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THE NEW FEDERALISM

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COVER PHOTOS: Clockwise from lower left: Alexander Hamilton, John Jay and James Madison, authors of The Federalist Papers. Photos courtesy of The Federalist Papers Online.

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Of Note

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THE ASSOCIATION SUBMITTED A BRIEF TO THE NEW YORK STATE Supreme Court, Appellate Division, First Department, in *Lang* v. *Pataki*. Prepared by the Project on the Homeless, the brief argued that sections of the Rent Regulation and Reform Act of 1997 (RRRA), which eliminated many of the essential powers judges exercised in handling landlord-tenant matters, dramatically and improperly change and limit the role of an independent judiciary in violation of the separation of powers doctrine.

Prior to the RRRA, judges had the power to control their calendars, to examine the merits of a request to adjourn a case, to decide if and when a trial should be commenced, to evaluate the merits of a case before entering judgment for the petitioner, and to enter stays of the issuance of a warrant of eviction. Provisions of the RRRA dramatically change this judicial role and divest judges of their ability to perform these judicial functions in cases.

In *Lang* v. *Pataki* the lower court determined that the RRRA did not violate the separation of powers between the legislature and the judiciary. The brief argues that the decision was incorrect, that the judiciary is an independent branch of the government and the legislature does not have the authority to strip courts of all those discretionary powers they have exercised since their inception. The challenged section of the RRRA significantly interferes with a judge's power to sign orders to show cause, modify decisions, stay executions of warrants of eviction, adjourn cases, control their own calendars and exercise discretion in rendering judgment.

The effect of the challenged sections of the RRRA is improper judgments for petitioners, thereby exposing many of New York City's poorest to the threat of homelessness. The resulting eviction of respondents puts stress on the New York City's emergency shelter system. Restoring a judge's ability to perform judicial functions will help ensure that poor tenants do not lose their housing improperly, prematurely or needlessly.

❊

THE KATHRYN A. MCDONALD AWARDS FOR EXCELLENCE IN SERVICE to Family Court were awarded at the Association on October 25, 1999.

The award is named after Hon. Kathryn A. McDonald, a distinguished Legal Aid Society lawyer and Family Court Judge, who retired in 1995 as Administrator of the New York City Family Court.

This year's recipients are: Patricia E. Henry, Counsel to the Administrative Judge of the Criminal Court of the City of New York and Chair of the Domestic Violence Committee of the NYC Family Court Advisory Council; and Samuel I. Ackerman, member of the 18-B Panel and Chair of the Family Court Advisory Committee for the Supreme Court, Appellate Division, First Department. Judith S. Kaye, Chief Judge of the New York Court of Appeals, and Joseph M. Launa, Administrative Judge of the New York City Family Court, spoke at the ceremony.

"People who have dedicated their careers to working in the family court are often criticized, but rarely thanked," said Anne Reiniger, Chair of the Committee on Family Court and Family Law, which sponsored the event. "The purpose of this award is to acknowledge lawyers who make significant contributions to perhaps the most difficult and demanding court in our judicial system and to the children and families who come before it. Ms. Henry and Mr. Ackerman personify the excellence in Family Court that the Association has encouraged and supported for years."

❊

ALSO ON OCTOBER 25, THE ASSOCIATION HOSTED ITS ANNUAL RECEPTION for Legal Advisors of United Nations member states. The reception, sponsored by the Council on International Affairs (James H. Carter, Jr., Chair), provides an opportunity for members of the United Nations legal community to meet legal advisors and members of the New York legal community.

❊

A RECEPTION CELEBRATING VOLUNTEERISM IN HOUSING COURT WAS held at the Association on September 28, 1999. The reception honored the hundreds of attorneys and tenant advocates who have volunteered their time to help unrepresented litigants in New York City's Housing Courts. Certificates of Appreciation were handed out to more than 200 volunteers. Speakers addressing the volunteers included Chief Judge Judith S. Kaye; Fern Fisher-Brandveen, Administrative Judge of the New York City Civil Court; and Association President Michael A. Cooper.

Recent Committee Reports

Art Law
Amicus Brief: *People v. The Museum of Modern Art*

Drugs and the Law
Letter to Speaker Silver and Senator Bruno Regarding Greater Discretion of State Courts in Sentencing of Drug Offenders

Federal Courts
Revisiting the Codification of Privileges under the Federal Rules of Evidence

Amending the Federal Rules of Evidence to Accommodate Technological Changes and "Computerized" Evidence

Futures Regulation
Performance Data and Disclosure for Commodity Trading Advisors

Government Ethics
Lobbying Reform Legislation

Housing Court
A Tenant's Guide to Housing Court

Letter Regarding Part X of the Housing Court

International Affairs
Letter to President Clinton Regarding East Timor

International Law
Letter to National Security Council Re: Interagency Review of U.S. Policy in Respect of the International Criminal Court

Judicial Administration
Report on the Attendance of Third Parties at Depositions

Labor and Employment Law
Letter to the Editor Regarding Workfare Participants' Coverage under Anti-Discrimination Laws

Legal Issues Pertaining to Animals
Docket No. 98-121-1, Draft Policy re: Environmental Enhancement for Non-Human Primates

New York City Affairs
Report on Ballot Proposals of the 1999 New York City Charter Revision Commission

Project on the Homeless
Amicus Brief: *Lang v. Pataki*

Trusts, Estates & Surrogates' Courts
Report on an Act to Amend the Judiciary Law, in Relation to Mechanical Recording of Court Proceedings

Copies of any of the above reports are available to members by calling (212) 382-6658, or by e-mail, at skumara@abcny.org.

Remarks

Annual Meeting of the Association

The following remarks were presented by Hon. Albert M. Rosenblatt, Judge of the New York Court of Appeals, at the Annual Meeting of the Association, held on May 18, 1999.

Albert M. Rosenblatt

I understand that I am becoming a part of a tradition in which the newest member of the Court of Appeals is invited to speak at the Annual Meeting. I assure you that I am very happy to fulfill the assignment. Your president—my friend and classmate, Mike Cooper—asked me if I might impart an observation or two about the Court.

It should come as no surprise to you that the Court is extremely collegial and hard-working. It is led by our Chief Judge, Judith Kaye, who is the embodiment of talent and decency. She is a marvelous and extraordinary Chief Judge.

I will share with you one revelation about how a newcomer feels on the Court. Some years ago, when I argued appeals there, I would occasionally see one judge whispering to another just as they were filing in before being seated. What could they be whispering about? I wondered. Perhaps: "The third footnote in the opening case raises an interesting

question regarding liability of corporate directors," or "Watch out for the collateral estoppel argument on the appellant's side." On my very first day on the Court, I took my place at the end of the line of seven, and just as we were filing in, one of my colleagues whispered in my ear, "Be sure to close the door behind you; you're the last one in."

In addition to the excellent health of the Court of Appeals, I can assure you that the court system is preparing for Y2K. As some of you know, this can be done by reprogramming all the computers or by simply turning them back to 1972 (a year in which, I am told, all of the days fall as they do in 2000). I've opted for the 1972 way. I'd be 36 again; not bad. (And think of the fun we would have dealing with statutes of limitations!)

I sometimes contemplate the array of judges who sat on the Court and the many lawyers who have practiced law over the same 150 or so years—or even since the formation of this republic—and I have asked myself: How do we measure ourselves as a profession? As we approach the millennium, it seems an apt time to ask it again. Our profession, the law, is among the most elusive to gauge. Take, for example, the people in the typewriter business or the automobile industry, or even the medical profession. Most people would affirm that a word processor is better and faster that the quaint click of a manual typewriter. Years ago that clicking sound brought mixed feelings to lawyers; a good feeling, knowing that the writing was taking a permanent form, coupled with a sense of fear that the writing *was* taking a permanent form and you had better get it right the first time, or you would have to ask the secretary to do it all over again with the carbon papers attached. No office was without white-out.

Today we simply write in the changes, time after time (so that what you're hearing is the ninth draft of this talk). And as for today's automobiles, are they not vastly improved over the early model T's or the horses and buggies of 1870 (the year this Association was founded)? It might be fun to take a horse and buggy ride through Central Park, but let's face it: it's just not up to a ride in a new 911-C4 Porsche convertible.

The sciences are easily amenable to measurement. The Hubble telescope is undeniably better than the ones in 1870. We can capture a bullet in midair with a camera a lot easier than we could in 1870. Strawberries are bred bigger and bigger. As for medicine, our counterpart in many ways, we have learned that penicillin is usually better than the leeches of bygone years. And we have often said that if a friend had such-and-such a condition 30 years ago he or she would be gone, but is now living a healthy life.

I don't mean to suggest that 1870 was a bad year or that the only good thing that happened in 1870 was the creation of this City Bar Association. Great things were born in 1870: the Paris Opera House, Wellesley College, and the first American kindergarten, not to mention the first use of celluloid for the manufacture of billiard balls and shirt collars. But the advances in pencil sharpeners, flush toilets, tennis racquet sweet spots, storm windows, ski boots, and computers are just "things." We don't measure the law in terms of "things." In this sense we're more like the clergy, or teachers, where the yardstick is not plainly visible and results are open to debate.

But there are some measuring rods as to the state of the law and those who administer it. I have two. The first relates to the formation of this very Bar Association. A lawyer who was active in that pursuit had this to say in 1868 (as quoted in George W. Martin's history of the Association), not long before the Association was formed, and surely as one of the reasons for its existence:

> "BENCH AND BAR . . . settle deeper in the mud every year and every month. They must be near the bottom now." As a New York lawyer he was [describing] the scandals in the [Courts of New York]. . . . He [later] added: "To be a citizen of New York is a disgrace. A domicile on Manhattan Island is a thing to be confessed with apologies and humiliation." And, as many of his fellow citizens were beginning to believe, "The New Yorker belongs to a community worse governed by lower and baser blackguard scum than any city in Western Christendom, or in the world."

He was referring, among other things, to a state of affairs involving some of the most prominent members of the New York City Bar in the ruthless power struggles associated with the control of the New York Central Railroad and the Erie Railroad. Reportedly, bribery and dishonesty were the order of the day, and the Bar was depicted as but one manifestation in a sea of dishonesty involving police, lawyers, prosecutors, and judges. The historian also described the actions of legislators who openly held themselves out as accepting between $3,000 to $5,000 a vote to pass laws that would favor one railroad or the other. This corruption was seen as so much a part of City life that it was not until we passed into another era that Thomas Dewey helped to create a better environment—in which incidents of corruption now leave us not with a feeling of numbness, but of anger and resolve, and absolute intolerance.

Frankly, I was surprised and a bit saddened to learn of how bad things were when this Association was founded. I read of it in Martin's history, and on reflection, I realized that this is simply another case of the good old days not being all that good. I can say with little doubt that our ideas about wrongdoing, and the level of our tolerance for wrongdoing, have been changed, and much for the better. That is not to say that we are wanting for problems of a different sort or that we are entirely free of corruption. But I cannot believe that we will review the end of the 20th century as a time in which we looked the other way at bribery and dishonesty in the legal system. We are not so deluded as to think it is all gone, but when we hear of it we become incensed, and we don't stand still for it. And that is because the great majority of lawyers and judges are people of high ethical standards.

Which brings me to my other illustration, which *is* quite measurable. Not only was the profession in 1870 a part of what was described as a system of pervasive corruption, but it was exclusionary at that. As I look out at the profession today, I do not see the profiles that were described in 1870. I see, instead, men and women of every stripe, who conduct their professional duties under standards far more rigorous and exacting than their predecessors. Your very presence here, and your diverse make-up, is a testament to what the law has accomplished over the last 130 years. The development and enhancement of the Bar would not have happened without the energies and commitment of lawyers. Lawyers in the beginning, lawyers in the middle, and lawyers in the end. It is one thing to dream a dream or even pass a law, but reality is putting good things into practice. And this has been the role of 20th century lawyers, for which the profession is not enough credited, amid the woeful accounts of an unrepresentative few.

I see an Association now with members who serve on committees from corporate law to public service, to domestic violence, consumer issues, international trade, environmental concerns, criminal justice, social welfare, pro bono services, and dozens of other civic-minded concerns; in short, legal pursuits that are designed to improve the law and the delivery of legal services that affect every facet of the lives of New Yorkers and beyond. From its documented beginnings, this is what the Bar has become. To me it is the bitterest of ironies that the public is not treated to these functions and does not see the Bar Association meetings attended ultimately by hundreds and even thousands of lawyers, who serve the Bar and the public with dedication to high-minded causes. Instead, the public is fed a dreary diet of lawyer jokes on late night TV and exposed almost

exclusively to the sensational, which probably constitutes an infinitesimal fraction of what most lawyers really do. The public is given little or no clue as to the constructive role that lawyers play in sorting out rights and responsibilities in a society that has grown so complex that it has fallen to the lawyers to pick up the tasks that had traditionally been the province of others—only then to be blamed for the social and cultural conditions themselves.

Just look around the next time you go out. There is construction going on down the street. A building does not happen by accident. There are countless contracts that lawyers draft so that the process goes smoothly. The construction is governed by insurance clauses, drafted by lawyers, so that the rights and obligations are established without conflict—as they are 99% of the time. There are the trade unions with collective bargaining provisions crafted and administered by lawyers, so that the job goes off without a hitch, as it usually does. The buildings are occupied by leaseholds, negotiated and written by lawyers, so that responsibilities are established without disputes. For every lease in New York that results in litigation there are thousands that create established working relationships that make this city breathe. The regulations and zoning requirements are met, in the public interest, by lawyers, who see to it that there is compliance. You enter your car and turn on the radio and you hear, not a cacophony, but one station at a time, because regulations were drawn by lawyers. You listen to a musical piece that is presented under copyright law, so that the artists' rights are protected, and they are protected, of course, by lawyers. You stop at the bank or draw a check and the process is simple and efficient because everyone proceeds under the UCC, which is tended by lawyers. For every financial transaction that goes awry, there are millions that are carried out with ease, because lawyers have helped make it so. How dismaying it is that even a responsible newspaper can, with one broad sweep, besmirch an entire profession as evil, characterized by vulgar tactics in barely a handful of sensational cases.

Your president, Michael Cooper, has presented a yearly report with goals and achievements that would make any citizen proud of the Association's dedication to the public interest. I am hopeful that when thoughtful analysis replaces what we too often see, the public will come to realize that the law and the profession should not glibly be made scapegoats for the many ills that confront a complex society. Lawyers are the agents of the rule of law. Without it we would have not order, but chaos and violence. I'll take the lawyers, anytime.

The New Federalism

The Committee on Federal Legislation

I. INTRODUCTION

Since the 1994-95 Supreme Court Term, the Court has held twenty separate federal laws unconstitutional. This rate is unprecedented in our history. The Supreme Court has nullified a total of 150 acts of Congress on constitutional grounds since *Marbury v. Madison*, 1 Cranch 137 (1803), an average of slightly less than one act per year. The recent trend of striking down an average of four statutes each year is exceptional and deserves the attention of the legal profession and other branches of government.

In annulling these federal laws, the Court has applied new standards for examining legislation passed by Congress. While it is not unusual for the Court to hold that a particular law violates the First Amendment or the equal protection or separation of powers doctrines, it was previously quite rare for the Court to hold that Congress exceeded its powers under the Commerce Clause, as the Court did in *United States v. Lopez*, 514 U.S. 549 (1995). Indeed, before *Lopez*, the Court had not struck down a federal law on that basis since 1936. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

In the Term after *Lopez*, 1995-96, the Court held in *Seminole Tribe of*

Florida v. Florida, 517 U.S. 44 (1996) that the Commerce Clause did not give Congress the power to override the State's Eleventh Amendment immunity. Congress, the Court said, could only overcome the Eleventh Amendment immunity of the States by exercising its power under the Fourteenth Amendment and only by expressing an unequivocal intent to do so.

More recently, the Court greatly expanded the Tenth Amendment in *Printz v. United States*, 117 S.Ct. 2365 (1997). In *Printz*, the Court struck down provisions of the Brady Handgun Violence Prevention Act that required state law enforcement officials to perform background checks on handgun purchasers for an interim period before a federal computer system could be established. The Court held that the federal government may not enlist state officials to carry out federal policies. *Printz* calls into question many federal laws that impose minimum burdens on state officials to supply information to, or cooperate with, the federal government.

After *Printz*, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that Congress could not, by exercising its powers under Section 5 of the 14th Amendment, expand individual rights beyond the limits established by the Supreme Court in interpreting that Amendment. That decision goes against a long line of decisions by the Court that had interpreted Section 5 as the equivalent of the "necessary and proper clause" in Article 1, Section 8. See *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966): "By including Section 5, the draftsman sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause."

In its most recent Term, 1998-99, the Court expanded the federalist rulings noted above still further. In *Alden v. Maine*, 119 S.Ct. 2240 (1999) (June 23, 1999), the Court held that those provisions of the Fair Labor Standards Act that expanded the protection of that law to state employees, 29 U.S.C. §216(b), and that required the States to pay overtime to their employees, could not be enforced in either state or federal court. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219 (1999) (June 23, 1999), the Court struck down the Trademark Remedy Clarification Act, 15 U.S.C. §1122, which extended the protections of the federal Lanham Act to the States, holding that the Eleventh Amendment prohibited any such suit in federal court. And in the companion case of *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S.Ct. 2199 (1999) (June 23, 1999) the Court came to a similar conclusion which respect to the Patent Remedy Act, 35 U.S.C. §271(h) and 296(a), which made the States amenable to suits for patent infringement in federal court.

These decisions have created considerable concern that the Court has imposed impractical and inappropriate limitations on the power of Congress to legislate in the national interest. The theme of all of the decisions is a new view of federalism in which the power of the federal government vis-a-vis the States is constitutionally limited to a degree unprecedented in modern times. The Court explained the principle in *Printz*:

> It is incontestible that the Constitution established a system of "dual sovereignty." . . . Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text, ... Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

117 S.Ct. at 2376-77.

The lower federal courts have recognized this trend, and some have stretched and expanded the concept of states' rights to an unprecedented degree. The discussion in some recent cases is reminiscent of the early debates between the Federalists and Anti-Federalists over ratification of the Constitution. The Fourth Circuit began its recent opinion invalidating the Violence against Women Act—a law protecting women from violence, sponsored in part by Senators Hatch and Dole and passed by large majorities in both Houses of Congress in 1994—with the following exhortation:

> We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves. Thus, though the authority conferred upon the federal government be broad, it is an authority constrained by no less a power than that of the People themselves. "[T]hat these limits may not be mistaken, or forgotten, the constitution is written." Marbury v. Madison, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). These simple truths of power bestowed and power withheld under the Constitution have never been

> more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient.

Brzonkala v. Virginia, 169 F.3d 820, 825-26 (4th Cir. 1999)(en banc).

Simlarly, lower federal courts have applied the new federalism to strike down numerous federal statutes, whose validity had never been questioned before. Besides the Violence Against Women Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Drivers Privacy Protection Act were held invalid as applied to the States. Justice Stevens, in his dissent in ***Florida Prepaid***, identified a number of other laws that were vulnerable, based on the reasoning in that case—including the Family and Medical Leave Act and the Individuals with Disabilities Education Act. ***See*** 119 S.Ct.—fn 18. (Stevens, J. dissenting).

The Committee on Federal Legislation is greatly concerned that the New Federalism developed by the Supreme Court and expanded by the lower federal courts is both inappropriate and dangerous.

First, the formalistic rules established by the Supreme Court are anti-majoritarian in the extreme. The decisions discussed in detail below make it more difficult for the national Congress—surely expressing the desires and wishes of "We the People"—to address problems of national dimension on a national basis. The New Federalism decisions focus primarily on those provisions of the Constitution intended to preserve the theoretical separation of the States in the constitutional scheme and protect them from encroachment by the central federal government. These concerns had some force at the founding of the republic, when a strong central government was viewed as a danger to liberty. We believe that the Court's resurrection of these doctrines at the threshold of the 21st Century is anachronistic at best.

Second, the States do not need the assistance of the United States Supreme Court to protect their independence. The Court's fear that the States' separateness will be overwhelmed or undermined by federal legislation and that they will become mere provinces in the European model subject to direct central control is unrealistic in the extreme. The Constitution affords the states ample power to protect their separateness in a number of ways: the Senate consists of two senators from each state regardless of population. The Electoral College guarantees that any candidate for President must deal with the political power of each State separately. The States establish both the qualifications of voters and the electoral lines of legislative districts for the House of Representatives. We dis-

agree with the view that the States need further protection from the United States Supreme Court, applying the vague phrases of the Tenth Amendment or some general idea of proper "structure" between the states and the federal government.

We believe that it is very undesirable to impose dramatic new restrictions on Congress' power to legislate in the national interest. The New Federalism adds to the already difficult process of marshalling political and legislative support for initiatives that must occur on a national level. We reject the notion that Congress, which represents the concerns of the entire nation, cannot ask for State cooperation on national policies, such as protecting the environment, and cannot make the States amenable to protective or anti-discriminatory legislation in dealing with its own employees. We are not dealing with theoretical problems of an Eighteenth Century rural society where the greatest danger to freedom seemed to be a national government with a standing army. We should not interpret the Constitution as if that were the chief threat facing our government today.

This report will examine each of the relevant recent Supreme Court decisions and suggest ways in which Congress, in passing future legislation, may satisfy the Supreme Court's concerns about federalism. We believe that Congress should make its purpose clear in passing protective federal legislation affecting state employees or requesting state aid in carrying out federal policies. In addition, in exercising its power of the purse, it may condition the grant of federal funds to the States upon their compliance with federal policies designed to resolve national problems on a national basis.

II. COMMERCE CLAUSE POWERS AFTER LOPEZ

Lopez appeared, initially, to impose the most severe restrictions on Congress. In practice, however, the lower federal courts have generally not expanded the ruling, which appears to present serious challenges to few federal laws, with one notable exception from the Fourth Circuit. Congress itself easily corrected the defect the Court identified in *Lopez*. The Court gave Congress considerable leeway in relying on the Commerce Clause, and the case no longer seems a serious barrier to legislation.

A. The holding in Lopez

The Supreme Court in *Lopez* invalidated the Gun-Free School Zones Act of 1990, which forbids "any individual knowingly to possess a fire-

arm at a place that [he] knows ... is a school zone," 18 U.S.C. § 922(q)(2)(A). The Court held in a five-to-four decision that the law was explicitly based upon Congress' power under the Commerce Clause. The Court returned to what it called "first principles" of our Constitutional scheme, under which the police power of the States was virtually unlimited (unless specifically prohibited by some Constitutional limitation) while the powers of the federal government "are few and defined."

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist* No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." . . . .

Although the Court acknowledged that its modern precedents had significantly expanded Congress' power under the Commerce Clause to permit it to deal with national problems, there remained limitations on that power:

> But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S., at 37, 57S.Ct., at 624.

514 U.S. at 556-57.

To support a Congressional enactment under the clause, one of three conditions had to be met. The Court explained:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or

> persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce. 514 U.S. at 558-59.

Congress has broad power to regulate the "channels of interstate commerce," (*e.g.*, railroads, wire communications, the mail) and to "protect the instrumentalities of interstate commerce, or persons or things in interstate commerce," *e.g.*, guns or drugs that have moved in interstate commerce. But with respect to the last category, where an interstate facility is not involved and no "person or thing" has moved in interstate commerce, three requirements must be met: (1) the activity that is regulated must involve or affect commerce in the strictest sense, that is, "economic enterprise" or activity; (2) the activity regulated by the federal law must "substantially affect" interstate commerce; (3) the Court will not simply accept Congress' say-so that the required effect exists.

