or recovered in a nonpayment proceeding. A landlord wishing to recover these sums must begin a plenary action.[57] Landlords often include provisions in leases deeming these charges "additional rent" to render into rent what would otherwise be non-rent charges or fees, to make them recoverable in a nonpayment proceeding, and to compel the tenant's eviction for failure to pay them.

Common examples of additional rent include real-property tax-escalation charges, water and sewer charges, condominium common charges where the subject property is owned as a condominium, and legal fees. In the context of commercial tenancies, courts in nonpayment proceedings will enforce these provisions, rendering these additional charges as rent.

2. Rent Demand

RPAPL 711(2) provides for a written or oral rent demand as the predicate to commencing a nonpayment proceeding. Giving a proper rent demand is a jurisdictional prerequisite to maintaining a nonpayment proceeding. The failure to do so requires dismissal.[58]

A rent demand may issue as soon as the rent for any month is past due. Although the statute provides for either written or oral rent demands, it imposes specific requirements for written demands. To avoid disputes over whether an oral demand was made, what exactly was said, and whether it constituted a sufficient demand, commercial landlords almost always opt for a written rent demand to prove service of the rent demand and its contents in court.

Under RPAPL 735, a written rent demand, commonly known as a "three-day notice" (which may be longer as provided for in a lease), must be served on the tenant in the same manner as a notice of petition and petition. When a landlord gives a written three-day notice, a copy of the three-day notice and the affidavit of its service must be annexed to the nonpayment petition.[59]

The written rent demand must set forth the amount of the rent arrears due and give the tenant at least three days to pay the arrears or surrender possession of the premises.[60] It must also state that if neither occurs within the three days (or, alternatively, the longer period provided in the notice), a nonpayment proceeding will be commenced.

The rent demand must be specific about the alleged rent due. It must inform the tenant of the specific period for which rent is alleged to be due and be a good-faith approximation of the amount alleged to be due for each period.[61] The demand should state the total sum due and give a month-by-month breakdown of the months

demanded and the amount demanded for each month. A single lump-sum amount alleged for numerous months without any breakdown or a lump-sum prior balance carried over into the first month of the period covered by the rent demand is insufficient and should result in dismissal.[62]

If a rent demand seeks payment of additional rent items like real-property tax escalations, condominium charges, water charges, and sewer charges, the demand should provide a breakdown of the additional rent charges, the month(s) for which they are demanded, and the amount of each demanded for each month.

A landlord need not sign a written rent demand in a nonpayment proceeding. An unsigned three-day notice or one signed by an attorney or agent will suffice.[63] Although a landlord must give the tenant at least three days after serving the rent demand to pay the arrears, the demand need not specify a payment-deadline date.

The parties may, by lease provision, impose additional requirements on the landlord in giving a rent-demand notice, but they may not agree to reduce the requirements to less than those required by statute. A rent demand that does not comply with the statutory requirements is jurisdictionally defective even if it complies with lease provisions governing rent demands.[64] If the lease imposes on the landlord more stringent requirements for a rent demand than the statute does, then the rent demand must comply with the lease provisions as well as the statute.[65]

If a landlord obtains a judgment in a nonpayment proceeding, the court will generally stay issuance of the warrant of eviction until five days from the entry of the judgment.[66] The warrant of eviction will not issue, or is a nullity, if the tenant pays the full amount of the judgment within five days or before the issuance of the warrant.[67] This permits a tenant to pay the judgment in full to avoid issuance of the warrant.

Unlike a holdover proceeding, in which, if the landlord prevails, the tenancy is terminated on the termination date in the termination notice (and before the proceeding commences), a tenancy is terminated in a nonpayment proceeding when the warrant of eviction issues.[68]

Unlike in residential nonpayment proceedings, the doctrine of laches is inapplicable and may not be raised in commercial nonpayment proceedings, regardless of the length of the landlord's delay in the bringing the rent claim or the prejudice resulting to the tenant.[69]

Also, the lack of a required certificate of occupancy or violation of the certificate of occupancy does not bar a nonpayment proceeding, or recovering rent or use and occupancy in a holdover proceeding against a commercial tenant, as it does for a residential tenant.[70]

Landlords also have ways to use a lease to transform a nonpayment-of-rent cause of action into a holdover cause of action. Commercial leases often contain a conditional limitation requiring the tenant to pay every month's rent on time and in full and prohibiting any set-off against the rent. When a commercial lease contains a conditional limitation to pay rent, the landlord is not limited, as a landlord would be in a residential proceeding, to a nonpayment proceeding if the tenant defaults in paying rent. The landlord may take the aggressive approach in serving a cure notice and then a termination notice and commencing a holdover proceeding. Unlike a nonpayment proceeding, in which the tenant can preserve the tenancy by paying the judgment for rent within five days after its issuance, once the tenancy is terminated the tenant cannot revive it or avoid eviction in a later holdover proceeding by making payment. A tenancy properly terminated in accordance with its terms cannot be revived, no matter how inequitable the result.[71]

The two main forms of ancillary relief commonly awarded in summary proceedings are legal fees and use and occupancy.

D. Other Monetary Relief in Summary Proceedings

Other than the principal relief sought in a summary proceeding — a judgment of possession and warrant of eviction, and a corresponding money judgment for rent in a nonpayment proceeding — the two main forms of ancillary relief commonly awarded in summary proceedings are legal fees and use and occupancy.

A landlord may recover legal fees from a tenant only when expressly authorized under a written lease. Commercial leases typically contain provisions authorizing the landlord to recover legal fees in the event of a tenant's default or legal proceedings against the tenant. No reciprocity of these provisions, unlike those in residential leases, arises in commercial leases. When a lease contains this provision, a prevailing landlord may recover reasonable legal fees from a losing tenant, but the reverse will not be true. In limited circumstances, a lease may provide that the prevailing party in a legal proceeding may recover legal fees from the losing party.

Although not expressly provided for in RPAPL Article 7, courts adjudicating summary proceedings may award ancillary judgments for reasonable legal fees, and they almost always will if the landlord prevails and demonstrates its legal entitlement to the fees under the lease. When there is an entitlement to recover legal fees, the normal practice is that, upon prevailing, the prevailing party makes a post-judgment motion for an ancillary award of legal fees, or the fees may be awarded as part of a stipulation of settlement.

Although a tenancy does not terminate in a nonpayment proceeding until the issuance of the warrant of eviction, it terminates in a holdover proceeding on the termination date in the termination notice. Notwithstanding the monthly rent in the parties' lease or rental agreement due from the tenant during the tenancy, a petitioner in a summary proceeding may seek an award for the fair-market value of use and occupancy for the period after the termination of the tenancy for which the tenant remains in possession, so long as the notice of petition recites that the landlord will seek this relief.[72]

Regardless of the rent reserved in the lease, post-termination use and occupancy is not contractual but rather grounded in quantum meruit and is calculated on the fair-market rental value of the premises while the respondent remains in possession after the tenancy is terminated.[73]

Separate and apart from a money judgment for the fair-market value of post-termination use and occupancy is a statutory provision providing for payment of pendente lite use and occupancy while a New York City summary proceeding is pending.[74] This provision, RPAPL 745(2), known as the Rent Deposit Law, was enacted as part of the Legislature's 1997 overhaul of the rent laws. It applies to nonpayment and holdover proceedings.

The Rent Deposit Law requires the summary-proceeding court, after the sooner of the second adjournment granted at the respondent's request or 30 days after the parties' first court appearance (less any days the proceeding has been adjourned at the petitioner's request), to direct, at the petitioner's request, that the respondent deposit into court all use and occupancy accruing since service of the notice of petition and petition and coming due thereafter. The deposit must be made unless the respondent can establish at an immediate hearing to the court's satisfaction that (i) the court lacks jurisdiction, (ii) the respondent was actually or constructively evicted from the premises, or (iii) the petitioner lacks standing to maintain the proceeding.[75]

The Rent Deposit Law also requires, if the respondent fails to comply with the court's order to pay use and occupancy under this provision, that the court strike the respondent's answer and award judgment in the petitioner's favor on default.[76]

Sums a court directs to be paid as pendente lite use and occupancy under the Rent Deposit Law will presumptively be at the rate of the last monthly rent in the lease (unless the petitioner seeks a hearing to get a higher market rate). They are paid without prejudice to the parties' claims and defenses, including the petitioner's claim for rent arrears and the respondent's defense or counterclaim for a rent abatement in a nonpayment proceeding and without prejudice to the petitioner's right to seek full-market value use and occupancy upon final disposition of the proceeding.

Courts do not always strictly enforce RPAPL 745(2). Even after a case is adjourned twice or more at the tenant's request or has been pending for over 30 days, the court may direct payment of one month's rent as use and occupancy, or a specific number of months, rather than all the use and occupancy that has accrued since the commencement of the case and all ongoing use and occupancy while the proceeding is pending.

Conversely, courts may order a tenant to pay use and occupancy dating back to before the proceeding commenced, if the amount in arrears is not in dispute. In directing payment of use and occupancy, courts might not wait until after 30 days or the respondent's second requested adjournment.

Despite the statutory language that payments under this provision be deposited into court, judges frequently order that use and occupancy payments be made directly to the landlord. Also, as a practical matter due to the logistical difficulty of withdrawing money deposited into court, tenants will often consent to pay the landlord directly instead of depositing payments into court.

E. Reverse Holdover Proceedings: Alleged Illegal Lockouts

Almost all commercial holdover proceedings involve a landlord as the petitioner seeking to recover possession from a respondent-tenant whose lease or rights to possession are alleged to have been terminated or expired. But a commercial tenant that has been illegally locked out or physically evicted from the premises by a landlord's resort to self-help without legal process may commence an illegal-lockout proceeding under RPAPL 713(10).

Illegal-lockout proceedings are reverse holdover proceedings commenced by tenants against landlords. They are summary proceedings to recover possession from an occupant (in this case the landlord) that lacks a legal right to continued possession. No predicate notice is required to maintain an illegal-lockout proceeding,[77] but most or all the pleading and procedural requirements and defenses that apply to holdover proceedings by landlords against tenants apply with equal force to lockout proceedings commenced by tenants. Although summary proceedings commenced by landlords almost always begin by notice of petition and petition, illegal-lockout summary proceedings almost always begin by order to show cause.

Part II of this two-part article continues in the next issue of the *Journal* with personal jurisdiction, defenses against summary proceedings, trials, settlements, defaults, and courts that adjudicate summary proceedings, plenary actions between landlords and tenants, and bankruptcy implications in the landlord-tenant relationship. ■

1. *Michaels v. Fishel*, 169 N.Y. 381, 389, 62 N.E. 425, 427 (1902); *Arthur at the Westchester, Inc. v. Westchester Mall, LLC*, 104 A.D.3d 471, 471–72, 960 N.Y.S.2d 417, 418 (1st Dep't 2013); *N. Main St. Bagel Corp. v. Duncan*, 6 A.D.3d 590, 591, 775 N.Y.S.2d 362, 363 (2d Dep't 2004).

2. *Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 24–28, 464 N.E.2d 125, 127–29, 475 N.Y.S.2d 821, 824–26 (1984); *A1 Entm't LLC v. 27th St. Prop. LLC*, 60 A.D.3d 516, 516–17, 875 N.Y.S.2d 463, 463 (1st Dep't 2009); *All 4 Sports & Fitness, Inc. v. Hamilton, Kane, Martin Enters., Inc.*, 22 A.D.3d 512, 513–14, 802 N.Y.S.2d 470, 470–71 (2d Dep't. 2005).

3. RPAPL 711(1).

4. *Id.* 713.

5. *Id.* 711(2).

6. *First Nat'l City Bank v. Wall St. Leasing Corp.*, 80 Misc. 2d 707, 708, 363 N.Y.S.2d 699, 700 (Civ. Ct. N.Y. County 1974).

7. *N.Y. Railways Corp. v. Savoy Assoc., Inc.*, 239 A.D. 504, 508, 268 N.Y.S. 181, 185 (1st Dep't 1933); *Triborough Bridge & Tunnel Auth. v. Wimpfheimer*, 165 Misc. 2d 584, 586, 633 N.Y.S.2d 695, 696 (App. Term 1st Dep't 1995).

8. CPLR 408.

9. RPAPL 731(2).

10. *Id.* 732(1).

11. *Id.* 732(2).

12. *MSG Pomp Corp. v. Doe*, 185 A.D.2d 798, 799, 586 N.Y.S.2d 965, 966 (1st Dep't 1992).

13. RPAPL 741(3).

14. *272 Sherman, LLC v. Vasquez*, 4 Misc. 3d 370, 372, 777 N.Y.S.2d 853, 854 (Civ. Ct. N.Y. County 2004); *Elul Realty Corp. v. Java N.Y. Ltd.*, 12 Misc. 3d 336, 337–38, 816 N.Y.S.2d 885, 886–87 (Civ. Ct. Kings County 2006).

15. *Elul Realty*, 12 Misc. 3d at 338–39, 816 N.Y.S.2d at 887.

16. RPAPL 741(1).

17. *Id.* 741(2).

18. *Id.* 741(4).

19. *MSG Pomp Corp.*, 185 A.D.2d at 800, 586 N.Y.S.2d at 966; *Villas of Forest Hills v. Lumberger*, 128 A.D.2d 701, 702, 513 N.Y.S.2d 116, 117 (2d Dep't 1987).

20. *See* Rent Stabilization Code § 2520.11(n).

21. *See* Multiple Dwelling Law § 325; 22 N.Y.C.R.R. 202.42(g).

22. 22 N.Y.C.R.R. 202.42(g).

23. RPAPL 741(5).

24. *Id.* 741.

25. *Id.* 732(1).

26. *860 Nostrand Assoc., LLC v. WF Kosher Food Distribs., Ltd.*, 27 Misc. 3d 16, 17, 898 N.Y.S.2d 753, 754 (App. Term 2d Dep't 2010).

27. RPAPL 743.

28. *Id.*

29. *Id.*

30. *Lun Far Co. v. Aylesbury Assoc.*, 40 A.D.2d 794, 794, 338 N.Y.S.2d 84, 84 (1st Dep't 1972); *Dandey Realty Corp. v. Nick's Hideaway, Inc.*, 24 Misc. 3d 105, 106, 886 N.Y.S.2d 549, 550 (App. Term 2d Dep't 2009).

31. *All 4 Sports & Fitness*, 22 A.D.3d at 513–14, 802 N.Y.S.2d 470, 471 (2d Dep't 2005); *Bomze v. Jaybee Photo Suppliers, Inc.*, 117 Misc. 2d 957, 958, 460 N.Y.S.2d 862, 863 (App. Term 1st Dep't 2009).

32. N.Y.C. Civ. Ct. Act § 204; Uniform Dist. Ct. Act § 204; Uniform City Ct. Act 204; Uniform Justice Ct. Act § 204.

33. CPLR 406; *Goldman v. McCord*, 120 Misc. 2d 754, 754–55, 466 N.Y.S.2d 584, 585 (Civ. Ct. N.Y. County 1983).

34. *542 Holding Corp. v. Prince Fashions, Inc.*, 46 A.D.3d 309, 310, 848 N.Y.S.2d 37, 38 (1st Dep't 2007).

35. *Cohn v. White Oak Coop. Hous. Corp.*, 243 A.D.2d 440, 440, 663 N.Y.S.2d 62, 62 (2d Dep't 1997); *Kabro Assoc. LLC v. KDMC Rest. Inc.*, 10 Misc. 3d 127(A), 809 N.Y.S.2d 481, 2005 N.Y. Slip Op. 51896(U), **1–2 (App. Term 2d Dep't 2005).

36. *Chinatown Apts., Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 788, 412 N.E.2d 1312, 1314, 433 N.Y.S.2d 86, 88 (1980); *Westhampton Cabins & Cabanas Owners Corp. v. Westhampton Bath & Tennis Club Owners Corp.*, 62 A.D.3d 987, 988, 882 N.Y.S.2d 124, 125 (2d Dep't 2009); *200 W. 58th St. LLC v. Little Egypt Corp.*, 7 Misc. 3d 1017(A), 801 N.Y.S.2d 243, 2005 N.Y. Slip Op. 50640(U), *2 (Civ. Ct. N.Y. County 2005).

37. *67 Wall St. Co. v. Franklin Nat'l Bank*, 37 N.Y.2d 245, 248, 333 N.E.2d 184, 186, 371 N.Y.S.2d 915, 917 (1975); *Greenwich Vill. Assoc. v. Salle*, 110 A.D.2d 111, 113, 493 N.Y.S.2d 461, 463 (1st Dep't 1985); *Leighton's, Inc. v. Century Circuit*, 95 A.D.2d 681, 682, 463 N.Y.S.2d 790, 791 (1st Dep't 1983).

38. *J.N.A. Realty Corp. v. Cross Bay Chelsea*, 42 N.Y.2d 392, 397–400, 366 N.E.2d 1313, 1315–18, 397 N.Y.S.2d 958, 959–62 (1977); *57 E. 54 Realty Corp. v. Gay Nineties Realty Corp.*, 71 Misc. 2d 353, 354, 335 N.Y.S.2d 872, 873 (App. Term 1st Dep't 1972).

39. RPL (Real Property Law) § 232-a (governing termination of month-to-month tenancies in New York City; this provision requires 30-days' notice); RPL § 232-b (governing termination of month-to-month tenancies outside New York City; this provision requires one-month's notice, not 30-days' notice).

40. *People ex rel. Botsford v. Darling*, 47 N.Y. 666, 667, 2 Sickels 666 (1872); *Avalonbay Communities, Inc. v. Betts*, 4 Misc. 3d 133(A), 791 N.Y.S.2d 867, 2004 N.Y. Slip Op. 50750(U), *1 (App. Term 2d Dep't 2004).