> We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. . . . But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

514 U.S. at 562-63.

The Court rejected the government's argument that crime has an affect on interstate commerce and that guns in school zones will ultimately impact on the nation's economic activities, noting:

> Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate. 514 U.S. at 564.

The Court thereby redefined federalism, finding the general power to legislate for the public good should remain in the hands of the States, and

that the Commerce Clause does not empower Congress to legislate in every area of national life.

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, . . . and that there never will be a distinction between what is truly national and what is truly local. . . . This we are unwilling to do.

514 U.S. at 567-68.

B. Lower Court interpretation of Lopez

The decision in *Lopez* precipitated challenges against dozens of federal laws. The constitutionality of the Violence against Women Act (VAWA) (42 U.S.C. § 13981 et seq.) under *Lopez* has been debated in many cases, see, e.g., *United States v. Page*, 136 F.3d 481 (6th Cir. 1998) and *United States v. Gluzman*, 154 F.3d 49 (2d Cir. 1998). The Fourth Circuit, however, is the only circuit to apply the reasoning of *Lopez* to invalidate the VAWA. See *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999)(en banc)(holding that criminal violence based on gender did not involve commercial activity and that ultimate impact of violence against women on the movement of goods and services across state lines did not create sufficient interstate nexus under *Lopez*). The validity of the Child Support Recovery Act (18 U.S.C. §228) was upheld in *United States v. Williams*, 121 F.3d 615 (11th Cir. 1997) and *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996).

Federal courts have also had to deal with *Lopez* challenges to the Hobbs Act (18 U.S.C. §1951), see *United States v. Guerra*, 164 F.3d 1358 (11th Cir. 1999); the Freedom of Access to Clinics Act (FACE), see *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997) and *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998); the federal drug trafficking statute (21 U.S.C. §841(a)(1)), see *United States v. Patterson*, 140 F.3d 767 (8th Cir. 1998); the federal child pornography statute (18 U.S.C. §2252), see *United States v. Bausch*, 140 F.3d 739 (8th Cir. 1998) and *United States v. Robinson*, 137 F.3d 652 (1st Cir. 1998);

the federal arson statute (18 U.S.C. §844(i)), see *United States v. Tocco*, 135 F.3d 116 (2d Cir. 1998); the firearm possession law, (18 U.S.C. §922(g)(1)), see *United States v. Crawford*, 130 F.3d 1321 (8th Cir. 1997); the domestic violence gun possession law, (18 U.S.C. §922(g)(8)), see *United States v. Cunningham*, 161 F.3d 1343 (11th Cir. 1998); contraband cigarette trafficking law, (18 U.S.C. §2341-46), see *United States v. Abdullah*, 162 F.3d 897 (6th Cir. 1998); the federal carjacking law (18 U.S.C. § 2119) and sentencing factors under the law, see *United States v. Rivera-Figueroa*, 149 F.3d 1 (1st Cir. 1998); *United States v. Cobb*, 144 F.3d 319 (4th Cir. 1998) and *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995), *appeal after remand*, 116 F.3d 1487 (9th Cir. 1997).

The lower courts have had no difficulty in concluding that even without a specifically articulated interstate nexus, laws against arson, the possession of a machine gun, devices of mass destruction or possession of explosives has a "substantial effect" on interstate commerce. See generally *United States v. Latouf*, 132 F.3d 320 (6th Cir. 1997)(arson statute), *United States v. Franklyn*, 157 F.3d 90 (2d Cir. 1998)(machine gun possession), *United States v. Viscome*, 144 F.3d 1365 (11th Cir. 1998)(possession of weapons of mass destruction), and *United States v. Dascenzo*, 152 F.3d 1300 (11th Cir. 1998)(possession of explosives).

Rarely has a lower federal court upheld a challenge under *Lopez* to a federal law. However, the Fourth Circuit held that regulations issued under the Clean Water Act, which extended federal legal protection to certain wetlands, exceeded Congressional power under the Commerce Clause, see *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). It has also recently held that the VAWA was unconstitutional since there was no showing that violence against women had a substantial effect on commercial activity between the states. See *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999)(en banc). Prompt review of that decision in the Supreme Court is being sought by the government.

In addition, one district court has held that the Child Support Recovery Act (18 U.S.C. §228), criminalizing a parent's failure to make child support payments when the parent and child live in different states, was unconstitutional, see *United States v. Schroeder*, 894 F.Supp 360 (D. Ariz. 1995), but that decision was reversed on appeal, *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996).

The overwhelming number of cases treat the limitations established by *Lopez* as a minor problem, easily correctable through the devices mentioned below. So long as Congress relies upon regulating the "channels" of interstate commerce or "persons or things" moving in interstate commerce as the basis for legislation, *Lopez* should not pose an impediment.

C. Congressional Response After Lopez

Shortly after the decision in *Lopez*, Congress amended the Gun Free School Zones Act to correct the defect noted by the Supreme Court. In P.L. 104-294, Congress added the underlined twelve words to the law to create the missing interstate nexus: "It shall be unlawful for any individual knowingly to possess a firearm *that has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. §922(q)(2)(A). Since the new law specifically relies for federal jurisdiction upon a "thing" (the gun) that moved in interstate commerce, the deficiency noted in *Lopez* was corrected.

Thus, so long as Congress relies on the first two bases for its commerce clause legislation—regulating a "channel" of interstate commerce or regulating or protecting a "person or thing" that moved in interstate commerce, *Lopez* is not a problem.

Even if there is no explicit interstate nexus, Congress can make specific legislative fact-findings to demonstrate the "substantial effect" on economic activity required for the third prong of *Lopez*. In the future, the case should not create a serious bar to the exercise of Congressional power under the Commerce Clause.

III. STATE IMMUNITY FROM FEDERAL SUIT UNDER THE ELEVENTH AMENDMENT

The most serious obstacle to the exercise of Congressional power is *Seminole Tribe*. The Supreme Court expanded the rationale of that decision in three cases decided in the 1998-99 Term, mentioned above, *Alden, Florida Prepaid*, and *College Savings Bank*. Lower federal courts found that Congress lacked the power after *Seminole Tribe* to expand federal court jurisdiction over the States in many separate instances, involving such important federal laws as the Age Discrimination in Employment Act and the Americans with Disabilities Act. As noted above, in his dissent in *Florida Prepaid*, Justice Stevens identified six separate federal laws that were also susceptible based on *Seminole Tribe.*

A. Seminole Tribe, Alden and Florida Prepaid

The Supreme Court held in *Seminole Tribe* that Congress could not rely upon its commerce clause power to overcome a State's Eleventh Amendment immunity, even if Congress made its intent and purpose unequivocally clear. In a five-to-four decision (involving the same majority as in

Lopez), the Court struck down a provision of the Indian Gaming Regulatory Act (IGRA) that permitted a federal court action against a state to compel state officials to negotiate with an Indian tribe with respect to a gambling compact. The IGRA allows an Indian tribe to conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. 25 U.S.C. § 2710(d)(1)(C). Under the Act, States have a duty to negotiate in good faith with a tribe toward the formation of a compact, § 2710(d)(3)(A), and a tribe may sue a State in federal court in order to compel performance of that duty, § 2710(d)(7). Florida refused to negotiate with the Seminole Tribe, and suit was then brought by the Seminoles in federal court to compel the State to engage in the required negotiations.

Striking down that provision of the IGRA that permitted a federal court action to compel the state to negotiate, the Court noted that there were two requirements for Congress to abrogate a State's Eleventh Amendment immunity: First, Congress must unequivocally express its intent to do so and second, it must act "pursuant to a valid exercise of power." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

In this instance, through the numerous references to the "State" in § 2710(d)(7)(B)'s text, Congress provided an "unmistakably clear" statement of its intent to abrogate.

With respect to the second condition, the Court had to decide whether the law was passed pursuant to a constitutional provision granting Congress such power. The Court had previously held that Congress could rely upon its power under Section 5 of the Fourteenth Amendment to overrule a State's Eleventh Amendment immunity, see *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In a later split decision, the Court held that Congress could also rely upon the Commerce Clause to overrule a State's Eleventh Amendment immunity, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The *Union Gas* plurality found that Congress' power to abrogate came from the States' cession of their sovereignty when they gave Congress plenary power to regulate commerce, and thus the States had "consented" to the waiver of their 11th Amendment immunity.

Seminole Tribe overruled *Union Gas* and held that Congress could not rely upon the Commerce Clause to make States amenable to federal court jurisdiction.

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the

> subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction.

517 U.S. at 72-73.

The Supreme Court read even more federalism dictates into the Eleventh Amendment in ***Alden v. Maine.*** That case was originally brought by certain probation officers from the State of Maine, who sued for overtime pay under the Fair Labor Standards Act. After the ***Seminole Tribe*** decision, the First Circuit dismissed the case, holding that since the FLSA was passed pursuant to Congress' Commerce Clause power, the State could now raise an Eleventh Amendment defense. See ***Mills v. State of Maine***, 118 F.3d 37 (1st Cir. 1997).

The plaintiff in ***Mills*** then moved his case for overtime pay to state court, relying on a long line of Supreme Court cases holding that the Eleventh Amendment was not a defense to a suit against a State brought in state court: " . . . the Eleventh Amendment does not apply in state courts," ***Will v. Michigan Dept. of State Police***, 491 U. S. 58, 63-64 (1989). Nevertheless, the Maine Supreme Court held that Congress could not require the states to entertain federal causes of action that could not be brought in federal court because of the Eleventh Amendment, see ***Alden v. Maine***, 715 A.2d 172 (Me. 1998), ***affirmed***, 119 S.Ct. 2240 (June 23, 1999).

The Supreme Court, in yet another five-to-four decision written by Justice Kennedy, held that even though the Eleventh Amendment by its own terms prohibited suits against the States in ***federal court***, the Amendment embodies a broader sovereign immunity doctrine which protects the States from federal suits in their own courts.

> We have . . . sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative

> interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

119 S.Ct. at 2246-47.

Examining the history of the Court's Eleventh Amendment immunity cases, Justice Kennedy noted:

> These holdings reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.

The Court examined in great detail the historical background to State sovereign immunity, Congressional practice and court decisions interpreting the concept. Based on this broader interpretation of the meaning of the Eleventh Amendment, the Court held that Congress lacked the power to abrogate State sovereign immunity in its own courts.

> In some ways, of course, a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum. . . . . A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. . . Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States.

The Court concluded:

> In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.

In the two other five-to-four Eleventh Amendment decisions decided in the 1998-99 Term, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219 (1999) (June 23, 1999) and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S.Ct. 2199 (1999) (June 23, 1999), the Court struck down the Trademark Remedy Clarification Act, 15 U.S.C. §1122, and the Patent Remedy Act, 35 U.S.C. §271(h) and 296(a), which made the States amenable to suit for trademark and patent infringement in federal court.

In the trademark case, the Court held that the State of Florida had not impliedly or constructively waived its Eleventh Amendment immunity by engaging in commercial activity that fell within the Trademark Remedy Act. The Court overruled the *Parden* doctrine (*Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964)), under which a State may constructively waive its Eleventh Amendment immunity by engaging in activity that Congress warned could lead to a federal suit. *Parden* had held:

> By enacting the [FELA] ... Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

377 U. S. at 192.

In *Florida Prepaid*, the Court rejected the principle of "constructive waiver":

> We think that the constructive-waiver experiment of *Parden* was ill conceived, and see no merit in attempting to salvage any remnant of it. As we explain below in detail, *Parden* broke sharply with prior cases, and is fundamentally incompatible with later ones. We have never applied the holding of *Parden* to another statute, and in fact have narrowed the case in every subsequent opinion in which it has been under consideration. In short, *Parden* stands as an anomaly in the jurisprudence of sovereign immunity, and indeed in the jurisprudence of constitutional law. Today, we drop the other shoe: Whatever may remain of our decision in *Parden* is expressly overruled.

In the companion patent case, the Court examined the question whether

Congress had properly exercised its power under section 5 of the Fourteenth Amendment in passing the Patent Remedy Act. That is, was Congress enforcing the due process clause by making the States amenable to suit in federal court for patent infringement? The Court concluded that a patent right was a property right. But it held that Congress exceeded its powers under the Fourteenth Amendment by passing the law in question, since it was not clearly established that patent infringement by the States was a pervasive problem that had to be solved by Congressional exercise of its Section 5 power. Relying on the narrowing interpretation of Congressional power under section 5 as described in *City of Boerne*, the Court held that Congress had to demonstrate that the law it passed could be viewed as remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment for victims of State actions.

The Court explained:

> In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations. Unlike the undisputed record of racial discrimination confronting Congress in the voting rights cases, see *City of Boerne, supra,* at 525-527, Congress came up with little evidence of infringing conduct on the part of the States. The House Report acknowledged that "many states comply with patent law" and could provide only two examples of patent infringement suits against the States. See H. R. Rep., at 38. The Federal Circuit in its opinion identified only eight patent-infringement suits prosecuted against the States in the 110 years between 1880 and 1990.

Even if a deprivation of property rights had occurred, the States did provide a remedy through their own courts.

> Thus, under the plain terms of the Clause and the clear import of our precedent, a State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution. Instead, only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result.

Since a remedy (such as an eminent domain suit in state court) was possible, no deprivation could be shown.

B. Lower Court Expansion of Eleventh Amendment

After 1989, Congress reacted to the *Union Gas* decision by passing a series of laws making the States amenable to federal court jurisdiction. As noted above, Congress amended the Copyright, Patent and Trademark Laws, specifically granting jurisdiction to federal courts to hear cases against the States involving infringement of rights in those areas. *See e.g.,* 17 U.S.C. §511, 35 U.S.C. §271(h) and §296(a), and15 U.S.C. §1125(a)(1) and (2). In addition, Congress had expanded federal anti-discrimination laws, particularly in the employment area, and made the States proper defendants in such suits, in view of the States' significant role as a major employer.[1]

Soon after *Seminole Tribe*, the lower federal courts began to examine the question of whether the States may be sued in federal court for violating various anti-discrimination laws passed by Congress. As noted above, the Court had held in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) that Congress had properly exercised its powers under Section 5 of the Fourteenth Amendment in making the states amendable to suit under Title VII for discrimination based on race, gender or national origin.

Lower federal courts applied the same reasoning to uphold the Equal Pay Act (29 U.S.C. §206) see *Varner v. Illinois State University*, 150 F.3d 706 (7th Cir. 1998). For the most part, federal courts have upheld the validity of almost all of the important anti-discrimination laws such as Title VI, the ADEA and the ADA as applied to the States. See *Cooper v. New York State Office of Mental Health,* 162 F.3d 770 (2d Cir. 1998)(ADEA); *Magneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998)(ADEA); *Coger v. Board of Regents of State of Tenn.*, 154 F.3d 296 (6th Cir. 1998)(ADEA); *Debs v. Northeastern Illinois University*, 153 F.3d 390 (7th Cir. 1998)(ADEA); and *Goshtasby v. Board of Trustees of the University of Illinois*, 123 F.3d 427 (7th Cir. 1997)(upholding validity of ADEA as applied to the States); *Autio v. AFSCME,* 140 F.3d 802 (8th Cir. 1998)(ADA as applied to states was valid exercise of Congressional power under Section of 14th Amendment); *Alsbrook v. City of Maumelle*, 156 F.3d 825 (8th Cir. 1998)(ADA); *Lesage v. State of Texas*, 158 F.3d 213 (5th Cir. 1998)(Congress had authority to abrogate States' Eleventh 11th Amendment immunity under Title VI); *Anderson v. State University of New York*, 169 F.3d 117 (2d Cir. 1999)(Congress had authority to overrule state's 11th Amendment immunity in Equal Pay Act); *Varner v. Illinois State University*, 150 F.3d 706 (7th Cir. 1998)(Equal Pay Act).

But some lower federal courts have come to opposite conclusions.

1. According to Justice Souter's dissent in Alden, the States collectively employed 4,732,608 workers in 1997, see fn. 40, approximately 3.5% of the total civilian work force in the United States.

Thus the Eighth Circuit and the Eleventh Circuit have held that the ADEA was not properly passed pursuant to Section 5 of the Fourteenth Amendment, and States may assert their Eleventh Amendment immunity to private suits brought against the states to enforce that law. See ***Humenansky v. Regents of the University of Minnesota***, 152 F.3d 822 (8th Cir. 1998) and ***Kimel v. Florida Board of Regents***, 139 F.3d 1426 (11th Cir. 1997) ***cert. granted,*** 119 S.Ct. (January 25, 1999). The Americans with Disabilities Act was recently declared invalid insofar as it authorized suits against the states, see ***Brown v. North Carolina Division of Motor Vehicles***, 166 F.3d 698 (4th Cir. 1999)(holding that ADA regulations prohibiting states from charging handicapped people for special parking places were unconstitutional) and ***Kilcullen v. New York State Department of Transportation***, 33 F.Supp.2d 133 (N.D. N.Y. 1999)(ADA requirement of "reasonable accommodation" placed upon States and permitting suits against States, invalid under Eleventh Amendment).

The 1998-99 cases read even more force into the Eleventh Amendment, thus encouraging the States to raise even more objections to federal law.

C. Legislative Abrogation of Eleventh Amendment Immunity

As noted, Congress may abrogate the States' Eleventh Amendment immunity if it makes its intention to do so clear, and if it acts pursuant to a valid exercise of Constitutional power, such as section 5 of the Fourteenth Amendment. Thus, for example, to the extent that Congress' intention to overrule a State's Eleventh Amendment immunity was held to be unclear under the ADEA or the ADA, Congress could rectify the problem by doing what it tried to do in the Patent Remedy Act—specifically naming the States as proper defendants under these Acts.

The Eighth Circuit held in ***Humenansky*** that Congress did not make its intent to overrule a state's Eleventh Amendment immunity "unmistakably clear," as required by ***Dellmuth v. Muth***, 491 U.S. 223, 232 (1989). Although the 1974 amendments to the ADEA specifically broadened the definition of an "employer" to include a "State or a political subdivision of a State," see 29 U.S.C. §630(b), the Eighth Circuit found that Congress' failure to specifically mention its intent to overrule a State's Eleventh Amendment immunity or to amend the jurisdictional section of the law (specifically allowing suits in federal court) did not satisfy the strict requirements of ***Seminole Tribe***, 517 U.S. at 54, n. 6. See 152 F.3d at 825.

In the Eleventh Circuit decision in ***Kimel***, also invalidating the ADEA's application to the States, one judge (Edmondson) came to the same conclusion. (A concurring Judge found that age was not a protected status under the equal protection clause of the Fourteenth Amendment and thus

the law was invalid on that ground since Congress could enforce the equal protection provisions of Section 1 only with respect to classes found subject to heightened scrutiny. This was also an alternative holding of the Eighth Circuit in *Humenansky*.)

The solution is for Congress to specifically express its intention not only to make States amenable to suit, but also to express its desire to overrule the States' Eleventh Amendment immunity. For example, 42 U.S.C. §2000d-7 (a)(1) reads as follows: "A State shall not be immune under the Eleventh Amendment of the Constitution . . . from suit in Federal court for a violation of Section 504 of the Rehabilitation Act, . . .title IX of the Education Amendments . . . . Title VI of the Civil Rights Act of 1964 or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." This type of provision would certainly seem to satisfy the "unmistakably clear" requirement mentioned above.

In addition, if Congress is relying upon Section 5 of the Fourteenth Amendment as the basis for overruling a States' Eleventh Amendment immunity, it should say so. The Fifth Circuit panel decision in *Chavez* holding that the Copyright Remedy Act was unconstitutional relied in part on the fact that Congress did not explicitly cite Section 5 of the 14th Amendment when it passed that law: "The Copyright Remedy Clarification Act does not expressly rely on section 5 of the Fourteenth Amendment . . . It may be too much of a leap to infer Congress' reliance on the Fourteenth Amendment in the copyright amendments when it did not expressly state its intent to legislate on that basis." 157 F.3d at 288, n. 8.

Once again, the solution is to cite specifically Section 5 if Congress wishes to make the States amenable to suit in federal court. As noted below, *City of Boerne* also places an additional burden on Congress to show that its reliance on Section 5 was remedial and proportionate. In addition, Congress is now required to make findings that the State action it is remedying involved a "pattern" of unconstitutional action. See *Florida Prepaid*: "In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations. . . . Congress came up with little evidence of infringing conduct on the part of the States."

Another possible solution, as previously suggested by the Civil Rights Committee of this Association,[2] was for Congress to condition federal

2. See Committee on Civil Rights, "Congress' Continuing Authority to Override Eleventh Amendment Immunity in the Wake of Seminole Tribe v. Florida," 52 The Record of the Association of the Bar of the City of New York, 797, 835 (1997).

financial assistance upon a State's waiver of its Eleventh Amendment immunity. Under the Supreme Court decision in *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)(a seven-to-two decision written by Chief Justice Rehnquist, in which Justice Scalia joined), Congress may impose conditions on the States pursuant to its exercise of its Spending Power. Thus Congress could require the States to surrender their immunity under the Eleventh Amendment in order to obtain highway funds, crime control expenditures, medicaid or medicare funds, education funds or even funds under the Social Security Act. If the States wish to obtain federal funds under various social welfare provisions, they must accede to the anti-discrimination laws mentioned above, such as the ADEA and ADA, and waive their immunity for suit in federal court. *See discussion below at pp. 733-734.*

IV. THE PRINTZ DECISION AND TENTH AMENDMENT IMMUNITY

In yet another five-to-four decision involving the same voting majority as in *Lopez* and *Seminole Tribe*, the Court in *Printz* held that the federal government may not enlist state officials to carry out federal policies. Thus as minor a burden as requiring local sheriffs to conduct background checks on potential purchasers of handguns (until a national computer system could be established) violated States' rights under the Tenth Amendment.[3]

A. The Printz Decision

The 1993 amendments to the federal Gun Control Act (the Brady Bill) required the "chief law enforcement officer" in local jurisdictions to make background checks on potential purchaser of handguns, to insure that they did not fall within certain prohibited categories, such as convicted felons, aliens, dishonorably discharged veterans or persons adjudicated as mentally defective or committed to mental institutions. The Act required the Attorney General to establish a national instant background check system by November 30, 1998, at which time the state officers' obligation to perform background checks would end.

The interim background check requirement was challenged by various sheriffs, who claimed that the Tenth Amendment forbade Congress from enlisting them to carry out the federal policy. The Supreme Court agreed.

3. The Association had filed a brief as Amicus curiae in Printz urging that the background check provision be upheld. See "The Brady Bill and the Tenth Amendment," 52 The Record (March, 1997).

In the majority opinion, Justice Scalia examined various early federal laws which generally placed certain reporting requirements on state officials to supply information to the federal government and distinguished them from the requirements of the Brady Bill.

He then examined the "structure" of the Constitution, which unequivocally showed that:

> using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict. See *The Federalist* No. 15. Preservation of the States as independent political entities being the price of union, and "[t]he practicality of making laws, with coercive sanctions, for the States as political bodies" having been, in Madison's words, "exploded on all hands," 2 *Records of the Federal Convention of 1787*, p. 9 (M. Farrand ed.1911), the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people—who were, in Hamilton's words, "the only proper objects of government," *The Federalist* No. 15, at 109.

117 S.Ct. at 2376.

According to Justice Scalia's analysis, "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens." *Id.* This structure, the Court reasoned, was crucial to protect the people's freedom:

> This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." Citing *Gregory*, 111 S.Ct., at 2400.

Finally, the Court found that the requirements of the Brady Bill violated the "political accountability" requirements of *New York v. United States,* 505 U.S. 144 (1992):

> The Government also maintains that requiring state officers to perform discrete, ministerial tasks specified by Congress does

> not violate the principle of *New York* because it does not diminish the accountability of state or federal officials. This argument fails even on its own terms. By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes.