41. RPL § 232-a.

42. *Morse v. Brozzo*, 94 A.D.3d 1184, 1185–86, 942 N.Y.S.2d 246, 247–48 (3d Dep't 2012); *Higbie v. Ripka*, 2002 WL126287, 2002 N.Y. Slip Op. 50018(U), **2–3 (Dist. Ct. Nassau County 2002).

43. *City of Buffalo Urban Renewal Agency v. Lane Bryant Queens*, 90 A.D.2d 976, 977, 456 N.Y.S.2d 568, 569 (4th Dep't 1982), *aff'd*, 59 N.Y.2d 825, 451 N.E.2d 501, 456 N.Y.S.2d 568, 569 (1983); *Ellivkroy Realty Corp. v. HDP 86 Sponsor Corp.*, 162 A.D.2d 238, 238, 556 N.Y.S.2d 339, 340 (1st Dep't 1990).

44. *Siegel v. Kentucky Fried Chicken of Long Island*, 108 A.D.2d 218, 220, 488 N.Y.S.2d 744, 746 (2d Dep't 1985), *aff'd*, 67 N.Y.2d 792, 492 N.E.2d 390, 501 N.Y.S.2d 317 (1986); *Filmtrucks, Inc. v. Express Indus. & Terminal Corp.*, 127 A.D.2d 509, 510, 511 N.Y.S.2d 862, 864 (1st Dep't 1987); *Linroc Enters., Inc v. 1359 Broadway Assoc.*, 186 A.D.2d 95, 95, 588 N.Y.S.2d 34, 35 (1st Dep't 1992).

45. *Warehouse Eyes v. Hann*, NYLJ, Dec. 19, 1990, at 22, col. 4 (Civ. Ct. N.Y. County).

46. *Eklecco Newco, LLC v. Schlomit, Inc.*, 13 Misc. 3d 133(A), 831 N.Y.S.2d 347, 2006 N.Y. Slip Op. 51935(U), *1 (App. Term 2d Dep't 2006); *152 W. Realty, LLC v. N & G Luggages, Inc.*, 15 Misc. 3d 1121(A), 839 N.Y.S.2d 434, 2007 N.Y. Slip Op. 50789(U), *4 (Civ. Ct. N.Y. County 2007).

47. *Int'l Bus. Machs. v. Stevens & Co.*, 300 A.D.2d 222, 223, 754 N.Y.S.2d 233, 234 (1st Dep't 2002); *184 W. 10th Corp. v. Westcott*, 8 Misc. 3d 132(A), 2005 N.Y. Slip Op. 51150(U), *1 (App. Term 1st Dep't 2005).

48. *Hudson River Park Trust v. Basketball City USA*, 22 A.D.3d 422, 423, 803 N.Y.S.2d 58, 58 (1st Dep't 2005); *Schneider v. McEnaney*, NYLJ, Mar. 19, 1999, at 26, col. 2 (App. Term 1st Dep't).

49. *Harris v. Timecraft Indus.*, 132 Misc. 2d 386, 389, 503 N.Y.S.2d 987, 989 (Civ. Ct. N.Y. County 1986).

50. *1050 Tenants Corp. v. Lapidus*, 12 Misc. 3d 1196(A), 824 N.Y.S.2d 769, 2006 N.Y. Slip Op. 51593(U), **14–16 (Sup. Ct. N.Y. County 2006), *aff'd*, 39 A.D.3d 379, 835 N.Y.S.2d 68 (1st Dep't 2007).

51. *28 Mott St. Co. v. Summit Import Corp.*, 64 Misc. 2d 860, 864, 316 N.Y.S.2d 259, 263 (Civ. Ct. N.Y. County 1970).

52. *Kaycee W. 113th St. Corp. v. Diakoff*, 160 A.D.2d 573, 573, 554 N.Y.S.2d 216, 216 (1st Dep't 1990); *AREP 19 Fifty-Fifth LLC v. McLaughlin*, 28 Misc. 3d 135(A), 957 N.Y.s.2d 634, 2010 N.Y. Slip Op. 51406(U), *1 (App. Term 1st Dep't 2010).

53. *Arol Dev. Corp. v. Goodie Brand Packing Corp.*, 83 Misc. 2d 477, 481–83, 372 N.Y.S.2d 324, 329–31 (Civ. Ct. Bronx County 1975), *aff'd*, 84 Misc. 2d 493, 378 N.Y.S.2d 231 (App. Term 1st Dep't 1975), *aff'd*, 52 A.D.2d 538, 382 N.Y.S.2d 215 (1st Dep't 1976).

54. *145 E. 16th St. LLC v. Spencer*, 36 Misc. 3d 128(A), 954 N.Y.S.2d 760, 2012 N.Y. Slip Op. 51199(U), *1 (App. Term 1st Dep't 2012).

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56. RPAPL 711(2).

57. *Ross Realty v. V & A Fabricators, Inc.*, 42 A.D.3d 246, 250, 836 N.Y.S.2d 242, 245–46 (2d Dep't 2007); *Graham Realty Assoc. LLC v. Peller*, 11 Misc. 3d 132(A), 816 N.Y.S.2d 695, 2006 N.Y. Slip Op. 50352(U), *1 (App. Term 2d Dep't 2006).

58. *716 Realty LLC v. Zadik*, 38 Misc. 3d 139(A), 969 N.Y.S.2d 806, 2013 N.Y. Slip Op. 50194(U), *2 (App. Term 2d Dep't 2013); *15 W. 24th St. Corp. v. Stall-*

man, 2001 WL1682737, 2001 N.Y. Slip Op. 40504(U), *2 (App. Term 1st Dep't 2001); *Solack Estates v. Goodman*, 102 Misc. 2d 504, 505, 425 N.Y.S.2d 906, 907 (App. Term 1st Dep't 1979), *aff'd*, 78 A.D.2d 512, 512–13, 432 N.Y.S.2d 3, 3–4 (1st Dep't 1980).

59. *Kentpark Realty Corp. v. Lasertone Corp.*, 3 Misc. 3d 28, 31, 779 N.Y.S.2d 324, 326 (App. Term 2d Dep't 2004).

60. RPAPL 711(2).

61. *D'Esposito v. Downing St. of Flushing Corp.*, 19 Misc. 3d 1105(A), 859 N.Y.S.2d 902, 2008 N.Y. Slip Op. 50565(U), *9 (Dist. Ct. Nassau County 2008); *Kulok v. Riddim Co.*, LLC, 185 Misc. 2d 195, 196, 712 N.Y.S.2d 728, 730 (Civ. Ct. N.Y. County 2000); *Schwartz v. Weiss-Newell*, 87 Misc. 2d 558, 561, 386 N.Y.S.2d 191, 194 (Civ. Ct. N.Y. County 1976).

62. *542 Holding*, 46 A.D.3d at 310, 848 N.Y.S.2d at 38–39; *Retail Prop. Trust v. SHNS Corp.*, 28 Misc. 3d 1217(A), 958 N.Y.S.2d 63, 2010 N.Y. Slip Op. 51375(U), *3 (Dist. Ct. Nassau County 2010); *St. James Ct. LLC v. Booker*, 176 Misc. 2d 693, 695, 673 N.Y.S.2d 821, 823 (Civ. Ct. Kings County 1998).

63. *Yui Woon Kwong v. Sun Po Eng*, 183 A.D.2d 558, 560, 583 N.Y.S.2d 457, 459 (1st Dep't 1992); *QPII-143-45 Sanford Ave., LLC v. Spinner*, 34 Misc. 3d 14, 16–18, 936 N.Y.S.2d 473, 474–75 (App. Term 2d Dep't 2011).

64. *Hendrickson v. Lexington Oil Co.*, 41 A.D.2d 672, 672, 340 N.Y.S.2d 963, 965 (2d Dep't 1973); *Alexander Muss & Sons v. Rozany*, 170 Misc. 2d 890, 891–92, 655 N.Y.S.2d 238, 239 (App. Term 2d Dep't 1996).

65. *CLK/HP One Old Country Rd. LLC v. Settlement Sys., Inc.*, 39 Misc. 3d 1230(A), 972 N.Y.S.2d 143, 2013 N.Y. Slip Op. 50824(U), **4–5 (Dist. Ct. Nassau County 2013); *Bogatz v. Extra Touch Int'l, Inc.*, 179 Misc. 2d 1029, 1034, 687 N.Y.S.2d 558, 562 (Civ. Ct. Kings County 1999).

66. RPAPL 747-a; RPAPL 751(1).

67. RPAPL 751(1); *Agor v. Country Airways, Inc.*, 278 A.D. 666, 666–67, 102 N.Y.S.2d 672, 672–73 (2d Dep't 1951); *3881 Richmond Ave. Realty, Inc. v. Richmond Amboy Realty*, 17 Misc. 3d 132(A), 851 N.Y.S.2d 67, 2007 N.Y. Slip Op. 52001(U), *3 (App. Term 2d Dep't 2007).

68. RPAPL 749(3); *Frey v. Rose*, 51 A.D.3d 859, 861, 859 N.Y.S.2d 219, 221 (2d Dep't 2008); *Iltit Assoc. v. Sterner*, 63 A.D.2d 600, 601, 405 N.Y.S.2d 68, 69 (1st Dep't 1978).

69. *UBO Realty Corp. v. Fulton*, NYLJ, Sept. 8, 1993, at 21, col. 2 (App. Term 1st Dep't); *Abrogio & Caterina Giannone Family Ltd. P'ship v. 7th Heaven USA Inc.*, 36 Misc. 3d 1204(A), 954 N.Y.S.2d 757, 2012 N.Y. Slip Op. 51193(U), *1 (Dist. Ct. Nassau County 2012); *SLG 1185 Sixth A LLC v. Hedman & Costigan, P.C.*, 24 Misc. 3d 1203(A), 890 N.Y.S.2d 371, 2009 N.Y. Slip Op. 51246(U), *7 (Civ. Ct. N.Y. County 2009).

70. Multiple Dwelling Law (MDL) § 302.

71. *First Nat'l Stores v. Yellowstone Shopping Ctr.*, 21 N.Y.2d 630, 637–38, 237 N.E.2d 868, 870–71, 290 N.Y.S.2d 721, 725–26 (1968).

72. RPAPL 741(5).

73. *Eighteen Assoc. v. Nanjim Leasing Corp.*, 257 A.D.2d 559, 559–60, 683 N.Y.S.2d 291, 292 (2d Dep't 1999); *Cooper v. Schube*, 101 A.D.2d 737, 475 N.Y.S.2d 52, 53 (1st Dep't 1984); *Wahl v. Warren*, 19 Misc. 3d 130(A), 859 N.Y.S.2d 907, 2008 N.Y. Slip Op. 50537(U), *2 (App. Term 2d Dep't 2008).

74. RPAPL 745(2).

75. *Id.* 745(2)(a).

76. *Id.* 745(2)(c).

77. *Id.* 713(10).

BY MARY CAMPBELL GALLAGHER, J.D., PH.D. AND PROFESSOR SUZANNE DARROW-KLEINHAUS

Mary Campbell Gallagher, J.D., Ph.D., is president of BarWrite® and BarWrite Press. Her company prepares candidates for the bar exam, focusing on foreign-trained candidates and retakers, and offers in-school and in-house writing instruction. She is the author of *Scoring High on Bar Exam Essays* (3rd ed. 2006) and *Perform Your Best on the Multistate Performance Test (MPT)* (2011). Her last article for the NYSBA *Journal* was "Alternatives for Scheduling the Bar Exam" (with Professor Carol A. Buckler), September 2013. She serves on the NYSBA Committee on Legal Education and Admission to the Profession.

Suzanne Darrow-Kleinhaus is Professor of Law and Director of Academic Development and Bar Programs at Touro Law School. She is the author of several publications including *The Bar Exam in a Nutshell 2d*, *Acing the Bar Exam*, and *Mastering the Law School Exam*. She has also written law review articles in this area, "A Response to the Society of American Law Teachers' Statement on the Bar Exam" and "Incorporating Bar Pass Strategies into Routine Teaching Practices."

A Comparison of the New York Bar Examination and the Proposed Uniform Bar Examination

The New York Board of Law Examiners (BOLE) proposes adopting the Uniform Bar Exam (UBE), substituting it for the current New York Bar Exam (NYBE). The BOLE proposal is currently under active consideration, and it is the subject of public hearings. This article examines some of the issues the proposal raises. First, we look at the history of the proposal, and at the differences between the UBE and the NYBE as it is currently administered. Then we look in detail at the proposal for New York: a combination of the UBE plus a stand-alone one-hour multiple-choice New York test. Finally, we pose some important questions: What are the possible effects of adopting the new tests? What will the effect be on bar-exam pass rates, and on practice-readiness? What will the effect be on preparation of foreign-trained members of the bar? How will adoption of the UBE affect the way law school professors teach? Must professors choose between preparing students for the bar exam by teaching uniform rules and preparing them for practice in New York State by teaching New York law? Will the UBE affect the attractiveness of New York law schools?

History of the Proposal

In early October 2014, the New York Court of Appeals announced that at the prompting of the Board of Law

Examiners it was urging the State to adopt the Uniform Bar Exam, effective for the July 2015 bar exam.[1]

The New York State Bar Association Committee on Legal Education and Admission to the Bar co-chaired by practitioner Eileen Millett and Dean Patricia Salkin of the Touro Law Center, submitted a report on that proposal to the Executive Committee of the NYSBA.[2] The Committee took no position on the UBE, but it urged delay and careful consideration of the proposal. On November 1, 2014, the House of Delegates of the New York State Bar Association adopted the report of the Committee. It also urged delay, stressing that if the UBE were adopted, adequate notice should be provided to all parties.[3]

On November 12, 2014, Chief Judge Lippman announced that the comment period would be extended from the original November 7, 2014 deadline to March 1, 2015, and that introduction of the UBE would be delayed. He announced creation of a study committee headed by the Honorable Jenny Rivera, Associate Judge of the New York Court of Appeals.[4] The committee has been holding hearings.[5]

The Current New York Bar Examination

Structure of the New York Bar Examination

The current New York Bar Examination (NYBE) has exceptional prestige among state bar examinations in the United States. It is a two-day examination, administered twice a year, on the last Tuesday and Wednesday of February and July.[6] It consists of four parts: (1) the Multistate Bar Examination (MBE), a full-day 200-question multiple-choice examination on seven subjects, designed and licensed to the states by the National Conference of Bar Examiners (NCBE); (2) five essays on New York law, each requiring 40 to 45 minutes; (3) the Multistate Performance Test (MPT), designed and licensed to the states by the NCBE, which is a simulated law-office task where research and writing tasks are to be performed within 90 minutes; and (4) the New York Multiple Choice Test, 50 multiple choice questions, roughly 25 testing the Civil Practice Law and Rules (CPLR).[7] The Board of Law Examiners creates the New York essay questions and the New York Multiple Choice Test.

Half of the current New York Bar Examination tests on New York law and is drafted by the New York Board of Law Examiners. Like the examinations of a number of other states whose examinations must reflect their legal specifics and local industries, the New York bar examination tests candidates' knowledge of specific New York law and skills for practice. Thus, the Texas bar exam tests on oil and gas; Delaware, on corporations law; California, on community property. The New York bar exam tests on the CPLR, and on the numerous New York distinctions in wills, domestic relations, criminal law and procedure, and other subjects.

According to the website of the New York Board of Law Examiners, applicants may qualify to sit for the NYBE in four ways.[8] These are (1) graduation from an American Bar Association (ABA)-approved law school in the United States with a juris doctor (J.D.) degree;[9] (2) a combination of law school study at an ABA-approved law school and law office study;[10] (3) graduation from an unapproved law school in the United States with a juris doctor degree and practice in a jurisdiction where admitted for five of the seven years immediately preceding application to sit for the New York bar examination;[11] or (4) foreign law school study.[12]

In 2014 the number of bar candidates taking the New York exam in February and July, combined, was 15,227. The first-time pass-rate for the 8,277 candidates with a J.D. from an ABA-accredited law school was 82%. The first-time pass rate for 2,437 foreign-trained candidates was 43%.[13]

In addition to passing the bar examination, candidates for the New York bar must demonstrate that they have completed a mandatory 50 hours of pro bono work.[14] They must pass the national, multiple-choice, Multistate Professional Responsibility Examination (MPRE), also designed by the NCBE.[15] They must also produce proof of moral character.[16]

This year, under the Pro Bono Scholars Program, a limited number of graduates will be allowed to take the bar exam during their third year of law school in exchange for a commitment to do pro bono work.[17]

The New York State Board of Law Examiners Provides a Content Outline for the NYBE[18]

The BOLE states:

> The New York portion of the NYBE consists of five essay questions and 50 multiple-choice questions. The general subject areas that may be tested are as follows:
>
> (1) administrative law [effective with the February 2015 exam];
> (2) business relationships, including agency, business corporations, limited liability companies, partnerships and joint ventures;
> (3) New York civil practice and procedure [effective with the February 2015 exam, federal civil practice and procedure will no longer be tested on the New York portion of the exam];
> (4) conflict of laws;
> (5) New York and federal constitutional law;
> (6) contracts and contract remedies;
> (7) criminal law and procedure;
> (8) evidence;
> (9) matrimonial and family law;
> (10) professional responsibility;
> (11) real property;
> (12) torts and tort damages;
> (13) trusts, wills and estates; and
> (14) UCC Articles 2 and 9.

Proposal to Substitute the UBE for the NYBE While Adding a Stand-Alone One-Hour Multiple-Choice New York Test

Structure of the UBE

The Uniform Bar Examination is a two-day package of bar-exam components created by the NCBE and licensed to the states. Under the BOLE proposal, the UBE would be a substitute for the components of the current New York Bar Examination. None of the content of the UBE would be drafted by the New York Board of Law Examiners. The New York Board of Law Examiners would create only an add-on one-hour multiple-choice test on New York law.

The UBE would consist of these three parts: (1) the Multistate Bar Examination, as on the NYBE, the full-day 200-question multiple-choice examination on seven subjects; (2) six Multistate Essay Examination (MEE) questions, based on uniform laws, rather than state-specific law, each taking 30 minutes; and (3) two tasks of the Multistate Performance Test (MPT), the simulated law-office task where research and writing are to be performed within 90 minutes. All parts of the UBE are designed by the NCBE and licensed to the states.

The proposal thus excludes the current New York Multiple Choice Test, with its 50 multiple-choice questions, roughly 25 of which test the CPLR.[19]

Most significantly, the UBE proposal substitutes an essay component designed by the National Conference of Bar Examiners, the Multistate Essay Examination (MEE), for the New York essays currently offered by the BOLE, while adding a separate one-hour test on New York law. The MEE component of the UBE consists of six questions that test on uniform laws rather than the law of any particular jurisdiction. Each essay requires 30 minutes.

According to the National Conference of Bar Examiners, the UBE has been adopted by these 14 jurisdictions: Alabama, Alaska, Arizona, Colorado, Idaho, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming. Each UBE state sets its own pass score. These may, of course, change.

The one-hour multiple-choice test on New York law that the BOLE would add would be in lieu of the extended testing on New York-specific law in the current five New York essays and 50 New York multiple-choice questions. According to a presentation on October 23, 2014, by BOLE Chair Diane Bosse to the NYSBA Committee on Legal Education and Admission to the Bar, the one-hour test would be offered on additional dates to accommodate re-takers. The BOLE has provided an outline of law to be tested in this new New York multiple-choice test. Except that the new test does not include Articles 2 and 9 of the UCC, but does include federal and New York constitutional law, although representing inquiries of different lengths, these outlines are the same.

The *New York Law Journal* published a comparison of the UBE and the current New York Bar Examination on October 7, 2014.[20] Below is the table created by the Board of Law examiners.

Structure of Current New York Bar Exam, Uniform Bar Exam and Proposed Exam

New York Bar Exam	Uniform Bar Exam	Proposed Exam
Day 1	**Day 1**	**Day 1**
Multistate Performance Test (MPT) (1 item – 10%)	Multistate Performance Test (MPT) (2 items – 20%)	Multistate Performance Test (MPT) (2 items –20%)
NY essay questions (5 questions – 40%)	Multistate Essay Examination (MEE) (6 questions – 30%)	Multistate Essay Examination (MEE) (6 questions – 30%)
NY Multiple-Choice Questions (50 questions – 10%)		
Day 2	**Day 2**	**Day 2**
Multistate Bar Examination (MBE) (200 questions – 40%)	Multistate Bar Examination (MBE) (200 questions – 50%)	Multistate Bar Examination (MBE) (200 questions – 50%)
		New York Law Examination (NYLE) (50 multiple-choice questions. Must be passed independently. Offered with the UBE and on other dates)

Currently, New York bar exam scores are weighted as follows: MBE = 40%; Essays = 40%; MPT = 10%; and the NY MCT = 10%. Note that these proportions are statistical constructs. Stronger scores on one section may compensate for weaker scores on another. Under the proposed UBE, the score would be weighted differently: MBE = 50%; MEE = 30%; and MPT = 20%. In addition to passing the UBE, a candidate in New York will be required to pass a separate New York multiple-choice test, achieving a minimum score of 30 out of 50.

These proposed changes in scoring have raised some concerns:

- Difference in scoring between the UBE and the New York bar exam is significant because New York bar candidates can use stronger scores on one section to compensate for weaker scores on other sections; increasing the MBE from 40% to 50% of the total grade while decreasing essays from 40% to 30% may impact the pass rate.
- The UBE's increase of the MPT to 20% from 10% will not compensate for the decrease in the weight of the essays. An MPT task is a more complicated and challenging test instrument than an essay.

The differences between the essay components of two exams are discussed below.

Comparison of Essay Questions on the Multistate Essay Exam (MEE) and the New York Bar Exam

The MEE questions:

- Candidates are allowed 30 minutes per question.
- MEE questions are open-ended. Candidates must spot the issues.
- Comparison of released sample answers in a UBE (MEE) jurisdiction, on the one hand, with released sample answers from the NYBE, on the other, suggests that MEE essay responses may be longer than New York responses and contain more extensive and detailed rule statements. Meanwhile, however, MEE candidates have less time to answer each question.[21]

The MEE essay subject-matter coverage:

- Answers based on "uniform rules" in such subjects as Business Associations, Wills, Trusts, Family Law.
- Subjects that are key in New York practice, such as Contracts and UCC, and that appear on every New York bar exam, may be included less frequently on the MEE.

New York essay questions:

- Candidates are allowed 42–45 minutes per question.
- The questions do not demand issue-spotting, because the interrogatories are "issue specific," for example, "Can Dan be held liable in Mom's personal injury action on behalf of Child against Dan?" Candidates must know and be able to quickly state the applicable rule of law.[22]

The NYBE essay subject matter coverage:

- Answers based on New York law.
- Students who study in New York law schools and plan to practice in New York benefit from learning New York law.

Note that with the MEE rather than New York essay questions on the bar exam, law school faculty will have to choose between preparing students for practice (New York law) and preparing students for the bar exam (uniform rules). This is because the MEE tests on the uniform laws, rather than on New York law. Subjects that the NYBE emphasizes by testing at every session or almost every session, such as contracts and the Uniform Commercial Code, may show up on the MEE only once a year or less. The questions on the MEE require the bar candidate to do "issue-spotting," while those on the NYBE specify the issues the candidate must address. The questions on the MEE can be more discursive than those on the NYBE, which require producing a tight syllogistic response, more like a brief.[23] The MEE questions may be fairly described as advocates' questions or debaters' questions, those on the NYBE as practitioners' questions.

During her October 23 presentation to the NYSBA Committee on Legal Education and Admission to the Bar, Ms. Bosse offered the following chart to compare the content on the current NYBE with that of the proposed UBE. Italics indicate content unique to either the UBE or the NYBE.

Content Comparison

Current New York Bar Exam	Uniform Bar Exam
Administrative Law	–
Business Relationships	Business Associations
NY Civil Practice and Procedure	*Civil Procedure (Federal)*
Conflict of Laws	Conflict of Laws
Constitutional Law	Constitutional Law
Contracts and Contract Remedies	Contracts
Criminal Law and Procedure	Criminal Law and Procedure
Evidence	Evidence
Matrimonial and Family Law	Family Law
Professional Responsibility	–
Real Property	Real Property
Torts and Tort Damages	Torts
Trusts, Wills and Estates	Trusts and Estates
UCC Articles 2 and 9	UCC Articles 2 and 9

During her presentation, Ms. Bosse also noted the things that do *not* change under the UBE. New York will still

- decide who may sit for the bar exam and who will be admitted to practice,

- set its own passing scores,
- grade the essays and performance tests,
- set policies regarding how many times candidates may retake the bar exam,
- decide how to assess knowledge of local law,
- determine for how long incoming UBE scores will be accepted, and
- make character and fitness decisions.

Effects of Adopting the UBE Plus One-Hour Test on New York Law

Effect on Portability; Questions Remaining

The chief argument in favor of the UBE is that it may give new law school graduates the ability to transfer their UBE scores from one UBE jurisdiction to another, that is, it offers "portability." At a time when many law school graduates have difficulty finding suitable jobs, the ability to expand the scope of their job search may have a significant advantage. Thus, a bar candidate who passes the Alabama bar exam could in theory simply transfer the score to Missouri, meet any additional licensing requirements, and be licensed to practice law in Missouri, without having to prepare for and pass the Missouri bar exam. The National Conference of Bar Examiners' Comprehensive Guide to Bar Admission Requirements, 2014, lists the additional requirements.[24]

Likewise, new graduates who had passed the bar exam in another UBE state would no longer have to prepare for, take, and pass the New York bar exam, in addition to the first bar exam, in order to be licensed in New York. They could come to New York, pass the one-hour test on New York law, and, assuming passage of the MPRE and the character requirements, be licensed and work in New York.

In her presentation to the NYSBA committee, Ms. Bosse listed the following advantages of the UBE for students:

- Eliminates the duplication of effort associated with taking the bar exam in multiple jurisdictions
- Reduces the cost, delay, anxiety and uncertainty of having to take multiple bar exams
- Maximizes employment opportunities
- Enhances mobility for law graduates and their families
- Offers more options when choosing where to take the bar exam

Possible Effect on Practice-Readiness of New York Graduates

New York law as tested on the New York Bar Examination differs markedly from the uniform law tested on the Multistate Essay Examination.

New York has adopted few uniform laws. Justin L. Vigdor is a former president of the New York State Bar Association, a longtime member of the New York State Uniform Law Commission, and a member of the Executive Committee of the National Conference of Commissioners on Uniform State Laws. Speaking from the floor at the November 1, 2014, meeting of the NYSBA House of Delegates, which was considering the UBE proposal, he emphasized the difficulty of getting the New York State Legislature to adopt uniform laws. He said:

> From a practical point of view, New York law, which is in many ways unique, plays an important role in commerce locally, nationally, and throughout the world.

> I'm very concerned about the fact that [the UBE] is going to test on uniform law. I have been one of New York's five uniform law commissioners for 26 years. Unfortunately, New York is not big on adopting and passing uniform laws. We have a terrible time getting most uniform laws through the legislature . . . . When we do get uniform laws passed, we have a New York version of those uniform laws, and it's questionable whether they're really uniform. . . . That is an issue that must be addressed.[25]

Thus, substituting the UBE for the NYBE may impede the efforts of New York law schools to prepare graduates to be practice-ready, that is, ready for practice in New York State. This is because, with the UBE, law schools would have to teach the uniform laws in order to prepare students for the bar exam.

In addition, bar preparation is for all practical purposes part of legal education. As bar-preparation professional John Gardiner Pieper stressed in the *New York Law Journal* on November 5, 2014, eliminating the intensive training in New York law that is now required to pass the bar exam would do a disservice to new lawyers:

> Stripping the bar exam of its local component would do a disservice to newly admitted attorneys, including the foreign-trained attorneys who now account for nearly one-third of bar exam applications in New York and for whom bar exam preparation often is their first opportunity to learn New York law. These new lawyers have more than enough to learn and navigate in the first years of practice in New York without the specter of entering the practice without the benefit of having studied New York law and procedure that

> we as a bar were not just encouraged, but required to know for admission. No matter how concentrated, experienced and specialized one may become, one should have a base knowledge of certain core subjects at one's disposal along the way. The New York BOLE has labeled this "minimum competency."[26]

New York law schools have recently emphasized preparing students to be practice-ready, adding many clinical courses, all of which must necessarily focus on New York law. The Pro Bono Scholars Program initiated by Chief Judge Jonathan Lippman counts additional practice readiness as among its objectives.[27] In many law schools, the effort to achieve practice-readiness may extend throughout the curriculum, encompassing doctrinal courses, writing courses, and clinics. Substituting the UBE for the New York Bar Exam would force in-school courses to reduce teaching for practice-readiness, that is, for New York law, by substituting uniform laws for New York law. To aid graduates in obtaining employment, many of the law schools in New York have also added credit-bearing courses specifically tailored to preparing students for the New York bar exam. This creates a conflict for the law schools.

How Candidates Prepare for the Bar Exam

At many of the New York State law schools, law students can enroll in for-credit bar-preparation courses focusing on New York law, taught either by members of their own faculty or by representatives of the various bar courses. Whether or not they take such courses in law school, almost all candidates for the New York bar exam take a full six-week bar-preparation course emphasizing New York law. Courses for the NYBE are offered by BarBri, Pieper Bar Review, Themis, Kaplan, Marino, and BarMax. Supplemental shorter courses teach essay or MPT or MBE skills, or all three, or are geared to re-takers. These include BarWrite®, BarBri, Marino, Pieper, and Kaplan. Because of the numerous ways in which New York law and practice is state-specific, full bar-preparation courses and supplemental essay courses devote substantial time to preparing candidates for the five New York essays and the 50 New York multiple-choice questions.[28]

Effect on Competence of Foreign-Trained Candidates

The effect on the education and testing of foreign-trained bar candidates raises significant issues about how the differences between the uniform laws and New York law may affect the usefulness of the UBE. If the BOLE has an alternative plan for training foreign-trained candidates if the UBE is adopted, the BOLE has not disclosed it. Foreign-trained bar candidates, about one-third of all New York bar candidates, make up one of the largest groups significantly impacted by the UBE proposal. Many contracts entered into worldwide are governed by New York law. New York's unusually liberal standards for allowing foreign-trained law graduates to take the bar exam have been justified as promoting the global spread of New York law. For foreign-trained bar candidates, bar preparation is necessarily a key part of legal education. When they take a six-week course preparing them for the current New York bar exam, they learn the CPLR and the so-called New York distinctions, as well as law for the subjects on the Multistate Bar Exam. It weighs against the UBE that preparation for a one-hour test will not make for effective global ambassadors. By reducing the emphasis on New York law in foreign-trained candidates' bar-preparation, the UBE will serve neither these bar candidates nor the policy goals of New York State.

Possible Effect on Pass Rates

The MEE appears to require candidates to know less substantive law than the current New York bar exam, and in fewer subjects. Depending on how the exam is graded, that might be expected to raise pass rates. However, the MEE essays are difficult in a different way. Their structure requires more issue-spotting than do the NYBE essays. This may impact the speed with which candidates must answer. Anyone hoping to raise bar pass rates by adopting the UBE must be aware that, in fact, bar pass rates have been dropping nationwide, and particularly in states administering the UBE:

> Pass rates have declined (dramatically in some cases) from the July 2013 bar exam to the July 2014 bar exam in the majority of the UBE states. The pass rate for people taking the bar exam dropped a whopping 22% in Montana, 15.2% in Idaho, and 13% in North Dakota. The pass rate is down 7.7% and 7.5% in Arizona and Washington, respectively. Other UBE states reporting a lower pass rate include Alabama, Wyoming, and Utah.[29]

The first-time pass rate for J.D.s with a degree from ABA-approved schools in New York State also dropped, but by much less. It was 83% in July 2014. In 2012, it had been 85% and in July 2013, it was 88%.[30]

Possible Effect on Attractiveness of Law Schools in New York to Prospective Students

Practitioner Eileen Millett, Co-Chair of the NYSBA Committee on Legal Education and Admission to the Bar, poses the question: "Does the UBE take away or add to the allure of coming to a New York law school? It remains to be seen." That is, would adoption of the UBE make law schools in New York less attractive?[31]

Conclusion

The Board of Law Examiners and the National Conference of Bar Examiners have presented substantial arguments in favor of the Uniform Bar Examination, which tests on uniform laws. However, there is an understandable reluctance to give up a markedly successful bar examination, one that is a source of prestige and pride to

the profession. From a practical point of view, New York law, which is in many ways unique, plays an important role in commerce locally, nationally, and throughout the world. New York's host of New York-specific laws and rules of procedure, which many law schools now emphasize in their effort to help students become practice-ready, also weigh strongly against adoption of the UBE. With the UBE, law schools may be placed in a position of choosing between preparing students for practice by teaching New York law or preparing students for the bar exam by teaching uniform laws. Until this conflict is resolved, we should be concerned about the potential for the UBE to reduce New York graduates' practice-readiness. ■

1. *See* Request for Public Comment http://nylawyer.nylj.com/adgifs/decisions14/100714rfc.pdf. Joel Stashenko, *Court System Seeks Comment on Adopting Uniform Bar Exam*, NYLJ, Oct. 7, 2014. http://www.newyorklawjournal.com/id=1202672451929?.

2. One of the authors of this report, Mary Campbell Gallagher, is a member of the Committee.

3. Christine Simmons, *Don't Rush Adoption of New Bar Exam, State Bar Cautions*, NYLJ, Nov. 4, 2014. http://www.newyorklawjournal.com/id=1202675408809?.

4. "Request for Public Comment on the Uniform Bar Exam" (Nov. 12, 2014). http://nylawyer.nylj.com/adgifs/decisions14/111314request.pdf.

5. Joel Stashenko, *Hearings Set on Adopting UBE in New York State*, NYLJ, Dec. 31, 2014. http://www.newyorklawjournal.com/id=1202713691686/Hearings-Set-on-Adopting-UBE-in-New-York-State, referring to the "Notice of Public Hearings," http://www.nycourts.gov/ip/bar-exam/publichearing.shtml.

6. Most states now have a two-day bar examination. The bar examinations of California and Louisiana extend over three days, rather than two.

7. As of February 2015, the MBE comprises seven subjects: contracts, torts, constitutional law, real property, evidence, criminal law and procedure, and federal civil procedure.

8. http://www.nybarexam.org/TheBar/TheBar.htm#qual.

9. Section 520.3 of the Rules of the Court of Appeals.

10. Section 520.4 of the Rules of the Court of Appeals.

11. Section 520.5 of the Rules of the Court of Appeals.

12. Section 520.6 of the Rules of the Court of Appeals. See also the section titled "Foreign Legal Education," http://www.nybarexam.org/Foreign/ForeignLegalEducation.htm.

13. An additional three candidates were graduates of non-ABA law schools, and none passed. Four candidates combined law office study with law school, and three passed. http://www.nybarexam.org/ExamStats/2014_NY_Bar_Exam_Statistics.pdf.

14. http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml; http://www.nybarexam.org/Rules/Rules.htm#520.16.