117 S.Ct. at 2382.

B. Application of the Printz Decision

Other courts have applied *Printz* to cast doubt on the constitutionality of the Fair Labor Standards Act as it applies to state and local government employees. See *West v. Anne Arundel County Maryland*, 137 F.3d 752 (4th Cir. 1998)

The Fourth Circuit held that the Driver's Privacy Protection Act (18 U.S.C. §2721-2725), which broadly prohibited States from selling motor vehicle records for commercial purposes, was unconstitutional under *Printz*, see *Condon v. Reno,* 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S.Ct. since Congress was requiring state officials to carry out a federal policy.

The First Circuit had to deal with the question of whether, after *Printz*, an injunction would be issued under the Endangered Species Act against state officials issuing permits for lobster pot fishing. See *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997). Although the Court ultimately upheld the injunction against state officials issuing gillnet permits and lobster pot fishing permits, the Court acknowledged that *Printz* had raised serious barriers to federal environmental requirements against state officials. The Ninth Circuit found the Forest Resources Conservation and Shortage Relief Act (16 U.S.C. § 620-620j) invalid, *Board of National Resources v. Brown*, 993 F.2d 937, 947 (9th Cir 1993), because of the burden placed on state officials to carry out a federal environmental policy.

Many other requirements of the federal environmental laws, which require state coordination and reporting, may be questionable after *Printz*. Among the questionable laws are the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2645, 2647, requiring governors to develop management plans for dealing with asbestos in school buildings, and the Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. §11001, requiring states to create emergency response commissions. See generally Jonathan Adler, "The Green Aspects of *Printz*: The Revival of Federalism and Its Implications for Environmental Law," 6 *Geo. Mason L.*

Rev. 573 (1998). See also Vicki C. Jackson, "Federalism and the Uses and Limits of Law," 111 *Harv. L. Rev.* 2181, 2205 (1998).

C. Legislative Solution to Printz

The *Printz* restriction on Congressional power under the Tenth Amendment cannot be evaded simply by Congressional expression of its intent to overturn a State's immunity. *Printz* and *New York* both provide that a State cannot involuntarily be required to carry out any federal policy.

However, in the same way that Section 5 of the Fourteenth Amendment can be utilized to overrule States' immunity under the Eleventh Amendment, we think it can also be relied upon to serve as a basis for federal action to prevail against a Tenth Amendment challenge. See Evan H. Caminker, "*Printz*, State Sovereignty, and the Limits of Federalism," 1997 *Sup. Ct. Rev.* 199, 238 (1997). Thus, so long as Congress has made the proper legislative findings and has expressed its clear intent to rely on Section 5, the analysis is the same as with the Eleventh Amendment above.

For example, the States can be obliged to follow the requirements of the Voting Rights Act and carry out federal policy to insure the elimination of barriers to voting. Since the Voting Rights Law was clearly based on the Fourteenth Amendment, *Printz* does not bar its enforcement.

Another solution to the problems caused by the Court's reliance on the Tenth Amendment doctrine may lie in the Spending Power. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Supreme Court held that Congress may condition receipt of federal funds upon state compliance with federal requirements if three conditions are met: (1) the condition must relate "to the federal interest in particular national projects or programs," 483 U.S. at 210; (2) there is no other constitutional prohibition that independently bars the conditional grant of funds (such as the "unconstitutional condition" doctrine), 483 U.S. at 207; (3) the financial inducement must not be "coercive," 483 U.S. at 211.

States receive a wide variety of federal funds for highway construction, crime control, medicaid, medicare, education, social security and other programs. Congress could condition the States' receipt of such funds upon the States' agreement to carry out certain federal policies in the areas for which funds are made available to the States, such as the Brady gun control act (crime control funds) or the Driver's Privacy Protection Act (highway funds), the subject of cases described above. Surely if Congress could require the states to raise the drinking age to 21 or lose millions of dollars in highway funds, Congress could also require the States to protect the privacy of motor vehicle records or lose such funds. Con-

gressional conditional grant of funds in these areas would appear to meet the three conditions noted above.[4]

V. CONGRESSIONAL POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Another important federalism decision was *City of Boerne v. Flores*, 521 U.S. 507 (1997), which struck down a very popular Congressional enactment, the Religious Freedom Restoration Act. In *Morgan v. Katzenbach*, 384 U.S. 641, 650 (1966) the Court had held that Congress could, through specific legislation, enlarge the scope of Fourteenth Amendment rights as previously defined by the Supreme Court. Now the Supreme Court in *City of Boerne* has cast doubt on that principle.

A. The Decision in City of Boerne

In *City of Boerne*, the Court analyzed the extent of Congressional power under Section 5 of the Fourteenth Amendment. The Court examined Congress' power to alter the extent of protection of religious rights through the Religious Freedom Restoration Act. In a previous decision, the Court had held in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) that any law of general applicability that impacted on free exercise rights would be measured under a more lenient standard than a "compelling state interest" test.

Congress was dissatisfied with such a moderate and easily met test. It quickly passed the RFRA, which required that whenever government action substantially burdens religious free exercise rights, the government action can be upheld only by the demonstration of a compelling state interest. And this test would have to be applied to laws or actions that directly focused on religious rights or to laws of general applicability that impacted substantially on such rights. It was that law, explicitly passed pursuant to Congressional power under Section 5, which *City of Boerne* examined.

In previous cases, the Court had held that Section 5 must be interpreted as broadly as the Necessary and Proper clause.

> By including Section 5, the draftsman sought to grant to Congress, by a specific provision applicable to the Fourteenth Amend-

4. This is the conclusion reached by most commentators on the issue. See Jesse H. Choper, "On the Difference in Importance between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-1997 Term," 19 Cardozo L. Rev. 2259, 2271 (1998).

> ment, the same broad powers expressed in the Necessary and Proper Clause.

Katzenbach v. Morgan, 384 U.S. 641, 650 (1966).

The Court had noted that Congress may deem it necessary to add specific statutory guarantees to the broad language of the rights contained in Section 1 of the Amendment:

> [i]t is the power of Congress which has been enlarged [by §5]. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. *Id.* at 648.

To eliminate any lingering doubt over the true intent of Section 5, Justice Brennan, writing for the Court and citing the legislative history of the Amendment, reasoned in *Morgan*:

> [e]arlier drafts of the proposed Amendment employed the "necessary and proper" terminology to describe the scope of congressional power under the Amendment . . . The substitution of the "appropriate legislation" formula was never thought to have the effect of diminishing the scope of this congressional power. *Id.*, fn. 9.

But as broad as this power may be, Congress cannot create new constitutional rights in the guise of enforcing the Fourteenth Amendment. The Court explained in *Boerne*:

> Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," *South Carolina v. Katzenbach*, supra, at 326, 86 S.Ct., at 817-818. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.

117 S.Ct. 2164.

The Court concluded that any remedy that Congress establishes to enforce the substantive provisions of the Fourteenth Amendment must be "proportionate" to the evil sought to be corrected:

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment. *Id.*

In *Florida Prepaid*, the Court added another prerequisite to exercise of Congress' power under Section 5.

Chief Justice Rehnquist noted that: "Following *City of Boerne*, we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propriety of any §5 legislation 'must be judged with reference to the historical experience ... it reflects.'" With respect to the problem of state infringement of patents, the Court noted that: "In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."

D. Effect of City of Boerne and Florida Prepaid

The key issue under *City of Boerne* is whether Congress is simply providing a proportionate remedy to the violation of a Constitutional right already recognized by the Supreme Court or whether Congress is attempting to "decree the substance of the Fourteenth Amendment's restrictions on the States." In addition, there must be a showing that Congress was attempting to deal with a "pattern" of unconstitutional action by the States, as required by *Florida Prepaid.*

The issue has arisen in a scattering of cases in the lower federal courts. The Fourth Circuit has rejected the purported exercise of Congressional power under Section 5 in two recent cases, *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999)(holding that federal regulations under the ADA prohibiting states from charging for handicapped parking privileges were unconstitutional and not a proper exercise of Congressional power under Section 5) and *Brozankala v. Virginia Polytechnic*

Institute, 169 F.3d 820 (4th Cir. 1999)(holding that the Violence against Women Act was not validly enacted pursuant to Congress' Section 5 power). In *Brown* the Court found that the regulations under the ADA which barred the requirement of payment for handicapped parking was too much of an intrusion into the States' traditional power. The Court noted:

> Nor do the safeguards of federalism wither in the face of an overzealous bureaucracy intent upon imposing its will on the states. Regulations that unjustifiably intrude "into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens," *Boerne*, 117 S.Ct. at 2171, are invalid exercises of power. Just as the Eleventh Amendment does not leave states without a shield when they confront congressional acts, states are not rendered defenseless in their duels with government by bureaucracy. 166 F.3d at 704.

The Court noted:

> Here, we hold that 28 C.F.R. § 35.130(f), which prohibits a state from charging even a modest fee to recover the costs of its efforts to aid the handicapped, lies beyond the remedial scope of the Section 5 power. As such, it is not a constitutionally valid exercise of power, and the effort to abrogate must fail. *Id.* at 705.

Similarly in the *Brzonkala* decision, the Court relied upon generalized notions of federalism, noting "'the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.'" 169 F.3d at 851.

In both cases, the Fourth Circuit found that Congress' power to legislate under Section 5 is disproportionate and a violation of the *Boerne* restriction if it violates the States' traditional prerogatives and general authority "to regulate for the health and welfare of their citizens."

Most other Circuits have rejected the Fourth Circuit's approach. Thus the Second Circuit recently upheld the validity of the Equal Pay Act as a proper exercise of Congress' Section 5 power.

> Finally, the EPA's provisions are not out of proportion to the harms that Congress intended to remedy and deter. . . Since the EPA provides an employer with four affirmative defenses, including the ability to prove that the wage differential [is] based

> on any other factor other than sex, 29 U.S.C. § 206(d)(1)(iv), the EPA reaches only those wage disparities for which the employee's sex provides the sole explanation. . . . Thus, the statute is remedial legislation reasonably tailored to remedy intentional gender-based wage discrimination and is sufficiently limited in scope to satisfy the *City of Boerne* test.

Anderson v. State University of New York, 169 F.3d 117, 121 (2d Cir. 1999).

E. Congressional Response to City of Boerne

Congress has limited options to meet the requirements of *City of Boerne*. Once again, it can attempt to justify any remedial legislation by making a careful legislative record of the problem which the legislation is attempting to meet and why its legislation is "proportionate" to the problem. While Congressional findings are not conclusive on the federal courts, see *Lopez*, the normal deference that federal courts afford to Congressional conclusions on the need for legislation should go a long way to satisfying the rule.

CONCLUSION

The States' concern about restrictions being placed on them by Congressional legislation can better be determined in the political arena, where the States have ample power to express and defend their positions, rather than by federal court decision. The New Federalism presents an unnecessary barrier to the already difficult process of enacting legislation on a national scale.

August 1999

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The Mediation Services Project

The Committee on Children and the Law and The Committee on Family Court and Family Law

Research reveals that parental separation and divorce can present serious difficulties for children—including depression, lack of self confidence, reduction in educational achievement, delinquent behavior, drug abuse, and problems in relationships—that can continue throughout adulthood.[1] However, research suggests that children can usually overcome these difficulties if parents cooperate with each other.[2] In fact, studies show that cooperation between parents during separation and divorce results in enormous benefits to the entire family, including more frequent contact between the non-custodial parent and the children, and more open and frequent communication between the custodial and non-custodial parents concerning the welfare of the children.[3]

Based largely on the proven beneficial effects of mediation on chil-

1. Kathryn E. Maxwell, Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients' Divorces on their Children, 67 Rev. Jur. U.P.R. 137 (1998).

2. Donald E. Stull and Nancy Kaplan, The Positive Impact of Divorce Mediation on Children's Behavior, Mediation Q., Winter 1987, at 57-59; Co-winning, Conflicting Roles in Child Custody Mediation (1997).

3. Peter A. Dillon and Robert E. Emery, Divorce Mediation and Resolution of Child Custody Disputes: Long-Term Effects, 66 AM. J. Orthopsychol. 131, 138-139 (1996).

dren in separating and divorcing families, the Mediation Services Project ("the Project") was established in March, 1995 to offer custody and visitation mediation to families served by the Manhattan Family Court. The Project grew out of earlier, more limited efforts to provide such court-annexed mediation services. In its current form, the Project functions as a unique collaborative effort among three groups: The New York Society for the Prevention of Cruelty to Children ("NYSPCC"), The Association of the Bar of the City of New York ("City Bar") and Victim Services' Manhattan Mediation Program ("Victim Services").

This article will explore several aspects of the Project from its inception to its current status. Part I details the benefits of mediation to various members of separating families—especially to the children, upon whom protracted litigation can have profoundly negative consequences. It also explores possible reasons why separating or divorcing parents are unable to communicate constructively without the benefit of a third party neutral, or mediator, and compares the mediation and litigation processes, analyzing their long-term effects on family dynamics. Part II describes the origins of the Project. Part III provides a description of the training and qualifications of Project mediators. Part IV discusses issues of confidentiality in mediation. Part V details the workings of the Project from intake through screening, mediation and beyond. Part VI consists of an account of how the referral system in Manhattan Family Court works. Part VII discusses the evaluation process. Part VIII is a description of a case handled by the Project that illustrates some of the issues our mediators work to resolve. Finally, Part IX provides conclusions and recommendations.

PART I. BENEFITS OF MEDIATION

Mediation fosters constructive communication between feuding parents. Even when parents do not get along, it is critical that they learn to communicate about their children. Warring parents often engage in inappropriate behavior, such as conveying negative information about one another to a child, or relying on a child to act as a messenger between them. If parents do not learn to communicate in a constructive way, the child will invariably suffer.

Mediation can help eliminate the problems experienced by children whose parents live in different households (even when the parents never lived together). If the parents do not communicate, they have no way of knowing what is happening at the other parent's house, and different

rules at each parent's house may confound children. For example, children who go to bed at 8:00 p.m. at the mother's house and are allowed to stay up until 10:00 p.m. at the father's house may be confused and begin to resent and even disrespect their mother for making them go to bed so early. Mediation can help parents develop consistent rules for their children to follow, and thus mitigate the negative impact that inconsistency and conflict have on their children. Mediation can also help parents understand and respect each other's different "rules" for the children and encourage their children to understand and respect them as well.

There are many reasons why parents are unable to communicate without the benefit of a mediator.[4] Some parents may have had only a brief relationship before their child was born, and they may not know each other well, or share the same values. Sometimes the break-up or divorce is very recent and one or both of the parents are too angry to communicate. Even when the parents have been apart for a long time, a new girlfriend or boyfriend who spends time with the children can cause anger and jealousy. Such emotions can lead to a breakdown of communication between the parents. This anger can be exacerbated by the fact that the other parent has not met the new companion and worries about that person's influence on the child.

Cultural barriers can also inhibit communication between parents. In one case mediated by the Project, the parents had a two-year-old son. The mother had remarried and refused to speak with the father. In the first mediation session it was revealed that, for cultural reasons, the mother believed a married woman could not speak to men other than her husband. In mediation, the mother came to recognize the importance of communication for the sake of the child. They were then able to resolve many differences, and the mother agreed to exchange notes with the father and to come back to mediation if they needed to discuss an issue that could not be agreed upon through written communication.

Even when divorced or never-married parents do communicate, changes in a child's needs or in one parent's schedule can cause chaos in both parents' lives. Many parents become used to a set schedule, and changes can upset them as well as the child. Mediation can provide the forum for everyone to express themselves and to rearrange schedules to everyone's satisfaction.

4. All of these possible reasons for lack of communication between parents are based on observations made by the MSP staff and volunteers during the 4 years the Project has been in existence.

Inter-Generational Mediation

Parents are not the only ones who can benefit from mediation in a family which is not intact. Grandparents, especially the parents of the non-custodial parent, often desire to spend time with their grandchildren but may be unable make arrangements with a hostile custodial parent. These situations typically arise when the non-custodial parent is not involved in the child's life—as a result of death or incarceration—and the custodial parent does not want to have anything to do with the non-custodial parent's family. A neutral mediator can ensure that the custodial parent hears what the grandparents have to say, what their feelings are, and what their grandchildren mean to them. At the same time, the mediator ensures that the grandparents hear the concerns of the custodial parent. The mediator can help the parties work out a mutually acceptable visitation plan that does not unduly burden the custodial parent.

The Mediation Services Project has had several cases where an infant, the teenaged mother and the maternal grandmother all lived in the same household. In one such case, the grandmother used mediation to make clear to the mother exactly how much responsibility she would be willing to undertake and what the mother would have to do herself. To avoid future misunderstandings, the grandmother and the mother made a schedule as to when the baby was to be fed, bathed, put to sleep, and who would do it. They agreed that if the mother wanted to go out and "hang out with her friends," they would discuss it in advance, and agree to a time for the mother's return. Subsequently, the grandmother reported that the mother handled her child care responsibilities better. Knowing that she had some time set aside to go out with her friends gave her something to look forward to, and helped the young mother improve her attitude towards child care.

Mediation vs. Litigation

There are numerous reasons why people involved in a custody or visitation dispute might prefer mediation over litigation. The Family Court is overwhelmed with cases, and typically it can take several months before a trial is scheduled. Due to the overload of cases, once a trial begins the judges may be forced to hear a case for a short period of time on many different days, often a one month or more apart.[5] A child's exaggerated

5. Robert E. Emery and Joanne A. Jackson, The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes, Mediation Q. (Summer, 1989), at 11-12 ("Mediation clearly led

sense of time magnifies the emotional impact of any delay.[6] In mediation, sessions can be held weekly for several hours at a time until an agreement is reached. The parties do not have to wait an extended period—while their situations are likely to deteriorate, and parents are diverted from their parental responsibilities—in order to have a say in the outcome.[7]

Some studies show that mediation participants report gender bias less often than those involved in litigation.[8] Men tend to feel that the court process is biased against fathers, yet both men and women tend to perceive mediation as a fairer process than litigation; "A study of a child custody mediation project in Charlottesville, Virginia found that men in the mediation group were more likely to feel that their rights were protected than men in the court process group. Interestingly, this benefit to men was not at the cost of the women in the study—women in the mediation group indicated that their rights were protected to a similar extent as the women in the court process. This was in spite of the fact that women generally were highly satisfied with courts routinely awarding custody to mothers."[9]

Studies show that mediation tends to heal relationships while litigation tends to polarize them. Litigation can compel even cooperative parents to challenge each other's competence and may force a child to choose sides.[10] The presentation of negative testimony in court can alienate the parties, whereas communication through mediation can promote understanding and acceptance. As attorneys often assume the role of negotiator in litigation, parents then lose the opportunity to engage directly in meaningful dialogue and do not learn ways to resolve future conflicts.[11]

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to greater satisfaction in a large number of areas, including issues where adversary settlement would be expected to be superior [for example, feeling that one's rights were protected].")

6. J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child*, pp. 40-49 (2d ed. 1978).

7. Kimberly A. Smoron, Co-winning Essay: 1997 Law School Essay Contest: Conflicting Roles in Child Custody Mediation: Impartiality/Neutrality and the Best Interest of the Child, 36 Fam & Conciliation Courts Rev. 258 (1998).

8. Andrew Kiddle, Non-Custodial Fathers—Why So Many Drop Out and What Can Be Done About It, 57-MAR Or. St. B. Bull., 15, 16 (1997); Robert E. Emery and Joanne A. Jackson, *supra*, note 5.

9. *Id*.

10. Melissa Douthart Philbrick, Agreements to Arbitrate Post-Divorce Custody Disputes, 18 Colum. J.L. & Soc. Probs., 427, 419-462 (1985).

11. J. Auerbach, Justice without Law, 3, 12 (1983).

Furthermore, mediation is less costly than litigation, and through the Project it is a free service.

In mediation parties craft their own agreements and therefore are more likely to abide by them. Studies show that participation in a decision-making process produces a higher level of satisfaction and compliance with the decision itself.[12] Non-custodial parents who have mediated their agreements have more frequent contact with their children, and they report communicating more frequently about their children.[13] One study even showed that non-custodial parents who felt in control of the divorce process and its outcome were "more likely to make their child support payments regularly and on time."[14] Thus, mediation can prevent minor disagreements from assuming destructive proportions.[15] Unlike the litigation process, parties who choose to participate in mediation are the arbiters of their own fate.[16]

PART II. ORIGINS OF THE PROJECT

The Project was conceived and implemented as a response to:

- a concern for the well-being of children caught in the middle of a divorce, custody or visitation dispute;
- a desire to provide families with the kind of help—both short- and long-term—that a court of law is not equipped to provide;

12. Kathryn E. Maxwell, Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients' Divorce on their Children, 67 Rev. Jur. U.P.R. 137 (1998).

13. Peter A. Dillon, supra, note 3.

14. Kathryn E. Maxwell, supra, note 7, citing Desmond Ellis and Noreen Stuckless, Mediating and Negotiating Marital Conflicts, 137 (1996).

15. Andrew Kiddle, Non-Custodial Fathers—Why So Many Drop Out and What Can Be Done About It, 57-MAR Or. St. B. Bull. 15, 16 (1997) ("Mediation also tends to diffuse anger between parents....Particularly interesting is a recent Canadian report which compared mediation and litigation clients and tracked the number of instances of emotional and physical abuse following the entry of a divorce decree. [Ellis, 1994] Mediation clients generally reported greater rates of decrease in physical and emotional abuse than did lawyer negotiation clients. Among the lawyer negotiation clients, the use of affidavits with hurtful contents was correlated with higher levels of post-divorce abuse.")

16. Kathryn E. Maxwell, Ibid., note 7 also suggests that, in the average mediated divorce case, the parents are more likely to agree on a joint custody arrangement in which "the mother who mediates still gets actual physical custody (essentially identical to traditional sole custody with father visitation...)"

- a concern about the escalating volume of custody and visitation cases surfacing in Family Court; and
- a desire to find ways to ease the burden on the Family Court

In 1991, the Family Court and Child Welfare Committee of the New York County Lawyers' Association ["NYCLA"] issued a report recommending that a mediation program be started in Manhattan. This committee worked with the New York Department of Probation and the Family and Divorce Mediation Council of Greater New York to initiate the Child Custody Mediation Services Project ["CCMSP"], the precursor to the current Project. CCMSP's cases were limited to pre-petition referrals. Because of its administrative capabilities, in 1994 NYSPCC was approached to participate to administer CCMSP.

Concurrently, two other groups were taking their own steps to provide mediation services to disputing parents. The City Bar decided to provide custody mediation services on a pro bono basis, and sponsored its first training of volunteer attorney mediators. Victim Services, the second group, was awarded a contract with the New York State Unified Court System to provide broad-based mediation services in Manhattan, including custody mediation.

In 1995, NYSPCC, the City Bar, and Victim Services joined forces to provide comprehensive quality mediation services in custody and visitation contexts. CCMSP was folded into the new Mediation Services Project that arose out of this joint venture, which had the goal of pooling and coordinating resources rather than duplicating services. Each of the three participating groups brought unique strengths to the Project. The City Bar drew on its broad based membership pool and training capabilities to enlist and train volunteer mediators. With input from the City Bar, NYSPCC and Victim Services capitalized on their administrative resources and expertise to create an infrastructure (protocol, procedures, court forms, etc.) with regard to screening cases, structuring mediation sessions, establishing confidentiality, and developing public education and outreach efforts. NYSPCC had already established contacts and a presence in the Family Court, which paved the way for increased referrals. In March, 1995, with funding from a foundation, the Mediation Services Project went into operation, taking both pre- and post-petition referrals. The project is one of the designated pilot projects of Chief Judge Kaye's ADR Commission; it is the only custody mediation pilot project in New York City.

PART III. MEDIATION TRAINING

Mediators in the New York City court-annexed mediation program are attorneys who have been trained by the City Bar and act as volunteer mediators. The program requires that all mediators complete a 30-hour basic skills mediation training course as well as an additional 12-hour course that focuses specifically on child custody and visitation issues.

The 30-hour training consists of lectures given by experienced mediators on basic mediation skills. Most lecturers involved in the training have a private mediation practice or teach mediation courses at a New York City area law school. The mediators who act as trainers for the Project have had extensive experience in child custody mediation. The training program affords the student mediators a chance to be exposed to various styles and philosophies of mediation.

The course seeks to provide sufficient practical training to enable the student mediators to begin developing their own style of mediation. A significant portion of the course is spent role-playing in order to allow the student mediator to experience different scenarios prior to mediating actual cases. While role-playing, student mediators gain experience in identifying the many issues specific to child custody mediation, such as visitation and holiday schedules and decisions regarding education and religion.

The student mediator must help the parties determine whether their positions are realistic or the result of an aggravated emotional situation. The mediator attempts to do this through directed questioning. A by-product of this methodology is often the recognition by the parties of the legitimacy of each other's position. The mediators help the parties to articulate their interests and priorities by unearthing the origin of each position. They then attempt to elicit and explore a spectrum of potential solutions. Student mediators learn how to encourage the parties to assess the plausibility of the agreement and to explore options.

The training program is designed to reorient lawyers from the traditional advocacy role to that of a neutral facilitator by teaching the proper methods of asking and answering questions in a neutral fashion, and fine-tuning listening skills. Student mediators review several custody and visitation agreements prepared for court, as well as mediated agreements, in order to learn how to draft a mediated agreement.

It is stressed throughout the course that the mediators cannot provide legal advice during the mediation. The mediators should inform the parties that they are free to seek outside counsel to review any agreement before final signing. Furthermore, the mediators are prohibited from le-

gally representing either party involved in the mediation at any time in the future.

Once the student mediators have completed their training, they are deemed certified and placed on the City Bar list to mediate in the Project. All Family Court-annexed mediation is pro bono. The Project uses a co-mediation model: either an experienced mediator is paired with a newly certified mediator to provide him or her with guidance; or two experienced mediators will co-mediate a case. Using two mediators, whether experienced or inexperienced, allows for additional perspectives, and thus broadens the possible options for parties to consider.

PART IV. CONFIDENTIALITY

Confidentiality is essential to the success of the mediation process. At the outset the parties are told that the sessions are confidential. The parties are asked to sign an agreement before they begin to mediate stating that all sessions are confidential, that the mediators cannot be called as witnesses in any future proceeding, nor can documents be produced. Confidentiality is essential to the mediation process in order to establish trust between the parties and trust between the parties and the mediators. In an effort to provide an environment in which the mediation is successful, the parties must be assured that what they say and do during the mediation session will not be used against them in future proceedings.

There is one exception to the rule of confidentiality: any evidence of child abuse or neglect must be reported to the State Central Registry. Mediators are also required to report to the Project any inappropriate actions or behavior that surface during the mediation. Such information includes: an ACS (Administration for Children's Services) case that the Project was not made aware of prior to the mediation; evidence of current domestic violence; or any major imbalance of power that would prevent the parties from reaching a fair agreement. These concerns will likely result in the termination of the mediation, and the case will return to court.

PART V. HOW THE PROGRAM WORKS

Cases are referred to the Project in either the pre-petition or post-petition stages. Pre-petition cases come to the Project before either party has filed a petition in court. Interest in pre-petition mediation of custody and visitation disputes is generated through outreach efforts to social services agencies and Hearing Examiners and through posters displayed in

the Family Court. As Hearing Examiners handle child support cases, they constantly see parents struggling with custody and visitation issues. Many Hearing Examiners have been exposed to the benefits of mediation, and will recommend that parents contact the Project for help with these issues before filing a petition.[17] Disputing parents wishing more specific information can obtain it from the Project's coordinator, who is based in the Manhattan Family Courthouse.

Post-petition referrals are made by Family Court judges, with the requirement that the parties return on the adjourn date to report to the court on the outcome of the mediation. The adjourn date is usually six to eight weeks after the referral in order to allow time for several mediation sessions, if necessary, and to prepare a mediation agreement for the court's review.

Regardless of whether a case is a pre- or post-petition referral, the parties—who may be the parents, grandparents, godparents, or others connected to the child—are directed to a Project representative. The established protocol is that the coordinator explains the mediation process and advises the parties that mediation is voluntary. The parties are told that even if they initially agree to mediate, they are free to terminate the mediation at any point and return to court. The Project representative explains that the parties have the right to consult with an attorney before consenting to mediation, and encourages the parties to seek legal counsel before signing any agreement. They are also told that their mediated agreement may be signed by the Judge and become enforceable as a Court order.[18]

If the parties decide to proceed with mediation, a Project representative screens the case to ensure there is no history or current evidence of domestic violence, drug or alcohol abuse, mental illness, and/or child abuse. If such issues do arise, the specifics of this history are discussed to

17. James J. Brudney, Mediation and Some Lessons from the Uniform State Law Experience, 13 Ohio St. J. on Disp. Resol. 795 (1998) (Mediation is believed to have its greatest benefit when used early, before substantial litigation costs have been incurred.)

18. See Jacqueline M. Nolan-Haley, Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking, 74 Notre Dame L. Rev. 775, 777-779 ("Mediation, however, is different from litigation because it is governed by the principle of consent..... The value of consent promotes self-determination and autonomy giving parties control. Informed consent prepares the way for a party to participate voluntarily and intelligently in the mediation process and to accept its outcome.... Parties, particularly those who are not represented by lawyers, need to understand what it means to participate voluntarily in mediation, how the consent process operates, and what it means to reach an agreement.").

determine if the case is appropriate for mediation. If a party indicates that there was a history of domestic violence, the Project representative will ask questions to determine the severity of the history. The representative will inquire when the last incident was, how many times violence occurred, and the severity of the individual incidents. In most cases, a history of domestic violence will disqualify a case from acceptance to mediation.

For mediation to be effective, the parties must be able to speak their minds, and a "level playing field" must exist. If one party feels intimidated by the other, it is very difficult to conduct a fair mediation. However, the existence of prior Orders of Protection does not always mean that mediation is inappropriate. Parties in Family Court have been known to use Orders of Protection as "bargaining chips," as well as a means to harass one another.[19] For example, if it appears that there was an Order of Protection several years ago due to phone harassment or to verbal abuse inspired by an argument long over, the case may still be appropriate for mediation; however, the Mediation Services Project errs on the side of caution. If either party is uncomfortable, they may opt to keep the case in court to take advantage of all the protections provided by the court system.

The same is true of cases with a history of allegations of child neglect or abuse and a history of parental mental illness. For example, if a Neglect petition filed by the Administration for Children's Services ("ACS") a long time prior was eventually deemed "unfounded" and there have been no problems since then, the case may be appropriate for mediation. The Project will accept the case if the representative is satisfied that there is no danger to the child, and that both parties are comfortable with each other's ability to parent and are willing to sit down together to try to work out the current problems.[20] The Project also screens for mental illness; while many parties will insist that the other is "crazy," this is usually not a serious concern; nor is someone attending psychotherapy usually a concern. Cases involving a history of mental illness and hospitalizations will generally be screened out by the Project.

19. See generally Frances Randy Kandel, Squabbling in the Shadows: What the Law Can Learn from the Way Divorcing Couples Use Protective Orders as Bargaining Chips in Domestic Spats and Child Custody Mediation, 48 S.C. L. Rev. 441 (Spring 1997).

20. If, at any time, during the mediation process, the mediator or the Project Director perceive any danger or potential danger to children, the MSP reserves the right to immediately terminate the mediation and to refer the case to ACS and the Court for investigation.

If the case is deemed appropriate for mediation after screening, the representative meets with the parties, and explains the principles of mediation and how the Project works. The representative describes the differences between mediation and litigation and suggests that mediation is a way for parents to take control of the decisions that affect their child. The representative reminds the parents that regardless of how they feel about each other, they will have to communicate about this child until the child turns 18; they should learn how to do it now, or they will be spending their lives in Family Court waiting rooms.

If the parties are willing to try mediation, they are given an appointment for their first mediation session, and the representative assigns the case to NYSPCC or to Victim Services, on an alternating basis, to handle "case management." These agencies, in turn, contact the City Bar to request the assignment of volunteer mediators for that date. Most cases are completed within one to three sessions, which last approximately an hour and a half each, and many cases result in final agreements. If a case is pre-petition, and an agreement is reached as a result of mediation, the parties have two options: they can leave it as a "mediation agreement," enforceable as a civil contract between the two of them with an agreement to attempt to handle future disputes through mediation or, after they have signed the agreement, they can consider filing a petition in Family Court. After filing, the parties can present the agreement to a judge and ask that the legally enforceable provisions be incorporated into a court order.

If a case is post-petition, the parties are given a six to eight week adjournment. The parties often return to court on the adjourned date with a completed, written agreement for the judge's review. A Project representative will appear in court with the parties to present the agreement and answer any questions the judge may have. As long as the judge believes the agreement is in the best interests of the children, and there are no concerns about the parties' parenting abilities, the judge will sign the agreement and it will become a court order. Occasionally, if a case is particularly complicated, the representative will request an adjournment in order to have time for more mediation sessions. If no agreement can be reached and the parties are no longer interested in continuing mediation, they will return to court on the adjourned date, and the representative will explain that mediation was not successful in this case.[21] The judge

21. Due to confidentiality procedures, the MSP cannot disclose to the Court why mediation is unsuccessful other than to indicate that the parties do not wish to return to mediation, or as long as no sessions have occurred, to say which party did not cooperate with scheduling.

will then determine the next step, as if the disputants never tried mediation; the parties will embark on the usual court path of investigations, hearings, and trials.

PART VI. THE REFERRAL PROCESS

Since its inception in 1995, many efforts have been made to increase the number of referrals to the Project. The court has begun to recognize that the Project can not only help lighten the Family Court's busy docket, but also help parents focus on the best interests of their children. For the first three years, there were a modest number of referrals to mediation; however, in 1998 there was a distinct increase in the number of cases referred. As part of the restructuring of Manhattan Family Court's caseload, one judge was designated to hear custody and visitation cases as of April 1998. This judge began to refer directly to the Project as many cases as he felt appropriate for mediation. Even though he no longer presides over custody and visitation cases, this judge continues to review custody and visitation petitions and determines which cases will be screened by the Mediation Services Project. Such referrals are handled by the Project coordinator and, when available, by volunteer mediators and law students who report to the court room at frequent intervals during the day. After reviewing the petition to ensure that he has no immediate concerns regarding danger to the child, the Judge gives the case file to the Project representative.

The representative then reviews the file for prior ACS involvement, Orders of Protection, history of domestic violence, reports of drug abuse, and other warning signals that a case may not be appropriate for mediation. The representative interviews each party separately to screen for risk factors. If a case is appropriate, the Project representative describes mediation to each party and asks for their consent to participate, making clear that it is a voluntary process. If the case is screened out by the Project, or if parties do not consent to mediate, the file is returned to the referring Judge.

If concerns arise that the referring judge may not have been aware of, the Project representative brings these issues to the judge's attention. For example, while there were no prior Orders of Protection in the file for one case, an interview with the mother led to her showing the many scars she had received, allegedly as a result of the father's wrath. Parties sometimes refuse to try mediation because their history is such that they are convinced they could not or would not sit in a room and have a discus-

sion with the other party about the child. In other cases, parties do not want to take the time to attend mediation sessions; they often feel that if they see the judge that day, everything will be resolved then and there. These cases often result in investigations, temporary orders, adjournments to retain counsel, and the usual need to return to court several times. In cases where an immediate agreement is possible, the Project will tell the judge that "the case can be conferenced today." This signals to the judge that the parties already have a working agreement that had been tested over time and merely want it to be written up and entered as a court order. Such cases are then handled by the judge's Court Attorney, saving the parties both time in mediation and trips back to court.

Cases are also referred to mediation by the judge who currently presides over the custody and visitation part and by the "Special Referees." These referrals may occur at the beginning of a case or at any point during the pendency of litigation. For example, the court may make a ruling on custody, and then send the parties to mediation to work out a visitation schedule. Or, if the court has worked out the specifics of custody and visitation but disagreement arises on sensitive topics such as religious or medical concerns, a referral to mediation can become appropriate later in the case. In such situations, mediation complements rather than replaces the court process.

PART VII. EVALUATION

Surveys

In order to better understand the impact of mediation, the Project is working in conjunction with the Alternative Dispute Resolution Research Project of the New York State Unified Court System ("the ADR Research Project") to conduct Client Satisfaction Surveys on all participants. For a person to be a "participant," he or she must have attended at least one mediation session. Participants include those who have successfully reached mediation agreements as well as those who have chosen to return to Court instead of continuing in mediation. The Surveys are mailed to each participant approximately one month after completion of the mediation process, along with a cover letter from the Deputy Chief Administrative Judge explaining the importance of the evaluation. In order to encourage participants to respond to the Survey, the Survey is accompanied by a stamped, self-addressed envelope.

The Survey is divided into five parts, ranging from general, objective questions such as the method by which the participant was referred to

the Project and the purpose of the participant's mediation, to more subjective questions such as the demeanor and skill level of the mediator. The Survey is an effective evaluation tool because it encourages each participant to discuss specifics of the Program. Participants are encouraged to convey their feelings regarding the mediation process by answering questions such as:

Were you told that the mediation discussions would not be used in court? If "yes," did this make it easier to participate in the mediation?

If you felt pressured to enter into an agreement, who pressured you? [Sample responses have included the mediator, the judge, the opposing party, the participant's lawyer, the opposing lawyer, other family members, a court attorney.]

As a result of mediation, are you and the other person better able to work with one another on matters affecting the child(ren)? Since the inception of the Project, the ADR Research Project has forwarded a Survey to each of the participants in the Project.

Analysis

The ADR Research Project has completed an analysis of the 48 Surveys they received and in May, 1999 an official report was issued detailing the results. These results are very encouraging: the Surveys reflect that, on average, participants spent just over three hours in mediation, and almost seventy percent of the participants reported that their mediation resulted in an agreement.[22]

The Surveys reflect a high level of satisfaction with both the Project and the Mediation process in general. An overwhelming ninety-six percent of responding participants would recommend mediation to others to resolve custody and visitation issues. Eighty-eight percent of the responding participants strongly agree that, as a consequence of the mediation, they are better able to address custody and visitation issues. Seventy-seven percent of the responding participants reported that visitation occurred on a more regular schedule after mediation than before mediation. Ninety-one percent of the responding participants were satisfied with the quality of the Project, and seventy percent indicated that they would return to mediation rather than return to court if the agreement didn't work out.

22. Often, mediation involves limited or narrow issues. For example, once a judge renders a decision regarding custody, a case can be referred to the MSP to help the parties work out a viable visitation schedule.

The mediators were favorably reviewed as well. Ninety-one percent of the mediators were believed to possess the skills necessary to mediate; eighty-nine percent felt the mediators listened to what each party had to say, and eighty-seven percent perceived the mediators as fair to both side; Eighty-seven percent of responding participants described the mediators as courteous.

According to the May 1999 Report, additional comments written on the surveys included complimentary statements such as: "The Mediation Services Project provided an environment where people could openly discuss issues in a controlled civil environment." Participants felt that they could "talk about matters they could not as easily discuss in the court room." Participants also stated that mediation "made confidential conversations possible, leading to more open communication."

Internal Review

In addition to the Surveys, the Project is conducting its own internal statistical review. This entails assessing each case handled by the Project in order to determine the number of cases referred to the Project; the number deemed inappropriate for mediation (those cases in which there is a history of violence or threatening behavior, child or substance abuse, psychiatric illness or mental instability, or a history of broken agreements); and the number of cases which returned to court.

The Project review also analyzes the point in the dispute when each case was referred, the extent of participation, and the length of time each case took to complete the mediation process.

By reviewing each participant's evaluation of the Project and considering the Project's internal review, the sponsors of the Project hope to further tailor the Project to the needs of future participants and encourage a greater number of successful mediations in order to better serve the community.

PART VIII. CASE STUDY

Both the father and mother are in their early thirties. The parties have never been married but had lived together for several months. At the time that they separated, the mother was four months pregnant with a daughter, Christine, who is now five years old. When Christine was three months old, the father petitioned the Family Court to have his paternity legalized and to establish visitation with his daughters. He has since consistently visited with his daughter. Each of the parties is now

married. The father has no other children; the mother has an older daughter from a previous marriage and a two-year-old daughter from her current union. In this case the mother was petitioning the Court to modify the court order to change the visitation drop-off site from the local police precinct to a place less intimidating to Christine, and also to restrict access to the child by the father's wife.

Before our first meeting, the parties sat on opposite sides of a large waiting room steadfastly ignoring each other. In the mediation room, they found it difficult to speak without interrupting one another numerous times, and with each interruption the animosity increased. In explaining the history of their case, it became apparent that the parties were in a constant state of litigation around visitation and other parenting issues. They had even filed reciprocal charges of abuse and neglect. In total, the parties estimated that they had filed about twenty petitions with the court.

The mother seemed especially angry at the father. Verbal attacks and accusations were frequently forthcoming. Not only was she enraged that the child was being exchanged in a threatening atmosphere but, she could not tolerate the presence of the father's wife at these times. She felt that his wife was trying to usurp her position as parent. The father countered that the police station had been chosen specifically because it insured his safety, as he claimed to have been the victim of numerous verbal and even physical attacks by the mother. In addition, he felt that his wife had the right to be present when he picked up or delivered Christine because the mother's husband was always present. The mother insisted that she did not like the father's wife and could not be "forced" to accept her. After talking to the parties for a long while, it was clear that progress was being inhibited by some undisclosed factor. Also, there was a strong feeling that even if we achieved some resolution, the battle would resume almost immediately on other grounds.

We decided to caucus with the parties, seeing the mother first. As soon as the door closed, she broke into tears, stating that the father had never apologized to her or to her oldest daughter for abandoning them five years ago, during her pregnancy. The mother felt that she could not reshape her relationship with the father until this issue has been put to rest.

With the permission of the mother, we raised the question of an apology during our caucus with the father. We suggested that even if he had terminated his relationship with the mother for good reason, he might still feel compassion for her situation and feel sorry for her pain. The

father responded that he had never thought of her side. He also recognized that his wife, as a replacement for the mother in his affections, could be a source of the mother's seemingly relentless anger. When the parties came back together after the caucus, the father, with no further prompting or suggestions from the mediators, apologized to the mother for having hurt her in the past. The mother looked flustered but pleased.

In the two subsequent sessions, the parties were able to discuss the benefits and drawbacks of various drop-off places and to express their feelings about the other party's spouse. In the end, they chose a neutral site (the YMCA) in the mother's neighborhood as the exchange point. Accepting that the presence of spouses was too provocative, both parents agreed to attend events involving Christine without their partners, at least for the time being.

During the final session, the mother and father sat in the waiting room conferring face to face. While we were reviewing and signing the agreement, there was friendly banter and jokes between the parties. At the very end, after the father had left the room, the mother approached the mediators to thank them: "There's been such a change in him, I can't tell you. It's just remarkable."

PART IX. CONCLUSION AND RECOMMENDATIONS

The Mediation Services Project routinely plays an instrumental role in resolving difficult family conflicts. When parents or other caretakers are in conflict, children's needs are too often ignored. The Mediation Services Project helps parties focus on the children's best interests, and equips them with vital communication skills. Parties can then use these skills to resolve future disputes on their own, rather than relying on the already overburdened court system.

Recommendation 1: Mediation services should be available in every appropriate custody or visitation case. In order to increase the volume of cases referred to mediation, the Project's goal is to establish an automatic referral system which would allow the Project representatives to review and screen every custody and visitation petition each morning, and then report to the Judge as to which cases are appropriate for mediation. The hope is to speed up the referral process, save court time, and increase the numbers of people who can benefit from mediation. Except in cases where there is a risk of violence, imbalance of power, child abuse or neglect, domestic violence, drug or alcohol abuse, or mental illness, every family involved in a custody or visitation case in Family Court should be granted

the opportunity to work out their own disputes in mediation before resorting to a Judge's mandate. Agreements have a much greater chance of long-term success when they are created and committed to by the parties themselves.

Recommendation 2: Participation in one mediation session should be mandated in all appropriate cases. The Mediation Services Project should continue to allow potential litigants to make an informed choice as to whether to participate in the mediation process; however, eligible families should be required to attend one introductory session in order to determine for themselves if the process will be helpful to them and to dispel any misconceptions they may have about mediation. To protect the parties, the Project must also continue to encourage participants to consult with a lawyer at any point in the mediation process, especially before signing an agreement.

Recommendation 3: Careful screening must be an integral part of the mediation services. While mediation is an alternative to litigation, it is not a panacea for all custody and visitation problems. In fact, it is often inappropriate to use mediation to resolve certain types of cases—particularly cases involving child abuse and neglect, domestic violence, drug or alcohol abuse, or mental illness. The Mediation Services Project must continue to carefully "screen out" these cases. As the ADR Research Project's Report reveals, the number of cases accepted by the Project that end in workable written agreements, and the impressive ninety-six percent of participants who would recommend mediation to others, speaks not only to the effectiveness of the mediation process itself but to the appropriateness of the cases which have been selected for mediation. This intensive screening must continue in order to protect children from potential dangers. At this point in time, it is in the best interests of children that the courts continue to handle cases involving child abuse and neglect, domestic violence, drug or alcohol abuse, and mental illness.

Recommendation 4: Education and public awareness must be expanded. The Mediation Services Project must broaden its efforts to educate judges, attorneys, other Family Court personnel, and potential litigants about mediation through seminars, training, video tapes and outreach. Education is necessary to inform the courts and the public about the availability of mediation and its possible benefits in appropriate cases. Education will also help dispel any misconceptions, doubts, and concerns that may exist about the mediation process.

With increased awareness and acceptance, and continued screening of inappropriate cases, the Mediation Services Project strives to help more

and more families every day, while providing relief to overburdened courts. As referrals to mediation increase, so does the likelihood that children will be protected from the unnecessary and often life-long damage caused by custody and visitation disputes.

August, 1999

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Formal Opinion 1999-4

Law Firm Mergers

The Committee on
Professional and Judicial Ethics

TOPIC: Law Firm Mergers

DIGEST: A law firm merging with another firm need not obtain the express consent of its clients to their matters being handled by the new form of organization, but should give its clients notice of the merger if the merger would result in the clients' matters being handled by a firm materially different from the one prior to the merger.

CODE: DR 2-111; 5-105(D); EC 2-8; 7-8; 9-2.

QUESTION

When one law firm merges into another, does it need to obtain consent from its clients to their matters being handled in the new organization?

OPINION

The inquirer is a member of a firm (Firm A) that is merging into another firm (Firm B); Firm A would no longer exist and the partners of Firm A would become partners in Firm B. The inquirer wants to know whether the partners in firm A have to get express consent from their

clients to the change of law firms, by, for example, asking the clients to sign and return a form.