15. Rule 520.9 of the Board of Law Examiners. http://www.nybarexam.org/Rules/Rules.htm#520.9.

16. Rule 520.12 of the Board of Law Examiners. http://www.nybarexam.org/Rules/Rules.htm#520.12.

17. Rule 520.17 of the Board of Law Examiners. http://www.nybarexam.org/Rules/Rules.htm#520.17.

18. "Content Outline," revised August 2014. http://www.nybarexam.org/Docs/CONTENTOUTLINE.pdf.

19. *See supra* note 7.

20. Stashenko, *supra* note 1.

21. *See* Minnesota sample candidate answers: http://www.ble.state.mn.us/file/JULY2013RGAs EAs.pdf

22. *See* New York sample candidate answers: http://www.nybarexam.org/ExamQuestions/JULY2013QA.PDF.

23. See the discussion of "brief-writing" bar examination questions as opposed to "memo-writing" questions in Mary Campbell Gallagher, Scoring High on Bar Exam Essays 21–26 (2006).

24. NCBE and ABA Section of Legal Education and Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements, 2014. http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf.

25. Meeting of the NYSBA House of Delegates, November 1, 2014. http://www.totalwebcasting.com/view/?id=nysbar at 160:00-160:25.

26. John Gardiner Pieper, *Why UBE Needs Careful Consideration*, NYLJ, Nov. 5, 2014. http://www.newyorklawjournal.com/id=1202675467003/Why-UBE-Needs-Careful-Consideration#ixzz3P6ePjFhS.

27. Rules of the Board of Law Examiners, "Pro Bono Scholars Program." "The Pro Bono Scholars Program is a voluntary component of legal education that provides law student participants in their final semester of study with an opportunity to assist in improving access to justice for persons of limited means while acquiring practical legal skills training." http://www.nybarexam.org/Rules/Rules.htm#520.17.

28. For example, full bar-preparation courses teach the CPLR. This instruction serves graduates of out-of-state J.D. programs, graduates of in-state J.D. programs that do not include the CPLR, and LL.M. graduates. Perhaps stressing a national character, not all law schools in New York State offer a course in the CPLR, which is intensively tested on the New York bar exam. Nor, to this writer's knowledge, do any out-of-state law schools offer courses in CPLR. Accordingly, to prepare candidates for local practice, bar review courses stress the CPLR.

29. Joseph Marino, "Declining Nationwide Bar Pass Rates" (advertisement), Oct. 27, 2014. http://abovethelaw.com/2014/10/declining-nationwide-bar-exam-pass-rates/.

30. Tania Karas, *Deans Dismayed by Drop in Bar Pass Rates*, NYLJ, Nov. 13, 2014. http://www.newyorklawjournal.com/id=1202676229642/Deans-Dismayed-by-Declines-in-BarPass-Rates.

31. "What is the incentive to come to a school in New York? Why pay the high cost of tuition at an unranked New York law school when you can study in Colorado? Can these schools in New York survive the UBE?" Joseph Marino, "Ask the Professor: New York and the Uniform Bar Exam," Oct. 9, 2014. http://abovethelaw.com/2014/10/ask-the-professor-new-york-and-the-uniform-bar-exam.

BY DIANE F. BOSSE

Diane F. Bosse was appointed by the Court of Appeals to the New York State Board of Law Examiners in 1998, after having served as a legal assistant to the Board for 19 years. She has chaired the Board since 2001. She served on the Board of Trustees of the National Conference of Bar Examiners from 1999 to 2008 (Chair 2006–2007) and currently co-chairs the Conference's Long Range Planning Committee. Ms. Bosse is a member of the Council of the American Bar Association Section of Legal Education and Admissions to the Bar and the Immediate Past Chair of the Accreditation Committee of the Section. A graduate of SUNY Buffalo Law School, Ms. Bosse is of counsel to the law firm of Hurwitz & Fine, P.C. She has received many awards, most recently the Lawyer of the Year Award from the Bar Association of Erie County (2014), National Conference of Bar Examiners Chair's Award (2012) and the NYSBA's Award for Excellence in Public Service (2010).

Assessing Minimum Competence in a Changing Profession: Why the UBE Is Right for New York

Wherever we attended law school, and wherever we practice, lawyers across this country share a common core of fundamental legal knowledge and basic lawyering skills. First-year law students learn general principles in foundational subjects; in ensuing coursework they learn concepts that are a feature of every state's law, although the implementation and interpretation of those concepts may, at times, vary from state to state. Law students, wherever they are schooled in the law, learn the elements of a negligence action, the requirements for contract formation, the ways in which landowners may hold title, and the dual aspects of personal jurisdiction. They learn *mens rea* requirements for imposing liability on criminal conduct and the concepts of federalism and state sovereignty. They learn that there are rules of intestate succession, grounds for divorce, and various types of business organizations with particular formation requirements and differing obligations of ownership. They learn how to perform legal research, how to analyze facts and apply the law, how to read a statute, and how to communicate effectively and in the required voice.

Bar examiners across this country assess the competence of law graduates in these general principles, concepts, and skills, with the ultimate purpose of protecting the public by ensuring that those who are awarded a license have the knowledge and skills required for entry-level practice. But while bar examiners are all in large measure testing the same material, they do it in a patchwork fashion and with significant disadvantages to the new lawyer who, after passing the bar exam in one jurisdiction, wishes to gain admission in a second. Such admission might be sought, for example, to allow the new lawyer to accept a job in our still unsettled legal job market, to relocate in order for a spouse or partner to take advantage of an employment opportunity, to become more valuable to an existing employer, or to serve clients in another jurisdiction.

Last October, acting on a recommendation from the New York State Board of Law Examiners, Chief Judge Jonathan Lippman announced a proposal to replace the current New York bar exam with the Uniform Bar Examination (UBE) and a separate test of New York-unique laws and distinctions, to be known as the New York Law Examination (NYLE).[1] Following an initial period of public comment, Chief Judge Lippman extended the comment period and appointed an Advisory Committee, chaired by

the Honorable Jenny Rivera, Associate Judge of the Court of Appeals, to provide a report and recommendation to the Court after studying and evaluating the proposal through a public process. That ongoing process includes accepting testimony at public hearings and in written comments to the Committee; conducting outreach to engage in dialogue with stakeholders, including bar associations, most notably the New York State Bar Association and the American Bar Association; and, where possible, enlisting the Board of Law Examiners and the National Conference of Bar Examiners to perform relevant data analysis for the Committee's review. Information regarding the Committee's work and resources regarding the proposal are available on the Committee's website.[2]

This article is intended to provide information regarding the proposal and to address some questions that have been raised in the hopes of informing the discussion. The threshold question is definitional – just what is the Uniform Bar Examination?

The Uniform Bar Examination Basics

The UBE is a high-quality, uniform battery of assessment measures that are administered simultaneously in the jurisdictions that adopt the test. It consists of the Multistate Bar Examination (MBE), the Multistate Performance Test (MPT), and the Multistate Essay Examination (MEE). Together, these components test the fundamental legal knowledge and lawyering skills that are needed to begin the practice of law. The UBE is uniformly administered, graded, and scored by the participating jurisdictions, and it results in a score that can then be transferred to other states that have joined the UBE network. New York currently incorporates components of the UBE, specifically the MBE and the MPT, into its bar exam. Thus, the proposal requires New York to adopt the remaining component, the MEE.

For those unfamiliar with the tests that comprise the UBE, the MBE is a 200-question multiple-choice test on the subjects of Civil Procedure, Constitutional Law, Contracts (including Uniform Commercial Code [UCC] Article 2), Criminal Law and Procedure, Evidence, Real Property, and Torts. It is currently administered as part of the bar exam in 49 states and the District of Columbia. (Louisiana, with its Civil Code, has not adopted the MBE.)

The MPT is a test in which candidates are presented with a simulated case file and directed to perform a task. The file consists of materials – such as interview notes, transcripts, correspondence, contract provisions, and pleadings – that might be found in a lawyer's file. Candidates are also given a library consisting of cases, statutes, and regulations. They are required to assimilate the facts from the file; abstract the applicable principles of law from the library; apply these principles directly or by analogy to the facts; and perform the task. The task can be either persuasive, such as to write a section of a brief or a letter to opposing counsel, or objective, such as to write a memo or an opinion letter – the kinds of tasks that a new lawyer might be required to do. The UBE includes two such exercises on each administration, generally one being a persuasive task and one requiring an objective writing. In addition to New York, 35 states and the District of Columbia, currently use at least one MPT item as part of the bar exam.

The MEE would be new to New York. Composed of six essay questions, the MEE covers all of the MBE subjects and the additional topics of Business Associations, Conflict of Laws, Family Law, Trusts and Estates, and UCC Article 9, the particular subjects covered varying from exam to exam. The MEE questions are shorter than the current New York essay questions but test much the same content. Both the New York essays and the MEE questions are designed to test the candidate's skills of issue identification, factual and legal analysis, and written communication, as well as knowledge of the law. Twenty-seven states and the District of Columbia currently administer the MEE.

The theory of the UBE is that once a law graduate has achieved an acceptable score on this uniform battery of tests, he or she should be able to take that score and seek admission in another UBE jurisdiction. The state importing that score could add a local component, by way of a test or course covering important state law distinctions, and would perform its own character and fitness investigation before admitting the candidate to practice. But the candidate would not face the delay, cost, uncertainty, and anxiety of sitting for another – and unnecessary – bar exam, having already demonstrated competence on the core legal knowledge and skills that are the stuff of minimum competence.

The UBE tests a candidate's knowledge of generally accepted fundamental legal principles. Sources for questions on the UBE are compendia of black letter law, such as *Restatements of the Law* for various subjects, introductions to legal topics such as are found in *American Jurisprudence 2d* and similar legal encyclopedias, casebooks, treatises, uniform laws and model codes.

Fifteen states have adopted the UBE.[3] Admittedly, they are not large states by numbers of candidates tested, and our near neighbors have not yet adopted the test, New Hampshire being the only state in the Northeast to currently occupy a place on the UBE map. However, a number of large metropolitan areas are represented by the states that are UBE jurisdictions. Other jurisdictions are watching closely, and if New York were to adopt the UBE, it is reasonable to assume that other jurisdictions will follow. New York is perceived as a leader, and for good reason.

A Comparison of the UBE and the New York Bar Examination

Table 1 compares the components of the current New York bar exam with those of the UBE and the proposed new exam. The MBE has been part of the New York bar exam since 1979, and New York has included one MPT

item as part of its bar exam since 2001. The UBE would add a second MPT item to the exam, giving twice the testing time and weight to the critically important assessment of clinical skills on the bar exam. While the MPT cannot assess all of the skills needed by a new lawyer, doubling the time devoted to practice skills testing and including two items that require different lawyering tasks will improve the measure we make of a candidate's readiness to enter the profession. The MEE would capably replace the current New York-created essay questions, and the New York multiple-choice questions would transition to a separate 50-question New York Law Examination.

As is apparent from a review of Table 2, three subjects are tested on the current New York bar exam that are not tested on the UBE. These are Administrative Law (being added to the New York bar exam in February 2015), New York Civil Practice and Procedure, and Professional Responsibility. On the UBE side, the only subject tested that is not tested on the New York bar exam is Federal Civil Procedure. The Board of Law Examiners determined to delete that topic from the content coverage of the New York bar exam because it is being added to the MBE as of February 2015. Thus, candidates will have to continue to prepare to be tested on Federal Civil Procedure, regardless whether or not the proposal is adopted.

The New York multiple choice and essay questions on the current exam are crafted by our Board of Law Examiners. They may test any of the topics listed above. Typi-

Table 1. Structure and Weighting of Current New York Bar Exam, Uniform Bar Exam, and Proposed Exam

New York Bar Exam	Uniform Bar Exam	Proposed Exam
Day 1	**Day 1**	**Day 1**
Multistate Performance Test (MPT) (1 item – 10%)	Multistate Performance Test (MPT) (2 items – 20%)	Multistate Performance Test (MPT) (2 items –20%)
NY essay questions (5 questions – 40%)	Multistate Essay Examination (MEE) (6 questions – 30%)	Multistate Essay Examination (MEE) (6 questions – 30%)
NY Multiple-Choice Questions (50 questions – 10%)		
Day 2	**Day 2**	**Day 2**
Multistate Bar Examination (MBE) (200 questions – 40%)	Multistate Bar Examination (MBE) (200 questions – 50%)	Multistate Bar Examination (MBE) (200 questions – 50%)
		New York Law Examination (NYLE) (50 multiple-choice questions. Must be passed independently. Offered with the UBE and on other dates)

Table 2. Content of Current New York Bar Exam and Uniform Bar Exam
(subjects indicated in italics are unique to that exam)

New York Bar Exam	Uniform Bar Exam
Administrative Law	–
Business Relationships	Business Associations
NY Civil Practice and Procedure	*Civil Procedure* (Federal)*
Conflict of Laws	Conflict of Laws
Constitutional Law	Constitutional Law*
Contracts and Contract Remedies	Contracts*
Criminal Law and Procedure	Criminal Law and Procedure*
Evidence	Evidence*
Matrimonial and Family Law	Family Law
Professional Responsibility	–
Real Property	Real Property*
Torts and Tort Damages	Torts*
Trusts, Wills and Estates	Trusts and Estates
UCC Articles 2 and 9	UCC Articles 2* and 9

*Subjects marked with an asterisk are tested on the MBE, as well as on the MEE. The other listed UBE subjects are tested only on the MEE.

cally, essays test major substantive areas of Contracts, Criminal Law, Family Law, Real Property, Torts and Wills and Trusts, with minor substantive areas and, at times, procedural issues or Professional Responsibility questions integrated into the essay questions.

On a given exam, about half of the multiple choice questions will be based on procedural issues and on remedies, including New York (and, prior to February 2015, Federal) Civil Procedure, Criminal Procedure, Contract Remedies, Tort Damages, Equitable Remedies and Evidence. The remaining questions focus on substantive law.

The Board relies mostly on New York authorities in writing essay questions, but quite often the analysis of the issue and answer to the question would be the same, or substantial credit would be awarded if the candidate answered in accordance with general principles. The goal of a question is frequently to test the candidate's understanding of legal concepts, such as the statute of frauds, an attempt to commit a crime, strict liability, or ademption, and an answer that does not correctly state the New York rule may nonetheless earn several of the allotted points for recognizing and stating the issue and analyzing the facts, as well as for the quality of the writing and analysis.

If the only point of a question was to test a candidate's knowledge of the law, that could be done more efficiently with a multiple choice question than with an essay. Essays permit testing of the skills of identification of the legal issue, legal analysis and reasoning, and written communication. Replacing the New York essays with the MEE will allow continued assessment of these important skills, in the context of fundamental legal principles of the type that are generally taught regardless of where one attended law school.

Proposed New York Law Examination

The subjects tested on the proposed NYLE would be largely the same as the content of the current New York essays and multiple choice questions, except that questions would focus on areas where New York law varies from the prevailing views or generally accepted fundamental legal principles or is unique. Constitutional Law would be dropped as an independent topic (although it would still be tested in the context, for example, of important New York expansive constitutional protections afforded to criminal suspects and defendants). The UCC would also be eliminated, as it is adequately covered by the UBE.

The NYLE would be heavily focused on New York Civil Practice and Procedure, given the importance of that subject to practice in our state and the unique nature of our practice statute, and on distinctive features of the New York Rules of Professional Conduct. Administrative Law would be tested on the NYLE, as that subject is not tested on the UBE. The NYLE would also sample knowledge in other content areas where New York law parts company with the prevailing views on fundamental principles that are tested on the UBE.

In addition, the Board is committed to continuing to test issues, where appropriate, in an access to justice context, as well as the particular obligations of New York attorneys with respect to service and engagement in pro bono activities.

Some concern has been raised that testing of general principles on the UBE and entrusting the assessment of a candidate's knowledge of distinctive aspects of New York law to the separate NYLE will inadequately test our state law. The focus of some criticism is the mistaken belief that the UBE tests strictly "uniform laws," and the observation is made that New York is somewhat of a contrarian when it comes to adopting proposed uniform legislation.

The MBE and MEE test generally accepted fundamental legal principles, drawn, as noted above, from an array of sources, with uniform laws being only one such source. And while New York may not have adopted in wholesale fashion the myriad uniform laws that have been drafted by the National Conference of Commissioners on Uniform State Laws, the provisions of such laws are often substantially aligned with New York law.

New York long ago accepted the idea that it was appropriate to assess the competence of law graduates by testing their knowledge of generally accepted principles, such as are tested on the UBE. Were that not the case, we would not have relied on the MBE for over 35 years as the anchor for our bar exam. But clearly there are differences. It is for that reason that the proposal under consideration includes a requirement that candidates take and pass the NYLE.

In considering what structure a separate test of New York-specific law should take, the Board was mindful of the fact that multiple choice tests provide greater reliability than essays, because more questions can be asked per unit of testing time, supplying better information about the competence of the candidates. We are cautioned by testing experts that, if content can be tested in multiple choice format, it is the preferred method of testing. In addition to enhanced reliability, multiple choice questions have the advantage of being readily graded, so as not to delay the announcement of results, and they are graded objectively, without being subject to the potential for bias and human error found in essay grading. The Board believes that the important distinctions in New York law can be tested in multiple choice format and, thus, to add an essay exam on those distinctions would only duplicate the skills assessments already adequately made by the MEE. Finally, there are administrative and cost impediments to an essay test, which are insurmountable if the NYLE is to be administered in conjunction with the UBE.

In terms of the number of questions to be included, considerations were given to when and how the test could be administered, and to the fact that this test was

designed to be an independent means to evaluate competence in New York-specific law. No test covers 100% of the coursework, and this test was not intended, on each or on any administration, to assess the full range of New York distinctions. Rather, it was intended to sample the candidate's knowledge of areas where New York law is unique and important, and specifically to include those aspects of our jurisprudence that, as a matter of public protection, a new lawyer should be expected to know.