We note at the outset that there may be issues of contract and partnership law involved in this question that the opinion does not address. In particular, the opinion does not consider the extent to which retainer agreements entered into with the old firm can be modified without the express consent of the client so that the new firm succeeds to the rights and obligations of the agreement.[1]

The question is whether, independent of these contractual questions, there is any ethical obligation to obtain the consent of clients to their matters being handled in a new merged firm. That is, regardless of whether the client can look only to the former partners of Firm A to enforce the retainer agreement, or also to the partners of the now-larger Firm B, is there an ethical requirement of obtaining consent from all clients to their matters being handled by the new law firm?[2]

There is nothing in the Code that directly addresses this question. The Code does prescribe that upon a sale of a law practice the client must be notified and given an opportunity to object, but that consent to the transfer of the matter to the buyer will be inferred from a failure to object. DR 2-111. No express consent is required. A sale of a law practice is a far more complete disruption of the attorney-client relationship than a merger, where the lawyers handling the matter typically continue to handle it, so we conclude that no requirement of express consent is necessary in the merger context either.

Even though there is no requirement of express consent, that does not mean that clients need not be informed of the merger. A lawyer has a

1. See, e.g., II Alan R. Bromberg & Larry E. Ribstein, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 7.14(a) (1998) ("Dissolution per se has no effect on existing liabilities of the partners . . . to third parties . . . ."). See also id. § 7.14(d) (When partners retire, it is assumed that the continuing partners assume the debts, so that the retired partner becomes a surety. "A creditor with notice of the dissolution and assumption becomes subject to the suretyship relationship between the partners."); id. § 7.14(c) (When partners retire, "[t]he creditor's consent to a novation [so as to relieve the retiring partners of liability] is sometimes express, but it is more often implied by conduct.").

2. If the merger results in a conflict of interest between clients of the old and new firms, of course, the multiple representations cannot be continued without consent. DR 5-105(D). This opinion does not address that situation. See generally Picker Int'l, Inc. v. Varian Associates, Inc., 869 F.2d 578 (Fed. Cir. 1989); ABA/BNA Lawyers' Manual on Professional Conduct 91:808-09 (1991); Suffolk Cty. 89-1 (Where one partner in a merged firm represented the plaintiff and another, the defendant, continued representation was not permitted even with consent.).

continuing duty to advise clients of information and developments material to the clients' decisions in connection with the matter entrusted to the lawyer. EC 7-8 states, "A lawyer should exert best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations." EC 9-2 states, "[i]n order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform the client of material developments in the matters being handled for the client." These provisions, which have been elevated to the status of rules in the Model Rules, Rule 1.4,[3] are applications of the common law duty of all agents to keep their principal informed of material facts. RESTATEMENT (SECOND) OF AGENCY § 381 (1957); N.Y. State 555 (1984). "Material facts are those which, if known to the client, might well have caused him, acting as a reasonable man, to alter his proposed course of conduct." ***Spector v. Mermelstein***, 361 F. Supp. 30, 40, (S.D.N.Y. 1972), ***aff'd in part***, 485 F. 2d 474 (2d Cir. 1973).

These general duties have usually been applied to information directly related to the matter entrusted to the lawyer, ***e.g., Spector***, or to conflicts of interest that could compromise the lawyer's ability to exercise independent professional judgment on behalf of the client, ***e.g.***, N.Y. City 1996-3 (lawyer should consider informing client when lawyer represents adversary counsel even when no consent is required). But there is no reason why the duty of an agent to inform the principal of material developments would be so limited, since factors relating to the lawyer's own practice short of circumstances giving rise to conflicts of interest could certainly affect the client's decision to employ the lawyer. ***See generally*** EC 2-8 ("Selection of a lawyer should be made on an informed basis."). In the case of a sale of a practice to a new lawyer or firm, for example, the Code can be said to make the judgment that such a sale is always material, necessitating client notification and opportunity to object. DR 2-111.[4]

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3. Rule 1.4, entitled "Communication," states:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

4. Similar considerations would govern whether clients should be informed of other events in the life of a law firm, such as dissolution: a technical dissolution and reformation of a partnership to account for the making of a new partner would presumably rarely be material, but a dissolution that led to the partners going their separate ways, taking their own matters with them, presumably would nearly always be.

Not all mergers will be material to all of the clients of the merging firms, but some may be. When a three-lawyer firm merges with a 300-lawyer firm, the clients of the larger firm will have little concern that three new lawyers have been added to the firm by way of a law firm "merger"—with transfer of client matters and, perhaps, technical reformation of the partnership—rather than a simple hire. In that example, however, the clients of the three-lawyer firm may well be represented by a materially different firm than the one that represented them before the merger. A client that enjoyed the status of being firm A's largest client or appreciated working with a small firm may now be relegated to one among firm B's many clients working with one or two of firm B's many lawyers. Similarly, if a personal injury firm were to merge with a corporate law firm or a "union-side" labor law firm were to merge with a "management-side" firm, the clients of both firms might well feel the development to be material to their decision to continue to retain the merged firm. Thus, where a merger would result in the clients of one of the merging firms being represented by a materially different firm than the one that had previously represented the client (or in other cases where the lawyer knows that a particular client would view the change as material), the client should be advised of the merger and of the information that makes the merger of significance.

We do not believe it is necessary or appropriate to provide the full panoply of notice that is required by DR 2-111 upon a sale of a law practice.[5] In a merger, unlike in a sale of a practice, the formerly responsible

5. DR 2-111(C) provides:

> C. Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:
>
> 1. The client's right to retain other counsel or to take possession of the file;
>
> 2. That fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;
>
> 3. The fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer;
>
> 4. Proposed fee increases, if any, permitted under DR 2-111(E); and
>
> 5. The identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in the state, whether the buyer has never been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to re-sell the practice.

lawyers will usually continue to look after the matter, and retain an interest in keeping the client satisfied, which provides a level of structural protection for the client that is absent in a sale of a practice. Rather, the precise content of the notice given will vary with the circumstances and should be guided by the purposes of the notice: to provide the client with the information necessary to understand and, if desired, respond to a material development in the representation.

CONCLUSION

The Committee concludes that, while express consent is not required, when a merger would leave a client represented by a firm materially different from the one that had previously represented the client, the client should be notified of that fact as a matter of the lawyer's general duty to advise the client of all material developments in the matters entrusted to the lawyer's case.

August 1999

DR 2-111(E) (referred to in DR 2-111(C)(4)) provides:

> The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

The Committee on Professional and Judicial Ethics

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William J. Sushon, *Secretary*

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Caseload and Trial Capacity Issues in the Criminal Court of the City of New York

The Committee on Criminal Courts

INTRODUCTION

In 1983, The Association of the Bar of the City of New York, by its Criminal Courts Committee, issued a public report concerning the lack of trial capacity for misdemeanor cases in the Criminal Court of the City of New York. That report concluded that the Criminal Court had been "virtually incapacitated" because of its staggering volume of cases and its inability to provide trials. The report further noted that the Criminal Court's emphasis and reliance on judicial dismissal of cases and plea bargaining to dispose of its caseloads had resulted in a "marketplace" atmosphere inconsistent with the court's mission of dispensing justice. The 1983 report recommended various means by which that deficiency in an important area of the administration of justice could be addressed.

Now, fifteen years later, the lack of trial capacity persists. As detailed in the following report, significant changes have occurred in both the number and nature of the misdemeanor cases handled by the Criminal Court. The increase in misdemeanor drug, domestic violence and quality of life offenses, and the law enforcement strategies that have been developed and implemented to deal with those crimes, have required changes

in the courts to adjudicate the resulting cases efficiently and effectively. Yet, while the court system has developed new initiatives and procedures in many areas of its work, the lack of trial capacity has not been addressed and has, in fact, become more severe. As a result, many people who are charged with committing crimes and who want to exercise their right to a trial cannot obtain that fundamental right that is guaranteed to all by the Constitution of the United States and the Constitution of the State of New York.

Analysis of criminal justice functions often consists of nothing more than a numerical compilation of numbers of arrests and prosecutions and the number of dispositions, statistics that do not reveal the quality of those functions. The fact that most cases filed in the Criminal Court are "disposed of" without a trial, by judicial dismissal or by negotiated pleas (often to non-criminal charges), does not mean that additional trial capacity in the Criminal Court is unnecessary. Statistics concerning the percentage of cases disposed of without a trial will never reveal how many cases were dismissed because there was no capacity in the court to try them, or how many people simply pleaded guilty to something in order to end the case rather than to wait a lengthy period of time to have the question of their guilt or innocence decided at trial. If persons charged with a crime demand a trial and the court cannot provide that basic and fundamental right, then the criminal justice system has failed regardless of how many cases resulted in non-trial dispositions.

In 1982, ***860*** cases were adjudicated at a trial in the Criminal Court of the City of New York. That was one-half of one percent (.005) of all the misdemeanor filings that year in that court. In 1997—fifteen years later—after the lack of trial capacity in that court was documented and its negative effects acknowledged by all in the criminal justice system, only ***581*** cases were adjudicated by trial in the Criminal Court, one-fifth of one percent (.0022) of the total cases filed. The judges of the Criminal Court and those who practice in that court know that many people want to have their cases adjudicated at a trial, but the system cannot provide them their day in court.

This is not simply a case of justice delayed—it is justice denied.

JUDICIAL UNDERSTAFFING AND LACK OF TRIAL CAPACITY

In 1992, Criminal Court filings totaled 147,200. The Mayor's Quality of Life initiative, begun in 1994, changed the landscape dramatically. In 1995, well into the Mayor's initiative, the number of filings was 211,247.

By 1997, that number had grown to 261,575. To meet this dramatic increase, the number of arraignment parts has been expanded over the past five years, from a citywide low of 14.5 in 1992 to a high of 19.5 in 1997. In addition, the criminal justice system has sought creative solutions to the increase in misdemeanor arrests by the establishment of the Midtown Community Court in Manhattan's Times Square area, the creation of specialized domestic violence parts, and the expanded use of Judicial Hearing Officers to staff hearing parts, Summons All Purpose (SAP) courts and compliance parts.

The downside to the establishment of additional arraignment and pretrial court parts where there has been no increase, and, in fact, a decrease in the number of criminal court judges, is obvious. The trial parts are the last to be staffed, resulting in a decrease of trial parts citywide. In 1992, 89 judges were assigned to Criminal Court, a number that steadily declined through the next five years. In 1997, there were only 74 judges assigned to Criminal Court. The past year has seen a slight increase; as of October 22, 1999, 77 judges were assigned. (These numbers include the Supervising Judges of each county but exclude the Administrative Judge.) The number of citywide Criminal Court pretrial parts that must be staffed totals 60. The use of Judicial Hearing Officers (JHOs) in the SAP parts frees up five judges for assignment elsewhere. The result: a total of 21 judges in the entire city available to handle trials, and a consequent decline in jury parts. (21 is a maximum number; at any given time there may be fewer judges available due to illness and annual leave absences.)

A look at Criminal Court filings and dispositions reveals the inadequacy of that number of judges in light of the increase in filings. Initially, the number of trials remained constant: in 1992 there were 812 trials as compared to 815 in 1994. As a percentage of dispositions, this was, of course, a decline: from .0055% to .0038%. By 1997, both the number and percentage of trials had declined drastically: 581 trials, or .0022% of the total number of cases.

As it has been in the past, plea bargaining remains the paramount mechanism for case disposition. In 1997, a year in which 261,575 new cases were filed, 199,490 cases were disposed of by pleas to either misdemeanors or violations and 71,384 were adjourned in contemplation of dismissal ("ACD"). There were 60,217 dismissals, 10,471 of which were for lack of a speedy trial.[1] Both the ACD and speedy trial dismissals represent

1. Because some of the 1997 dispositions related to cases pending from prior years, the total number of those dispositions exceeded the number of new cases filed in 1997.

a numerical and percentage rise since 1992.

It is obviously unrealistic and impossible for New York City Criminal Court to provide a trial for each person arrested for a misdemeanor. Plea bargaining will always be the principal mode of disposition. However, the ability to provide a trial for only .0022% of those arrested is a clear failure of the system. The rise in speedy trial dismissals and ACD dispositions also illustrates the harm to the system as a whole. There is no incentive for a guilty defendant to plead guilty at an early stage, and every incentive to play the game of delay, resulting in more dismissals and ACDs. Victims are thereby denied their day in court and may be denied a just disposition. Defendants who are not guilty and who want trials may give up and plead guilty just for the sake of expediency. The public needs to be assured that the Criminal Court provides swift and certain consequences for those who are guilty of a crime and a day in court for those who are not guilty. The credibility of the system suffers as a whole because of the inadequate trial capacity. Furthermore, valuable city financial resources are squandered when cases are endlessly adjourned and by the repeated assignment of police officers for trials that will, in reality, never take place.

An increase in the number of Criminal Court judges is essential to improving the system's ability to provide trials. Unfortunately, the number of judges is statutorily restricted and not easily changed. In 1962, the New York City Criminal Court Act established the Criminal Court and mandated that the court consist of the number of judges in the Court of Special Sessions, plus the number of magistrates sitting in the City Magistrate's courts. That number totaled 78 judges. Amendments to the law in 1968 and in 1982 created an additional 29 Criminal Court judges, for a total of 107.

Due to the insurmountable Constitutional restrictions on the number of Supreme Court judges, Criminal Court judges were appointed to the Supreme Court as Acting Supreme Court Justices as felony caseloads increased over the years. These appointments did not, however, create vacancies in Criminal Court that could be filled by new mayoral appointments. The dramatic decline in felony filings over the past several years has eased the pressure on Supreme Court, where judicial staffing is now adequate. However, the loss to Criminal Court is obvious. In order to fully implement the Mayor's Quality of Life Initiative, the number of judges assigned to Criminal Court must be increased.

Of the 77 judges currently assigned to the Criminal Court, only 47 are appointed Criminal Court judges. The remainder are judges reassigned from Civil Court (29) and Family Court (one). There are currently three

vacancies on the Criminal Court and three interim Civil Court vacancies. It is imperative that these vacancies be filled as soon as possible. The system will continue to need the service of reassigned Civil Court judges. Most importantly, the statutorily authorized number of judges must be increased. The Office of Court Administration, based upon a comparative study among New York City Criminal Court and other criminal courts outside New York City, has called, in its most recent legislative package, for an increase of 23 authorized judges to adequately meet the increased workload. Such requests have been ignored by the State Legislature in the past. This committee calls for the same increase and implores the Legislature to take the necessary action during the current session.

Equally pressing is the problem of judicial vacancies. This committee asks the Mayor's Office to fill existing vacancies as quickly as possible.

Increasing the number of judges is the most urgent need of the Criminal Court. Expediting the filling of vacancies is a goal that can be attained in the short term, but the underlying structural deficiency in the number of authorized judges will remain in the absence of legislative will to enact such changes. It is therefore imperative that administrative changes be made that can give judges the time and resources necessary to try cases.

IMPACT OF POST-JUDGMENT SENTENCING PROCEEDINGS ON THE AP PARTS IN NEW YORK CITY CRIMINAL COURT

In New York City Criminal Court, judges may impose sentences that include several alternatives to imprisonment. These include probation, conditional discharge, fines, restitution, and reparation. The law requires the court to impose mandatory surcharges (CPL § 420.35) and crime victim assistance fees (CPL § 420.35). Most of these alternative sentences require repeated post-judgment appearances in Criminal Court AP Parts, thereby consuming scarce judicial resources. What follows is a brief description of the various available alternative sentences, as well as the statutory procedures for post-sentence appearances, and some recommendations for changes that would alleviate the burden of post-judgment appearances on the Criminal Court AP Parts.

Alternative Sentences And Post-Judgment Appearances

A sentence of probation is available when a person has been convicted of a crime, and permits rehabilitation, without institutional confinement, under the supervision of a probation officer (PL § 65.00). The Court maintains power to impose more stringent sanctions should an

offender violate the conditions of his or her probation. (Donnino, McKinney's Cons. Laws, Book 39, Art. 65, p. 300 [1998], citing Staff Notes of the Commission on Revision of the Penal Law, Proposed New York Penal Law. McKinney's Spec. Pamph. [1964], p. 260). A sentence of probation may be modified or revoked entirely and a new sentence imposed. Alternatively, a conditional discharge is available to any person convicted of any offense (PL § 65.05), and, like probation, may include one or more conditions which, if violated, can result in modification or revocation and re-sentencing.

At any time prior to the expiration or termination of the sentence, the court may modify or enlarge the conditions of probation or a conditional discharge (CPL Article 410). If the modification eliminates or relaxes one or more conditions, the defendant need not be present but must receive written notice within twenty days of such modification. If the court has reasonable cause to believe that the defendant has violated a condition of the sentence, it may declare the defendant delinquent by filing a written declaration and compelling the defendant's appearance by written notice to appear or by a warrant. Any person taken into custody for a violation of a condition of probation or conditional discharge must be brought before the court that imposed sentence; the court may remand, fix bail or release the defendant. Defendants are entitled to a hearing on the declaration of delinquency at which the court can receive any relevant evidence. The defendant may cross-examine witnesses and present evidence. At the conclusion, the court may revoke, continue or modify the sentence.

A sentence to pay a fine is set in an amount fixed by the court. Restitution, defined as the "fruits of the offense" and reparations, the "actual out of pocket loss" caused by the offense, are sanctions available as conditions of probation, conditional discharge or imprisonment. The amount is determined by the court and a mandatory surcharge between five and ten percent is imposed. Failure to pay or to appear to request an adjournment to pay results in the issuance of a bench warrant. A defendant may be imprisoned up to a set time that depends on the offense or crime for which he was convicted. Where a sentence provides that a defendant is to be imprisoned for failure to pay, the court must advise the defendant that he has the right to apply to the court for resentencing. If the court is satisfied that the defendant is unable to pay, it may extend the defendant's time to pay, reduce the fine or resentence the defendant.

A mandatory surcharge and crime victim assistance fee are imposed upon conviction of a felony, misdemeanor or violation and are included

in restitution and reparation payments. At the time of imposition, a summons directs the defendant to appear in 60 days if the surcharge has not been satisfied or the case may itself be adjourned to the sixty first day for payment. A defendant may appear at any time prior to that date and make direct payment through the clerk's office. If the defendant has not paid or is unable to pay by the 61st day, the defendant must appear before the judge, who will institute a new schedule for payment or enter a civil judgment.

As can be seen from the previous description, post-judgment proceedings can take up a good part of a judge's duties. Both anecdotal evidence and statistics from late 1998 (see chart below) suggest that defendants often fail to comply with the conditions of probation or a conditional discharge, and must therefore make additional appearances before the judge. There is no consistent policy and procedure among the mem-

AVERAGE NUMBER OF CALENDARED CASES IN AP PARTS FOR TERM 11, 1998 (October 12 to November 8, 1998)

AVERAGE CALENDARED CASES PER DAY

	Pre-disposition	For Sentence	Post-Sentence*	Total
Bronx	81.7	5.6	42.3	129.6
Kings	65.7	1.1	42.8	109.6
New York	81.3	2.2	36.8	120.3
Queens	59.1	0.9	58.9	119.0
Richmond	42.9	2.1	17.7	62.7

% OF CALENDAR TOTAL

Pre-disposition	For Sentence	Post-Sentence*
63.1%	4.3%	32.6%
60.0%	1.0%	39.0%
67.6%	1.8%	30.6%
49.7%	0.8%	49.5%
68.4%	3.4%	28.2%

Post Sentence Calendared Cases include the following: payment of fines, mandatory surcharges, and crime victim assistance fees; proof of compliance with ACDs; conditional discharges; community service programs; violations of probation; and restoration of ACDs.

bers of the bench to handle the various kinds of post-judgment proceedings.

Post-Judgment Compliance Parts

Some changes have proven beneficial. In Manhattan, a post-judgment compliance part was established in January 1998 at 346 Broadway to monitor compliance with alternatives to incarceration in domestic violence cases. The Part is presided over by a Judicial Hearing Officer (JHO). This has helped reduce the impact of post-judgment proceedings in the AP Parts.

As of November 9, 1998, there is a new part in New York County called the Alternative Sentence Compliance Part, located in 346 Broadway. In non-domestic violence and non-vehicle and traffic law ("VTL") cases, this part monitors the defendant's compliance with community service obligations in cases which the defendant received either an adjournment in contemplation of dismissal or a conditional discharge. All VTL convictions continue to remain in the AP Parts. Currently, only four of the six AP Parts in New York County may adjourn cases to the compliance part. It is the expectation of the Criminal Court Administrative Judge that the remaining parts will be phased in and that the project will be expanded throughout the city.

Defendants who have a community service obligation now have an affirmative duty to appear and establish compliance, and to pay the requisite mandatory surcharge and crime victim assistance fee. A defendant can establish compliance by showing written proof to the clerk and is not obligated to wait and see the JHO. The JHO may monitor those who request an additional opportunity to comply, but, because JHOs may not order warrants or resentence defendants, any case in which the defendant does not voluntarily comply with the alternative sentence must ultimately be referred back to a Criminal Court judge in either an AP Part or other part where a Criminal Court judge is presiding.

In Brooklyn, there are two domestic violence parts which operate as pretrial and trial parts for domestic violence cases. There is also a compliance part to monitor the defendants who must complete an alternative to violence or drug or alcohol program as part of their sentences. The defendants must appear on a regular basis before the JHO and the programs must send a written report of the defendants' attendance and continuing compliance with the programs. If a defendant fails to complete the program or misses the sessions or fails to appear in the compliance part, the case is forwarded to the court that originally imposed sentence

and a warrant is ordered. Upon the defendant's return on the warrant, the case is disposed of in the usual manner as described above for a violation of a conditional discharge or of probation. The use of a compliance part relieves the calendar judge from the onerous and sometimes merely ministerial task of monitoring compliance.

In Queens, a single domestic violence part handles pretrial proceedings and bench trials (but not jury trials), and there is also a compliance part. Both pretrial proceedings and compliance monitoring are handled by JHOs.

The Bronx has a Domestic Violence Complex, consisting of three parts and developed over a two-year period, which now handles about 200 cases daily. Pending cases are separated from post-judgment cases. There is a calendar part, a trial part, a trial part for trial-ready cases, and a post-judgment compliance part. The pending cases are further subdivided to identify trial-ready cases. To help alleviate the impact of monitoring post-judgment compliance, a compliance part was opened, presided over, as in Brooklyn, by a JHO. If a problem develops with alternatives to incarceration programs—for example, if a defendant terminates the program early, or fails to appear—the case will be re-calendared before the calendar judge.

The Bronx Domestic Violence Complex has recently received funding from the Federal Government to automate its systems and to hire social workers. Treatment history is computerized to more closely monitor defendants. Judges have reported that monitoring of the defendants is helpful in that the court can occasionally forestall serious problems if it is aware of compliance problems sooner rather than later.

The use of compliance parts and JHOs helps to ease the pressure on the domestic violence part judges. The same concept can be applied to the collection of fines and monitoring of post-judgment proceedings as a whole. The Office of Court Administration (OCA) seeks to establish compliance parts, staffed by JHOs, to collect the outstanding fines, restitution and reparations payments and mandatory surcharges, and to monitor compliance with community service sentences. The plan to establish such parts will be implemented on a county by county basis. Such parts will go far to free up the AP parts to conduct bench trials. This Committee endorses the OCA plan and urges its swift implementation.

While the Committee recommends the increased use of JHOs for compliance purposes, many members of the Committee have concerns regarding judicial powers currently afforded to JHOs, such as presiding over suppression hearings. That issue is beyond the scope of this report, but the Committee may revisit it in the future.

Recommendations for Legislative Action

Even with these administrative developments, there is still a need for legislative action. We recommend that legislation be enacted to empower the clerk of the court or a JHO to directly handle fines and partial payments. This would free scarce judicial resources and make the process less burdensome for defendants who must now appear in court and wait for their cases to be called, only to be told to wait further in the audience to be escorted to the cashier's office to pay.

Elimination of the Right to Jury Trials for Certain Misdemeanors

One proposal to increase the Criminal Court's trial capacity is to eliminate the right to a jury trial for a substantial number of misdemeanor offenses. Proponents argue that this measure, previously employed during the mid-eighties, would ease the backlogs that plague the Criminal Court.

As a matter of both federal and New York State law, a defendant charged with a crime that carries a maximum sentence of no more than six months incarceration possesses no constitutional right to a jury trial.[2] Indeed, not even the possibility of consecutive sentences which, in the aggregate, exceed six months, entitles a defendant to a jury trial. Thus, there is clearly no constitutional impediment to providing only bench trials for specified misdemeanors.

Under existing law, however, all defendants charged with Class A misdemeanors are entitled to a jury trial, since all such crimes are punishable by up to one year in jail.[3] Persons charged with Class B misdemeanors, who face up to three months in jail, are not entitled to a trial by jury.

Prior Law: The MTL

From November 1, 1984 until June 30, 1990, New York State embarked on a novel experiment aimed at increasing the trial capacity of its criminal courts. Both the Penal Law and the Criminal Procedure Law were amended so as to reduce the authorized maximum term of imprisonment for the majority of Class A misdemeanors from one year in jail to six months. By limiting the potential punishment for such "petty crimes" to

2. See *Baldwin v. New York*, 399 U.S. 66, 90 S. Ct. 1886 (1970); *Duncan v. Louisiana*, 391 U.S.145, 88 S.Ct. 1444 (1968); *Lewis v. United States*, ___ U.S. ___, 116 S.Ct. 2163 (1996); *People v. Foy*, 88 N.Y. 2d 742 (1996); *Matter of Morgenthau v. Erlbaum*, 59 N.Y.2d 143 (1983).

3. See C.P.L. § 340.40.

six months, the law, known as the Misdemeanor Trial Law (hereinafter "MTL"), permitted bench trials for a large class of misdemeanors.

During this period of almost six years, Penal Law § 70.15 was amended to create two groups of Class A misdemeanors. The first group, set forth in subparagraph (b) of that section, were deemed to be more serious offenses and continued to carry potential sentences of up to one year, and the attendant right to a jury trial. The crimes included in this category were Assault in the Third Degree, Criminal Possession of a Controlled Substance where the substance was a narcotic drug, Endangering the Welfare of a Child, Criminal Possession of a Weapon in the Fourth Degree where the weapon was a firearm, Sexual Abuse in the Second Degree, Sexual Misconduct, Tampering with a Juror or Witness, and Riot.

All other Class A misdemeanors defined in the Penal Law formed the second category created by the amended Penal Law § 70.15 (b), which carried a maximum sentence of six months incarceration.[4] The list of "six month" Class A misdemeanors included the following crimes, which then, as today, occupy a substantial percentage of the Criminal Court's Docket:

- Criminal Trespass
- Possession of Burglars Tools
- Criminal Mischief in the Fourth Degree
- Petit Larceny
- Unauthorized Use of a Vehicle
- Theft of Services
- Jostling
- Criminal Possession of Stolen Property in the Fifth Degree
- Resisting Arrest
- Criminal Possession of Marijuana in the Fifth Degree
- Criminal Sale of Marijuana in the Fourth Degree, and
- Criminal Possession of a Weapon which is not a Firearm

Additionally, the maximum sentences for more than 60 other Class A misdemeanors, not as frequently encountered in Criminal Court as these crimes, were reduced so as to permit bench trials.

The MTL created two exceptions to the six month-sentence cap. The first applied where a defendant was charged with a "six month" misdemeanor but was previously convicted of at least a misdemeanor in New York State or a similar crime elsewhere. In this circumstance, the prosecu-

4. Class A misdemeanors defined outside of the Penal Law were not affected by the MTL.

tor could exercise discretion to increase the authorized punishment to one year by filing with the Court a statement setting forth the circumstances of each alleged predicate conviction.[5] The result, of course, was that defendant was then entitled to a jury trial. If convicted, defendant was then entitled to a hearing to determine whether he was, in fact, a second offender.

The second exception applied where a defendant, charged with one or more felonies in a felony complaint, superior court information or indictment, pled guilty to one or more of the "six month" misdemeanors in exchange for a dismissal of the felony charges. In this circumstance, the authorized term of imprisonment was increased to up to one year.

The experimental existence of "six month" Class A misdemeanors came to an end on June 30, 1990, when the law reverted back to its current form.

OCA's Report Regarding the Misdemeanor Trial Law

In April 1990, the Office of Court Administration, as directed by the Legislature, prepared and submitted a lengthy report on the impact of the Misdemeanor Trial Law.[6] In addition to compiling statistics regarding the number and type of dispositions, type and length of sentences, case processing time and the number and percentage of trials, the Report provided OCA's proposals concerning the continued life of the MTL. OCA's report concluded that, while far from perfect, the MTL was a highly beneficial expedient to ease the logjam plaguing our criminal courts.

In the Criminal Court of the City of New York, OCA found that in 1989, the last year it studied, there was, for the first time, a marked decrease in the median processing time of misdemeanor cases. Moreover, OCA reported a significant decrease, over a five-year period, in disposition time from arraignment to verdict after trial. There was a similar decrease in the percentage of trials by jury, which was attributed to the increase in cases being tried non-jury. There was a large increase in the conviction rate at trial, especially in the non-jury context. Most significantly, the number of bench trials per week vastly outnumbered jury trials.

OCA also conducted a detailed survey of representatives of the judiciary, district attorneys' offices, public defenders, private attorneys, and local bar associations regarding their experience and impressions of the

5. See former C.P.L. § 400.14(1) and (4).

6. See, The Impact of the Misdemeanor Trial Law, 1984-1989, Findings and Recommendations, State of New York, Office of Court Administration, April 1, 1990.

MTL. According to the OCA report, the majority of those surveyed in the judicial and prosecutorial branches regarded the MTL "as one of the few mechanisms which has helped each court to cope with the ongoing trend of increased filings."[7] The administrative judges of the affected jurisdictions uniformly agreed that the MTL played a "crucial role in enabling them to address the tremendous increase in case intake in their courts."[8] Not surprisingly, the defense bar reported a negative view of the legislation based on "its philosophical rejection of any restriction of the right to a jury trial."[9]

An overwhelming majority of survey participants suggested that the list of twelve-month misdemeanors be modified to delete the majority of these crimes, which, those surveys indicated, were rarely prosecuted.[10] Extensive support was also expressed for the reclassification of non-Penal Law misdemeanors which carry a one-year term of imprisonment to the second category of "six month misdemeanors."[11] There was also support to reduce the maximum jail term for first time drunk drivers under V.T.L. §§ 1192(2) and (3) to no more that six months in order to eliminate jury trials for these cases.[12]

The OCA report noted that notwithstanding the dramatic increases in the number of pending cases in the latter 1980s, the criminal courts had managed to dispose of an increasing number of cases within roughly the same time frames. During this period, although pending case backlogs had grown, they had not increased as sharply as case intake. "Those surveyed agreed that without the Misdemeanor Trial Law, trials would be fewer, pending case backlogs would be larger and case disposition times would be longer."[13]

Accordingly, OCA strongly recommended that the Misdemeanor Trial Law be expanded and made permanent. It recommended further that the list of twelve-month misdemeanors be reviewed to delete those crimes which are rarely prosecuted, and urged that "legislative consideration" be given to reclassification of non-Penal Law misdemeanors carrying sentences greater

7. See Report at I-28.

8. Id. at I-34.

9. Id.

10. Id.

11. Id.

12. Id.

13. Id.

than six months. OCA proposed that the maximum term of incarceration for first time violators of VTL § 1192 and 1193 be downgraded to six months and further proposed that the crimes of Assault in the Third Degree and Criminal Possession of a Controlled Substance in the Seventh Degree be removed from the one-year list except where the defendant had previously been convicted of those crimes.

* * *

Our informal survey of prosecutorial officials, judges and representatives of the defense bar has detected a mixed reaction to the MTL. Proponents argue that such a measure will increase the number of cases tried in Criminal Court; indeed, in some boroughs, where jury trials are nearly impossible to obtain, cases are routinely reduced from Class A misdemeanors to Class B misdemeanors in order to avoid the requirement of a jury trial. In all boroughs, the number of jury trials has fallen year after year as the number of jury trial parts has fallen. Opponents of the MTL contend, however, that the fundamental importance of the defendant's right to a jury trial outweighs any gains in systemic efficiency that revival of the MTL might produce. Some opponents also argue that some of these misdemeanors may, under certain circumstances, constitute serious crimes, and that a reduction in the maximum sentence for such misdemeanors would send an inappropriate message that the system takes these crimes lightly. Given these conflicting considerations and the resulting absence of a consensus within the Committee, the Committee makes no recommendation concerning revival of the MTL.

CONCLUSION

Today, the most crucial need of the Criminal Court of the City of New York is to staff the system with an adequate number of judges. The State Legislature should take up this urgent task in the current session and enact legislation increasing the number of judges by 23, to a total of 130. This, in the long run, is the best solution to meet the increasing caseloads in Criminal Court. New York City cannot turn back the clock to a time when quality of life issues were deemed insoluble or not worthy of the Criminal Court's attention. The large number of Criminal Court filings will remain with us and must be met with sufficient resources so that trials are a viable part of the system and not an impossibility.

Assuming the political difficulty of enacting such legislation immediately, other short-term solutions are available. The administrative cre-

ation of additional post-judgment parts presided over by JHOs, and the use of JHOs to monitor compliance with alternative sentences and the collection of various payments, would lighten the now-onerous daily calendars in the all-purpose parts and free judges to conduct trials.

The most immediate remedy would be the speedier filling of existing Criminal Court vacancies and the expansion of post-judgment compliance parts staffed by JHOs. This Committee urges the officials and administrators responsible for such actions to expedite their work to implement these solutions.

Affording trials in one-fifth of one percent of the number of cases disposed of is not a statistic of which the Criminal Court can be proud. The clear failure of the system to provide trials to those people accused of misdemeanors and violations cannot be allowed to continue. We urge the above solutions so that the Criminal Court can fulfill its proper function as an institution that dispenses justice to the citizens of the City of New York.

August 1999

The Committee on Criminal Courts

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A Proposal of the National Conference of Commissioners on Uniform State Laws to Adopt a Proposed Uniform Computer Information Transactions Act

The Committee on Copyright and Literary Property, the Committee on Communications and Media Law, and the Committee on Entertainment Law

The following is a report on the draft Uniform Computer Information Transaction Act ("UCITA") that was presented this summer to the National Conference of Commissioners on Uniform State laws at its July 1999 meeting. The National Conference adopted UCITA by a 43-6 vote on July 29. As a uniform act, it is recommended by the National Conference for enactment by state legislatures.

INTRODUCTION

The Committees on Copyright and Literary Property, Communications and Media Law, and Entertainment Law of The Association of the Bar of the City of New York (the "Committee") reports on the Draft for Approval of the Uniform Computer Information Transactions Act ("UCITA") prepared by the National Conference of Commissioners of Uniform State Laws ("NCCUSL").

A. Short History of the Project

UCITA evolved from a project begun several years ago by NCCUSL to

develop "uniform law treatment of software contracts."[1] Working under the aegis of the committee on Article 2 of the Uniform Commercial Code("UCC") dealing with sales, NCCUSL initially considered a "hub and spoke" configuration to Article 2 "under which licensing and sales would be treated as separate chapters of a revised Article 2."[2] Later, "responding to the obvious convergence in information industries and the increasing relevance of digital technology,"[3] the project expanded to cover "online and other forms of information licensing" within a separate Article 2B of the UCC "dealing with licensing and other transactions involving information."[4] Its drafters, including representatives from both NCCUSL and the American Law Institute ("ALI"), stated that Article 2B "provides a framework for contractual relationships at the center of the information era."[5]

Article 2B evoked a great amount of comment from industry groups, academics, consumer groups, and others, and went through many lengthy drafts which made changes in scope and added exclusions of parts of certain industries. On April 7, 1999, NCCUSL and ALI announced in a press release that the project would not be continued as Article 2B of the UCC, but that NCCUSL would instead promulgate a freestanding uniform state law entitled UCITA. A draft of UCITA, issued on about June 1, 1999 and labeled "Draft for Approval," was promulgated at the annual meeting of NCCUSL on July 23-30, 1999. According to the April 7, 1999 press release, NCCUSL's plan is to immediately introduce and enact UCITA in the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands beginning in the Fall of 1999.

The Reporter states that UCITA is a "contract law statute" applicable to "computer information transactions" including "commercial agreements to create, modify, transfer, or distribute: computer software[,] multimedia interactive products [,] computer data and databases [and] Internet and online information."[6] The Reporter states that UCITA applies "to many

1. Preface to Article 2B, Part 1, Deliberative Process. References to sections of Article 2B (the August 1, 1998 draft) will be indicated by "2B-___." References to sections of UCITA will be indicatedby "UCITA___." All references to "Section ___" refer to sections of the Copyright Act.

2. Id.

3. Id.

4. Id.

5. Preface to Article 2B, Introduction.

6. Prefatory Note to UCITA, Introduction.

of the most significant transactions in the information age that are for the most part intangibles."[7] UCITA contains sections on scope, formation and terms, warranties, transfer of interest and rights, breach of contract, financing, repudiation and assurances, and remedies.

B. Summary Of The Committee's Conclusions

The Committee's principal concern was whether this proposed uniform state law, which would apply to the licensing of many copyrighted works, conflicts with the policy of promoting the creation of works for the public good mandated by the Copyright Clause of the Constitution, Article I, §8, cl.8, and embodied in the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* ("Copyright Act"). The Committee focused on the preemption doctrine because it is the primary vehicle by which potential conflicts between state and federal law are evaluated.

The Committee recognizes that the convergence in information industries, the growth of digital technologies, and the increased use of mass market licenses create issues that may not be adequately addressed by existing law. The Committee believes, however, that, in dealing with these issues, UCITA raises serious questions under copyright law:

1. UCITA includes some provisions that conflict directly with provisions of the Copyright Act and that may therefore be preempted;

2. UCITA interferes with federal policy that there be a uniform national copyright law and will create confusion about the legal rules applicable to copyright licensing; and

3. UCITA validates market-wide restrictions on copying and other uses that copyright law permits.

II. FEDERAL PREEMPTION

A. Source And Types Of Federal Preemption

Federal preemption of state law has its source in the Supremacy Clause of the U.S. Constitution.[8] Under that clause, federal law may preempt state law

7. Id.

8. The Supremacy Clause provides: "This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 1.

in three ways: (1) Congress may expressly preempt state law ("express preemption"); (2) preemption may be implied when federal law is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementing state regulation; or (3) a state statute is preempted either when compliance with both federal and state laws is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of Congress's full purposes and objectives ("conflict preemption").[9]

Section 301 of the Copyright Act is an example of express preemption.[10] Section 301(a) specifies two elements that must be met for federal preemption: (1) the work must come within the subject matter of copyright specified in Sections 102 and 103 (the subject matter requirement); and (2) the nature of the claim asserted must be equivalent to any of the exclusive rights within the general scope of copyright as specified in Section 106 (the general scope requirement).[11] The statute states that for any work meeting these two requirements, "no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state."

Under Section 301, courts have held preempted state laws that attempt to protect works that fall within the subject matter of copyright from conduct that is equivalent to the rights reserved to a copyright owner—reproduction, distribution, creation of derivative works, public performance—but that are cast under state law theories such as misappropriation, unfair competition, unjust enrichment, contract, and conversion.[12] To so protect works within the subject matter of copyright would allow the states to "expand the perimeters of copyright protection to their own liking" and "run directly afoul" of Congress's purpose to "'avoid ... vague borderline areas between State and Federal protection.'"[13]

9. *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 713 (1985); *Association of American Medical Colleges v. Cuomo*, 928 F.2d 519, 522 (2d Cir. 1991) (relying on *Darling v. Mobil Oil Corp.*, 864 F.2d 981, 985-86 (2d Cir. 1989). *See generally* II W.F. Patry, Copyright Law and Practice 1093-1135 (1994) and 1997 Supp. at 220-36.

10. 17 U.S.C. § 301 (1976), which Congress described as one of the "bedrock provisions" of the Copyright Act. H.R. Rep. No. 94-1476 at 129 (1976) ("House Report").

11. The Second Circuit has described Section 301 as a "sweeping displacement of state law," *Computer Associates Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir.1992), and the legislative history confirms that this was Congress's intention. House Report, at 130-31.

12. *See e.g.*, *National Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 848-54 (2d Cir.1997) (holding that NBA's state law claim of misappropriation of its game scores is preempted); *see also* II W.F. Patry, Copyright Law and Practice 1115-26, collecting cases.

13. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 200 (2d Cir. 1983) (quoting House Report at 130), *rev'd on other grounds*, 471 U.S. 539 (1985).

The preemption inquiry does not end, however, with Congress's statement of express preemption in Section 301. "We must proceed to determine whether the challenged state statute is void under the Supremacy Clause*** and 'to determine whether, under the circumstances of this particular case, [the state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[14]

B. UCITA's Approach To Preemption

The predominant approach to preemption in UCITA is "neutrality," based on the proposition that preemption is an issue of federal law which state law should not address.[15] Accordingly, although a number of its provisions conflict with federal copyright law,[16] UCITA's text refers explicitly to preemption only once, stating the general principle that "[a] provision of this [Act] which is preempted by federal law is unenforceable to the extent of the preemption."[17]

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14. *Goldstein v. California*, 412 U.S. 546, 561(1973) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); Orson Inc. v. Miramax Film Corp., 50 USPQ 2d 1580 (3d Cir. 1999), *reh'g granted*, ___ F.3d___(3d Cir. 1999) (preempting Pennsylvania statute that interfered with motion picture distributors' right under copyright to grant exclusive licenses for more than 42 days); Vault v. Quaid Software Ltd., 847 F.3d 255, 269 (5th Cir.1988)(Vault's shrinkwrap license provisions that prohibited all copying forever of any part of programs held preempted by the Copyright Act, which permits an owner of a computer program to make certain copies (17 U.S.C. § 117), limits the term of protection (*id.* at § 302, 303), and allows protection only for works of authorship (*id.* at § 301(a)); *Rodrigue v. Rodrigue*, __ USPQ2d __ (E.D.La.1999) (preempting state community property law on the question of copyright ownership); *American Society of Composers, Authors, and Publishers v. Pataki*, 930 F. Supp. 873, 878 (S.D.N.Y. 1996) (preempting state statute whose requirements impinged upon the right of owners of performing rights to enforce those rights under the Copyright Act). See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479 (1974) (applying a thorough analysis of constitutional preemption—including a comparison of the objectives of the patent law's disclosure/exclusive use provisions and trade secret law's requirement of disclosure—and holding that Ohio's trade secret law was not preempted by the federal patent law, 35 U.S.C. § 101, *et seq.*)

15. Reporter's Notes 1 and 2 to UCITA 105.

16. See discussion, *infra*, Section IIIB. As noted in the Intellectual Property Overlay section of the Preface to Article 2B, "in several situations, provisions push against explicit federal rules insofar as reasonably possible."

17. UCITA 105(a). The drafters have imported concepts analogous to preemption by providing in UCITA 105(b) that "[i]f a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, may enforce the remainder of the contract without the impermissible term, or so limit the application of the impermissible term as to avoid any result contrary to public policy, in each case, to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term." See Reporter's Note 3 to UCITA 105.

UCITA's implementation of its neutrality approach is not consistent. In some provisions that conflict with copyright law, UCITA's text obliquely signals possible preemption by making the provision applicable "to the extent allowed by other law" or unless "prohibited under other law."[18] In other provisions discussed below in Section III.B, UCITA conflicts with copyright law without any qualifying language in its text.

The Committee believes that it is not sufficient to state that federal law will resolve any problems of preemption that may arise. State legislatures are obliged by the Supremacy Clause to adopt state laws that do not conflict with federal law and policy, and that do not, by being largely silent on preemption, induce business people and their counsel to rely on state rules that may not be applied to their transactions.

UCITA does sometimes depart from "neutrality" by adopting provisions consistent with federal law, reflecting "a policy of correspondence of rules in addition to simple recognition that federal law preempts contrary state law."[19] In general, however, UCITA does not attempt to make its provisions consistent with copyright law.

A related concern is that, when courts do address UCITA's conflicts with copyright law, they will do so under UCITA 105(b), the "public policy" section, and not under the principles and precedents of federal preemption. UCITA 105(b) provides that if a contractual term violates "a fundamental public policy," the court may refuse or limit the requested remedy "to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term." The Reporter's Notes increase the likelihood of judicial recourse to UCITA's public policy rubric. They take an unduly narrow view of the scope and applicability of federal preemption under UCITA 105(a)[20] and state that courts may use a public policy balancing test under Section 105(b) to address conflicts with copyright law.[21]

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18. UCITA 308, 503(1). See discussion infra Section III.B.

19. UCITA, Preface, Information and First Amendment; UCITA 503(1)(A) and Reporter's Note 3a. The Reporter's Notes to Article 2B, referring to a federal rule on transfers of nonexclusive licenses, acknowledged that "a [state] default rule which ignores this preemptive provision creates true traps for the unwary." Article 2B, Preface, Intellectual Property Overlay.

20. Reporter's Note 2 to UCITA 105(a) (Federal Law: Preemption) (citations omitted).

21. Reporter's Note 3 to UCITA 105(b) (Public Policy Invalidation) provides, in part, as follows:

> In part because of the transformations caused by digital information, many areas of public information policy are in flux and subject to extensive debate. In several instances these debates are conducted within the domain of copyright or patent

Such a test, when UCITA conflicts with copyright law, is inappropriate. UCITA 105(b) applies, on its face, only to contractual terms, not to UCITA's statutory default and other rules. In addition, under UCITA 105(b), courts may, but need not, consider federal law and policy, and can limit enforcement only to the extent such enforcement is "clearly outweighed" by federal public policy. These standards give insufficient weight to the Supremacy Clause.

III. UCITA INTERFERES WITH FEDERAL POLICY THAT THERE BE A UNIFORM NATIONAL COPYRIGHT LAW

A. Federal Policy Directs That Copyright Law Be National

In addition to promoting the creation of "writings," a principal goal of U.S. copyright law is national uniformity. National uniformity, the Supreme Court has observed, was "[o]ne of the fundamental purposes behind the Patent and Copyright Clauses of the Constitution."[22] The Court has also referred to the Copyright Act's "express objective of creating national uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation."[23]

The legislative history of the Copyright Act is clear on this point. Referring to "the basic constitutional aims of uniformity and the promotion of writing and scholarship," the House Report on the 1976 Copyright Act stated that:

> One of the principal purposes behind the copyright clause of

laws, such as whether copying a copyrighted work for purposes of reverse engineering is an infringement. This Act does not address these issues of national policy, but how they are resolved may be instructive to courts in applying this subsection .....Under the general principle in subsection (b), courts ... may look to federal copyright and patent laws for guidance on what types of limitations on the rights of owners of information ordinarily seem appropriate, recognizing, however, that private parties ordinarily have sound commercial reasons for contracting for limitations on use and that enforcing private ordering arrangements in itself reflects a fundamental public policy enacted throughout the Uniform Commercial Code and common law. (emphasis added).

22. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 162 (1989).

23. Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) (referring to Copyright Act § 301(a)). See In re Peregrine Entertainment, Ltd., 116 Bankr.194, 199 (C.D. Cal. 1990)(Kozinski, J.) ("The federal copyright laws ensure 'predictability and certainty of copyright ownership', 'promote national uniformity' and 'avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States."') (citations omitted).