As noted above, if the proposal is adopted, the NYLE will be an independent requirement. The proposed passing score is 30, or 60%. The addition of this test would represent a shift to an exam requiring a greater demonstration of competence in New York law than is required on the current bar exam, where the score achieved is a blend of performance on New York-specific and general principles. On the current exam, candidates who do well on the MBE and MPT could offset any deficiency in their knowledge of New York-specific law and pass the exam.

If the plan is adopted as proposed, the NYLE would be offered multiple times a year. The Board has created a detailed, annotated outline for the proposed NYLE and invites comment from all stakeholders. Comment is particularly invited as to the scope of the outline: whether New York law, in fact, varies from the prevailing view in a way that is significant and important for entry-level practice; and whether there are critical areas of practice that are not reflected in the outline.[4]

In addition, the Board is drafting and, if the proposal is adopted, plans to post a bank of questions on its website. The Board anticipates that these will be direct questions of legal principles, testing a candidate's specific knowledge of the law. Gone will be any complex fact patterns to present the issues, given that the Board is satisfied that the factual and legal analysis skills required by fact-based questions will be adequately assessed on the UBE.

Preparing for the UBE and the NYLE

Some are concerned that if New York adopts the UBE, it will disadvantage New York candidates who have learned the New York rules in their study in New York law schools. Others fear that our New York law schools will no longer teach New York law. These dual concerns touch the question of how candidates will prepare – and will be prepared by their law schools – for the new testing regimen.

New York has for many years tested on both general principles and New York distinctions with regard to the MBE subjects, which now number seven.[5] Candidates are already preparing for the New York bar exam by learning the general principles that are tested on the MBE, together with the New York rules tested on the traditional New York bar exam.

Thus, it is only with regard to the non-MBE UBE subjects that appear (along with the MBE subjects) on the MEE that testing would pivot from a New York-only perspective to general principles and New York distinctions. Those subjects are Business Associations, Conflict of Laws, Family Law, and Trusts and Estates. Additionally, UCC Article 9 would be tested on the UBE, but it would not be tested on the NYLE.

> Wherever we attended law school, and wherever we practice, lawyers across this country share a common core of fundamental legal knowledge and basic lawyering skills.

While the Board of Law Examiners has no doubt that New York law schools seek to prepare their students for practice in New York, the majority of people who sit for the New York bar exam did not earn their J.D. degrees at our New York law schools and presumably did not have the benefit of studying New York-specific law. In fact, while there are 15 law schools in New York, in 2014 graduates of 193 ABA-approved law schools sat for the New York bar exam. Out of the 15,227 candidates who sat for the bar exam in New York in 2014, 5,088 were graduates of New York law schools, 5,304 were graduates of out-of-state ABA-approved law schools, 4,813 were foreign-educated, and a handful qualified in another fashion.

The Board assumes that most, if not all, of our candidates – including those who attended law school in New York – studied from national casebooks and learned the general concepts that are tested on the UBE. Many, if not most, of our candidates learned the critical distinctions in New York law through their preparation for the bar exam. The passing rates on the bar exam for candidates who graduated from an ABA-approved law school and then sat for the New York bar exam for the first time in July are quite similar for graduates of New York law schools and for those who attended law school beyond our borders. On our July exams, from 2008–2014, the passing rates for these first-time takers who were New York law school graduates ranged from 83% to 91%; the out-of-state law school graduates passed at rates ranging from 82% to 90%.

The adoption of the UBE does not incentivize reducing the amount of New York law taught in the classroom. As it now stands, faculty teach general principles and

certain jurisdictional distinctions, including rules unique to New York. That would not change given the need to prepare for the NYLE and the alignment of New York law with UBE coverage. The Board also anticipates that many students attending New York-based law schools want to learn New York law because they believe this provides them with an edge in the employment market. Therefore, New York-based law schools would be an attractive option for these students, providing sufficient motivation to continue to teach as much New York law as schools have in the past.

Some are concerned that, if New York adopts the UBE, it will disadvantage New York candidates who have learned the New York rules in their study in New York law schools.

While graduates of New York law schools may have – and may continue to have – an advantage in demonstrating their knowledge of New York law on the NYLE and in gaining employment in New York, insofar as the UBE is concerned, it is not anticipated that the change to testing general principles (rather than strictly New York law) in the non-MBE UBE subjects, and particularly in the essay format in which they will be tested, will present a significant added burden to any candidates or disadvantage to graduates of New York law schools. Certainly, the high caliber of the faculty at our New York law schools suggests that they have broad knowledge of their subject areas and are fully capable of preparing students both for practice and for the bar exam, in whatever format it is administered.

Passing Score on the UBE

A word about the passing score on the UBE is in order. The passing score on the UBE would be the same as the passing score on the current New York bar exam, albeit on a different scale. The key is the MBE. The MBE is an equated test, meaning that, through a statistical process that involves the comparison of performance on common items embedded on different administrations of the test, a score on the MBE achieved on one administration of the test has the same meaning as a score earned at a different time. In order for our bar exam scores overall to have that same consistent measure of competence, we scale the other components of the bar exam to the MBE. On the MBE scale, New York's passing score is 133. Currently, we use a 1000-point scale. We multiply the MBE scores by five, and our passing score is five times 133, or 665 out of 1000. If we adopt the UBE, we are proposing a passing score of 266, or two times 133, as the UBE is on a 400-point scale. To emphasize, the score of 266 would have the same meaning as the current 665.

There are more than 30 jurisdictions whose passing scores, on that same MBE scale, are higher than New York's.[6] This has given rise to some concern about the portability of the scores earned on the UBE if taken in New York. A candidate can transfer a score to a jurisdiction only if the score is sufficiently high to satisfy the passing standard in the importing jurisdiction. New York's passing score is lower than that of 10 of the 15 jurisdictions that have already adopted the UBE. But two considerations bear mention.

First, New York test takers who are graduates of ABA-approved law schools typically do quite well – and earn a mean score on the MBE that is well above the passing score. Those candidates who graduated from ABA-approved law schools and took the New York bar exam for the first time in July 2014 earned an MBE mean score of 145.4, which is higher than the MBE-equivalent passing score required by any state in the country, UBE jurisdiction or not.

Should a candidate not score sufficiently high on the UBE for admission in New York, the candidate may still satisfy the passing score in another UBE jurisdiction, become admitted, and enter practice there, whereas he or she would be relegated to repeating the bar exam under the current testing regime. The candidate could qualify for federal employment (in New York or elsewhere) or could otherwise become employed and may ultimately, after five years of practice, qualify to be admitted on motion in New York, should that be the desired outcome.

Effect on Employment in New York

There are, naturally, concerns about the potential impact of new cadres of candidates who could qualify for admission in New York without taking the current New York bar exam. Of course, these candidates would be required to demonstrate their knowledge of New York law by taking and passing the NYLE, but the concern is one of the effect on job opportunities for New York lawyers.

Because of New York's central position in the global marketplace, the location here of many large law firms and many international firms, and the high regard in which our Court of Appeals is held throughout the country, New York already attracts some of the best and brightest of the law graduates in the United States.

The people who would be eligible for admission based upon their having taken the UBE in another jurisdiction would be new lawyers. They hardly represent competition to the seasoned practitioner. Moreover, New York is a traditionally "open market." New York has educational eligibility requirements that are welcoming to foreign-educated applicants. New York's ability to attract legal

talent from all corners of the country and of the world is a significant strength. It is what makes the New York bar the envy of the world. It would be ironic for New York to extend a hand to foreign-educated lawyers but close the door to new graduates of accredited American law schools who have demonstrated their competence on a robust and rigorous test. And, of course, the purpose of the bar exam is to protect the public by admitting to practice only those candidates who have acquired the quantum of knowledge of skills that equates to minimum competence.

Impact of Change on Discreet Groups

The Bar as a whole is committed to improving access to the profession and increasing the diversity of our ranks. Change of any kind breeds uncertainty and concern. Important concerns have been raised about the impact of the adoption of the UBE on subgroups of our test-takers, and particularly on racial and ethnic groups, and whether the adoption of the UBE will exacerbate existing barriers to the profession unrelated to individual competence. Such barriers include lack of sufficient financial resources, crushing educational debt, and family caretaker responsibilities. The Board shares those concerns. The short answer – and one that is understandably not fully satisfactory – is that we cannot know with 100% certainty what the impact would be. However, we have no reason to think there should be an adverse effect, and no UBE jurisdiction has reported such an effect, but the data are simply not available. And we will never fully know the answer. It is impossible to give the current New York bar exam and the UBE to the same population of candidates, so we cannot know how a given cohort's performance on one instrument would compare to that group's performance on another.

However, the UBE is sufficiently similar to the existing test to make wide swings in performance unlikely. The Board has examined what data are available and will continue to monitor performance, but there is no reason to believe that we would see outcomes that are significantly different from the results observed on the current bar exam. The uncertainty should not be an obstacle to adoption of the UBE but a caution for continuing analysis.

Conclusion

The present New York bar exam has served us well. It has produced a bar with a long and proud tradition of competent and ethical representation of trusting clients. It is not by reason of any deficiency in the structure or content of our current exam that consideration should be given to the adoption of the UBE. Rather, it is the mobile nature of our society and the ongoing dramatic transformation of legal education and our profession that compels the conclusion that the time has come in this country for a common licensing test. The UBE acknowledges our shared heritage of foundational principles, while allowing space for our unique approach to law and policy, in those areas where we choose to be different. Adoption of the UBE would also mean more testing of practice and lawyering skills, in furtherance of the current goals and trends in legal education.

Assessment of law graduates on this complementary battery of tests will assure that they have assimilated the fundamental legal knowledge and lawyering skills required for entry-level practice. Requiring candidates for admission in New York to pass the New York Law Examination, in addition to the demonstration of competence implicit in passing the UBE, will further serve the ultimate purpose of the bar exam – to protect the public. ■

1. *See* Request for Public Comment, October 6, 2014. http://www.nycourts.gov/ip/bar-exam/resources.shtml.

2. http://www.nycourts.gov/ip/bar-exam/.

3. The UBE has been adopted in Alabama, Alaska, Arizona, Colorado, Idaho, Kansas (effective April 2, 2015), Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming.

4. The Content Outline can be found at http://www.nycourts.gov/ip/bar-exam/resources.shtml.

5. Eight, including UCC Article 2.

6. *Comprehensive Guide to Bar Admission Requirements 2015*, chart 9, pp. 29–30. http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf (last visited Jan. 31, 2015).

BY DAVID P. MIRANDA

Remarks of President-elect David P. Miranda to the Advisory Committee on the Uniform Bar Examination

February 3, 2015

May it please the Court and the Committee, I'm David Miranda, President-elect of the New York State Bar Association (NYSBA). Our President Glenn Lau-Kee asked me to express his deep regret for not being here today and our gratitude on behalf of the NYSBA to Hon. Chief Judge Jonathan Lippman, Hon. Associate Judge Jenny Rivera, who chairs the Chief Judge's Study Committee, the Committee, and the entire Court of Appeals for providing us this opportunity to share the NYSBA's views regarding proposed changes to the manner in which those seeking the honor and privilege of practicing law in the great State of New York are examined and tested. We applaud Chief Judge Lippman for his leadership in raising the issue of whether our current form of testing for New York State bar admission is sufficient to test the skills and ability of law graduates to be ready to practice law in New York.

Our current test includes one full day (6 hours and 15 minutes) of New York State-specific essays and multiple choice questions and a Multistate Performance Test (MPT), which are intended to test practice readiness and fundamental lawyering skills.

We support the view, in this ever-changing world, that more than ever, newly admitted attorneys in New York need to be ready for practice, and in order to get there our old testing models need to be challenged and improved. However, the membership of NYSBA, the practicing attorneys of New York State, have very strong concerns that the Uniform Bar Examination (UBE) proposal for the New York State bar, as it is currently configured, will not lead us in the right direction, but rather is a step backward from the current New York State bar exam.

Our Association formed a Committee on Legal Education and Admission to the Bar with attorney leaders in the bar and academia to study this important issue. With me here today is Eileen Millett, Co-chair of that Committee, to briefly summarize our initial findings, submitted with our testimony to assist the Chief Judge and this Committee in its study of this important issue. Also with me is Sarah Gold, the Chair of our Young Lawyers Section, which includes law students and newly admitted attorneys who have very strong concerns that our New York State bar exam test for competency specific to New York practice, and that any changes do not diminish the prestige of a license to practice law in New York.

A license to practice law in New York is the gold standard for lawyers across our nation and around the world. And that must not change, or be tinkered with, without long and careful deliberation and not without substantial good cause shown. More often than not, the laws of New York do not follow the Uniform Laws that the UBE tests; rather New York laws are special, unique and sometimes frustrating, but the ability to understand and navigate the nuances and pitfalls of New York law is crucial to the ability to be able to practice competently in New York.

New York, with its progressive laws, courts, and judges, is a recognized leader in the legal community throughout our nation and the world.

Practicing here is special and is unique, and very different from practicing in Iowa or South Dakota. And our bar examination should be, must be, properly reflective of our uniqueness, our diversity, and our influence throughout the world.

There are no two ways about it, practicing in New York is different than any place else in the world. We are the opposite of uniform. What makes us different is also what makes us wonderful and sought after. Attorneys in other states and other countries first want to practice in their home jurisdiction, but for many a license to practice law in New York is their second most valuable asset. Just last month in Albany we had attorneys from 17 countries and 40 states seeking admission in New York. And when we're told that the UBE is better because it will increase the portability of a New York license we're concerned, because there is no outcry about barriers to entry in other states from our members; no outcry from practicing New York attorneys, no outcry from our clients or the public, and no outcry from

the courts that they wish more out-of-state attorneys could practice here. It is the attorneys in other states who will now be able to more easily flood the New York legal community and dilute the significance of a license to practice in New York. Law firms and employers in New York *want* attorneys steeped in the complicated nuances of New York practice; clients in New York, whether rich or poor, *need* their attorneys to be fully versed in New York law. Our bar examination is the gatekeeper to protect the public. The proposed configuration of the UBE takes us from a full day of New York-specific essays and practical testing to 50 multiple choice questions on New York law.

New York State must keep as much control as possible over its testing of new lawyers. Under the UBE, New York might retain some influence over this examination, but we would be losing much of the control we have over our own exam. This proposed configuration takes us in the wrong direction.

* * *

We agree that New York State should embark upon creating an exam that is greater than the current model, a bar exam that truly tests the ability to practice law in New York and keeps the New York license as the gold standard for lawyers. We submit that implementing the UBE under its proposed configuration does not lead us in that direction. We ask the Chief Judge and this committee not to be unnecessarily hasty in its decision. There needs to be more time to study the effect of this proposal. To date we have seen scant proof regarding the potential disparate impact of this new exam. It is not sufficient to say let's try it for a few years and see what happens. Without further study we may well be disenfranchising important groups of people from the privilege of practicing law in New York – and it is a privilege, a privilege that New York and not some other entity should control. Under the UBE New York would have some influence, but lose much of its control.

Finally, New York State must be diligent in providing an examination that fully tests knowledge of New York law and the skills necessary to practice in New York. The current exam does not fully get us where we need to be, but the proposed UBE does not get us there either. We must not change merely for the sake of change. We are New York State. We can do better.

And I am confident that with the leadership of Chief Judge Lippman, and the dedication of this committee, working together with the organized bar and the great law schools of this state, we will do better. On behalf of the NYSBA, I thank Chief Judge Lippman, Associate Judge Jenny Rivera and this esteemed committee for starting us on the path to a bar exam that truly and comprehensively tests the ability to practice law in New York.

The NYSBA's Committee on Legal Education and Admission to the Bar (CLEAB) published a report on the issue in October 2014. The report was approved by the House of Delegates at its November 2014 meeting. To view the report visit our website, www.nysba.org and click on Committee on Legal Education and Admission to the Bar under "Committees."

This committee's findings and concerns were discussed during the presentation by Eileen Millet, Co-chair of CLEAB, and Sarah Gold who spoke about the concerns of young lawyers. ■

BY PETER SIVIGLIA

Peter Siviglia, an attorney in Tarrytown, N.Y., is author of *Commercial Agreements: A Lawyer's Guide to Drafting and Negotiating*, West, Supplemented annually; *Writing Contracts: A Distinct Discipline*, Carolina Academic Press; and *Exercises in Commercial Transactions*, Carolina Academic Press.

Shareholder Arrangements

Voting Arrangements and Transfer of Shares

Arrangements among shareholders are typically handled, as one might expect, in a "shareholder agreement." I titled this article "Shareholder Arrangements" because I prefer to deal with these matters in the company's articles or certificate of incorporation, making them part of the company's constitution, thereby eliminating any argument that a provision is unenforceable because of a breach of another provision of the agreement.[1]

The essential concerns in shareholder arrangements are control and veto power at the shareholder (ownership) and director (management) levels and transferability of shares.

Control and Veto Power

Voting arrangements are handled easily by the use of different classes of stock, which can have identical rights in all respects other than the voting features. Each class, for example, will have the right to elect a specified number of directors, the right to replace directors elected by that class, and the right to fill vacancies in the directorships of that class.

Consistent with those arrangements, action by the board of directors can, for example, be made to require approval by a majority of each class. And likewise, at the shareholder level, action by the shareholders can be made to require approval by a majority of each class. Shareholder approval is typically required to amend the company's articles or certificate of incorporation, to merge with other companies, to sell all or substantially all of the assets of the company, and to dissolve the company.

Further, if the investor is acquiring a minority position in the company, the class of stock that the investor receives can contain terms which will confer upon that class the right to elect a majority of the board on the occurrence of certain events – such as losses for a specified number of fiscal periods, failure to achieve specified profits, and failure to pay specified dividends. Conversely, provision can be made to return control to the majority when and if specified criteria are met for a specified period.

The variations are as many as a deal may require, but, in the final analysis, any voting arrangement that can be addressed in an agreement can be treated more safely and more easily by using different classes of stock.

Transfer of Shares

Other common ingredients of privately held companies are rights of first refusal on the issuance by the company of shares or rights or options to acquire shares of the company, and on the transfer of shares by the shareholders. These rights are designed to protect the proportional interests of shareholders in the company and to protect shareholders from newcomers with whom they do not wish to do business. Be aware, though, that as a general rule, an absolute prohibition on the transfer of shares in a corporation, even if contained in the articles or certificate of incorporation, is invalid.

Rights of first refusal on the issuance by the company of shares or options to purchase shares in the company are called preemptive rights. These rights give shareholders the right to participate proportionately in the offering before anyone else can purchase the securities offered. Generally, preemptive rights must be specified in the company's articles or certificate of incorporation, but some jurisdictions may, like New York State prior to February 22, 1998, mandate preemptive rights unless excluded by the articles or certificate of incorporation.

Rights of first refusal on the transfer of shares by a shareholder generally require a shareholder, before selling any of its shares, to obtain a bona fide offer to purchase those shares. The selling shareholder must then offer the shares to both the company and to the other shareholders on the terms of that offer. If the company and none of the other shareholders accept the offer within a specified period, the selling shareholder may then sell the shares to the person who offered to buy them, but only on the terms of that bona fide offer. If the terms of that offer or any subsequent offer change, then the process must be repeated with respect to that "new" offer.

Essential characteristics of these rights of first refusal on shareholder transfers are:

1. In order to eliminate a type of payment (such as shares in

another company) or collateral of a type that the company and the other shareholders might not be able to match, the bona fide offer to purchase the shares must be all cash payable within a short, specified period without any collateral securing payment of the purchase price;

2. The company and the shareholders may exercise their options only as to all of the shares subject to the bona fide offer;
3. If the company exercises its option, its exercise trumps the other options, and the company alone will purchase the shares;
4. If the company does not exercise its option and two or more shareholders exercise their options, then those shareholders will purchase the shares in proportion to their shareholdings. Of course, if the company has more than one class of stock outstanding, then shareholders owning stock of the class to be sold should have priority of purchase over those shareholders who do not own stock of that class.

Again, as with voting arrangements, these restrictions on the issuance and transfer of shares can be handled easily and safely in the company's articles or certificate of incorporation.[2]

Exit Strategies – Particularly for Minority Investors

Before embarking on this voyage, I must sound two warnings:

1. As a general rule, a minority position in a privately held company is worth little more than the parchment on which it is written.
2. Control may not be used to benefit the controlling party. The business must be run entirely to benefit the company and to benefit the shareholders equally, without preference.

The promised land for investors in a privately held company is often a public offering, which will provide, subject to certain legal restrictions, a market for their investment. But taking a company public depends on an unpredictable future and may not be possible. Further, because of the costs involved, because of the added baggage – unrelated to the business of the company – of having to comply with the rules regulating public companies, and because of the enhanced risk of personal liability and other considerations, a public company may not be the desired result. The public arena just may not be the best environment for the company.

Nevertheless, other exit roads are available, though none is without its potholes.

Piggyback Rights

A piggyback right allows an investor to include its shares in a public offering of the company's stock. Of course, the right is useless unless the company decides to go public. From the company's point of view, the added shares and the fact that an "insider" has elected to cash in its investment could have a depressing effect on the offering.

Puts to the Company

Sometimes investors negotiate a right to sell or put their shares back to the company. Companies should be wary of granting such rights. And there is also a concealed risk to the investor. The following illustrates both risks with this very type of arrangement:

> Client: Peter, we have a problem.
>
> Peter: Yes?
>
> Client: Before you became our lawyer, we bought that Colorado company, and we gave the owners options to buy shares of our stock.
>
> Peter: OK.
>
> Client: But we also gave them simultaneous rights to sell their shares back to us.
>
> Peter: Ohhh?
>
> Client: Well, as you know, for many years our company was not doing well. But for the last few years, since we changed the business plan, the company has been profitable. Under the earnings formula the price at which they can sell back their shares is now much greater than the price they have to pay for them. So they exercised both options. The trouble is we don't have the money to spare to buy back the shares. It will cripple us.
>
> Peter: Ahhh . . . . But doesn't your company have a cumulative deficit?
>
> Client: Yes.
>
> Peter: Well, the company can only redeem its shares from surplus, so it is legally precluded from buying the shares. It can't buy them. I suggest you call Jonathan and explain the situation. We'll work out something.

A relieved but nervous client called the CEO of the subsidiary, who was one of the option holders. The CEO, in turn, called the lawyer who represented him and the other owners on the sale of their company. Following that call, the CEO called the client and said: "Peter's right, so what do we do now?"

What we did was to restructure the transaction to the mutual satisfaction of all, by issuing to the option holders, in place of their options, hypothetical shares (called "phantom stock"), in exchange for which the recipients could elect to receive payment during their employment or for up to five years thereafter with the company's having a right to make that payment over a limited period of time.[3]

Generally, *from the company's point of view*, I advise against granting these puts because of the cash flow risk to the company depicted by the illustration above. Besides, although concocting a valuation formula is a fine source of income for the lawyer, those formulas are poor predictors of actual value since no one can know what the actual factors of valuation will be some time in the future.

On the other hand, *from the point of view of an investor obtaining a put*, the investor should negotiate an alternate buyer for its shares (as, for example, a secondary put to a parent or affiliated company) against the risk of the com-

pany's being legally precluded from purchasing them.

Tagalong Rights

A tagalong right is a right or option given to one or more shareholders allowing them to participate in the sale of shares arranged by another; it is a bit like the piggyback right described above, but with some additional considerations.

The participation, of course, must be on the same terms arranged by the initiating seller: price, payment, security for any deferred payment, warranties, etc. But, like rights of first refusal, the tagalong right to participate in a sale complicates the sale for the initiating party, and it may even frustrate the sale because the initiating party and the buyer will not know to what extent, if any, tagalong-right holders will participate. To say the least, advance discussion, coordination and agreement among all three interests – seller, buyer and tagalong-right holders – are essential.

A further consideration is how to determine the number of shares a tagalong-right holder can sell. For example, if a person sells a portion of its shares and a tagalong guy does not participate in that sale, but at a later date that same person sells all of its remaining shares, should that tagalong guy have the right to sell all of its shares in the second transaction? And if a person sells all of its shares, should the tagalong guy be allowed to sell all of its shares even if the tagalong shares are more than the shares owned by the initiating seller? Considerations like these pester tagalong arrangements.

And there is one final technical note: If the transaction includes both tagalong rights and rights of first refusal as discussed above, the tagalong rights should become operative only if no right of first refusal is exercised.

Dragalong Rights

The counterpart to the tagalong right is a dragalong right. A dragalong right gives the right holder the option to require the other shareholders to participate in a sale that the right holder arranges, on the same terms that the right holder arranges.

Typically, a majority shareholder would want a dragalong right to assure itself of the ability to sell its shares to a buyer that wants to purchase the entire company and not less, or to arrange a sale of the entire business and assets of the company when the minority interests have the voting power to block the sale. In the case of a sale of the business and assets, the company would be liquidated and dissolved following the sale, and the proceeds of the sale, after payment and provision for the company's obligations, would be distributed to the shareholders.

The dragalong right also will have the effect of depriving the minority shareholders of any leverage they might have by refusing to sell.

If I were asked to give a dragalong right, I would want the dragalong contract to assure me that I would not be required to sell my shares or to vote my shares in favor of a sale of the business and assets unless the sales price for the entire company is not less than a specified amount. That amount

(A) could be a fixed sum, which could be increased yearly by a specified amount or by a compounding factor; or

(B) subject to a specified minimum price, it could be determined

  (i) by a formula such as a multiple of earnings or a multiple of EBITDA (earnings before interest, taxes, depreciation and amortization); or

  (ii) by the company's book value, valuing the assets of the company at their fair market values; or

  (iii) by an average or weighted average of two or more formulas.

Another consideration of "draggees" is the disposition of any obligations of the company to them. These obligations might include loans to the company, guarantees of company obligations, or collateral pledged to secure obligations of the company. Surely "draggees" will want those obligations discharged and any collateral returned to them at or before the sale is concluded.

Moreover, as a shareholder asked to grant a dragalong right, I would seriously consider insisting on receiving a tagalong right in exchange. Accompanying dragalong rights with tagalong rights should insulate the dragalong right-holder from any claims by the other shareholders that they were treated unfairly, especially when the dragalong right mandates a minimum value to require the shareholders to be dragged along.

Finally, as a "draggee" I would want the entire purchase price payable in cash on closing because any other arrangement – even deferred payment terms for an all cash deal – converts a seller into a hybrid, that is, into both a seller and a buyer: a seller of shares and a buyer of debt. For that very same reason, I would exclude merger transactions from the dragalong right because in a merger transaction each participant is both a seller and buyer: a seller of shares in the merging company and a buyer of shares in the company formed by the merger.

Because, to be effective, any dragalong arrangement requires the participation of all shareholders, option holders as well as the shareholders should be parties to the contract. Further, provision should be made to require future shareholders and option holders to become parties as a condition to their receiving any shares or options. And, of course, the company should also be a party.[4] ■

1. *See* Peter Siviglia, Commercial Agreements: A Lawyer's Guide to Drafting and Negotiating, Lawyers Cooperative Publishing (1993), West Group Rev. Ed. 1997. Supplemented annually.

2. Chapters 8 and 8B of *Commercial Agreements* contain sample provisions for shareholder arrangements, discussed above, in the first part of this article.

3. Chapter 6A discusses and provides an example of a "phantom stock" plan.

4. Chapter 12 contains sample provisions for piggyback, tagalong and dragalong rights, and for stock options discussed in the second part of this article.

Continued from Page 64

The newly discovered evidence must be competent evidence, "although occasionally even incompetent evidence may be allowed to do it if it tends 'dramatically' to undermine the original judgment."[22] Some judges might disagree and not consider incompetent evidence on your motion to vacate.

An additional requirement under CPLR 5015(a)(2) is that the newly discovered evidence could not have been discovered in time to move for a new trial under CPLR 4404. A motion under CPLR 4404 must be made within 15 days after the decision or verdict.[23] If you discover the evidence within 15 days of the decision or verdict, move under CPLR 4404, not CPLR 5015(a)(2). The 15-day period under CPLR 4404 is not a statute of limitations and is thus "presumably subject to discretionary extension by the court."[24] A court might treat a CPLR 5015(a)(2) motion as an excusably late CPLR 4404 motion.[25] If the evidence you discover is really late — months, or even years, after the entry of a default judgment — move under CPLR 5015(a)(2).

In your motion papers, give the court proof that the evidence was "'in existence and hidden at the time of the judgment.'"[26]

Be diligent: You must show that even after exercising due diligence, you couldn't have discovered the new evidence before the default judgment was entered.[27]

Fraud, Misrepresentation, or Other Misconduct: CPLR 5015(a)(3). If your adversary engaged in fraud, misrepresentation, or other misconduct, you may move under CPLR 5015(a)(3).[28]

Persuade the court, in your motion papers, that the adverse party's conduct "could have affected the outcome" of the case.[29]

Fraud may be extrinsic or intrinsic. Determining whether the fraud is extrinsic or intrinsic is difficult. Extrinsic fraud is "conduct which deprives a party of a full trial, or has the effect of preventing a party from fully presenting [the party's] case."[30] Intrinsic fraud is fraud that leads to "[a] judgment based on a fraudulent instrument . . . or perjured testimony, or any other item presented to and acted on by the court, whatever its fraudulent component."[31] As one scholar explains, "conduct which in effect denies a hearing is extrinsic while conduct that injects fraud into the hearing is intrinsic."[32]

If the fraud is intrinsic, you may act on it "only by direct attack, which means on direct appeal or by a motion to vacate the judgment made to the court that rendered it."[33]

If the fraud is extrinsic, you may act on it by direct attack or by collateral attack, meaning that you may bring "a separate action to enjoin its enforcement, or a refusal by some other court to recognize the judgment when its validity arises in some context before that court."[34]

If a party or a party's counsel obtained a default judgment through extrinsic fraud, you needn't show, in your motion to vacate under CPLR 5015(a)(3), that you have a meritorious defense or cause of action.[35]

CPLR 5015(a)(3) applies whether the plaintiff or the plaintiff's counsel commits the fraud, misrepresentation, or misconduct.[36]

No fraud, misrepresentation, or misconduct exists if the "proof against non-defaulting defendants at trial differs somewhat from the proof offered by way of an affidavit or verified complaint at the beginning of litigation offered in support of an order of default against the defaulting party."[37]

No statutory time limit exists if you're moving under CPLR 5015(a)(3). The court will determine only whether you brought your motion within a reasonable time. The "court determin[es] reasonableness on a sui generis basis."[38]

A court has "inherent power to vacate orders and judgments obtained by misrepresentation or fraud."[39]

Lack of Jurisdiction: CPLR 5015(a)(4). Move to vacate a default judgment under CPLR 5015(a)(4) if subject-matter or personal jurisdiction is absent.

You needn't show a meritorious defense if you're moving under CPLR 5015(a)(4).[40] A default judgment obtained without jurisdiction is a "'nullity, irrespective of the question of merit.'"[41]

If a court vacates a judgment under CPLR 5015(a)(4), it must do so without imposing terms or conditions on the vacatur.

You never waive the defense of subject-matter jurisdiction.[42]

No time limit exists if you're moving under CPLR 5015(a)(4).[43]

If the court didn't have jurisdiction when it "rendered the default judgment, the court must unconditionally grant defendant's motion to vacate."[44]

Move under CPLR 5015(a)(4) if the court didn't have personal jurisdiction over the defendant when it rendered the default judgment. Move under 5015(a)(4) to vacate the default judgment if you were never properly served with the summons and complaint.[45] Move to vacate under this ground if "the default judgment was a nullity due to insufficient proof or notice."[46] Move to vacate under this ground if the "judgment was granted for relief beyond what [plaintiff] sought in the [default] application."[47]

If a court vacates a judgment under CPLR 5015(a)(4), it must do so without imposing terms or conditions on the vacatur.[48]

You waive personal jurisdiction if you move to vacate but fail to raise the personal-jurisdiction ground under 5015(a)(4).[49] You waive personal jurisdiction if you make payments on the judgment "for a considerable time after it[] [was] rend[ered."[50]

If you believe that jurisdiction is lacking, move to vacate a default for lack of jurisdiction. At the same time,

move to dismiss the action on that basis.[51]

You may also move under alternative grounds. Move to vacate the default for lack of jurisdiction and also to dismiss the action. Alternatively, move to vacate the default and defend the action on the merits if the court finds that jurisdiction exists.[52] For more information, see "Overlap of Rules," below. Even though you needn't allege a meritorious defense if you're moving under 5015(a)(4), it's a good practice to do so if you're moving under alternative grounds.[53] "Thus, in the event the court finds jurisdiction, the court may still vacate the default and permit [you] to defend the action."[54]

The court might find that a traverse hearing is necessary to determine whether personal jurisdiction exists over the defendant.[55] The court might vacate the default judgment and schedule the case for a traverse hearing. Or, the court might hold your motion to vacate the default judgment in abeyance pending the outcome of the traverse hearing.

Reversal, Modification, or Vacatur of a Prior Judgment or Order: CPLR 5015(a)(5). Use CPLR 5015(a)(5) if a sibling state or foreign-country judgment — judgment one — has been converted into a New York judgment — judgment two — and the sibling state or foreign-country judgment has been undermined in some way, such that it was reversed, modified, or vacated.[56] In your 5015(a)(5) motion, ask that the New York judgment — judgment two — be vacated or modified.

CPLR 5015(a)(5) also applies when judgment one is a New York judgment.[57]

No time limit exists when moving under CPLR 5015(a)(5).

Vacatur on "Terms as May Be Just." CPLR 5015(a) authorizes a court to vacate a default judgment on just terms. The court may grant costs and disbursements, attorney fees, "and such other sums as would defray actual expenses to which the other side has been put."[58]

A court may condition vacatur of the judgment by having the judgment stand as security pending the outcome of the trial.[59]

A court may also require a defendant to post a bond in the amount of "all or part of the judgment."[60] A court might not require the defendant to post a bond if the default was inadvertent or if posting the bond would be burdensome.[61]

A court may not, however, impose conditions when your motion to vacate the judgment is based solely on want of prosecution, under CPLR 5015(a)(4).[62] Thus, the court may not require a defendant's appearance or require the defendant to waive a defense.

On Application to an Administrative Judge: CPLR 5015(c)

An administrative judge has the authority under CPLR 5015(c) to bring a proceeding before a judge other than the administrative judge to relieve, on such terms as may be just, a party or parties from the terms of default judgments that were

> obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities or where such default judgments were obtained in cases in which those defendants would be uniformly entitled to interpose a defense predicated upon but not limited to the foregoing defenses, and where such default judgments have been obtained in a number deemed sufficient by him to justify such action as set forth herein, and upon appropriate notice to counsel for the respective parties, or to the parties themselves.

CPLR 5015(c) is sometimes referred to as "Thompson's Law" after Justice Edward Thompson, a former New York City Civil Court administrative judge who "paved the way" for this codification.[63]

CPLR 5015(c) "allows the courts to prevent misuse of process by the unscrupulous."[64]

Restitution: CPLR 5015(d)

The court has the discretion to grant restitution.[65] Under CPLR 5015(d), you — the judgment debtor — might be entitled to restitution from the judgment creditor if you've already paid, either voluntarily or involuntarily (through an execution), in whole or in part, the judgment you're moving to vacate. You needn't bring a separate plenary action to seek restitution. Move instead under CPLR 5015(d).