> the Constitution, as shown in Madison's The Federalist, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States.[24]

The Report also observed that "national uniformity in copyright protection is even more essential than it was ... to carry out the constitutional intent" because "the methods of dissemination of an author's work are incomparably broader and faster than they were in 1789."[25]

The Copyright Act of 1976 moved copyright toward greater national uniformity by eliminating the dual system in place since the Act of 1790, under which federal copyright regulated published works and state copyright regulated unpublished works. As stated in the House Report, this was a "fundamental and significant change in the present law":

> By substituting a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system, the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship.[26]

Section 301 was intended, in the words of the House Report, "to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of Federal copyright law." Moreover, Congress's declaration of that aim was

> stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.[27]

Other provisions of copyright law and jurisprudence reflect the policy

24. House Report at 129. Madison wrote in The Federalist with respect to copyrights and patents that "[t]he States cannot separately make effectual provision for either of the cases." James Madison, The Federalist No. 43 at 270-71 (Rossiter ed. 1961).

25. House Report at 129.

26. Id.

27. Id. at 130.

of uniform, national copyright standards. To further this policy Congress gave federal courts exclusive jurisdiction in copyright cases[28] and incorporated a national statute of limitations for copyright cases.[29] When necessary to maintain national copyright standards, Congress has imposed federal standards even concerning issues normally in the domain of state law—for example, the Copyright Act's definition of "children" for the purpose of its termination of transfers provisions.[30]

Federal courts have taken a similar approach. The Supreme Court, citing the need for national uniformity, has mandated a federal definition of "agency" to determine the existence of an employment relationship for the purpose of copyright's work made for hire doctrine.[31] As stated by the Ninth Circuit, "We rely on state law to provide the canons of contractual construction, but only to the extent such rules do not interfere with federal copyright law or policy."[32]

B. UCITA Fosters Confusion About Applicable Law

As a comprehensive state law covering the licensing of copyrightable subject matter, UCITA departs significantly from settled copyright law and policy. It creates an array of state law rules that parallel, overlap and sometimes conflict with the provisions of copyright law, and extends the vague borderline areas between federal and state protection that Congress has expressly sought to avoid. UCITA's inconsistencies with copyright law, and its possible impairment of copyright licensing, are of concern.

UCITA's formal requirements are an important example. The Copy-

28. See Richard Anderson Photography v. Brown, 852 F.2d 114, 118 (4th Cir.1988) ("Because of the need for national uniformity of copyright law . . . Congress has . . . provided for exclusive federal jurisdiction over civil actions arising under the Act."). Title 28 U.S.C. § 1338(a) provides as follows: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patents, plant variety protection, and copyright cases."

29. Copyright Act § 507.

30. Section 203 of the Copyright Act sets forth the termination of transfers provisions. The definition of "children" is in Section 101 of the Copyright Act. See 3 Nimmer On Copyright § 11.04[A] at 11-24.

31. Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989). The Supreme Court cited "Congress' paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership." Id. at 749.

32. S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081 (9th Cir.1989).

right Act provides, without qualification, that any assignment or exclusive license of *any* copyright right "is not valid" without a "writing" signed by or on behalf of the owner of the rights conveyed.[33] Under UCITA, however, oral copyright transfers and exclusive licenses are enforceable (i) if they require no or nominal consideration or payment of less than $5,000, or (ii) if their duration isless than one year, or (iii) if there has been partial performance.[34] In addition, although there is federal case law suggesting that copyright law's writing requirement may not be waived,[35] UCITA validates oral copyright transfers if the parties have agreed in advance in a written or electronic record not to require a writing.[36]

Where UCITA does not dispense altogether with the federal requirement of a signed writing, it substitutes the requirement of a "record" and an "authentication" for the requirement of a "writing" and signature. Its definition of record, which encompasses "information ... stored in an electronic or other medium,"[37] broadens the traditional concept of "writing." Likewise, an authentication under UCITA includes electronic authentications, such as by using symbols, sounds, or encryption.[38] UCITA 102(a)(6) expressly states that "a record or authentication may not be denied legal effect or enforceability because it is in electronic form."

UCITA's expanded concept of records and authentications appears to introduce the very uncertainty that Section 204(a) of the Copyright Act was intended to avoid. One source of uncertainty is the need for attribution of electronic authentications, a procedure for determining whether an authentication is of a particular person.[39] The attribution procedure is

33. "A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." 17 U.S.C. 204(a). See e.g., Effects Assocs, Inc. v. Cohen, 908 F.2d 555, 556-57 (9th Cir.1990); Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27, 36 (2d Cir.1982). A "transfer of copyright ownership" includes a license "of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect . . . ." 17 U.S.C. § 101.

34. UCITA 201. But see Pamfiloff v. Giant Records, Inc., 794 F. Supp. 933, 936 (N.D. Cal. 1992) (plaintiff could not rely on the doctrine of equitable estoppel and the parties' conduct to substitute for the absence of a writing under Section 204(a)). Reporter's Note 1 to UCITA 201 does refer to the Copyright Act's writing requirement.

35. E.g., Konigsberg Int'l Inc. v. Rice, 16 F. 3d 355, 356-7 (9th Cir.1994).

36. UCITA 201(f).

37. UCITA 102(a)(58).

38. UCITA 102(a)(6).

39. UCITA (a)(5).

left open by UCITA, creating the possibility of disputes about attribution and authentication. For example, a binding attribution procedure can be "established by... agreement, or otherwise adopted by the parties."[40] Presumably an attribution procedure can be adopted by oral agreement or by conduct, and need not precede the transaction.[41] Additional uncertainty is created by the requirement in UCITA 214 that the attribution procedure be "commercial[ly] reasonable."

For some contracts between "merchants,"[42] including exclusive copyright licenses, UCITA dispenses entirely with the need for authentication (*i.e.*, signature) by the party against whom enforcement is sought. If a "merchant" copyright licensor receives a record in confirmation of the license, "sufficient against the sender," and does not object to it within ten days of receipt, the license is binding on her without her authentication, provided she receives the confirmatory record "within a reasonable time" and "has reason to know its contents."[43] These imprecise requirements for enforceability without authentication can themselves be sources of uncertainty and dispute.[44]

Another source of uncertainty and conflict with federal law is UCITA's apparent validation of agreements (including copyright transfers) even if the electronic record evidencing them no longer exists when enforcement is sought. Reporter's Note 35 to UCITA 102 states that the definition of "record" does not require "permanent storage or anything beyond temporary recordation. Fixation can be fleeting ..." Although UCITA 201(a) states that an agreement is not enforceable "unless ... the party against whom enforcement is sought authenticated a record ...", Reporter's Note 3 to that section states that "[t]here is no requirement that the record be retained."

If a writing by the party to be charged does exist when enforcement

40. Id.

41. Reporter's Note 3 to UCITA 214.

42. "Merchant" is broadly defined as a person that (i) "deals in information or informational rights of the kind," or (ii) has knowledge or skill "peculiar to the practices or information involved in the transaction," or (iii) employs someone holding itself out as having such knowledge. UCITA 102(a)(47).

43. UCITA 201(d).

44. Disputes may arise, for example, not only about whether the confirmatory record was received within a reasonable time and whether the recipient had reason to know its contents, but also about whether the recipient was a "merchant" within the meaning of the statute and whether the confirmatory record was "sufficient against the sender," as required by UCITA-201(d).

is sought, UCITA may still conflict with federal law because it purports to validate an exclusive copyright license even if the writing evidencing it "omits or incorrectly states a term."[45] As stated in the Reporter's Note to this provision, "The required record need not contain all material terms of the contract or even be designated by the parties as the contract."[46] Under this provision, an exclusive copyright license could be valid even if the writing required by Section 204(a) of the Copyright Act was silent as to exclusivity.

UCITA's default rules on the duration of contractual rights and restrictions are inconsistent with copyright law and present similar problems. Copyright law states that the duration of rights licensed or granted after January 1, 1978 is "for the term of copyright" if the grant does not specify its duration, subject to earlier termination by the grantor or her statutory successors during a specified period.[47] This right to terminate a contractual right cannot itself be waived or contracted away. Any contract provision purporting to do so is invalid.[48]

UCITA, in contrast, provides that if a contract does not specify the duration of the rights granted, they are "perpetual" for software and information used in creating certain other works, and "a time reasonable" for other information.[49] No indication is given that these provisions conflict with copyright law, except that they are qualified by the phrase "to the extent allowed by other law."

UCITA's default rules on the duration of contractual restrictions also conflict with federal law. The Constitution requires, and copyright law enacts, a limited term of protection for works within the subject matter of copyright. UCITA provides, however, that the right of licensors to enforce contractual use restrictions on software and some other copyrighted works is "perpetual" if the license does not specify otherwise.[50] In the context of industry-wide standard forms imposed by licensors, this provision autho-

45. UCITA 201(b).

46. Reporter's Note 3 to UCITA 201.

47. Copyright Act, § 203. The only exception to this rule are grants relating to works made for hire.

48. Copyright Act, §§ 203(a)(5), 203(b)(4).

49. UCITA 308. Reporter's Note 6 to UCITA 308 acknowledges that the perpetual rights default rule differs from common law. Compare P.C. Films Corp. V. MGA/UA Home Video, Inc., 138 F.3d 453, 458 (2d Cir.1998) (stating in dictum that contract provision which forbids copying forever may be preempted).

50. UCITA 308(2).

rizes the equivalent of perpetual copyright protection.[51]

The remedy provisions of UCITA also contain potential conflicts with copyright law. UCITA 816 prohibits licensors in certain circumstances from using "electronic self-help" against a breaching licensee after cancelling the license. These restrictions may be preempted by the Digital Millennium Copyright Act, which prohibits circumvention of technological copyright protection systems. 17 USC Section 1201.[52]

UCITA's statute of limitations—four years or, under certain circumstances, five years—conflicts with the Copyright Act's three-year statute of limitations.[53] In some cases, a litigant's reliance on UCITA's limitations period could have significant unanticipated effects. If, for example, a state court action brought in the fourth year were dismissed because it was preempted, the plaintiff would be without a remedy. Because UCITA applies expressly to licenses of "information," it is likely to be relied on more than general statutes of limitations.

These inconsistencies with copyright law illustrate both the need for uniform national standards and the inadequacy of UCITA's neutrality approach to questions of federal preemption. Many transactions structured in reliance on UCITA's requirements and default rules may be unenforceable, in whole or in part. By enacting rules which conflict with copyright law and acknowledging that some of them may be federally preempted, UCITA provides insufficient guidance to business people and their counsel. To the unsophisticated, led to rely on possibly invalid statutory provisions, UCITA's neutrality may be a trap. To knowledgeable copyright licensors and licensees, UCITA creates considerable uncertainty about whether federal or state rules apply and the extent to which UCITA's provisions are preempted.[54]

This confusion will be compounded by the variations that may creep into UCITA in each state as localized interests exert their influence on the legislative process. The result may be separate and divergent statutes, each with its own unique interpretation. At a time when increasingly interstate and international transactions in information require a single set of

51. See discussion infra Section IV.

52. Reporter's Note 1 to UCITA 816 states that "[t]here may ... be federal law issues under the Communications Privacy Act and under the Copyright Act regarding copyright security devices, but of course, this Act does not alter federal law on this matter."

53. Compare UCITA 805(a) with Section 507(b).

54. The uncertainty is compounded by the fact that some copyright industries, or parts of them, and certain transactions are excluded from the scope of UCITA. See UCITA 103(d) and Reporter's Note 5 (Exclusions).

rules, enactment of UCITA would move the law in the wrong direction.

Judicial interpretation of UCITA by fifty separate state court systems will further fragment the law, as state courts become the forum of choice for cases brought under the statute. UCITA presents state courts with a system of state-created rules patterned after the rules that apply to the sale of goods, as well as choice-of-forum provisions that *prima facie* validate the parties' choice of state courts.[55] Many state courts will inevitably fail to recognize the preemption problems inherent in UCITA and will therefore adjudicate copyright issues reserved by Congress exclusively to the federal courts.

UCITA's basis for conferring state court jurisdiction—namely, that the claims are for breach of contract—is questionable. Federal courts have been held to have exclusive subject matter jurisdiction over contract claims when they are in essence copyright claims,[56] when they require the construction or interpretation of the Copyright Act,[57] or when they entail a breach of a condition to the exercise of a copyright or involve a claim that is so material that it would give rise to a right of rescission.[58]

55. UCITA 110(a).

56. Berger v. Simon & Schuster, Inc., 631 F. Supp. 915 (S.D.N.Y. 1986). See also CBS Catalogue Partnership v. CBS/Fox, 668 F. Supp. 282 (S.D.N.Y. 1987) (motion to dismiss copyright infringement claim arising from use of musical compositions denied because royalty agreement covering compositions pertained to past, not future infringement, and therefore "the heart of the controversy" was claim for unauthorized use beyond the scope of the agreement); Schrut v. News America Publishing, Inc., 123 Misc. 2d 845, 474 N.Y.S.2d 903 (Civ. Ct. 1984) (photographer's breach of contract claim for use of photo of Ronald Reagan's son was "in essence" a claim for copyright infringement and was therefore dismissed).

57. T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir.1964). See also Maxey v. R.L. Bryan Co., Inc., 1988 Copyright L. Dec. ¶ 26,281 (S.C. Ct. App. 1988) (breach of contract claim for failure to register copyright following plaintiff's inability to recover damages and attorneys' fees in copyright infringement action arises under Copyright Act because it requires construction of the Act); Christopher v. Cavallo, 662 F.2d 1082 (4th Cir.1981) (reversing dismissal of claim for breach of warranty following successful copyright infringement action against producer of play: "Proof of that claim plainly required the construction of the copyright laws of the United States in order to establish the existence of the infringement, for the existence of the infringement was necessary to prove the breach of warranty"); EMSA Ltd. Partnership v. Lincoln, 1997 Copyright L. Dec. ¶ 27,630 (Fla. Dist. Ct. App. 1997) (affirmed dismissal of claim for declaratory relief concerning ownership of voice billing system because it arises under copyright law).

58. Schoenberg v. Shapolsky Publishers, Inc., 971 F.2d 926, 932 (2d Cir. 1992). Conversely, claims that are merely "incidental" to a claim seeking determination of ownership or contractual rights under acopyright do not "arise under" the Copyright Act and cannot form the basis for federal subject matter jurisdiction. Id. (citing T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964), and Berger v. Simon & Schuster, Inc., 631 F. Supp. 915 (S.D.N.Y. 1986)).

UCITA is intended, in part, to address the inadequacy of chattel-based rules to transactions in information. As the Reporter notes, "[t]his mismatch of legal rules and the uncertainty of outcome adds complexity and cost to transactions."[59] However, UCITA, by applying state law rules that sometimes differ from, and are subject to preemption by, federal copyright law, is likely to create its own mismatch of legal rules, causing uncertainty and added transaction costs. The Committee believes that UCITA would burden the exploitation of copyrighted works and possibly impair the value of copyrights, raising serious questions under the Supremacy Clause.[60]

IV. UCITA'S VALIDATION OF USE RESTRICTIONS THAT CONFLICT WITH COPYRIGHT LAW RAISES SERIOUS PREEMPTION QUESTIONS

UCITA confers *prima facie* validity on market-wide use restrictions in mass market contracts without sufficient qualifications to safeguard the kinds of use and expression contemplated by the fair use doctrine or copyright law's accommodation of First Amendment interests. From the earliest American copyright decisions (such as Justice Story's in *Folsom v. Marsh*)[61] to the present, a fundamental tenet of copyright law has been the fair use doctrine, with its accommodation of the rights of intellectual property proprietors and the rights of free expression. Biographers must be able to use facts available only in private letters; critics must be permitted to describe works of art, entertainment, or scholarship in the course of producing informed commentary; journalists must be free to quote from the writings of persons or entities on whom they are reporting.[62]

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59. Preface to UCITA. The Preface analogizes to the mismatch of legal rules which gave rise to the Uniform Commercial Code:

> Sixty years ago, Karl Llewellyn argued that it was important to develop a contract law framework for commercial sales of manufactured goods that departed from law applicable to commerce in horses and similar chattels which shaped prior law. The rules for the one (horses) did not adequately apply to the other (manufactured goods).[Footnote omitted] While insightful judges might be able to surmount the difference, Llewellyn argued, some might not and, in any event, use of a wrong paradigm (horses) yielded uncertainty, complexity and risk of error when applied to merchantile goods.

60. See American Society of Composers, Authors, and Publishers v. Pataki, 930 F. Supp. 873, 878 (S.D.N.Y.1996) (state statute regulating enforcement of public performance rights held likely to be preempted because it "burdens enforcement and threatens to marginalize copyright itself").

61. 9 F. Cas. 342 (C.C.D. Mass. 1841).

62. Copyright law as a whole serves the purpose of encouraging the production of "writings"

As the Supreme Court reminded us in ***Feist Publications, Inc. v. Rural Tel. Serv. Co.***, copyright law is founded on, not incompatible with, the encouragement of "others to build freely upon the ideas and information conveyed by a work . . . This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."[63]

The Reporter's Notes to UCITA and the predecessor Article 2B suggest that this legislation would not intrude on copyright law because, unlike the Copyright Act, it merely validates two-party agreements and does not confer property rights.[64] However, by validating mass market shrinkwrap licenses without sufficient safeguards for permissible copying, UCITA confers rights more akin to property than contract rights and thus facilitates market-wide restrictions at odds with copyright law. Mass market shrinkwrap licensing imposes market-wide restrictions whose uniformity and non-negotiability give them, in some respects, the same general scope and effect as state copyright legislation.[65] Such licenses operate not simply to affect

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by creating a balance between the rewards given to "authors" and the access allowed to the public. The Copyright Act, in this context, works in tandem with the First Amendment to permit dissemination of, and public access to, information. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985) ("[T]he Framers intended copyright itself to be the engine of free expression"). Keeping facts in the public domain ensures an "uninhibited, robust, and wide-open" marketplace of ideas. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

The "limited Times" provision of the Copyright Clause also reflects the balance between protection and the public domain. See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). The same is true of the requirement of substantial similarity to prove infringement. See infra, note 72.

63. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991).

64. Reporter's Note 2 to UCITA 103 states: "'Computer information transactions' are agreements. The Act does not deal with property rights in information." Similarly, the Preface to Article 2B, Part 2, Basic Themes stated: "A contract defines rights between the parties to the agreement, while a property right creates rights against all the world." (emphasis in original). See also ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir.1996).

65. See, e.g., Robert P. Merges, Intellectual Property and the Costs of Commercial Exchange: A Review Essay, 93 Mich. L. Rev. 1570, 1613 (1995) ("Standard form software licensing contracts, by virtue of their very uniformity and the immutability—in other words, non-negotiability—of their provisions, have the same generality of scope as the state legislation that is often the target of federal preemption. Furthermore, these contracts have the same effect as offending state legislation: wholesale subversion of an important federal policy."). As noted by another commentator, "permitting the parties to alter intellectual property law with a standard-form, unsigned 'shrinkwrap license,' in which even the fiction of 'agreement' is stretched to the vanishing point, exalts the (standard) form of contract law over the substance

private transactions. As applied to software, where they are currently in wide use, mass market shrinkwrap licenses are the end-point of a system which places the same use restrictions on every transfer of every software diskette or CD-ROM leaving the publisher's hands. No transferee can escape them.

The claimed distinction between a choice-based contract system and a property-based copyright system is also questionable because both shrinkwrap licensing and the terms of such licenses have become standard in the mass market software field. Consumers who need word processing software, for example, can choose only among substantially the same non-negotiable use restrictions.[66] In effect, the use restrictions in shrinkwrap licenses confer a copyright-like "right against the world."

The Committee takes no position on whether shrink-wrap licenses should be enforceable as a general matter, as opposed to shrinkwrap licenses with provisions that conflict with copyright law. However, when UCITA enforces mass market shrinkwrap licenses which prohibit copying that would otherwise constitute fair use under copyright law, it confers copyright-like protection that is inconsistent with the goals and objectives of copyright.

UCITA potentially affects the fair use of a wide variety of copyrighted works. "Computer information," UCITA's subject matter, includes fiction, history, poetry, databases, and any other text "obtained from or through the use of a computer, or that is in digital or equivalent form capable of being processed by a computer."[67] For example, text on a CD-ROM[68] could be shrink-wrapped and sold subject to a license such as this:

> Purchaser may not copy any portion of the contents without Publisher's written permission except for Purchaser's sole and exclusive personal use. Purchaser may not sell, lease, lend or otherwise transfer possession of this CD without Publisher's written permission.

of intellectual property." Mark A. Lemley, Beyond Preemption: The Federal Law and Policy of Intellectual Property Licensing at 46 (presented at the 1998 Berkeley Center Conference on Article 2B) ("UCC 2B promises to usher in an era of 'private legislation,' in which parties who are in a position to write contracts can jointly impose uniform terms that no one can escape.")

66. Without market alternatives, the right of a purchaser to reject a shrinkwrap license and return software for a refund under UCITA 211(b) is effectively meaningless.

67. UCITA 102(11).

68. Reporter's Note 3 to UCITA 103 ("Scope") states that the Act "does not apply to print industries." However, as the electronic distribution of books, magazines and newspapers increases, so will the importance of the fair use restrictions facilitated by UCITA.

The first sentence of this license effectively circumvents copyright's fair use doctrine[69] and its requirement of substantial similarity to prove infringement.[70] The second sentence circumvents copyright's first sale doctrine.[71]

Similarly, databases distributed on a CD-ROM or online could be sold subject to shrinkwrap or click licenses providing that purchasers will not copy any individual fact in the database.[72] Like the example given above, this provision effectively circumvents copyright's fair use doctrine and requirement of substantial similarity to prove infringement.[73]

Under UCITA, all the above contractual use restrictions would be ***prima facie*** valid. UCITA increases the likelihood that providers of information will seek to impose market-wide use restrictions such as these through shrinkwrap or click licenses and that the restrictions will be upheld and enforced by state court judges.

These potentially far-reaching effects are particularly troubling be-

69. The fair use doctrine fosters "the creativity protected by the copyright law" and "balances the public interest in the free flow of ideas with the copyright holder's interest in the exclusive use of his work." Warner Bros. Inc. v. American Broadcasting Co., 720 F.2d 231, 242 (2d Cir.1983). (The court referred specifically to the parody branch of the fair use doctrine.)

70. Like originality, the substantial similarity requirement "[strikes] a delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected against infringement." Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

71. The first sale doctrine is codified in Section 109(a) of the Copyright Act, which provides in pertinent part that "the owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that particular copy or phonorecord."

The House Report (at 79) states that Section 109(a) "does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract." This statement indicates that at least some "conditions" on future dispositions, negotiated between buyer and seller, should not be preempted. But it may not support the validity of non-negotiated market-wide prohibitions against all future dispositions, particularly since it was written before the advent of shrinkwrap licenses.

72. Though discrete facts are not copyrightable, UCITA's definition of licensable "information" suggests that discrete facts, as well as compilations of facts, may be protected. UCITA-102(37) defines "Information" as "data, text, images, sounds, mask works, or computer program, including collections or compilations thereof." (emphasis added). Cf. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

73. This Report does not address the proposed legislation in Congress dealing with databases or take any position regarding any legal argument supporting or opposing the validity of such legislation. See H.R. 354 ("Misappropriation of Collections of Information").

cause the provisions on which they are based do not restate established law. The Fifth Circuit has invalidated a shrinkwrap license provision which conflicted with copyright law, as well as state legislation purporting to validate such contract provisions.[74] The Second Circuit has indicated in dictum that even a privately negotiated contractual provision that conflicted with copyright law might be subject to federal preemption.[75] Other courts have invalidated publishers' or sellers' use restrictions that were inconsistent with copyright law.[76]

74. Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir.1988). Vault claimed that Quaid's copying and decompilation of Vault's program to determine how it worked violated the shrinkwrap agreement and the Louisiana Software License Enforcement Act, which authorized a perpetual prohibition of any copying or decompilation (and reverse engineering) of any portion of a computer program. The Fifth Circuit affirmed the district court's holding that the state statute was preempted both because it conflicted with express provisions of the Copyright Act and because it "touched upon" areas of federal copyright law. First, the court noted that the total prohibition on copying conflicted with the copying right allowed to an authorized owner of a copy of a computer program under Section 117. In addition, the perpetual restriction on copying conflicted with the limited term of copyright required by the Constitution and the Copyright Act. Finally, the prohibition of copying any part of a computer program, even those parts not protected by copyright, conflicted with the directives of the Constitution and the Copyright Act that only "original works of authorship" be protected.

75. P.C. Films Corp. v. MGM/UA Home Video Inc., 138 F.3d 453, 458 (2d Cir.1998). The Second Circuit questioned whether a negotiated contract that extended beyond the copyright renewal period would be enforceable under federal law. The court questioned the district court's conclusion that a grant of "the perpetual and exclusive right to distribute" a film was "merely a contract between two private parties" that did not affect the process by which the film would fall into the public domain:

> We are not convinced that this analysis gives sufficient weight to federal copyright law and the constitutional principle that a grant of copyright can be for "limited Times" only. See U.S. Const. Art. I, § 8, cl.8.

76. Judge Learned Hand concluded under the 1909 Copyright Act that a recording company and performer could not rely on legends on record albums (not then protectible as sound recordings under copyright) stating that they were "Not Licensed for Radio Broadcast" or were "For Non-Commercial Use on Phonographs in Homes" to prevent their being played on the radio. RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 89 (2d Cir.1940). He reasoned that the same rule applies to a work not protected by copyright as does to a work that is. Id. ("[W]e see no reason why the same acts that unconditionally dedicate the common-law copyright in works copyrightable under the act, should not do the same in the case of works not copyrightable."). In so ruling, Learned Hand relied on Jewelers' Mercantile Agency v. Jewelers' Pub. Co., 155 N.Y. 241, 254 (1898), which held that a compiler of a directory of jewelers' names and identifying information could not both make a general publication of its copyrightable book and maintain common law copyright through the fiction of a lease offered to all comers which restricted transfer of thebook and use of the information in it. Once it published the book generally, the compiler possessed only those rights conferred by copyright law.

In view of these concerns, the Committee believes that, before approving UCITA, NCCUSL should consider more fully the following question: whether a system of state contract law, that permits licensors to impose market-wide restrictions on uses safeguarded by copyright law, is preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[77]

CONCLUSION

National uniformity is essential to an effective copyright system. Uniformity furthers predictability in copyright ownership and transactions, which is especially important in the contemporary economy built around non-localized dealings in copyright properties. The Committee believes (i) that UCITA significantly diminishes national uniformity by establishing state copyright licensing rules that overlap and sometimes conflict with federal copyright law, and (ii) that revision of the law governing information transactions, which are increasingly national and international in scope, is more appropriately undertaken at the federal level.

Copyright law also seeks "[t]o promote the Progress of Science and useful Arts" through a system of limited protection for original works of authorship that maintains a balance between what is protected and what is reserved for the public domain and the creation of future works. The Committee believes that UCITA may upset this balance by validating mass market shrinkwrap and click licenses which prohibit fair use and other conduct permitted by copyright law.

77. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See generally David Nimmer, Elliot Brown & Gary N. Frischling, *The Metamorphosis of Contract into Expand**, at 22-24 (presented at the 1998 Berkeley Center Conference on Article 2B). See also David A. Rice, *Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Prohibitions Against Reverse Engineering*, 53 U. Pitt. L. Rev. 543 (1992), and Merges, *supra*, note 66.

Although they raise related policy issues, we have not considered here instances of copyright misuse, *i.e.*, where use of a copyright conflicts with some other law or policy, such as antitrust. See, e.g., *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (resale price maintenance); *Practice Management Info. Corp. v. American Med. Ass'n*, 121 F.3d 516 (9th Cir.1997) (AMA licensed its coding system on condition that licensee not license any other coding system); *DSC Communications Corp. v. DGI Tech., Inc.*, 81 F.3d 597, 601 (5th Cir.1996) (plaintiff conditioned its copyright license on defendant's use of plaintiff's equipment); *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 979 (4th Cir.1990) (plaintiff's license prohibited licensee and its employees from creating competing computer programs for 99 years). Cf. *Brulotte v. Thys Co.*, 379 U.S. 29 (1964) (obligation to pay royalties in return for use of patented device may not extend beyond the life of the patent).

UCITA's impact on the copyright system raises serious Supremacy Clause questions that require closer scrutiny.

June 1999

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DISSENT

I agree with the Report that certain provisions of UCITA as currently drafted conflict directly with, and are preempted by, federal copyright law. I believe, however, that the Report could make a more constructive contribution if it devoted more time to considering how UCITA and the copyright law might coexist. Clearly changes need to be made to UCITA. It is also appropriate at least to consider whether in some areas of conflict the copyright law should be modified to facilitate electronic contracts (something that the Report does not address). Electronic commerce in copyrighted works is here to stay, and both contract law and copyright law must evolve. Trying to do this through a uniform state law (and possibly also through federal legislation) seems preferable to allowing courts and legislatures to make accommodations piecemeal. In short, I believe that UCITA's goal is a worthy one (even if its execution may be wanting), and the substantial effort that went into its drafting deserves a response in the Report that helps more to advance than to quash the process of drafting a uniform law to facilitate electronic commerce in copyrighted works.

More troubling, however, is the broad sweep of some of the Report's conclusions, which have implications inadequately explored in the Report. Specifically, I take issue with the Report's blanket conclusion in Section IV that shrinkwrap licenses[1] with provisions that "conflict" with copyright law should be unenforceable.

The Report takes a one-sided view of licensing. On the one hand, it appears to be saying that a copyright owner may be able to agree, in a shrinkwrap license, to give up rights granted to it by the copyright law, but on the other hand, that users may not agree to give up privileges granted to them by the copyright law. The copyright law, however, clearly gives users the right to bargain away their rights and privileges. ***See, e.g.,*** H.R. Rep. 1476 (94th Cong., 2d Sess.) 79 (1976) ("House Report") (stating, in connection with the "first sale doctrine" in section 109(a): "This does not mean that conditions on future disposition of copies or phono records, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright."); ***id.*** (stating, in connection with a limitation on the scope of the copyright owner's exclusive right to control public display of a copy of a

1. I use the term "shrinkwrap" to embrace online "clickwrap" licenses as well.

work: "As in cases arising under section 109(a), this does not mean that contractual restrictions on display between a buyer and seller would be unenforceable as a matter of contract law.")[2]

In my view, the Report cannot reach its broad conclusion concerning shrinkwrap agreements by dismissing the legislative history with nothing more than "it may not support the validity of non-negotiated market-wide prohibitions. . . ." (n. 71) True, as the Report points out, the House Report was written before the advent of shrinkwrap licenses. But the House Report was written in the context of many broad, industry-wide standard-form agreements that differed from shrinkwrap licenses only in that they were signed.

The Report's apparent conclusion that shrinkwrap agreements deserve different treatment under the preemption doctrine than other agreements overlooks a number of significant points. First, such agreements are not the equivalent of law, since they bind only parties in privity. Second, the existence of a shrinkwrap agreement does not preclude the user from seeking different terms from the copyright owner. (While this is the exception and not the rule, it does happen, in my experience.) Third, many signed agreements are regularly executed with as little negotiation or opportunity to negotiate their provisions as with shrinkwrap licenses. Fourth, many signed and negotiated licenses contain the same types of provisions in derogation of users' privileges under copyright (in exchange for certain rights under the contract) that are commonly present in shrinkwrap agreements.

Preemption in the context of copyright licenses raises complicated issues. They are worthy of a finer, more nuanced analysis than the Report provides.

The Report has not persuasively articulated a basis for its conclusion that the copyright law permits no derogation of users' rights in a shrinkwrap license. Certainly not all provisions in a shrinkwrap that derogate from users' rights and privileges under the copyright law are necessarily valid. But the same is true of so-called "negotiated" licenses. A provision that would prohibit redistribution of even a single item of information, for example, would be problematic in either case. The preemption determination more appropriately rests on the nature of the restriction in the circumstances of a particular license. Consider, for example, a shrinkwrap

2. When Congress wanted to preclude a party from transferring rights or privileges under copyright, it did so explicitly. See, e.g., 17 U.S.C. section 203(a)(5) ("Termination of the grant may be effected notwithstanding any agreement to the contrary. . .").

agreement that permits users in academic institutions to license a work at 50% of the license fee charged to commercial users, provided they agree not to use material from the copyrighted work for commercial purposes. This may be an entirely reasonable bargain on both sides, and I find nothing in the Report or the copyright law that justifies the conclusion that such a transaction is necessarily unenforceable because it is preempted by copyright.

It is difficult to see how the fundamental goals of the copyright law will be served by deeming unenforceable all shrinkwrap agreements that trade off benefits of copyright ownership for a derogation in users' rights, regardless of the nature or context. Indeed, the Report's imbalanced view of shrinkwrap licenses has the real potential of inhibiting the broad distribution of information. Shrinkwrap agreements are inherently more efficient than signed licenses in reaching large numbers of users. If users cannot be held to restrictions such as those in the example above, the copyright owner, if it chooses to engage in shrinkwrap licensing, will be compelled to provide its copyrighted works with rights a particular user may not need but with a price and other contractual provisions sufficient to compensate it for providing the mandated rights. Or the copyright owner may simply choose to forego shrinkwrap licensing and use only signed agreements. Either result places at risk differential pricing and other contractual benefits accorded to research, scholarship or other noncommercial uses, and potentially makes information less accessible to users.

Even with certain restrictions on users' privileges under the copyright law, the flow of information that shrinkwrap licenses permit may enhance rather than derogate from the "Progress of Science and useful Arts." The extent it does so will depend on the circumstances and the contractual restrictions at issue in a particular case.

UCITA should not bar a licensee from arguing that specific provisions of a license agreement are unconscionable, illegal, preempted and/or violative of public policy. But concerns about possible overreaching by licensors do not justify completely removing from the ambit of UCITA any shrinkwrap agreement that potentially requires a licensee to give up a right or privilege under copyright. The Report's conclusion may have the benefit of providing certainty, but it jeopardizes a commercial mechanism that has advantages for both licensees and licensors.

I agree with the Report that UCITA requires closer scrutiny. I believe that the Report's conclusions concerning the enforceability of shrinkwrap agreements do as well. A shrinkwrap agreement should not be deemed

unenforceable merely because a user agrees to yield a privilege it might otherwise have under copyright. Because the Report concludes otherwise, I respectfully dissent.

June M. Besek

A Proposal for Expanded Expert Disclosure

The Committeee on State Courts of Superior Jurisdiction

The Committee recommends that expert disclosure in New York State litigation be expanded to include exchange of expert reports and to permit depositions of expert witnesses.

BACKGROUND

Prior to 1985, information about expert witnesses and their opinions was not discoverable in New York,[1] and New York trials involving expert testimony were considered "trial[s] by ambush."[2] Recognizing the central role that expert testimony often plays in medical malpractice and other personal injury actions, the Legislature passed CPLR § 3101(d)(1) to provide for expert discovery.[3] The Legislature believed that permitting the discovery of expert opinions would encourage "prompt settlement by providing both parties an accurate measure of the strength of their adversaries' case" and would discourage the assertion of unsupportable claims or defenses because all parties would know that they "w[ould] be required

1. McKinney's 1985 N.Y. Sess. Laws 3019, 3025.

2. Steven R. Cramer, Expert Disclosure Under the CPLR, N.Y.L.J., December 21, 1994 at 1 (internal citations and quotation marks omitted).

3. McKinney's 1985 N.Y. Sess. Laws at 3019, 3025; Marian E. Silber & Maria Elyse Rabar, Expert Disclosure, Revisited, N.Y.L.J., April 23, 1998 at 3.

to disclose what, if any, expert evidence w[ould] support their allegations."[4]

CPLR § 3101(d)(1) provides that upon request, a party must disclose the identities of the experts the party intends to call at trial, the qualifications of each expert, the subject matter of each expert's testimony, the substance of facts and opinions on which each expert is expected to testify, and a summary of the grounds for each expert's opinion.[5] In the medical malpractice context, parties are exempt from having to disclose their medical experts' names, but must disclose "the medical schools attended by the [] expert, the expert's board certifications, areas of special expertise, jurisdictions of licensure and the locations of internships, residencies and/or fellowships . . ."[6] Given today's availability of databases and search engines, commentators have pointed out that with this information, litigants can determine the identities of their adversaries' medical experts with relative ease.[7]

The description of "the substance of facts and opinions on which each expert is expected to testify" required by CPLR § 3101 is fairly limited. For example, in ***Tannenbaum v. Huntington Hosp.***,[8] an action involving injuries the plaintiff allegedly sustained when he fell out of his hospital bed, the court held that a summary of a nurse expert's expected testimony that "on certain dates . . . the defendant hospital, its nurses and staff failed to follow procedures and deviated from the acceptable standards of care to allow [the plaintiff] to fall out of bed," satisfied the requirements of CPLR § 3101.[9] The court ruled that the summary stated in "reasonable detail the substance and facts and opinions" of the nurse's testimony, and that it was not necessary for the summary of the expert's testimony "to provide the fundamental factual information upon which [the] expert's opinions were made."[10]

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4. McKinney's 1985 N.Y. Sess. Laws at 3025.

5. CPLR § 3101(d)(1)(i).

6. Jasopersaud v. Rho, 169 A.D.2d 184, 188, 572 N.Y.S.2d 700, 703 (2d Dep't 1991).

7. Marian E. Silber & Maria Elyse Rabar, Expert Disclosure, Revisited, N.Y.L.J., April 23, 1998 at 3; Nathan L. Dembin & Edward J. Yun, Medical Expert Witness Disclosure Under the CPLR: An Anachronism, N.Y.L.J., December 1, 1997 at 1.

8. Identify court of decision N.Y.L.J., June 2, 1997 at 34.

9. Id. See Marian E. Silber & Maria Elyse Rabar, Expert Disclosure, Revisited, N.Y.L.J., April 23, 1998 at 3.

10. Tannenbaum, N.Y.L.J., June 2, 1997 at 34; accord Krygier v. Airweld, Inc., 176 A.D.2d 700, 700-01, 574 N.Y.S.2d 790, 791 (2d Dep't 1991), Rennucci v. Mercy Hospital, 124 A.D.2d 796, 508 N.Y.S.2d 518, 519 (2d Dep't 1986).

Even on those occasions where courts have found the summary of an expert's expected disclosure to be insufficient, the courts generally have permitted the proponent of the testimony to supplement the summary and have not usually precluded the testimony at trial.[11]

In general, all other expert discovery, including depositions, is only available by court order upon a showing of "special circumstances."[12] A party's mere desire to depose another party's expert for preparation of the case is insufficient.[13] The most common type of "special circumstance" courts have found to justify the deposition of an expert is the destruction or loss of the evidence upon which the expert based his or her opinion.[14] Courts have also found "special circumstances" to be satisfied under other limited factual scenarios.[15]

Given the limitations of expert discovery under CPLR § 3101(d)(1), commentators have argued that "the lofty goals of the Legislature in enacting [this statute] have not been realized" and that it "may be time to seriously consider the viability of expert depositions. . ."[16] We agree and consequently propose to expand expert discovery as set forth below.

PROPOSAL

The Committee proposes that CPLR 3101 be amended to require exchange of detailed expert reports and to allow parties to depose their adversaries'

11. See *Qian v. Dugan*, ___ A.D.2d ___, 681 N.Y.S.2d 408, 409 (3rd Dep't 1998); *Curatola v. Staten Island Medical Group*, 243 A.D.2d 673, 664 N.Y.S.2d 570, 571 (3rd Dep't 1997).

12. CPLR § 3101(d)(1)(iii). For actions involving medical, dental or podiatric malpractice, CPLR 3101(d)(1)(ii) provides a procedure for parties to make their experts available for depositions voluntarily.

13. See, e.g., *232 Broadway Corp. v. New York Prop. Ins. Underwiring Assn.*, 171 A.D.2d 861, 567 N.Y.S.2d 790 (2d Dep't. 1991); *Brooks v. City of New York*, 178 Misc.2d 104, 104-05, 678 N.Y.S.2d 479, 480 (Sup. Ct., N.Y. Cty. 1998); Steven R. Cramer, Expert Disclosure Under the CPLR, *N.Y.L.J.*, December 21, 1994, at 1.

14. See Steven R. Cramer, Expert Disclosure Under the CPLR, *N.Y.L.J.*, December 21, 1994, at 1; *Rosario v. General Motors Corp.*, 148 A.D.2d 108, 543 N.Y.S.2d 974 (1st Dep't 1989).

15. See *Massachusetts Bay Ins. Co. v. Stamm*, 237 A.D.2d 145, 654 N.Y.S.2d 752, 753 (1st Dep't 1997) (finding that the "appellants' completion of their depositions of all of respondent's experts and refusal to answer certain interrogatories as improper attempts to obtain expert discovery constitute special circumstances . . . justifying the court's directive to permit each side to depose the other's experts who will be testifying at trial"); *Mead v. Benjamin*, 201 A.D.2d 796, 796-97, 607 N.Y.S.2d 472, 473-74 (3rd Dep't 1994).

16. Marian E. Silber & Maria Elyse Rabar, Expert Disclosure, Revisited, *N.Y.L.J.*, April 23, 1998 at 3.

expert witnesses. We recommend that CPLR 3101(d) be amended as follows:

> (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall supply a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, and the qualifications of the witness.
>
> (ii) Unless the court otherwise orders, an expert whose report is required to be furnished pursuant to subsection (i) may be deposed as to the opinion stated therein at a time and place as provided by this article. Unless otherwise ordered by the court, the party taking the deposition shall pay the expert a reasonable fee for the appearance, to be determined by the court if the parties and the expert cannot agree on the amount therefor. The fee for the witness' preparation for the deposition shall, however, be paid by the proponent of the witness, unless otherwise ordered by the court.
>
> (iii) No party may file its note of issue and certificate of readiness within sixty days after supplying its expert's report pursuant to subsection (i) thereof. Failure to comply with this subsection shall constitute a ground for vacating the note of issue and certificate of readiness.
>
> (iv) A party may supply disclosure of the expected testimony of an expert witness pursuant to this section after the filing of a note of issue and certificate of readiness only by court order upon good cause shown or by stipulation of all parties.
>
> (v) A party shall be precluded from introducing expert testimony at trial that has not been disclosed pursuant to the terms of this section.

BENEFITS OF EXPANDED EXPERT DISCLOSURE

The adoption of these amendments would bring New York into conformity not only with federal practice, but also with that of many states, including neighboring New Jersey, which allow interrogatories and deposition discovery of expert witnesses to be called at trial. Indeed, the limita-

tions on expert discovery imposed by current New York practice are counterintuitive, when viewed in the context of "the purpose and spirit of the discovery practice, namely the pre-trial opportunity of litigants to explore every avenue of inquiry in their search for the relevant facts and circumstances. . ..."[17] The current practice serves to subvert one of the main purposes of discovery, which is to "make a trial less a game of blind man's buff [sic] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[18]

Expanded expert discovery, as proposed, has distinct advantages, both before trial and during the trial itself. In the pre-trial stage, a party's opportunity to discover the facts and basis of his adversary's expert opinion, and to depose that expert, will result in less motion practice relating to further discovery. This obviously will serve to save the parties time and money, as well as conserve judicial resources. Litigants will be given the pre-trial opportunity to explore every avenue of inquiry in the search for relevant facts and circumstances. At the conclusion of discovery, parties will be better able to utilize motions for summary judgment, or be in an optimal position to effect a settlement. Expanded expert discovery before an action is placed on the trial calendar may help eliminate the all too common problem of parties' waiting until jury selection to seriously consider the settlement of an action. Finally, the ability of a party to demand expert disclosure will lessen the practice of retaining an expert on the eve of trial.

The advantages of pre-trial expert disclosure then carry over into the trial stage. Such disclosure will serve to narrow the issues to be tried and eliminate surprise, which are the normal aims of discovery in general. The main benefit at trial would be a party's ability to effectively cross-examine an expert witness, since such an examination requires advance preparation. The only substitute for the discovery of an expert's background and the basis for his or her opinions is often "lengthy—and often frivolous—cross examination during trial."[19] Likewise, an effective rebuttal also requires advance knowledge of an adversary's line of testimony, which would be made known during pre-trial expert discovery.

The need for pre-trial expert witness disclosure is crucial not only in complex litigation, such as antitrust or products liability matters where

17. New Jersey Court Rule 4:10-2, Comment 1.1.

18. United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958).

19. California Law Review Commission, Discovery in Eminent Domain Proceedings 707-710 (January 1963).

expert testimony is often the crux of the case, but also in less complex matters, where only one or two experts testify. These may include cases involving medical, legal, architectural or other professional malpractice, where a lay jury requires the assistance of expert testimony in determining whether negligence occurred.

ARGUMENTS AGAINST EXPANDED EXPERT DISCLOSURE

Several arguments against expanding expert disclosure can be expected. The most significant of these is probably the concern that expert depositions will add to the time and expense of a litigation process that is already criticized as too time-consuming and expensive. While the costs of litigating certain cases will undoubtedly increase with expert depositions, we believe the overall increases in efficiency resulting from expanded disclosure will outweigh those increased costs. Earlier settlement, improved summary judgment practice, and increased fairness and predictability at trial can be expected to save parties time and money. Also, the availability of expert depositions does not mean they will be employed in every case. The experience in federal court and jurisdictions that already permit expert depositions suggest that decisions to depose experts are usually rationally based on the seriousness of the case and the significance of the proposed testimony. With the exchange of expert reports containing more detail than the current § 3101(d) disclosures, litigants will be able to make informed decisions as to whether to depose their adversaries' experts.

A related concern is that a party with greater financial resources would be able to take advantage of a less well-funded adversary. The wealthier party could afford to take more expert depositions than the other party and would put the other party to the expense of defending those depositions and paying for their experts' time spent preparing to testify. While this too may sometimes present a problem, we expect decisions to depose experts to be generally reasonable, economic decisions, with large, well-funded litigants likely to attempt to keep their expenses to a minimum. Where expert depositions appear to be abused by a party, the aggrieved party can seek a protective order from the court.

There may also be concerns about the greater burden that depositions will impose on expert witnesses. However, "professional" expert witnesses will probably welcome additional work. Also, it is far easier to accommodate a busy expert when scheduling a deposition—which may supply the information needed to avoid a trial—than when scheduling the expert's appearance at trial.

Finally, the proposed expansion of expert discovery would for the first time require the identification of expert witnesses in medical, dental and podiatric malpractice actions. This raises the traditional concern that physicians may be not willing to serve as experts in malpractice litigation if their identities were disclosed. However, even if that concern is still valid despite physicians' obviously greater willingness to testify, in actual practice the identities of malpractice experts already are often discerned based on disclosure of their qualifications.

CONCLUSION

It is the Committee's belief that expanding expert disclosure to include exchange of expert reports and to permit depositions of expert witnesses will (a) enable counsel to cross-examine expert witnesses effectively, thereby narrowing the issues raised and the time necessary for trial; (b) discourage the practice of retaining an expert on the eve of trial, thereby improving case preparation, efficiency and raising the general level of trial practice in New York; (c) provide the information necessary to challenge the introduction of expert testimony where appropriate; (d) facilitate more informed summary judgment practice, and (e) provide increased information and incentives to settle cases earlier in the litigation process.

June 1999

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Ronald I. Mirvis

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STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

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