The court's order "directing restitution is the equivalent of an ordinary money judgment."[66] But the court's order isn't "ordinarily enforceable through the contempt punishment" procedure.[67]

Overlap of Rules

You may move to vacate under several alternative grounds.[68] For example, you may move under both CPLR 5015(a)(1) and 5015(a)(4). Practitioners often overlap CPLR 5015(a)(3) with other grounds. Practitioners also overlap CPLR 5015(a)(2) and 5015(a)(3) because the "fraudulent conduct now uncovered . . . likely . . . qualif[ies] as 'newly-discovered evidence' as well."[69]

Raising alternative grounds helps you: "[A]sserting alternative grounds maximizes your chances of obtaining a vacatur. Keep in mind, however, that you must submit the papers required to support each ground."[70] Even if the court disagrees with one of your grounds, the court might rule for you on your alternative grounds.

Motion Papers

In the last issue, the *Legal Writer* discussed notice requirements when moving to vacate a default judgment. The *Legal Writer* explained that CPLR 5015(a) suggests that you move by order to show cause. Consult the last issue for more information.

To demonstrate a meritorious defense, provide in your moving papers an affidavit from an individual who has personal knowledge of the facts and defense(s).[71] If you submit an affidavit from someone who lacks personal knowledge, a court will likely deny your motion to vacate. An attorney's affirmation has no probative value unless the attorney personally knows about the transaction or incident.[72]

A verified answer that "does not offer much in the way of affirmative facts will not likely suffice as an affidavit of merit."[73]

You may provide a verified complaint instead of an affidavit.[74]

To prove that the default was excusable because of law-office failure, provide an attorney's affirmation "if the excuse is within counsel's personal knowledge."[75]

Consult each of the grounds under CPLR 5015(a), above, and CPLR 317, explained in the last issue, to determine what you must demonstrate in your moving papers.

To preserve all the issues in your case for trial, address in your motion papers all the issues that'll be determined at trial.[76]

Opposing a Motion to Vacate a Default Judgment

Oppose a motion to vacate a default judgment by submitting opposition papers.

Provide in your opposition papers an affidavit that refutes the facts in your adversary's moving papers.

Attach in your exhibits documentary proof that refutes the facts in your adversary's moving papers. If your adversary attacks service of the summons and complaint, attach proof of service.

Attack any procedural defect in your adversary's moving papers.[77]

In your opposition papers, point out the "factual gaps or defects" in your adversary's proof.[78]

Point out in your opposition papers whether your adversary delayed, engaged in dilatory tactics, or engaged in improper conduct when it defaulted.[79]

Discuss delays: Tell the court how long your adversary waited to move to vacate the default.[80]

Demonstrate whether you'll be prejudiced if the court were to vacate the judgment.[81] Explain what the prejudice would be.

If your adversary contests service, consider whether to consent to a traverse hearing. Explain in your opposition papers whether you consent to a traverse hearing. If you don't consent, explain how your adversary's factual showing doesn't warrant a traverse hearing.

Tell the court about the costs you incurred for having to respond to your adversary's motion to vacate.[82]

In the next issue of the *Journal*, the *Legal Writer* will discuss post-trial motions. ■

Argue in your opposition papers whether your adversary delayed, engaged in dilatory tactics, or engaged in improper conduct when it defaulted.

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, NYU, and NYLS law schools. He thanks court attorney Alexandra Standish for her research.

1. *Woodson v. Mendon Leasing*, 100 N.Y.2d 62, 68, 760 N.Y.S.2d 727, 731, 790 N.E.2d 1156, 1161 (2003).

2. David L. Ferstendig, New York Civil Litigation, § 11.10[2][b], at 11-32 (2014) (quoting *Pichardo-Garcia v. Josephine's Spa Corp.*, 91 A.D.3d 413, 414, 936 N.Y.S.2d 27, 28 (1st Dep't 2012) ("[W]e reject the claim of law office failure as 'conclusory and perfunctory.' Counsel explained that the failure to appear was due to a conflict between scheduled appearances in this action and in an unrelated action. However, he did not state that he took any steps to resolve or alleviate the conflict or that he was unaware of the conflict. Counsel's 'overbooking of cases and inability to keep track of his appearances' does not constitute a reasonable excuse for the failure to appear.")).

3. *Id.* § 11.10[2][b], at 11-38 (citing *Kouzios v. Dery*, 57 A.D.3d 949, 949, 871 N.Y.S.2d 303, 304 (2d Dep't 2008) ("[D]efendant's conclusory, undetailed, and uncorroborated claim of law office failure did not amount to a reasonable excuse."); *Staples v. Jeff Hunt Developers, Inc.*, 56 A.D.3d 459, 460, 866 N.Y.S.2d 756, 757 (2d Dep't 2008) ("Here, the plaintiff's bald and unsubstantiated claim of law office failure was insufficient to explain the five-year delay in moving for leave to enter a default judgment."); *330 Wythe Ave. Assoc., LLC v. ABR Constr., Inc.*, 55 A.D.3d 599, *2, 864 N.Y.S.2d 314, *2 (2d Dep't 2008) ("It is within the Supreme Court's discretion to accept the plaintiff's excuse of law office failure, as it was supported by a 'detailed and credible' explanation of the default."); *Piton v. Cribb*, 38 A.D.3d 741, 742, 832 N.Y.S.2d 274, 274 (2d Dep't 2007) ("[A] conclusory and unsubstantiated claim of law office failure will not rise to the level of a reasonable excuse.")).

4. *Id.* § 11.10[2][b], at 11-32.

5. *Id.* § 11.10[2][b], at 11-36 (citing *47 Thames Realty, LLC v. Robinson*, 61 A.D.3d 923, 924, 878 N.Y.S.2d 752, 753 (2d Dep't 2009) ("[T]he Supreme Court did not improvidently exercise its discretion in rejecting counsel's proferred excuse that the associate who scheduled the compliance conference had left his firm and had not told him about the compliance conference.")).

6. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 39:381, at 39-39 (2006; Dec. 2009 Supp.) (citing *Holloman v. City of New York*, 52 A.D.3d 568, 569, 861 N.Y.S.2d 356, 357 (2d Dep't 2008); *Wainwright v. Elbert Lively & Co., Inc.*, 99 A.D.2d 490, 491, 470 N.Y.S.2d 433, 435 (2d Dep't 1984)); Ferstendig, *supra* note 2, § 11.10[2][b], at 11-34 (citing *Youni Gems Corp. v. Bassco Creations Inc.*, 70 A.D.3d 454, 455, 896 N.Y.S.2d 315, 317 (1st Dep't 2010) ("'[B]are allegations of incompetence on the part of prior counsel cannot serve as the basis to set aside a [default] pursuant to CPLR 5015.'")); Ferstendig, *supra* note 2, § 11.10[2][b], at 11-35 (citing *Davidson v. Valentin*, 65 A.D.3d 1075, 1076, 886 N.Y.S.2d 425, 426 (2d Dep't 2009) (noting that law-office failure will be excused but a "'pattern of willful default and neglect should not be excused.'")).

7. Ferstendig, *supra* note 2, § 11.10[2][b], at 11-32 (citing *Pichardo-Garcia*, 91 A.D.3d at 414, 936 N.Y.S.2d at 28 ("[P]laintiff made no attempt to vacate the default until almost a year after being served with the notice of entry.")); *id.* § 11.10[2][b], at 11-34 (citing *Youni Gems Corp.*, 70 A.D.3d at 455, 896 N.Y.S.2d at 317 ("[C]ounsel was aware of the scheduled date of the inquest before he underwent surgery, and yet did not seek an adjournment prior to that date. . . . Moreover, defendants made no attempt to vacate their default until almost a year later when plaintiffs sought to enforce the judgment.")).

8. Barr et al., *supra* note 6, § 39:381, at 39-39 (citing *Quenqua v. Turtel*, 146 A.D.2d 686, 686, 536 N.Y.S.2d 1018, 1018 (2d Dep't 1989); *Curtis v. Town of Clinton*, 138 A.D.2d 445, 445, 526 N.Y.S.2d 18, 19 (3d Dep't 1988) (finding that town clerk failed to notify town officials of pending action)).

9. *Id.* (citing *Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 877, 800 N.Y.S.2d 613, 614 (2d Dep't 2005); *Hayes v. R.S. Maher & Son, Inc.*, 303 A.D.2d 1018, 1018, 746 N.Y.S.2d 811, 811–12 (4th Dep't 2003); *Parker v. I.E.S.I. N.Y. Corp.*, 279 A.D.2d 395, 395, 720 N.Y.S.2d 59, 59 (1st Dep't 2001); *contra Lemberger v. Congregation Yetev Lev D'Satmar, Inc.*, 33 A.D.3d 671, 672, 822 N.Y.S.2d 597, 599 (2d Dep't 2006) ("[A] general excuse that the default was caused by delays occasioned by the defendants' insurance carrier is insufficient.")).

10. *Id.* § 38:383, at 39-40 (citing *Lafata v. Broder*, 162 A.D.2d 250, 250, 556 N.Y.S.2d 555, 556 (1st Dep't 1990) ("Counsel for plaintiff, having affirmed the fact of her contemporaneous hospitalization and inability to work during the period of extension, has set forth a meritorious excuse for the default.")); Ferstendig, *supra* note 2, § 11.10[2][b], at 11-36 (citing *Zaidi v. New York Bldg. Constr., Ltd.*, 61 A.D.3d 747, 748, 877 N.Y.S.2d 381, 383 (2d Dep't 2009) ("The

defendants presented a reasonable excuse for their default based upon their principal's inability, due to the terminal illness and death of his wife, to retain new trial counsel after former counsel was relieved.")).

11. Barr et al., *supra* note 6, § 39:383, at 39-40 (citing *Teachers Ins. & Annuity Ass'n of Am. v. Code Beta Group, Inc.*, 204 A.D.2d 193, 193, 612 N.Y.S.2d 124, 124–25 (1st Dep't 1994) ("Defendants' attorney was aware of complications in his recovery from eye surgery more than a month before trial was set to begin on February 24, 1992, but failed to arrange for substitute counsel as the court had directed on December 16, 1991, the originally scheduled trial date that was adjourned at the request of defendants' attorney because of his then impending eye surgery. Failure to seek substitution of other counsel was not excusable given these circumstances.")).

12. *Id.* § 39:384, at 39-40.

13. *Id.* (citing *LaFata*, 162 A.D.2d at 250, 556 N.Y.S.2d at 556) (vacating default because, among other things, judgment was entered one day after date of service of responsive pleading)).

14. *Id.* (citing *First Nationwide Bank v. Calano*, 223 A.D.2d 524, 525, 636 N.Y.S.2d 122, 123 (2d Dep't 1996) ("[H]er inexcusable delay of nearly one year in seeking to vacate her default, together with the detriment to the Schiavones caused by the delay, warrants application of the doctrine of laches.")).

15. *Id.*

16. *Harcztark*, 21 A.D.3d at 877, 800 N.Y.S.2d at 614.

17. David D. Siegel, New York Practice § 428, at 753 (5th ed. 2011).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. CPLR 4405.

24. Siegel, *supra* note 17, § 428, at 754.

25. *Id.*

26. 1 Byer's Civil Motions § 23:07 at 260 (Howard G. Leventhal 2d rev. ed. 2006; 2013 Supp.) (quoting *In re Commercial Structures v. City of Syracuse*, 97 A.D.2d 965, 966, 468 N.Y.S.2d 957, 958 (4th Dep't 1983) ("Here, although the sale of the subject premises was closed more than a year and a half after trial and more than eight months after entry of judgment, the record fails to disclose any facts relating to negotiations for the sale and the time of their commencement, or of the date and content of the contract of sale. Thus, we cannot determine whether there was "in existence and hidden at the time of the judgment" evidence which may properly be viewed as newly discovered.")).

27. *Id.* (citing *Litras v. Litras*, 271 A.D.2d 578, 578, 707 N.Y.S.2d 340, 341 (2d Dep't 2000)).

28. Barr et al., *supra* note 6, § 39:390 at 39-40 (citing *Oppenheimer v. Westcott*, 47 N.Y.2d 595, 603–04, 419 N.Y.S.2d 908, 912, 393 N.E.2d 982, 986 (1979) ("[W]e hold that the default judgment against Hancock must be vacated, for the record is clear that Oppenheimer was guilty of misconduct, if not fraud, in at least two ways. . . . The withholding of that information from the court was, therefore, clearly misconduct, if not fraud, warranting vacatur of the judgment."); *In re Felix v. Herman*, 257 A.D.2d 900, 900-901, 684 N.Y.S.2d 62, 63–64 (3d Dep't 1999) (finding that petitioners failed to notify co-conservator before action was taken on behalf of conservatee); *Tonawanda Sch. Employees Fed. Credit Union v. Zack*, 242 A.D.2d 894, 894, 662 N.Y.S.2d 885, 885 (4th Dep't 1997) ("When defendant was notified that a default judgment had been entered against her, she immediately moved to vacate it. She averred that, after she was served with the summons and complaint, she telephoned plaintiff's attorney, who told her that, if she provided information concerning the whereabouts of Zack, no further action would be taken against her. She provided the requested information and, according to defendant, plaintiff's attorney told her that she could ignore the summons and complaint. Plaintiff's attorney submitted an affirmation denying defendant's allegations.")).

29. Siegel, *supra* note 17, § 429, at 754.

30. *Id.*; Byer's Civil Motions, *supra* note 26, § 23:08, at 260 (citing *Tamini v. Tamini*, 38 A.D.2d 197, 204, 328 N.Y.S.2d 477, 484 (2d Dep't 1972) ("Upon the undisputed testimony in this case the plaintiff was 'robbed' of her opportunity to make her defense in the Thai court by reason of the defendant's fraud and misrepresentation that he would discontinue the action which he had instituted against her. Therefore, since she never had an opportunity to litigate the question determined in the Thai court, the judgment there obtained against her is not a bar to this action under the theory of those cases which prevent the relitigation in other states of issues already adjudicated.")).

31. Siegel, *supra* note 17, § 429, at 754; Byer's Civil Motions, *supra* note 26, § 23:08, at 260 (citing *Carbone v. Alverio*, 89 A.D.2d 553, 554, 452 N.Y.S.2d 121, 122 (2d Dep't 1982) ("The wife's alleged misrepresentations of her financial status are 'in essence no different from any other type of perjury committed in the course of litigation,' and thus constitute intrinsic fraud.")).

32. Siegel, *supra* note 17, § 429, at 754.

33. *Id.*; Byer's Civil Motions, *supra* note 26, § 23:08 at 260 (citing *Vinokur v. Penny Lane Owners Corp.*, 269 A.D.2d 226, 226, 703 N.Y.S.2d 35, 36 (1st Dep't 2000) ("A litigant's remedy for alleged fraud in the course of a legal proceeding 'lies exclusively in that lawsuit itself, i.e., by moving pursuant to CPLR 5015 to vacate the civil judgment due to its fraudulent procurement, not a second plenary action collaterally attacking the judgment in the original action.'")).

34. Siegel, *supra* note 17, § 429, at 754.

35. Byer's Civil Motions, *supra* note 26, § 23:08 at 260-61 (citing *Shaw v. Shaw*, 97 A.D.2d 403, 403, 467 N.Y.S.2d 231, 233 (2d Dep't 1983) ("In our opinion, a movant seeking relief from a judgment under this paragraph, at least on the ground of extrinsic fraud, need not show that he has a meritorious defense or cause of action."); *Tamini*, 38 A.D.2d at 203, 328 N.Y.S.2d at 483)).

36. Barr et al., *supra* note 6, § 39:390, at 39-40.

37. *Id.* (citing *Woodson*, 100 N.Y.2d at 70, 760 N.Y.S.2d at 733, 790 N.E.2d at 1162 ("In light of our determination that plaintiff was consistent and had personal knowledge of the accident, it also follows that, as a matter of law, ATIC has failed to show that plaintiff procured the default judgment through 'fraud, misrepresentation, or other misconduct.'")).

38. Siegel, *supra* note 17, § 429, at 755.

39. Byer's Civil Motions, *supra* note 26, § 23:08, at 261 (citing *In re Kisloff v. Covington*, 73 N.Y.2d 445, 450, 541 N.Y.S.2d 737, 740, 539 N.E.2d 565, 568 (1989); *Lockett v. Juviler*, 65 N.Y.2d 182, 186, 490 N.Y.S.2d 764, 768, 480 N.E.2d 378, 381 (1985)).

40. Barr et al., *supra* note 6, § 39:403, at 39-41 (citing *Laurenzano v. Laurenzano*, 222 A.D.2d 560, 560, 635 N.Y.S.2d 668, 669 (2d Dep't 1995)).

41. Siegel, *supra* note 17, § 430, at 756 (quoting *Shaw*, 97 A.D.2d at 404, 467 N.Y.S.2d at 234).

42. Barr et al., *supra* note 6, § 39:401, at 39-41.

43. Siegel, *supra* note 17, § 430, at 755.

44. Barr et al., *supra* note 6, § 39:402, at 39-41 (citing *Shaw*, 97 A.D.2d at 404, 467 N.Y.S.2d at 233).

45. *Id.* § 39:400, at 39-41.

46. *Id.* (citing *Woodson*, 100 N.Y.2d at 67, 760 N.Y.S.2d at 731, 790 N.E.2d at 1160).

47. *Id.* (citing *McGuire v. McGuire*, 29 A.D.3d 963, 965, 816 N.Y.S.2d 158, 159 (2d Dep't 2006)).

48. Byer's Civil Motions, *supra* note 26, § 23:09, at 261 (citing *Hitchcock v. Pyramid Ctrs. of Empire State Co.*, 151 A.D.2d 837, 838, 542 N.Y.S.2d 813, 815 (3d Dep't 1989); *McMullen v. Arnone*, 79 A.D.2d 496, 499, 437 N.Y.S.2d 373, 376 (2d Dep't 1981)).

49. Barr et al., *supra* note 6, § 39:400 at 39-41 (citing *Boorman v. Deutsch*, 152 A.D.2d 48, 52, 547 N.Y.S.2d 18, 21 (1st Dep't 1989), *lv. dismissed*, 76 N.Y.2d 889, 561 N.Y.S.2d 550, 562 N.E.2d 875 (1990)).

50. Siegel, *supra* note 17, § 430, at 756 (citing *Star Credit Corp. v. Ingram*, 71 Misc. 2d 787, 788, 337 N.Y.S.2d 245, 247 (Civ. Ct. N.Y. County 1972)).

51. *Id.* § 108, at 203.

52. *Id.*

53. *Id.* § 430, at 756.

54. Ferstendig, *supra* note 2, § 11.10[2][e], at 11-45.

55. *See* Gerald Lebovits, *The Legal Writer, Drafting New York Civil-Litigation Documents: Part XVIII — Motions to Dismiss Continued*, 84 N.Y. St. B.J. 64, 64 (Sept. 2012).

56. Siegel, *supra* note 17, § 431, at 756.

57. *Id.* at 757 (citing *Feldberg v. Howard Fulton St., Inc.*, 44 Misc. 2d 218, 219–20, 253 N.Y.S.2d 291, 293 (Sup. Ct. Kings County 1964), *aff'd*, 24 A.D.2d 704, 704, 261 N.Y.S.2d 1012, 1012 (2d Dep't 1965)).

58. *Id.* § 432, at 757.

59. *Id.*

60. *Id.*

61. Barr et al., *supra* note 6, § 39:427, at 39-44.

62. Siegel, *supra* note 17, § 432, at 757.

63. *Id.* § 427, at 753 n.13.

64. Oscar Chase & Robert A. Barker, Civil Litigation in New York, § 20.03, at 798 (6th ed. 2013).

65. Byer's Civil Motions, *supra* note 26, § 23:12, at 262.

66. Siegel, *supra* note 17, § 433, at 757.

67. *Id.*

68. Barr et al., *supra* note 6, § 39:404, at 39-41.

69. Siegel, *supra* note 17, § 429, at 754–55.

70. Barr et al., *supra* note 6, § 39:404, at 39-41.

71. *Id.* § 39:421, at 39-42.

72. *Id.*

73. *Id.*

74. *Id.* at § 39:404, 39-43 (citing *Saks v. New York City Health & Hosp. Corp.*, 302 A.D.2d 213, 213, 753 N.Y.S.2d 377, 377 (1st Dep't 2003) ("The motion was properly denied on the ground that a complaint verified by counsel who does not claim personal knowledge of the facts is insufficient to support a default judgment.")); *contra Goldman v. City of New York*, 287 A.D.2d 482, 483, 731 N.Y.S.2d 212, 214 (2d Dep't 2001) ("[W]e note that we have previously accepted an answer verified by counsel as sufficient to demonstrate a meritorious defense.").

75. Barr et al., *supra* note 6, § 39:404, at 39-43.

76. *Id.*

77. *Id.* § 39:422, at 39-43.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

A classmate of mine from law school (Anna Associate) works at a firm which focuses on plaintiff's side employment litigation. Her firm filed a complaint in New York State Supreme Court on behalf of a client against her former employer only. The claims asserted were for discrimination, retaliation and wage violations. Anna told me she advised her boss that they should be bringing claims against the company's principals, but, she said, he ignored her suggestions even though the law was clear that principals should have been named in the suit.

The defendant-employer moved for summary judgment and the court dismissed the action. The statute of limitations has apparently run out on the claims which could have been asserted against the company's principals.

Anna told me that she was incensed by the conduct of her boss and felt terrible for the client. She told me that she had evidence of her boss's failure to acknowledge the well-settled law that supported her position that the individual principals should have been defendants to the lawsuit. Her plan was to reach out to the client and assist the client in a potential malpractice case against the firm. After initially contacting the client, Anna threatened to destroy the evidence of malpractice to get the client to acquiesce to the financial recovery in the malpractice claim. She negotiated a 50% contingent fee as compensation for her efforts and because her testimony would require her to leave the firm. And to make matters worse, Anna and the client had apparently engaged in a brief romantic affair which began when his case came to the firm and ended shortly after the case against his former employer was dismissed.

The client is threatening to take both Anna and her firm to the Disciplinary Committee.

What ramifications would Anna face because of her conduct as described here?

Sincerely,

Not a Fan of Vengeance

Dear Not a Fan of Vengeance:

The question raised by Anna's conduct is not whether Anna should be the subject of disciplinary action, but rather what level of punishment would be appropriate. The actions outlined in your question are very similar to the examples of attorney misconduct presented in *In re Novins*, 119 A.D.3d 37 (1st Dep't 2014) (where an attorney was suspended from practice for one year). As discussed below, Anna's behavior (and that of the attorney in *Novins*) are examples of an outright failure to maintain basic professional integrity.

You (and more importantly, Anna) should be aware of the numerous provisions of the Rules of Professional Conduct (the RPC) applicable here:

Rule 1.5(a) provides that "[a] lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive."

Rule 1.8(i) states that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client."

Rule 3.4(b) provides that "[a] lawyer shall not offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter . . ."

Rule 3.4(c) states that "[a] lawyer shall not disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling . . ."

Finally, Rule 8.4 governs attorney misconduct and states that a lawyer or law firm shall not

> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> * * *
>
> (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

So where shall we start? First, Anna's attempt to extort a 50% contingency fee from the client is a clear violation of Rules 1.5(a) (excessive fee), 1.8(i) (acquiring a proprietary interest in the client's cause of action) and 8.4(h) (conduct that adversely reflects on the lawyer's fitness as a lawyer). Although the attorney disciplined in

Continued on Page 60

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.

Novins got his client to agree to a 45% contingency fee, we would venture to guess that Anna's one-half contingency fee would probably warrant an even greater penalty than what Mr. Novins had received.

Second, Anna's attempt to serve as a witness in the potential malpractice case against her firm in exchange for the exorbitant contingency fee which she has sought would be a violation of Rule 3.4(b).

Third, by failing to tell her employer that she entered into the contingency fee arrangement with the client and attempting to charge the client for information that the client was ethically obligated to receive, Anna violated Rule 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and (h) (conduct that adversely reflects on the lawyer's fitness as a lawyer).

Fourth, Anna's threat to destroy evidence to get the client to agree to her proposed contingency fee arrangement is a violation of Rule 8.4(d) (conduct that is prejudicial to the administration of justice).

Lastly, although Rule 1.8(j)(iii), which prohibits an attorney from entering into sexual relations with a client in a domestic relations matter, is inapplicable here, in our view the romantic relationship that you describe is highly problematic and something that should be highly discouraged.

Your question does not give us much detail as to why Anna did what she did or the underlying circumstances surrounding her behavior. However, her failure to abide by some of the more basic ethical obligations of our profession suggests an exposure to a penalty similar or possibly even greater than what Mr. Novins received. So what is an appropriate penalty here? Like most legal questions, the answer depends on the underlying circumstances as well as an analysis of any mitigating and aggravating factors related to Anna's conduct. *Novins* gives us a series of cases (including *In re Larsen*, 50 A.D.3d 41 (1st Dep't 2008); *In re Caliguiri*, 50 A.D.3d 90 (1st Dep't 2008); and *In re Kiczales*, 36 A.D.3d 276 (1st Dep't 2006)), which tell us why Mr. Novins received a one-year suspension and also provide guidance for us here.

The attorney disciplined in *Larsen* received a two-and-a-half-year suspension for extensive misconduct that involved, among other things, charging the client an excessive fee and threatening fee arbitration if the client did not withdraw a letter of complaint to the court about the lawyer. *Larsen*, 50 A.D.3d at 49–50. Although the majority in *Larsen* felt that the suspension route recommended by the Disciplinary Committee was the correct sanction, former Justice James M. McGuire, writing for the dissent, noted that since the attorney in question had also improperly dipped into escrow funds on multiple occasions, then "no penalty short of disbarment [was] appropriate." *Id.* at 47. Despite the fact that Justice McGuire believed that "no extreme mitigating circumstances [were] present warranting a departure from the typical penalty of disbarment . . ." (*id.* at 53) the majority found that the attorney's "28-year legal career, which was previously unblemished by any disciplinary history, and the fact that she [was] 68 years old, suffering from a variety of ailments, and [as] the sole means of support for her divorced daughter and grandson," suspension and not disbarment was the appropriate sanction. *Id.* at 47.

In *Caliguiri*, a one-year suspension was given to an attorney who improperly used documents surreptitiously obtained after agreeing to advise an inexperienced attorney in the prosecution of a medical malpractice claim. *Caliguiri*, 50 A.D.3d at 92.

Lastly, the attorney in *Kiczales* received a five-year suspension for accepting payments from an adverse party in exchange for information about his client and for assisting in obtaining a favorable settlement. *Kiczales*, 36 A.D.3d at 281. The Disciplinary Committee recommended that Mr. Kiczales be disbarred for conduct that, in its words, constituted "a serious breach of the most fundamental duty of loyalty that governs the practice of law" and found that such misconduct "strikes at the heart of the attorney-client relationship, that is, the trust that clients place in their attorneys to pursue their legal interests. The misconduct encompasses precisely the fear clients have that their attorneys will be 'bought off' by opposing counsel, or that their attorneys will use the clients' case to surreptitiously profit from the representations." *Id.* at 280 (internal citation omitted). However, the First Department noted that Mr. Kiczales lacked any disciplinary record up and until the time of the incident in question, had admitted guilt and expressed remorse, and cooperated with the Disciplinary Committee. *Id.* at 281. The court found that due to these mitigating factors, a lengthy suspension, rather than disbarment, was appropriate.

Now turning back to Mr. Novins. In his attempt to get a lesser penalty, he argued that "his family's psychological problems and the resulting financial difficulties" were significant mitigating factors. *Novins*, 119 A.D.3d at 43. However, because it was determined that Mr. Novins' violations were "serious and were motivated by financial gain" (*id.*) as well as his failure to "fully comprehend[] and accept[] responsibility for his misconduct . . . ," the court looked past Mr. Novins' supposed mitigating factors based upon its view that they "seemed too remote in time to be either a causal or mitigating factor with respect to [his] misconduct." In addition, the court found that Mr. Novins' conduct was motivated by the fact that he wanted to retaliate against his employer for cutting his annual bonus. *Id.* at 44.

The lesson that should be learned from *Novins* and other cases is that while it may be true that mitigating and/or aggravating factors may be considered as part of the determination of an appropriate sanction, the impact of these factors is often uncertain and is decided on a case-by-case basis. Anna's behavior, in our view, crossed the line and should subject

her to suspension from practice, or perhaps worse.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Matthew R. Maron, Esq.
(maron@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

My colleagues and I always try to be civil in my dealings with adversaries and judges. However, I have found that bullying typical of what I imagine occurs with kids is occurring more and more in the legal profession. I have seen this kind of behavior not only in depositions but also in court and at settlement meetings (where clients are often present). One of my colleagues (Bullied Ben) has been on the receiving end of repeated harassment by an adversary in contentious litigation in court, in settlement meetings and in all of the depositions taken in the case. I am seeing this adversary's persistent bullying beginning to take a psychological toll on this person. It is affecting his performance in the office, and I've been told his home life is a mess.

What should I say to him to do in order to help him address this situation?

Sincerely,
Friend of Bullied Ben

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INDEX TO ADVERTISERS

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Lawsuites	61
NAM	7
USI Affinity	4
West, a Thomson Reuters Business	cover 4
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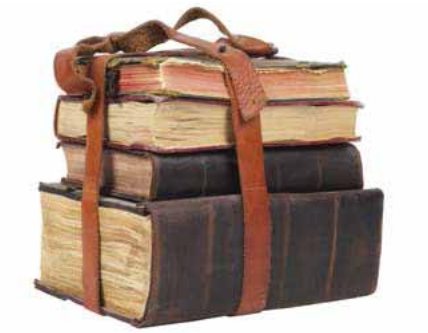

Drafting New York Civil-Litigation Documents: Part XXXIX — Motions to Vacate a Default Judgment Continued

In the last issue, the *Legal Writer* discussed motions to vacate default judgments. Specifically, the *Legal Writer* discussed when a party might default. It also discussed the overlap between CPLR 317 and 5015(a) in moving to vacate a default. The *Legal Writer* discussed the first ground under 5015(a) — excusable default — to moving to vacate a default judgment. We continue with excusable default and the remaining grounds under CPLR 5015(a).

The CPLR 5015(a) grounds are not exhaustive: "In addition to the grounds set forth in section 5015(a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice."[1]

Grounds to Vacate a Default Judgment Under CPLR 5015(a) Continued

Excusable Default: CPLR 5015(a)(1). In the last issue, the *Legal Writer* explained that a court has the discretion in vacating a default to consider a party's default for law-office failure.

If the basis of your motion to vacate is law-office failure, don't be "conclusory and perfunctory" in your motion papers.[2] Explain in detail how your law-office failure led to the default.[3]

A court won't be persuaded by your law-office excuse if you allege that you overbooked court cases or didn't keep track of your court appearances.[4] Also, a court won't be persuaded if you allege only that an associate left your firm and didn't tell you about the adjourned date of your case.[5]

If counsel's law-office failure "was, in fact, a dilatory tactic as part of a pattern of willful default and neglect . . . the default is not excusable under CPLR 5015(a)(1)."[6] A court will likely deny your motion if you've waited too long to move to vacate after you knew about your default and did nothing about it.[7]

A court might find an excusable default "if the default was inadvertently due to clerical errors made by the court or defendant."[8]

Courts have found that an insurance carrier's office failure may be "akin to 'law office failure' and may constitute an excusable default to support the vacatur of a default judgment."[9]

A party's or a party's attorney's disability or hospitalization might be a valid excuse to vacate a default.[10] But the party or attorney must have had "insufficient warning of the disability's onset."[11]

A court will consider the length of the defaulting party's delay. The court measures the length of the delay between (1) the defendant's default (the act that constitutes the default) and the entry of the default judgment and (2) the entry of judgment and the defendant's motion to vacate the default judgment.[12] If the plaintiff enters judgment quickly[13] or if the defendant moves quickly to vacate the default,[14] a court will consider that in vacating the default.[15]

In determining whether a reasonable excuse for the default exists, a court will consider several factors, "including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits."[16]

Newly Discovered Evidence: CPLR 5015(a)(2). You may move to vacate a default judgment under 5015(a)(2) if you have "newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404."

> A court may vacate a default judgment in the interests of substantial justice.

The key word, according to one scholar, is "probably."[17] You must persuade the court that the new evidence would probably change the result; "[a] mere showing of possibility is insufficient."[18] Also insufficient is "a showing that the new evidence is merely cumulative, or relevant only to a witness's credibility."[19]

You may move under CPLR 5015(a)(2) if a key witness to the event who appears post-judgment was "unknown of or unlocatable earlier in spite of [your] diligent effort."[20]

No time limit arises if you're moving under CPLR 5015(a)(2): "The law implies a reasonable time, and what is reasonable is determined sui generis."[21]

Continued on Page 52

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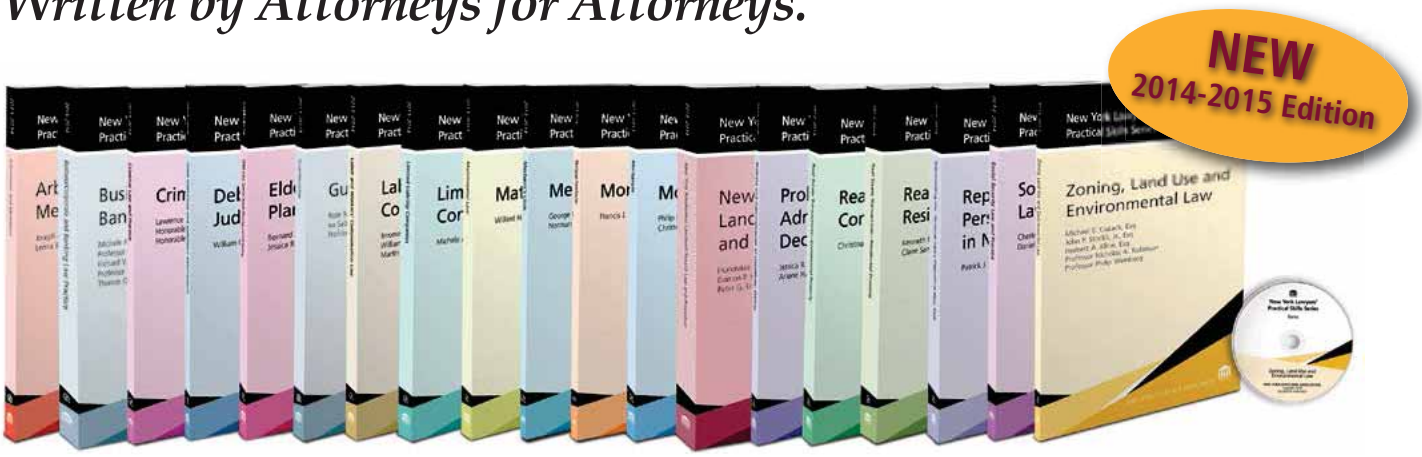

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